Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 13 February 2014[1]

Case C-527/12

European Commission
v

Federal Republic of Germany

(Action under Article 108(2) TFEU — State aid — Recovery of incompatible aid — Obligation as to result — Absolute impossibility — National proceedings — Right to effective judicial protection)

1. May the recovery of aid found incompatible with the internal market be rendered absolutely impossible because of the obligation to respect the right to effective judicial protection enjoyed by the recipient of that aid and, if so, in what circumstances and for how long?

2. That, in essence, is the main issue to be considered in order to give a ruling in the present action, which has been brought by the Commission against the Federal Republic of Germany for its alleged failure to recover incompatible aid granted to the Biria Group.

I – **Legal framework**

3. Article 14 of Regulation (EC) No 659/1999,[2] 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 … The Commission shall not require recovery of the aid if this would be contrary to a general principle of [EU] law.

…

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 [EU] law.'

1 — Original language: English.

2 — Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

4. Under Article 23(1) of Regulation No 659/1999:

'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]. …'

II – **Facts**

5. In 2001, Bike Systems GmbH & Co ('Bike Systems') received financing in the form of a 'silent participation' from gbb-Beteiligungs AG ('gbb'). That participation had not been notified to the Commission under the EU State aid rules.

6. Bike Systems has since been succeeded, first by MB System GmbH & Co KG ('MB System') and then by MB Immobilien Verwaltungs GmbH ('MB Immobilien'). All those companies are members of the Biria Group. Both Bike Systems and MB System manufactured bicycles until production ceased in 2005, when the sole company object was amended to become the management of real estate.

7. At the time when the aid was granted, gbb was a wholly-owned subsidiary of the Kreditanstalt für Wiederaufbau ('the KfW'), a German public law development bank. In 2003 gbb ceased its business activities and all of its assets were transferred to the Technologie-Beteiligungsgesellschaft mbH ('tbg'), which is also a wholly-owned subsidiary of the KfW.

8. Following a formal investigation into three alleged State aid measures, Commission Decision 2007/492/EC[3] ('the first Commission Decision') found the aid granted to Bike Systems in 2001 to be unlawful. MB System and MB Immobilien subsequently challenged Decision 2007/492 before the General Court. By judgment of 3 March 2010, the General Court annulled the decision on the ground that it had not been sufficiently motivated.[4] On 14 December 2010, the Commission adopted Decision 2011/471/EU ('the Commission Decision at issue'), explaining in more detail the reasons for its finding that the aid granted was incompatible with the internal market, and ordering recovery of that aid.[5] Again, MB System challenged the decision before the General Court. That court first refused a request by MB System for interim measures,[6] and later also upheld the Commission Decision at issue by judgment of 3 July 2013.[7]

9. The Federal Republic of Germany was to implement the Commission Decision at issue within four months of the date of notification.[8] To that end, tbg, acting on behalf of the Federal Republic of Germany, addressed a private law claim to MB System on 16 February 2007 seeking implementation of the first Commission decision. When MB System refused payment, tbg lodged an action on 10 April 2008 before the Landgericht Mühlhausen (Mühlhausen Regional Court) for recovery of the aid in question ('the national proceedings seeking recovery'). In addition to the first Commission Decision, that action is based on infringement of Article 108(3) TFEU for failure to notify the aid in question. In accordance with §134 of the Bürgerliches Gesetzbuch (BGB) (German Civil Code) and the established case-law of the German courts, a contract concluded in breach of Article 108 TFEU is void. That is why, in order to secure recovery of the aid in question, tbg was able to rely solely on an infringement of Article 108(3) TFEU. The action before the Landgericht Mühlhausen was thus not directly affected by the annulment of the first Commission Decision. The private law claim continues to exist regardless of whether or not a definitive Commission decision or order exists.

3 — Decision of 24 January 2007 on the State aid C 38/2005 implemented by Germany for the Biria Group (OJ 2007 L 183, p. 27).

4 — Joined Cases T-102/07 & T-120/07 *Freistaat Sachsen and Others* v *Commission* [2010] ECR II-585.

5 — Commission Decision of 14 December 2010 on State aid granted by Germany to the Biria Group (OJ 2011 L 195, p. 55).

6 — Order of 21 June 2011 in Case T-209/11 R *MB System* v *Commission*.

7 — Case T-209/11 *MB System* v *Commission* [2013] ECR.

8 — See Article 3(2) of Decision 2011/471.

10. Various provisional judgments and interim orders were made in the course of the national proceedings seeking recovery. On 26 November 2008, the Landgericht Mühlhausen handed down a provisionally enforceable judgment by default against MB System. On 19 December 2008, however, MB System appealed against that judgment. After MB System had provided security in the form of a bank guarantee, the Landgericht Mühlhausen suspended the seizure of MB System's property by order of 9 January 2009. In March 2009, in view of the case pending before the General Court at the time, the national court also suspended the national proceedings seeking recovery. Tbg brought further appeals against that decision, first before the Oberlandesgericht Jena (Jena Higher Regional Court) and then before the Bundesgerichtshof (Federal Supreme Court). As the action concerning Decision 2007/492 before the General Court had come to a close in the meantime, the Bundesgerichtshof found, on 16 September 2010,[9] that the appeal before it had become devoid of purpose and that the main proceedings could be resumed.

11. Accordingly, an application was lodged in March 2011 before the Amtsgericht Nordhausen (Nordhausen District Court) for the forcible seizure of MB System's property through the registration of a creditor's mortgage in the relevant entries in the Land Register. After the registration of the mortgages had been published, tbg applied on 21 July 2011 for the forced sale of MB System's property. To that end, the Amtsgericht Nordhausen ordered an expert's report to be drawn up regarding the market value of the properties in question. On 8 September 2011, however, MB System filed a counterclaim against the forced sale of its property. The claim was rejected as unfounded, whereupon MB System appealed before the Oberlandesgericht Jena. That appeal was withdrawn in May 2012.

