JUDGMENT OF THE GENERAL COURT (Second Chamber)

17 May 2011 *

In Case T-1/08,

Buczek Automotive sp. z o.o., established in Sosnowiec (Poland), represented initially by T. Gackowski, then by D. Szlachetko-Reiter and lastly by J. Jurczyk, lawyers,

applicant,

supported by

Republic of Poland, represented initially by M. Niechciała, and then by M. Krasnodębska-Tomkiel and M. Rzotkiewicz, acting as Agents,

intervener,

* Language of the case: Polish.

European Commission, represented initially by K. Gross, M. Kaduczak, A. Stobiecka-Kuik and K. Herrmann, and then by A. Stobiecka-Kuik, K. Herrmann and T. Maxian Rusche, acting as Agents,

defendant,

APPLICATION for the partial annulment of Commission Decision 2008/344/EC of 23 October 2007 on State Aid C 23/06 (ex NN 35/06) which Poland has implemented for steel producer Technologie Buczek Group (OJ 2008 L 116, p. 26),

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 7 September 2010,

gives the following

Judgment

Background to the dispute

Development of the position of TB and its subsidiaries, BA and HB, between 2001 and 2006

1 The applicant, Buczek Automotive sp. z o.o. ('BA'), a company established in Poland, is active in the production of tubes, primarily for automotive applications. At the time of the disputed facts, BA was a subsidiary of Technologie Buczek S.A. ('TB'), a tube manufacturer also established in Poland. TB had several other subsidiaries including Huta Buczek sp. z o.o. ('HB'), a company active in the production of cylinders.

2 From 2001 onwards, TB was faced with increasing debts. The following bodies were TB's public creditors: Zakład Ubezpieczeń Społecznych (the 'ZUS'), the Polish social insurance institution, Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych, the State Fund for the Rehabilitation of Disabled Persons, the Tax Office and the municipality of Sosnowiec (Poland). TB was also in debt to private creditors, including Eurofaktor S.A. ('EF'). The debts owed to the latter by TB stood at approximately PLN 35 million, a greater amount than all of its public debts, making EF the main creditor of TB.

3 In 2002, TB drew up a restructuring plan in order to tackle its financial difficulties. On the basis of that plan, TB became eligible to receive State aid under the National Restructuring Programme for the Polish Steel Industry, within the framework of which the Republic of Poland provided for the grant of State aid to that industry for restructuring in the period from 1997 to 2006. The national restructuring programme was approved by Protocol No 8 on the restructuring of the Polish steel industry (OJ 2003 L 236, p. 948, 'Protocol No 8'), which forms an integral part of 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. 33) in accordance with Article 60 of the Act.

4 TB's restructuring plan envisaged several types of aid, including employment aid, research and development aid and financial restructuring measures, taking the form of a write-off or a rescheduling of the debts owed by TB to public bodies.

5 The financial restructuring measures were however never authorised, since two essential conditions laid down respectively in Protocol No 8 and in Polish legislation were not satisfied, and TB's debt was therefore neither written off nor rescheduled.

6 Accordingly, between 2004 and 2006, the public bodies referred to in paragraph 2 above took steps to recover the sums owed by TB. Thus, in accordance with the provisions of the ustawa z dnia 17 czerwca 1996 r. o postepowaniu egzekucyjnym w administracji (Law of 17 June 1996 on the methods of enforcement available to the public authorities), the ZUS, the municipality of Sosnowiec and the Tax Office seized assets belonging to TB, such as bank accounts, monies owed and cash. In addition, pursuant to Article 66 of the ordynacja podatkowa (Law on the Tax Code) of 19 August 1997, the municipality of Sosnowiec obtained the transfer of several assets into

its ownership, namely parcels of land belonging to TB. Moreover, alongside those recovery measures, in order to guarantee their claims, the public bodies obtained securities over TB's assets. In particular, the ZUS obtained mortgages of PLN 25 million and had pledges on TB's production assets of around PLN 12 million. Finally, on the basis of Article 112 of the ordynacja podatkowa, the ZUS of Sosnowiec also unsuccessfully attempted to recover its debts from HB.

7 On 1 January 2006, BA concluded a lease agreement with TB in relation to certain production assets, the value of which amounted to PLN 6 383 000. That agreement was concluded for an indefinite period. Provision was made in the agreement that BA would pay PLN 258 000 per month plus VAT to TB. In addition, in July 2006, BA benefited from a capital injection of PLN 1 550 000.

8 In 2005 and 2006, TB increased the capital of HB by means of several capital injections totalling PLN 14 811 600. Those capital injections took the form of a transfer of fixed assets corresponding to the foundry equipment, a cash injection, the offsetting of debts, and a transfer of intangible assets and rights. On each occasion that the capital was increased, TB received shares from HB.

9 On 16 August 2006, TB was declared insolvent but allowed to continue trading.

Administrative procedure before the Commission

10 In 2005, an independent evaluation conducted as part of the implementation and monitoring of Protocol No 8 revealed an increase in TB's financial obligations to

public creditors and a failure to achieve profitability. By letters of 29 March, 1 August and 2 December 2005, the Commission of the European Communities requested additional information from the Polish authorities. The authorities replied by letters of 23 June and 28 September 2005 and of 14 February 2006.

11 By letter of 7 June 2006, the Commission notified the Republic of Poland of its decision to open a formal investigation procedure under Article 88(2) EC. That decision was published in the *Official Journal of the European Union* of 19 August 2006 (OJ 2006 C 196, p. 23). In that decision, the Commission invited the interested parties to submit their observations. Only the Republic of Poland responded to that invitation.

12 At the end of the formal investigation procedure, the Commission adopted Decision 2008/344/EC of 23 October 2007 on State Aid C 23/06 (ex NN 35/06) which Poland has implemented for steel producer Technologie Buczek Group (OJ 2008 L 116, p. 26, 'the contested decision').

