Summary: *Rousse Industry v Commission*

Case T-489/11

Appeal seeking partial annulment of Commission Decision 2012/706/EU of 13 July 2011, regarding State aid SA.28903 (C 12/2010) (ex N 389/2009) implemented by Bulgaria in favour of Rousse Industry (JO 2012 L 320/27).

Judgment of the General Court (Fourth Chamber) of 20 March 2013:

1. On scope of the aid element: Where a private company is debtor to the State and fails for a prolonged period of time to comply with deadlines for reimbursement of its debt, inaction by the granting authorities may amount to State aid. The Court underlines that, in this case, the incompatible aid measure identified by the Commission involves exclusively the State's inaction, which allowed the company to delay payment deadlines defined by means of a rescheduling of its debt from 2001, thus creating an advantage within the meaning of Article 107(1) TFEU. The 2001 rescheduling itself is not in question, and the aid element is limited to the period post EU-accession and up to the date at which Bulgaria started insolvency proceedings. (§§ 25-28)
2. On the advantage: Payments made after the beginning of insolvency proceedings cannot be taken into account in the quantification of the advantage as the temporal scope of the aid is clearly defined in the Commission Decision and because the legality of a Decision may only be assessed on the basis of the information available to the Commission when said decision was taken. (§§ 31-34)
3. In order to determine whether the State's inaction may be qualified as State intervention creating an advantage, the market economy creditor test must be applied. (§ 29)
4. In a situation where the private company disregards its reimbursement obligation blatantly and over a long period of time and where that company is manifestly in such financial difficulty as to compromise its viability, a private creditor would have taken enforcement measures to recover at least part of the capital. Mere payment reminders do not amount to appropriate enforcement measures. (§§ 36-37)
5. A market economy creditor may abstain from taking enforcement measures if this threatens its ability to recover the outstanding debts, but only if it is manifestly likely that the company will come back to solvency and profitability. To argue such a case, the complainant must submit "concrete and credible evidence" that it was the case. (§ 39)
6. The fact for a company to be able to delay the repayment of a debt thanks to State non-intervention constitutes an advantage as this option would not be available on the free market. It is not necessary for the Commission to demonstrate that the State measure had a positive impact on the company's operating results. (§ 40)
7. On State resources: A non-recovered debt to the State constitutes State resources, as the property of the State is diminished by the corresponding amount. Irrespective of whether or not the debt was eventually acquitted, if the recovery of the debt is highly uncertain, the State takes over a financial risk from the company by not taking appropriate enforcement measures. State property is additionally diminished by losses in interest rates, when interests foreseen in case of belated reimbursement are lower than interests that the State has to pay itself when borrowing on the financial markets. (§ 46, § 60)
8. On selectivity: The advantage is selective as the company is the only one benefiting from the possibility to fail and reimburse its debt. (§ 47)
9. On intra-community trade: It is established case law that if an aid measure is liable to affect trade between the Member States, it fulfils the criteria of Article 107(1) TFEU. Any aid granted to a company active on the internal market may create distortions of competition. (§ 49-50)
10. On the qualification of the aid as "new aid": Article 1(c) of Regulation 659/1999 defines "new aid" negatively as "all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid". (§ 54)
11. The fact that provisions for interests on belated payments are foreseen does not authorise the debtor to delay his payments, and certainly not in an indefinite manner. If those interests are in no relation with the solvability

of the debtor and below the interest rates that the creditor must bear, both the loss and the risk for the creditor increase with payment delays. In the case at hand, the inaction of the State authorities thus substantially modified the State measure that had been authorised before the accession of Bulgaria to the EU by making ineffective the rescheduling of the debt and indefinitely deferring the complainants' repayment. This modification of the existing scheme constitutes "new aid". (§§ 55-61)