12. The national proceedings seeking recovery before the Landgericht Mühlhausen were suspended for a second time on 30 March 2011. This was unsuccessfully appealed by tbg before the Oberlandesgericht Jena. A further appeal by tbg was finally allowed before the Bundesgerichtshof, which set aside the suspension by order of 13 September 2012.[10]

13. MB System's property was to be sold by public auction on 10 April 2013 but no bid was submitted on that occasion.

III – **Procedure before the Court and forms of order sought**

14. By its application, dated 20 November 2012, the Commission claims that the Court should:

— declare that, by failing to adopt within the prescribed period the measures necessary to comply with Commission Decision 2011/471/EU of 14 December 2010 concerning aid granted by Germany to the Biria Group, the Federal Republic of Germany has failed to fulfil its obligations under Articles 288(4) and 108(2) TFEU, under the principle of effectiveness, under Article 14(3) of Regulation No 659/1999, and under Articles 2 and 3 of Decision 2011/471;

— order the Federal Republic of Germany to pay the costs.

15. The Federal Republic of Germany contends that the Court should:

— dismiss the action;

— order the Commission to pay the costs.

9 — Decision of 16 September 2010, III ZB/18/10.

10 — Order of 13 September 2012, III ZB/3/12.

16. Both the German Government and the Commission presented oral argument at the hearing on 4 December 2013.

IV – **Analysis**

17. In their lengthy written submissions and at the hearing both parties developed several arguments in support of their respective claims. I will present those arguments in more detail when analysing their respective merits.

18. At this stage, suffice it to say that the Commission criticises the German Government for the fact that, within the period fixed in the Commission Decision at issue, the incompatible aid granted to the Biria Group had not been repaid. The German Government, for its part, denies the alleged infringements and argues that compliance with the Commission Decision at issue was achieved within that period. As a subsidiary argument, that government submits that any delay in achieving actual recovery was attributable to the fact that it was absolutely impossible to execute the Commission Decision at issue.

19. That said, it is important to point out that it is common ground between the parties that: (i) the aid recipient had not repaid the incompatible aid by the end of the period specified in the Commission Decision at issue; (ii) the aid had not been recovered by 4 December 2013, the date of the hearing in the present procedure; and (iii) the aid to be recovered amounts to EUR 651 007 plus interest.

20. I believe that, in order to give a ruling in the present action, the Court will need to take a position on a number of legal issues relating to the significance and the consequences of the Member States' obligation to comply with Commission decisions ordering the recovery of incompatible aid.

A – *What is the scope of the action under Article 108(2) TFEU?*

21. A preliminary point which, in my view, needs to be addressed concerns the scope of the present proceedings. In both their written and oral observations, the parties discuss at length whether the German authorities could have – and, as the case may be, should have – made use of their administrative powers to recover the aid illegally granted to the Biria Group.

22. In essence, the German Government argues that, within the German legal order, the form in which aid is granted determines the procedure for its recovery (theory of the *actus contrarius*). Consequently, aid awarded by means of private law contracts (such as the aid granted to the Biria Group) can only be recovered by means of private law proceedings. Conversely, that aid cannot be recovered through an administrative procedure since, in German law, there is no specific legal basis empowering public authorities to recover incompatible aid by means of an administrative act.

23. Although not formally raising a specific plea in that regard, the Commission contests the argument put forward by the German Government. The Commission maintains that, by virtue of the direct effect of Articles 108 and 288 TFEU and of Article 14 of Regulation No 659/1999, German authorities have sufficient legal bases for those purposes. According to the Commission, that view is supported by two decisions handed down, respectively, by the Oberverwaltungsgericht Berlin-Brandeburg (Berlin-Brandenburg Higher Administrative Court)[11] and by the Verwaltungsgericht Trier (Trier Administrative Court).[12]

11 — Judgment of 7 November 2005, 8 S 93/05.

12 — Judgment of 8 March 2013, 1 L 83/13. For the sake of completeness, it must be pointed out that the German Government argues that all these decisions constitute isolated cases that have not been endorsed by its highest courts.

24. These arguments call for a brief explanation of the differences between a procedure brought under Article 108(2) TFEU and a procedure based on Article 258 TFEU.

25. Article 108(2) TFEU explicitly states that the procedure thereunder is in derogation from the provisions laid down in Articles 258 and 259 TFEU. In fact, as the Court has observed, the procedure under what is now Article 108(2) TFEU is no more than a variant of the action for a declaration of failure to fulfil Treaty obligations, specifically adapted to the specific problems which State aid poses for competition within the common market. [13]

26. Importantly, the pre-litigation stage of the procedure, which is a necessary step in standard infringement proceedings, is not required for an action pursuant to Article 108(2) TFEU. Under that provision, access to the Court is quicker and easier. [14] The reason for this is that the formal exchange of views with the Member State and (as the case may be) with other interested parties has already taken place under the administrative procedure which led to the adoption of the relevant Commission decision. [15]

27. Accordingly, the Court has made it clear that, because of the special characteristics of the procedure in question, the conduct of a Member State against which an action pursuant to what is now Article 108(2) TFEU is brought must be assessed solely in the light of the obligations imposed on that Member State by the relevant Commission decision. [16]

28. For those reasons, I take the view that a procedure based on Article 108(2) TFEU can only be concerned with the question whether or not, with regard to a specific Commission decision, the Member State concerned has complied with the obligation to abolish or alter incompatible aid within the period specified. It is thus the Commission decision which delimits the ultimate periphery of the procedure under Article 108(2) TFEU.

29. It follows that no other claim can be brought under that derogatory procedural provision. In particular, pleas of more general scope or of a horizontal nature are inadmissible in the context of an Article 108(2) TFEU procedure. For example, the issue of whether the German legal rules currently in force are effectively unsuitable for ensuring the prompt and effective recovery of incompatible aid in certain cases (such as when aid is granted through private law contracts), or whether there is a structural or systemic infringement of the State aid rules on the part of the German authorities, are matters which – if the case arose – could be dealt with solely within the framework of a standard infringement procedure under Article 258 TFEU.

