OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 26 June 1997 *

Introduction

1. This case concerns the failure of Italy to recover an aid granted in 1992 to between 100 000 and 150 000 Italian road-haulage undertakings by means of a tax credit calculated on the basis of their consumption of motor fuel and lubricants. Italy does not dispute its failure to take steps to recover the aid, as is required by a Commission decision of June 1993. In its defence to the present infringement action, Italy claims that it is impossible to recover the aid, because the hauliers affected would respond with a strike, leading to social crisis and the undermining of public order, and because of the technical difficulty in identifying the amount of credit granted to so large a number of beneficiaries in respect of a variety of taxes and taxable periods.

Legal and factual background

2. Excise duties on gas oil in Italy are amongst the highest in the Community. Difficulties in the road-haulage sector led, in 1990, to a one-week transport strike which severely disrupted the economic and social life of the country. On 19 April 1990, the Italian Government reached an agreement with the relevant trade associations to settle the dispute, which committed it to reducing the costs which burdened the sector's competitiveness, and, in particular, to provide a tax credit to reduce the effective price of gas oil. On 28 January 1992, the Italian Government introduced, by Ministerial Decree (hereinafter 'the 1992 Decree'), [1] a tax credit for the fiscal year 1992 in favour of Italian professional road hauliers operating on behalf of third parties. This tax credit could be deducted by such undertakings from the income tax imposed on them as natural or legal persons, from municipal tax, from value added tax, or from payments by them by way of tax of monies deducted at source from employees or self-employed persons. The amount of the credit was based on the difference between the price in Italy and the average price in the other Member States of the Community of the motor fuel and lubricants used by such road-haulage undertakings in the course of their business, subject to ceilings established by reference to the average annual distance travelled and average annual fuel consumption of vehicles in four different categories, defined according to total permissible weight. The credit was deductible from biannual instalments and final balances relating to direct taxation, from monthly and three-monthly value added tax returns and from monthly returns of monies deducted at source arising during

1 — GURI No 25 of 31 January 1992, p. 17. Modifications were introduced by Ministerial Decrees of 7 March 1992 and 16 January 1993.

* Original language: English.

the 1992 fiscal year. The agent for Italy pointed out at the oral hearing that any surplus credit remaining at the end of the 1992 fiscal year, which would have been established before the date of the Commission's decision by the taxpayer's final declaration in May 1993, could be carried over to the following year or years, although he added that the amounts involved in later years were probably negligible. In answer to a written question posed by the Court regarding the administration of the tax-credit scheme, Italy stated that the beneficiary was required to indicate, in an *ad hoc* tax declaration form prescribed by Ministerial Decree, [2] both evidence supporting the amount of credit claimed and the manner in which this right was exercised in the fiscal year in question.

3. The Commission wrote to the Italian Government on 15 April 1992 seeking detailed information about the 1992 Decree, and indicating that it considered the tax-credit scheme to fall within Article 92(1) of the Treaty establishing the European Community (hereinafter 'the Treaty'). [3] Being dissatisfied with the Italian Government's reply of 4 August 1992, the Commission informed the Government, by letter dated 26 October 1992, that it had decided to initiate the procedure provided for in Article 93(2) of the Treaty, and asked it to submit the detailed information requested and its comments. [4] No reply was received, and the Commission adopted Decision No 93/496/EEC of 9 June 1993 concerning State aid procedure C 32/92 (ex NN 67/92) — Italy (tax credit for professional road hauliers) (hereinafter 'the Decision'), [5] notified to the Italian Government by letter dated 16 June 1993.

4. Articles 1 to 3 of the Decision provide as follows:

'(1) The aid in favour of professional road hauliers in Italy in the form of a tax credit on income tax or on municipal tax or on VAT which was introduced by the Ministerial Decree of 28 January 1992 is unlawful in so far as it is granted in breach of the procedural rules laid down in Article 93(3) of the EEC Treaty. The aid is also incompatible with the common market within the meaning of Article 92(1) of the EEC Treaty, in so far as it meets neither the conditions for the exemptions provided for in Article 92(2) and (3) nor the conditions of Regulation (EEC) No 1107/70.

2 — Ministerial Decree of 26 July 1990, GURI No 175 of 28 July 1990.

3 — A reminder was sent on 6 May 1992.

