OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 9 July 2002 [1]

I — Introduction

1. In this case the Commission claims that the Court should declare that by not making available to the Commission the sum of ITL 1 484 936 000 000 by way of own resources within the period laid down by Articles 9 and 10 of Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources, [2] and subsequently refusing to pay default interest on that amount owed pursuant to Article 11 of the same regulation, the Italian Republic is in breach of its obligations under Articles 9, 10 and 11 of that regulation.

II — Legal background

2. Article 9(1) of Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources [3] provides:

'In accordance with the procedure laid down in Article 10, each Member State shall credit own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed.

This account shall be kept free of charge.'

3. Under the first paragraph of Article 10(3) of Regulation No 1552/89:

'VAT resources, the additional resource — excluding the own resources for the EAGGF (European Agricultural Guidance and Guarantee Fund) monetary reserve — and, where appropriate, GNP financial contributions shall be credited on the first working day of each month, the amounts being one-twelfth of the relevant totals in

1 — Original language: Dutch.

2 — OJ 2000 L 130, p. 1.

3 — OJ 1989 L 155, p. 1.

the budget, converted into national currencies at the rates of exchange of the last day of quotation of the calendar year preceding the budget year, as published in the *Official Journal of the European Communities*.'

4. Article 11 of Regulation No 1552/89 provides:

'Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at the interest rate applicable on the Member State's money market on the due date for short-term public financing operations, increased by two percentage points. This rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

5. Regulation No 1552/89 has been amended several times. These amendments were consolidated by Regulation No 1150/2000. Articles 9(1), 10(3) and 11 of the original Regulation No 1552/89 have remained virtually unchanged and retained the same numbering. In its application the Commission refers to the provisions as they are now incorporated in Regulation No 1150/2000. These provisions are set out below. However, in this opinion I will refer to the relevant articles of Regulation No 1552/89 because this regulation was in force at the material time.

6. Article 9(1) of Regulation No 1150/2000:

'In accordance with the procedure laid down in Article 10, each Member State shall credit own resources to the account opened in the name of the Commission with its Treasury or the body it has appointed.

This account shall be kept free of charge.'

7. Under the first paragraph of Article 10(3) of Regulation No 1150/2000:

'VAT resources, the additional resource — excluding an amount corresponding to the EAGGF (European Agricultural Guidance and Guarantee Fund) monetary reserve, to the reserve relating to loans and loan guarantees and to the reserve for emergency aid — and, where appropriate, GNP financial contributions shall be credited on the first working day of each month, the amounts being one-twelfth of the

relevant totals in the budget, converted into national currencies at the rates of exchange of the last day of quotation of the calendar year preceding the budget year, as published in the *Official Journal of the European Communities*, "C" Series.'

8. Article 11 of Regulation No 1150/2000 provides:

'Any delay in making the entry in the account referred to in Article 9(1) shall give rise to the payment of interest by the Member State concerned at the interest rate applicable on the Member State's money market on the due date for short-term public financing operations, increased by two percentage points. This rate shall be increased by 0.25 of a percentage point for each month of delay. The increased rate shall be applied to the entire period of delay.'

III — Facts and pre-litigation procedure

9. Under Presidential Decree No 321, as amended by Decree No 532, [4] the Minister for the Treasury opened two accounts. The first account is numbered 435/23203 and is in the name of the Ministry. The resources owed to the European Communities were 'parked' in this account. Monthly instalments are to be transferred from this so-called transfer or transit account to the second account, account No 414/23200, which is in the name of the Commission. These two non-interest bearing accounts are connected to one another but only the latter account is the account which is referred to in Article 9 of the regulation and which must be in the name of the Commission.

10. Pursuant to Article 10 of Regulation No 1552/89, which was in force at the material time, the Italian Republic had to pay, by 3 June 1996 at the latest, the sum of ITL 1 486 422 594 526 for June 1996, this being one-twelfth of the Communities' own resources.