30. This convinces me that it is not the role of the Court to interpret German laws so as to rule on whether German public authorities are, or should be, empowered to adopt administrative acts in order to recover incompatible aid granted through civil law contracts. I therefore propose that the Court disregard all arguments touching on those matters and take a decision only on whether there was a breach of the obligations laid down in the Commission Decision at issue.

B – *Do Articles 288(4) and 108(2) TFEU impose an obligation as to means or an obligation as to result?*

31. The first important issue raised in the present case is whether the obligation under Articles 288(4) and 108(2) TFEU to recover incompatible aid is an obligation as to the means to be used or the result to be achieved.

13 — Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 23.

14 — The Court itself described the action under what is now Article 258 TFEU as a '*more complicated procedure*' in Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 9.

15 — See Opinion of Advocate General Mayras in Case 70/72 *Commission* v *Germany* [1973] ECR 813, p. 835.

16 — Case 213/85 *Commission* v *Netherlands* [1988] ECR 281, paragraphs 7 and 8.

32. The German Government contends that, within the four months specified in the Commission Decision at issue, the public authorities had adopted all the measures necessary to ensure effective recovery of the aid in question. According to the German Government, the key consideration under Article 14 of Regulation No 659/1999 is not whether recovery is actually achieved, but whether the measures taken have the capacity *in abstracto* to ensure compliance.

33. Like the Commission, I cannot see any support for the German Government's arguments, either in the text of the relevant EU provisions or in the Court's case-law.

34. First, it seems quite clear to me that the wording of Regulation No 659/1999 suggests an obligation as to result, not means. A Commission decision would not be executed 'immediately and effectively', and the recovery would not be effected 'without delay', as required under that legal instrument, if it were enough for a Member State merely to set in motion the process of recovery in order to ensure that, at some point in the future, actual repayment takes place.

35. The Court's case-law lends further support to such an interpretation. According to well-established jurisprudence, a Member State which is the addressee of a recovery decision is free to choose the means of fulfilling the obligation resulting from that decision, in accordance with its own internal rules,[17] provided that the measures chosen do not adversely affect the scope and effectiveness of EU law.[18] This implies that measures taken by the Member State must lead to the actual recovery of the sums owed.[19]

36. Importantly, the Court has already clarified that recovery must be made within the time fixed in the Commission decision adopted under Article 108(1) TFEU or, where applicable, within the time subsequently set by the Commission. As a matter of principle, a late recovery – that is to say, recovery after the deadlines prescribed by the Commission – does not satisfy the requirements laid down in the Treaties.[20]

37. In its recent judgment in *Commission* v *Slovakia*, the Court dismissed, for those very reasons, an argument similar to that put forward by the German Government in the present proceedings.[21]

38. I therefore take the view that Articles 288(4) and 108(2) TFEU impose an obligation as to result upon a Member State to which a recovery decision is addressed. That being so, the Member State does not achieve effective compliance with the Commission decision until the incompatible aid has been repaid in its entirety to the State by the aid recipient.

39. I would add that a Member State which considers that the time allowed by the Commission is excessively short, or which faces difficulties in recovering the aid, may always ask the Commission for one (or more) extension(s). To that end, the State must explain precisely the reasons for its request and, where appropriate, submit evidence in support of its contentions, so as to enable the

17 — See judgment of 20 October 2011 in Case C-549/09 *Commission* v *France*, paragraph 29, and Case C-344/12 *Commission* v *Italy* [2013] ECR, paragraph 40.

18 — See Case C-209/00 *Commission* v *Germany* [2002] ECR I-11695, paragraph 34, and Case C-507/08 *Commission* v *Slovakia* [2010] ECR I-13489, paragraph 51.

19 — See, to that effect, judgment of 1 June 2006 in Case C-207/05 *Commission* v *Italy*, paragraphs 36 and 37, and Case C-331/09 *Commission* v *Poland* [2011] ECR I-2933, paragraph 54 et seq.

20 — See, to that effect, judgment of 14 February 2008 in Case C-419/06 *Commission* v *Greece*, paragraphs 38 and 61, and judgment of 13 October 2011 in Case C-454/09 *Commission* v *Italy*, paragraph 37.

21 — *Commission* v *Slovakia*, paragraphs 47 to 52.

Commission to take an informed decision.[22] In such a case, in the light of the duty of cooperation enshrined in Article 4(3) TEU, the Commission would be under an obligation to examine the request of the Member State and, to the extent possible, assist that Member State to overcome the existing difficulties by granting the requested extension, should the relevant conditions be met.[23]

40. If the Member State believes that, despite its exchange of views with the Commission, the final deadline fixed by that institution is still unreasonable, and objectively impossible to meet, it can challenge the deadline before the EU Courts.

41. In this regard, I would point out that, in the context of an Article 108(2) TFEU procedure, the period laid down in a Commission decision ordering recovery of aid has the same function as the period set in a reasoned opinion under Article 258 TFEU.[24] This means, to my mind, that the Court's case-law on the reasonableness of the period specified in reasoned opinions should apply, *mutatis mutandis*, to Commission decisions taken pursuant to Article 108 TFEU. According to settled case-law on what is now Article 258 TFEU, the Commission must afford Member States a reasonable period in order to comply with reasoned opinions.[25] The legality of such a period of time is subject to review by the Court.[26] In order to determine whether the period granted is reasonable, the Court must take into account all the circumstances of the individual case.[27]

42. From the above I would therefore draw the conclusion that the period laid down in a Commission decision can be extended, or it can even be challenged in court by the Member State concerned. As a matter of principle, however, it is within that period, or the period subsequently fixed, that actual recovery must take place.

C – *May national proceedings render the recovery of aid absolutely impossible?*

43. Having reached the interim conclusion that aid must imperatively be recovered within the period prescribed by the Commission, and since the parties agree that, within the period fixed in the Commission Decision at issue, the aid had not been repaid, it must be examined whether that lack of compliance can be justified.

44. The German Government claims that it cannot be held responsible for the delay which came about because the aid recipient opposed recovery before domestic courts. In so doing, the Biria Group simply made use of its constitutional right to effective judicial protection. Furthermore, that government also contends that tbg did all it could to execute the Commission Decision at issue and cannot be criticised for the actions of the German courts that have wrongly applied EU State aid rules, thereby delaying the recovery procedure.

