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. The other cases are the 'Aluminia/Comsal' case (Case C-349/93) and the 'Lanerossi' case (Case C-350/93).

2. In the present case the Commission seeks a declaration that, by failing to implement within the prescribed period its Decision of 31 May 1989 concerning aid provided by the Italian Government to Alfa Romeo, an undertaking in the motor vehicle sector, [1] Italy has failed to fulfil its obligations under the Treaty. The proceedings raise the issue 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. That issue is also raised in the 'Lanerossi' case (Case C-350/93).

3. The events which gave rise to the present proceedings took place in 1985 and 1986. At that time Alfa Romeo, which was the second largest Italian car manufacturer, formed part of the Finmeccanica holding company, controlled in its turn by the State holding company IRI (Istituto per la Ricostruzione Industriale). In 1986, following a request by the Commission, the Italian Government ('the Government') confirmed that in 1985 it had provided to Alfa Romeo aid of LIT 206.2 thousand million in the form of capital contribution in order to cover losses incurred by Alfa Romeo in 1984 and during the first half of 1985. The funds to finance that aid came from budgetary allocations made to the bodies administering State shareholdings, including IRI, by the 1985 budget. [2] The distribution of those funds was the subject of a decision by the Comitato Interministeriale per la Programmazione Economica ('CIPE', Interministerial Committee for Economic Planning) of 3 April 1985. [3]

4. The Commission took the view that the capital contribution of LIT 206.2 thousand million was State aid and on 29 July 1987 it initiated the procedure provided for in Article 93(2) of the Treaty. On the basis of information supplied by the Government and Finmeccanica in the course of that procedure, the Commission established that in 1986 an additional aid in the form of the

* Original language: English.

1 — Decision 89/661/EEC, OJ 1989 L 394, p. 9.

2 — Law No 887 of 22 December 1984, *Gazzetta Ufficiale della Repubblica Italiana* 1984 No 365, ordinary supplement.

3 — *Gazzetta Ufficiale* 1985 No 163.

provision of new capital of LIT 408.9 thousand million was made to Alfa Romeo. The funds for that aid came from bonds issued by IRI pursuant to Decree Law No 547 of 19 October 1985 [4] (subsequently amended by Law No 749 of 20 December 1985 [5]) which permitted public bodies, including IRI, to issue bonds bearing interest paid by the State. The proceeds of the bonds issued by IRI were allocated by a decision of the CIPE of 28 November 1985 [6] and on the basis of the 1986 budget. [7] On 10 May 1988, the Commission extended the procedure initiated on 29 July 1987 to cover the capital contribution of LIT 408.9 thousand million.

5. On 31 May 1989 the Commission adopted the decision in issue, Articles 1, 2 and 3 of which provide as follows:

'*Article 1*

The aid in the form of capital contributions totalling LIT 615.1 billion awarded by the Italian Government through the public holding companies IRI and Finmeccanica to Alfa Romeo is unlawful and therefore incompatible with the common market within the meaning of Article 92(1) of the EEC Treaty because it was provided in contravention of the rules of procedure laid down in Article 93(3). The aid is also incompatible because it does not satisfy the conditions for exemption provided for in Article 92(3).

Article 2

The Italian Government is hereby required to recover the aid referred to in Article 1 from Finmeccanica within two months from the date of notification of this Decision.

The recovery shall be carried out in accordance with the procedures and provisions of national law including those concerning interest charges on State claims in the event of repayment taking place later than the two months referred to in the preceding paragraph.

Article 3

The Italian Government shall inform the Commission, within two months from the

4 — *Gazzetta Ufficiale* 1985 No 248.
5 — *Gazzetta Ufficiale* 1985 No 299.
6 — *Gazzetta Ufficiale* 1986 No 6.
7 — Law No 41 of 28 February 1986, *Gazzetta Ufficiale* 1986 No 49, ordinary supplement No 1.

date of notification of this Decision, of the measures taken to comply herewith.'

