JUDGMENT OF THE COURT (Second Chamber)

13 November 2008 *

In Case C-214/07,

Action under Article 88(2) EC for failure to fulfil obligations, brought on 23 April 2007,

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

applicant,

v

French Republic, represented by G. de Bergues, S. Ramet and J.-C. Gracia, acting as Agents,

defendant,

* Language of the case: French.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, K. Schiemann, P. Kūris and L. Bay Larsen (Rapporteur), Judges,

Advocate General: E. Sharpston,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 12 June 2008,

gives the following

Judgment

1 By its action, the Commission of the European Communities asks the Court to declare that, by failing to implement within the prescribed period Commission Decision 2004/343/EC of 16 December 2003 on the aid scheme implemented by France for the takeover of firms in difficulty (OJ 2004 L 108, p. 38; 'the decision'), the French Republic has failed to fulfil its obligations under Articles 5 and 6 of that decision, the fourth paragraph of Article 249 EC and Article 10 EC.

2 The French Republic disputes the substance of the action and seeks to have it dismissed.

Background to the dispute

3 The decision classifies as a State aid scheme a scheme of tax exemptions provided for in Articles 44 septies, 1383 A, 1464 B and 1464 C of the French General Tax Code ('the GTC'). The scheme was introduced by the Finance Law for 1989, Law 88-1149 of 23 December 1988 (*Journal Officiel de la République Française*, 28 December 1988, p. 16320), without prior notification to the Commission.

4 Under Article 44 septies of the GTC, companies created to take over the activities of industrial firms in difficulty are exempted from corporation tax for a period of two years. In accordance with Articles 1464 B and 1464 C of the GTC, those newly created companies may also benefit, with the agreement of the competent local authorities, from exemption from business tax and property tax for a period of two years.

5 Article 1 of the decision declares that the aid scheme is incompatible with the common market and states that it was implemented in breach of Article 88(3) EC.

6 Article 2 of the decision excludes, however, from the classification as State aid exemptions granted which fulfil the conditions laid down by Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ 2001 L 10, p. 30), or by the *de minimis* rules applicable at the time of the grant.

7 Article 3 accepts, moreover, the compatibility of the aid referred to in Article 1 which fulfils the conditions laid down by the 1979 Communication of the Commission on regional aid systems (OJ 1979 C 31, p. 9), by the 1998 Commission Guidelines on national regional aid (OJ 1998 C 74, p. 9), or by Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33).

8 Article 5 requires, in the following terms, the recovery of aid which is unlawful and incompatible:

'France shall take all necessary measures to recover from its beneficiaries aid granted under the scheme referred to in Article 1, other than that referred to in Articles 2 and 3, and unlawfully made available to those beneficiaries.

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. …'

9 Article 6 states:

'France shall inform the Commission, within two months of notification of this Decision, of the measures taken and to be taken in order to comply with it.'

10 Article 7 adds:

'France shall furnish this information on the basis of the attached questionnaire and shall draw up an exhaustive list of companies granted exemption under the scheme referred to in Article 1 and of the amounts paid in each case.

France shall draw up a list of companies in receipt of aid under the scheme referred to in Article 1 which does not fulfil the conditions laid down by Regulation [No 69/2001], by the *de minimis* rules applicable at the time of grant of the aid, by Regulation [No 70/2001], by the 1979 communication on regional aid systems or by the 1998 guidelines on national regional aid. The list shall also specify the amount of aid each company has received.'

11 Following various exchanges and reminders subsequent to the expiry of the two-month period laid down by the decision for the communication of the measures taken and to be taken for its implementation, the Commission, considering that the French Republic had still not given effect to the decision, decided to bring the present action.

The action

Arguments of the parties

Arguments of the Commission

12 The Commission complains that the French Republic has not recovered any aid in implementation of the decision.

13 It states that it accepted that implementation in respect of the period between 1991 and 1993 is absolutely impossible because, due to a lack of available tax records for that period, the relevant recipients of the aid cannot be identified.

14 It does not, however, accept that implementation is absolutely impossible in respect of the period since 1993.

15 As regards the companies in receipt of aid which had ceased their activity, referred to in the exchanges on the implementation of the decision, the Commission claims that, in the case of a transfer of assets, it is necessary to examine the financial conditions of the transaction in order to ascertain that the transfer took place in accordance with market conditions.

16 According to case-law, it is on that condition that the aid element can be regarded as included in the purchase price, so that the buyer cannot, in principle, be regarded as having benefited from an advantage (Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 77, and Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 80), since the benefit of the aid is retained by the vendor.

