JUDGMENT OF THE COURT (Fourth Chamber)

22 December 2010 *

In Case C-507/08,

ACTION under Article 88(2) EC for failure to fulfil obligations, brought on 21 November 2008,

European Commission, represented by C. Giolito, J. Javorský and K. Walkerová, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Slovak Republic, represented by B Ricziová, acting as Agent,

defendant,

* Language of the case: Slovak.

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann (Rapporteur), L. Bay Larsen, C. Toader and M. Safjan, Judges,

Advocate General: P. Cruz Villalón,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 3 June 2010,

after hearing the Opinion of the Advocate General at the sitting on 9 September 2010,

gives the following

Judgment

1 By its application, the European Commission (formerly the Commission of the European Communities) asks the Court to declare that, by failing to execute Commission Decision 2007/254/EC of 7 June 2006 on State aid C 25/2005 (ex NN 21/2005) implemented by the Slovak Republic for Frucona Košice, a.s (OJ 2007 L 112, p. 14),

the Slovak Republic has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Article 2 of that decision.

Legal context

2 Recital 13 in the preamble to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), is worded as follows:

'Whereas in cases of unlawful aid which is not compatible with the common market, effective competition should be restored; whereas for this purpose it is necessary that the aid, including interest, be recovered without delay; whereas it is appropriate that recovery be effected in accordance with the procedures of national law; whereas the application of those procedures should not, by preventing the immediate and effective execution of the Commission decision, impede the restoration of effective competition; whereas to achieve this result, Member States should take all necessary measures ensuring the effectiveness of the Commission decision.'

3 Article 14(3) of Regulation No 659/1999 states:

'Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article [242 EC], recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their

respective legal systems, including provisional measures, without prejudice to Community law.'

4 Article 23(1) of that regulation provides:

'Where the Member State concerned does not comply with conditional or negative decisions, in particular in cases referred to in Article 14, the Commission may refer the matter to the Court of Justice of the European Communities direct in accordance with Article [88(2) EC].'

The pre-litigation procedure

5 By Decision 2007/254 the Commission declared that the measures adopted by the Slovak Republic in favour of Frucona Košice, a.s. ('Frucona') constituted State aid and that that aid was not compatible with the common market.

6 According to that decision, at the material time, Frucona was active in the sector of production of spirit and spirit-based beverages, non-alcoholic beverages, canned fruit and vegetables, and vinegar. The State measure at issue consisted in the writing-off of tax liability by the Košice IV Tax Office ('the tax office') as part of an arrangement with creditors, a procedure governed by Law No 328/91 on Bankruptcy and Arrangement with Creditors. It is evident from that legislation that, like the bankruptcy procedure, an arrangement with creditors aims at settling the financial situation of an indebted company, but its objective is to enable the company to continue its business through reaching an agreement with the creditors whereby the company undertakes to pay back part of its debts and, in exchange, the remainder of the debt

payable is written off. The agreement has to be approved by the court responsible for supervising the procedure.

7 On 8 March 2004 Frucona made an application for an arrangement with creditors to the competent regional court, its liabilities including, inter alia, a debt in respect of alcohol excise duty. After the creditors had voted in favour of the arrangement, the agreement with the creditors was confirmed by the regional court on 14 July 2004. On the expiry of the period for an appeal, the decision of that court acquired the force of *res judicata*.

8 The agreement with the creditors provided that Frucona would repay 35 % of its debts within one month, and the creditors would write off the remaining 65 %.

9 The total amount of Frucona's debt to the tax office was SKK 640 793 831 (EUR 16.86 million). As part of the arrangement with creditors, the tax office recovered the sum of SKK 224 277 841 (EUR 5.86 million), and the tax claim written off therefore amounted to SKK 416 515 990 (EUR 11 million).

10 At the conclusion of the investigation of the tax write-off in question under the first paragraph of Article 88(2) EC, the Commission declared that, by means of that write-off, the Slovak Republic had unlawfully granted aid to Frucona; Decision 2007/254 contains the following provisions:

'*Article 1*

The state aid which the Slovak Republic has implemented for [Frucona], amounting to SKK 416 515 990, is incompatible with the common market.

Article 2

1. The Slovak Republic shall take all necessary measures to recover from the beneficiary the unlawfully granted aid referred to in Article 1.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this decision.

3. The sum to be recovered shall bear interest throughout the period running from the date on which it was put at the disposal of [Frucona] until its actual recovery.

