

JUDGMENT OF THE COURT (First Chamber)

5 May 2011 *

In Case C-305/09,

ACTION under Article 88(2) EC for failure to fulfil obligations, brought on 30 July 2009,

European Commission, represented by L. Flynn, V. Di Bucci and E. Righini, acting as Agents, with an address for service in Luxembourg,

applicant

v

Italian Republic, represented by G. Palmieri, acting as Agent, assisted by D. Del Gaizo and P. Gentili, avvocati dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ilešič, M. Safjan (Rapporteur) and M. Berger, Judges,

Advocate General: V. Trstenjak,
Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 16 December 2010,

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

gives the following

Judgment

- 1 By its application, the Commission of the European Communities claimed that the Court should declare that, by failing to adopt, within the prescribed time-limits, all necessary measures to abolish the aid scheme declared unlawful and incompatible with the common market by Commission Decision 2005/919/EC of 14 December 2004 [on direct] tax incentives in favour of companies taking part in trade fairs abroad (OJ 2005 L 335, p. 39) and to recover from the beneficiaries the aid granted under that

scheme, the Italian Republic has failed to fulfil its obligations under the EC Treaty and under Articles 2 to 4 of that decision.

Legal context

- 2 Recital 13 in the preamble to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) is worded as follows:

‘Whereas in cases of unlawful aid which is not compatible with the common market, effective competition should be restored; whereas for this purpose it is necessary that the aid, including interest, be recovered without delay; whereas it is appropriate that recovery be effected in accordance with the procedures of national law; whereas the application of those procedures should not, by preventing the immediate and effective execution of the Commission decision, impede the restoration of effective competition; whereas to achieve this result, Member States should take all necessary measures ensuring the effectiveness of the Commission decision.’

- 3 Article 14 of Regulation No 659/1999, entitled ‘Recovery of aid’, provides:

‘1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a “recovery decision”). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the Court of Justice of the European Communities pursuant to 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'.

4 Article 23(1) of that regulation is in the following terms:

'Where the Member State concerned does not comply with conditional or negative decisions, in particular in cases referred to in Article 14, the Commission may refer the matter to the Court of Justice of the European Communities direct in accordance with Article [88(2) EC].'

Background to the dispute

5 According to Recital 1 in the preamble to Decision 2005/919:

'Italy enacted Decree-Law No 269 of 30 September 2003 laying down urgent measures to promote development and correct the trend in public finances ["Decree-Law

No 269/2003”], published in [the GURI] No 229 of 2 October 2003. Article 1(1)(b) [thereof] provides for specific tax incentives for participation in trade fairs abroad and was subsequently converted, without amendments, into Law No 326 of 24 November 2003 ..., published in [the GURI] No 274 of 25 November 2003.’

- 6 As is clear from that decision, the aid scheme in question allowed any undertaking liable to corporate income tax in Italy and in business on 2 October 2003 to reduce its taxable income by the amount of the expenses directly incurred with respect to its participation in trade fairs abroad. For undertakings whose business cycle followed the calendar year, that reduction affected the determination of their 2004 taxable income.

- 7 Following the opening of a formal investigation by the Commission, the Italian authorities officially warned potential beneficiaries of the aid scheme in question of the possible consequences, should that scheme be declared to be incompatible with the common market. The Commission decided, having found the aid scheme in question to be incompatible, that it was necessary to recover from the beneficiaries the aid already made available.

- 8 More specifically, Articles 1 to 4 of Decision 2005/919 provided as follows:

‘Article 1

The state aid scheme in the form of tax incentives in favour of companies taking part in trade fairs abroad, provided for by Article 1(1)(b) of Decree-Law No 269 of 30 September 2003, which Italy has unlawfully put into effect in breach of Article 88(3) of the EC Treaty, is incompatible with the common market.

Italy shall abolish the aid scheme referred to in the first paragraph.

Article 2

1. Italy shall take the necessary measures to recover from the beneficiaries the aid referred to in Article 1 and unlawfully made available to them.

Recovery shall be effected without delay and in accordance with the procedures of national law.

2. Where the aid has already been made available by means of lower part payments of taxes due for the current tax year, Italy shall collect the entire tax due by means of the final scheduled payment for 2004.

In all other cases, Italy shall recover the tax due at the latest by the end of the first tax year following the date of notification of this Decision.

3. The aid to be recovered shall bear interest, running from the date on which it was first put at the disposal of the beneficiaries until its actual recovery and calculated in accordance with the Articles 9, 10 and 11 of Regulation (EC) No 794/2004.

