OPINION OF ADVOCATE GENERAL JACOBS
delivered on 2 February 1995 *

1. This is one of three related cases in which the Commission has instituted proceedings under Article 93(2) of the Treaty against Italy. [1] In the present case the Commission seeks a declaration that, by failing to implement its Decision 89/43/EEC of 26 July 1988 on aids granted by the Italian Government to ENI-Lanerossi, [2] Italy has failed to fulfil its obligations under the Treaty. The proceedings raise the same issue as that raised in Case C-348/93, namely whether, in a case where unlawful State aid has been paid indirectly through a public undertaking, the aid must be repaid to that undertaking or to the State. I shall therefore refer where appropriate to my Opinion in Case C-348/93.

2. ENI (Ente Nazionale Idrocarburi), a State holding company, took over the Lanerossi group in 1962 with a view to resolving the financial problems of a number of textile and clothing companies which were part of that group. Despite restructuring efforts, four subsidiaries of Lanerossi in the men's outer wear sector, namely Lanerossi Confezioni, Intesa, Confezioni di Filottrano, and Confezioni Monti ('the four subsidiaries') continued to make heavy operating losses which, for a number of years, were made up by the State.

3. By a letter of 20 May 1983 addressed to the Italian Government ('the Government'), the Commission stated that it had not objected to the grant of aid until the end of 1982 in view of the social and regional importance of the four subsidiaries. It doubted, however, whether financial assistance from public funds could continue to be paid to them in the future without interfering with the orderly functioning of the common market. It invited the Government to notify it of any plans to grant aid in the future in accordance with Article 93(3) of the Treaty.

4. Although the Government responded that no further aid was envisaged for the four subsidiaries, it continued to cover their operating losses through public funds after the end of 1982. The Commission took the view that that was State aid and that the Government had failed to fulfil its obligations under Article 93(3) since it had granted the aid without prior notification. Consequently, it

* Original language: English.

1 — See also Case C-348/93 'Alfa Romeo', judgment of 4 April 1995, [1995] ECR I-673, and Case C-349/93 'Aluminia/Comsal', not yet published.

2 — OJ 1989 L 16, p. 52.

initiated the procedure provided for in Article 93(2) by a letter of 19 December 1984.

5. On the basis of information submitted by the Government during that procedure, the Commission established that, between 1983 and 1987, ENI had received State aid in the form of capital injections in order to cover the operating losses of the four subsidiaries. The total amount of aid was LIT 260.4 thousand million. In particular, ENI received aid of LIT 78 thousand million in 1983, LIT 56.8 thousand million in 1984, LIT 42.2 thousand million in 1985, LIT 45.9 thousand million in 1986 and LIT 37.5 thousand million in 1987. [3] The Commission took the view that the aid was incompatible with the common market.

6. On 26 July 1988, the Commission adopted the decision in issue in these proceedings, Articles 1, 2 and 3 of which provide as follows:

'*Article 1*

The aids granted between 1983 and 1987 to ENI/Lanerossi in the form of capital injections in favour of the group's men's outer wear subsidiaries and amounting to LIT 260.4 billion are illegal as they were provided in violation of the provisions of Article 93(3) of the EEC Treaty. Moreover, they are incompatible with the common market within the meaning of Article 92 of the Treaty.

Article 2

These aids shall be withdrawn by recovery.

Article 3

The Italian Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply herewith.'

7. The decision was notified to the Government by letter of 10 August 1988. The Government did not take the measures necessary to recover the aid. It brought an action for the annulment of the decision which was dismissed by the Court in its judgment in Case

3 — See Commission Decision 89/43/EEC, cited in note 2, pp. 54-55 of the Official Journal.

C-303/88 *Italy* v *Commission*, [4] hereafter referred to as 'Lanerossi I'. Among the submissions of the Government which were rejected by the Court in 'Lanerossi I' were submissions to the effect that the Commission attributed unlawful effects to Italy's failure to notify the aid, that the order for recovery of the aid was insufficiently reasoned, and that it was impossible to recover the aid. In response to the Government's argument that it was uncertain from whom the aid was to be recovered, the Court held that the aid was to be recovered from the undertakings which actually benefited from it, namely the four subsidiaries. [5] In 'Lanerossi I', however, the Court examined only the issue which entity is responsible for repaying the aid. It did not examine the issue to which entity the aid must be repaid in order to comply with the decision. [6]

8. Following the judgment of the Court, the Commission invited the Government to take the necessary measures to comply with the decision. On 24 May 1991 the Italian authorities informed the Commission that recovery of the aid was proving difficult. In particular, although the Minister responsible for State holdings had asked ENI to take all necessary measures to recover the aid, plus interest, from the four subsidiaries, ENI had stated that it was legally and practically impossible to recover the aid since the four subsidiaries had been wound up and sold to the private sector.