17 Where there is no genuine market for certain goods transferred after the cessation of activity, other points of reference or criteria can be used to assess whether the aid has been transferred to the buyer.

18 In any event, the recovery of aid cannot be dependent on an indication of the amount of the aid in the legal instrument transferring assets. Otherwise, it would be extremely easy to undermine the effectiveness of the rules on State aid. It would suffice for the parties to a transaction below market price to fail to mention the transfer of the aid in the contract. However, the assessment of whether the aid has been transferred to the buyer cannot depend only on the will of the parties to the transaction.

19 The Commission points out that its complaint based on Article 10 EC must not be regarded as a complaint separate from that based on the failure to implement Articles 5 and 6 of the decision. It is simply intended to highlight the excessive delay on the part of the French authorities to comply with that decision.

Arguments of the French Republic

20 The French Republic considers that all possible measures have been taken in order to implement the decision. Nevertheless, recovery is impossible with regard to recipient undertakings which have ceased their activities.

— Recovery of the aid from recipients which have not ceased their activities

21 The French Republic lists various difficulties in identifying the recipients, in calculating the amount of the aid to be recovered, and in the choice and implementation of recovery procedures. In its submission, those difficulties amount to external constraints connected to the extent and complexity of the recovery process.

22 The difficulties encountered in identifying the recipients were the result first of all, in respect of the 1991, 1992 and 1993 fiscal years, of the rule of national law whereby financial records need be retained only for a period of 10 years.

23 In respect of later years, they were the result of the fact that the aid scheme did not necessarily involve a specific identification of the recipients in the context of a declaratory system. An inquiry at the competent territorial services was therefore necessary.

24 The French Republic contends that, on 16 March 2005, it sent to the Commission a list of 55 companies which had received between 1994 and 2002 aid in a gross amount in excess of EUR 1 million and above the Community ceiling.

25 It adds that, on 7 July 2006, in response to a letter from the Commission of 26 April 2006 requesting it to communicate the list of all companies which had benefited from a tax exemption exceeding EUR 100 000, it sent:

— a list of 464 beneficiary companies not under a reimbursement obligation, pursuant to the Community provisions on *de minimis* aid, regional aid and aid to small and medium-sized enterprises ('SMEs');

— a list of 105 beneficiary companies which, pursuant to the decision, were obliged to repay net aid of less than EUR 200 000.

26 In its rejoinder lodged on 22 October 2007, it appends a list of 88 companies required to repay aid exceeding EUR 200 000.

27 As regards the difficulties encountered in determining the amount of aid to be recovered, the French Republic relates them, in the first place, to Articles 2 and 3 of the decision.

28 It maintains that the amount of aid to be recovered corresponds to the extent to which the exemptions did not fall within the scope of Articles 2 and 3. However, in its submission, as with the identification of the recipient companies, the determination of the amount of the aid required information to be gathered from all the departmental tax directorates by consulting the entire tax files of the companies in question. The tax declarations made at national level did not include certain information necessary for the application of the Community rules on regional aid and aid in favour of SMEs.

29 The French Republic points out that the Commission has allowed the application of those rules to be relaxed in certain ways and that, therefore, the competent authorities were able to apply different calculations in order to determine the amount of aid to be recovered, corresponding to the amount of the exemption reduced by the amount of the aid covered by the Community provisions on *de minimis* aid, regional aid and aid in favour of SMEs.

30 It contends in the second place that the determination of the amount of aid to be recovered has also been made more difficult by the need to obtain the cooperation of the companies concerned. The competent authorities, which had to regard the recovery claims as non-fiscal claims, did not have available to them under national

law, with regard to such claims, a formalised procedure for communication such as is provided for in the case of fiscal claims. The cooperation of the companies concerned also appeared to be necessary in numerous cases where necessary information was not included in their tax files.

31 As regards, finally, the difficulties related to recovery procedures, the French Republic states that the procedure applicable to non-fiscal claims required the successive intervention of three authorities: the Directorate-General for Taxes, responsible for the calculation of the debts to be recovered, the prefect, in his capacity as authorising officer for the claims and thus signatory of the orders for payment, and the auditors of the Directorate-General for Public Auditing, responsible for the recovery of the debts. It adds that, in the interests of efficiency, it was decided to group the claims by department, so that each prefect would be able to sign the orders for payment in respect of all the companies established in his department.

32 In its rejoinder, the French Republic admits that, by that stage, the orders for payment had still not been issued.

— Recovery of the aid from recipients which had ceased their activity

33 The French Republic maintains that, during its exchanges with the Commission, it relied on the absolute impossibility of recovery vis-à-vis 204 recipients which had ceased their activity.