6. The decision was notified to the Government on 31 July 1989. The Government did not take the measures necessary for the recovery of the aid within the prescribed period. It brought an action for the annulment of the decision. In its judgment in Case C-305/89 *Italy* v *Commission* [8] (the 'Alfa Romeo' case), the Court dismissed that action. The Court rejected the Government's submissions to the effect that there was no State aid adversely affecting competition within the meaning of Article 92(1) of the Treaty, that the conduct of the Commission was unlawful, and that the aid was not incompatible with the common market. The Court also rejected the Government's submissions concerning the obligation to repay the aid, in particular the submission that that obligation should not be borne by Finmeccanica.

7. Following the judgment of the Court, the Commission repeatedly invited the Government to take the necessary measures in order to recover the aid. On 13 March 1992 the Italian authorities informed the Commission of their intention to recover the aid by requiring Finmeccanica to repay to IRI a sum equal to the amount of the aid plus interest. 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. In connection with the present case, he stated that, with regard to the amount of LIT 206.2 thousand million, which corresponded to the capital contribution of 1985, it was not sufficient to require repayment from Finmeccanica to IRI. In order to comply with the decision, that amount had to be repaid to the Italian State. With regard to the amount of LIT 408.9 thousand million, which corresponded to the capital contribution of 1986, he invited the Italian authorities to provide further information with a view to enabling the Commission to decide whether the repayment of that sum by Finmeccanica to IRI was sufficient to comply with the decision. He also stated that, since Italy had failed to comply with the decision, he would propose to the Commission before the end of July 1992 that enforcement proceedings should be instituted. By a letter dated 14 October 1992, the Italian authorities requested an additional period of grace stating that the abolition of the aid should be addressed within the framework of the programme for the privatization of public undertakings which the Government was planning to implement.

8. By a letter dated 12 February 1993, the Government informed the Commission that Finmeccanica had repaid to IRI the sum of LIT 719.1 thousand million. That sum consisted of LIT 615.1 thousand million of aid plus LIT 104 thousand million of interest. The sum of LIT 615.1 thousand million corresponded to the capital contribution of LIT 206.2 thousand million of 1985 and the capital contribution of LIT 408.9 thousand million of 1986. By the same letter, the Government also informed the Commission that Law No 405 of 29 December 1990 [9] abolished the obligation of the State to pay to IRI the sum of LIT 698 thousand million as

8 — [1991] ECR I-1603.

9 — *Gazzetta Ufficiale* 1990 No 303.

capital and the sum of LIT 571 thousand million as interest in relation to the bonds issued by IRI in accordance with Law No 749 of 1985 and Law No 41 of 1986. [10] The State had undertaken to repay the capital and the interest of those bonds, which provided the necessary funds to finance the capital contribution of LIT 408.9 thousand million.

9. In the letter of 12 February 1993, the Government stated that repayment of the sum of LIT 719.1 thousand million from Finmeccanica to IRI fulfilled the obligation of recovery provided for in the decision. In the view of the Government, IRI had no obligation to repay that sum to the Italian State. Repayment from Finmeccanica to IRI removed the distortions of competition which resulted from the unlawful payment of the aid. Also, there was no reason to distinguish between IRI and the Italian State since IRI was a public undertaking which was part of the State. Moreover, as a result of the abolition by Law No 405 of 29 December 1990 of the financial obligations of the State, IRI did not receive from the State the financial contributions which had been characterized as aid in the decision.

10. By a letter dated 6 April 1993, the Commission notified the Italian authorities that the decision had not been implemented correctly. It pointed out that the capital contribution of LIT 206.2 thousand million had not been funded by bonds but by budgetary allocations made to IRI. Therefore, the sum of LIT 206.2 thousand million should be repaid to the Italian State. With regard to the capital contribution of LIT 408.9 thousand million, the Commission accepted that Law No 405 of 29 December 1990 abolished the obligation of the State to pay as capital the sum of LIT 698 thousand million to IRI. However, the Commission stated that that amount only represented 11.4% of a total amount of LIT 6 135 thousand million up to which IRI was authorized by Law No 749 of 1985 and Law No 41 of 1986 to issue bonds paid by the State. Consequently, the Commission concluded that it could only accept a reduction in the same proportion of the amount which, according to the decision, IRI owed to the State, namely a reduction of 11.4% of LIT 408.9 thousand million, i. e. LIT 46.5 thousand million. It followed that IRI should pay to the State the sum of LIT 568.6 thousand million.