45. In substance, the arguments put forward by the German Government raise the question whether compliance with a Commission decision may be rendered absolutely impossible as a result of the aid recipients having recourse to national proceedings.

22 — See Case C-263/12 *Commission* v *Greece* [2013] ECR, paragraphs 30 to 32.

23 — See, to that effect, Case C-214/07 *Commission* v *France* [2008] ECR I-8357, paragraph 45 and case-law cited.

24 — See, especially, Case C-529/09 *Commission* v *Spain* [2013] ECR, paragraphs 70 and 71.

25 — See, among many, Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraph 65, and Case C-328/96 *Commission* v *Austria* [1999] ECR I-7479, paragraph 51.

26 — See, in particular, Case 28/81 *Commission* v *Italy* [1981] ECR 2577, paragraph 6.

27 — See the case-law cited in footnote 25.

46. In the light of the above, I will first examine the contours of the concept of 'absolute impossibility' and explain the circumstances in which such a defence could, in principle, be acceptable in a case concerning State aid recovery. I will then turn to the specific characteristics of the case under consideration here.

1. The concept of 'absolute impossibility'

47. According to consistent case-law, the only defence available to a Member State in opposing an infringement action brought by the Commission under what is now Article 108(2) TFEU is to plead that it was absolutely impossible for it to implement the decision in question. [28]

48. The concept of 'absolute impossibility', often referred to by the French term '*force majeure*', must generally be understood 'in the sense of abnormal and unforeseeable circumstances, outside the control of the party relying thereupon, the consequences of which, in spite of the exercise of all due care, could not have been avoided'. [29]

49. The main constituent elements of the concept of 'absolute impossibility' are thus, on the one hand, the occurrence of an event which cannot be influenced by the person who wishes to invoke this defence (objective element) and, on the other hand, the exercise of all reasonable efforts by that person to avoid the consequences of the event in question (subjective element). [30]

50. In my view, a defence based on absolute impossibility can, in a case like this, be put forward in two sets of circumstances.

51. The first set of circumstances involves *factual* impossibility: that is to say, when the actual recovery of the sum to be repaid is objectively and inevitably unachievable. This is typically the case where the aid recipient is a company that no longer exists at the time when the Commission adopts its decision. In that situation, there is no entity from which repayment can be demanded; nor are there any assets or monies to seize. [31] That is the case, provided that no other company has – *de facto* or *de jure* – succeeded the company wound up, with the result that it continues to benefit from the incompatible aid. [32]

52. The second set of circumstances involves *legal* impossibility. As Article 14 of Regulation No 659/1999 states: '[t]he Commission shall not require recovery of the aid if this would be contrary to a general principle of [EU] law'. [33]

53. In both situations, the impossibility may be only *temporary*, which means that it can be overcome after a certain period of time, or it can be *lasting*, which means that it will permanently prevent compliance.

28 — See, notably, Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031, paragraph 21, and Case C-441/06 *Commission* v *France* [2007] ECR I-8887, paragraph 27.

29 — Case C-105/02 *Commission* v *Germany* [2006] ECR I-9659, paragraph 89, and Case C-377/03 *Commission* v *Belgium* [2006] ECR I-9733, paragraph 95.

30 — See, to that effect, the Opinion of Advocate General Kokott in Case C-334/08 *Commission* v *Italy* [2010] ECR I-6869, points 21 to 24.

31 — See, inter alia, Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031, paragraph 37, and Case C-214/07 *Commission* v *France*, paragraph 64.

32 — See, for example, Case C-610/10 *Commission* v *Spain* [2012] ECR, paragraph 106, and Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 86. See also the Opinion of Advocate General Van Gerven in Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, points 22 and 23.

33 — That principle had already been established by the Court in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 33, and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25. For the sake of completeness, it must be mentioned that the Court in those instances applied that principle restrictively. For a critical assessment, see Gambaro, E., and Papi Rossi, A., 'Recovery of Unlawful and Incompatible Aid', in Santa Maria, A. (ed.), *Competition and State Aid – An Analysis of the EC Practice*, Kluwer Law International, Alphen aan den Rhijn: 2007, pp. 183 to 220.

54. The general principle of EU law to which the German Government refers in the present case is that of effective judicial protection.

55. In that respect, I would call to mind that, according to well-established case-law, in implementing EU law, national courts must respect the requirements of effective judicial protection for the rights which individuals derive from EU law, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.[34] This is especially true – I believe – when the implementation of EU law affects the legal status of individuals in a negative way.

56. On the other hand, however, I must also observe that Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition,[35] annexed to the Treaty of Lisbon, is to include a system ensuring that competition is not distorted.

57. Articles 107 and 108 TFEU are some of the competition rules referred to in Article 3(1)(b) TFEU as being necessary for the functioning of that internal market. The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings or consumers, thereby ensuring the well-being of the European Union.[36]

58. Admittedly, there is some inherent tension between the right of aid recipients to challenge, before a court, acts which may be detrimental to them, and the right of their competitors to have a situation of legality and a level playing field re-established as soon as possible.

59. Since both these rights are vital to a Union based on the rule of law and one of whose cornerstones is the internal market, I am of the view that neither of them should be unconditionally sacrificed for the sake of the other.

60. For this reason, I do not find it inconceivable that the need to ensure effective judicial protection for aid recipients may, in certain circumstances, justify the non-recovery of aid on grounds of *legal* absolute impossibility.

61. This begs the following question: under what conditions and for how long can a Member State validly invoke the existence of judicial proceedings at national level as justification for its failure to comply?

2. Requirements for ‘absolute impossibility’

62. The existence of judicial proceedings before domestic courts can only be considered to constitute a case of absolute impossibility in so far as the two requirements mentioned in point 49 above are satisfied.

63. As regards the first requirement – that the event preventing recovery must not have been influenced by the person invoking this defence – it seems to me that this may often be fulfilled.