4 — [1991] ECR I-1433.

5 — Paragraph 57 of the judgment.

6 — See also the Opinion of Advocate General Van Gerven in 'Lanerossi I', cited in note 4, p. 1468.

9. By a letter of 26 September 1991 the Commission stated that the difficulties referred to by the Italian Government did not exonerate it from the obligation to recover the aid and called on the Government to notify it within fifteen days of the measures taken to effect recovery. Since the Italian authorities did not take any such measures, the Commission again emphasized, by a letter dated 10 March 1992, the urgent need to comply with the decision.

10. By a letter dated 25 March 1992 the Italian authorities informed the Commission of their intention to recover the aid by arranging for the repayment from Lanerossi (renamed SNAM SpA) to ENI of the sum of LIT 260.4 thousand million plus interest. They expressed the view that that method of recovery was sufficient to comply with the decision. It appears from a communication from the Italian Ministry responsible for State holdings to the Ministry of Foreign Affairs annexed to the letter of 25 March 1992 and bearing the same date that recovery of aid would take place by entering as liabilities in the accounts of SNAM SpA a sum equal to the amount of the aid plus interest.

11. On 26 June 1992 the member of the Commission responsible for competition wrote to the Government in relation to all three cases referred to in paragraph 1. With regard to the present case, he stated that in order to comply fully with the decision it

was not sufficient for the aid to be repaid from Lanerossi to ENI. The aid had to be repaid to the Italian State. He added that the Italian authorities had not submitted any valid reasons why recovery by ENI was sufficient to comply with the decision. Further, he stated that, since Italy had failed to take the necessary measures in order to comply with the decision, he would propose to the Commission before the end of July 1992 that enforcement proceedings should be instituted.

12. By a letter of 14 October 1992 the Italian authorities requested an additional period of grace, stating that the abolition of the aid had to be addressed within the general framework of the programme for the privatization of public undertakings which the Government was proposing to implement. By a letter dated 10 March 1993, the Commission once more invited the Government to take the necessary measures in order to comply with the decision. It stressed the urgent need to eliminate the distortions of competition arising from the failure to implement it and fixed 31 March 1993 as the final date for its implementation. Since the Italian authorities did not take the requested measures, the Commission initiated the present proceedings.

13. In its application, the Commission argues that, in order to comply fully with the decision, it is not sufficient for the aid to be repaid by Lanerossi to ENI. ENI must repay to the Italian State the part of the aid which was financed by State funds specifically earmarked for the textile sector of the Lanerossi group. In particular, SNAM SpA, as the successor of Lanerossi, must pay to ENI the sum of LIT 260.4 thousand million. In turn, ENI must pay to the Italian State the sum of LIT 173.7 thousand million, which corresponds to the funds received by ENI from the State earmarked for the Lanerossi group. ENI may retain the sum of LIT 86.7 thousand million which corresponds to that part of the aid financed by ENI's own funds.

14. The Government contests the admissibility of the application on two grounds. It claims that the alleged obligation of ENI to repay part of the aid to the Italian State is not provided for in the decision. It was first invoked by the Commission in its letter of 26 January 1992. According to the Government, therefore, the application is inadmissible since the Commission seeks a declaration that Italy has failed to fulfil an obligation which is not provided for in the decision. The Government also argues that the application infringes Article 38(1)(c) of the Rules of Procedure, according to which the application must state the subject-matter of the proceedings and a summary of the pleas in law on which it is based.

15. The Government raised similar objections to admissibility in Case C-348/93. It is sufficient to state here that, for the reasons which I stated in my Opinion in that case, the objections to admissibility raised in this

case should be rejected: see paragraphs 12 to 16 of my Opinion in Case C-348/93. I turn now to examine the substance of the case.

16. I should first point out that even if it were accepted that ENI had no obligation to repay the sum of LIT 173.7 thousand million to the Italian State, Italy would still be in breach of its obligations under the Treaty. According to Article 3 of the decision, Italy was under an obligation to inform the Commission of the measures taken to recover the aid within two months of notification, which took place on 10 August 1988. As the Government concedes, SNAM SpA repaid the aid to ENI after the end of the prescribed period. It follows that Italy failed to take the measures necessary to implement the decision in time. The Government states that, although the aid was repaid after the expiry of the prescribed period, interest was paid. It is clear, however, that payment of interest does not absolve a Member State from the obligation to recover aid within the period prescribed by the Commission in its decision. Otherwise, a Member State would be free to delay the implementation of a decision ordering recovery of unlawful State aid and to maintain the distortions of competition caused as a result of the granting of aid. That would render the provisions of the Treaty on State aid nugatory.

17. Thus, in any event, Italy has failed to fulfil its obligations under the Treaty since it failed to implement the decision in time.