4 — A reminder was sent on 12 February 1993.

5 — OJ 1993 L 233, p. 10.

(2) The Italian Republic shall abolish the aid referred to in Article 1 and ensure that the aid granted is recovered within two months of the notification of this Decision. The aid shall be recovered in accordance with the procedures and provisions of national law, in particular those relating to interest on overdue payments owed to the Government, with interest starting to run from the date on which the unlawful aid was granted.

(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 with it.'

5. In the meantime, the Italian Government extended the application of the tax-credit scheme to the 1993 fiscal year, but also extended it to non-Italian road-haulage undertakings in respect of gas oil consumed on Italian territory. [6] The Italian Government, in a letter to the Commission of 26 August 1993, contended that this extension removed any ground of illegality, and also that the recovery of credits granted would be, from the technical point of view, extremely difficult and onerous for the tax authorities because the date, frequency and manner of administration of deductions varied in accordance with the taxes from which individual undertakings chose to deduct the credit. However, it took no action to challenge the Decision.

6. In its response of 24 November 1993, the Commission indicated that, in its opinion, the amended tax-credit scheme did not eliminate the distortion of competition which it had identified in the Decision, [7] and noted that the Italian Government had not yet taken steps to recover the aid granted pursuant to the 1992 Decree. The Italian Government defended the amended tax-credit scheme in its reply of 21 December 1993, [8] but did not refer to the Decision. In a subsequent letter of 13 January 1994, the Italian Government claimed that, upon further examination, it had proved to be technically impossible to recover the aid granted under the 1992 Decree, as the Decision required, because this would entail examination of a mass of declarations submitted by some 150 000 different road-haulage undertakings

6 — Legislative Decree No 19 of 26 January 1993, GURI No 21 of 27 January 1993; extended by Legislative Decree No 82 of 29 March 1993, GURI No 73 of 29 March 1993; extended and modified by Law No 162 of 27 May 1993, GURI No 123 of 28 May 1993. The tax-credit scheme was later extended to subsequent fiscal years.

7 — The Commission had already sought information about the amended tax-credit scheme in a letter of 5 July 1993.

8 — The Commission requested the Italian Government to suspend the amended tax-credit scheme in a letter of 4 December 1995. The scheme was condemned by Commission Decision No 97/270/EC of 22 October 1996 on a tax-credit scheme introduced by Italy for professional road hauliers (C 45/95 ex NN 48/95), OJ 1997 L 106, p. 22, which is now the subject of an annulment action brought by Italy, Case C-6/97.

regarding a variety of different taxes. [9] It should be noted that the Italian Government did not in this letter or at any time prior to the institution of these proceedings contend that an attempt to recover the tax credit would lead to unacceptable social disruption.

7. On 18 August 1995, the Commission commenced proceedings before the Court pursuant to Article 93(2) of the Treaty, requesting that it declare that, by failing to take the necessary measures to comply with the Decision, and by failing, in particular, to recover the aid granted pursuant to the 1992 Decree in the form of a tax credit for the 1992 fiscal year in respect of income tax, municipal tax or VAT, the Italian Republic had failed to comply with its obligations under the Treaty, and that the Court condemn the Italian Republic to bear the costs of the proceedings.

Pleadings

8. The Commission and the Italian Republic submitted written and oral pleadings to the Court.

9. The Commission argues that Member States may not plead obstacles in their domestic legal orders as an excuse for failure to fulfil their Community-law obligations, [10] and that only absolute impossibility could justify the Italian Government's non-implementation of the Decision. [11] Where a Member State encounters unforeseen difficulties in implementing a Commission decision in the field of State aids, it should bring the matter to the Commission's attention so that they can cooperate in good faith in addressing the problem, as prescribed by Article 5 of the Treaty. [12] While the Italian Government had raised its difficulties in its correspondence with the Commission, it neither attempted to recover the aid nor proposed any alternative course of action to the Commission.

10. Italy acknowledges that it cannot now question the validity of the Decision. However, it maintains that it had pointed out its

9 — Italy estimates the number of undertakings concerned as being more than 100 000, in its defence in the present action.

10 — Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 18 of the judgment.

11 — Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 14 of the judgment; Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 8; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 10.