34 — See, for example, Case C-472/11 *Banif Plus Bank* [2013] ECR, paragraph 29, and Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraphs 50 and 54.

35 — OJ 2010 C 83, p. 309.

36 — See, to that effect, Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 42, and Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-527, paragraphs 20 to 22.

64. Obviously, Member States can do nothing to stop an aid recipient from resisting recovery in the context of judicial proceedings instituted by the public authorities with a view to enforcing recovery. Nor, when the public administration proceeds by means of administrative acts, can they bar any possible appeal by the aid recipient against those acts. Thus, judicial proceedings against recovery actions can never be excluded *a priori*.

65. That is true unless it is the public authorities themselves who are responsible for the litigation at national level. They may have acted without the requisite degree of thoroughness: for example, they may have miscalculated the interest due or made some other mistake in the course of the recovery procedure.

66. The possibility of litigation therefore seems to be something that, at least in most cases, cannot be influenced or controlled by the Member State's authorities.

67. On the other hand, the second requirement for absolute impossibility appears to me to be more difficult to meet.

68. A Member State putting forward a plea of absolute impossibility must show that its authorities have made every reasonable effort to avoid or minimise the consequences of the event in question. The Court has made it clear that this defence does not apply to a situation in which, objectively, a diligent and prudent person would have been able to take the necessary steps to avoid the negative consequences flowing from the occurrence of the unforeseen event. [37]

69. In that regard, I believe that the degree of diligence and prudence which must be demonstrated by a Member State can, in general, be viewed as a function of the probability that the unforeseen event may occur: the more likely that the event will occur, the more significant the *ex ante* efforts required of the public administration.

70. With regard to the recovery of State aid, I believe it to be obvious that Member States' authorities should anticipate that some aid recipients may resist recovery by means of judicial proceedings. It follows that, to the extent that the occurrence of litigation is not unexpected, Member States ought to show a correspondingly high level of diligence and prudence. [38]

71. That diligence and prudence should be reflected, in the first place, when choosing, from the arsenal of possibilities open to them, the procedure to be followed in order to secure recovery in a specific case. Although administrative authorities certainly enjoy some discretion in that regard, that discretion is not unlimited.

72. The authorities are under an obligation, I believe, to choose a procedure that, from the beginning, appears likely to ensure the prompt and effective execution of the Commission decision in question, even in the face of resistance from the aid recipient.

73. It cannot be excluded that this may, at times, involve recourse to administrative measures. In fact, there may be circumstances, however exceptional they may be, in which the public authorities need to step in, in order to ensure prompt compliance with EU State aid rules. For example, what happens if the entity that granted the aid by means of a private law contract has gone into liquidation and there is no legal successor for it? Would that mean that some incompatible aid may never be recoverable, in so far as there is no longer an entity with title to act before the civil or commercial courts having jurisdiction?

37 — See, by analogy, Case C-325/03 P *Zuazaga Meabe* v *OHIM* [2005] ECR I-403, paragraph 25, and Case 209/83 *Ferriera Valsabbia* v *Commission* [1984] ECR 3089, paragraph 22.

38 — See, to that effect, Case C-297/08 *Commission* v *Italy* [2010] ECR I-1749, paragraphs 80 to 86.

74. Obviously, that would not be a tenable interpretation of the EU rules. The Court has always dismissed Member States' arguments invoking the absence of a proper legal basis in national law for prompt recovery of incompatible aid. [39] Indeed, if a Member State's domestic legal order lacks the necessary mechanisms to enable it to fulfil its EU law obligations, it is for the Member State to put them in place, as a consequence of the binding nature of decisions passed under Article 288 TFEU. [40] Likewise, the Court has consistently held that domestic courts have to refrain from applying national rules which might impede effective recovery. [41] The Court also has never accepted that the mere fact that national procedures are complex and time-consuming may be enough to justify a delay in the execution of a Commission decision. [42]

75. In addition to choosing the appropriate procedure for recovering aid, the administrative authorities are under an obligation to demonstrate diligence and prudence in their attitude while the recovery process is ongoing.

76. That means, for example, that the authorities should, when confronted with opposition or delays in judicial proceedings, consider resorting to accelerated proceedings or procedures for interim measures. In this context, I would call to mind that, according to consistent case-law, a national court seised of a dispute governed by EU law must be able to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under EU law. [43]

77. That also implies that the authorities may need to act through procedures other than those initially chosen for recovery, when the latter prove impossible, ineffective or too lengthy. [44] As Advocate General Sharpston has convincingly stated, the defence of absolute impossibility attaches to the *result* to be achieved: the recovery of the unlawful aid. If it could be invoked in respect of the *manner* in which recovery were effected, it would be all too easy for a Member State to choose a process for recovering the unlawful aid that proved impossible and then claim that it was relieved of its obligation to recover the aid. [45]

78. To conclude on this point, the question whether the requirement of diligence and prudence is fulfilled by a Member State's authorities in a given case must be evaluated by the Court on a case-by-case basis. Finally, it is hardly necessary in this context to point out that the onus of proving that the requirements for a case of absolute impossibility are satisfied lies with the Member State invoking that defence. [46]

3. Temporal dimension

79. Having explained the circumstances in which a Member State can validly invoke absolute impossibility, I think that there is an additional aspect which deserves attention. It concerns the period of time in which such a defence could be valid.

80. It seems to me that, by virtue of the principle of effective judicial protection, national courts must be able to grant aid recipients a reasonable period of time in which to present their defence. Moreover, those courts should be able to avail themselves of the time necessary to perform their judicial function in a proper manner.

39 — See, for example, Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraphs 56 and 60.

40 — See, to that effect, the Opinion of Advocate General Sharpston in Case C-214/07 *Commission* v *France*, point 76.

41 — See to that effect, for example, Case C-232/05 *Commission* v *France* [2006] ECR I-10071, paragraph 53.

42 — See, for example, Case C-353/12 *Commission* v *Italy*, paragraph 41.

43 — See Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 75, and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 23.

44 — See, for example, Case C-214/07 *Commission* v *France*, paragraph 56.

