

JUDGMENT OF THE COURT (Second Chamber)

14 September 2004^{*}

In Case C-276/02,

ACTION for annulment under Article 230 EC,

brought before the Court on 23 July 2002,

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by V. Kreuzschitz and J.L. Buendía Sierra, acting as Agents, with an address for service in Luxembourg,

defendant,

^{*} Language of the case: Spanish.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, J.-P. Puissechet (Rapporteur), J.N. Cunha Rodrigues and F. Macken, Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 1 April 2004,

gives the following

Judgment

- 1 By its application, the Kingdom of Spain seeks the annulment of Commission Decision 2002/935/EC of 14 May 2002 on the State aid granted to Grupo de Empresas Álvarez (OJ 2002 L 329, p. 1) (hereinafter 'the contested decision').

The factual framework and the contested decision

- 2 Grupo de Empresas Álvarez SA (hereinafter 'GEA'), which was one of the main Spanish manufacturers and sellers of porcelain and china, registered significant losses after its privatisation in 1991.

- 3 The undertaking received State aid in the form of guarantees and a direct subsidy which the Commission authorised by Decision 98/364/EC of 15 July 1997 (OJ 1998 L 164, p. 30) on condition that the Spanish authorities refrained from granting any new aid and fully implemented the restructuring plan which they had submitted.

- 4 However, during the three years following that authorisation, GEA and its subsidiary, Vidrios Automáticos del Noroeste SA (hereinafter 'VANOSA'), failed to comply with their tax and social security contribution obligations.

- 5 After the statutory suspension of payments by GEA and VANOSA was declared upon their application, on 19 November 1997 and 14 November 1997 respectively, the Agencia Estatal de Administración Tributaria (State tax authorities, hereinafter 'the tax authorities') entered into an individual agreement with each of the two undertakings, on 14 April 1998.

- 6 Under those agreements, some two thirds of the existing tax debt was waived and an extension, as well as long-term rescheduling, namely, two years' deferment followed by quarterly payments over 10 years, the first as from January 2000, were granted for payment of the balance of that debt, subject to the condition that the two undertakings comply with the schedule and punctually discharge their subsequent tax obligations. Failing compliance with those conditions, the agreements would be cancelled and the initial debt revived in its entirety.

- 7 On 6 November 1998, the Tesorería General de la Seguridad Social (hereinafter 'the social security authorities') also entered into an individual agreement with VANOSA of the same type as the agreements of 14 April 1998, with the first rescheduled monthly payment due in January 2000. GEA, however, did not reach any similar agreement with the social security authorities.
- 8 During the two years which followed the conclusion of the agreements with the tax and social security authorities, GEA and VANOSA continued to fail to pay their social security contributions and taxes when they fell due, with the exception of some sporadic payments. As from the beginning of 2000, those undertakings also failed to pay arrears in accordance with the arrangements set out in those agreements.
- 9 According to the Spanish Government, on 7 February 2001, having sent several letters of formal notice without result, the tax authorities cancelled the agreements of 14 April 1998 with GEA and VANOSA. On 20 December 2001, the social security authorities for their part terminated the agreement of 6 November 1998 with VANOSA.
- 10 The Spanish Government also states that, even after the declarations of suspension of payments, the social security and tax authorities continued with various seizure procedures, following on from seizures prior to those declarations, and initiated other forced collection measures. Thus, the tax authorities seized 96 council houses (on 23 December 1999), attached GEA group trade marks (on 22 August 2000) and debts owed by the main customers of the undertakings in question (between October 2000 and April 2001), and seized VANOSA's plant (on 5 June 2002), while the social security authorities were able to recover certain sums of money (for example, ESP 42 767 950 in November 1998) and applied to attach bank accounts (in January 2001) and a claim on the Treasury (in April 2001). Those actions finally resulted in the undertakings closing in the spring of 2001, since the revenue which could be generated by their operations was largely diverted to the public creditors.

- 11 After it received two complaints in the first half of 2001 claiming, inter alia, that the Spanish authorities had waived the recovery of taxes and social security contributions with regard to GEA and VANOSA, the Commission sent a number of requests for information to those authorities. After several exchanges of letters, it decided on 19 September 2001 to initiate the procedure under Article 88(2) EC and notified the Spanish authorities thereof by letter of the same date, which it subsequently published in the *Official Journal of the European Communities*, inviting interested parties to submit their comments (OJ 2001 C 336, p. 6).
- 12 The Spanish authorities submitted comments, which were received by the Commission on 4 December 2001. No other Member State or interested party submitted comments. On 14 May 2002, the Commission adopted the contested decision.
- 13 In the grounds for the decision, the Commission states that the systematic non-payment of social security contributions and taxes by GEO and VANOSA, at least between November 1997, when payments were suspended, and January 2001, amounts to a transfer of public resources to those undertakings and constitutes State aid within the meaning of Article 87(1) EC.
- 14 That transfer gave those enterprises a competitive advantage inasmuch as, unlike their competitors, they were not obliged to defray the costs of social security contributions and taxes, as would ordinarily be the case. That advantage arises from the failure to apply the measures available under Spanish law, namely the adoption of separate forced collection procedures with regard to post-suspension debts which would have prevented the undertakings in question from continuing to operate without fulfilling their tax and social security obligations.

