JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

1 July 2009 *

In Case T-288/06,

Regionalny Fundusz Gospodarczy S.A. (formerly Huta Częstochowa S.A.), established in Częstochowa (Poland), represented by C. Sadkowski and D. Sałajewski, lawyers,

applicant,

v

Commission of the European Communities, represented by C. Giolito and A. Stobiecka-Kuik, acting as Agents,

defendant,

APPLICATION for the partial annulment of Commission Decision 2006/937/EC of 5 July 2005 on State aid C 20/04 (ex NN 25/04) in favour of Huta Częstochowa S.A.

* Language of the case: Polish.

(OJ 2006 L 366, p. 1) inasmuch as it declares certain aid to be incompatible with the common market and orders the Republic of Poland to recover it,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Eighth Chamber),

composed of M.E. Martins Ribeiro, President, S. Papasavvas and A. Dittrich (Rapporteur), Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 4 September 2008,

gives the following

Judgment

Legal context

1 Article 8 of Protocol No 2 on ECSC products to the Europe Agreement of 16 December 1991 establishing an association between the European Communities and their

Member States, of the one part, and the Republic of Poland, of the other part (OJ 1993 L 348, p. 2; 'Protocol No 2'), provides as follows:

'1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and [the Republic of] Poland:

…

(iii) public aid in any form whatsoever except derogations allowed pursuant to the ECSC Treaty.

…

4. The Parties recognise that during the first five years after the entry into force of the Agreement, and by derogation [from] paragraph 1(iii), [the Republic of] Poland may exceptionally, as regards ECSC steel products, grant public aid for restructuring purposes provided that:

— the restructuring programme is linked to a global rationalisation and reduction of capacity in Poland,

— it leads to the viability of the benefiting firms under normal market conditions at the end of the restructuring period, and

— the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced.

The Association Council shall, taking into account the economic situation of [the Republic of] Poland, decide whether the period of five years could be extended.'

2 Decision No 3/2002 of the EU-Poland Association Council of 23 October 2002 extending the period set in Article 8(4) of Protocol No 2 (OJ 2003 L 186, p. 38) extended for a further period of eight years starting on 1 January 1997, or until the date of the Republic of Poland's accession to the European Union, the period within which the Republic of Poland could exceptionally, in respect of 'steel' products, grant public aid for restructuring purposes under the conditions listed in Article 8(4) of Protocol No 2. Article 2 of that decision states:

'[The Republic of] Poland shall submit to the Commission... a restructuring programme and business plans that meet the requirements listed in Article 8(4) of Protocol [No] 2 and that have been assessed and agreed by its national State aid monitoring authority (the Office for Competition and Consumer Protection).'

3 Protocol No 8 on the restructuring of the Polish steel industry, annexed to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union

is founded (OJ 2003 L 236, p. 948; 'Protocol No 8'), authorised the Republic of Poland, in derogation from the general rules on State aid, to grant aid for the restructuring of its steel sector in accordance with the detailed rules laid down in the restructuring plan and the conditions stipulated in that protocol. It provides inter alia as follows:

'1. Notwithstanding Articles 87 [EC] and 88 [EC], State aid granted by [the Republic of] Poland for restructuring purposes to specified parts of the Polish steel industry shall be deemed to be compatible with the common market provided that:

— the period provided for in Article 8(4) of Protocol [No] 2 ... has been extended until the date of accession,

— the terms set out in the restructuring plan on the basis of which the abovementioned Protocol was extended are adhered to throughout the period 2002-06,

— the conditions set out in this Protocol are met, and

— no State aid for restructuring is to be paid to the Polish steel industry after the date of accession.

2. …

3. Only companies listed in Annex 1 (hereinafter referred to as "benefiting companies") shall be eligible for State aid in the framework of the Polish steel restructuring programme.

4. A benefiting company may not:

(a) in the case of a merger with a company not included in Annex 1, pass on the benefit of the aid granted to the benefiting company;

(b) take over the assets of any company not included in Annex 1 which is declared bankrupt in the period up to 31 December 2006.