18. I turn now to examine the central issue in this case, namely, whether it is sufficient for the aid to be repaid by Lanerossi to ENI or whether, as the Commission claims, a part of it must be repaid by ENI to the Italian State.

19. As I stated in my Opinion in Case C-348/93, in enforcement proceedings under Article 93(2) the Commission may only claim that the defendant Member State has failed to fulfil an obligation arising from the decision the alleged infringement of which is the subject-matter of the proceedings. It follows that the issue which entity is responsible for recovering the unlawfully paid aid should be determined by reference to the decision, account being taken of the purposes of the obligation to recover. It is necessary therefore to determine whether, according to the decision, the aid must be repaid to the Italian State.

20. The decision does not specify to which entity the aid must be repaid. Article 2 merely states that 'these aids shall be withdrawn by recovery'. The Italian language version of the decision, which is the only authentic version, is to the same effect. [7] It is clear from the decision, however, that the funds necessary to finance the aid were provided by the State and not by ENI itself.

7 — In Italian, Article 2 states as follows: 'Tali aiuti debbono essere oggetto di recupero'.

Article 1 refers to 'The aids granted between 1983 and 1987 to ENI/Lanerossi ... in favour of the group's men's outer wear subsidiaries'. Thus, Article 1 identifies ENI as a recipient rather than as the grantor of the aid. That is confirmed by the preamble to the decision which states as follows: [8]

'The interventions by the Italian State in favour of ENI/Lanerossi which were intended to cover operating losses suffered by its men's outer wear subsidiaries between 1983 and 1987 and amounted to LIT 260.4 billion took the form of capital donations explicitly and specifically intended to serve the above purpose.'

Thus, the decision is readily understood as meaning that ENI granted financial assistance to the four subsidiaries on the basis of the funds given to it by the Italian State and that ENI acted as intermediary.

21. The Government claims that, in order to comply with the decision, it is sufficient for the aid to be repaid to ENI. It is not necessary for the aid to be repaid to the Italian State. In support of its views, it refers to arguments similar to those that it advanced in Case C-348/93.

22. In particular, the Government claims that the purpose of the obligation to recover unlawfully paid aid is to deprive the beneficiary of a benefit acquired illegally and to terminate the distortions of competition caused as a result of the payment of the unlawful aid. In order to fulfil that purpose it is sufficient for the aid to be repaid to ENI.

23. The Government also claims that the obligation to recover only concerns unlawfully paid aid. The Italian State would be under an obligation to recover the aid from ENI only if the transfer of funds from the Italian State to ENI had been characterized as aid in the decision. However, the decision does not state that that transfer of funds is State aid. In support of its views, the Government refers to the judgment of the Court in 'Lanerossi I' where the Court held that, in order to establish the existence of State aid, it was not necessary to establish that the capital funds received by ENI from the Italian State were specifically and expressly intended to make up the losses of the four subsidiaries. It was sufficient that the receipt of the capital funds enabled ENI to release other resources to make up the losses of the four subsidiaries. [9] The Government concludes that the

8 — Decision 89/43/EEC, cited in note 2, p. 55 of the Official Journal.

9 — Paragraph 14 of the judgment.

issue which entity provided the funds for the payment of the aid is not relevant in determining the issue to which entity the aid must be repaid.

24. For the reasons given in my Opinion in Case C-348/93, I cannot accept those arguments.

25. As I stated in my Opinion in that case, the issue to which entity the illegal aid must be repaid should be determined taking into account the purposes of the obligation to recover. One of the purposes of that obligation is to re-establish the situation which would have existed if the Member State had notified the aid and had not implemented it before receiving the Commission's clearance as required by Article 93(3). The Court has held that the obligation to recover unlawfully paid aid is the logical consequence of illegality and that it cannot therefore be considered as disproportionate to the objectives of the provisions of the Treaty on State aid. [10] Further, recovery of aid must take place in such a way as to ensure that the funds by which the aid was financed are not passed on to other undertakings and in such a way as to facilitate the supervisory function of the Commission, which lies at the heart of the system of preventive control of new State aid provided for by Article 93. If that system is to be effective, it is necessary for the relations between the State and public undertakings to be transparent and for the Commission to be able to ascertain that unlawful aid has been recovered.

26. In order to fulfil the obligation of recovery it is necessary but may not be sufficient to deprive the beneficiary undertaking of the unlawful aid that it has received. Where aid is ultimately provided by the State, whether by direction of the State or by the use of State resources, it must be repaid to the State, even if it was provided indirectly, e. g. via a holding company. It is not sufficient to repay the holding company which acted as an intermediary or, as here, to transfer it from one holding company to another. Otherwise recovery of the aid might amount to no more than a book-keeping operation, requiring only the appropriate entries in the accounts of the respective holding companies. It would be difficult in that event both to ensure that the aid had been properly repaid and also to ensure that the funds so transferred would be used in the future in accordance with the requirements of the Treaty provisions on State aid.

