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JUDGMENT OF THE COURT (Fifth Chamber)

11 September 2014 (\*)

(Failure of a Member State to fulfil obligations — State aid incompatible with the internal market — Obligation to recover — Article 108(2) TFEU — Regulation (EC) No 659/1999 — Article 14(3) — Commission decision — Measures to be taken by the Member States)

In Case C-527/12,

ACTION under Article 108(2) TFEU for failure to fulfil obligations, brought on 20 November 2012,

**European Commission**, represented by T. Maxian Rusche and F. Erlbacher, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Federal Republic of Germany**, represented by T. Henze and K. Petersen, acting as Agents,

defendant,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász (Rapporteur), A. Rosas, D. Šváby and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 4 December 2013, after hearing the Opinion of the Advocate General at the sitting on 13 February 2014, gives the following

### **Judgment**

- 1 By its application, the European Commission asks the Court to declare that the Federal Republic of Germany has failed to fulfil its obligations under Articles 108(2) and 288 TFEU, the principle of effectiveness, Article 14(3) 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) and Articles 1 to 3 of Commission Decision 2011/471/EU of 14 December 2010 on State aid granted by Germany to the Biria group (C 38/05 (ex NN 52/04)) (OJ 2011 L 195, p. 55) by failing to take all necessary measures to allow the immediate and effective execution of that Commission decision through the recovery of the aid granted.

#### **EU law**

- 2 Recital 13 in the preamble to Regulation No 659/1999 states:

‘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 Union] pursuant to Article [278 TFEU], 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, entitled 'Non-compliance with decisions and judgments', states:

'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 ... direct in accordance with Article [108(2) TFEU].'

### **Background to the dispute**

- 5 MB System GmbH & Co. KG ('MB System') is a member of the Biria Group. MB System manufactured bicycles until the end of 2005 when bicycle production ceased and the physical assets used for that purpose were sold. The principal object of MB System has since become the management of immovable property.
- 6 Technologie-Beteiligungsgesellschaft mbH ('TBG') is a wholly-owned subsidiary of the Kreditanstalt für Wiederaufbau, a public law body controlled by the Federal Republic of Germany. The Kreditanstalt für Wiederaufbau finances small- and medium-sized companies in the technology sector through equity participations. As a result of restructuring, gbb Beteiligungs AG's assets were transferred, in 2003, to TBG. In 2001, Bike Systems GmbH & Co. Thüringer Zweiradwerk KG, succeeded by MB System, received financing from gbb Beteiligungs AG in the form of a silent participation in the capital of that company. That participation had not been notified to the Commission as State aid. The parties agree on the fact that it amounted to State aid in that the repayment interest rate agreed upon was below market rate.
- 7 The participation contract was governed by private law.
- 8 On 20 October 2005, following several complaints made by competitors, the Commission opened a formal investigation procedure under Article 108(2) TFEU.
- 9 By Decision 2007/492/EC of 24 January 2007 on the State aid C 38/2005 (ex NN 52/2004) implemented by Germany for the Biria Group (OJ 2007 L 183, p. 27), the Commission found that the participation amounted to aid incompatible with the internal market and ordered the Federal Republic of Germany to take all necessary measures to recover the aid ('the first decision'). By the judgment of 3 March 2010 in *Freistaat Sachsen v Commission* (T-102/07 and T-120/07 EU:T:2010:62), the General Court annulled that decision.
- 10 Following the first Commission decision, TBG addressed a claim to MB System, on 16 February 2007, seeking recovery of the amount of State aid corresponding to the benefit of a preferential interest rate below market rate. MB System refused to make payment.

