



## Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

29 November 2012\*

(Accession of the Republic of Bulgaria to the European Union — EC-Bulgaria Association Agreement — Steel sector — Public aid for reconstruction granted prior to accession — Conditions — Viability of the recipients at the end of the restructuring period — Declaration of insolvency of a recipient following accession — Respective powers of the national authorities and the European Commission — National decision finding the existence of a public debt in the form of aid which has become unlawful — Decision EU-BG No 3/2006 — Annex V to the Act of Accession — Aid applicable following accession — Council Regulation (EC) No 659/1999 — Existing aid)

In Case C-262/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 12 May 2011, received at the Court on 26 May 2011, in the proceedings

**Kremikovtzi AD**

v

**Ministar na ikonomikata, energetikata i turizma i zamestnik-ministar na ikonomikata, energetikata i turizma,**

THE COURT (Second Chamber),

composed of: A. Rosas, acting as President of the Second Chamber, U. Lõhmus, A. Ó Caoimh (rapporteur), A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 4 July 2012,

after considering the observations submitted on behalf of:

- Kremikovtzi AD, by T. Bankov, Receiver, K. Atanasov, T. Chobanov and B. Cholakov,
- the Bulgarian Government, by T. Ivanov and D. Drambozova, acting as Agents,
- the European Commission, by A. Stobiecka-Kuik and S. Petrova, acting as Agents,

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

\* Language of the case: Bulgarian.

gives the following

### Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of the provisions of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 358, p. 1) ('the EC-Bulgaria Association Agreement' or 'the Europe Agreement'), of Article 3 of the Additional Protocol to the Europe Agreement as regards an extension of the period provided for in Article 9(4) of Protocol No 2 to the Europe Agreement (consilium 10827/02) ('the Additional Protocol'), as amended by Decision No 3/2006 of the EU-Bulgaria Association Council of 29 December 2006 ('Decision EU-BG No 3/2006'), of Title 2 of Annex V to the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded (OJ 2005 L 157, p. 203) ('the Act of Accession') and also Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), as amended by Council Regulation (EC) No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1) ('Regulation No 659/1999').
- 2 The reference was made in the course of proceedings between Kremikovtzi AD (in insolvency) ('Kremikovtzi') and the Ministar na ikonomikata, energetikata i turizma i zamestnik-ministar na ikonomikata, energetikata i turizma (Minister and Deputy Minister for the Economy, Energy and Tourism), concerning a notice of State claim under public law (No APDV – 01, of 4 September 2008) ('the notice contested in the main proceedings') finding that such a claim under public law did exist, consisting of aid granted for the purpose of restructuring Kremikovtzi, plus interest.

### Legal context

*The EC-Bulgaria Association Agreement and the protocols thereto*

- 3 Under Article 3(2) of the EC-Bulgaria Association Agreement:  
  
'At ministerial level, political dialogue shall take place within the Association Council. This shall have general responsibility for all matters which the Parties might wish to put to it.'
- 4 Under Article 121, the EC-Bulgaria Association Agreement was concluded for an unlimited period, subject to the possibility of one or more parties withdrawing from it.
- 5 Article 9 of Protocol No 2 to the Europe Agreement on products covered by the Treaty establishing the European Coal and Steel Community (OJ 1994 L 358, p. 91) ('Protocol No 2 to the Europe Agreement') provides:  
  
'1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Bulgaria:  
  
...  
  
(iii) public aid in any form whatsoever except derogations allowed pursuant to the ECSC Treaty.  
  
2. Any practices contrary to this Article should be assessed on the basis of criteria arising from the application of ... the rules on State aids, including the secondary legislation.'

...

4. The Contracting Parties recognise that during the first five years after the entry into force of the Agreement, and by derogation from paragraph 1(iii) of this Article, Bulgaria may exceptionally, as regards ECSC steel products, grant public aid for restructuring purposes, provided that:

- it leads to the viability of the benefiting firms under normal market conditions at the end of the restructuring period,
- the amount and intensity of such aid are strictly limited to what is absolutely necessary in order to restore such viability and are progressively reduced,
- the restructuring programme is linked to a global rationalising and reduction of overall production capacity in Bulgaria.

5. Each Party shall ensure transparency in the area of public aid by a full and continuous exchange of information to the other Party, including amount, intensity and purpose of the aid and detailed restructuring plan.