12. On aid and accession: Even though a State measure covers a larger temporal scope, in the exercise of State aid control, the Commission is only entitled to take into account of aid measures posterior to the accession of a Member States to the EU. (§§ 62-64)
13. The debt rescheduling in the case at hand cannot be qualified as existing aid, for pursuant to its Annex V, point 2, the Accession Treaty of Bulgaria sets clears rules for the qualification as State aid of State measures anterior to accession, which it does not fulfil: it was not implemented before 10 December 1994, is not included in the exhaustive list of the appendix to Annex V, and has not been objected to by the Commission according to part 2 of Annex V, point 1. (§§ 65-68)
14. By means of helping State authorities determine the amount of aid that must be recovered, the Commission is only required by Article 14 of Regulation 659/1999 to provide an interest rate and the date from which they apply. (§ 78)

Marie Walter

The full text of the judgment is available in French and Bulgarian at:
http://curia.europa.eu/juris/liste.jsf?language=en&num=T-489/11

About the Principle of Private Creditor and the Concept of New State Aid

Annotation on the Judgment of the General Court (Fourth Chamber) of 20 March 2013 in Case T-489/11, *Rousse Industry AD v Commission*

*Nuria Arenas Montañana**

I. Introduction

In the *Rousse case*,[1] the Court deals with the question of whether the continued postponement of a debt contracted by a private company with a public entity constitutes or not a State aid. Against this background, the Court analyses whether the conduct of the authorities fits or not the principle of "private creditor in a market economy".

Nowadays, it is standard practise for creditors (private and also public), to offer refinancing agreements and delays in the payments of the instalments, in order to ensure the recovery of their debts, rather than implement other measures that could destroy the viability of the debtor. For this reason, to differentiate whether a public authority is granting an aid to its debtors or it is acting like a private creditor is an important issue, but the line between both can be very thin.

Also the Court reviews the concept and the elements that must concur to determine that a State aid is existing or new and if a measure, that lasts over the time, could be divided into different periods to be considered as new State aid.

II. The facts of the case

The case pertains to a loan that was initially granted to Rousse Industry and Rousse Shipyard ("Rousse") by the State Reconstruction and Development Fund ("SRDF") and the deferral and rescheduling of that public debt.

Rousse was created in 1991 and privatised in April 1999, when 80 % of its shares were sold to a German firm. The debt originates from loan agreements dating back to 1996 and 1997 between the SRDF and Rousse concerning a principal, at the time of US$8.45 million.

In April 1999 an agreement ("the 1999 rescheduling") was concluded between the Ministry of Finance (hereinafter "MoF") which has taken over the claims of the SRDF and Rousse. Rousse undertook to repay the sum (renominated in Euros) plus interest accrued between 1 December 2000 and 30 June 2006 under a rescheduled reimbursement plan.

On 21 May 2001 the MoF and Rousse concluded a further agreement, according to which the full reimbursement of the company's public debt, plus the interest accrued, was deferred until 30 September 2015, with a grace period (with payment of interests only, not principal) until 31 March 2006 ("the 2001 rescheduling").[2]

In September 2005, before the end of the grace period, the beneficiary requested a new rescheduling of its public debt (in addition to the 2001 agreement) which was rejected by the National Competition Authorities and the Administrative Court of Appeal.

In July 2008 the beneficiary offered to pay €1 million of the amount overdue in two equal instalments. According to this offer, the first instalment was to be paid by October 2008 and the second one by February 2009. The deadline of the first instalment – upon the company's request – was extended twice, until December 2008 and until January 2009, respectively. Rousse did not pay any of these, and given that no

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1 Case T-489/11, *Rousse Industry AD v Commission* [2013]. ECR n.y.r.

2 According to the 2001 rescheduling, the entire debt was as follows: the principal was set at €7.97 million and the interest (accrued until 1 April 1999) set at €2 million. In this agreement, the principal was subject to an interest of 1 %, whereas penalty interest of 3 % was applicable on overdue amounts (i.e. in event of being the company late with the reimbursement).

reimbursement of the amounts took place, the Bulgarian authorities sent a reminder for payment in February 2009. Additional reminders for reimbursement of the amounts overdue were filed. The State however failed to effectively enforce the debt which was not paid in respect to the 2001 rescheduling.