11. The Government did not respond to the Commission's letter of 6 April 1993. As a result, the Commission instituted the present proceedings. In its application, it claims that, in order to comply fully with the decision, the Government must not only ensure that IRI recovers from Finmeccanica the sum of LIT 615.1 thousand million plus interest; in addition the Italian State must recover from IRI the sum of LIT 568.6 thousand million plus interest.

12. Before dealing with the substance of the case, it is necessary to examine the admissi-

10 — See above, paragraph 4.

bility of the action, which is contested by the Government on two grounds.

13. The Government claims that the alleged obligation of IRI to repay the aid to the Italian State is not stated 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 because the Commission seeks a declaration that Italy has failed to fulfil an obligation which is not provided for in the decision.

14. I do not find that argument persuasive. It is true that, in enforcement proceedings under Article 93(2), the Commission may only claim that the defendant Member State has failed to comply with the decision the alleged infringement of which is the subject-matter of the proceedings. The Commission may not in such proceedings impose obligations on the defendant State other than those already provided for in the decision. In this case, however, the Commission does not seek to impose any new obligations on the Italian State. It claims rather that, according to the decision, the Italian State has the obligation to recover the aid from IRI. Whether that is so is a matter of interpretation of the decision and is therefore an issue of substance.

15. The Government also claims 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. The Government states that the Commission's application does not explain why the failure of the Italian State to recover the aid from IRI infringes the decision.

16. That argument must also be rejected. In order to comply with the requirements of Article 38(1)(c) of the Rules of Procedure, the Commission must indicate in its application the specific complaints on which the Court is called upon to rule and, at least in summary form, the legal and factual particulars on which those complaints are based. [11] The application in the present case contains a clear exposition of the facts and of the Commission's arguments and has enabled the Government to submit a detailed defence. [12] The application is therefore admissible. I turn now to examine the substance of the case.

17. The Commission argues that repayment of the aid by Finmeccanica to IRI is not sufficient to comply with the decision. The aid must be repaid to the Italian State.

11 — Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 28 of the judgment; Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17.

12 — See Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, paragraph 15 of the judgment.

18. I should first point out that even if it were accepted that repayment of the aid from Finmeccanica to IRI was sufficient to comply with the decision, Italy would still be in breach of its obligations under the Treaty. That is so because, under Article 2 of the decision, the Government was required to recover the aid within two months from notification, which took place on 31 July 1989. It is clear from the information submitted to the Court that Finmeccanica had not repaid the aid to IRI within the prescribed period. It is sufficient to refer to the letter of 13 March 1992 by which the Italian authorities informed the Commission of their intention to recover the aid by requiring Finmeccanica to repay to IRI a sum equal to the amount of the aid plus interest. [13] That letter is accompanied by a communication of the Italian Ministry responsible for State holdings to the Italian Ministry of Foreign Affairs dated 7 March 1992. It appears from that communication that on 7 March 1992 the aid had not yet been repaid by Finmeccanica to IRI. It follows that, in any event, Italy has failed to implement the decision within the prescribed period.

19. It should also be noted at this stage that Italy did not calculate the interest due correctly. As we have seen, in its letter of 12 February 1993, the Government informed the Commission that Finmeccanica had repaid to IRI the sum of LIT 719.1 thousand million which consisted of LIT 615.1 thousand million of aid plus LIT 104 thousand million of interest. In its letter, Italy did not furnish any proof of that payment. After the commencement of the present proceedings, the Government sent to the Commission, with a letter dated 25 November 1993, the documents which in its view proved that the aid had been repaid by Finmeccanica to IRI. In its reply, the Commission claims that the Government has calculated the interest due incorrectly. Under Article 2 of the decision, interest must be calculated as from the expiry of the two-month period from the notification of the decision to the Government. The decision having been notified on 31 July 1989, interest should be calculated as from 30 September 1989. The Government took as a starting point for the calculation of interest not the date of notification but the date of publication of the decision in the Official Journal, i. e. 30 December 1989. It calculated interest as of 28 February 1990. The Commission concludes that, in addition to the payments that it has already made, Finmeccanica must pay interest for a period of five months, at the rate of 5%.