12 — Case 52/84, cited above, paragraph 16 of the judgment; Case 94/87, cited above, paragraph 9; Case C-183/91, cited above, paragraph 19.

difficulties in implementing the Decision in its letters to the Commission of 26 August 1993 and of 13 January 1994, after which, in the absence of any further communication from the Commission, it considered the matter to be closed. Italy invokes the lapse of time before the commencement of these proceedings, not so much to question their admissibility as to argue that the Commission's delay compounds the difficulty in recovering the aid. Italy claims that it is impossible to recover the aid in question: firstly, because the tax credit was a response to a grave social crisis, and any attempt to recover it would lead to renewed strikes and dislocation by a very militant economic sector, which would undermine public order and could only end in defeat for the State; and secondly, because the number of taxpayers involved, and the variety of taxes, taxable periods and divisions of the tax administration over which the deductions could be spread, would make it unacceptably onerous to seek recovery of the aid, which in any event could only be partial. In answer to a written question posed by the Court regarding recovery procedures, Italy stated that recovery would involve a large number of different tax offices dispersed throughout its territory, because the applicable law provides for each branch of the revenue service, divided on geographical and functional lines, to recover taxes for which it is responsible. The agent for Italy argued at the oral hearing that recovery should be deemed to be objectively impossible when it was neither reasonably nor relatively possible, so that actions with grave negative effects would be considered to be, in effect, impossible. Italy states that it was willing to seek to compromise with the Commission, although it asserts that even alternative strategies of partial recovery of the aid, for example by instalments, would not be feasible.

11. The Commission argues that Italy's public-order argument would result in there being one law for the strong and another for the weak, and that its difficulties were not unforeseeable, because the aid was introduced precisely in order to alleviate the sort of social crisis which Italy now maintains would be unleashed by its attempted recovery. Furthermore, Italy did not attempt recovery in 1993, when this might have been easier. Given the scale of the Italian tax administration, the Commission does not consider the technical obstacles to recovery raised by Italy to be so onerous as to satisfy the criterion of absolute impossibility. The Commission accepts that recovery may not be possible 'to the last lira', but Italy challenges it, in this respect, to specify what measures or degree of recovery would satisfy it. Irrespective of any lapse of time, the Commission submits that its attitude on the need to recover the illegal aid was always clear, and that it made suggestions such as the establishment of a task force at the Ministry of Finance to demonstrate Italy's willingness to give effect to the Decision. Moreover, the Commission submitted, in response to a written question from the Court, that recovery would be facilitated by recourse to the special table regarding the amount and manner of use of the tax credit required to be included in each taxpayer's annual tax declaration. [13]

13 — See the Ministerial Decree of 26 July 1990, cited in footnote 2 above.

Analysis

12. It is common case that the validity of the Decision cannot be contested in these proceedings, as it was not challenged within the time-limit set out in Article 173 of the Treaty. The Court has made clear in its consistent case-law that a Member State's failure to comply with an obligation to recover illegally paid State aid can be justified only by absolute impossibility. [14] Furthermore, while the recovery of aid unlawfully paid must, in principle, take place in accordance with the relevant procedural provisions of national law, those provisions must not be applied in such a way that the recovery required by Community law is rendered practically impossible. [15] Before assessing the particular grounds on which Italy claims that it is not possible to comply with the Decision, I shall first consider in general terms the test of absolute impossibility.

13. A number of conditions have been imposed on the application of the test of absolute impossibility, as articulated in the specific context of the recovery of illegal State aid. A Member State which, '*in giving effect to the decision*, encounters unforeseen or unforeseeable difficulties or perceives consequences overlooked by the Commission', should submit those problems for consideration by the Commission, together with proposals for suitable amendments. [16] The Court has consistently rejected arguments of absolute impossibility made by Member States which 'merely informed the Commission of the political and legal difficulties involved in implementing the decision, without taking any step whatsoever to recover the aid from the undertaking in question and without proposing to the Commission any arrangements for implementing the decision which would have enabled those difficulties to be overcome'. [17] Absolute impossibility, therefore, cannot be merely surmised, but, rather, must be demonstrated by the failure of attempts made in good faith to recover illegal aid, and must be accompanied by cooperation with the Commission, in accordance with Article 5 of the Treaty, with a view to overcoming the difficulties encountered.