...'

- 6 Article 1 of the Additional Protocol, signed on 21 November 2002, granted an extension of eight years starting on 1 January 1998 or until the date of the Republic of Bulgaria's accession to the European Union, whichever came first, of the period during which the Republic of Bulgaria could, by way of exception, grant public aid for the restructuring of the steel sector.
- 7 That extension was subject to two conditions, provided for in Articles 2 and 3 of the Additional Protocol. Article 2 required the submission to the Commission of the European Communities of a restructuring programme and business plans meeting the requirements of Article 9(4) of Protocol No 2 to the Europe Agreement. Under Article 3 of the Additional Protocol, that extension was made conditional on a final assessment of the restructuring programme and business plans by the Commission.
- 8 Under Article 4, the Additional Protocol could be amended by decision of the Association Council established by the EC-Bulgaria Association Agreement ('the EU-Bulgaria Association Council').
- 9 That protocol was first amended by Decision No 1/2004 of the EU-Bulgaria Association Council of 28 September 2004 (OJ 2005 L 68, p. 41), which replaced Articles 2 and 3 of the Additional Protocol. Recital 4 in the preamble to that decision states that that amendment was intended to ensure conformity between the Additional Protocol and institutional changes in Bulgaria.
- 10 A second amendment to the Additional Protocol was made through Decision EU-BG No 3/2006.
- 11 Recital 1 in the preamble to that decision states that the Republic of Bulgaria, in a modified restructuring programme in 2006, proposed that, if monitoring of the implementation of the restructuring showed that the relevant requirements of Protocol 2 to the Europe Agreement had not been met and that the key restructuring measures had not been implemented or if, in the course of the restructuring period the Republic of Bulgaria had granted additional State aid in favour of the steel industry, Bulgaria would recover any aid granted in breach of those conditions before or after its accession to the European Union.

- 12 Article 1 of Decision EU-BG No 3/2006 replaced Article 3 of the Additional Protocol with the following text:

‘The European Commission shall regularly monitor the implementation of the restructuring programme and the plans referred to in Article 2 on behalf of the European Community. The Ministry of Finance shall do so on behalf of Bulgaria. The European Commission may require Bulgaria to take appropriate steps to modify the restructuring plan for Kremikovtzi AD company in case the fulfilment of the requirements of Article 9(4) of Protocol 2 to the Europe Agreement are unlikely to be fulfilled.

The European Commission shall decide whether the restructuring programme and the plans are fully implemented and are in compliance with the requirements of Article 9(4) of Protocol 2 to the Europe Agreement.

In case monitoring of the implementation of the restructuring programme and the plans shows that the relevant conditions of Protocol 2 to the Europe Agreement and key restructuring measures, including all investments implemented, have not been fulfilled or that in the course of the restructuring period Bulgaria has granted additional State aid in favour of the steel industry, and to Kremikovtzi AD in particular, Bulgaria shall recover from the beneficiary any aid granted in breach of these conditions before or after its accession to the European Union.’

*Primary law*

- 13 Pursuant to Article 97 CS, the ECSC Treaty expired on 23 July 2002.

- 14 Under Article 2 of the Act of Accession:

‘From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on Bulgaria and Romania and shall apply in those States under the conditions laid down in those Treaties and in this Act.’

- 15 Title 2 of Annex V to the Act of Accession provides for a mechanism for monitoring measures of State support implemented in Bulgaria before the date of Bulgaria’s accession to the European Union. Articles 1 to 3 of that title provide:

- ‘1. The following aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date shall be regarded upon accession as existing aid within the meaning of Article 88(1) [EC]:
  - (a) aid measures put into effect before 10 December 1994;
  - (b) aid measures listed in the Appendix to this Annex;
  - (c) aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the *acquis*, and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the common market, pursuant to the procedure set out in [Article] 2.

All measures still applicable after the date of accession which constitute State aid and which do not fulfil the conditions set out above shall be considered as new aid upon accession for the purpose of the application of Article 88(3) [EC].

...

2. ...

If the Commission does not object to the existing aid measure on the ground of serious doubts as to the compatibility of the measure with the common market, within [three] months of receipt of complete information on that measure or of receipt of the statement of the new Member State in which it informs the Commission that it considers the information provided to be complete because the additional information requested is not available or has been already provided, the Commission shall be deemed not to have raised an objection.