20. The Government does not dispute that it calculated the interest incorrectly. It states that it will take the necessary measures in order to comply with the decision. It follows that Italy has failed to recover the interest due according to the decision.

21. I turn now to examine the issue whether repayment of the aid by Finmeccanica to IRI is sufficient to comply with the decision or whether the aid should be repaid to the Ital-

13 — See above, paragraph 7.

ian State. In their submissions to the Court the Commission and the Government concentrate on that issue.

22. As already stated, 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. In interpreting the decision, account should be taken of the purposes of the obligation to recover.

23. The Government states that the obligation to repay the aid falls upon the beneficiary. Since under Article 2 of the decision Finmeccanica is the beneficiary of the aid, it is the only entity responsible for repaying it. IRI was the institution via which the aid was managed and paid and not the beneficiary of the aid. IRI therefore has no obligation to repay it to the Italian State.

24. I do not find that reasoning persuasive. The Government confuses two separate issues, namely, the issue which entity has the obligation to repay the aid and the issue to which entity the aid must be repaid. Article 1 of the decision makes it clear that the aid was granted by the Government to Alfa Romeo and that IRI and Finmeccanica acted only as intermediaries. Article 2 is readily understood as meaning that the aid must be repaid to the Italian State. That interpretation is supported by the Italian language version of the decision which is the only authentic version. Article 2 states that 'Il Governo italiano è tenuto a sopprimere gli aiuti di cui all'articolo 1 mediante ricupero presso la Finmeccanica ...'. That interpretation is also supported by the English language version of the decision. [14] I note that the French language version is less clear [15] but, as already stated, only the Italian text is authentic.

25. The preamble to the decision confirms that IRI acted merely as an intermediary and that the funds necessary to finance the capital contributions of 1985 and of 1986 were provided by the State. It states as follows: [16]

'... IRI received State resources for this purpose [i. e. for the purpose of providing aid to Alfa Romeo] in the form of capital grants

14 — See above, paragraph 5.

15 — In French, Article 2 states as follows: 'Le gouvernement italien est tenu de supprimer les aides mentionnées à l'article 1er et d'exiger de la société Finmeccanica qu'elle les restitue ...'.

16 — OJ 1989 L 394, p. 14.

and convertible bonds specifically earmarked for Finmeccanica and, in particular "... for the recapitalization and financial restructuring of undertakings in the engineering (and) automotive sectors ..." (see, for example, the *Official Journal of the Italian Republic*, General Series No 163, 12.7.1985, p. 4954, and No 6, 9.1.1986, p. 40).

The present case, therefore, concerns aid granted by the Italian State or through State resources, to Alfa Romeo Auto, by indirect means through public financial entities (IRI and Finmeccanica) wholly controlled by the State ... .'

The references in the decision to the *Official Journal of the Italian Republic* are to the decisions of CIPE of 3 April 1985 and 28 November 1985 by which the Italian State decided to grant aid to Alfa Romeo. [17] The preamble to the decision confirms therefore that, in granting the aid, IRI acted only as an intermediary, that the aid was financed by State resources, and that the decision to grant the aid was taken by the Government via CIPE.

26. The judgment of the Court in 'Alfa Romeo' does not support the submission that, in order to comply with the decision, it is sufficient for the aid to be recovered by IRI. One of the arguments submitted by the Government in that case was that since the actual recipient of the aid was Alfa Romeo the decision should not have imposed the obligation to repay the aid on Finmeccanica. The Court rejected that argument stating that Finmeccanica, as the holding company to which Alfa Romeo belonged at the material time, was the recipient of the aid and therefore was required to repay it. [18] In 'Alfa Romeo' the Court did not examine the issue who was ultimately responsible for recovering the aid but only the issue who was responsible for repaying it.

27. The Government argues that, since IRI is a public undertaking controlled by the State, it is part of the State. Recovery of the aid by IRI is as good as recovery by the State itself.