34 It explains that the Commission none the less replied that:

— in the case of transfer of a recipient's assets, it was necessary to ascertain that the transaction had taken place under market conditions, so as to avoid a transfer of aid to the buyer;

— in consideration of the practical difficulties of that kind of examination for all the undertakings affected, it accepted that the review could be limited to the most significant asset transfers.

35 It maintains that, with regard to both asset transfers which are privately negotiated and those taking place within the context of proceedings for compulsory reconstruction and winding-up, the tax authorities are not able to determine whether the transfers at issue took place under normal market conditions.

36 Although there is a market for immovable property, there is no market for second-hand industrial assets. There is, therefore, no available point of reference for such assets in order to ascertain a market price at the time of transfer.

37 As a result, it is impossible to determine whether, in cases where an undertaking ceases activity, the transfer of assets involved a transfer of aid to the new buyer.

38 The French Republic states furthermore that:

— no recovery is possible where the undertaking has not found a buyer and, having simply ceased to exist, it no longer has a legal representative;

— in certain cases, the assets may have been acquired by a number of different buyers.

39 In any event, recovery is also hampered by legal obstacles.

40 Thus, with regard to undertakings subject to collective proceedings, it is not possible to recover a debt which was not presented before the liquidator within the time-limit set.

41 Concerning privately negotiated asset transfers from undertakings which have ceased their activity, the recovery of the aid would lack any legal basis where the transfer of aid to the buyer was not mentioned in the legal instrument transferring assets.

42 The French Republic claims, therefore, that it is absolutely impossible for it to recover the aid granted to undertakings which have ceased their activity.

Findings of the Court

Recovery of the aid

43 Where a negative decision is taken in a case of unlawful aid, the recovery of that aid, ordered by the Commission, takes place according to the conditions provided for in Article 14(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), which states:

'… 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.'

44 According to settled case-law, 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, inter alia, Case C-177/06 *Commission* v *Spain* [2007] ECR I-7689, paragraph 46 and the cited case-law).

45 In the event of difficulties, the Commission and the Member State must, pursuant to the rule imposing on the Member States and the Community institutions reciprocal duties of genuine cooperation, which underlies, in particular, Article 10 EC, work together in good faith with a view to overcoming those difficulties whilst fully observing the Treaty provisions and, in particular, the provisions on State aid (see Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 42 and the cited case-law).

46 The condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant Member State merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real steps 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 those difficulties to be overcome (see, in particular, Joined Cases C-485/03 to C-490/03 *Commission* v *Spain* [2006] ECR I-11887, paragraph 74 and the cited case-law).

47 In the present case, it is necessary to note from the outset that, well beyond the period prescribed by Article 6 of the decision and the extensions granted by the Commission during its exchanges with the defendant Member State, no sum had been recovered by the French Republic by the date the application was lodged, or even by the date the rejoinder was lodged, almost four years after the decision was adopted.

— Recovery of the aid from recipients which have not ceased their activity

48 As a preliminary point, it must be stated that the aid relating to the 1991 to 1993 financial years is not at issue in the present proceedings. In respect of that aid, the Commission, prior to commencing the action, had already accepted the absolute impossibility of recovery, a view which it expressly confirmed in its application.

49 As to the remainder, the French Republic cannot reasonably claim that the difficulties alleged amount to external constraints.

50 Those difficulties, concerning the identification of the recipients, the calculation of the amount of the aid to be recovered and the choice and implementation of recovery procedures, are internal difficulties caused by the national authorities' own acts or omissions.

51 Faced with those internal difficulties, the national authorities entered into exchanges with the Commission. They thus replied to requests for information, described the difficulties encountered, suggested compromises which might resolve some of those difficulties, and requested instructions.

52 However, their participation in the exchanges was first of all subject to successive significant delays.

53 Above all, although the Commission had initially insisted, both in the second paragraph of Article 7 of the decision and in its later written requests, on the need to draw up a list of companies subject to recovery of the aid and to carry out actual recovery without delay, and then agreed to the application of the applicable Community rules being relaxed, the French authorities:

— concerned themselves with communicating to it a list of 464 companies not required to make a reimbursement;

— failed to carry out, as of the first quarter of 2005, genuine steps to ensure actual recovery from the 55 companies on the list communicated on 16 March 2005, which had received between 1994 and 2002 gross aid in excess of EUR 1 million and above the Community ceiling;

— similarly failed, as of July 2006, to take such steps vis-à-vis the 105 companies on the list communicated on 7 July 2006, required to repay net aid of less than EUR 200 000;

— communicated only on 22 October 2007, in an annex to the rejoinder lodged in the present proceedings, almost four years after the decision, a list of 88 companies required to repay aid in excess of EUR 200 000;

— admitted, in that rejoinder, that the orders for payment had still not been issued, although an initial issue had been announced on 12 April 2006 with a deadline of 31 May 2006;

— invoked a concern for efficiency to justify grouping the claims by department, without, however, that concern resulting in the issue of a single order for payment.