Article 3

Within two months of the date of notification of this Decision, Italy shall inform the Commission, using the questionnaire in the Annex to the Decision, of the measures taken to comply with it.

Within the same period of time as that referred to in the first paragraph, Italy shall:

- (a) enjoin all beneficiaries of the aid referred to in Article 1 to reimburse the illegal aid, with interest;

- (b) transmit all documents giving evidence that the recovery proceedings have been initiated against the beneficiaries of the illegal aid.

Article 4

This Decision is addressed to the Republic of Italy'

Pre-litigation procedure

- 9 On 17 December 2004, Decision 2005/919 was notified to the Italian Republic.
- 10 In order to implement that decision, the Italian authorities adopted a number of measures and informed the Commission accordingly. Thus, in particular, the implementation procedure was composed of the following steps:
- the Italian authorities informed the Commission of the adoption of Law No 29 of 25 January 2006 (GURI No 32, of 8 February 2006; ‘Law No 29/2006’), which entered into force on 23 February 2006 and provided, in particular, for the cessation of the aid scheme in question, as well as the detailed rules for identifying, determining and recovering the aid unlawfully received;
 - the Agenzia delle Entrate (Revenue Authority) adopted codes for recovery for the repayment of the aid in question, sent to the local agencies directives and practical instruments for the recovery of that aid and, lastly, adopted a computerised procedure appropriate for tracking the progress of the recovery;
 - the Italian legislature attempted to solve the procedural problem arising as a result of the suspension by the national courts of enforcement of the repayment orders by making use of legislative means, through the adoption of Decree-Law No 59 of 8 April 2008 (GURI No 84, of 9 April 2008, p. 3; ‘Decree-Law No 59/2008’), which entered into force on 9 April 2008 and was converted into law by Law No 101 of 6 June 2008 (GURI No 132, of 7 June 2008, p. 4).

- 11 Throughout the pre-litigation procedure, the Commission emphasised the need for the immediate and effective implementation of Decision 2005/919. In addition, the Commission several times requested additional information and clarification regarding the beneficiaries of the aid in question and the procedural rules for the adoption of a legislative framework for recovery of that aid. The Italian authorities informed the Commission, by a series of letters, of the procedure for implementing Decision 2005/919 and the progress made.
- 12 The Commission drew the attention of the Italian Republic to the inadequacy of the procedures for the recovery of the aid declared unlawful and incompatible with the common market. More precisely, by its letter of 11 December 2007, the Commission noted that the recovery effected by the Italian authorities corresponded to less than 50% of the aid which it was appropriate to presume had been paid. Accordingly, since it considered that the recovery of the aid had not progressed despite the legislative action, the Commission decided to bring the present action.

The action

Arguments of the parties

- 13 In its application, the Commission submits that the Member State to which a decision requiring recovery of unlawful aid is addressed is, under Article 249 EC, obliged to take all necessary measures to ensure the implementation of that decision.

- 14 The Commission submits that the obligation to recover constitutes a genuine obligation to achieve a result. In addition, the recovery must be not only effective but also immediate.
- 15 With regard to the necessity of adopting a law and the corresponding implementing administrative measures in order to implement Decision 2005/919, the Commission stated more than once that the choice of a legislative instrument was not the most suitable way of ensuring the immediate and effective implementation of that decision.
- 16 The Commission next observes that the only defence available to the Italian Republic in the present case is to plead that it was absolutely impossible for it to implement Decision 2005/919 properly. However, the Italian authorities have never pleaded that it was absolutely impossible to implement the decision properly.
- 17 In any event, in the Commission's submission, the condition that it be absolutely impossible to implement a decision is not fulfilled where, as in the present case, the defendant Member State merely informs the Commission of the legal, political or practical difficulties involved in implementing Decision 2005/919.
- 18 With regard to orders of national courts suspending the operation of measures, the Commission stresses that the principle of effectiveness must also apply to national courts. Confronted with an application from the aid beneficiary for suspension of enforcement of the recovery measure, the national court must apply the conditions laid down in the Court's case-law, in order to prevent the recovery decision from being

deprived of its effectiveness. As it is, in the present case, the suspension orders made by the national courts do not comply with the requirements under that case-law.