13 In the contested decision, the Commission stated that, in 2005 and 2006, TB restructured the group and spun off two profitable activities: the production of chrome steel cylinders, which was transferred to HB, and the production of aluminium-covered steel tubes and chrome tubes, which was transferred to BA.

14 It also stated, with regard to the debts owed to the public authorities by TB, that, although the recovery measures required by law and other measures, such as obtaining mortgages, had been adopted by those authorities, the repayments made by TB were insignificant in 2004. In that connection, the Commission pointed out that, from the end of 2004, it was clear that TB was no longer able to honour its debts or its current commitments. However, according to the Commission, the Polish authorities had solid guarantees that they were able to convert those guarantees into liquid assets in the context of insolvency proceedings. Accordingly, in the view of the Commission, it

appeared to make more sense, from the point of view of a hypothetical private creditor, to use those guarantees than to opt for restructuring.

15 The Commission concluded that the Polish authorities had waived their right to enforce a claim in the amount of PLN 20 761 643. It added that, since the waiver of the right to enforce had had the same effect as granting the recipient the entire non-reimbursed amount, the advantage thereby obtained concerned an amount of PLN 20 761 643 received as of 1 January 2005. In addition, the Commission found that BA and HB had benefited from the aid. It took the view that TB had not retained the aid because the failure to enforce the claims had allowed the undertaking to continue trading and organise its internal restructuring.

16 In the light of the foregoing, in Article 1 of the contested decision, the Commission declared the State aid in the amount of PLN 20 761 643 unlawfully granted by the Republic of Poland to the Technologie Buczek Group ('the TB Group') to be incompatible with the common market.

17 In Article 3(1) and (3) of the contested decision, the Commission orders the Republic of Poland to recover that sum, plus late-payment interest, specifying that that recovery must be made from the subsidiaries HB and BA in proportion to the aid which they actually received, that is to say an amount of PLN 13 578 115 from HB and an amount of PLN 7 183 528 from BA.

18 In accordance with Articles 4 and 5 of the contested decision, the Republic of Poland is required to implement that decision in the four months following its notification and to inform the Commission, within two months of the notification of the decision, of the measures that it has taken to comply with the decision.

19 Article 6 of the contested decision states that the decision is addressed to the Republic of Poland.

Procedure and forms of order sought by the parties

20 By application lodged at the Registry of the General Court on 8 January 2008 the applicant brought the present action.

21 By separate document lodged at the Registry of the General Court on the same day, the applicant also applied for suspension of the operation of the contested decision.

22 By order of the President of the General Court of 14 March 2008 in Case T-1/08 R *Buczek Automotive* v *Commission* [2008] not published in the ECR, the application for interim relief was dismissed and the costs reserved.

23 By document lodged at the Registry of the General Court on 18 March 2008, the Republic of Poland sought leave to intervene in support of the form of order sought by the applicant.

24 By order of the President of the Second Chamber of the General Court of 13 May 2008, the Republic of Poland was granted leave to intervene.

25 By order of the President of the Second Chamber of the General Court of 4 May 2009, the present case was joined with Case T-440/07 *Huta Buczek* v *Commission* and Case T-465/07 *Technologie Buczek* v *Commission* for the purposes of the oral procedure and the judgment.

26 By letters lodged at the Registry of the General Court on 28 April and 30 August 2010 respectively, the applicants in Case T-465/07 and Case T-440/07 informed the Court that they were withdrawing their actions.

27 By orders of the President of the Second Chamber of the General Court of 7 July and 3 September 2010 respectively, Case T-465/07 and Case T-440/07 were removed from the register of the Court.

28 The applicant, supported by the Republic of Poland, claims that the Court should:

— annul Article 1 and Article 3(1) and (3) of the contested decision;

— in the alternative, annul Article 1 and Article 3(1) and (3) of the contested decision in so far as the Commission orders the recovery of PLN 7 183 528 from it;

— annul Articles 4 and 5 of the contested decision in so far as those articles relate to the recovery of the aid from it;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the action as inadmissible in so far as the applicant seeks the annulment of provisions which are not of direct and individual concern to it;

— dismiss the remainder of the action;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

30 The Commission states that the first head of claim is inadmissible, since the applicant does not have an interest in bringing proceedings against Article 1 and Article 3(1) and (3) of the contested decision. Indeed, those provisions are addressed to the Republic of Poland and relate to the TB Group. However, the Commission is of the opinion that, since the applicant is merely one entity within the TB Group and has failed to produce a power of attorney authorising it to be a party to judicial proceedings on behalf of the group, it does not satisfy the conditions required under Article 230 EC.

31 The applicant disputes the Commission's claims and states that it does have an interest in bringing proceedings against Article 1 and Article 3(1) and (3) of the contested decision. Indeed, it points out that, although it is not named in the text of Article 1 of the contested decision, that provision does concern the TB Group. However, the TB Group is defined by the Commission from an economic perspective, thereby failing to take into account the fact that the different entities which make up the group have separate legal personality. It follows from the Commission's analysis that the amount of the aid determined in relation to the whole group has an impact on the sums to be recovered from the applicant.

32 The Republic of Poland disputes the argument advanced by the Commission that the applicant would have an interest in bringing proceedings only if it had a power of attorney authorising it to be a party to judicial proceedings on behalf either of the TB Group or of the Republic of Poland. In the view of the Republic of Poland, Article 1 of the contested decision refers to the TB Group, of which the applicant is part, and, therefore, the amount of the aid determined in relation to the group has an impact on the part of the aid which the applicant will have to pay back. For this reason, the Republic of Poland is of the opinion that, taking into account the structure of the decision and the inseparable nature of its content, the Court is required to examine the decision in its entirety.

