

JUDGMENT OF THE COURT (First Chamber)

5 October 2006 *

In Case C-232/05,

ACTION under the second subparagraph of Article 88(2) EC for failure to fulfil obligations, brought on 26 May 2005,

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 and S. Ramet, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of Chamber, K. Schiemann, N. Colneric, K. Lenaerts and E. Juhász, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2006,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by failing to execute within the prescribed period Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott Paper SA/Kimberly-Clark (OJ 2002 L 12, p. 1), the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of that decision.

Legal context

Community legislation

- 2 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) sets out the rules concerning recovery of State aid which has been declared incompatible with the common market:

‘Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article 185 of the Treaty [now Article 242 EC], recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.’

National legislation

- 3 Article L4 of the Administrative Justice Code provides:

‘Unless the court rules otherwise, applications shall not have suspensory effect save where provided for in special legislative provisions.’

- 4 As a special legislative provision, Article 6 of Decree No 92-1369 of 29 December 1992 amending Decree No 62-1587 of 29 December 1962 laying down general rules on public accounts and provisions applicable to recovery of the debts owed to the State referred to in Article 80 of that decree (JORF of 30 December 1992, p. 17954) provides, as regards demands for payment issued by the State or national public bodies:

‘Parties liable for settlement of the demands for payment referred to in Article 85 of the Decree of 29 December 1962 cited above may either challenge the enforceability of those demands where the existence or amount of the debt or whether it is payable is disputed, or challenge enforcement where the validity as to the form of an enforcement measure is disputed.

Other demands for payment may be subject to a challenge as to enforcement.

Those challenges shall have the effect of suspending recovery.’

- 5 Similarly, as regards demands for payment issued by local authorities or local public bodies, the second paragraph of Article L1617-5, 1° of the General Local Authorities Code, inserted by Law No 96-314 of 12 April 1996 (JORF of 13 April 1996, p. 5707), provides that ‘where an action is brought before a court to contest the justification for a claim calculated by a local authority or a local public body, the enforceability of the demand for payment is suspended’.

Pre-litigation procedure

Background to Decision 2002/14

- 6 In 1969, Scott Paper Company, established in the United States of America, acquired Bouton Brochard, a company governed by French law, and created a separate company, Bouton Brochard Scott SA ('Bouton Brochard Scott'), which took over the business of Bouton Brochard.

- 7 In 1986, Bouton Brochard Scott decided to establish a factory in France and for that purpose chose a site in the département of Le Loiret on La Saussaye industrial estate, Orléans.

- 8 On 31 August 1987, the City of Orléans and the département of Le Loiret granted Bouton Brochard Scott certain concessions. First, those local authorities sold it a 48-hectare plot on La Saussaye industrial estate on preferential terms. Second, they undertook to calculate the water treatment levy at a similarly preferential rate.

- 9 Bouton Brochard Scott was renamed 'Scott SA' ('Scott') in November 1987.

10 In January 1996, the shares in Scott were acquired by Kimberly-Clark Corporation ('Kimberly-Clark').

11 In January 1998, Kimberly-Clark announced the closure of the factory in question, the assets of which, namely the site and the paper mill, were bought by Procter & Gamble in June 1998.

12 On 12 July 2000, the Commission adopted Decision 2002/14, Article 1 of which states that the State aid in the form of a preferential land price (EUR 12.3 million at present value) and a preferential rate of water treatment levy (amount to be determined by the French authorities) ('the aid at issue') granted to Scott by the French Republic was incompatible with the common market.

13 Article 2 of Decision 2002/14 states:

'1. France shall take all necessary measures to recover from the beneficiary the aid [at issue] referred to in Article 1 and already made available to it unlawfully.

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

14 Under Article 3 of that decision:

‘France shall inform the Commission, within two months of notification of this decision, of the measures taken to comply with it.’

15 Decision 2002/14 was notified to the French Republic on 31 July 2000.

16 On 30 November and 4 December 2000, Scott and the département of Le Loiret each brought an action for annulment of that decision before the Court of First Instance of the European Communities. The parties did not request that the application of that decision be suspended under Article 242 EC.

The steps taken by the French Republic in response to Decision 2002/14 as regards the aid in the form of a preferential land price

17 In relation to the aid in the form of a preferential land price, the General Council of Le Loiret issued, on 15 December 2000, an assessment in the amount of EUR 5 054 721. On 2 January 2001, the City of Orléans issued an assessment in the amount of EUR 8 002 231.

18 However, following a clerical error in the calculation of the amount of that aid, the Commission rectified it and sent a corrigendum to the French Republic in March 2001.

19 Consequently, the assessments of 15 December 2000 and 2 January 2001 were annulled on 23 March 2001.

20 Subsequently, on 5 October 2001, the General Council of Le Loiret issued a new assessment in the amount of EUR 4 691 370. The City of Orléans also issued, on 18 October 2001, a new assessment in the amount of EUR 7 621 937.

21 On 29 October and 27 November 2001, Kimberly-Clark brought actions challenging those two assessments before the tribunal administratif d'Orléans (Administrative Court, Orléans).