- 11 The final amount to be recovered had been jointly agreed upon by the parties in October 2007 and was fixed at EUR 697 456.
- 12 On 10 April 2008, following MB System's refusal to comply with a new claim seeking repayment, TBG brought an action before the Landgericht Mühlhausen (Mühlhausen Regional Court) for recovery of the amount in question. That action was based on the first decision and the alleged infringement of Article 108(3) TFEU and Paragraph 134 of the German Civil Code (Bürgerliches Gesetzbuch) for failure to notify the aid in question.
- 13 According to the established case-law of the German courts, a contract granting State aid concluded in breach of Article 108(3) TFEU is void pursuant to Paragraph 134 of the German Civil Code. For that reason, the action pending before the Landgericht Mühlhausen was not affected by the annulment of the first decision.
- 14 The hearing before the Landgericht Mühlhausen was held on 26 November 2008 in the absence of the authorised representative of MB System. For that reason, the Landgericht Mühlhausen delivered a provisionally enforceable judgment by default ('the judgment by default') enabling TBG to enforce recovery of the sum owed against MB System's assets. On 19 December 2008, MB System brought an appeal against that judgment.
- 15 By order of 9 January 2009, the Landgericht Mühlhausen suspended the enforcement of the judgment by default on the condition that MB System provided security in the amount of EUR 840 000 in the form of a deposit to the Landgericht Mühlhausen or a guarantee.
- 16 In the light of the proceedings then pending before the General Court, the Landgericht Mühlhausen suspended, on 17 March 2009, the national proceedings before it.
- 17 On 7 April 2009, TBG brought an appeal against that decision to suspend before the Thüringer Oberlandesgericht (Higher Regional Court of Thuringia). On 25 January 2010, that appeal was dismissed and, on 25 February 2010, TBG brought an appeal on a point of law before the Bundesgerichtshof (Federal Supreme Court). By order of 16 September 2010, the Bundesgerichtshof found that the order of 17 March 2009 of the Landgericht Mühlhausen suspending proceedings and the order of 25 January 2010 of the Thüringer Oberlandesgericht upholding that suspension order, had become devoid of purpose following the annulment of the first decision by the General Court.
- 18 Following the annulment of the first decision by the General Court, the Commission adopted Decision 2011/471 at issue in the present case ('the decision at issue'), the operative part of which is worded as follows:

*'Article 1*

The State aid granted by Germany to Bike Systems GmbH & Co. Thüringer Zweiradwerk KG (now MB System) ... ['the aid in question'], is incompatible with the internal market. The aid consists of the following measures:

- (a) measure 1: a silent participation (stille Einlage) amounting to EUR 2 070 732 contributed to Bike Systems GmbH & Co. Thüringer Zweiradwerk KG (now MB System);

...

#### *Article 2*

1. Germany shall recover the aid referred to in Article 1 from the recipient.
2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided these allow the immediate and effective enforcement of this Decision.

...

#### *Article 3*

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. Germany shall ensure that this Decision is implemented within 4 months of the date of notification of the Decision.

...

#### *Article 5*

This Decision is addressed to the Federal Republic of Germany.'

- 19 By judgment of 3 July 2013 in *MB System v Commission* (T-209/11, EU:T:2013:338), the General Court dismissed the appeal brought by MB System against the decision at issue.
- 20 On 21 March 2011, TBG lodged an application before the Amtsgericht Nordhausen (Nordhausen District Court) for the registration of judicial hypothecs in execution of the judgment by default. On 1 June 2011, the judicial hypothecs were registered. TBG filed an application for MB System's immovable property to be auctioned before the Amtsgericht Nordhausen which, on 21 July 2011, ordered an expert's report to be drawn up regarding the market value of the properties in question.
- 21 In proceedings relating to the enforcement of the decision at issue, by order of 30 March 2011 and at the request of MB System, the Landgericht Mühlhausen suspended proceedings for a second time. On 14 April 2011, TBG again brought an appeal before the Thüringer Oberlandesgericht which was dismissed by order of 28 December 2011. On 26 January 2012, TBG brought an appeal on a point of law before the Bundesgerichtshof which, by order of 13 September 2012, set aside the decisions of the lower courts. Accordingly, the proceedings pending before the Landgericht Mühlhausen resumed on 27 March 2013.
- 22 On 25 July 2012, the Amtsgericht Nordhausen, on the basis of the expert's report of 22 May 2012, found the market value of MB System's property to be EUR 1 893 700. MB System's

property was to be sold by public auction on 10 April 2013. At the date of the hearing before the Court, 4 December 2013, no bid had been submitted with the result that the aid in question had not been recovered.