28. I cannot accept that argument. It is true that, in accordance with the objectives of Article 92 of the Treaty, the Court has followed a functional approach in defining the term State aid. It has held that the prohibition of Article 92(1) covers all aid granted by a Member State or through State resources without it being necessary to draw any distinction according to whether the aid is granted directly by the State or by public or private bodies established or appointed by it

17 — See above, paragraphs 3 and 4.

18 — 'Alfa Romeo' case, cited in note 8, paragraph 40 of the judgment.

to administer the aid. [19] In applying Article 92, it is necessary to have regard primarily to the effects of the aid on the undertakings or producers favoured and not to the status of the institutions entrusted with the distribution and administration of the aid. [20] The Court has also confirmed that 'aid need not necessarily be financed from State resources to be classified as State aid'. [21]

29. Contrary to what the Government argues, however, it does not follow from the above case-law that, where aid has been granted by the State through a public undertaking, it is sufficient for that aid to be repaid to the public undertaking and not to the State. The purpose of the above case-law is to prevent the provisions of the Treaty on State aid from being undermined by the granting of aid through indirect means. In none of the cases referred to above did the Court examine specifically the issue to which entity unlawful aid should be repaid. That issue should be resolved by reference to the objectives of the obligation to recover and the effectiveness of the system of preventive control of new State aids.

30. One of the purposes of the obligation to recover is to re-establish the previously existing situation, [22] namely the situation which existed before the beneficiary received the aid. Since according to Article 93(3) of the Treaty Member States are under an obligation to notify proposed aid to the Commission and not to implement it before receiving the Commission's clearance, recovery must so far as possible re-establish the situation which would have existed if the Member State had duly complied with the obligation of notification and the obligation of non-implementation. However, that is not the only purpose of the obligation to recover. Recovery of unlawful aid must be effected in such a way as to ensure that the funds by which the aid was financed are not channelled to other undertakings in the same or another economic sector and in such a way as to facilitate the supervisory function of the Commission.

31. The Government argues that repayment of the aid by Finmeccanica to IRI removed the distortions of competition which had been caused by the granting of the aid. There is no reason why the aid should be returned to the State. I cannot accept that argument. As already stated, one of the purposes of the obligation to recover is to re-establish the situation which would have existed if the Member State concerned had complied with the obligation of notification and the obligation not to grant the aid before receiving the Commission's clearance. It is not simply to restore the pre-existing competitive situation. Indeed, this may often not be possible. According to the case-law, the fact that the distortion of competition caused by the

19 — Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, paragraph 21 of the judgment; Case 290/83 *Commission* v *France* ('Crédit Agricole' case) [1985] ECR 439, para 14; Joined Cases 67, 68 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, para 35 and 'Alfa Romeo', cited in note 8, para 13.

20 — *Steinike und Weinlig*, cited in note 19, paragraph 21 of the judgment.

21 — 'Crédit Agricole', cited in note 19, paragraph 14 of the judgment.

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

granting of unlawful aid can no longer be remedied by recovery when recovery is ordered or that aid unlawfully granted can no longer have any effect on the recipient, because, for example, the recipient is in liquidation does not affect the obligation to recover which is the 'logical consequence' of illegality. [23] The case-law of the Court points to the conclusion that the obligation to recover is determined by the need to terminate the infringement of Community law, over and above the actual consequences of recovery.

32. The Government states that the obligation to recover may only refer to State aid which has been granted unlawfully. It argues that the transfer of funds from the State to IRI, which took place in a transparent manner and on the basis of legislative measures, was not examined, and was not characterized as State aid, in the decision. It follows that there is no obligation on the part of the Italian State to recover those funds from IRI.

33. In support of its arguments, the Government refers to the 'Commission communication to the Member States on the application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector' [24] ('the Commission Communication'). It claims that there is a difference between, on the one hand, legitimate financial operations between the State and public undertakings and, on the other hand, State aid. With regard to the first, there is only an obligation of transparency and not an obligation of notification. Where there is no obligation of notification, there cannot be an infringement of Article 93(3) and, consequently, there cannot be an obligation to recover.