…

Article 3

The Slovak Republic shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it. …

…'

11 On 12 January 2007 Frucona brought an action before the Court of First Instance of the European Communities for the annulment of that decision, but did not seek suspension of its operation as an interim measure. The Slovak Republic brought no action against the decision, of which it had been notified on 12 June 2006.

12 In order to execute the decision, on 4 July 2006 the tax office called on Frucona to repay the unlawful aid, together with interest, within a period of eight days. Since Frucona did not comply with that order, on 21 July 2006 the tax office brought a debt recovery action before the Košice II District Court.

13 By judgment of 11 June 2007 that court dismissed the action, holding that Frucona was under no obligation to repay the aid. That judgment was upheld by the judgment of 21 April 2008 of the Košice Regional Court, one of the grounds being that it was not possible to review the judgment on the arrangement with creditors, which had acquired the force of *res judicata*.

14 By letter of 2 July 2008 the tax office asked the Prosecutor General of the Slovak Republic to bring an extraordinary appeal against the latter judgment. The Slovak Republic has not provided any clear information on what action was taken on that request.

15 Throughout the recovery procedure, the Commission insisted on the immediate and effective execution of Decision 2007/254, its criticism of the Slovak authorities being that they did not directly execute the decision, pursuant to national law, but thought it necessary to bring a debt recovery action before the district court.

16 In that regard, the Slovak authorities put forward, in essence, two main arguments:

— There was no alternative to the bringing of legal proceedings to recover the aid, both the principal sum and interest, since Slovak tax law contains no legal basis for the recovery of money owed to a tax authority which has been written off as

part of an arrangement with creditors. It was therefore necessary to obtain an enforceable order. To put it another way, under Slovak law, the tax office could not by an administrative decision 'annul' the judgment of the court responsible for supervising the arrangement between Frucona and its creditors which approved the agreement they entered into, a judgment which has acquired the force of *res judicata*;

— Decision 2007/254 was not directly binding on Frucona, but required the Slovak Republic to take all necessary measures to recover the unlawfully granted aid. That decision, which constituted a 'foreign' administrative decision, did not create any obligation on the part of Frucona to repay that aid. It was therefore impossible to execute that decision at national level.

17 Following various exchanges and reminders subsequent to the expiry of the two month period laid down by Article 3 of Decision 2007/54 for the communication of the measures taken for the execution of the decision, the Commission considered that the Slovak Republic had still not taken effective action to execute the decision and decided to bring the present action.

The action

Arguments of the parties

18 The Commission claims that the recovery of unlawful aid is the logical consequence of the finding that it is unlawful, referring to Case C-142/87 *Belgium* v *Commission*

[1990] ECR I-959, paragraph 66, and Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 41. 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, in accordance with Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 21.

19 However, the Commission states that, in the present case, more than two years and five months after the notification of Decision 2007/254 the aid granted to Frucona had still not been recovered. Consequently, the Commission claims that the Slovak Republic has failed to fulfil its obligations under Decision 2007/254 and Article 14(3) of Regulation No 659/1999.

20 According to the Commission, the fact that the tax authority brought a debt action for the recovery of the unlawful aid, the slowness of the legal proceedings and the content of the judgments of, first, the Košice II District Court and then the Košice Regional Court prevented the immediate and effective execution of Decision 2007/254, even though the authority responsible for debt recovery acted in accordance with national law. The Commission considers that the Slovak authorities disregarded the principle of direct effect of provisions of Community law in the event of conflict with a provision of the national law of a Member State.

21 As regards the fact that the judgment of the court which approved the agreement reached as part of the arrangement with creditors had acquired the force of *res judicata* so that, according to the Slovak Republic, the aid granted could not be recovered, the Commission refers to Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 63, where the Court ruled that Community law precludes the application of a provision of national law which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in

breach of Community law which has been found to be incompatible with the common market in a Commission decision which has become final.

22 According to the Commission, the decisions made in this case by the Slovak court amount also to a failure to have regard to the objectives pursued by the Community rules on State aid, which prevents the effective execution of Decision 2007/254 and the immediate restoration of the previously existing situation and prolongs therefore the unfair competitive advantage resulting from the aid at issue, as follows from Case C-232/05 *Commission* v *France* [2006] ECR I-10071, paragraph 52.

23 Furthermore, the Commission criticises the conduct of the Slovak authorities in the light of the principle of equivalence, a principle which, like the principle of effectiveness, must be taken into consideration when assessing the procedural autonomy which Member States are accepted to have in relation to the enforcement of Community law. According to the Commission, the disregard of the principle of equivalence is evident in the fact that Decision 2007/254 was not enforceable in the same way as, for example, tax notices issued by the tax office.

