JUDGMENT OF THE COURT (Fifth Chamber)

1 April 2004 *

In Case C-99/02,

Commission of the European Communities, represented by V. Di Bucci, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I. Braguglia, acting as Agent, assisted by O. Fiumara, vice avvocato generale dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by not adopting within the time-limit prescribed all measures necessary for the recovery from the recipients of the aid which was found, according to Commission Decision 2000/128/EC of 11 May

* Language of the case: Italian.

1999 concerning aid granted by Italy to promote employment (OJ 2000 L 42, p. 1), notified on 4 June 1999, to be unlawful and incompatible with the common market, and in any event by not notifying the Commission of such measures, the Italian Republic had failed to fulfil its obligations under Articles 3 and 4 of that decision and under the EC Treaty,

THE COURT (Fifth Chamber),

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

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 18 September 2003, at which the Commission was represented by E. Montaguti, acting as Agent, and the Italian Republic by O. Fiumara, vice avvocato generale dello Stato, and A. Morrone,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 March 2002, the Commission of the European Communities brought an action pursuant to the second paragraph of Article 88(2) EC for a declaration that, by not adopting within the time-limit prescribed all measures necessary for the recovery from the recipients of the aid which was found, according to Commission Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment (OJ 2000 L 42, p. 1), notified on 4 June 1999, to be unlawful and incompatible with the common market, and in any event by not notifying the Commission of such measures, the Italian Republic had failed to fulfil its obligations under Articles 3 and 4 of that decision and under the EC Treaty.

Decision 2000/128 and pre-litigation procedure

2 On 11 May 1999, the Commission adopted Decision 2000/128, Articles 1 to 4 of which read as follows:

'Article 1

1. The aid granted unlawfully by Italy since November 1995 for employment under the training and work experience contracts provided for in Laws Nos

863/84, 407/90, 169/91 and 451/94 is compatible with the common market and the EEA Agreement provided that it concerns:

— the creation of jobs in the recipient firm for persons who have not yet found employment or have lost their previous employment within the meaning of the guidelines on aid to employment,

— the employment of workers experiencing particular difficulties in entering or re-entering the labour market. For the purposes of this Decision, workers experiencing particular difficulties in entering or re-entering the labour market shall mean young persons under the age of 25, [university graduates] up to the age of 29 and the long-term unemployed, i.e. out of employment for more than one year

2. Aid for training and work experience contracts which does not satisfy the conditions set out in paragraph 1 is incompatible with the common market.

Article 2

1. The aid granted by Italy under Article 15 of Law No 196/97 for the conversion of training and work experience contracts into open-ended contracts is compatible with the common market and the EEA Agreement provided that it complies with the net job creation requirement as defined in the Community guidelines on aid to employment.

The workforce employed by a firm shall be calculated without taking account of jobs resulting from the conversion and jobs created through fixed-term contracts or not guaranteeing sufficiently stable employment.

2. Aid for the conversion of training and work experience contracts into open-ended contracts which does not satisfy the requirement laid down in paragraph 1 is incompatible with the common market.

Article 3

Italy shall take all necessary measures to recover from the recipients the aid which does not satisfy the conditions of Articles 1 and 2 and has already been unlawfully paid.

Repayment shall be made in accordance with the procedures of Italian law. The amounts to be repaid shall bear interest from the date on which the aid was paid 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.

Article 4

Italy shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply herewith.'

3 By application lodged with the Court on 13 August 1999, the Italian Republic brought an action pursuant to the first paragraph of Article 230 EC for annulment of Decision 2000/128 and, in the alternative, annulment of that decision in so far as it provides for the repayment of amounts found to be aid incompatible with the common market.

4 On 28 October 1999 the Commission requested the Italian authorities to provide it with information concerning the measures taken to ensure implementation of Decision 2000/128. That request was followed by an exchange of letters between the Commission and the Italian Republic on that subject, during which the latter referred to the extreme complexities involved in implementing that decision, and by a meeting in Rome (Italy) on 27 March 2000 between the Minister for Labour and Social Security and the Commissioner responsible for competition.

5 On 19 April 2001 the Commission received a final letter from the Italian authorities informing it that the departments of the competent authorities had met on 1 February 2001 to draw up guidelines to be used as the basis for a procedure for recovery of the unlawfully paid aid and that the 'technical operational procedure' for recovery of those sums had been drawn up.

6 By judgment of 7 March 2002 in Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, the Court dismissed the action for annulment brought by the Italian Republic against Decision 2000/128.