All aid measures submitted under the procedure described in [Article] 1(c) prior to the date of accession to the Commission are subject to the above procedure irrespective of the fact that in the period of examination the new Member State concerned has already become a member of the Union.

3. A Commission decision to object to a measure, within the meaning of [Article] 1(c), shall be regarded as a decision to initiate the formal investigation procedure within the meaning of [Regulation No 659/1999].

If such a decision is taken before the date of accession, the decision will only come into effect upon the date of accession.'

*Regulation No 659/1999*

16 It emerges from recital 18 in the preamble to Regulation No 659/1999 that, in order to ensure compatibility of existing aid with the common market and in accordance with Article 108(1) TFEU, the Commission should propose appropriate measures where such aid is not, or is no longer, compatible with the common market and should initiate the procedure provided for in Article 108(2) TFEU if the Member State concerned declines to implement the proposed measures.

17 Under Article 1 of Regulation No 659/1999:

'For the purpose of this Regulation:

...

(b) "existing aid" shall mean:

(i) without prejudice to ... Annex V, [Title] 2 and [Title] 3(b) and the Appendix to said Annex of the Act of Accession of Bulgaria and Romania, all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

...

(c) "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

...'

18 Article 7 of Regulation No 659/1999, entitled ‘Decisions of the Commission to close the formal investigation procedure’, provides in paragraph 5:

‘Where the Commission finds that the notified aid is not compatible with the common market, it shall decide that the aid shall not be put into effect (hereinafter referred to as a “negative decision”).’

19 Article 14(1) of Regulation No 659/1999 provides:

‘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 ... The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.’

20 Article 19 of Regulation No 659/1999, entitled ‘Legal consequences of a proposal for appropriate measures’, concerns existing aid and reads as follows:

‘1. Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures.

2. Where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4). Articles 6, 7 and 9 shall apply *mutatis mutandis*.’

#### *The Commission decision of December 2009*

21 Article 1 of the Commission Decision of 15 December 2009 on the National Restructuring Programme and the Individual Business Plan for the Bulgarian steel producer Kremikovtzi (summary published in OJ 2012 C 27, p. 3) (‘the Commission decision of December 2009’) states that the ‘restructuring programme and the plans for Kremikovtzi AD are not fully implemented and are therefore not in compliance with the requirements of Article 9(4) of Protocol 2 to the Europe Agreement’.

#### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

22 Kremikovtzi is a legal entity incorporated under Bulgarian law which was State-owned until 1999, when it was privatised.

23 Under Article 9(4) of Protocol No 2 to the Europe Agreement, the Republic of Bulgaria had a period of five years, from 1 January 1993 to 31 December 1997, during which it was, by way of exception, authorised to grant public aid for restructuring the steel sector.

24 It is apparent from the case-file, however, that, after 1997, Kremikovtzi received State aid in various forms, including cancellation of debts owed to the State, the use of State resources to pay other debts, and favourable credit terms.

25 In those circumstances, the Additional Protocol granted an extension of eight years starting on 1 January 1998 or until the date of Bulgaria’s accession to the European Union, whichever came first, of the period during which Bulgaria could, by way of exception, grant State aid for the restructuring of the steel sector.