On 4 June 2009, Rousse asked the Bulgarian authorities to reschedule the public debt until 2019 with a grace period until 2012. After that, by 28 June 2010 Rousse offered again to the State to repay its liabilities according to the repayment arrangements of the 2001 rescheduling.

In July 2010 the company undertook to cover all amounts overdue and unpaid in two equal instalments: the first one due by the end of July 2010 and the second by the end of August 2010. However, the company failed to fulfil this arrangement. By November 2010 the beneficiary reimbursed €1 million and on 11 November 2010, the Bulgarian authorities filed for bankruptcy proceedings against Rousse.

In its Decision SA.28903 of 13th of July of 2001, the EU Commission declared that the non-effective enforcement of public debt from 1 January 2007 until 11 November 2010 constituted a State aid and it was incompatible with internal markets. As a consequence, Bulgaria shall recover the aid plus the interests accrued. The General Court confirmed this Decision.

III. The legal questions involved

The case therefore concerns mainly two aspects.

Firstly, whether the deferral, rescheduling and the non-effective enforcement of public debt constitutes a State aid. To clarify if the conduct of Bulgarian authorities shall be considered State aid, it must be assessed whether (or not) it behaved according to the principle of the "private market economy investor" and even more specifically, with "private creditor's" manner.

The second aspect is whether the aid can be considered "existing aid" or, on the contrary, must be declared as "new aid". The declaration of a new or an existing aid must be done according to the Regulation 659/99. In this particular case it is controverted which one of all the measures taken by the Bulgarian authorities constitutes a State aid (the original loan, the deferral or the non-effective enforcement of that); also, if a measure originated in 1996 and continues until 2010, could be divided into different periods and some of them could constitute new aid.

IV. State aid assessment

1. The behaviour of the beneficiary and the Bulgarian authorities

The debt dated back to 1996-1997 and had been rescheduled twice (in 1999 and 2001). The Bulgarian authorities sent several reminders for the payment of the amounts due but without results. The beneficiary expressed willingness, and voluntarily offered repayment, but in practice it never covered in full the amounts under rescheduling 2001.

With regard to the principal, Rousse did not pay the stipulated amounts and thus did not comply with the half-yearly repayment schedule. Besides, the ordinary interest was paid only until July 2008.

In relation to the penalty interest, the contract stipulated that 3 % was charged on the due instalments as from 2006. These penalty interests were paid by Rousse between August 2006 and July 2008. Since July 2008 the company did not pay the charged penalty interest.

The company's financial situation was weak and there was no prospect of the company returning to profitability. Furthermore, part of the debt was secured with collaterals and the Bulgarian authorities did not take any steps to enforce that part of the debt either.

On November 2010 the Bulgarian authorities also made an official request for repayment and filed for insolvency proceedings against the beneficiary.

2. The interpretation by the EU Commission and the Court

With regard to the non-enforcement of the debt under the 2001 rescheduling and the company's previous failures to meet its obligations, the interpretation of both the EU Commission and the Court of Justice about the Bulgarian authorities' behaviour is that, apart from reminders, there was no evidence that the Bulgarian authorities took any step to seek to enforce effectively their claims. Indeed, no concrete steps were taken to enforce the debt when the grace period ended and the first instalments of the principal became due but were not paid; in consequence, both conclude that no private creditor would have behaved like the Bulgarian State.[3] That conferred

3 Case C-342/96, *Spain v Commission* [1999] ECR I-02459; Case C-256/97, *SM transport* [1999] ECR I-03913, Case T-152/99, *Hamsa v Commission* [2002] ECR II-03049.

an advantage to the company which would not have been obtained otherwise in the market.

Additionally, in the referred case, the existence of the advantage was measured comparing the SRDF's and the Bulgarian Ministry's behaviour with the usual manners of a Private Creditor in Market Economy.