- 15 The Spanish authorities thereby failed to act as a diligent private creditor trying to recover at least a marginal amount of unpaid taxes and social contributions. Their passivity resulted in a considerable increase in tax and social security arrears, entailing flagrant non-compliance with the restructuring plan on which the decision of 15 July 1997 was based.
- 16 The Commission next states that the aid identified cannot qualify for any of the exceptions provided for in Article 87(2) and (3) EC and that, in particular, it does not satisfy the conditions set out in the information notice (1999/C 288/02) on Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2).
- 17 In conclusion, the Commission finds that 'the aid in the form of the persistent non-payment of taxes and social security contributions by [GEA] and VANOSA between the dates on which payments were suspended (19 November 1997 for GEA and 14 November 1997 for VANOSA) and January 2001 is incompatible with the common market'. It also states that the Kingdom of Spain is to 'take all the necessary steps to recover from the recipient the aid [in question] unlawfully already made available to the recipient'.

The action

- 18 The Spanish Government claims, inter alia, that the Commission has committed an error of law and of fact in applying Article 87(1) EC. It is appropriate first of all to consider these pleas in law.

Plea alleging an error of law

Arguments of the parties

- 19 The Spanish Government maintains that the contested decision infringes Article 87 (1) EC, inasmuch as the existence of State aid within the meaning of that provision is not established in circumstances such as those in the present case.
- 20 The Spanish Government submits that the competent authorities merely entered into waiver and debt rescheduling agreements with GEA and VANOSA, as they were allowed to do under the national legislation relating to suspension of payments by undertakings and as they would have done with any undertaking in that situation. Merely concluding such agreements in the context of a suspension of payments procedure cannot be considered to give rise to State aid.
- 21 To follow the Commission's reasoning, according to which State aid is constituted by the fact that the undertakings obtained agreements allowing them to continue to operate although the public creditors could have brought about their immediate liquidation, amounts to considering that any suspension of payments procedure involves elements of aid and that procedures established by the Member States to prevent insolvency are themselves contrary to the Community rules on State aid.
- 22 The Spanish Government also submits that in the present case the Commission neither demonstrated nor claimed that the agreements entered into by the public creditors with GEA and VANOSA were different from or more advantageous than those normally concluded in suspension of payments procedures.

- 23 The Commission points out, however, that it is not the agreements on waiver and debt rescheduling as regards the public creditors as such that gave rise to State aid, but the passivity of the social security and tax authorities after those agreements were concluded. Contrary to the assertion by the Spanish Government, the Commission has never stated in the present case that those agreements gave rise to State aid.

Findings of the Court

- 24 Article 87(1) EC defines State aid which is governed by the EC Treaty as aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States. The concept of aid within the meaning of that provision is wider than that of a subsidy because it embraces not only positive benefits, such as the subsidies themselves, but also measures which, in various forms, mitigate the normal burdens on the budget of an undertaking (see, inter alia, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1, 19; Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19, and Case C-5/01 *Belgium v Commission* [2002] ECR I-11991, paragraph 32).
- 25 In the contested decision the Commission does not call into question the agreements concluded with GEA and VANOSA for the waiver and rescheduling of debts. Contrary to the assertion of the Spanish Government, the Commission does not deduce that there is State aid from the fact that such agreements were entered into with the public creditors under a suspension of payments procedure.

26 In the grounds and operative part of the contested decision, the Commission expressly refers to the persistent failure by the two undertakings to fulfil their obligations to pay taxes and social security contributions. According to the contested decision, inter alia in points 44 and 47, it is the advantage derived from the systematic non-payment of taxes and social security contributions between at least January 1997 and January 2001, that is to say, both prior and subsequent to the declaration of suspension of payments and the conclusion of the agreements, that constitutes State aid. That advantage results from the failure by the competent authorities to initiate separate forced collection procedures to prevent the two undertakings from continuing to operate, in particular after the agreements were entered into, without fulfilling their tax and social security obligations and, specifically, without honouring post-suspension debts not included in the waivers and schedule laid down in the agreements. At point 53 of the grounds of the contested decision it is stated that, by taking that attitude, the public creditors did not act as a private creditor trying to recover at least a marginal amount of unpaid taxes and social contributions.

27 Accordingly, since it is based on a misreading of the contested decision, the first plea put forward by the Spanish Government must be dismissed.