- 26 In accordance with the requirement laid down in Article 2 of the Additional Protocol, the Republic of Bulgaria submitted to the Commission a restructuring and development programme for the Bulgarian steel sector as well as a business plan for the only steel undertaking which had received public aid for restructuring, namely Kremikovtzi.
- 27 As part of the preparation of that programme and plan, by decisions of 6 November 2003 and 3 February 2004, the Komisia za zashtita na konkurentsiyata (Commission for the Protection of Competition, the Bulgarian authority charged at the time with monitoring public aid) had established that Kremikovtzi had received various forms of public aid totalling BGN 431 073 159. It emerges from the case-file that most of that amount was paid out in 1999 and that the rest was granted in 2004, in the form of restructuring of debts incurred by Kremikovtzi towards its suppliers of gas and electricity.
- 28 It is apparent *inter alia* from recital 10 in the preamble to Council Decision 2004/746/EC of 18 October 2004 on the fulfilment of the conditions laid down in Article 3 of the Additional Protocol to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, with regard to an extension of the period foreseen in Article 9(4) of Protocol 2 to the Europe Agreement (OJ 2004 L 328, p. 101) that, under Article 3 of the Additional Protocol as in force at that time, the Commission made a final assessment of the restructuring programme and the business plan. That assessment showed *inter alia* that the amount of public aid for restructuring purposes as specified in the plan would be progressively reduced and stopped by 2005.
- 29 According to the Commission's report to the Council and the European Parliament of 12 August 2008, entitled 'First monitoring report on steel restructuring in Bulgaria and Romania' (COM(2008) 511 final), no aid was granted to Kremikovtzi in 2006.
- 30 Towards the end of 2006, an extension until the end of 2008 of the time-limit for the implementation of the plan was requested due to changes in the investment projects and time lost due to a change in ownership of Kremikovtzi. The recitals in the preamble to Decision EU-BG No 3/2006 refer to a modified restructuring programme and business plan. According to the order for reference, the modified restructuring programme provided that the restructuring process would end before 31 December 2008.
- 31 On 6 August 2008, Kremikovtzi was placed in bankruptcy proceedings. As part of those proceedings, it was declared officially insolvent as from 6 June 2008.
- 32 In the light of that insolvency declaration, the Deputy Minister for the Economy and Energy adopted the notice contested in the main proceedings for an amount of BGN 431 073 159, plus interest. According to the Administrativen sad Sofia-grad, that notice was premised on the idea that the insolvency declaration pertaining to Kremikovtzi and the opening of bankruptcy proceedings had rendered the individual plan for the viability of the company obsolete. In those circumstances, Kremikovtzi was not in a position to achieve viability under normal market conditions, which constituted an infringement of Article 9(4) of Protocol 2 to the Europe Agreement and rendered the State aid granted unlawful. In the opinion of the Deputy Minister, the recovery of the aid was governed by the restructuring programme as updated.
- 33 Kremikovtzi brought an action, upon which the referring court (in a different composition) annulled the notice contested in the main proceedings. The chamber hearing the case held that, under the prevailing legislation, the aid could be recovered only if the Minister for Finance notified the Commission beforehand, so that the latter could adopt a decision ordering recovery of the aid on the grounds of its being unlawful; neither of those two conditions was satisfied in the case before it.

- 34 The Minister for the Economy, Energy and Tourism appealed against that decision before the Varhoven administrativen sad (Administrative Supreme Court). That court quashed the Administrativen sad Sofia-grad's decision and referred the case back to it, to be heard by a different composition, adding binding instructions regarding the handling of the case as to its merits, requiring the chamber hearing the case to take account of the new written evidence, including the Commission decision of December 2009.
- 35 In the proceedings before the referring court, Kremikovtzi's receiver lodged a request for the proceedings to be stayed in order for a reference to be made for a preliminary ruling from the Court of Justice with a view to determining, first, the authority with jurisdiction to rule on whether State aid is incompatible with the common market and order recovery of that aid and, second, the legal scope of the Commission decision of December 2009.
- 36 In those circumstances, the Administrativen sad Sofia-grad decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
1. Do the provisions of the Europe Agreement and particularly of the EU-Bulgaria Association Council decisions apply to State aid that was granted prior to the accession of the Republic of Bulgaria to the European Union pursuant to the provisions of the Europe Agreement and, in particular, pursuant to Article 9(4) of Protocol 2 [to the Europe Agreement] where an assessment of the incompatibility of State aid granted in that way takes place after the date of accession of the Republic of Bulgaria to the European Union? If the answer to this question is in the affirmative the following interpretation is required:
    - (a) Is the second paragraph of Article 3 of the [Additional Protocol] to be interpreted as meaning that only the European Commission may establish whether the restructuring programme and the plans have been fully implemented in accordance with Article 2 of the Additional Protocol and are in compliance with the requirements of Article 9(4) of Protocol 2 to the Europe Agreement? If the answer to this question is in the negative the following interpretation is required:
    - (b) Is the third paragraph of Article 3 of the [Additional Protocol] to be interpreted as meaning that the competent national authority of the Republic of Bulgaria has the right to adopt a decision on the recovery of State aid that does not comply with the requirements of Article 9(4) of Protocol 2 to the Europe Agreement? If the Court of Justice should answer this question in the negative an interpretation of the following question is requested:
  2. Is the provision in Article 1 of Title 2 of Annex V [to the Act of Accession] relating to competition rules to be interpreted as meaning that the State aid in question constitutes "new aid" within the meaning of Title 2 of that Annex? If so, are the provisions of Articles 107 [TFEU] and 108 TFEU (Articles 87 EC and 88 EC) on State aid and the provisions of Regulation No 659/1999 to apply in such a case to such "new aid"?
    - (a) If the answer to this question is in the negative ... are the provisions in ... Annex V to the Act of Accession to be interpreted as meaning that the competent national authorities cannot take steps to recover State aid such as that in the main proceedings before the Commission has taken a decision by which the State aid at issue is declared incompatible with the common market?
    - (b) If the answer given to the previous question is in the affirmative: is the Commission decision of December 2009 ... to be considered a negative decision on unlawful aid within the meaning of Article 14 of Regulation No 659/1999?