3. Comment

The Market Economy Creditor Principle is a variation of the Market Economy Investor Principle. Profit maximisation is the common aspect and normal market behaviour is the benchmark that can be used for assessing all kinds of economic transactions entered into by public authorities.[4] However, obtaining the more profitable result may require different strategies depending on the circumstances and all of them should be admissible whether the creditor is private or public. If the enforcement of a claim may lead to default of the debtor and partial or complete loss of the credit, a creditor may well decide to accept a rescheduling and even a partial waiver of the debt. A similar conduct by the State would not constitute aid.[5]

A private creditor discretionary would not refrain from exercising its guarantees and recover its claims towards debtor in difficulties. It would only extend the credit if it had an expectation that the debtor would eventually be able to pay back a larger amount of the debt, taking into account the additional loan and risk.

In the *Rousse* Case, both the Commission and the Court understood that the fact of rescheduling the debt for a long period, the lack of profitability of the company, the decision of not executing the collaterals or not initiating the insolvency procedure, were conducts that a Private Creditor should not have accepted.

In fact, the non-enforcement of a public debt was catalogued as State aid.[6] This does not mean that when a public entity is the creditor, has always to sue its debtors. The possibility of renegotiation cannot be limited, but public bodies must justify their decisions, and show that the result of following the other alternative is more favourable. What needs to be demonstrated to pass the Market Economy Creditor Test is that the strategy chosen by State responds to the logic of a private creditor (and a private creditor would always try to maximise profits or minimise losses).

As an example, in the recent Decision of 6th of March of 2013 opening the formal investigation procedure regarding the financing of Dutch football clubs,[7] the Commission accepted that the agreement subscribed between the "Vitesse Arnhem" team ("Vitesse") and the municipality was in conformity with the Market Economy Credit Principle. In this case, Vitesse faced severe financial problems because it had made losses over the preceding 10 years, with a net total of €27.4 million. Its most important creditor was the municipality of Arnhem, which accounted for 45 % of all claims. In view of arrears in payment, the municipality pressed Vitesse to pay the sums due, which Vitesse was unable to do. Vitesse started negotiations with its creditors in order to restructure its debts and a draft agreement was reached with all creditors except the municipality.[8] Finally the municipality accepted the agreement, in result of which, the council received only €886.662. Other large creditors received a similar percentage of their recognised credits.

The Commission concluded that, by accepting the creditors' agreement, the municipality acted in conformity with the market economy creditor principle and the action would therefore not entail State aid.

As in the aforementioned case, the comparison with the hypothetical behaviour of a private creditor in a similar situation is a valuable reference. For this purpose, to analyse different (credible and realistic) scenarios in case of a restructuring plan or to compare the behaviour of the public bodies and other private creditor (for example if both had written off the same proportions of the debt) may be convenient.

But in fact this is not the only element to consider; the existence of discretionary power of the public ad-

4 *Mederer and others*. EU Competition Law. State Aid (Volume IV). Ed. Claeys&Casteels.

5 Ibid.

6 The form of the aid is not relevant to its assessment under Article 107(1) TFUE. It comprises measures that mitigate the charges or debts which are normally included in the budget of an undertaking.

7 Commission Decision of 6 March 2013 to open a formal investigation regarding alleged municipal aid to the professional Dutch football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch in 2008-2011, SA.33584 (2013/C) (ex 2011/NN).

8 The temporary suspension of payments procedure is laid down in the Dutch insolvency law of 1893. It allows a Court to provide temporary protection to a company, which foresees that it will be unable to pay its debts in the future, while an appointed trustee explores the possibility of finding an agreement with the creditors, which would allow the company to continue operations with a restructured balance sheet if there is a perspective for profitability.

ministration is also a relevant aspect.[9] Therefore, two elements must concur to declare the existence of a State aid in a measure that alleviates a public debt:[10]

(i) The measure is manifestly more generous than those which a hypothetical private creditor in the same position would have granted, and
(ii) A discretional power is granting the measure.

In view of the facts, both elements concurred in the *Rousse* case and for that reason, the existence of State aid was declared.

V. Whether the aid can be considered existing aid or must be declared as new aid

1. The measure

Rousse was constituted in 1991 and the debt originates from loan agreements dating back to 1996 and 1997 between this company and SRDF concerning a principal at the time of US$8.45 million that was rescheduled many times and not enforced.