Plea alleging an error of fact

Arguments of the parties

28 The Spanish Government claims in essence that the contested decision is vitiated by an error of fact, since the Commission considered that the Spanish authorities had remained inactive after the suspension of payments by GEA and VANOSA was declared in November 1997.

- 29 Contrary to what is stated in the contested decision, both the social security and tax authorities used all the means available to them, in particular separate forced collection procedures, for the purpose of ensuring the recovery of debts which arose after the conclusion of the waiver and rescheduling agreements. The Spanish Government refers to the measures mentioned in paragraph 10 of the present judgment.
- 30 The Commission, on the other hand, contends that the Spanish authorities did not show sufficient diligence when confronted with non-compliance on the part of the undertakings in question with their tax and social security obligations. The social security and tax authorities remained inactive after entering into the waiver and rescheduling agreements in 1998, which resulted in a considerable increase in subsequent debt.

Findings of the Court

- 31 The legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (see, inter alia, Case 234/84 *Belgium v Commission* [1986] ECR 2263, paragraph 16, and Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 33).
- 32 With regard to the basis for the contested decision, as was stated in paragraph 26 of this judgment, the Commission takes the view that State aid arises from the fact that the Spanish authorities did not initiate separate forced collection procedures and did not act as private creditors trying to recover at least a marginal amount of the debts owed to them.

33 However, it is clear from the correspondence between the parties during the administrative procedure that the Spanish authorities had indicated that steps had been taken during the period from January 1997 to January 2001 to recover part of the public claims against GEA and VANOSA and to make the latter comply with their obligations. It is true that the information supplied to the Commission during the administrative procedure was less complete than that submitted by the Spanish Government in these proceedings and was at times imprecise, but it did not allow the Commission to conclude that the measures available under Spanish law (separate forced collection procedures) to prevent firms from continuing to operate without fulfilling their tax and social security obligations had not been applied at all and that the public creditors had therefore not acted as private creditors trying to recover at least a marginal amount of the debts owed to them.

34 It is true that the Spanish authorities, in their reply to a request for information from the Commission, which the latter received on 5 July 2001, merely mentioned that the social security authorities had seized property belonging to GEA and VANOSA, without specifying the date on which those seizures took place or supplying information on possible action by the tax authorities. It was on that basis that, in its letter informing them of its decision to initiate the procedure laid down in Article 88 (2) EC, the Commission pointed out to those authorities that they had not indicated that they had availed themselves of certain legal means available under national law such as the initiation of insolvency proceedings or separate forced collection procedures in order to put an end to the failure by the undertakings to fulfil their social security and tax obligations.

35 In their observations in reply, which the Commission received on 4 December 2001, the Spanish authorities stated that since GEA and VANOSA had not complied with the agreements of 14 April 1998, the tax authorities had cancelled them on 7 February 2001 and a certain number of forced collection measures had been set in motion again. In that regard, they cited the attachment of debts owed by customers, trade marks and shares of subsidiaries and seizure of properties. They also pointed out that a first charge had been taken over a property. That information can be understood as meaning that the forced collection procedures referred to were set in

motion again only after the period covered by the contested decision, which ended in January 2001. The Spanish authorities also referred, however, to a report and to social security documentation annexed to their reply, including, inter alia, a statement of properties seized, and bank accounts and debts owed to the two undertakings by other undertakings or the Treasury that had been attached. Consideration of that statement makes clear that several attempts to seize property that had been initiated between 1993 and 1996 were set in motion again between October 1997 and November 1998, that on 1 February 2001 the attachment of a bank account of GEA was notified to the bank concerned, which presupposes that this measure was being prepared in the preceding weeks, and that on 9 April 2001 a debt owed by the public treasury was also attached.

36 In the light of that information, the Commission could not consider that in general '[the Kingdom of Spain failed] to take measures available under Spanish law (separate forced collection procedures) to prevent firms from continuing to operate without fulfilling their tax and social security obligations' and to deduce therefrom that 'nothing in the State's behaviour suggests that it acted as a private creditor trying to recover at least a marginal amount of unpaid taxes and social contributions'.

37 Without prejudice to the question of whether or not State aid is involved in the present case, it must therefore be held that the conclusion in the contested decision that the 'persistent non-payment of taxes and social security contributions by [GEA] and VANOSA following the suspension of payments in November 1997 until January 2001 [constitutes State aid] incompatible with the common market' is based on factually erroneous premisses. Accordingly, the contested decision must be annulled, without there being any need to examine the other pleas in law or arguments put forward by the Spanish Government.

Costs

38 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 Spanish Government has asked that the Commission be ordered to pay the costs and the latter has failed in its submissions, it must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Annuls Commission Decision 2002/935/EC of 14 May 2002 on the State aid granted to Grupo de Empresas Álvarez.**
2. **Orders the Commission of the European Communities to pay the costs.**

Signatures.