5. …

6. The restructuring aid granted to the benefiting companies shall be determined by the justifications set out in the approved Polish steel restructuring plan and individual business plans as approved by the Council. But in any case the aid paid out in the period of 1997-2003 and in its total amount shall not exceed PLN 3 387 070 000.

…

No further State aid shall be granted by [the Republic of] Poland for restructuring purposes to the Polish steel industry.

…

10. Any subsequent changes in the overall restructuring plan and the individual plans must be agreed by the Commission and, where appropriate, by the Council.

…

18. Should the monitoring show that:

…

(c) [the Republic of] Poland in the course of the restructuring period has granted additional incompatible State aid to the steel industry and to the benefiting companies in particular,

the transitional arrangements contained in this Protocol shall not have effect.

The Commission shall take appropriate steps requiring any company concerned to reimburse any aid granted in breach of the conditions laid down in this Protocol.'

4 Article 7(5) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) states:

'Where the Commission finds that the notified aid is not compatible with the common market, it shall decide that the aid shall not be put into effect …'

5 Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation (EC) No 659/1999 (OJ 2004 L 140, p. 1) provides as follows:

'1. Unless otherwise provided for in a specific decision the interest rate to be used for recovering State aid granted in breach of Article 88(3) [EC] shall be an annual percentage rate fixed for each calendar year.

It shall be calculated on the basis of the average of the five-year interbank swap rates for September, October and November of the previous year, plus 75 basis points. In duly justified cases, the Commission may increase the rate by more than 75 basis points in respect of one or more Member States.

…

4. In the absence of reliable or equivalent data or in exceptional circumstances the Commission may, in close cooperation with the Member State(s) concerned, fix a State aid recovery interest rate, for one or more Member States, on the basis of a different method and on the basis of the information available to it.'

6 With regard to the detailed rules for the application of the interest rate, Article 11(2) of Regulation No 794/2004 provides:

'The interest rate shall be applied on a compound basis until the date of the recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year.'

Facts of the dispute

7 The present case concerns a restructuring operation in respect of the Polish steel producer Huta Częstochowa S.A. ('HCz'). The restructuring of HCz took place between 2002 and 2005. To that end, HCz's assets were transferred to new companies:

— in 2002, Huta Stali Częstochowa sp. z o.o. ('HSCz') was formed to continue HCz's steel production. HSCz leased HCz's production facilities from the receiver and took over the majority of the employees. The parent company of HSCz was Towarzystwo Finansowe Silesia sp. z o.o., a company wholly owned by the Polish Treasury;

— in 2004, the companies Majątek Hutniczy sp. z o.o. ('MH') and Majątek Hutniczy Plus ('MH Plus') were formed. Their shares were wholly owned by HCz. MH received HCz's steel assets and MH Plus received certain other assets necessary for production;

— assets not linked to production (called 'non-steel assets') and the electricity company Elsen were transferred to Operator ARP sp z o.o., a company answerable to Agencja Rozwoju Przemysłu S.A. (the Polish Industrial Development Agency, owned by the Polish Treasury), in order to settle public-law claims subject to restructuring (taxes and social security contributions).

8 By letter of 19 May 2004, the Commission informed the Republic of Poland that it had decided to initiate the formal investigation procedure in respect of the restructuring aid granted to the steel producer HCz. That decision was published in the *Official Journal of the European Union* on 12 August 2004 (OJ 2004 C 204, p. 6; 'the decision to initiate') in the authentic language (Polish), preceded by a summary in the other official languages. The Commission called on all interested parties to submit their comments on the facts and legal analysis set out in the decision to initiate. It received comments from the Republic of Poland and from four interested parties.

9 At the end of the procedure, the Commission concluded that, contrary to its initial doubts, the measures for the restructuring of HCz in accordance with the provisions of the Ustawa o pomocy publicznej dla przedsiębiorców o szczególnym znaczeniu dla rynku pracy (Law of 30 October 2002 on public aid for undertakings having special impact on the labour market, Dz. U. No 213, position 1800, as amended) did not constitute State aid within the meaning of Article 87(1) EC. By contrast, the Commission found that HCz had benefited on several accounts from State aid over the period from 1997 to 2002. The Commission found that that aid was in part compatible with the common market but ordered repayment of the part which it found to be incompatible with the common market, amounting to PLN 19 699 452 ('the aid in question').