11. On 28 May 1996 [5] the ministero del Tesoro, Ragioneria Generale dello Stato

4 — Decree No 321 of the President of the Republic of 16 April 1971 implementing the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources and the regulations on funding the common agricultural policy, pursuant to Article 3 of Law No 1185 of 23 December 1970, *Gazette Ufficiale* of 9 July 1971, No 145.

5 — Letter of 28 May 1996, No 142798.

(Ministry of the Treasury, State Accounts Department) ordered the Direzione Generale del Tesoro (Directorate-General of the Treasury) to transfer from account No 435/23203 'Ministry of the Treasury — Article 7 of Decree of the President of the Republic No 532 of 4 July 1973' to account No 414/23200 'EC Commission — Own resources' the sum of ITL 1 486 422 594 526, this being the sum owed by way of VAT resources and GNP resources for June 1996, pursuant to Article 10(3) of Regulation No 1552/89. The final sentence of the relevant letter pointed out that the transaction had to be completed by 3 June 1996 in order to avoid payment of default interest.

12. On the same date the Ministry of the Treasury informed the Commission by fax that this order had been given. [6] The fax stated: 'to have effected the transfer to the Commission's current account No 414/23200 — due date 3 June 1993 — the total sum of ITL 1 486 422 594 526'.

13. On 29 May 1996 the Directorate-General of the Treasury ordered the Tesoreria Centrale dello Stato (State Central Treasury) to transfer resources to account No 414/23203 and to issue a receipt for the transfer to account No 414/23200 'EEC Commission — Own resources'. The amount stated in letters in this order was correct, but the numbers '422' were missing from the amount indicated in figures.

14. The following day, 30 May 1996, the Central Treasury issued a receipt [7] indicating that the sum of ITL 1 486 594 526 had been transferred to the Commission's account.

15. On 27 June 1996 the Directorate-General of the Treasury issued a new order authorising the Central Treasury to transfer and credit to account No 414/23200 'CEE Ris. proprie' the sum of ITL 1 484 936 000 000, with a value date of 30 May 1996 and the statement 'by way of supplement to the transfer referred to in receipt No 12912 of 30 May 1996 of ITL 1 486 594 526 and in full settlement'.

16. On the same date, 27 June 1996, the Central Treasury issued a receipt [8] stating that the sum of ITL 1 484 936 000 000 had been transferred to the Commission's

6 — Fax of 28 May 1996, No 9835.

7 — Receipt No 12912, type 80 T.

8 — Receipt No 16817, type 80 T.

account, with a value date of 30 May 1996 and the statement 'by way of supplement to the transfer referred to in receipt No 12912 of 30 May 1996 of ITL 1 486 594 526 and in full settlement'.

17. The Commission concluded from the statements of account (type 56 T) relating to May and June 1996 from the Italian bank that only ITL 1 486 594 526 rather than ITL 1 486 422 594 526 had been credited to account No 23200 'EEC own resources' on 30 May 1996, that the remainder due was not entered until 27 June 1996, and that the Italian Republic had thus failed to make available the full sum owed in due time in contravention of Regulation No 1552/86, as subsequently amended, in particular Articles 9 and 10 thereof. The Commission therefore decided to apply Article 11 of Regulation No 1552/89.

18. It considered that, according to the wording of Article 11 of the regulation, the interest rate was 10.24%, that the remainder had been paid 24 days late, and that therefore the sum of ITL 9 970 980 092 in interest for delay had to be paid. By letter of 28 November 1996 the Commission requested that the Italian authorities make this amount available to it.

19. However, the Italian Minister for the Treasury refused to comply with this request. [9] He took the view that there had been no delay in making available the full sum owed for June. There had merely been a substantive error in the internal accounting procedure.

20. The Commission issued a reasoned opinion on 15 November 1999, calling upon the Italian Government to take the measures necessary to comply with the opinion within two months. Since the Italian Government failed to do so, the Commission brought the present action on 29 September 2000.