24 In its defence, the Slovak Republic contends that a literal interpretation of Article 2(1) and (2) of Decision 2007/254, in particular the fact that the Slovak word meaning 'the process of reclaiming' ('vymáhanie') is used, rather than the word meaning 'the achievement of recovery' ('vymoženie'), indicates that, contrary to the interpretation favoured by the Commission, the decision cannot be held to impose an obligation on the Slovak Republic actually to recover the aid within the prescribed period. The only obligation arising from it is that of taking within the prescribed period all necessary measures in order to reclaim the amount of aid concerned.

25 The Slovak Republic submits that it did in fact take various measures to recover the aid rapidly and effectively, in particular by calling on Frucona to repay the aid and

then by seeking to compel payment by means of legal proceedings. Furthermore, the Slovak Republic states that Decision 2007/254 is not yet final, given that it was challenged before the General Court by an action which is still pending.

26 Consequently, the Slovak Republic considers that it has complied with Decision 2007/254 and with the requirements of Article 14(3) of Regulation No 659/1999.

27 The Slovak Republic insists also on the fact that the grant of State aid to Frucona as part of the arrangement with creditors was authorised by a judgment of the court responsible for supervising that arrangement, a judgment which, after acquiring the force of *res judicata*, cannot be annulled by the tax office, which is an administrative body. The Slovak Republic submits that it is not a requirement of Community law that such an administrative body is obliged to annul judgments of national courts which have the force of *res judicata*.

28 The Slovak Republic considers moreover that *Lucchini* is of no relevance to the present case. Unlike the judgment of the Italian court at issue in *Lucchini*, the judgment of the regional court of 14 July 2004 acquired the force of *res judicata*, following the expiry of the legally prescribed periods in which an appeal could be brought in accordance with national procedural law, well before the adoption of Decision 2007/254. In addition, *Lucchini* was delivered after the Slovak Republic commenced steps to recover the amount of the aid at issue in this case, by initiating legal proceedings.

29 The bringing before a national court of a debt recovery action against Frucona in respect of that aid was therefore the appropriate way to proceed, in compliance with the requirement that recovery be immediate and effective.

30 As regards the Commission's claim that the Slovak Republic disregarded the principle of equivalence, the Slovak Republic contends that, since Decision 2007/254 is not directly enforceable, the Slovak Republic did not have to recognise it as directly applicable, otherwise the procedural autonomy enjoyed by Member States in relation to the execution of a decision adopted under Article 88(2) EC would be set at nought.

31 Furthermore, the principle of equivalence was developed in the area of protection of the rights of individuals, and not in the area exclusively concerned with the obligations of Member States vis-à-vis the European Community in the ambit of which fall decisions of the Commission under Article 88(2) EC.

32 In its reply, the Commission does not accept the literal interpretation of Decision 2007/254 proposed by the Slovak Republic. According to the Commission, that decision means that the Slovak Republic is under an obligation actually to obtain repayment of the unlawful State aid, and not merely to begin the process of recovery, in the period of two months fixed in Article 3 of the decision, which reflects the principle that procedures under national law commenced by a Member State in order to implement decisions must ensure that those decisions are implemented immediately and effectively.

33 The obligation to implement a decision of the Commission knows only one exception, when there are exceptional circumstances that would make it absolutely impossible for the Member State to implement the decision properly. However, in this case, the Slovak Republic has never claimed that such circumstances exist.

34 Further, the Commission claims, referring to Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 55, that although Community law does not determine the procedure to be followed by the Member State concerned in order to execute a

decision ordering the recovery of unlawful aid in accordance with Article 14(3) of Regulation No 659/1999 and such recovery must take place, in principle, in accordance with the relevant provisions of national law, those provisions must none the less be applied in such a way that the recovery required by Community law is not rendered practically impossible and in such a way that the interests of the Community are taken fully into consideration.

35 In that regard, the Commission states that, although it has no intention of dictating to the Slovak Republic how the State aid in question is to recovered, the procedure chosen by the Slovak Republic does not satisfy the requirement of immediate and effective recovery of the unlawful aid, since, two years and five months after the notification of Decision 2007/254, that recovery has still not taken place.

36 Moreover, contrary to what is maintained by the Slovak Republic, the Commission has not demanded that the tax office annul a final court judgment, but has suggested, as one of the possible procedures for the execution of Decision 2007/254, that the competent authority retract the decision to grant the unlawful aid, which would be in line with the Court's case-law. The Commission also submits that that case-law requires national courts with jurisdiction not to apply provisions of domestic law which are contrary to Community law.

