JUDGMENT OF THE COURT
4 April 1995 *

In Case C-350/93,

Commission of the European Communities, represented by Antonino Abate, Principal Legal Adviser, and Vittorio Di Bucci, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by failing to abolish and recover within the prescribed period the aid paid to the ENI-Lanerossi Group (now SNAM SpA) in the amount of LIT 260.4 thousand million, the Italian Republic has failed to fulfil its obligations under Commission Decision 89/43/EEC of 26 July 1988 on aids granted by the Italian Government to ENI-Lanerossi (OJ 1989 L 16, p. 52),

* Language of the case: Italian.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler (Rapporteur) (President of Chamber), G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward and J.-P. Puissochet, Judges,

Advocate General: F. G. Jacobs,
Registrar: Lynn Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 December 1994,

after hearing the Opinion of the Advocate General at the sitting on 2 February 1995,

gives the following

Judgment

By application lodged at the Court Registry on 7 July 1993, the Commission of the European Communities brought an action under the second subparagraph of Article 93(2) of the EEC Treaty for a declaration that, by failing to abolish and recover within the prescribed period the aid paid to the ENI-Lanerossi Group (now SNAM SpA) in the amount of LIT 260.4 thousand million, the Italian Republic has failed to fulfil its obligations under Commission Decision 89/43/EEC of 26 July 1988 on aids granted by the Italian Government to ENI-Lanerossi (OJ 1989 L 16, p. 52) ('the decision').

2 In the decision the Commission found that the aid of LIT 260.4 thousand million granted to ENI-Lanerossi in the form of capital injections in favour of its subsidiaries manufacturing menswear was illegal on the ground that it was in breach of the provisions of Article 93(3) of the Treaty and was incompatible with the common market within the meaning of Article 92 of the Treaty (Article 1 of the decision). The Commission decided that the aid in question should be withdrawn by recovery (Article 2 of the decision). The Italian Government was required to inform the Commission within two months of the date of notification of the decision of the measures taken to comply therewith (Article 3 of the decision).

3 By judgment of 21 March 1991 in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, the Court dismissed an application for the annulment of the decision.

4 After several requests by the Commission that it implement the decision and notify the Commission of the measures adopted to that end, the Italian Government informed the Commission on 25 March 1992 of its intention to take steps to recover the aid through payment by Lanerossi to the State holding company ENI of an amount equal to the aid plus interest due.

5 By correspondence of 26 June 1992 the Commission informed the Italian Government that it ought to have demanded that Lanerossi repay the aid not merely to ENI but to the Italian State. In that letter the Commission stated its intention to bring the matter before the Court of Justice if the Italian Republic failed to take the measures necessary to recover the aid before 31 July 1992, a time-limit subsequently extended to 31 March 1993.

6 It was not until after the application had been lodged that SNAM SpA, as the successor of Lanerossi, transferred to ENI the sum of LIT 362.241 thousand million, which, according to the Italian Republic, represented the principal sum of and the interest due on the aid which the Commission had required the defendant to recover.

In support of its application, the Commission argues that the Italian Republic infringed Article 93(2) of the Treaty by failing to take steps to recover the aid within two months of notification of the decision and by failing to require ENI to repay the aid to the Italian State.

Admissibility of the application

The Italian Republic raises the objection that the application is inadmissible in so far as the Commission seeks a declaration that it has failed to fulfil an obligation which does not follow from the decision, namely ensuring that the aid is repaid by ENI to the Italian State. Moreover, the application does not, contrary to Article 38(1)(c) of the Court's Rules of Procedure, set out a summary of the pleas in law alleging that failure to recover the aid from ENI is contrary to the decision.

In that regard, it must be held that the Commission merely submits that the Italian Republic has not complied with the decision, the alleged breach of which forms the subject-matter of these proceedings. The question whether the decision imposes on the Italian Republic an obligation to recover the aid from ENI has to be examined in connection with the issue whether the application is well founded and cannot adversely affect its admissibility.