Findings of the Court

33 In the context of the first head of claim, the applicant seeks the annulment of Article 1 and Article 3(1) and (3) of the contested decision in their entirety and not, as it requests in the context of the second head of claim, in so far as the Commission orders the recovery of PLN 7 183 528 from it. In essence, the Commission takes the view that the first head of claim must be dismissed as inadmissible due to a lack of interest in bringing proceedings.

34 In that connection, it should be borne in mind that, in accordance with settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as the applicant has an interest in the annulment of the contested measure. Such an interest presupposes that the annulment of the contested measure must of itself be capable of having legal consequences and that the action must be likely, if successful, to procure an advantage for the party who brought it (see Case T-387/04 *EnBW Energie Baden-Württemberg* v *Commission* [2007] ECR II-1195, paragraph 96, and the case-law cited).

35 Article 1 of the contested decision declares the State aid in the amount of PLN 20 761 643 unlawfully granted to the TB Group to be incompatible with the common market. In addition, in recital 124 and Article 3(1) of the contested decision, the Commission finds that the aid must be recovered from its recipients, namely the applicant and HB. If Article 1 were to be annulled, the basis of the obligation to effect restitution imposed inter alia on the applicant would disappear. It follows that the applicant has an interest in obtaining the annulment of Article 1 of the contested decision in its entirety.

36 However, it should be pointed out that the provisions of Article 3(1) and (3) of the contested decision lay down the amounts to be recovered from the applicant and from HB respectively. In recital 131 of the contested decision, the Commission specified how those amounts had been calculated. It follows from that recital that, first of all, the Commission took into account the resources actually transferred by TB to the applicant and to HB, that is to say PLN 7.833 million and PLN 14.81 million respectively. In a second stage, it stated that the combined amount of those resources, i.e. PLN 22.643 million, exceeded the total amount of the aid granted. Accordingly, in the third stage, it limited the total amount to be reimbursed to the amount of the aid granted and reduced the amount owed by the applicant and by HB proportionately. Since the applicant and HB had received 34.6 % and 65.4 % of the resources transferred respectively, they were required to pay 34.6 % and 65.4 % of the total amount to be reimbursed, that is to say PLN 7 183 528 and PLN 13 758 115.

37 In the light of the explanations provided in recital 131 of the contested decision, if that decision were to be annulled as far as the amount owed by HB is concerned, the Commission would be able to demand that the applicant effect restitution of the amount of the resources actually transferred by TB and from which it benefited, namely PLN 7.833 million.

38 Accordingly, although the applicant has an interest in obtaining the annulment of Article 3(1) and (3) of the contested decision in so far as the Commission orders the recovery of PLN 7 183 528 from it, it cannot be held that it also has an interest in the annulment of the provisions of Article 3(1) and (3) of the contested decision in their entirety.

39 It follows that the plea of inadmissibility raised by the Commission in relation to the first head of claim should be upheld in part and that head of claim dismissed as inadmissible in so far as the applicant seeks the annulment of the provisions of Article 3(1) and (3) of the contested decision in their entirety.

Substance

40 The applicant puts forward six pleas in law in support of its application. The first alleges infringement of Article 87(1) EC and of Article 88(2) EC, the second infringement of Article 253 EC and of Article 41 of the Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), the third infringement of Article 5 EC, the fourth infringement of the principle of legal certainty, the fifth infringement of the right to property and the sixth a misuse of powers.

Arguments of the parties

41 In the context of the first limb of the first plea in law, the applicant, supported by the Republic of Poland, argues that the Commission infringed Article 87(1) EC by wrongly regarding the existence of public debts as aid incompatible with the common market. In the view of the applicant, none of the four conditions for a measure to be regarded as State aid — intervention by the State or through State resources, advantage, effect on trade between Member States and distortion of competition — is met in the present case.

42 Firstly, with regard to the condition relating to State intervention, the applicant submits, first, that the Polish authorities have never granted a debt write-off to TB, and have rather on the contrary taken all the necessary steps to enforce their claims.

43 Second, the applicant disputes the analysis conducted by the Commission in the contested decision in order to determine whether the Polish public authorities had behaved like a hypothetical private creditor. In this connection, first of all, the applicant strongly denies the Commission's claim, in recital 91 of the contested decision, that a private creditor would have chosen to realise the guarantees which it held in the context of insolvency proceedings rather than allow TB to proceed with its restructuring, since:

— the recovery procedure implemented allowed for the gradual payment of the sums owed;

— insolvency proceedings are lengthy and, prior to the liquidation of the debtor's assets, a series of steps must be taken by the receiver and by the presiding judge, the majority of which are open to appeal, which appeal proceedings, if brought, postpone the date of payment of the sums owed correspondingly;

— insolvency proceedings themselves give rise to costs, and those costs reduce the estate intended to satisfy the claims of creditors;

— none of the securities held by the public bodies had first-class status.

44 The applicant adds, in the reply, that the Commission's view that if an application for insolvency proceedings had been lodged in 2004 the debts would already have been recovered is based on an a posteriori assessment which takes into account events that occurred subsequently and of which the authorities were unaware when deciding on the means of enforcement. In the present case, the applicant explains that the Polish authorities took into account, first, the risk that insolvency proceedings would result in only a partial settlement of the debts and, second, the fact that a declaration of insolvency has the effect of terminating ongoing enforcement proceedings.

45 Next, the applicant points out that the conduct of a hypothetical private creditor should, in the present case, be determined on the basis of the actions taken by TB's private creditors, in particular those of its main creditor EF. In that connection, the applicant argues that, despite the fact that EF had very solid and real guarantees in the form of mortgages over real estate and pledges secured over movable property, it did not request that TB be declared insolvent but rather took the view that a debt recovery proceedings gave it a greater chance of obtaining the settlement of its claims.