45 — See the Opinion of Advocate General Sharpston in Case C-214/07 *Commission* v *France*, point 44.

46 — See, among others, *Commission* v *Slovakia*, paragraphs 61 to 64.

81. It is not realistic, however, to believe that national courts will always be able to reach a final decision in such cases within the period laid down in the corresponding Commission decisions (usually, four months). The overall length of judicial proceedings may vary according to several different factors.

82. At the same time, however, I also see a need to preserve the *effet utile* of the Commission decisions. Delaying strategies practised by aid recipients, or inertia or carelessness on the part of national administrations and domestic courts, should not prevail over the legitimate right of companies adversely affected by the incompatible aid to have the distortion of competition eliminated once and for all.

83. Striking the right balance between those two competing interests is no easy task.

84. At this juncture, I would call to mind that the Court has made it clear in a number of cases that an argument based on absolute impossibility can only be accepted for the time needed 'for an administration exercising a normal degree of diligence to put an end to the [unforeseeable event] which has arisen for reasons outside its control'.[47] These considerations are, in my view, applicable *mutatis mutandis* to the activities of the domestic courts. I am accordingly of the opinion that a delay in recovering incompatible aid because of pending national judicial proceedings can be excused only temporarily: that is to say, when that extra period corresponds to the minimum time necessary for a court exercising a reasonable degree of diligence to adjudicate in the case before it.

85. In this context, it is scarcely necessary to point out that a delay occasioned by the misapplication by those courts of the pertinent EU rules cannot be justified.[48] A diligent court would, in fact, apply those rules on the basis of settled case-law and, in the event of doubt, refer questions of interpretation or validity to the Court under the preliminary ruling procedure.

86. That said, I must admit that it is impossible to identify, *a priori*, an additional length of time which could be considered acceptable in all circumstances, or parameters precise and specific enough to enable this Court to calculate, in each case, the appropriate period. The question whether a delay is justifiable can only be determined on a case-by-case basis.

87. Yet, it seems to me that, in this respect, two main situations can be distinguished, according to the type of claim introduced by the aid recipient before the national courts.

88. On the one hand, a company may, directly or indirectly, call into question the lawfulness of the Commission decision being implemented by the national authorities. On the other hand, it may simply challenge the steps taken to effect recovery, without calling into question the lawfulness of the Commission decision. Below, I will examine these two situations in turn.

47 — Case C-297/08 *Commission* v *Italy*, paragraph 48 and case-law cited. See also the Opinion of Advocate General Jacobs in Case C-236/99 *Commission* v *Belgium* [2000] ECR I-5657, points 20 and 25.

48 — According to settled case-law, a Member State is not relieved of liability if a breach of its EU obligations is attributable, in whole or in part, to errors of interpretation or application of the relevant EU rules by its domestic courts. See, in particular, Opinion 1/2009 [2011] ECR I-1137, paragraph 87, and judgment of 12 November 2009 in Case C-154/08 *Commission* v *Spain*. A number of recent decisions of the Court in the field of State aid control illustrate this point well. See, especially, judgment of 6 October 2011 in Case C-302/09 *Commission* v *Italy*; Case C-304/09 *Commission* v *Italy*; and Case C-243/10 *Commission* v *Italy* [2012] ECR.

a) Calling into question the lawfulness of the Commission decision

89. It should be recalled that Commission decisions enjoy a presumption of lawfulness and, as such, produce legal effects until such time as they are withdrawn, annulled or declared invalid following a reference for a preliminary ruling or a plea of illegality. [49] Rulings declaring Commission decisions to be unlawful are reserved to the EU Courts. National courts entertaining doubts in that respect must make a preliminary reference to the Court. [50] Moreover, the mere fact that a decision is being challenged before the EU Courts, does not, by itself, allow national courts to suspend its validity. In principle, such suspension should be the subject of an application to the EU Courts, lodged by parties with the requisite standing, pursuant to Articles 278 and 279 TFEU.

90. Exceptionally, however, suspension of a Commission decision may also be sought before national courts. The Court has consistently stated that national courts are allowed to adopt suspension measures with regard to EU acts only when the conditions laid down in the *Zuckerfabrik* case-law [51] are met, namely: (i) the national court must entertain serious doubts as to the validity of the EU measure and, if the validity of the contested measure is not already in issue before the Court of Justice, that court must itself refer the question to the Court; (ii) there must be urgency, in that the interim relief must be necessary to avoid serious and irreparable damage being caused to the party seeking the relief; (iii) the national court must take due account of the interests of the European Union; and (iv) in its assessment of all those conditions, the national court must comply with any decisions of the EU Courts on the lawfulness of the EU measure or on an application for provisional measures seeking similar interim relief at EU level.

91. Importantly, the Court has also clarified that, in the context of State aid procedures, the requirements laid down in the *Zuckerfabrik* case-law are also applicable to actions seeking a stay of proceedings in which the national measure for recovery of the unlawful aid is challenged. [52] Indeed, challenging recovery measures on the premiss that they are implementing an invalid Commission decision is tantamount to directly challenging that decision.

92. Thus, where the abovementioned requirements are met, the national authorities are obviously obliged to respect any interim measures adopted by the national court and, accordingly, it might be *legally* impossible for them to proceed with recovery.

93. However, such a situation of impossibility lasts only as long as the EU Courts have not taken a decision in the proceedings pending before them. Indeed, if the EU Courts confirm the lawfulness of the Commission decision, the domestic courts must draw the necessary inferences from such a ruling. Decisions taken by the Commission pursuant to what is now Article 108 TFEU which have become final *vis-à-vis* the aid recipient are binding upon national courts. [53] Those courts are required, under Article 14(3) of Regulation No 659/1999, to ensure that the decision ordering recovery of the unlawful aid is fully effective and achieves an outcome consistent with the objective pursued by that decision. [54]

49 — See Case C-475/01 *Commission* v *Greece* [2004] ECR I-8923, paragraph 18 and case-law cited.

50 — Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraphs 9 to 18, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraphs 27 to 32.

51 — 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.