- 23 In view of the fact that the decision at issue had not yet been enforced nearly two years after it was adopted, the Commission brought the present action. The Federal Republic of Germany does not contest the substance of that decision or its obligation to recover the aid in question from MB System. The parties agree that, on the date on which the application was lodged before the Commission, the sum to be recovered amounted to EUR 816 630.

## **The action**

### *Arguments of the parties*

- 24 The Commission considers that the defendant has not taken all necessary measures to implement the decision at issue by recovering the aid in question.
- 25 The Commission observes, principally, that, in accordance with Article 14(3) of Regulation No 659/1999, the Member State in question is, in principle, free to choose the means, pursuant to its national procedural law, of implementing the Commission's decision ordering the recovery of aid incompatible with the internal market, subject, however, to respect for the principle of effectiveness. None the less, the Commission takes the view that the means chosen by the defendant in the present case to recover the aid, namely submitting a claim seeking repayment before the German civil law courts, was not appropriate to ensure the immediate and effective implementation of the Commission's decision. Having regard to the normal length of court proceedings, it would have been impossible for the defendant to ensure the effective recovery of the aid in question within the four-month period set by the decision at issue.
- 26 The Commission therefore considers that, because the immediate and effective implementation of the decision at issue was not secured by German civil law procedures, in accordance with the second sentence of Article 14(3) of Regulation No 659/1999, national procedural law should have given way to EU law and the defendant was itself under a duty to provide for a means of enforcement by the adoption of an administrative measure under EU law ordering the recovery of the aid in question. EU law forms a legal basis pursuant to which the defendant may adopt such an administrative measure. In that regard, the decision at issue constitutes such a legal basis, notwithstanding the fact that it does not directly require MB System to repay the aid in question. Article 14(3) of Regulation No 659/1999 and the second subparagraph of Article 108(2) TFEU also constitute such bases.
- 27 In that context, the Commission submits, in general, that, in the case of a decision ordering the recovery of unlawful aid incompatible with the internal market, the Member State concerned is under an obligation to achieve a certain result, requiring it to ensure effective recovery of that aid within the period set by the Commission, and not an obligation as to the means to be used which would be limited to bringing an action for recovery within that period. In the present case, the aid in question should have been recovered within the period

set in Article 3 of the decision at issue. The defendant is therefore responsible for the failure to achieve that result, in so far as the recovery of that aid should have been effected from the assets of the recipient before the expiry of that period.

- 28 In the alternative, the Commission submits that, even though the provisionally enforceable judgment by default was such as to allow the immediate and effective implementation of the decision at issue, the defendant has not, in any event, used it as a basis to ensure immediate and effective recovery of the aid in question.
- 29 The Commission notes that the defendant, notwithstanding the fact that the period set in the decision at issue for recovery of the aid in question was four months, submitted a request for enforcement of the judgment by default only on 21 March 2011, that is to say, more than three months after the adoption of that decision.
- 30 In its reply, the Commission further observes that, between the date of that request for enforcement and 10 April 2013 — the date planned for the sale of MB System's immovable property by public auction — nearly two years had passed which were characterised by the defendant's manifest lack of activity.
- 31 The German Government notes that EU law does not impose on Member States the form that the grant of State aid must take. Under German law, which provides for the grant of State aid by means of administrative measures, public or private law contracts, the choice of form for the grant of aid determines the way in which that aid can be recovered. In the present case, the aid in question was granted to MB System by means of a private law contract by TBG, a private-law investment company owned by the German State. Consequently, in so far as MB System did not respond to the request for repayment of that aid, the public authorities were not entitled to implement the decision at issue themselves but had to assert their right to repayment of that aid before the civil courts.
- 32 The German Government maintains that, in accordance with the principle that public authorities must act in accordance with the law and that a distinction requires to be made between public law and private law acts, under German law and, in particular, Article 20(3) of the Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland), public authorities are empowered to recover State aid by means of an administrative act only where that aid was granted by means of an administrative act under public law and there is a legal basis for the adoption of such an act. Under German law, public authorities are not empowered to intervene and to terminate a private law contract by means of an act of a public authority. Moreover, there is no general power under German law for such an authority to act in an unrestricted manner.
- 33 The German Government adds that, in any event, even an administrative act adopted by a German public authority may be challenged by the beneficiary of the aid. There is, therefore, always a risk of delay. Such a situation is merely the result of the principle of effective judicial protection. It cannot, therefore, be established that the adoption of an administrative act would effectively enable quicker recovery of the aid in question than by bringing an action before the civil courts.