46 Finally, the applicant submits that the Commission's claim in recital 96 of the contested decision that, from the end of 2004, it was clear that TB was not going to return to profitability is incorrect. Indeed, the applicant points out that, in recitals 57 and 14 of the contested decision, the Commission noted that TB was receiving rent in consideration for the leasing of some of its assets. In addition, the Commission does

not dispute the fact that the shares in HB, a recipient company, were included in TB's assets, meaning that TB could therefore expect income in the form of dividends. Furthermore, contrary to the Commission's claim in recital 94 of the contested decision, TB continued its production activity until the end of 2006.

47 Third, the applicant submits that all of TB's public debts, together with the interest and costs of enforcement, have been honoured in the context of the insolvency proceedings in respect of TB.

48 Secondly, the Commission completely fails to state in what way TB derived an advantage from the aid in question. On the contrary, the actions initiated by the Polish authorities resulted in the gradual worsening of TB's financial difficulties.

49 Thirdly, the applicant argues that the Commission has also failed to show that the aid in question affected trade between Member States or distorted or threatened to distort competition.

50 First of all, with regard to the recovery measures adopted by the Polish authorities, the Republic of Poland adds that the period running from the point at which enforcement became legally possible to the point at which the Commission considers that that enforcement was ended, that is to say 31 December 2004, is very short and, in any event, insufficient to recover the debts and to conclude that the recovery of those debts is impossible by normal means of enforcement and that an application for a declaration of insolvency must be lodged.

51 Next, the Republic of Poland points out that the contested decision is wholly illogical, since in it the Commission claims that the State aid was granted on 31 December 2004 but supports that claim by relying on steps taken by the Polish authorities in 2005 and 2006. However, in order to find that the aid was granted to TB on 31 December 2004, the Commission should take as a basis solely the situation existing at that time and the information available on that date.

52 Finally, with regard to the criterion of the hypothetical private creditor, the Republic of Poland notes inter alia that the Commission has not conducted in-depth economic analyses enabling it to conclude that the Polish authorities would have recovered a greater share of the sums owed to them at an earlier stage if, towards the end of 2004, it had brought an action for a declaration of insolvency. In addition, in the view of the Republic of Poland, the Commission appears to forget that insolvency proceedings do not result in the immediate satisfaction of creditors' claims and give rise to costs, which further reduce the amount of the estate available to be shared between the creditors.

53 Firstly, with regard to the question of the recovery of public debts, the Commission replies, first, that there was no rational recovery of public debts or any optimisation of that recovery, and that the applicant ignores the fact that the steps taken by the Polish authorities were ineffective. Indeed, the steps that they took led to the recovery of only a negligible percentage of the debts and did not contribute to reducing TB's overall indebtedness. On the contrary, in practice, they represented continuous financing and operational support for TB, which was thus able to continue a non-profitable activity, even though the authorities could have applied for a declaration of insolvency in respect of TB which would have allowed for the effective enforcement of the guarantees held over TB's assets, in particular in view of the fact that those guarantees were first-class guarantees.

54 In addition, the Commission states that its point of view is supported by the case-law under which State aid is present where a debt has not, on the facts, been recovered. Indeed, the tolerance shown by the public authorities vis-à-vis the non-repayment of the debts reduces the undertaking's normal costs and, without being a subsidy *stricto sensu*, is similar in character to a subsidy and has the same effect.

55 Second, the Commission submits that, although the selective advantage is the result of ineffective national provisions, the fault in that regard rests with the Republic of Poland. Since the contested decision was addressed to the Republic of Poland, it is obliged to apply it, using all the measures at its disposal, including legislative measures.

56 Third, the Commission contends that the arguments advanced by the applicant are contradictory in so far as it submits, on the one hand, that the Polish authorities took all legal steps to recover the sums owed and, on the other hand, that those same authorities chose not to proceed with the immediate recovery of the debts in order to recover the amount owed in its entirety, plus late-payment interest.

57 Fourth, with regard to the claim made by the Republic of Poland that the Commission should have taken as a basis only the situation existing as at 31 December 2004 and the information available at that date, the Commission points out that State aid is not simply the grant of a pre-determined amount of funds. Such aid also exists where claims are not enforced effectively. It is therefore logical that State aid begins at a specific point and continues for as long as effective recovery is not made. The duration of such aid should therefore be justified by the continued inaction following its commencement, and not merely by earlier acts, as the Republic of Poland attempts to claim.

58 Secondly, with regard to the payment of interest, the Commission submits that, in the case of public debts, interest is calculated without regard to the will of the creditors and is mandatory. The failure to calculate and collect interest constituted additional aid.

59 Thirdly, on the issue of whether the Polish authorities behaved like a hypothetical private creditor, the Commission objects, first, that the fact that restructuring aid was initially granted to TB makes it impossible to examine the steps taken by the Polish authorities from the point of view of a hypothetical private creditor, since such a creditor would not tolerate TB being granted a write-off of its original debt.

60 Second, the Commission claims that a private creditor would not have acted in the same way as the Polish authorities in a comparable situation. Indeed, in the view of the Commission, a private creditor would be inclined to accept the deferment of the deadline for repayment of the debt owed by an undertaking in difficulty or to agree to the restructuring of that undertaking only if it were to thereby obtain an economic advantage for itself. However, in the present case, the Commission claims that it has shown in the contested decision that, from January 2004, TB was insolvent and that it was unlikely that it would become profitable again, meaning that a private creditor would, in such circumstances, have decided to enforce its claims as early as 2004.