22 Since such actions have automatic suspensory effect in French law, the amounts in question have not been recovered.

The steps taken by the French Republic in response to Decision 2002/14 as regards the aid in the form of a preferential rate of water treatment levy

23 As regards the aid in the form of a preferential rate of water treatment levy, the City of Orléans issued, in January and August 2001, six assessments in the total amount of EUR 1 046 903.

- 24 One of those assessments, in the amount of EUR 165 887, was paid by Procter & Gamble, the current owner of the Orléans factory.
- 25 The five other assessments were replaced by three assessments of 5 December 2001 in the total amount of EUR 881 015.
- 26 Kimberly-Clark brought actions challenging those assessments before the tribunal administratif d'Orléans on 8 March 2002.
- 27 Since such actions have automatic suspensory effect, those assessments have not been paid.

The procedure before the tribunal administratif d'Orléans

- 28 In its letter of 2 July 2003, the French Government stated that the tribunal administratif d'Orléans had stayed the proceedings pending the decision of the Court of First Instance of the European Communities on the validity of Decision 2002/14. However, the French Government acknowledged in its defence that that assertion was incorrect.

The discussions before this action was brought

- 29 By letters of 8 May, 31 July, 8 October 2001, 13 March, 26 August, 23 December 2002, 13 February, 16 May, 21 November 2003, 27 January, 9 March and 29 April 2004, the Commission requested the French authorities to inform it of the progress made in recovering the sums owed and to provide certain documents and information on the proceedings before the tribunal administratif d'Orléans. In its letters, the Commission stressed the importance of immediate and effective execution and pointed out that it could refer the matter directly to the Court under Article 88(2) EC. In its last letter of 29 April 2004, it allowed the French Government one final additional period of 20 days.
- 30 Not being satisfied with the French Republic's responses in its letters of 13 November 2001, 27 November 2002, 25 March and 2 July 2003, the Commission decided to bring the present action.

The action

- 31 In support of its action, the Commission relies on a single complaint alleging, in essence, breach of the fourth paragraph of Article 249 EC and of Articles 2 and 3 of Decision 2002/14 on the ground that the French Republic failed to execute that decision within the prescribed period.

The relevant date for assessing the infringement

- 32 According to settled case-law, the reference date for the application of the second subparagraph of Article 88(2) EC is that provided for in the decision failure to

implement which is denied or, where appropriate, that subsequently fixed by the Commission (see, to that effect, Case C-378/98 *Commission v Belgium* [2001] ECR I-5107, paragraph 26; Case C-499/99 *Commission v Spain* [2002] ECR I-6031, paragraph 28, and judgment of 1 June 2006 in Case C-207/05 *Commission v Italy*, not published in the ECR, paragraph 31).

33 In the present case, Articles 2 and 3 of Decision 2002/14 imposed a time-limit of two months, from the date of its notification, for the French Government to take the measures necessary in order to recover the aid at issue and inform the Commission thereof. After long discussions between the parties, the Commission fixed, in its letter of 29 April 2004, one final period expiring 20 days after that date.

34 Accordingly, the period fixed in Article 3 of Decision 2002/14 must be considered to have been replaced by that which resulted from the letter of 29 April 2004 (see, to that effect, *Commission v Italy*, cited above, paragraph 35). That period was therefore extended until 19 May 2004.

The complaint

Arguments of the parties

35 The Commission submits that, more than five years after the adoption of Decision 2002/14, the measures taken by the French authorities have not led to the recovery of the aid at issue. That decision has not therefore been duly implemented.

- 36 The Commission acknowledges that Article 14(3) of Regulation No 659/1999 authorises the application of procedures laid down by national law but states that that applies only to procedures which allow the ‘immediate and effective’ execution of the Commission’s decision. The Commission takes the view that a national procedure which provides for the automatic suspensory effect of actions brought against demands for payment issued in order to recover aid granted does not fulfil those criteria.
- 37 The French Government counters by saying that the French authorities took all the steps necessary to implement Decision 2002/14.
- 38 In accordance with the national procedures, the French authorities sent the beneficiary of the aid a number of demands for payment which become enforceable at the end of the proceedings before the competent national court.
- 39 Article 14(3) of Regulation No 659/1999 expressly provides for such recourse to national procedures, provided that they allow the immediate and effective execution of the Commission’s decision. The national procedural rules applied in the present case, including that providing for the suspensory effect of actions brought against demands for payment, do not preclude such execution.
- 40 The French Government submits that the ‘immediate and effective’ execution of the Commission’s decision does not necessarily mean that the aid must be recovered immediately. On the other hand, that execution signifies that the Member State is to initiate immediately the national procedure which must lead to the recovery of the aid granted.