- 19 Even though, pursuant to Decree-Law No 59/2008, referred to in paragraph 10 of the present judgment, in the event of suspension on grounds relating to the unlawfulness of the repayment order, the national court must in principle make a reference for a preliminary ruling immediately to the Court of Justice, the Commission is of the opinion that that national legislation does not seem to have had a significant effect on the procedural practice of the national courts. In fact, more than four years after the adoption of Decision 2005/919, the Italian authorities had recovered no more than about 65% of the aid in respect of which repayment orders had been issued.
- 20 Lastly, as regards the obligation to provide information which is incumbent on the Italian authorities under both Article 3 of Decision 2005/919 and Article 10 EC, the Commission points out that no information was sent about recovery of the aid in question from 104 beneficiaries who were not initially authorised to use the aid scheme. That situation constitutes a breach of the abovementioned obligation.
- 21 The Italian Republic contends that the law of the European Union does not require that a specific procedure be followed in order to recover State aid, but merely that national procedures be applied if they make possible the immediate and effective implementation of Decision 2005/919.
- 22 It was precisely to ensure the immediate and effective implementation of Decision 2005/919 that the Italian authorities considered it necessary to adopt Law No 29/2006. Indeed, in the Italian legal order, the legislative instrument is submitted to be the most appropriate means to satisfy the requirements arising from the principle of effectiveness.

- 23 The Italian Republic also notes that in the voluminous correspondence between the Commission and the Italian authorities, the latter reported, among other things, difficulties connected with the need to calculate the amounts due and to exclude from the recovery in question the small- and medium-sized enterprises for which the aid should be regarded as compatible with the common market.
- 24 As regards the Commission's argument based on the ineffectiveness of the national judicial procedure, the Italian Republic draws attention to the efforts of the legislature and the national tax authority. In that context, that Member State also notes that it cannot be accused of having failed to recover the aid in question when its recovery depends on decisions of the national courts.
- 25 As regards the Commission's plea in law alleging breach of the duty to inform, the Italian Republic submits that it informed that institution that the situation of potential beneficiaries of the aid in question is not governed by Law No 29/2006, but rather by the regime governing tax evasion. Furthermore, that Member State produced, in its defence, an additional account of the sums collected and of the litigation pending in this respect.

Findings of the Court

- 26 It is settled case-law that the Member State to which a decision requiring recovery of unlawful aid is addressed is obliged under Article 249 EC to take all measures necessary to ensure implementation of that decision (see Case C-232/05 *Commission v France* [2006] ECR I-10071, paragraph 42 and the case-law cited).

- 27 The Member State must actually recover the sums owed (see *Commission v France*, paragraph 42, and Case C-304/09 *Commission v Italy* [2010] ECR I-13903, paragraph 32). Recovery out of time, after the deadlines set, cannot satisfy the requirements of the Treaty (*Commission v Italy*, paragraph 32 and the case-law cited).
- 28 Pursuant to the second subparagraph of Article 2(1) of Decision 2005/919, the Italian Republic was to recover the aid in question from the beneficiaries at the earliest opportunity. In particular, under Article 2(2), where the aid had already been made available by means of lower part-payments of taxes due for the current tax year, the Italian Republic had to recover the total amount of tax due with interest as part of the adjustment required for the tax year 2004. In all other cases, the tax due had to be recovered, together with interest, at the latest by the end of the tax year following the date of notification of the decision, which was 17 December 2004.
- 29 In the present case, it is not disputed that, several years after Decision 2005/919 was notified to the Italian Republic and after the expiry of all the deadlines fixed by that decision, some of the unlawful aid has not yet been recovered by the Italian Republic. Such a situation is clearly irreconcilable with that Member State's obligation actually to recover the sums owed and constitutes a breach of the duty to implement Decision 2005/919 immediately and effectively.
- 30 That finding is not affected by the fact that, as is clear from the documents in the court file, about 90% of the capital of the unlawful aid had been recovered up to the day of the hearing in the present case. In addition, it is not disputed that the aid in question had not been fully recovered on the date the present action was brought.

