OPINION OF ADVOCATE GENERAL ALBER

delivered on 11 January 2001 [1]

1. In the present application for a declaration that a Member State has failed to fulfil its obligations, the Commission claims that France has failed to implement a decision concerning the recovery of aid.

2. On 4 November 1998 the Commission adopted the decision on aid granted by France to Nouvelle Filature Lainière de Roubaix. [2]

3. The decision states *inter alia* that:

'*Article 4*

(1) France shall take all necessary measures to recover from the recipient, Nouvelle Filature Lainière de Roubaix, the aid referred to in Article 2 which has already been illegally paid.

(2) Repayment shall be made in accordance with the procedures and provisions of French law. The amounts to be repaid shall bear interest from the date on which the aid was paid to the recipient until the date on which it is effectively recovered. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid.

(3) France shall without delay abolish the aid referred to in Article 3 by applying normal market conditions corresponding at least to the reference rate of 8.28% applicable at the time the loan was granted.

Article 5

France shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply with it.'

1 — Original language: German.

2 — Notified by letter of 17 November 1998 under document number C(1998) 3515, OJ 1999 L 145, p. 18.

4. Subsequently, France brought an action for annulment of that decision lodged on 26 January 1999.[3] For further details of the facts, reference is made to the Opinion delivered in that case.

5. On 3 February 1999 the Commission wrote to the French authorities reminding them to inform it that the decision had been implemented, otherwise the matter would be referred to the Court of Justice under Article 93(2) of the EC Treaty (now Article 88(2) EC). Since the Commission did not receive a reply to that letter, it brought the present action on 13 July 1999.

6. The Commission of the European Communities claims that the Court should:

— declare that, by failing to adopt within the prescribed time-limit the measures necessary in order to recover from Nouvelle Filature Lainière de Roubaix, the recipient thereof, the aid declared to be illegal and incompatible with the common market by the decision of the Commission of 4 November 1998, which was notified on 17 November 1998, the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 189 of the EC Treaty (now the fourth paragraph of Article 249 EC) and Articles 4 and 5 of that decision;

— order the French Republic to pay the costs.

Pleas in law and arguments of the parties

7. The Commission points out that the action for annulment does not have suspensory effect and that France did not make any application for interim measures in Case C-17/99. Consequently, France is obliged to comply with the decision.

8. The Court has consistently held that the only defence available to a Member State in opposing the obligation to recover aid is to plead that recovery was absolutely impossible. There is no reason to suppose that that obtains in the present case.

9. It is also claimed that France had failed to fulfil its obligation to cooperate with the Commission in good faith, since the French authorities had not replied to the Commis-

3 — Case C-17/99 *France* v *Commission* [2001] ECR I-2481, ECR I-2484, see the Opinion delivered on 11 January 2001.

sion's reminder nor had they drawn attention in any other way to possible obstacles to the recovery of the aid or suggested alternative measures for implementing the decision. There was also no evidence that France had taken any steps whatever to recover the aid.

10. France states that it is aware of its obligation to recover the aid but has so far not been in a position to fulfil that obligation.

11. France contends that it endeavoured, in cooperation with the undertaking concerned, to find a way to recover the aid. Although immediate recovery of the full amount would result in the undertaking becoming bankrupt — a circumstance which, in accordance with the case-law of the Court with which France is familiar, does not justify refraining from recovering the aid — France had not relied on this against the Commission.

12. France had brought the aforementioned action for annulment, but had made no application for interim measures because it was aware of the consistent case-law of the Court.

13. At the hearing in Case C-17/99 of 23 November 2000, the French Government representative announced that Nouvelle Filature Lainière de Roubaix had since become bankrupt and had been wound up by judicial decision.

Analysis

14. It is of course unsatisfactory that a decision has to be made in this case as to whether France is in breach of the Treaty in refraining — provisionally at least — from recovering aid while another action against the decision concerning aid is pending. [4] However, as France acknowledges, the case-law on this issue is quite unambiguous.