37 The Commission observes that that principle of the primacy of Community law means that the latter must take precedence over any domestic measure, whether the measure concerned is administrative or legislative or even a final judgment, as is clear from *Lucchini*. The fact that the judgment in *Lucchini* was delivered after the date of the court judgment which approved the State aid granted to Frucona is not critical, since *Lucchini* does no more than interpret existing law as it ought to be applied.

38 Lastly, the Commission does not accept the Slovak Republic's assertion that the principle of equivalence is not applicable in the context of the execution of a Commission

decision in relation to State aid and maintains that the Member State's procedural autonomy is limited by the general principle of effectiveness. Otherwise, the obligation to recover aid would lose all meaning and it would be impossible to ensure the uniform application of Community law.

39 The Slovak Republic, for its part, does not accept the Commission's assertion that the competent Slovak authorities must not merely take all necessary measures to reclaim the aid, but must actually recover it. The Slovak Republic considers that it has fully complied with the obligations which arise from the Slovak version of Decision 2007/254, which is the sole authentic version.

40 Further, the Slovak Republic continues to maintain that the tax authorities had no power to annul a court judgment and considers that the tax authorities employed the only possible means of recovering the aid at issue.

Findings of the Court

41 Before examining the failure attributed to the Slovak Republic in respect of its obligation to execute Decision 2007/254, certain principles which emerge from the Court's settled case-law on the subject must be borne in mind.

42 Recovery of unlawful aid is the logical consequence of the finding that it is unlawful and 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).

43 Where a decision is taken declaring aid to be unlawful, the recovery of that aid, ordered by the Commission, takes place according to the conditions provided for in Article 14(3) of Regulation No 659/1999. The only defence available to a Member State in opposing an application by the Commission under Article 88(2) EC for a declaration that it has failed to fulfil its obligations is to plead that it was absolutely impossible for it properly to implement the decision (see Case C-214/07 *Commission* v *France* [2008] ECR I-8357, paragraphs 43 and 44 and case-law cited).

44 In the event of difficulties in implementation, the Commission and the Member State must, pursuant to the rule imposing on the Member States and the European Union institutions reciprocal duties of genuine cooperation, which underlies, in particular, Article 4(3) TEU, work together in good faith with a view to overcoming those difficulties whilst fully observing the Treaty provisions, in particular the provisions on State aid (see, to that effect, Case C-214/07 *Commission* v *France*, paragraph 45 and case-law cited).

45 In this case, it is clear at the outset that, when the Commission brought this action, namely two years and five months after the notification of Decision 2007/254, no sums had been recovered from Frucona. The Slovak Republic does not dispute that fact and, further, does not claim that execution of the Commission decision is absolutely impossible.

46 As regards the circumstances presented by the Slovak Republic in order to justify the non-execution of Decision 2007/254, and therefore, the non-recovery of the aid unlawfully granted to Frucona, its arguments fall, essentially, into two parts.

47 First, in its written observations, the Slovak Republic advocated a literal interpretation of Article 2(1) and (2) of Decision 2007/254 and relied in that regard on the use,

in the Slovak version of that decision, of the word meaning 'the process of reclaiming' instead of the word meaning 'the achievement of recovery', which, in its opinion, entails merely an obligation to take various steps in order to reclaim the wrongful aid, but does not mean that the Slovak Republic is obliged actually to recover it.

48 It must be observed that such an interpretation of the wording of Decision 2007/254 quite obviously disregards the true scope of that decision. In the context of European Union legislation, and with particular regard to Recital 13 and Article 14(3) of Regulation No 659/1999, it is plain, as maintained by the Commission, that the purpose of Decision 2007/254 is the restoration of effective competition and that the decision therefore requires the Member State to which it is addressed actually to obtain, without delay, repayment of the wrongful State aid. Consequently, the Slovak Republic's literal interpretation of the wording of Decision 2007/254 cannot be accepted.

49 Secondly, the Slovak Republic's position is based on the argument that there was no alternative to the legal proceedings initiated by the tax office first before the Košice II District Court and then before the Košice Regional Court for the purposes of recovering the State aid granted to Frucona, because the agreement in the arrangement with creditors, authorised by a judgment of the court with jurisdiction which has acquired the force of *res judicata*, could not be annulled by the tax office, which is an administrative body.

50 In that regard, it must first be borne in mind that, in accordance with Article 14(3) of Regulation No 659/99, recovery of the unlawful aid which is the subject of a Commission decision is to be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission decision.