2. The interpretation of the EU Commission and the Court

In its Decision, the Commission states that the non-enforcement of public debt as from 1 January 2007 constitutes the aid in favour of Rousse within the meaning of Article 107(1) TFEU.

This non-notified measure was not covered by Appendix to Annex V of Bulgaria's Act of accession. In particular, it was (a) neither put into effect before 31 December 1994, (b) nor listed in the Appendix to Annex V, and (c) not covered by the interim mechanism that applied in connection with the accession.

For this reason the non-enforcement produces effects after the date of accession of Bulgaria to the European Union (1 of January 2007) and therefore, the measure is applicable after accession and thus, it involve a new State aid.

3. Comment

The definition of new aid is given by Article 1(c) of the "Council Regulation No 659/1999 of 22 march 1999 laying down detailed rules for the application of Article 93 of The EC Treaty" (hereinafter Regulation on Procedure) which provides that *"new aid shall mean all aid, that is to say, aid schemes and individual aid, which* is not existing aid*, including alterations to existing aid"* (emphasis added). According to this, all aid (aid schemes or individual aid) which is not existing aid, *including alterations to existing aid*, shall be considered a new aid.

It becomes necessary thus to clarify the concept of existing aid. This is mentioned in Article 108(1) of TFEU, which provides as follows: *"The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market".*

But the definition of existing aid is given by Article 1(b) of the Regulation on Procedure, which provides that: *"existing aid shall mean:*

(i) (...) all aid which existed prior to the entry into force of the Treaty in the respective Member States*, that is to say, aid schemes and individual aid* which were put into effect before, and are still applicable after, the entry into force of the Treaty*;*
(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;
(iii) aid which is deemed to have been authorised pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure;
(iv) aid which is deemed to be existing aid pursuant to Article 15;
(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State*. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation.* (emphasis added)

The first category of existing aid is which was granted before the entry into force of the Treaty and which

9 Case T-152/99, *HAMSA v Commission* [2002] ECR II-3049, para. 157.

10 *Mederer and others*. EU Competition Law. State Aid (Volume IV). Ed. Claeys&Casteels.

has not been substantially amended. According to this, State measures in force before the Treaty are thereby protected from being automatically treated as illegal State aid, and hence, subject to possible recovery, as from the date of entry into force of that Treaty.

Regarding when a new aid emerges following the modification of existing aid, the Community courts have tried to clarify it. Advocate General Trabucchi explained that, for an aid to be considered new, the system must have been altered substantially or the basic features of the previous system of aid must have been changed as would be the case if, for example, there had been changes in the aims pursued, the basis on which the levy was made, the persons and bodies affected or, generally, the source of its finances."[11]

This case law was lately developed by Article 4(1) Of the Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty which states that: *"For the purposes of Article 1(c) of Regulation (EC) No 659/1999, an alteration to existing aid shall mean* any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. *However an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid"* (emphasis added).

In *Gibraltar v Commission*[12], the Court of First Instance remarked that the alteration must be severable. In that case the issue was an amendment to tax legislation, which extended tax exemption to a new category of operations, and to a new category of undertakings. In those circumstances, the Court concluded that the amendment was severable and had to be examined separately. *The result was that the amendment constituted a new aid whereas the original scheme continued to be existing aid.*

In consequence, it can be concluded that aid might be classified as existing if two conditions are satisfied: (i) the first is that the aid was put into effect before the entry into force on the EC Treaty and (ii) the second is that its substance has not been altered. If a scheme introduced before the entry into force of the Treaty undergoes substantial alteration, it must be verified if the alteration is severable. If this is the case, the alteration constitutes a new aid.

It could also happen the contrary situation: that the initial measure is defined as State aid and its modification do not constitute State aid. In this sense, in the *ING* case,[13] the General Court concluded that the Commission could not assume that a modification of repayment conditions constitute State aid, simply because the initial terms and conditions were State aid.