34. I do not find those arguments persuasive. It seems to me that where the State transfers funds to a State holding company with the specific instruction to use those funds to grant aid to an undertaking or to a specific sector, the transfer of funds to the State holding company cannot be viewed as a complete transaction in its own right. It is rather to be seen as a step in granting aid to the undertaking or undertakings concerned.

35. As we have seen, the funds necessary to finance the capital contribution of LIT 206.2 thousand million to Alfa Romeo came from budgetary transfers to bodies administering State holdings, including IRI, by the State budget. Their allocation was decided by CIPE, a governmental body. The funds necessary to finance the capital contribution of LIT 408.9 thousand million came from bonds issued by IRI the proceeds of which were allocated by a further decision of CIPE. The State undertook the obligation to repay the capital and the interest on those

23 — 'Alfa Romeo', cited in note 8, paragraph 41 of the judgment and see the Opinion of Advocate General Van Gerven, pp. 1633-1634.

24 — OJ 1991 C 273, p. 2.

bonds. [25] It is clear, therefore, that IRI was not intended to be the final recipient of those funds nor did it exercise any discretion with regard to their allocation. They were intended for Finmeccanica as the holding company to which Alfa Romeo belonged at the time. In those circumstances, it can be doubted whether there was no obligation to notify the transfer of funds from the State to IRI.

36. Even if it were accepted that Italy could have fully complied with the obligation of notification imposed by Article 93(3) if it had made a notification after the funds had been transferred to IRI, namely after CIPE had taken the decisions concerning their allocation, it seems to me that the Italian State would still be under an obligation to recover the funds from IRI in order to comply with the decision. As already stated, in this case the transfer of funds from the State to IRI was never intended to be a transaction in its own right but merely a step in granting aid to Alfa Romeo. Therefore the requirement to restore Community legality will be fulfilled only if the aid is returned to the State. In the circumstances of this case, I fail to see any material difference between the transfer of funds by the Italian State to Finmeccanica via IRI and the transfer of funds by the Italian State directly to Finmeccanica.

37. It is not disputed that in order to fulfil the obligation of recovery it is necessary to deprive the beneficiary undertaking of the unlawfully paid aid that it has received. However, that may not be sufficient. 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. For these reasons, it seems to me that proper compliance with the Commission's decision in a case such as the present one can be effected only if the sums in question are repaid to the State.

38. I cannot see how the Commission Communication to which the Government refers can support its arguments. In order to determine the relevance of the Commission Communication in the present proceedings, it is necessary to examine briefly its background.

39. In 1980 the Commission adopted, pursuant to Article 90(3) of the Treaty, a directive

25 — See above, paragraphs 3 and 4.

on the transparency of financial relations between Member States and public undertakings [26] ('the Transparency Directive'). The purpose of the Transparency Directive is to ensure the effective application of the Treaty provisions on State aid without discrimination between public and private undertakings. In adopting the Directive, the Commission was motivated by the fact that the complexity of the financial relations between national public authorities and public undertakings made it difficult for the Commission to exercise its duty of ensuring that aid incompatible with the common market was not granted. The Commission considered that the provisions on State aid could only be applied fairly to both public and private undertakings if the financial relations between public authorities and public undertakings were made transparent. [27]

40. Article 1 of the Transparency Directive imposes the obligation on Member States to ensure that financial relations between public authorities and public undertakings are transparent so that the following emerge clearly: (a) public funds made available directly by public authorities to the public undertakings concerned; (b) public funds made available by public authorities through the intermediary of public undertakings or financial institutions; (c) the use to which those public funds are actually put. Article 5(2) provides that, upon the Commission's request, Member States must supply to it the information referred to above together with any necessary background information, notably the objectives pursued.

41. The Transparency Directive is without prejudice to the provisions of the Treaty on State aid. [28] Clearly, its purpose is not to replace the obligation of notification imposed by Article 93(3) but to facilitate the monitoring function of the Commission, namely, to enable the Commission to determine whether aid is involved when funds are provided, directly or indirectly, by public authorities to public undertakings.