27. In my view, therefore, unlawful aid which has been provided by State resources and has been paid indirectly via a State holding company must be repaid to the State. That is the case even if the State resources

10 — Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959 ('Tubemeuse' case), paragraph 66 of the judgment.

were not specifically earmarked for the undertaking which was the recipient of the aid. It is sufficient that the State holding company would not be able to provide the aid unless it had received funds from the State. In the present case, as already stated, the decision makes it clear that the aid was paid to the four subsidiaries by the Italian State via ENI. It follows that, in order to comply with the decision, the aid must be repaid to the Italian State.

28. The Commission says, however, that only part of the aid (LIT 173.7 thousand million) must be repaid to the State on the ground that only that part was financed by State resources. ENI may retain the remaining part of the aid (LIT 86.7 thousand million) since it was financed by ENI's own resources.

29. The decision does not make it clear that part of the aid was financed by the State and part of it by ENI's own resources. Nor is that made clear in the Commission's letter of 26 June 1992 in which the Commission stated that, in order to comply with the decision, the aid must be recovered by the Italian State. The first time the Commission made a distinction between funds granted by the State to ENI earmarked for the four subsidiaries and funds granted by ENI's own resources was in its application to the Court.

30. In support of its claim that ENI must repay to the Italian State the amount of LIT 173.7 thousand million, the Commission refers to a letter of 22 July 1988 sent by the Italian Ministry of Foreign Affairs to the Commission. That letter was sent before the adoption of the decision with a view to showing that the financial assistance granted by ENI to the four subsidiaries was compatible with the Treaty. It appears from the letter that the funds granted by the State to ENI and earmarked for its textile sector were as follows: LIT 46 thousand million in 1983, LIT 76 thousand million in 1985 and LIT 51.7 thousand million in 1986, namely LIT 173.7 thousand million in total. Although the preamble to the decision refers in passing to a letter of 22 July 1988, [11] it does not do so for the purpose of distinguishing between funds granted by the State to ENI earmarked for its textile sector and funds granted by ENI's own resources.

31. The Government argues that since the letter of 22 July 1988 was not taken into account in the decision, the Commission may not refer to it at this stage in order to argue that ENI is under an obligation to pay the sum of LIT 173.7 thousand million to the Italian State.

32. I cannot accept that argument. It is true that in enforcement proceedings under Article 93(2), the scope of the action is determined by the Commission decision in issue in the proceedings and that the Commission may not impose on the defendant State obligations other than those already provided for

11 — Decision 89/43/EEC, cited in note 2, p. 55 of the Official Journal.

in the decision. In this case, however, the Commission is not seeking to use the letter of 22 July 1988 to impose any new obligations on Italy. Nor does the letter affect adversely the interests of the Government. On the contrary, on the basis of the letter the Commission argues that it is not necessary for ENI to repay all the aid to the Italian State but it is sufficient to repay only LIT 173.7 thousand million. It would be otherwise if the letter had an adverse effect on the interests of the Government. [12]

33. A final point: in its application, the Commission states that the obligation of SNAM SpA to repay the unlawful aid, plus interest, does not eliminate the harmful effects that the payment of the aid has already caused to other undertakings in the textile sector. It refers to the case-law of the Court according to which a declaration in proceedings under Article 169 that a Member State has failed to fulfil its obligations under the Treaty may establish the basis of liability which that Member State may incur as a result of its default towards other Member States, the Community or private parties. [13] It claims that similar principles apply to proceedings under Article 93(2) and asks the Court to make an express statement to that effect in its judgment in the present case. The Commission has made similar requests in Case C-348/93 and C-349/93. For the reasons stated in my Opinions in those cases, I do not think that it is necessary for the Court to make the statement sought by the Commission. [14]

Conclusion

34. Accordingly, I am of the opinion that the Court should:

(1) declare that, by failing to implement Commission Decision 89/43/EEC on aids granted by the Italian Government to ENI-Lanerossi within the prescribed period, the Republic of Italy has failed to fulfil its obligations under the EEC Treaty;

(2) order the Republic of Italy to pay the costs.

12 — See Case C-47/91 *Italy* v *Commission*, judgment of 5 October 1994, paragraph 23 of the judgment.

13 — See e. g. Case C-263/88 *Commission* v *France* [1990] ECR I-4611, paragraph 9 of the judgment.

14 — See my Opinion in Case C-349/93, delivered on 19 January 1995, paragraphs 25 and 26 and my Opinion in Case C-348/93 delivered on 2 February 1995, judgment of 4 April 1995, [1995] ECR I-673 paragraphs 47 to 49.