IV — Submissions of the parties

21. The Commission notes that the statements of account from the Italian bank show that part of the sum owed was credited to account No 414/23200 'EEC own resources' on 30 May 1996 but that the remainder was not entered until 27 June 1996. It contends that only accurate accounting documents which show clearly and beyond doubt the actual entry of own

9 — Letter of 30 January 1997.

resources can serve as proof that they were made available to the Commission within the prescribed periods. In the present case the statements of account and receipt No 12912 show that there was a delay in crediting the full sum owed. None of the other documents submitted by the Italian Government can serve as evidence to the contrary.

22. It also considers that Member States cannot make rectifications with retrospective effect such as that made by the Italian Ministry of the Treasury on 27 June 1996. Firstly, credits of sums with retrospective effect make no sense in a system of non-interest bearing accounts such as the 'own resources' account in the name of the Commission. Secondly, to allow accounting rectifications with retrospective effect would deprive the obligation to pay default interest of any practical effect.

23. The Italian Government observes that as soon as the sum of own resources laid down in the budget is paid into the transit account it is de facto no longer available to the Italian Government since under national law it cannot dispose of the funds credited to account No 435/23203 other than to the benefit of the Community.

24. The sum of ITL 2 650 billion had been budgeted for and paid into the transit account half way into May 1996 and therefore there was considerably more in this account that was necessary.

25. Directly after the transfer of the resources from the transit account to the Commission's account had been approved, the Commission was informed by fax of the order to effect the transfer. The Italian Government contends that the resources were in fact available, given that the transfer had been made to account No 435/23203 and that the exact sum due to the Commission by way of own resources was stated.

26. The Italian Government considers that the orders at the end of May were lawfully issued and carried out even though in the latter case the amount had been stated incorrectly in figures. It notes that, in accordance with a general principle of Italian law, in the event of a discrepancy

between the amount in letters and that in figures, the amount in letters is binding.

27. Since the transactions are effected between two current, non-interest bearing accounts, they are both operated within the same government administration, and the financial resources concerned are reserved for the same purpose, the Italian Government considers that the incorrect indication of the amount in figures constitutes a straightforward substantive error which has had only a purely internal effect and which is, as a rule, to be rectified without external consequences on the lawfulness of the transaction concerned.

28. As regards the retrospective effect, the Italian Government contends that no manipulation of accounts is involved, but that this is an accepted practice in the accounting and banking world to rectify a mistake such as the one at issue here.

29. The Italian Government also notes that the Commission suffered no adverse effects, the Italian State itself has derived no benefit therefrom, and any request by the Commission for the full sum owed to be made available to it could have been complied with immediately, even if account No 414/23200 was not in funds, given the availability of the reserved resources paid into account No 435/23203.

V — Appraisal

30. Under Article 9 of the regulation and the first paragraph of Article 10(3) thereof, the Member State is required to enter the sums due in the Commission's account on the first working day of the month. Under Article 11 of the regulation, any delay in making the entry means that default interest must be paid.

31. The essential question in this case is whether, by 3 July 1996, the Italian authorities had transferred the required sum to account No 414/23200, an account within the meaning of Article 9 of the regulation, in the sense that the sum was also available to the Commission in practice.

32. The fact that there was an intention to do so is evident from the fax which the Italian authorities sent to the Commission on 28 May 1996. This intention was followed up by an internal procedure within the Italian administration during which an initial error was made in that the amount in figures was incorrectly stated on the order form. This initial error was

incorporated in a subsequent form (receipt No 12912) which stated an amount which was too low both in letters and in figures. When the Italian authorities noticed this error, a new order and authorisation was given and a new receipt issued. The rectification operation was given retrospective effect.

33. The Italian Government considers that the fax of 28 May 1996 is sufficient to establish that the resources were available to the Commission in due time and the other documents relate to internal communications. However, the Commission considers that the only account documents which it has and which have sufficient probative value establish the contrary. It claims that it must be concluded from these documents that there was a delay in making the entry.