61 However, the Commission points out that a private creditor would not been satisfied with whatever recovery measures had been taken, and would have been interested solely in measures likely to be effective. Accordingly, a private creditor would have considered whether realising the guarantees which it held in the context of insolvency proceedings would have resulted in a greater level of repayment than in the context of debt recovery proceedings. In addition, the Commission states first and foremost that, in the present case, recovery did not lead to the repayment of TB's debts, since the increase in the volume of those debts was always greater than the sums recovered,

secondly that the prospects of TB returning to profitability were significantly reduced, and finally that the ZUS had guarantees equivalent to the amount of TB's debts. It follows from this, in the view of the Commission, that a private creditor in the ZUS' position had no reason to continue to wait for its claims to be enforced.

62 Third, with regard to the argument advanced by the applicant concerning the conduct of EF, the Commission submits, first, that the argument must be dismissed because it was not presented during the investigation procedure and, second, that EF is not a reliable benchmark of a private creditor.

63 Fourth, with regard to the argument put forward by the Republic of Poland regarding the lack of in-depth economic analyses, the Commission replies, on the basis of recital 91 of the contested decision and Case T-36/99 *Lenzing* v *Commission* [2004] ECR II-3597, that it was not necessary to demonstrate the primacy of insolvency proceedings over other forms of recovery since the Polish authorities did not make use of all the recovery measures available even though it was obliged to do so.

64 Fourthly, with regard to the argument advanced by the applicant that the arrears on its public debts were honoured in the context of the insolvency proceedings, the Commission points out that the recovery of the public debts from TB will not mean the removal of all distortions of competition within the meaning of Article 88(2) EC. Indeed, it is clear from settled case-law that the purpose of the recovery of aid is to re-establish the situation existing on the market prior to the award of that aid. That objective is achieved once the illegal aid has been paid back by the recipient and the recipient loses the advantage from which it had benefited on the market as compared with its competitors. In the present case, since the competitive advantage was transferred from TB to BA and HB, the conditions of fair competition can be re-established only by the repayment of the aid by BA and HB.

Findings of the Court

65 In accordance with Article 87(1) EC, '[s]ave as otherwise provided in this Treaty, any 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 shall, in so far as it affects trade between Member States, be incompatible with the common market'.

66 Classification as aid within the meaning of Article 87(1) EC requires that all the conditions set out in that provision are fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be likely to affect trade between Member States. Third, it must confer an advantage on the recipient by favouring certain undertakings or the production of certain goods. Fourth, it must distort or threaten to distort competition (see Case T-34/02 *Le Levant 001 and others* v *Commission* [2006] ECR II-267, paragraph 110, and the case-law cited).

67 More specifically, with regard to the condition relating to the intervention by the State or through State resources, it has been acknowledged in case-law that only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 87(1) EC (Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58).

68 With regard to the condition relating to the presence of an advantage, it must be borne in mind first of all that, in accordance with settled case-law, the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without

being subsidies in the strict sense of the word, are therefore similar in character and have the same effect (see Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 35, and the case-law cited).

69 Next, it is also settled case-law that Article 87 EC does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (see Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 16, and the case-law cited).

70 Finally, it had been held that, in order to determine whether a State measure constitutes aid for the purposes of Article 87 EC, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 22). To that end, as far as non-recovered public debts are concerned, the public bodies must be compared to a private creditor who is seeking to obtain payment of sums owed to it by a debtor in financial difficulties (Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 167).

71 The question whether, in the present case, the Commission correctly applied the concept of aid within the meaning of Article 87(1) EC must be assessed in the light of the above principles.

72 Firstly, the applicant claims, in essence, that the measures at issue do not constitute State aid for the purposes of Article 87(1) EC since, in view of the fact that the Polish authorities have never granted a debt write-off to TB and took all the steps necessary to enforce their claims, the condition relating to State intervention is not satisfied.

73 It must be observed that, although the applicant claims there has been no State intervention, its arguments are essentially focussed on the question of the presence of an advantage granted by the public bodies referred to in paragraph 2 above. Indeed, its arguments by no means seek to prove that the advantage allegedly granted to TB was granted neither directly nor indirectly through State resources within the meaning of the case-law cited in paragraph 67 above. They seek to demonstrate simply that the measures examined by the Commission in the contested decision cannot be regarded as being an advantage. Accordingly, it is necessary to determine whether the condition relating to the presence of an advantage is satisfied in the present case.

74 In that connection, it should be pointed out that, contrary to the applicant's claim, the Commission does not dispute that the Polish authorities neither wrote off nor rescheduled TB's public debts. For example, it is clear from the contested decision, in particular recitals 38 to 40 thereof, that the Commission was fully aware that the Polish authorities had adopted the measures laid down in law to recover their claims, such as the seizure of bank accounts, obtaining mortgages and pledges and transfers of ownership of certain assets. At the hearing on 7 September 2010, the Commission made clear that it had taken the view, for the purposes of the adoption of the contested decision, that the recovery undertaken by the public bodies referred to in paragraph 2 above had been ineffective, in the light of the increase in the level of TB's indebtedness, and that the effective non-recovery of public claims had to be equated with a write-off or rescheduling of the debts.

75 Nevertheless, it is clear from the contested decision, in particular recitals 91, 96 and 97 thereof, that the Commission was of the opinion that the advantage conferred on TB resulted not from the fact that the ineffective nature of the recovery undertaken by the public bodies referred to in paragraph 2 above could be equated with a write-off or rescheduling of its debt, but from the fact that those authorities had waived their right to enforce a claim in the amount of PLN 20 761 643, since they had failed to apply for TB to be declared insolvent with effect from the end of 2004 even though at that time it had become unlikely that TB would be able to return to any degree of profitability. In the view of the Commission, as expressed in recital 97 of the

contested decision, this constituted operational support for TB, which was thus able to continue its non-profitable activity.