7 In those circumstances, taking the view that the Italian Republic had not taken all the measures necessary to comply with Decision 2000/128, the Commission decided to bring the present action.

Substance

Arguments of the parties

8 The Commission maintains that, on 4 August 1999, that is, upon expiry of the two months from the date of notification of Decision 2000/128, the Italian Republic had not yet informed it of the measures taken to comply with the obligation to recover the unlawfully paid aid from the recipient undertakings.

9 The Italian authorities at first confined themselves to referring generally to the extreme difficulties and complexities associated with the control procedures prior to recovery. It was only afterwards, in December 2000 and in April 2001, that they envisaged drawing up an 'operational plan' to implement Decision 2000/128 and notified the Commission of information concerning the initiatives by the competent national authorities, information which in any event is merely preparatory in nature. At no time did the Italian authorities state that they had undertaken actual steps regarding the undertakings in question.

10 Nor did the Italian authorities propose any measures to implement Decision 2000/128 which would have allowed for the difficulties encountered to be overcome.

11 The Italian Republic admits that it has not yet proceeded with recovery of the amounts in question. This is due to both the difficulties encountered by the Italian authorities in identifying the recipients of the unlawful aid and the doubts the

authorities have as to how much is to be recovered. The Italian Government has taken steps to comply with its obligations flowing from Decision 2000/128, however, and the Commission was wrong in alleging that it has not kept it informed of developments in the situation.

12 The Italian Government states that, during the proceedings leading up to the judgment in *Italy* v *Commission*, cited above, the Italian authorities undertook preliminary steps to recover the aid, subject to the outcome of that case. Since numerous difficulties arose in the determination of the extent of the actual obligation to recover, the authorities contacted the Commission a number of times to clarify the situation.

13 In particular, in a memorandum of 11 December 2000, the Ministry of Labour and Social Security proposed to the Commission a definition of what was to be recovered; the Commission was moreover informed both during the hearing of 4 April 2001 in the *Italy* v *Commission* case, cited above, and in a memorandum of 19 April 2001 that, in February 2001, a meeting had been held between the various departments of the competent ministries, during which guidelines for action were drawn up on the basis of which aid deemed to be unlawful was to be recovered, as a means of complementing the technical operational procedure for recovery.

14 The Italian Republic maintains that it definitely intends to perform its obligations, having regard to the statements made by the Court. However, in the interest of more expeditious recovery and to avoid the risk that recipients of the unlawful aid might bring proceedings of unforeseeable dimensions at national or even Community level, it is appropriate for the Italian and Community authorities to establish together, out of court and at the very least in broad terms, the criteria allowing, first, for the specific exclusion from the recovery of aid granted to

undertakings which, because of their size, location and type of business, are not bound by the obligation to repay the aid and, second, for the exemption of those undertakings which can be reasonably considered to be able to plead a legitimate expectation. The exclusion of certain categories of undertakings, mostly small enterprises, could make it easier to concentrate recovery efforts on undertakings which cannot rely on valid grounds of exclusion from recovery.

Findings of the Court

15 It is settled case-law that recovery of unlawful aid is the logical consequence of the finding that it is unlawful and that 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; Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 38; and Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 44).

16 In accordance with a consistent line of decisions, where a Commission decision requiring the cessation of State aid incompatible with the common market has not been the subject of a direct action or where such an action has been dismissed, the only defence available to a Member State in opposing an infringement action by the Commission under Article 88(2) EC 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; Case C-261/99 *Commission* v *France* [2001] ECR I-2537, paragraph 23; Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031, paragraph 21; and Case C-404/00 *Commission* v *Spain*, cited above, paragraph 45).

17 The fact that a Member State can only plead in its defence against such an action that implementation was absolutely impossible does not prevent a State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences overlooked by the Commission, from submitting those problems to the Commission for consideration, together with proposals for suitable amendments to the decision in question. In such cases, the Commission and the Member State must, by virtue of the rule imposing on the Member States and the Community institutions a duty of genuine cooperation which underlies, in particular, Article 10 EC, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions and, in particular, the provisions on aid (see *Commission* v *Italy*, cited above, paragraph 17; *Commission* v *France*, cited above, paragraph 24; Case C-378/98 *Commission* v *Belgium* [2001] ECR I-5107, paragraph 31; Case C-499/99 *Commission* v *Spain*, cited above, paragraph 24; and Case C-404/00 *Commission* v *Spain*, cited above, paragraph 46).