10 On 5 July 2005 the Commission adopted Decision 2006/937/EC on State aid C 20/04 (ex NN 25/04) in favour of HCz (OJ 2006 L 366, p. 1; 'the Decision'). Article 3 states:

'1. The State aid which [the Republic of] Poland awarded to [HCz] between 1997 and May 2002 as operating aid and aid for employment restructuring amounting to PLN 19 699 452 is incompatible with the common market.

2. [The Republic of] Poland shall take all necessary measures to recover from [HCz], Regionalny Fundusz Gospodarczy, [MH] and [Operator ARP] the aid referred to in paragraph 1 and unlawfully made available to [HCz]. All these companies shall be jointly and severally liable.

Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective enforcement of the decision. The sums to be recovered shall bear interest from the date on which they were made available to [HCz] until their actual recovery. The interest shall be calculated in conformity with the provisions laid down in Chapter V of... Regulation … No 794/2004.

3. …'

11 Pursuant to an agreement dated 30 September 2005, which came into effect on 7 October 2005, ISD Polska sp. z o.o. (at that time trading under the business name of ZPD Steel sp. z o.o.; 'ISD'), a wholly-owned subsidiary of Industrial Union of Donbass Corp., purchased from HCz all of the shares in MH and MH Plus, along with 10 remaining subsidiaries of HCz. By a contract which was also dated 30 September 2005

and came into effect on 7 October 2005, ISD purchased from Towarzystwo Finansowe Silesia sp. z o.o. all of the shares in HSCz. ISD thus became the owner of HSCz, MH, MH Plus and 10 other subsidiaries of HCz.

12 Following the sale, HCz changed its company name to Regionalny Fundusz Gospodarczy S.A. ('the applicant'). The applicant is still wholly owned by the Polish Treasury, but only owns a few properties unconnected with the steel industry.

13 By letter of 17 February 2006, the Commission requested the Polish authorities to inform it of the interest rates applicable to recovery of the aid in question from the jointly and severally liable debtors referred to in Article 3(2) of the Decision. In their reply of 13 March 2006, the Polish authorities made a proposal regarding the appropriate recovery interest rates to be applied and the principles for calculating the interest. In particular, they proposed taking as a basis for the period from 1997 to 1999 the rate for Polish zloty five-year fixed-rate Polish Treasury bonds and, for the period from 2000 until the accession of the Republic of Poland to the European Union, the 10-year rate for those same bonds. Furthermore, in the light of the situation of the capital markets in Poland at that time, which was characterised by very high, but rapidly falling, interest rates, they requested that those rates be updated annually and that the interest should not be calculated on a compound basis.

14 In a letter of 7 June 2006 addressed to the Polish authorities, the Commission stated that the interest rate applicable to recovery of the aid in question had to be, for the whole of the period concerned, the rate for Polish zloty five-year fixed-rate Polish Treasury bonds and that, pursuant to Article 11(2) of Regulation No 794/2004, that interest rate had to be applied on a compound basis.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court of First Instance on 18 October 2006, the applicant brought the present action.

16 By a separate document, lodged at the Registry of the Court of First Instance on the same day, the applicant submitted an application for interim measures, pursuant to Article 242 EC, seeking suspension of the operation of Article 3 of the Decision. By order of 13 December 2006, the President of the Court dismissed that application as inadmissible.

17 Following the partial renewal of the Court of First Instance, the case was allocated to a new Judge-Rapporteur. That Judge-Rapporteur was subsequently assigned to the Eighth Chamber, to which the present case was accordingly allocated.

18 As the applicant did not lodge its reply within the prescribed period, which expired on 16 March 2007, it has not been placed in the Court's file.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Eighth Chamber) decided to open the oral procedure, to put certain written questions to the parties and to request the Commission to lodge a number of documents. The parties complied within the time-limit accorded.