54 As regards the recipients which have not ceased their activity, it thus appears from the above that there was no absolute impossibility to give effect to the decision and that the complaint based on an infringement of Article 5 of the decision is well founded.

— Recovery of the aid from recipients which have ceased their activity

55 The Commission has not, either in its exchanges prior to the present proceedings or in its application, complained that the defendant Member State has failed to implement the decision with regard to the companies which simply disappeared without finding a buyer.

56 Where an undertaking is subject to collective proceedings, the re-establishment of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may, in principle, be achieved by registration of the liability relating to the repayment of the aid in question in the schedule of liabilities (*Germany* v *Commission*, paragraph 85). If the period for the presentation of claims has expired, the national authorities must, where such a procedure exists and is still available, apply any procedure to lift a time-bar so as to allow, in individual cases, the presentation of claims out of time.

57 As regards recipients which have ceased their activity and transferred their assets, it is for the national authorities to check whether the financial conditions of the transfer complied with market conditions.

58 In such a case, the aid element was assessed at the market price and included in the purchase price, so that the buyer cannot be regarded as having benefited from an advantage in relation to other market operators (*Germany* v *Commission*, paragraph 80). Otherwise, it cannot be ruled out that the transferee may, if necessary,

be required to repay the aid in question where it is established that it continues to benefit from the competitive advantage linked with the receipt of the aid (*Germany* v *Commission*, paragraph 86).

59 For the purposes of checking the financial conditions of the transfer, the national authorities may take into consideration, in particular, the form of the transfer, for example, public tendering, deemed to ensure that a sale takes place under market conditions.

60 They may also take into consideration, in particular, any expert's report prepared at the time of the transfer.

61 Where the assets have been acquired by a number of different buyers, there is nothing in principle to prevent the financial conditions of each of the transactions from being checked for their compliance with market conditions.

62 In the case of a privately negotiated transfer of assets, the recovery of the aid from the transferee cannot be dependent on an express reference in the legal instrument of a transfer of that aid. Recovery can take place where the transferee should have been aware of the existence of the aid and of a review procedure instituted by the Commission.

63 In the light of the above, the defendant Member State may not, in order to avoid a declaration that it has failed to fulfil its obligations, simply make general and abstract statements without referring to specific individual cases, analysed in the light of all the steps actually taken to implement the decision.

64 To allow the contrary would amount to precluding already a priori any implementation with regard to the whole category of undertakings which have ceased their activity, whereas, in their case, an absolute impossibility of implementation may be accepted, where relevant, only on the basis of their individual circumstances.

65 In the present case, the French Republic claimed, in its exchanges with the Commission, an absolute impossibility of implementation vis-à-vis 204 undertakings which have ceased their activity. However, it provides no evidence that it has taken any concrete steps to examine the situation of each of them and to determine whether or not it necessitated recovery pursuant to the criteria set out above. It does not provide evidence even of having taken advantage of the Commission's acceptance, in the context of cooperation under Article 10 EC, of a review restricted only to the most significant asset transfers.

66 In those circumstances, it must be concluded, also with regard to recipients that have ceased their activity, that there was no absolute impossibility of implementation

and that the complaint based on an infringement of Article 5 of the decision is well founded.

Information to the Commission on the measures taken and to be taken in order to implement the decision

67 The Court does not need to examine the head of claim based on Article 6 of the decision and seeking a declaration that the French Republic has failed to inform the Commission of the measures taken and to be taken in order to implement the decision, since the Member State did not in fact implement the decision within the prescribed period (see, inter alia, *Commission* v *Spain*, paragraph 54 and the cited case-law).

68 It must therefore be declared that, by failing to implement the decision within the prescribed period, the French Republic has failed to fulfil its obligations under Article 5 of the decision.

Costs

69 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 French Republic 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 (Second Chamber) hereby:

1. **Declares that, by failing to implement within the prescribed period Commission Decision 2004/343/EC of 16 December 2003 on the aid scheme implemented by France for the takeover of firms in difficulty, the French Republic has failed to fulfil its obligations under Article 5 of that decision;**

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

[Signatures]