### The questions referred for a preliminary ruling

- 37 By its questions, which it is appropriate to examine together, the referring court asks the Court of Justice, in essence, on which legal basis it is appropriate to assess and, if necessary, order the recovery of, the restructuring aid granted to the steel company Kremikovtzi before the Republic of Bulgaria acceded to the European Union on 1 January 2007, that company having been made subject to bankruptcy proceedings and declared insolvent in 2008, that is to say, post-accession. In particular, the referring court wishes to determine whether a procedure for recovering the aid granted to Kremikovtzi must be based on Article 3 of the Additional Protocol, as amended by Decision EU-BG No 3/2006, or on the mechanisms set out in Annex V to the Act of Accession and Regulation No 659/1999 and whether, in any event, a decision of the Commission is a mandatory prerequisite in the context of the recovery, by the Bulgarian authorities, of the aid granted pre-accession.
- 38 In order to answer the questions posed by the referring court, it is useful at the outset to note certain of the specific circumstances of the dispute in the main proceedings that emerge from the case-file submitted to the Court.
- 39 It is established that Protocol No 2 to the Europe Agreement contained transitional provisions concerning restructuring aid in order to enable the Republic of Bulgaria to complete the restructuring of its steel sector.
- 40 Thus, under Article 9(4) of Protocol No 2 to the Europe Agreement, Bulgaria was authorised to grant aid for the purposes of that restructuring, subject to the condition, inter alia, that the aid led to the viability of the recipient undertakings under normal market conditions by the end of the restructuring period.
- 41 As emphasised by the Commission, unlike the acts of accession relating to certain Member States (see, by way of comparison, Case C-369/09 P *ISD Polska and Others v Commission* [2011] ECR I-2011, paragraph 7), the Act of Accession relating to the Republic of Bulgaria does not contain any specific clauses about aid granted to undertakings in the steel sector before that Member State acceded to the European Union. It is apparent from the documents submitted to the Court that, during the accession negotiations, the Republic of Bulgaria stated that it would no longer grant aid to its steel industry and that it was withdrawing its request for extension of the period during which aid could be granted to the steel sector.
- 42 However, shortly before its accession to the European Union, the Republic of Bulgaria made it known, in essence, that the condition that Kremikovtzi be viable could not be satisfied under the national restructuring programme. Bulgaria accordingly submitted a modified restructuring programme and business plan and requested an extension of the restructuring period until the end of 2008. Kremikovtzi was the only undertaking covered by the modified national restructuring programme.
- 43 As is apparent from recital 1 in the preamble to Decision EU-BG No 3/2006, under the modified restructuring programme, the Republic of Bulgaria proposed, in essence, that if monitoring of the implementation of the restructuring showed that the relevant requirements of Protocol 2 to the Europe Agreement had not been met, it would recover any aid granted in breach of those conditions.
- 44 The Commission assessed the modified restructuring programme and business plan and expressed no objections to the extension requested.
- 45 On 29 December 2006, on a proposal from the Commission, the EU-Bulgaria Association Council adopted Decision EU-BG No 3/2006.
- 46 Kremikovtzi's financial situation continued to deteriorate and it went bankrupt in 2008.