20 The parties presented oral argument and replied to questions put by the Court at the hearing on 4 September 2008.

21 The applicant claims that the Court should annul the second subparagraph of Article 3(2) of the Decision.

22 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

Admissibility

Arguments of the parties

23 The Commission contends that, in disregard of the formal requirements laid down in Article 44(1) of the Court's Rules of Procedure, the applicant has not presented clear

and precise arguments in support of its grounds for complaint such as would have enabled the Commission to prepare its defence and the Court to review its arguments.

24 In support of its grounds for complaint, the Commission submits, the applicant has presented only three assertions of a general nature. Almost all of the reasoning underlying the application appeared in the Commission's summary published in the Official Journal.

Findings of the Court

25 It follows from the case-law that, if it sets out the grounds for annulment with sufficient clarity and precision to enable the defendant to defend itself effectively and for the Community Courts to exercise their judicial review, an application initiating proceedings satisfies the minimum requirements laid down by the first paragraph of Article 21 of the Statute of the Court of Justice and by Article 44(1)(c) of the Rules of Procedure of the Court of First Instance (see, to that effect, Case T-43/91 *Hoyer* v *Commission* [1994] ECR-SC I-A-91 and II-297, paragraph 22).

26 Consequently, there is no reason to hold an action inadmissible for failure to comply with Article 44(1)(c) of the Court's Rules of Procedure in circumstances where the application sets out briefly the pleas in question and neither the defendant, which replied in its defence to the arguments set out in the complaint, nor the Community Courts have been prevented from understanding the arguments on the point in question (see, to that effect, Joined Cases T-97/92 and T-111/92 *Rijnoudt and Hocken* v *Commission* [1994] ECR-SC I-A-159 and II-511, paragraph 71).

27 In the present case, the application is, indeed, brief to the point of terseness. None the less, it satisfies the minimum requirements set out above. As demonstrated by the substantive arguments concerning the merits of the case contained in the defence, the

application permitted the Commission to defend itself effectively. It also enables the Court to carry out its judicial review.

28 Consequently, the plea of inadmissibility put forward by the Commission must be rejected.

Merits

29 The applicant raises two pleas in law alleging infringement of Articles 87 EC and 88 EC along with Article 7(5) of Regulation No 659/1999, on the one hand, and an infringement of Article 9(4) of Regulation No 794/2004, on the other.

The first plea in law, alleging infringement of Articles 87 EC and 88 EC along with Article 7(5) of Regulation No 659/1999

— Arguments of the parties

30 The applicant claims that Articles 87 EC and 88 EC, along with Article 7 of Regulation No 659/1999, authorise the adoption of a decision declaring aid granted by a Member State to be incompatible with the common market in only two situations: first, where the aid was granted after the accession of the Member State to the European Union and, second, where the aid, although granted before the Member State acceded to the European Union, is still applicable after the date of accession.

31 Given that the Republic of Poland acceded to the European Union on 1 May 2004 and that the decision to grant the aid to HCz between 1997 and 2002 was not applied after the accession of the Republic of Poland, the Commission was not entitled, according to the applicant, to review whether the aid in question was or was not compatible with the common market and, accordingly, it was not entitled to rule on the calculation of interest for the period between the day on which the aid was granted to HCz and that of its actual recovery. The Commission, it argues, was entitled only to impose an obligation to repay the interest from 2 May 2004 (the day following the entry into force of the Treaty of Accession) until the day of actual payment.

32 The aid granted by the Republic of Poland for the period from 1997 to 2002 could not have had any effect on intra-Community trade, since it concerned the market of a State which, at the date on which the aid in question was granted, did not belong to the European Union. In addition, according to the applicant, Protocol No 8 does not mention HCz in its Annex 1, with the result that the majority of its provisions do not concern that company. Lastly, Protocol No 8 does not extend the Commission's review to the years preceding the Republic of Poland's accession.

33 The Commission contends, at the outset, that it does not see any link between the second subparagraph of Article 3(2) of the Decision and the grounds for complaint mentioned above. It also disputes the applicant's arguments.

— Findings of the Court

34 It is necessary, at the outset, to clarify the relationship which exists between the first plea in law and the form of order sought by the applicant, which relates only to the second subparagraph of Article 3(2) of the Decision.