Moreover, the application clearly sets out the facts and arguments relied on by the Commission, in accordance with the requirements of Article 38(1)(c) of the Rules of Procedure, and has enabled the Italian Government to submit a detailed defence.

The objection of inadmissibility must accordingly be rejected.

Failure to implement the decision

12 It is necessary to examine in turn the two complaints relied on by the Commission.

The complaint alleging failure to recover the aid within the prescribed period

13 The decision clearly sets out the obligation on the Italian Government to seek repayment of the aid within two months of 10 August 1988, the date on which the decision was notified.

14 SNAM SpA did not repay the aid to ENI until 11 October 1993.

15 The Court has consistently held that the only defence available to a Member State in opposing an application by the Commission under Article 93(2) of the Treaty for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to implement the decision properly (see, most recently, the judgment in Case C-349/93 *Commission* v *Italy* [1995] ECR I-343, paragraph 12, and the case-law cited therein).

16 The Court has also held that a Member State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences overlooked by the Commission, must submit those problems to the Commission for consideration, together with proposals for

suitable amendments to the decision in question. In such cases, the Commission and the Member State must, by virtue of the rule imposing on the Member States and the Community institutions a duty of genuine cooperation which underlies, in particular, Article 5 of the Treaty, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions and, in particular, the provisions on aid (see the above judgment in Case C-349/93 *Commission* v *Italy*, paragraph 13, and the case-law cited therein).

17 The Italian Republic has not referred to any absolute impossibility as regards implementation or to any unforeseen and unforeseeable difficulties.

18 In those circumstances, the application must be held to be well founded in so far as the Italian Republic failed to take steps to implement the decision within the prescribed period.

The complaint alleging failure by ENI to repay the aid to the Italian State

19 In order to rule on this complaint, it is necessary to refer to the purpose of the obligation to recover unlawful aid and to the scope which that obligation has in the decision.

20 Article 93(2) of the Treaty provides in this connection that if the Commission finds that aid granted by a State or through State resources is not compatible with the common market, it shall decide that the State concerned is to abolish or alter such aid within a period of time to be determined by the Commission.

21 The Court has consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the common market has as its purpose to re-establish the previously existing situation (see the judgment in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 75, and the case-law cited therein).

22 That objective is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient, in this case SNAM SpA, to ENI, the public body responsible for managing State holdings. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored.

23 Furthermore, in Article 2 of the decision, the Commission merely required the Italian Government to abolish the aid and oblige SNAM SpA to repay it within a certain period, with default interest after the expiry of that period.

24 However, while it cannot be ruled out that the allocation of funds by the State to a public body such as ENI may constitute State aid within the meaning of Article 92 of the Treaty, the Commission, contrary to its submissions, did not find in the decision, on completion of the procedure laid down in the Treaty, that the fact that funds were made available by the State to ENI also constitutes aid incompatible with the common market.

25 In those circumstances, the application must be considered to be unfounded in so far as the Commission charges the Italian Republic with failing to require ENI to repay the aid to the Italian State.

26 It must therefore be held that, by not taking steps to implement the decision within the prescribed period, the Italian Republic has failed to fulfil its obligations under the Treaty.

Costs

27 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the defendant has been essentially unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by failing to abolish and recover within the prescribed period the aid paid to the ENI-Lanerossi Group (now SNAM SpA) in the amount of LIT 260.4 thousand million, the Italian Republic has failed to fulfil its obligations under Commission Decision 89/43/EEC of 26 July 1988 on aids granted by the Italian Government to ENI-Lanerossi;**

2. **Dismisses the remainder of the application;**

3. Orders the Italian Republic to pay the costs.

Rodríguez Iglesias Schockweiler Mancini

Moitinho de Almeida Murray Edward Puissochet

Delivered in open court in Luxembourg on 4 April 1995.

R. Grass
Registrar

G. C. Rodríguez Iglesias
President