76 Accordingly, it must be stated that the contested decision is based neither on the grant of a write-off or a rescheduling of TB's debts nor on the ineffectiveness of the recovery measures adopted by the Polish authorities equated by the Commission with a write-off or a rescheduling of the debt, but rather on the fact that the Polish authorities had at their disposal an alternative method of enforcing their claims — the application for a declaration of insolvency — which, in the view of the Commission, would have allowed for an effective recovery of the debts.

77 In those circumstances, having regard to the case-law cited in paragraphs 68 and 69 above, pursuant to which neither the form nor the cause nor the aim of State measures can prevent them from being regarded as State aid, the Commission did not commit any error by taking the view that the fact that the Polish authorities did not opt, at the end of 2004, to apply for a declaration of insolvency in respect of TB and simply pursued, and indeed pursued with diligence, the legal procedures for the recovery of public debts represented an advantage granted to TB. Indeed, it must be pointed out all insolvency proceedings, whether they result in the recovery of the company declared insolvent or in its liquidation, have — at the very least — the objective of discharging the liabilities of that company. In that context, the freedom of the company declared insolvent to manage both its assets and its business is limited. Accordingly, by failing to apply for a declaration of insolvency in respect of TB, the Polish authorities referred to in paragraph 2 above allowed that company to have a period of time in which it could make use of its assets freely and continue to trade, thus conferring on it an advantage.

78 In addition, it must be noted, first, that in the present case it is not in dispute that between the end of 2004 and the declaration of insolvency in 2006 TB was unable to

honour all of its debts. For example, the applicant acknowledges in its written submissions that TB's public debts, together with the interest and costs of enforcement, were settled only in the context of the insolvency proceedings. Second, nor is it in dispute that in 2005 and 2006 TB continued to trade. During that period, TB inter alia leased to the applicant some of its production assets and injected capital into the applicant and HB. It must therefore be held that, notwithstanding the fact that the public bodies referred to in paragraph 2 above exercised all available legal remedies to secure payment of the debts owed by TB those debts were honoured only to a very limited extent, and that TB was able to continue trading and reorganise the group by leasing production assets to BA, injecting capital into BA and increasing the capital of HB by means of a transfer of immovable assets. However, that reorganisation would not have been possible if TB had been declared insolvent from the end of 2004 (see, to that effect, *Spain* v *Commission*, cited in paragraph 69 above, paragraph 20).

79 The view must therefore be taken, as the Commission has done, that from the end of 2004 TB benefited from operational support provided by the Polish authorities which, by failing to apply for a declaration of its insolvency, allowed TB to carry on its economic activity without having to pay its debts, which at that time stood at PLN 20 761 643.

80 Secondly, since, by the very fact of having pursued the legal procedures for the recovery of public debts but refrained from seeking a declaration of insolvency, the Polish authorities conferred an advantage on TB, it is necessary to establish, in accordance with the case-law cited in paragraph 70 above, whether the Commission infringed Article 87(1) EC by taking the view that that advantage would not have been granted under normal market conditions. It is therefore necessary to determine whether the Commission correctly applied the test of the hypothetical private creditor, a fact which the applicant disputes.

81 In particular, the applicant is of the opinion that a private creditor would not have chosen to realise the guarantees which it held in the context of insolvency proceedings in view of the length of such proceedings, the costs to which such proceedings give rise, the fact that the securities held by the public bodies did not all have first-class status and the fact that the debt recovery proceedings implemented by the Polish authorities had allowed for gradual payment of the sums owed. The Republic of Poland submits, inter alia, that the Commission did not conduct in-depth economic analyses enabling it to conclude that the Polish authorities would have recovered a larger share of the sums owed to them at an earlier stage if, towards the end of 2004, they had applied for a declaration of insolvency in respect of TB.

82 In that connection, it must be remembered that the assessment by the Commission of whether an investment satisfies the private investor test involves a complex economic appraisal. When the Commission adopts a measure involving such an appraisal, it consequently enjoys a wide discretion and judicial review is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether there was any error of law, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment of those facts or any misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (see, to that effect, Case C-323/00 P *DSG* v *Commission* [2002] ECR I-3919, paragraph 43; *HAMSA* v *Commission*, cited above in paragraph 70, paragraph 127; and Case T-196/04 *Ryanair* v *Commission* [2008] ECR II-3643, paragraph 41).

83 However, although the European Union judicature recognises that the Commission has a margin of assessment in economic or technical matters, that does not mean that it must decline to review the Commission's interpretation of economic or technical data. Indeed, in order to take due account of the parties' arguments, the European Union judicature must not only, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a

complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 65).

84 It must further be borne in mind that, in accordance with case-law, when a firm faced with a substantial deterioration of its financial situation proposes an agreement or series of agreements for debt arrangement to its creditors with a view to remedying the situation and avoiding liquidation, each creditor must make a decision having regard to the amount offered to it under the proposed agreement, on the one hand, and the amount it expects to be able to recover following possible liquidation of the firm, on the other. Its choice is influenced by a number of factors, including the creditor's status as the holder of a secured, preferential or ordinary claim, the nature and extent of any security it may hold, its assessment of the chances of the firm being restored to viability, as well as the amount it would receive in the event of liquidation (*HAMSA* v *Commission*, cited in paragraph 70 above, paragraph 168). It is for the Commission to determine, for each public body in question, having regard inter alia to the above-mentioned factors, whether the debt remissions granted by them were manifestly more generous than those which would have been granted by a hypothetical private creditor in a situation comparable vis-à-vis the undertaking concerned to that of the public body in question and seeking to recover the sums owed to it (*DM Transport*, cited in paragraph 70 above, paragraph 25, and *HAMSA* v *Commission*, cited in paragraph 70 above, paragraph 170).