35 First, the applicant claims that the conditions laid down in Articles 87 EC and 88 EC have not been fulfilled since, at the material time, the Republic of Poland did not yet belong to the European Union and Protocol No 8 did not apply. What it therefore disputes is essentially the applicability *ratione temporis* and *ratione personae* of the Community rules on State aid.

36 Second, the incompatibility of the aid in question with the common market is established in Article 3(1) of the Decision, whereas the sole provision which the applicant challenges, namely the second subparagraph of Article 3(2) of the Decision, concerns only the calculation of interest.

37 At the hearing, the applicant was, therefore, requested to clarify the scope of its action and the form of order which it seeks. In response to that request, it indicated, essentially, that, by its first plea, it indeed sought the annulment of the Decision as a whole. However,'for political reasons', its management had decided to request that, if that plea were to be upheld, the annulment of the Decision should be limited to the provision relating to interest, that is to say, the second subparagraph of Article 3(2) of the Decision.

38 Accordingly, it is necessary to interpret the first plea as seeking solely the annulment of the interest due in respect of the period prior to the accession of the Republic of Poland to the European Union.

39 With regard, first, to the applicability *ratione temporis* of the Community rules on State aid, the parties do not dispute that, in principle, Articles 87 EC and 88 EC do not apply to aid which was granted before accession and which no longer applies after accession.

40 That being the case, the Commission justifies its powers by contending that Protocol No 8 is a *lex specialis*. It is for that reason necessary to examine whether the provisions of Protocol No 8 entitled the Commission to extend its power of review over State aid to the aid in question and whether those provisions constituted a sufficient legal basis on which to prohibit that aid.

41 In this regard, it should be borne in mind that Protocol No 8 refers to aid granted during the period from 1997 to 2003. It authorises a limited amount of restructuring aid granted for that period (that is to say, before the accession of the Republic of Poland to the European Union) to a number of undertakings listed in its Annex 1 and, on the other hand, prohibits all other State aid for restructuring the steel industry.

42 The first paragraph of point 6 of Protocol No 8 provides, in particular, that in any case the total amount of aid paid out in the period from 1997 to 2003 could not exceed PLN 3 387 070 000. The third paragraph of point 6 of Protocol No 8 states that no further State aid could be granted by the Republic of Poland for restructuring the Polish steel industry. Accordingly, contrary to what the applicant claims, the retroactive application of Protocol No 8 is laid down in point 6 thereof, which refers to the period from 1997 to 2003.

43 Consequently, it follows from the actual wording of Protocol No 8 that it applies to aid granted before accession. The purpose of Protocol No 8 was to establish a comprehensive system for the authorisation of aid intended for the restructuring of the Polish steel industry and not merely to avoid the aggregation of aid by benefiting companies.

44 It follows that Protocol No 8 is a *lex specialis* in relation to Articles 87 EC and 88 EC which extends the review of State aid carried out by the Commission pursuant to the EC Treaty to aid granted in favour of the reorganisation of the Polish steel industry during the period from 1997 to 2003.

45 With regard, second, to the argument concerning the applicability *ratione personae* of Protocol No 8, to the effect that that protocol does not apply to undertakings which are not listed in its Annex 1, it must be stated that that protocol relates to the Polish steel industry as a whole, which includes the applicant by default. Not only does the third paragraph of point 6 of Protocol No 8 lay down a total amount for the aid and prohibit all other aid for which it does not provide, but point 3 thereof states expressly that only the companies listed in Annex 1 (benefiting companies) are to be eligible for State aid within the framework of the Polish steel restructuring programme. Were it to be accepted that a company not listed in Annex 1 could retain unlimited amounts of restructuring aid received before accession without reducing its production capacity in return, Protocol No 8 would be rendered meaningless.

46 Lastly, in so far as the applicant challenges the provisions of Protocol No 8, the action is inadmissible, since those provisions form part of primary law.

47 Consequently, the first plea in law must be rejected.

The second plea in law, alleging infringement of Article 9(4) of Regulation No 794/2004

— Arguments of the parties

48 The applicant criticises the Commission for having failed to fix, in the Decision, the interest rate applicable to recovery of the aid in question. In the absence of a five-year interbank swap rate in Poland prior to its accession to the European Union, an agreement ought to have been concluded between the Commission and the Republic of Poland on that issue in accordance with Article 9(4) of Regulation No 794/2004. Such an agreement ought to have been reflected in the Decision or another decision of the

Commission, since that would have been the only means by which to enable operators required to repay public aid to bring substantive proceedings against the bodies fixing the interest.