52 — Case C-304/09 *Commission* v *Italy* [2010] ECR I-13903, paragraph 47.

53 — Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 26.

54 — Case C-210/09 *Scott and Kimberly Clark* [2010] ECR I-4613, paragraph 29.

94. The same is true of any decision adopted by an EU institution which has not been challenged by its addressee within the time-limits laid down in the sixth paragraph of Article 263 TFEU. The Court has in fact held that it is not possible for a State aid recipient who could undoubtedly have challenged the Commission decision before the EU Courts, but who allowed the mandatory deadline to pass, to call into question the lawfulness of that decision before the national courts in an action challenging the measures taken by the national authorities in implementation of that decision. [55]

95. On the basis of the above, I would conclude that when an aid recipient is, directly or indirectly, calling into question before domestic courts the lawfulness of a Commission decision ordering recovery, a delay in the recovery process is acceptable only if it represents the minimum time that a diligent court would need to verify whether the requirements of the *Zuckerfabrik* case-law are fulfilled. If that is the case, a defence based on absolute impossibility may be accepted and thereby justify the delay, but only as long as those requirements continue to be fulfilled. If that is not the case, no additional delay is, for me, acceptable.

b) Not calling into question the lawfulness of the Commission decision

96. There may be cases, on the other hand, where the aid recipient is not, directly or indirectly, calling into question the lawfulness of the Commission decision. That may be so in a variety of circumstances.

97. First, that situation may arise where the Commission takes a decision on an aid scheme and does not identify all the aid beneficiaries, or omits to quantify the amount of the aid. In such circumstances, a company subject to recovery measures may argue, before domestic courts, that it does not fulfil the criteria for identifying the aid beneficiaries, or that, on application of the parameters laid down by the Commission, the amount of aid to be repaid is, in its case, zero or lower than that claimed by the State. Second, it could also be the case that the aid recipient is only contesting the calculation of interest due on the aid to be repaid. Lastly, a company may be merely contesting the *quomodo* of recovery. Since this aspect is in principle governed by the principle of procedural autonomy, it is possible that an aid recipient may oppose only the manner in which the Commission decision is being executed at national level.

98. In the light of all these factors, it cannot be excluded that there may be cases in which even a diligent court may need more than four months to settle the dispute.

99. However, I am of the view that, by virtue of the principle of sincere cooperation, domestic courts cannot examine the claims put forward by the aid recipients without taking into account the interests of the European Union in having the existing distortion of competition eliminated. [56]

100. In fact, I believe that the consideration set out above concerning the need to reconcile the aid recipients' right to effective judicial protection and the right of their competitors to the elimination of all distortion of competition brought about by the illegal aid is equally valid for the domestic courts.

55 — See, inter alia, *TWD Textilwerke Deggendorf*, paragraphs 13, 17 and 20, and Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, paragraphs 34 and 35.

56 — See, by analogy, *Atlanta Fruchthandelsgesellschaft and Others (I)*, paragraphs 28 and 29, and 42 to 45.

101. Indeed, the Court has stated that national courts also have certain duties *vis-à-vis* individuals whose interests may be harmed by the granting of illegal aid. [57] In particular, the Court has pointed out in a number of recent cases that one of the tasks conferred on national courts in the field of State aid control is precisely that of pronouncing measures appropriate for remedying the implementation of unlawful aid, so that the aid will not continue to be at the free disposal of the recipient during the period remaining before the Commission makes its decision. [58]

102. To my mind, the Court's findings seem all the more valid once there is a Commission decision which is final.

103. Although it is true that those considerations were developed by the Court in cases concerning national proceedings initiated by companies purportedly harmed by the granting of illegal aid, I do not see why they would not also be relevant in the context of actions initiated by aid recipients in order to halt or delay recovery of such aid.

104. On that basis, I take the view that when a national court is seised in proceedings which, because of their duration, may delay compliance with a Commission decision, thereby prolonging distortion of competition in the internal market, that court should duly take into account the interests of the individuals which might still suffer harm because of that delay. In particular, a diligent national court would, in my view, consider whether it would be possible, through the adoption of interim measures, to secure at least partial or temporary compliance.

105. While safeguarding the interests of the European Union as a whole, that would allow the national court to have at its disposal all the time needed to adjudicate the dispute.

106. As mentioned above, a request to that effect should, in my view, be made as a matter of course by the public authorities party to the domestic proceedings. [59] However, I think that domestic courts also have jurisdiction, where appropriate, to examine such an option *ex officio*.

107. It is against those principles that I will now assess the merits of the plea of absolute impossibility submitted by the German Government.

4. Appraisal of the plea

108. At the outset, I must say that I am not convinced by the Commission's arguments alleging lack of diligence in the choice made by the German authorities in 2007 as to how to recover the aid in question. In my view, there is nothing in the file to indicate that the procedure chosen was, *a priori*, unsuitable for achieving that objective, or that an administrative act would have been certain to result in a more speedy recovery.

109. Conversely, however, I find that, in the circumstances of the case, the German authorities can be criticised for a certain lack of diligence and promptness in the subsequent process.

110. In the first place, as mentioned above, it is uncontested that the incompatible aid granted to the Biria Group had not been repaid by the date of the hearing, which was held around two and a half years after the end of the period laid down in the Commission Decision at issue.

57 — See, especially, Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon ('FNCE')* [1991] ECR I-5505, paragraphs 11 and 12, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 39 and 40.

58 — See Case C-284/12 *Deutsche Lufthansa* [2013] ECR, paragraph 31 and case-law cited.

59 — See paragraph 76 above.

111. The fact that such a significant length of time elapsed after the end of that period, without any recovery, appears in itself to be an indication that the German authorities may not have done all they could to comply with the Commission Decision at issue as soon as possible. [60]

112. I am prepared to accept that, to the extent that the recovery involved a forced sale of assets, some additional time was genuinely required for the national authorities to complete all the necessary procedures. Likewise, I can agree that the fact that no bid was submitted at the first auction cannot be imputed to the German authorities.