18 However, the condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant government merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real step to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled the difficulties to be overcome (see Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 10; Case C-280/95 *Commission* v *Italy* [1998] ECR I-259, paragraph 14; Case C-499/99 *Commission* v *Spain*, cited above, paragraph 25; and Case C-404/00 *Commission* v *Spain*, cited above, paragraph 47).

19 In the present case, it should first be borne in mind that, in paragraph 102 of *Italy* v *Commission*, cited above, regarding the principle of legitimate expectation, the Court pointed out that, by a notice published in the *Official Journal of the European Communities* (OJ 1983 C 318, p. 3), the Commission had informed potential recipients of State aid of the risk attaching to any aid granted to them illegally, in that they might have to refund the aid (see Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 15).

20 It is true that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund the aid. If such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice (see Case C-5/89 *Commission* v *Germany*, cited above, paragraph 16, and *Italy* v *Commission*, cited above, paragraph 103).

21 However, a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 88 EC may not plead the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 87 EC and 88 EC would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct in order to render decisions taken by the Commission under those provisions of the Treaty ineffectual (see Case C-5/89 *Commission* v *Germany*, cited above, paragraph 17, and *Italy* v *Commission*, cited above, paragraph 104).

22 In paragraph 105 of its judgment in *Italy* v *Commission*, cited above, the Court also recalled that, as to the argument that repayment would be complicated and hard to verify and the argument concerning the wide reach of the aid scheme across the fabric of national production industry, it is sufficient to point out, in accordance with the case-law of the Court, that apprehension of even insuperable internal difficulties cannot justify a failure by a Member State to fulfil its obligations under Community law (see, in particular, *Commission* v *Portugal*, cited above, paragraph 52).

23 Neither the fact that the Member State in question finds it necessary to examine the individual situation of each undertaking concerned for the purposes of

recovering unlawful State aid, as recognised by the Court in paragraph 91 of *Italy* v *Commission*, cited above, nor the argument that the Commission initiated the action within an unusually short time after notification of the decision, can justify the failure to implement that decision (see Case C-404/00 *Commission* v *Spain*, cited above, paragraph 56).

24 Because the second paragraph of Article 88(2) EC does not provide for a pre-litigation phase, in contrast to Article 226 EC, and therefore the Commission does not issue a reasoned opinion allowing Member States a certain period within which to comply with its decision, when the former provision is applied the reference period can only be that provided for in the decision failure to implement which is denied or, where appropriate, that subsequently fixed by the Commission (*Commission* v *Belgium*, cited above, paragraph 26). In the present case, Article 4 of Decision 2000/128 shows that the Commission had fixed a time-limit of two months from the date of notification of that decision.

25 It is common ground that, at the expiry of the time-limit, the measures necessary to recover the aid in question had not been taken by the Italian Government. In addition, it is apparent from paragraph 105 of the judgment in *Italy* v *Commission*, cited above, that more than two and a half years after that time-limit, the Court found that the Italian Government had made no attempt to recover the aid in question.

26 Lastly, it is apparent from the explanations provided by the Italian Government at the hearing in the present case to the effect that, at that date, 18 September 2003, the recovery procedure was still in the preparatory stages, including the drawing-up of guidelines for carrying out recovery of the aid in question and identification

of the undertakings concerned. The Italian Government had thus not undertaken any actual steps with the firms concerned to recover the aid.

27 Accordingly, it is clear that, in the circumstances of the present case, the Italian Republic has not established that it was impossible to implement Decision 2000/128.

28 Since none of the measures necessary to recover the aid referred to in Decision 2000/128 from the recipient undertakings have been taken by the Italian Government, it cannot validly rely on an alleged lack of cooperation on the part of the Commission in its defence.

29 Accordingly, the Court finds that, by not adopting within the time-limit prescribed all measures necessary for the recovery from the recipients of the aid which was found, according to Decision 2000/128, to be unlawful and incompatible with the common market, the Italian Republic has failed to fulfil its obligations under Articles 3 and 4 of that decision.

Costs

30 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 Italian 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 not adopting within the time-limit prescribed all measures necessary for the recovery from the recipients of the aid which was found, according to Commission Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment, to be unlawful and incompatible with the common market, the Italian Republic has failed to fulfil its obligations under Articles 3 and 4 of that decision;**

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

Jann Timmermans Rosas

La Pergola von Bahr

Delivered in open court in Luxembourg on 1 April 2004.

R. Grass V. Skouris

Registrar President