85 By analogy, in a case such as the present one in which a debt arrangement agreement has not been concluded, a hypothetical private creditor faced with a choice between, on the one hand, the foreseeable proceeds from the legal procedure for the recovery of debts and, on the other hand, the amount it expects to be able to recover following insolvency proceedings initiated in respect of the company. Its choice is influenced by a number of factors, such as those mentioned in paragraph 84 above. It follows that, in the present case, the Commission was required to establish whether, taking those factors into account, a private creditor would have opted for the legal procedure for the recovery of debts over insolvency proceedings, as the public bodies referred to in paragraph 2 above did.

86 That finding is not contradicted by the Commission's interpretation of *Lenzing* v *Commission*, cited in paragraph 63 above, to the effect that it was not necessary to demonstrate the primacy of insolvency proceedings over other recovery procedures since the Polish authorities had not made use of all the recovery measures available — including insolvency proceedings — even though it was obliged to do so.

87 First, there is no obligation on national authorities seeking to recover public debts to make use of all the methods of recovery at their disposal. As is clear from paragraph 70 above, the only obligation to which those authorities are subject, in order that their intervention falls outside the classification as State aid, is to behave how a private creditor would have behaved under normal market conditions. However, where there are several methods of recovery, it is necessary to compare the respective merits of the different methods in order to determine which method a private creditor would have chosen.

88 Second, although in *Lenzing* v *Commission*, cited above in paragraph 63, the Court was not prompted to rule expressly on the need for the Commission to conduct a comparison of the respective merits of the different recovery procedures from the point of view of a hypothetical private creditor, that judgment nevertheless by no means supports the argument advanced by the Commission. On the contrary, the Court does point out in paragraph 152 of that judgment that it is for the Commission to ascertain, in each individual case and by reference to the facts of the case, whether the decision of the public bodies in question to agree to reschedule the debts of an undertaking in difficulties and also the conditions of that rescheduling are consistent with the private creditor test. Furthermore, in paragraphs 159 and 160 of that judgment, the Court held that the Commission could not conclude that the public bodies in question had acted in such a way as to maximise their prospects of recovery without having conducted a substantiated analysis of the viability of the recipient undertaking. The Court therefore acknowledges that the merits of the recovery procedure conducted by the public bodies at issue had to be assessed inter alia in the light of the undertaking's viability, which means — implicitly — that, on the basis of

the information relating to that viability, preference should perhaps have been given to an alternative recovery procedure.

89 In accordance with the case-law set out in paragraph 83 above, consideration should therefore be given to whether the evidence available to the Commission at the time the contested decision was adopted enabled it to conclude that a hypothetical private creditor would have opted to apply for a declaration of insolvency and would not have pursued the legal procedures for recovery.

90 In that connection, first, with regard to the nature and the extent of the securities held by the public bodies referred to in paragraph 2 above, it must be pointed out that it is clear from recitals 40 and 91 of the contested decision that the Commission conducted an analysis of those securities. Following that analysis, it concluded, in recital 91 of the contested decision, that the ZUS, the Państwowy Fundusz Rehabilitacji Osób Niepełnosprawnych and the Tax Office all had 'good securities' which they were able to convert into liquid assets in the context of insolvency proceedings and that, following the deterioration of TB's situation and of its assets, making use of those securities appeared to make more economic sense than restructuring. Although that conclusion is contested by the applicant, it must nevertheless be stated that it is clear from recital 91 of the contested decision that the analysis conducted by the Commission is based on material evidence provided by the Republic of Poland as part of the administrative procedure.

91 Second, with regard to the prospects of TB returning to viability, the Commission examined those prospects as at the end of 2004, inter alia in recitals 89, 90 and 96 of the contested decision. Following that examination, the Commission concluded that, at the end of 2004, all the indications regarding the prospects for TB's return to viability were negative. Although, as in the case of the analysis of the nature and the extent of the securities, the applicant disputes that conclusion, it must however be pointed out that the examination is based on the material evidence referred to in recitals 49 to 51

of the contested decision, namely the monitoring reports prepared by the Commission's independent consultant for the years 2003 and 2004 and the monitoring reports prepared by the Republic of Poland also for the years 2003 and 2004.

92 Third, with regard to the benefit that a hypothetical private creditor could have hoped to obtain in the context of insolvency proceedings, it must be pointed out that the Commission stated, in recital 88 of the contested decision, that 'careful examination of the advantage derived from rescheduling the debt would have shown that the potential recovery would not have exceeded the safe return inherent in the firm's liquidation'. However, the Court observes that the contested decision does not indicate what material evidence forms the basis of that claim.

93 In particular, the Commission fails to state in the contested decision whether it had in its possession, in support of that claim, analyses comparing the benefit which would be obtained by the hypothetical private creditor following insolvency proceedings — taking into account inter alia the costs incurred in the context of such proceedings — as compared with the benefit obtained from the legal procedure for the recovery of public debts.

94 When asked about this point by means of a written question to which it was asked to give a response at the hearing on 7 September 2010, the Commission was unable to state whether such analyses and studies had been prepared and used for the purposes of adopting the contested decision. It simply explained that those analyses were contained in recitals 84, 87 and 88 of the contested decision. However, those recitals do not contain any comparative analysis of the foreseeable proceeds from the legal procedure for the recovery of public debts and those from insolvency proceedings. Furthermore, the Commission was unable to produce documents containing such an analysis, as it was requested to do by the Court. It must therefore be held that the claim made in recital 88 of the contested decision is unsupported by any evidence.

95 Fourth, with regard to other factors likely to influence the choice of a hypothetical private creditor, the Court observes that the Commission fails to state in the contested decision whether it had in its possession studies or analyses comparing the duration of insolvency proceedings with that of the legal procedure for the recovery of public debts. On the contrary, when asked about this point by means of a measure of organisation of procedure to which it was asked to give a response at the hearing on 7 September 2010, the Commission stated that it had not compared the duration of the two procedures on the ground that TB's position in 2005 was such that insolvency was inevitable.