Findings of the Court

- 41 Under the fourth paragraph of Article 249 EC, decisions are binding in their entirety upon those to whom they are addressed.
- 42 According to the case-law the Member State to which a decision requiring recovery of illegal aid is addressed is obliged under Article 249 EC to take all measures necessary to ensure implementation of that decision (see Case C-209/00 *Commission v Germany* [2002] ECR I-11695, paragraph 31, and Case C-404/00 *Commission v Spain* [2003] ECR I-6695, paragraph 21). This must result in the actual recovery of the sums owed (see, to that effect, Case C-415/03 *Commission v Greece* [2005] ECR I-3875, paragraph 44, and *Commission v Italy*, cited above, paragraphs 36 and 37).
- 43 Article 14(3) of Regulation No 659/1999 states that the recovery of aid which has been declared incompatible must be effected 'without delay'.
- 44 In the present case, Decision 2002/14 requires the French Republic to take all measures necessary to recover from the beneficiary the aid at issue already made available to it unlawfully. To that end, the Commission granted it a period of two months. That period, replaced by that which resulted from the letter of 29 April 2004, was then extended until 19 May 2004.
- 45 It should be noted that at the end of that period, that is almost four years after the adoption of Decision 2002/14, the action taken by the French authorities had not led to actual recovery of the aid at issue, with the exception of one payment of EUR 165 887 of the EUR 13 350 000 owed.

46 As the French Government itself acknowledges, because of the automatic suspensory effect attaching to actions brought against demands for payment, those demands cannot produce any concrete effect in terms of reimbursement of that aid before the competent national court has given its decision.

47 Consequently, the beneficiary of the aid is able, during that period, to keep funds deriving from the aid declared incompatible and to benefit from the resulting unfair competitive advantage.

48 The French Government submits, however, that that delay is due to the application of the procedures laid down by French law, which is expressly authorised by Article 14(3) of Regulation No 659/1999.

49 It should be borne in mind in this respect that, under Article 14(3) of Regulation No 659/1999, the application of national procedures is subject to the condition that those procedures allow the immediate and effective execution of the Commission's decision, a condition which reflects the requirements of the principle of effectiveness laid down previously by case-law (see Case 94/87 *Commission v Germany* [1989] ECR I-175, paragraph 12; Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 24, and *Commission v Germany*, cited above, paragraphs 32 to 34).

50 The 13th recital in the preamble to that regulation states that, in cases of unlawful aid which is not compatible with the common market, effective competition should be restored and for this purpose it is necessary that the aid be recovered without

delay. The application of national procedures should not therefore impede the restoration of effective competition by preventing the immediate and effective execution of the Commission's decision. To achieve this result, Member States should take all necessary measures ensuring the effectiveness of that decision.

- 51 By providing for the suspensory effect of actions brought against demands for payment issued for the recovery of aid granted, the procedure laid down by French law and applied in the present case cannot be considered to allow the 'immediate and effective' execution of Decision 2002/14. On the contrary, by granting such suspensory effect, the procedure can considerably delay the recovery of the aid.
- 52 Thus, by failing to have regard to the objectives pursued by the Community rules on State aid, that national procedure has prevented the immediate restoration of the previously existing situation and prolonged the unfair competitive advantage resulting from the aid at issue.
- 53 It follows that the procedure provided for by national law in the present case does not fulfil the conditions laid down in Article 14(3) of Regulation No 659/1999. The French rule providing for the suspensory effect of actions brought against demands for payment should therefore have been left unapplied.
- 54 Accordingly, it is not necessary to rule on the question whether, in specific cases, the national court may order the suspension of the enforcement of demands for payment, in response to applications which do not contain any complaints against the Commission's decision.

- 55 In this context, it should be added that the suspensory effect of actions brought before national courts cannot be considered essential for ensuring effective judicial protection in the light of Community law.
- 56 Such protection is already fully ensured by the means provided by the EC Treaty, in this case, in particular, the action for annulment under Article 230 EC.
- 57 Since the European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraphs 38 and 40).
- 58 It is apparent from the case-law that the recipient of aid which has been declared incompatible has the right to bring an action for annulment under the second paragraph of Article 230 EC even if the decision is addressed to a Member State (see, to that effect, Case 730/79 *Philip Morris v Commission* [1980] ECR 2671 and Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 14).
- 59 On the other hand, it is not possible for a recipient of aid which has been declared incompatible, who could have challenged the Commission's decision, to call in

question the decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision. To accept that in such circumstances the person concerned could challenge the implementation of the Community decision in proceedings before the national court on the ground that the decision was unlawful would in effect enable the person concerned to overcome the definitive nature which the decision assumes as against that person once the time-limit for bringing an action laid down in the fifth paragraph of Article 230 EC has expired (see, to that effect, *TWD Textilwerke Deggendorf*, paragraphs 17 and 18, and Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 37).

- 60 It follows that the Commission's decision concerning the recovery of sums owed cannot be called in question before a national court. That question is reserved for the Court of First Instance of the European Communities, which will resolve it in an action for annulment brought before it. It is apparent from Article 242 EC that, in the absence of a decision of the Court of First Instance to the contrary, such an action does not have suspensory effect.
- 61 In the light of the foregoing, it must be held that, by failing to take within the prescribed period all the measures necessary to recover from the beneficiary the aid referred to in Decision 2002/14, the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of that decision.

Costs

- 62 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 applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

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

- 1. Declares that, by failing to take within the prescribed period all the measures necessary to recover from the beneficiary the aid referred to in Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott Paper SA/Kimberly-Clark, the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of that decision;**

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

[Signatures]