51 Accordingly, a Member State which, pursuant to a Commission decision, is obliged to recover unlawful aid is free to choose the means of fulfilling that obligation, provided that the measures chosen do not adversely affect the scope and effectiveness of European Union law (see, to that effect, Case C-209/00 *Commission* v *Germany* [2002] ECR I-11695, paragraph 34, and Case C-210/09 *Scott and Kimberly Clark* [2010] ECR I-4613, paragraph 21).

52 European Union law therefore imposes an obligation to take all appropriate measures to ensure the execution of Commission decisions on the recovery of unlawful aid but respects the specific features of the various procedures provided by Member States for that purpose. It should be stated that it is consistent with that law that, within this action, the Commission has maintained that it has no intention of dictating to the competent authorities of the Slovak Republic the precise manner in which the State aid unlawfully granted to Frucona ought to be recovered, but that it takes the view that the procedure employed for that purpose does not meet the requirement of immediate and effective recovery of that aid.

53 The fact that, following Decision 2007/254, the tax office took steps to reclaim the unlawful State aid by initiating legal proceedings cannot therefore in itself be a ground for criticism, since a Member State is free, as stated above, to choose the means by which it will implement its obligation to effect recovery.

54 However, in this case, the measures taken by the competent Slovak authorities did not lead to the recovery of the wrongful aid and normal conditions of competition were therefore not restored. The main obstacle in the way of that recovery was the refusal, first by the Košice II District Court and then by the Košice Regional Court, to uphold the recovery action brought by the tax office, in the light of the fact that the judgment

of 14 July 2004 of the court with jurisdiction approving the agreement in the arrangement with creditors had acquired the force of *res judicata*.

55 The first issue raised therefore by this case is whether, where, as part of a procedure for arrangement with creditors under court supervision, a national court judgment decides on an arrangement which involves a debt to a public authority being partly written off, and that write-off is thereafter categorised by the Commission as State aid, the finality of that judgment can prevent the recovery of that aid.

56 In that regard, it must, first, be stated that the situation at issue here is distinguishable from that in *Lucchini*, relied on by the Commission, where the Court held that European Union law precludes the application of a provision of national law which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of European Union law which has been found to be incompatible with the common market in a decision of the Commission which has become final (see, to that effect, paragraph 63 of *Lucchini*).

57 In the present case, the court judgment possessed of the force of *res judicata* relied on by the Slovak Republic precedes the decision whereby the Commission requires the recovery of the aid at issue.

58 Consequently, as maintained by the Slovak Republic, *Lucchini* cannot be of direct relevance to this case.

59 Secondly, attention should be drawn to the importance, both in the European Union legal order and in the national legal orders, of the principle of *res judicata*. In order to ensure stability of the law and legal relations, as well as the sound administration

of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided to exercise those rights can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38; Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20; and Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501, paragraph 22).

60 Accordingly, European Union law does not in all circumstances require a national court to disapply domestic rules of procedure conferring the force of *res judicata* on a judgment, even if to do so would make it possible to remedy an infringement of European Union law by the judgment in question (see, to that effect, *Kapferer*, paragraph 21, and *Fallimento Olimpiclub*, paragraph 23).

61 As stated by the Advocate General in his Opinion, it is clear both from the documents before the Court and from the observations made at the hearing by the Slovak Republic that under national law there were available to the national authorities resources which, if diligently used, could have ensured that the Slovak Republic was able to recover the aid at issue.

62 Nonetheless, the Slovak Government has not provided any precise information on the circumstances in which it used the resources which were available to it.

63 In particular, the Slovak Republic has not clearly explained what action was taken in response to the request by the tax office that an extraordinary appeal be brought against the contested judgment.

64 The Court can therefore do no other than hold that, standing the Commission's specific criticism, the information provided by the Slovak Republic is insufficient to allow the conclusion that it took, within the prescribed period, all the measures which it could have employed in order to obtain the repayment of the aid at issue.

65 In the light of the foregoing, it must be held that, by failing to take within the prescribed period all the measures necessary to recover from the beneficiary the aid referred to in Decision 2007/254, the Slovak Republic has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Article 2 of that decision.

Costs

66 Under Article 69(2) of the Court's 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 costs and the Slovak Republic has failed in its submissions, the Slovak Republic must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby

1. **Declares that, by failing to take within the prescribed period all the measures necessary to recover from the beneficiary the aid referred to in Commission Decision 2007/254/EC of 7 June 2006 on State aid C 25/2005**

(ex NN 21/2005) implemented by the Slovak Republic for Frucona Košice, a.s., the Slovak Republic has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Article 2 of that decision;

2. Orders the Slovak Republic to pay the costs.

[Signatures]