96 In the light of the foregoing, the Court takes the view that the Commission did not have in its possession material evidence enabling it to claim that a private creditor would have opted for insolvency proceedings at the end of 2004. It must therefore be concluded, having regard to the case-law cited in paragraph 83 above and without it being necessary to establish the validity of the conclusions drawn by the Commission following, on the one hand, the analysis of the guarantees held by the Polish authorities and, on the other hand, the evaluation of TB's prospects, that the Commission's application of the test of the hypothetical private creditor is contrary to Article 87(1) EC and that, therefore, the Commission has failed to establish properly the existence of State aid granted to TB.

97 It follows that the first limb of the first plea in law should be upheld and Article 1 of the contested decision annulled in so far as the Commission finds that State aid was unlawfully granted by the Republic of Poland to TB.

98 Since Article 1 of the contested decision is to be annulled for the reason set out in the previous paragraph, the Court will now examine merely for the sake of completeness the statement of reasons for the contested decision in so far as the Commission finds that State aid was unlawfully granted by the Republic of Poland to TB. It is specified in this regard, first, that the applicant claims in the context of the second plea in law that the Commission failed to comply with the duty to state reasons with regard to the conditions relating to the effect on trade between Member States and the distortion or threatened distortion of competition and, second, that the fact that a statement of

reasons is lacking or inadequate constitutes a matter of public interest which may, and even must, be raised by the Court of its own motion (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraphs 23 and 24).

99 In accordance with settled case-law, the statement of reasons in an adverse individual decision must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; see also *Le Levant 001 and Others* v *Commission*, cited in paragraph 66 above, paragraph 111, and the case-law cited).

100 It is not, however, necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 63).

101 When applied to the classification of aid, that principle requires the Commission to indicate the reasons why it considers that the aid in question falls within the scope of Article 87(1) EC (*Vlaams Gewest* v *Commission*, cited in paragraph 100 above, paragraph 64). In other words, the Commission is required to state the reasons why it takes the view that the four conditions laid down in Article 87(1) EC, as described in the case-law cited in paragraph 66 above, are satisfied.

102 More specifically, with regard to the conditions relating to the effect on trade between Member States and the distortion or threatened distortion of competition, a succinct discussion of the facts and legal considerations taken into account in the assessment of those conditions is sufficient. The Court has for example stated that the Commission was not required to carry out an economic analysis of the actual situation on the relevant market, of the market share of the applicant, of the position of competing undertakings and of trade flows of the products and services in question between Member States, since it had explained how the aid in question distorted competition and affected trade between Member States (Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraphs 9 to 12, and *HAMSA* v *Commission*, cited in paragraph 70 above, paragraphs 224 and 225). Nevertheless, even in cases where it is clear from the circumstances in which the aid has been granted that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (see *Vlaams Gewest* v *Commission*, cited in paragraph 100 above, paragraph 64, and the case-law cited).

103 Both in its written submissions and at the hearing, the Commission made reference to recital 97 of the contested decision, in which, it claims, it submitted that it had given reasons for its decision as regards the satisfaction of the conditions relating to the effect on trade between Member States and the distortion or threatened distortion of competition.

104 However, recital 97 of the contested decision is worded as follows:

'Thus Poland failed to enforce PLN 20.761 million (PLN 20.267 million was indicated in the fourth Polish restructuring report, but that amount was later rectified by the Polish authorities). This constitutes operating support for the firm to continue its inefficient business and is therefore an advantage granted through state resources which

threatens to distort competition in so far as it affects trade between Member States, and is thereby incompatible with the common market in the sense of Article 87 [EC]'.

105 It must be stated that, with regard to the effect on trade between the Member States and the distortion or threatened distortion of competition, recital 97 of the contested decision merely reproduces the wording of Article 87(1) EC and does not contain any discussion, however succinct, of the facts and legal considerations taken into account in the assessment of those conditions.

106 Furthermore, it is clear from an analysis of the remainder of the reasons stated in the contested decision that they do not contain the slightest evidence capable of demonstrating that the aid in question is liable to affect trade between Member States and to distort or threaten to distort competition, not even in the description of the circumstances in which that aid was granted.

107 It follows that the statement of reasons contained in the contested decision is insufficient for the purposes of Article 253 EC.

108 Since, as set out in paragraph 96 above, the Commission has failed to establish the existence of State aid within the meaning of Article 87(1) EC, and since, as stated for the sake of completeness in the previous paragraph, the statement of reasons contained in the contested decision is insufficient, Article 1 of the contested decision must be annulled and there is no need to examine the other pleas in law raised by the applicant.

109 In view of the annulment of Article 1 of the contested decision, which forms the basis of the obligation to effect restitution imposed on the applicant, Article 3(1) and (3) and Articles 4 and 5 of the contested decision should also be annulled in so far as they relate to the applicant.

Costs

110 Under Article 87(2) of the Rules of Procedure of the General Court, 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 been unsuccessful, it must be ordered to pay the costs incurred by the applicant, including those relating to the proceedings for interim relief, in accordance with the forms of sought by the latter.

111 The Republic of Poland is to bear its own costs, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls Article 1 of Commission Decision 2008/344/EC of 23 October 2007 on State Aid C 23/06 (ex NN 35/06) which Poland has implemented for steel producer Technologie Buczek Group;**

2. **Annuls Article 3(1) and (3) and Articles 4 and 5 of Decision 2008/344, in so far as they relate to Buczek Automotive sp. z o.o;**

3. **Orders the European Commission to bear its own costs and to pay those incurred by Buczek Automotive, including those relating to the interim proceedings;**

4. **Orders the Republic of Poland to bear its own costs.**

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 17 May 2011.

[Signatures]