113. Yet, it is clear to me that that auction should have taken place much earlier and not over two years after the Commission Decision at issue was adopted. If the forced sales procedure had progressed more swiftly, the German authorities would have been able promptly to request liquidation of the company when no suitable bidder was found. [61] Thus further deterioration of the aid recipient's financial situation could have been avoided.

114. In the second place, I observe that the German authorities never asked the Commission for an extension or prorogation of the deadline laid down in the Commission Decision at issue. They merely informed the Commission of the *status* of the recovery process and of the difficulties they had encountered in that context. Moreover, against that background, it is significant that the authorities also did not propose to the Commission any alternative course of action to try to overcome those difficulties and, as a consequence, to be able to execute the decision more swiftly. [62]

115. In the third place, the German Government admits that, despite the fact that it was possible to do so, the public authorities never requested *interim measures* under which the incompatible aid could have been diverted from the beneficiary's assets for the remainder of the domestic proceedings.

116. In that regard, the German Government argues that this was unnecessary, since tbg was already provisionally entitled to enforce recovery, in accordance with the judgment by default handed down by the Landgericht Mühlhausen on 26 November 2008. However, as the Commission correctly pointed out, that entitlement could be suspended against provision of a security. And that is precisely what happened, as the Landgericht Mühlhausen actually suspended the effects of the judgment by default, authorising the Biria Group to provide the security payment in the form of a personal guarantee for that purpose.

117. On that point, it should be noted that – contrary to the assertions of the German Government – the mere provision of a personal guarantee, despite entailing some costs for the aid recipient, does not produce the same effect in terms of neutralising the aid as the placement of the full amount of the aid in a blocked account [63] (given that the full amount of the aid remains at the disposal of the aid recipient). [64] In fact, as the Bundesgerichtshof correctly pointed out in its decision of 13 September 2012, it is the latter measure that the Landgericht Mühlhausen should have adopted.

60 — See, to that effect, Case C-411/12 *Commission* v *Italy* [2013] ECR, paragraph 35, and judgment of 14 July 2011 in Case C-303/09 *Commission* v *Italy*, paragraph 32.

61 — It is settled case-law that registration of the liability relating to the repayment of incompatible aid in the schedule of liabilities of a company subject to liquidation procedures is an acceptable means of achieving recovery (see, for example, Case C-610/10 *Commission* v *Spain* [2012] ECR, paragraph 72 and case-law cited).

62 — According to settled case-law, the condition that it must 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 in question 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, among many, Case C-305/09 *Commission* v *Italy* [2011] ECR I-3225, paragraph 33 and case-law cited).

63 — See Case C-1/09 *CELF and Minister of Culture and Communication* [2010] ECR I-2099, paragraph 37.

64 — See, to that effect, paragraph 70 of the Commission Notice entitled 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid' (OJ 2007 C 272, p. 4).

118. In the fourth place, it does not seem to me that the public authorities always acted as promptly as they should have, when it is recalled that the time allowed for recovery under the Commission Decision at issue was really somewhat brief (four months). For example, tbg did not introduce a request for the enforced recovery of MB System's debt until three months after the Commission Decision at issue was adopted. By then, three quarters of the period granted for complying with the Commission Decision at issue had already lapsed.

119. In the fifth and final place, the German Government itself conceded that considerable delay had accrued because of a number of erroneous decisions arrived at by the domestic courts before which the Biria Group had brought proceedings to oppose recovery.

120. In this context, I note that, before the national courts, the Biria Group is also calling into question the lawfulness of the Commission Decision at issue. Yet, it appears from the case-file that the recovery procedure was suspended on at least two occasions by the Landgericht Mühlhausen merely because the Biria Group had initiated proceedings before the EU Courts against the Commission Decisions in the present case. No real evaluation of the *Zuckerfabrik* criteria was carried out by that court, as is apparent from the Bundesgerichthof's decision of 13 September 2012 annulling the suspension orders of the Landgericht Mühlhausen of 30 March 2011 and the Oberlandesgericht Jena of 28 December 2011.

121. In any event, it is clear that those requirements could no longer be fulfilled after 21 June 2011, when the President of the General Court dismissed MB System's application for suspension of operation of the Commission Decision at issue. [65]

122. Admittedly, it is true that the Order of the President of the General Court ('the Order') contains some infelicitous wording, in that it seems to imply that, in order to obtain interim protection before the General Court, MB System should have proved that no effective legal remedies were available within the German legal order. [66] First, that reasoning seems to confuse the rule with the exception. It is clear to me that, when a party has standing before the EU Courts and has exercised its right by bringing an action for the annulment of a Commission decision, the 'natural judge' to decide whether operation of that decision should be suspended is the EU Court with jurisdiction to hear the main action. That being so, interim protection granted by the domestic courts under the *Zuckerfabrik* case-law should be seen as the exception, not the rule. Secondly, the reasoning in the Order also seems to require a *probatio diabolica* from applicants as it concerns the fulfilment of the condition of urgency.

123. Yet, despite the possible flaws in the reasoning of the Order – which was never appealed by MB System, however – I do not see how the repeated and lengthy suspension of the domestic proceedings in this case could be justified when the Bundesgerichtshof itself has found it to be erroneous.

124. In conclusion, I do not believe that the German Government has succeeded in proving that the recovery obligation laid down in the Commission Decision at issue with respect to the incompatible aid granted to the Biria Group was objectively impossible to fulfil.

65 — In that context, it is almost unnecessary to add that the Commission Decision at issue was, furthermore, ultimately upheld on 3 July 2013, when the General Court dismissed the action for annulment brought by MB System.

66 — Order of 21 June 2011 in Case T-209/11 R *MB System* v *Commission*, paragraphs 46 to 52.

V – **Conclusion**

125. In light of the foregoing considerations, I propose that the Court:

— declare that, by not complying with Commission Decision 2011/471/EU of 14 December 2010 concerning aid granted by Germany to the Biria Group, the Federal Republic of Germany has failed to fulfil its obligations under Articles 288(4) and 108(2) TFEU, under 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 under Articles 2 and 3 of Decision 2011/471/EU;

— order the Federal Republic of Germany to pay the costs.