- 34 The German Government also takes the view that EU law cannot be regarded as the legal basis for the adoption of an administrative act. The decision at issue was addressed to the Member State concerned without specifying the method of recovery of the aid in question to be taken under national law. Moreover, there is nothing in Article 14(3) of Regulation No 659/1999 relating to the procedure for recovering aid. Article 14(3) of that regulation and Commission decisions such as the decision at issue merely regulate the relationship between the Commission and the Member State concerned and refer, as to the remainder, to national procedural law. Furthermore, the first subparagraph of Article 108(2) TFEU is not sufficiently exhaustive to have direct effect for individuals and provides that the Commission should, at the outset, adopt a binding decision for the recovery of aid incompatible with the internal market.
- 35 The German Government also submits that the time-limit set by the Commission in a decision such as the decision at issue must be interpreted as being a time-limit for initiating proceedings for recovery and not a time-limit for the enforcement of that decision. Within that period, the Member State concerned is required only to take all necessary measures to enable the recovery of the aid in question and to ensure that normal conditions of competition are re-established. That interpretation is in accordance with the wording of the first sentence of Article 14(3) of Regulation No 659/1999 which refers to procedures under national law. In the present case, TBG took all the necessary measures to implement the decision at issue before the expiry of the period set therein.

#### *Findings of the Court*

- 36 It should be noted that, while the parties' arguments refer to events occurring before the adoption of the decision at issue, the Commission's application concerns the failure to implement that decision. The Court will consider the matter on that basis.
- 37 Under Article 14(1) of Regulation No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission must decide that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary. The Commission must not require recovery of the aid if this would be contrary to a general principle of EU law.
- 38 The first sentence of Article 14(3) of Regulation No 659/1999 states that recovery is to 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, the Member States concerned must, in accordance with the last sentence of Article 14(3) of that regulation, take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to EU law.
- 39 Although Article 14(3) of Regulation No 659/1999 reflects the requirements of the principle of effectiveness (judgment in *Scott and Kimberly Clark*, C-210/09, EU:C:2010:294, paragraph 20), it is also apparent that the law of the Member State concerned must, for the purposes of that recovery, be applied in accordance with the principle of the procedural autonomy of that Member State, in the absence of applicable provisions of EU law, while at the same time ensuring that fundamental rights are observed, in particular the right to a fair



hearing, including the rights of defence. It follows that EU law does not require the recovery of unlawful aid from the beneficiary by the competent national authority to be effected on the basis of the Commission's recovery decision alone.