4 — See the Opinion of Advocate General Ruiz-Jarabo Colomer of 28 October 1999 in Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, at p. I-4901, point 30 et seq.

15. The Court recently held: [5]

'34 ... the system of remedies set up by the Treaty distinguishes between the actions under Articles 169 and 170 of the EC Treaty (now Articles 226 and 227 EC), which are directed to obtaining a declaration that a Member State has failed to fulfil its obligations, and those under Articles 173 of the EC Treaty (now, after amendment, Article 230 EC) and Article 175 of the EC Treaty (now Article 232 EC), which are directed to obtaining judicial review of measures adopted by the Community institutions, or of failure to act on their part. Those remedies have different objectives and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of a decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision (Case 226/87 *Commission* v *Greece* [1988] ECR 3611, paragraph 14, and Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 10).

35 The position could be different only if the measure in question contained particularly serious and manifest defects such that it could be deemed non-existent (Case 226/87 *Commission* v *Greece*, cited above, paragraph 16, and Case C-74/91 *Commission* v *Germany*, cited above, paragraph 11).

36 That also applies to an action for failure to fulfil obligations based on the second subparagraph of Article 93(2) of the EC Treaty.'

16. In the present case there is no apparent reason to suppose that the Commission Decision should be deemed non-existent. On the contrary, it follows from the Opinion in Case C-17/99 of 11 January 2001 that it must be regarded as lawful.

17. The Court also held in the aforementioned judgment in Case C-404/97: [6]

'38 ... it is settled case-law that recovery of unlawful aid is the logical consequence of the finding that it is unlawful and that that consequence cannot depend on the form in which the aid was

5 — *Commission* v *Portugal* (cited in footnote 4, at paragraph 34 et seq.).

6 — Cited in footnote 4, at paragraph 38 et seq.

granted (see in particular Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 16).

39 The Court has also 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 (Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 16).'

18. Finally, the Court pointed out in that judgment that 'a decision is presumed to be lawful and, despite the existence of the action for annulment, it [remains] binding in all respects...'. [7] A similar provision is contained in Article 14(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. [8] That provision expressly points out that, pursuant to Article 185 of the EC Treaty (now Article 242 EC), [9] the obligation to effect recovery may be suspended whilst an action for annulment is pending.

19. The French Republic did not request a suspension of the obligation to recover the aid. France does argue that in accordance with the case-law of the Court such a request would have had no chance of success, but that opinion is irrelevant in the present proceedings. In the absence of a suspension, there clearly continues to be an obligation to recover aid. Any objections the French Republic may have to the case-law of the Court on this issue would have to be considered only in the event of a decision to suspend a Commission decision.

20. Even the fact that the recipient undertaking has since become bankrupt and been wound up cannot alter the outcome of these proceedings. In the first place, the French Republic is obliged to continue to recover the aid even in the bankruptcy proceedings. In the second place, under Article 5 of the Commission decision, the French Republic was obliged at the very least to take measures to recover the aid and inform the Commission within two months of receipt of the decision. [10] The French Republic failed to fulfil that obligation.

7 — Case C-404/97, cited in footnote 4, at paragraph 57.

8 — OJ 1999 L 83, p. 1.

9 — See also the Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-404/97, cited in footnote 4, at point 37.

10 — See Case 52/84 *Commission* v *Belgium* [1986] ECR 89, at paragraph 15.

Conclusion

21. It is therefore proposed that the Court should:

(1) declare that, by failing to adopt within the prescribed time-limit the measures necessary in order to recover from Nouvelle Filature Lainière de Roubaix, the recipient thereof, the aid declared to be illegal and incompatible with the common market by the decision of the Commission of 4 November 1998, which was notified on 17 November 1998, the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 189 of the EC Treaty (now the fourth paragraph of Article 249 EC) and Articles 4 and 5 of that decision.

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