- 31 Moreover, it is not apparent from the documents in the court file that the Italian authorities complied with the time-limits laid down in Article 2 of Decision 2005/919 for the recovery of the unlawful aid from its beneficiaries.
- 32 As regards the arguments submitted by the Italian Republic in its defence, it should be noted that, according to settled case-law, the only defence available to a Member State in infringement proceedings brought by the Commission under Article 88(2) EC is to plead that it was absolutely impossible for it properly to implement the decision at issue (see, in particular, Case C-177/06 *Commission v Spain* [2007] ECR I-7689, paragraph 46; Case C-214/07 *Commission v France* [2008] ECR I-8357, paragraph 44; and *Commission v Italy*, paragraph 35).
- 33 The condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant Member State merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real steps to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled those difficulties to be overcome (see, in particular, Joined Cases C-485/03 to C-490/03 *Commission v Spain* [2006] ECR I-11887, paragraph 74; *Commission v France*, paragraph 46; and *Commission v Italy*, paragraph 36).
- 34 The Court has also held that a Member State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences overlooked by the Commission must submit those problems to the Commission for consideration, together with proposals for suitable amendments to the decision at issue. In such a case, the Member State and the Commission must respect the principle underlying Article 10 EC, which imposes a duty of genuine cooperation on the Member States and on the EU institutions, who must

work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions and, in particular, the provisions on State aid (*Commission v Italy*, paragraph 37 and the case-law cited).

- 35 In that respect, it should be noted that, in its contacts with the Commission as well as in the proceedings before the Court, the Italian Republic has not pleaded that it was absolutely impossible for it to implement Decision 2005/919. In addition, the record shows that that Member State has never proposed to the Commission any amendments to Decision 2005/919 to overcome the difficulties in implementing it effectively and immediately.
- 36 In this case, the Italian Republic merely informed the Commission of the legal, political or practical difficulties involved in giving effect to the decision.
- 37 In particular, the Italian Republic's argument alleging difficulties connected with the need to calculate the amounts due and to exclude from the recovery in question small- and medium-sized enterprises for which the aid should be regarded as compatible with the common market cannot be accepted. The fact that the Member State in question finds it necessary to verify the individual situation of each company concerned, to conduct a screening to identify persons in receipt of benefits covered by the Commission's decision, cannot justify non-implementation of that decision (see Case C-99/02 *Commission v Italy* [2004] ECR I-3353, paragraph 23, and Case C-207/05 *Commission v Italy*, paragraphs 46 and 50).
- 38 It is true that, during the recovery process, the Italian legislature had taken serious action with a view to ensuring the effectiveness of that recovery by adopting, first of all, Law No 29/2006 and, then, Decree-Law No 59/2008. In particular, the court file shows that that law provided for the cessation of the aid scheme and the procedures

for identifying, determining and recovering the aid unlawfully received. However, to expedite the resolution of the litigation already pending, that decree-law was intended to resolve the procedural problem caused by the orders suspending recovery of the aid made by the national courts.

39 However, the adoption of the measures mentioned in the preceding paragraph failed to remedy the delay in the recovery of the aid covered by Decision 2005/919. Indeed, they entered into force after the time-limits laid down by that decision had expired and their operation was obviously ineffective, since several years after the notification of Decision 2005/919, up to the date the present action was brought, and after the expiry of all the time-limits prescribed by that decision, some of the unlawful aid had not been recovered by the Italian Republic.

40 It should be noted that, where legislative steps intended to ensure the implementation by national courts of a Commission decision requiring a Member State to recover unlawful aid are taken too late or prove ineffective, they do not meet the requirements under the case-law referred to in paragraphs 26 and 27 of the present judgment (Case C-304/09 *Commission v Italy*, paragraph 42).

41 Also, the Italian Republic contends that the situation of some of the beneficiaries of the aid in question is not governed by Law No 29/2006, but rather by the regime governing tax evasion and that, in those circumstances, the obligation to recover the unlawful aid is not applicable.

42 In that regard, the reference, by the Italian Republic, to the scope of Law No 29/2006 is irrelevant in this case. As is apparent from Article 1 of Decision 2005/919 and from the first recital in the preamble thereto, the aid scheme in question was in fact

implemented by Article 1(1)(b) of Decree-Law No 269/2003, which was converted into law by Law No 326/2003 of 24 November 2003. However, the Italian Republic is obliged, under Article 2(1) of Decision 2005/919 to recover the aid made available on the basis of Decree-Law No 269/2003. In that perspective, the question of whether the benefit allowed to the undertakings concerned was in accordance with domestic law or, on the contrary, constituted tax avoidance or evasion cannot affect the obligation of the Member State in question to recover the aid within the prescribed time-limits. Any possible difficulties connected with the need to check tax returns, under the appropriate national procedures, cannot justify, by themselves, as is clear from paragraphs 33 and 37 of the present judgment, the failure to implement Decision 2005/919 within the prescribed time-limits.