- 40 The Member State concerned is free to choose the means of fulfilling its obligation to recover aid found to be incompatible with the internal market, provided that the measures chosen do not adversely affect the scope and effectiveness of Union law (judgment in *Scott and Kimberly Clark*, EU:C:2010:294, paragraph 21 and the case-law cited).
- 41 So far as concerns the freedom of the Member States with regard to the choice of method of recovery of such aid, the Court has stated that that freedom is limited in so far as those rules and procedures cannot have the effect of making the recovery required by EU law practically impossible (see, to that effect, judgment in *Mediaset*, C-69/13, EU:C:2014:71, paragraph 34 and the case-law cited). The application of national procedures is subject to the condition that those procedures allow the immediate and effective execution of the Commission's decision, a condition which reflects the requirements of the principle of effectiveness laid down by case-law of the Court (judgment in *Commission v Italy*, C-243/10, EU:C:2012:182, paragraph 36 and the case-law cited).
- 42 The measures adopted by the Member States must be appropriate for the purpose of establishing the normal conditions of competition which were distorted by the grant of the unlawful aid the recovery of which has been ordered by a Commission decision (judgment in *Scott and Kimberly Clark*, EU:C:2010:294, paragraph 22 and the case-law cited).
- 43 Consequently, the question whether the Member State concerned, by choosing those measures, has fulfilled its obligation to recover aid found to be incompatible with the internal market in accordance with the requirement of effectiveness must be assessed on a case-by-case basis, having regard to the specific circumstances of the case.
- 44 In the present case, it must be found that the defendant cannot be criticised for having chosen to bring civil proceedings before a general court in order to recover the aid in question. There is nothing in the file before the Court to exclude a priori recourse to civil law or to a court of that kind apart, however, from the specific circumstances of the application of that law by the defendant and the degree of diligence shown by it in seeking to ensure the effective recovery of the aid in question.
- 45 In that regard, it must be stated at the outset that review by the national court of an enforceable order for the recovery of unlawful State aid and possible annulment of that order must be viewed simply as an expression of the principle of effective judicial protection which, according to the Court's settled case-law, is a general principle of Union law (see, to that effect, judgment in *Scott and Kimberly Clark*, EU:C:2010:294, paragraph 25 and the case-law cited).
- 46 It must also be found that the defendant has never contested its obligation to recover the aid in question and, moreover, that it took specific steps to recover that aid.

- 47 However, it is not disputed that the aid in question had still not been recovered on either the date on which the Commission's application was brought or the date of the hearing before the Court, in so far as recovery had not been effected from the assets of the beneficiary undertaking.
- 48 As for possible justification for the significant delay, the Court has held that the only defence available to a Member State in opposing an infringement action by the Commission under Article 108(2) TFEU is to plead that it was absolutely impossible for it to implement the decision in question (judgments in *Commission v Germany*, 94/87, EU:C:1989:46, paragraph 8, and *Commission v France*, C-441/06, EU:C:2007:616, paragraph 27 and the case-law cited).
- 49 As the Advocate General noted in point 92 of his Opinion, the basis of such absolute impossibility may also be a legal one, when it results from decisions adopted by the national courts, provided that those decisions comply with EU law.
- 50 In that regard, the following considerations must be taken into account in the present case.
- 51 It should be borne in mind, in the first place, that, in accordance with the case-law of the Court, if a Member State encounters difficulties in implementing a Commission decision ordering the recovery of aid, it must submit those problems for consideration by the Commission asking, in a reasoned manner, for the extension of the prescribed period and suggesting appropriate amendments to that decision, so that the Commission may take an informed decision. In such a case, and in the light of Article 4(3) TEU, a duty of cooperation in good faith is imposed on the Member State concerned and the Commission with a view to overcoming those difficulties (see, to that effect, judgments in *Commission v Germany*, EU:C:1989:46, paragraph 9; *Commission v Italy*, EU:C:2012:182, paragraphs 41 and 42; and *Commission v Greece*, C-263/12, EU:C:2013:673, paragraph 32).
- 52 In the present case, it is not disputed that the defendant has not taken the necessary steps within the meaning of the case-law of the Court, which might encourage the Commission to cooperate with it in order to overcome the difficulties which might be encountered when implementing the decision at issue and be involved in the satisfactory resolution of the issue. In particular, the defendant has not submitted the difficulties connected with recovery of the aid in question for consideration by the Commission within the prescribed period, nor has it requested that the Commission extend that period.
- 53 In the second place, in order to justify non-recovery of the aid in question prior to the lodging of the Commission's application, or the hearing before the Court, the defendant submits, first, that it was for TBG, as the public entity which granted that aid, to take the necessary steps to recover that aid and, secondly, that, pursuant to German law, aid granted on the basis of civil law rules can be recovered only in accordance with procedures provided for under civil law.