14. The justification of non-compliance with Community-law obligations on grounds of absolute impossibility appears, by its terms, to exclude any degree of relativism, and is inconsistent with Italy's submission. Thus, a distinction has been drawn in the case-law between absolute impossibility and the wider concept of *force majeure*, which includes circumstances which, in spite of the exercise of all due care, could not have been avoided

14 — Case 52/84 *Commission* v *Belgium*, cited above, paragraph 14 of the judgment; Case 94/87 *Commission* v *Germany*, cited above, paragraph 8; Case C-183/91 *Commission* v *Greece*, cited above, paragraph 10.

15 — Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 61 of the judgment; Case C-5/89 *Commission* v *Germany*, cited above, paragraph 12; Case C-24/95 *Land Rheinland-Pfalz* v *Alcan Deutschland* [1997] ECR I-1591, paragraph 24.

16 — Case 52/84 *Commission* v *Belgium*, cited above, paragraph 16 of the judgment, emphasis added.

17 — Case 94/87 *Commission* v *Germany*, cited above, paragraph 10 of the judgment; see, in virtually identical terms, Case C-183/91 *Commission* v *Greece*, cited above, paragraph 20.

except at the cost of excessive sacrifice. [18] Even if, when applying the test of absolute impossibility, some weighing of ends and means were permitted in cases of the most extreme disproportion between the two, the condition that due care have been taken to address foreseeable difficulties is an obvious safeguard against any attempted abuse.

15. I shall now examine Italy's plea of the absolute impossibility of complying with the recovery provision of the Decision, and the two specific grounds raised, viz. the public-order and technical problems which would be faced by any attempted recovery of the illegal aid. I am not convinced by Italy's arguments, for a number of reasons.

16. First, no attempt whatsoever has been made by Italy to recover the aid. Indeed, it appears that Italy continued, at least to some extent, to grant the illegal aid, by permitting unused credits to be carried over from 1992 and deducted from tax in subsequent fiscal years, even after the date of the Decision in June 1993. While Italy raised from the outset the technical difficulties it anticipated in complying with the Decision, it made no proposal as to how these might be overcome or how recovery could be effected either in whole or in part. Furthermore, Italy did not mention any public-order problems before these proceedings commenced. Italy has, therefore, failed to comply with the conditions outlined in paragraph 13 above.

17. Secondly, the problems which Italy now expects to face if it proceeds to seek recovery of the illegal aid were entirely foreseeable. Article 93(3) of the Treaty requires proposed aids to be notified to the Commission, and, unless the Commission raises no objection, that proposed measures not be given effect until the procedure set out in Article 93(2) of the Treaty has resulted in a final decision. Italy had ample opportunity to notify the aid between the agreement of 19 April 1990 and its implementation by the 1992 Decree. In any event, as of 15 April 1992, when the Commission first informed Italy of its view that the tax-credit scheme constituted a State aid, or as of 26 October 1992, at the very latest, when the Commission indicated that it had decided to initiate the procedure provided for in Article 93(2) of the Treaty, Italy was formally on notice that the credits should not be awarded and that it might have to recover any credits actually granted.

18 — Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125, paragraph 23 of the judgment; see also Case 109/86 *Theodorakis* v *Greece* [1987] ECR 4319, paragraph 7, and Case C-136/93 *Transáfrica* v *Administration of the Spanish State* [1994] ECR I-5757, paragraph 14; cf., however, Case 125/83 *OBEA* v *Corman* [1985] ECR 3039, paragraph 28.

None the less, it did not inform the road hauliers of this possibility and continued to operate the aid scheme. Given the circumstances which gave rise to the scheme, Italy should have known whether attempted recovery of the aid could result in a revival of militancy and strikes or other challenges to public order. Furthermore, the manner of administration of the aid scheme should have permitted Italy to foresee that its recovery would be administratively burdensome. That burden does not arise from an external cause, but from Italy's own decisions about the manner of administration of the aid and the organisation of its revenue services.

18. Thirdly, quite apart from its failure to satisfy the general conditions for justification by reason of absolute impossibility, the two specific grounds pleaded by Italy cannot be accepted.