⁴³ As regards, moreover, the Commission's argument concerning the right to adopt, by the national courts, suspension measures in the course of the process of recovery of the aid, it should be borne in mind that such measures may be granted, provided that certain conditions stated in the case-law are met (see, in particular, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415 and Case C-465/93 *Atlanta Fruchthandelsgesellschaft and Others (I)* [1995] ECR I-3761).

⁴⁴ In particular, interim suspension measures may be ordered by a national court where it entertains serious doubts as to the validity of the EU measure and where, if the validity of the contested measure is not already in issue before the Court of Justice, the national court itself refers the question of such validity to this Court. However, in the present case, the Courts of the European Union have not been seised of any question on the legality of Decision 2005/919. In any event, the Italian Republic has not demonstrated, in the proceedings before the Court, that the other conditions laid down by the case-law cited in the preceding paragraph have been met.

- 45 In reality, the subject-matter of the only national decisions placed on the Court file by the parties to the present case concerning the recovery ordered by Decision 2005/919, namely the decision of the Commissione tributaria provinciale di Treviso (Provincial Tax Court, Treviso) of 2 July 2007 and the decision of the Commissione tributaria regionale di Venezia-Mestre (Regional Tax Court, Venice-Mestre) of 15 December 2008, was, as the Italian Republic admitted at the hearing, a review of the legality of the national measure intended to recover the unlawful aid made available to an undertaking which received that aid and the legality of Decision 2005/919 was not put in issue. Consequently, the judgments in *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* and *Atlanta Fruchthandelsgesellschaft and Others (I)*, are not applicable as regards those national decisions.
- 46 In that regard, it is important to note that although the review by a national court of the formal legality of a national measure seeking the recovery of unlawful State aid must be viewed simply as an expression of the general principle of EU law of effective judicial protection, national courts are required, under Article 14(3) of Regulation No 659/1999, to ensure that the decision ordering the recovery of the unlawful aid is fully effective and achieves an outcome consistent with the objective pursued by that decision (see Case C-210/09 *Scott and Kimberly Clark* [2010] ECR I-4613, paragraphs 25 and 29).
- 47 In fact, annulment of a national measure implementing a Commission decision ordering recovery of unlawful aid, which impedes the immediate and effective implementation of that decision, is irreconcilable with the requirements arising from Article 14(3) of Regulation No 659/1999 (see, to that effect, *Scott and Kimberly Clark*, paragraph 30).
- 48 As regards the national decisions referred to in paragraph 45 of the present judgment, it should be noted that, as is clear from the documents on the court file, the recipient of the unlawful aid, required to repay it under a national payment order which it had

attacked, made the payment only after the appellate decision of 15 December 2008 dismissing its action for annulment. The foregoing matters show therefore that the annulment, at first instance, of the national payment order caused considerable delay in the recovery of the unlawful aid. That situation is not suitable to ensure the immediate and effective implementation of Decision 2005/919.

- 49 It follows from the foregoing that the present action is well founded in so far as the Commission claims that the Italian Republic failed to adopt, within the prescribed time-limits, all necessary measures to recover all the aid granted under the aid scheme declared unlawful and incompatible with the common market by Decision 2005/919.
- 50 Given the finding set out in the preceding paragraph, there is no need to rule on the Commission's claim that the Court should declare that the Italian Republic failed to inform the Commission of the measures referred to in that paragraph, since that Member State did not in fact implement Decision 2005/919 within the time-limits laid down (Case C-304/09 *Commission v Italy*, paragraph 57 and the case-law cited).
- 51 The Court therefore finds that, by failing to adopt, within the prescribed time-limits, all necessary measures to recover from the beneficiaries all the aid granted under the aid scheme declared unlawful and incompatible with the common market by Decision 2005/919, the Italian Republic has failed to fulfil its obligations under Article 2 of that decision.

Costs

- ⁵² Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for the Italian Republic to be ordered to pay the costs, and the latter has been unsuccessful, it must be ordered to pay the costs.

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

- 1. Declares that, by failing to adopt, within the prescribed time-limits, all necessary measures to recover from the beneficiaries all the aid granted under the aid scheme declared unlawful and incompatible with the common market by Commission Decision 2005/919/EC of 14 December 2004 [on direct] tax incentives in favour of companies taking part in trade fairs abroad, the Italian Republic has failed to fulfil its obligations under Article 2 of that decision;**
- 2. Orders the Italian Republic to pay the costs.**

[Signatures]