- 54 It must be noted in that regard that it is not only TBG which is liable for the recovery of the aid in question but also the public authorities in that Member State, each acting within its area of competence.
- 55 As for the Commission's argument concerning German law, it must be observed that the defendant has not claimed that the action taken was the only action envisageable in order to recover the aid in question and that there were no other measures to allow recovery within the period set in Article 3(2) of the decision at issue. In the event that civil law rules do not allow for the effective recovery of the aid in question, it may be necessary, in view of the circumstances of the case, for national rules to be left unapplied (see, to that effect, judgment in *Commission v France*, C-232/05, EU:C:2006:651, paragraph 53) and to have recourse to other measures, since such measures cannot be excluded on grounds relating to national law.
- 56 In the last place, it should be noted that, in accordance with the case-law of the Court relating to the application of the EU rules on State aid, Article 4(3) TEU also imposes an obligation of cooperation in good faith between the national courts, on the one hand, and the Commission and the European Union Courts, on the other, in the context of which national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under EU law and refrain from those which may jeopardise the attainment of the objectives of the Treaty (see, to that effect, judgment in *Mediaset*, EU:C:2014:71, paragraph 29 and the case-law cited).
- 57 It should also be observed that, as the Advocate General noted in point 91 of his Opinion, the requirements laid down by the Court in the judgments in *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* (C-143/88 and C-92/89, EU:C:1991:65) and *Atlanta Fruchthandelsgesellschaft and Others (I)* (C-465/93, EU:C:1995:369) are also applicable to actions seeking a stay of national proceedings for the recovery of aid, the recovery of which has been ordered by the Commission.
- 58 In the present case, the requirements laid down by that case-law have not been met, as may be seen from the fact that the Bundesgerichtshof, by order of 13 September 2012, set aside the decisions of the Landgericht Mühlhausen and the Thüringer Oberlandesgericht to suspend recovery proceedings, considering that those courts had not properly assessed the criteria laid down by the Court's case-law.
- 59 In the light of the foregoing considerations, it must be found that the delay in the implementation of the decision at issue is not justified. The defendant has failed to prove that it was absolutely impossible for it to implement appropriate measures to give full effect to that decision.
- 60 It must be observed that Article 288 TFEU, on which the Commission also bases its action, is a general provision whereas State aid is specifically governed by Article 108 TFEU and by Regulation No 659/1999 laying down detailed rules for the application of that article. There are therefore no grounds for holding that there has also been a failure to fulfil obligations under Article 288 TFEU. The same holds for the principle of effectiveness which forms part of Article 14 of that regulation.

- 61 Consequently, the Court holds that, by failing to take all necessary measures to recover from the beneficiary the aid in question which was the subject of the decision at issue, the Federal Republic of Germany has failed to fulfil its obligations under Article 108(2) TFEU, Article 14(3) of Regulation No 659/1999 and Articles 1 to 3 of that decision.

### **Costs**

- 62 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

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

- 1. Declares that, by failing to take all necessary measures to recover from the beneficiary the State aid which was the subject of Commission Decision 2011/471/EU of 14 December 2010 on State aid granted by Germany to the Biria group (C 38/05 (ex NN 52/04)), the Federal Republic of Germany has failed to fulfil its obligations under Article 108(2) TFEU, Article 14(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of [Article 108 TFEU], and Articles 1 to 3 of that decision;**
- 2. Orders the Federal Republic of Germany to pay the costs.**

[Signatures]