34. I concur with the Commission's view. In other words, the Italian Government has failed to show that the Commission had available to it the full sum owed on 3 June 1996. The fax of 28 May 1996 merely states an intention, it does not show that the own resources had also in fact been credited by 3 June 1996. Similarly, the order of 29 May 1996 authorising the transfer from the transit account to the Commission's account does not constitute proof that the correct sums were credited to the Commission's account in due time. Conversely, it must be concluded from the statements of account from the Italian bank and the receipt issued on 30 May 1996 that the full sum of own resources had not been made available at the beginning of June. The Italian Government's argument that there were sufficient resources in account No 435/23203, a so-called transit account, and that the full sum owed was available to the Commission likewise does not hold water. This account is in the name of the Ministry and not in that of the Commission. Consequently, the Commission did not have the funds in this account at its disposal.

35. It follows from the foregoing that on 3 June 1996 the Commission did not have the resources at its disposal and that Italy therefore failed to fulfil in due time its obligations under Articles 9 and 10 of Regulation No 1552/89.

36. As the Commission has correctly observed, there is an inseparable link between the obligation to establish the

Communities' own resources, the obligation to credit them to the Commission's account within the prescribed time-limit and the obligation to pay default interest. [10] Where it is established that a sum should have been credited to the account on a particular date — in this case 3 June 1996 — and the sum is not in that account on that date, Article 11 of the regulation automatically enters into effect. This automatic applicability means that default interest is payable in respect of the delay in paying this sum, regardless of the reason for the delay in making the entry in the Commission's account. [11] It was the intention of the Community legislature that such a penalty should be the result of a Member State's failure to fulfil its Treaty obligations.

37. Nor are there any circumstances which would provide grounds for an exception to this automatic application. The fact that the Italian Government acted in good faith and its failure to fulfil its obligations was unintentional is irrelevant [12] and the proceedings do not relate to force majeure or a dispute over interpretation. As regards the latter, the wording of the regulation is clear. In the present case there has been a substantive error. This error is not such that the Italian Government can evade its obligations to pay default interest arising from the regulation.

38. Furthermore, I should also note that the observation made by the Italian Government, namely that the Commission suffered no adverse effects, is of no relevance. Failure by a Member State to fulfil an obligation imposed by Community law is sufficient to constitute a breach of Treaty obligations and the fact that the failure had no adverse effects is irrelevant. [13] The contention that no adverse effects were suffered is not only irrelevant but also incorrect. The Commission did not have the own resources at its disposal on the abovementioned date and therefore was unable to use them for investments, for example.

39. Moreover, a rectification with retrospective effect cannot have the effect of making the resources available to the Commission on 3 June 1996, quite apart from the fact that rectifying value dates makes no sense in the case of non-interest bearing accounts. Finally, the argument that the Italian Government was also unable to derive any benefit from the delay in making the entry is also of no relevance. It provides no grounds for the fact that the Italian Republic failed to fulfil its obligations under Article 10(3) of the regulation between 3 June 1996 and 27 June 1996.

10 — Case C 96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 38.

11 — In this connection the Commission refers to Case 54/87 *Commission* v *Italy* [1989] ECR 385, paragraph 12.

12 — Case 93/85 *Commission* v *United Kingdom* [1986] ECR 4011, paragraphs 34 and 37.

13 — Case C-348/97 *Commission* v *Germany* [2000] ECR I-4429, paragraph 62.

VI — Conclusion

40. In the light of foregoing, I would recommend that the Court:

(1) declare that by not making available to the Commission the sum of ITL 1 484 936 000 000 by way of own resources within the period laid down by Articles 9 and 10 of Council Regulation (EEC, Euratom) No 1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources, subsequently consolidated in Council Regulation (EC, Euratom) No 1150/2000 of 22 May 2000 implementing Decision 94/728/EC, Euratom on the system of the Communities' own resources, and subsequently refusing to pay default interest on that amount owed pursuant to Article 11 of that regulation, the Italian Republic is in breach of its obligations under Articles 9, 10 and 11 of Regulation No 1552/89.

(2) order the Italian Republic to pay the costs.