42. The purpose of the Commission Communication is to lay down policy guidelines concerning the application of the rules on State aid to public undertakings. The Commission identifies a need for increased transparency and for developing a policy with regard to public undertakings because those undertakings have not been covered sufficiently 'by State aid disciplines'. [29] It notes that, under Article 93(3), aid granted to public undertakings must, like aid granted to private undertakings, be notified in advance to the Commission in order to enable it to

26 — Directive 80/723/EEC, OJ 1980 L 195, p. 35 as amended by Commission Directive 85/413/EEC, OJ 1985 L 229, p. 20 and Commission Directive 93/84/EEC, OJ 1993 L 254, p. 16.

27 — See preamble to the Transparency Directive, recitals 4 and 5.

28 — Preamble, recital 13.

29 — See paragraph 1 of the Commission Communication.

determine whether it falls within the scope of Article 92.

43. Neither the Transparency Directive nor the Commission Communication affects the obligations of Member States to notify proposed State aid and to recover State aid once it has been granted unlawfully. They do not contradict the view that in order to comply with the decision the aid must be repaid to the Italian State. On the contrary, they seem to me to reinforce the view that repayment of the aid to the State itself is necessary to ensure transparency, to facilitate the monitoring function of the Commission and to ensure the effective application of the Treaty provisions on State aid.

44. The Government also argues that in order to comply with the obligation of recovery it is not necessary for the aid to be repaid to any State entity, and that it would be sufficient, for example, to transfer an amount equal to the amount of the aid plus interest to a cultural or a charitable organization. In the present case, however, the aid is not transferred to any cultural or charitable organization. Rather, it remains with IRI, a State holding company which acted as the intermediary for paying the aid and through which the State intervenes in commercial enterprises. There is plainly a risk that IRI would use the funds by which the aid was financed to grant State aid to undertakings in the same sector or in another sector.

45. I conclude therefore that in order to comply with the decision IRI must repay the aid to the Italian State in the amount requested by the Commission.

46. In its application, the Commission also seeks a declaration that Italy has failed to fulfil its obligations under the Treaty by failing to notify to the Commission the measures taken in order to recover the aid as required by Article 3 of the decision. However, since Italy did not take the necessary measures in order to implement the decision within the prescribed period, the failure to notify those measures to the Commission is not an independent infringement of Community law. [30]

47. In its application, the Commission states that the obligation of Finmeccanica and IRI 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 competing in the same market with Finmeccanica. 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

30 — Case C-303/93 *Commission* v *Italy* [1994] ECR I-1901, paragraph 6 of the judgment; Case C-255/93 *Commission* v *France*, judgment of 5 October 1994, [1994] ECR I-4949, paragraph 29.

Community or private parties. [31] 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.

48. The Commission has made a similar request in its application in the abovementioned 'Aluminia/Comsal' case (Case C-349/93 *Commission* v *Italy*). As I stated in my Opinion in that case, [32] a declaration by the Court that a Member State has failed to fulfil its obligations under the Treaty by failing to recover unlawfully paid aid may indeed establish the basis of liability which that Member State may incur as a result of its default, and such a declaration may be of particular importance to undertakings competing with the beneficiary of the unlawful aid.

49. In the present case, however, it is not necessary for the Court to make the statement sought by the Commission. Such a statement may be appropriate to show that the Commission has an interest in continuing the enforcement proceedings even after the defendant Member State has put an end to the infringement. In the present case, however, the interest of the Commission in bringing proceedings is not in question.

Conclusion

50. I am accordingly of the opinion that the Court should:

(1) declare that, by failing to implement within the prescribed period Commission Decision 89/661/EEC of 31 May 1989 concerning aid provided by the Italian Government to Alfa Romeo, an undertaking in the motor vehicle sector, the Republic of Italy has failed to fulfil its obligations under the EEC Treaty;

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

31 — Case C-263/88 *Commission* v *France* [1990] ECR I-4611, paragraph 9 of the judgment; Case 154/85 *Commission* v *Italy* [1987] ECR 2717, para 6.

32 — Opinion delivered on 19 January 1995, paras 25 and 26.