19. The Court accepts that *concrete* obstacles of a public-order character may, in extreme circumstances, prevent compliance with Community-law obligations, but that they can only be permitted to do so temporarily, until the conditions of normal administration are restored. [19] However, in the field of fishery controls, the Court has observed that the uniform application of the common fisheries policy would be jeopardised '[i]f the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for ... infringements'. [20] In response to France's submission that it was forced to refrain from taking action against persons responsible for infringements of the quota regime because the socio-economic climate was so difficult that there was a risk of major disorders likely to give rise to serious economic problems, the Court stated that '[*m*]*ere apprehension* of internal difficulties cannot justify a failure to apply the rules in question'. [21] As I stated in my Opinion in that case, it follows from the obligations imposed by Articles 5 and 189 of the Treaty that, where Member States are specifically charged with the enforcement of Community law, they are obliged to utilise all their State apparatus, including, if necessary, their police powers, to ensure the fulfilment of their obligations. [22] The same reasoning can be extended without modification to the present case. The mere prospect of public-order problems cannot permit Italy to shirk its duty to proceed to recover the illegal aid.

19 — See, for example, Case 101/84 *Commission* v *Italy* [1985] ECR 2629, where the Court accepted that a bomb attack on a data-processing centre could justify Italy's failure to compile certain statistical returns required by Community law, but only for the limited period it would take a diligent administration to replace the equipment and to collect and prepare new data.

20 — Case C-52/95 *Commission* v *France* [1995] ECR I-4443, paragraph 35 of the judgment.

21 — Case C-52/95 *Commission* v *France*, cited above, paragraphs 37 and 38 of the judgment, emphasis added.

22 — Case C-52/95 *Commission* v *France*, cited above, paragraphs 31 and 32 of my Opinion.

20. Italy's argument regarding the technical difficulty of recovering the aid is equally unacceptable. *Commission* v *Greece* [23] also concerned the obligation to recover illegal aid granted by way of a tax exemption. Greece maintained that the trifling financial importance of the exemption, the administrative difficulties in distinguishing between the different activities of beneficiaries, and the disproportionate cost of the measures for recovery of the aid would make it uneconomic and unreasonable to collect the tax. [24] The Court did not accept that these obstacles constituted absolute impossibility in the absence of attempted recovery or of any proposal to the Commission of alternative arrangements. [25] In my view, the Court should reach the same conclusion in the present case. [26]

21. The agent for Italy admitted at the oral hearing that recovery would be, as he put it, theoretically possible, on the basis of the evidence provided by the prescribed annual tax declaration. He submitted, however, that recovery would be unreasonably onerous, because of the large number of beneficiaries of the aid and the division of competence for recovery between branches of the revenue service responsible for different geographical areas and different taxes. It does not seem to me, however, that, given the computerisation of tax records, there is anything to distinguish the recovery problem confronting Italy from the routine need to control the myriad tax liabilities, claims and allowances which are a feature of the fiscal machinery of a modern State. In any event, as I have already indicated, and contrary to Italy's argument for a test of reasonable and relative possibility, the concept of absolute impossibility does not permit any assessment of the proportionality of ends and means in terminating an unlawful distortion of competitive conditions, except, possibly, in the most extreme circumstances. Furthermore, in so far as technical problems arise from Italy's recovery procedures, it should be borne in mind that national procedures should not be applied in such a way as to make recovery practically impossible.

22. Thus, Italy has no excuse for its failure to deploy the resources of its revenue and, if necessary, police services to surmount obstacles which it should have foreseen and which are partly of its own making and to recover the illegal aid in conformity with the Decision. It follows that the Italian Republic has failed to fulfil its Treaty obligations.

23 — Case C-183/91, cited above.

24 — Case C-183/91, cited above, paragraph 12 of the judgment.

25 — Case C-183/91, cited above, paragraphs 19 and 20 of the judgment.

26 — See further the Court's rejection, in different contexts, of arguments of justification based on lack of staff and the overloading of the computer centre entrusted with certain work in Case 101/84 *Commission* v *Italy*, cited above, and in Case 145/85 *Denkavit* v *Belgium* [1987] ECR 565.

Conclusion

23. I therefore propose that the Court decide as follows:

(1) By not complying with Commission Decision No 93/496/EEC of 9 June 1993 concerning State aid procedure C 32/92 (ex NN 67/92) — Italy (tax credit for professional road hauliers), the Italian Republic has failed to fulfil its obligations under the Treaty establishing the European Community.

(2) The Italian Republic is ordered to pay the costs.