- 47 In those circumstances, by the notice contested in the main proceedings, the Bulgarian authorities, relying on the third paragraph of Article 3 of the Additional Protocol, as amended by Decision EU-BG No 3/2006, commenced proceedings to recover the restructuring aid identified in the decisions referred to in paragraph 27 above.
- 48 Kremikovtzi has challenged that notice and that legal basis in the main proceedings, arguing, in essence, that the Bulgarian authorities may not adopt their own decision to recover aid where there has been no negative decision from the Commission for the purposes of Regulation No 659/1999.
- 49 In that regard, it must be borne in mind that the EC Treaty provides for different procedures according to whether aid is existing or new (see, to that effect, inter alia, Case C-47/91 *Italy v Commission* [1992] ECR I-4145, paragraphs 22 to 24, and Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraphs 10 to 12). Whilst under Article 88(3) EC new aid must be notified to the Commission and may not be implemented until that procedure has led to a final decision, under Article 88(1) EC existing aid may be lawfully implemented so long as the Commission has made no finding of incompatibility (see, to that effect, inter alia, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 20; Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 42; Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraph 47; and also Case C-322/09 P *NDSHT v Commission* [2010] ECR I-11911, paragraph 52 and the case-law cited).
- 50 Moreover, it follows from Article 2 of the Act of Accession that Articles 87 EC to 89 EC and Regulation No 659/1999 are applicable in Bulgaria only as from its accession to the European Union on 1 January 2007, under the conditions laid down in the Act of Accession.
- 51 As regards aid implemented in Bulgaria before it acceded to the European Union, Title 2 of Annex V to the Act of Accession provides for a monitoring mechanism. That mechanism aims inter alia to limit the range of aid measures which could be regarded as ‘existing aid’ at the time of accession for the purposes of Article 88(1) EC.
- 52 Under that mechanism, measures implemented before accession but which, firstly, are still applicable post-accession and, secondly, satisfy the cumulative requirements of Article 87(1) EC on the date of accession, are subject to the specific rules laid down in Annex V to the Act of Accession, either as existing aid for the purposes of Article 88(1) EC when it comes within one of the three categories referred to in that annex, or as new aid on the date of accession for the purposes of application of Article 88(3) EC where it does not come within one of those three categories.
- 53 It follows that, in order to be capable of falling under the specific rules in Annex V to the Act of Accession, measures of State support adopted before the date of accession must, in particular, still be ‘applicable’ for the purposes of that annex as from the date of accession.
- 54 As may be inferred from inter alia Article 1(b)(i) and (c) of Regulation No 659/1999, read in conjunction with Article 2 of the Act of Accession, it is only as from the time of accession that, in Bulgaria, the criteria laid down in Article 87(1) EC may be directly applied as such, and then only in respect of situations that arise on or after that date. Moreover, it follows inter alia from the case-law referred to in paragraph 49 above, recital 18 in the preamble to Regulation No 659/1999 and Article 19 of that regulation that existing aid can be found to be incompatible by decision with prospective effect only.
- 55 In that light, the expression ‘still applicable’ in Annex V to the Act of Accession must be construed as relating, essentially, to measures implemented before accession to the European Union and which, following accession, remain such as to give rise to expenditure by the Member State concerned or an increase in its financial liability, or to decrease that Member State’s budgetary revenues.