49 The Commission disputes those arguments.

— Findings of the Court

50 To the extent to which the applicant disputes the method of calculating interest contained in the Decision, it must be stated that the findings in the second subparagraph of Article 3(2) of the Decision are purely declaratory in nature, since they merely refer to the relevant provisions of Chapter V of Regulation No 794/2004. The method for calculating interest is to be found in Regulation No 794/2004 itself. However, the applicant does not raise any objection of illegality against that regulation.

51 With regard to the alleged need for an agreement between the Commission and the Republic of Poland, it should be pointed out that, in recital 147 of the Decision, the Commission expressly stated that, as Poland had no five-year interbank swap rate for the period concerned by the grant of the aid in question, the interest rate applicable to the recovery of that aid ought to be based, in accordance with Article 9(4) of Regulation No 794/2004, on the available interest rate deemed appropriate for that period.

52 Article 9(4) of Regulation No 794/2004 provides only that the fixing of the applicable recovery interest rate must be effected in 'close cooperation' with the Member State concerned, but does not require an 'agreement'.

53 In that regard, the correspondence between the Commission and the Polish authorities, produced in response to a question from the Court of First Instance, shows that the fixing of the rate applicable to the recovery of the aid in question did indeed take place in 'close cooperation' with the Republic of Poland. In their letter of 13 March 2006, the Polish authorities proposed as the recovery interest rate the 5- or 10-year Treasury bond rate. Moreover, having regard to the situation of the Polish capital markets at the time, which was characterised by very high, but rapidly falling, interest rates, they requested that those rates be updated annually and that the interest should not be calculated on a compound basis.

54 The Commission accepted the essence of those propositions. Admittedly, it found that, for reasons of consistency, instead of using two different rates, the five-year bond rate alone should be applied throughout the entire period from 1997 to 2004. However, in determining the rate applicable in accordance with Article 9(4) of Regulation No 794/2004, the Commission enjoyed a measure of discretion. The choice of a single rate was, moreover, not challenged by the applicant.

55 With regard to the method of applying the interest, and in particular the calculation of the interest on a compound basis, it is true that the Commission rejected the Republic of Poland's argument concerning compound interest. However, Article 11(2) of Regulation No 794/2004 states expressly that the interest rate is to be applied on a compound basis until the date of the recovery of the aid and that the interest accruing in the previous year is to be subject to interest in each subsequent year. Moreover, Article 13 of Regulation No 794/2004 provides that Articles 9 and 11 of that regulation are to apply in relation to any recovery decision notified after the date of entry into force thereof. As Regulation No 794/2004 entered into force in May 2004, it was thus applicable at the time of adoption of the Decision, with the result that the Commission was required to order that interest be calculated on a compound basis.

56 In those circumstances, and having regard to the fact that the Polish authorities proposed the contested reference rates, it is not possible to find that the Commission

failed to have regard to its obligation to fix the interest rate for recovery of the aid in question in close cooperation with the Republic of Poland or that it committed a manifest error of assessment.

57 Lastly, the Commission was not under any obligation to indicate in the Decision the interest rate for recovery of the aid in question, given that it was not even required to identify precisely the principal amount of the recoverable aid and that it was entitled to limit itself to indicating merely the methods permitting the Member State to calculate the aid (see, to that effect, Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission* [2006] ECR II-1475, paragraph 67 and the case-law cited).

58 It follows that the plea in law alleging infringement of Article 9(4) of Regulation No 794/2004 must be rejected.

59 As all of the applicant's pleas in law have been rejected, the action must accordingly be dismissed in its entirety.

Costs

60 Under Article 87(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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Regionalny Fundusz Gospodarczy S.A. to pay the costs.

Martins Ribeiro Papasavvas Dittrich

Delivered in open court in Luxembourg on 1 July 2009.

[Signatures]

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