In the *Rousse* case, the debt originates from loan agreements dating back to 1996 and 1997 which were rescheduled many times, but the only measure considered as State aid was the non-enforcement of public debt from 1 January 2007, when Bulgaria joined to European Union. Upholding the Commission's decision, the Court estimates that the measure constitutes a new aid which was not covered by Appendix to Annex V of Bulgaria's Act of accession. In particular, it was (a) neither put into effect before 31 December 1994, (b) nor listed in the Appendix to Annex V, and (c) not covered by the interim mechanism that applied in connection with the accession.

It is also remarkable that the Treaty of Accession of Bulgaria entered into force on 1 January 2007 and the measure considered (new) State aid was the failure of the Bulgarian authorities, occurred between 1 January 2007 and 11 November 2010. In its evaluation, the Commission chose only the period after the accession of the Republic of Bulgaria to the European Union (1 January 2007) and in consequence, it divided facts and periods of the measure.

The applicant argued that there was, in reality, only one existing aid measure, namely rescheduling 2001. The inaction of the Bulgarian authorities to the late payment of the applicant began at the end of the grace period on 31 March 2006, when the Republic of Bulgaria was not at that time a member of the Union. But the Tribunal affirms that it is only after the date of accession of the Republic of Bulgaria when the Commission has acquired the competence to undertake the review of its action under the Article 108 TFEU. Therefore, it is stated that the Commission has not split artificially facts and periods, but took proper account on the one hand, the change in the legal situation of the applicant, under the rescheduling 2001 and, secondly, the temporal limits of its competence control of State aid.

11 Opinion in Case 51/74, *P.J. van der Hulst's Zonen v Produktschap voor Siergewassen* [1975] ECR 79.

12 Joined cases T-195/01 and T-207/01, *Government of Gibraltar v Commission* [2002] ECR II-2309, paras. 109-111.

13 Joined cases T-29/10 and T-33/10. *Netherlands and ING Groep v Commission* [2012] ECR n.y.r.

On the other hand, assuming that the rescheduling of 2001 must be regarded as State aid, (as the applicant argued) in opinion of the Court it was not qualified as existing aid within the meaning of the Article 1(b)(i) of Regulation No 659/1999, cited above. This particular provision is supplemented by Annex V, paragraph 2, of the Act concerning the conditions of accession to the European Union of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the founded the European Union, which provides as follows:

1. Aid schemes and individual aid below, put into effect in a new Member State before the date of accession and still applicable after that date shall be regarded upon accession as existing aid within the meaning of Article 88, paragraph 1 [EC]

a) aid measures put into effect before 10 December 1994;
b) aid measures listed in the Appendix to this Annex;
c) aid examined by the authority of the State aid monitoring of the new Member State before the date of accession and be compatible with the acquis, and in respect of which the Commission did not raise any objections Due to serious about the compatibility with the common market doubts, under the procedure referred to in paragraph 2.

So, this non-notified measure was not covered by Appendix to Annex V of Bulgaria's Act of accession. In particular, it was a) neither put into effect before 31 December 1994, b) nor listed in the Appendix to Annex V, and c) nor covered by the interim mechanism that applied in connection with the accession.

For this reason the non-enforcement produces effects after the date of accession of Bulgaria to the European Union (1 January of 2007) and therefore, the measure is applicable after accession, and thus involve a new State aid.

VI. Conclusions

In the referred Judgment, the General Court confirms the Decision of the European Commission which declared that the non-effective enforcement of public debt by Bulgarian authorities since 1 January 2007 was a State aid incompatible with internal markets. The main argument was that no private creditor would have behaved like the Bulgarian State and that conferred an advantage to the company which would not have been able to obtain otherwise in the market.

There concurred circumstances (like rescheduling the debt for a long period, the lack of profitability of the company, the decision of not executing the collaterals or not initiating the insolvency procedure) to affirm that a Private Creditor should not have accepted similar conditions.

But this judgment does not preclude the right of public authorities to renegotiate with its debtors. The conclusion of this pronouncement cannot be that the capacity of public bodies to reach new agreements or renegotiate with borrowers is limited, but that they must justify their decisions, and show that the result of following the chosen way is the most profitable.

On the other hand, the non-effective enforcement since 1 January 2007 (date of accession of Bulgaria to European Union) constitutes a new State aid.