- 56 In the present case, it has not been disputed before the Court that the State aid at issue in the main proceedings was implemented before the Republic of Bulgaria's accession to the European Union.
- 57 Moreover, as is apparent from the case-file submitted to the Court and from paragraphs 27 and 28 above, it was possible to make a precise calculation of the Republic of Bulgaria's financial liability arising from those measures at the time of their implementation. The precise amounts of the various forms of aid granted were officially established and taken into account in the drawing-up of the restructuring programme and business plan for Kremikovtzi.
- 58 As is apparent from inter alia paragraphs 27 to 29 above, the implementation of the public aid at issue in the main proceedings was completed before the Republic of Bulgaria's accession to the European Union. That aid was accordingly not, following accession, such as to give rise to expenditure or increased financial liability for the Bulgarian State bodies, or to decrease the Republic of Bulgaria's budgetary revenues.
- 59 In those circumstances, the public aid at issue in the main proceedings cannot be regarded as 'applicable' post-accession for the purposes of Annex V to the Act of Accession.
- 60 It follows that Annex V does not apply to the public aid measures at issue in the main proceedings. Consequently, those measures cannot be considered to be either 'existing aid' or 'new aid upon accession' for the purposes of that annex.
- 61 Similarly, nor do those measures qualify as 'existing aid' within the meaning of Article 1(b)(i) of Regulation No 659/1999.
- 62 Moreover, as also follows from paragraphs 17, 50 and 54 above, those measures do not qualify as 'new aid' within the meaning of Article 1(c) of that regulation either.
- 63 By contrast, Decision EU-BG No 3/2006, adopted after the signature of the Act of Accession and in the context outlined in particular in paragraphs 41 to 44 and 60 to 62 above, concerns specifically measures of State support implemented as part of the restructuring plan for the steel sector in Bulgaria.
- 64 The first paragraph of Article 3 of the Additional Protocol, as amended by Decision EU-BG No 3/2006, provides, in essence, for joint monitoring by the Commission and by the Bulgarian Minister for Finance of the implementation of aid in support of Kremikovtzi's restructuring.
- 65 Under the third paragraph of Article 3 of the Additional Protocol, the Republic of Bulgaria is obliged to recover any State aid paid to the Bulgarian steel industry contrary to the conditions stemming from Protocol No 2 to the Europe Agreement. Those conditions include, in particular, completion of all investments provided for in the restructuring programme and the business plans and the requirement that, at the end of the restructuring period granted, that restructuring must have enabled the recipients of the State aid in question to be viable.
- 66 It is true that, under the second paragraph of Article 3 of the Additional Protocol, as amended by Decision EU-BG No 3/2006, the Commission must decide whether the restructuring programme and the plans have been fully implemented and satisfy the requirements of Article 9(4) of Protocol No 2 to the Europe Agreement.
- 67 There is, however, nothing in the text of Article 3 implying that a decision adopted by the Commission under the second paragraph of Article 3 is a necessary prerequisite for recovery as provided for in the third paragraph therein.

- 68 Moreover, given recital 1 in the preamble to Decision EU-BG No 3/2006 and the joint monitoring referred to in paragraph 64 above, nor is there anything in the scheme of Article 3 to indicate that that is the case.
- 69 On the other hand, it follows from the third paragraph of Article 3 of the Additional Protocol, as amended by Decision EU-BG No 3/2006, that the Republic of Bulgaria has an obligation to recover State aid if, in the course of monitoring the implementation of the restructuring programme and the business plan for Kremikovtzi, either the Commission or the Bulgarian authorities find that the applicable conditions laid down in Protocol No 2 to the Europe Agreement have not been fulfilled.
- 70 Lastly, in order to provide the referring court with a complete answer to its questions, it should further be noted that a decision adopted under the second paragraph of Article 3 of the Additional Protocol, as amended by Decision EU-BG No 3/2006 is in no way equivalent to a decision adopted under Article 14 of Regulation No 659/1999, which, as is apparent *inter alia* from paragraphs 50, 61 and 62 above, does not apply in respect of the State aid at issue in the main proceedings.
- 71 In the light of all the foregoing, the answer to the questions referred is that proceedings to recover public aid granted to Kremikovtzi before the Republic of Bulgaria's accession to the European Union, aid measures which, following that accession, were not 'applicable' for the purposes of Annex V to the Act of Accession, must, in the event of non-compliance with the conditions laid down in Article 9(4) of Protocol No 2 to the Europe Agreement, be based on Article 3 of the Additional Protocol, as amended by Decision EU-BG No 3/2006. In that context, the competent national authorities in the Republic of Bulgaria may, pursuant to the third paragraph of Article 3, adopt a decision to recover public aid which does not satisfy those conditions. A decision adopted by the Commission on the basis of the second paragraph of Article 3 of the Additional Protocol does not constitute a necessary prerequisite for the recovery of such aid by those authorities.

### Costs

- 72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

**Proceedings to recover public aid granted to Kremikovtzi AD before the Republic of Bulgaria's accession to the European Union, aid measures which, following that accession, were not 'applicable' for the purposes of Annex V to the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, must, in the event of infringement of the conditions laid down in Article 9(4) of Protocol No 2 to the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994, be based on Article 3 of the Additional Protocol to the Europe Agreement, as amended by Decision No 3/2006 of the EU-Bulgaria Association Council of 29 December 2006. In that context, the competent national authorities in the Republic of Bulgaria may, pursuant to the third paragraph of Article 3, adopt a decision to recover public aid which does not satisfy those conditions. A decision adopted by the Commission on the basis of the second paragraph of Article 3 of the Additional Protocol does not constitute a necessary prerequisite for the recovery of such aid by those authorities.**

[Signatures]