OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 1 February 2005 [1]

I — Introduction

1. In the present case the Commission of the European Communities asks the Court to declare that, by failing to take within the prescribed period all the measures necessary for repayment of the aid found to be unlawful and incompatible with the common market (except that relating to the contributions to the IKA), in accordance with Article 3 of Commission Decision 2003/372/EC of 11 December 2002 on aid granted by Greece to Olympic Airways ('the Decision'), [2] or, in any event, by failing to inform the Commission of the measures taken pursuant to Article 4 of the Decision, the Hellenic Republic has failed to fulfil its obligations under the said articles and the EC Treaty.

A — *The background to the dispute*

2. The background to the dispute was set out exhaustively in the Decision. I shall refer only to the factual matters and procedural aspects which are relevant to the present proceedings, which relate only to the alleged failure of the Hellenic Republic to fulfil the obligations arising from Articles 3 and 4 of the Decision.

3. In 1996 the Commission initiated against Greece the procedure laid down in Article 88 (2) EC concerning aid granted to Olympic Airways, which led to Commission Decision 1999/332/EC of 14 August 1998 [3] concerning guarantees, the reduction and conversion to equity of debts approved in 1994, and also other guarantees and capital injections totalling GRD 40.8 billion, to be paid in three instalments of GRD 19, 14 and 7.8 billion. This aid was accompanied by a revised restructuring plan for the period from 1998

1 — Original language: French.

2 — OJ 2003 L 132, p. 1.

3 — OJ 1999 L 128, p. 1.

to 2002 and was subject to special conditions.

4. By decision of 6 March 2002 the Commission initiated the procedure laid down in Article 88(2) EC, on the ground that the restructuring plan had not been implemented and that some of the conditions laid down by the decision approving the aid had not been fulfilled. The decision to initiate the procedure was coupled with an information injunction within the meaning of Article 10 of Regulation (EC) No 659/1999. [4]

5. On 9 August 2002 the Commission addressed to Greece a further information injunction, requiring in particular the accounts and figures concerning the payment of operating costs to the State. The replies given by the Greek authorities on this subject were deemed insufficient by the Commission.

6. On 11 December 2002 the Commission approved the decision which is the subject of the present proceedings. The decision is based in particular on the finding that most of the objectives of the restructuring plan had not been attained and that the conditions imposed by Decision 1999/332 had been only partly fulfilled. The Commission also notes that the decision approving aid was wrongly implemented. In addition, the Commission refers to the existence of new operating aid consisting, in essence, in the toleration by the Greek State of the non-payment, or deferment of the payment dates, of social security contributions for October to December 2001, value-added tax ('VAT') on fuel and spare parts, rent payable to airports for the period 1998 to 2001 totalling EUR 2.46 million, airport charges totalling EUR 33.9 million and the so-called 'spatosimo' (a tax payable by passengers on departure from all Greek airports for development of those airports) totalling EUR 61 million.

7. The Commission's decision is worded as follows:

'*Article 1*

The restructuring aid granted by Greece to Olympic Airways in the form of:

(a) loan guarantees extended to the company until 7 October 1994 pursuant to Article 6 of Greek Law 96/75 of 26 June 1975;

4 — Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1).

(b) new loan guarantees totalling USD 378 million for loans to be contracted before 31 March 2001 for the purchase of new aircraft and for investment necessary for the relocation of Olympic Airways to the new airport in Spata;

(c) easing of the undertaking's debt burden by GRD 427 billion;

(d) conversion of GRD 64 billion of the undertaking's debt to equity;

(e) a capital injection of GRD 54 billion reduced to GRD 40.8 billion in three instalments of GRD 19, 14 and 7.8 billion in 1995, 1998 and 1999 respectively,

is considered to be incompatible with the common market within the meaning of Article 87(1) of the Treaty, as the following conditions, under which the initial authorisation of the aid has been granted, are no longer met:

(a) the full implementation of the restructuring plan aimed at the achievement of the long-term viability of the company;

(b) the observance of 24 specific undertakings attached to the authorisation of the aid, and

(c) the regular monitoring of the implementation of the restructuring aid.

Article 2

The State aid which Greece has implemented in the form of tolerance of a persistent non-payment of social security contributions, of VAT on fuel and spare parts payable by Olympic Aviation, of rentals for different airports, of airport charges payable to Athens International Airport and other airports, of Spatosimo tax is incompatible with the common market.

Article 3

1. Greece shall take the necessary measures to recover from the beneficiary the aid of GRD 14 billion (EUR 41 million) referred to

in Article 1 which is not compatible with the Treaty and the aid referred to in Article 2 and unlawfully made available to the beneficiary.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which the aid was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant-equivalent of regional aid.

Article 4

Greece shall inform the Commission within a period of two months from the date of notification of the present Decision of the measures to be taken to comply with it.

...'

8. On 11 February 2003 the Greek Government informed the Commission that it had instructed an independent third party to ascertain whether Olympic Airways had any debts to the State and whether the undertaking had received preferential treatment. On the basis of the information received, the Government stated that it would not implement Articles 3 and 4 of the Decision.

9. On 6 March 2003 the Commission informed the Greek Government that it was required to comply with the Decision. On 12 May 2003 the Commission sent the Government a notice with additional explanations concerning the quantification of the further aid and requested detailed information concerning the arrangements for the repayment of EUR 41 million, together with proof of repayment of the debts of Olympic Airways referred to in Article 2 of the Decision.

10. The Greek authorities replied by letter of 26 June 2003. With regard to the repayment of the second instalment of the capital injection of EUR 41 million, they stated that they intended to take a decision to recover that aid before the end of August 2003, while the legal effects of the decision and the procedure followed were being examined. They also noted that Olympic Airways would pay the debt of EUR 2.46 million relating to rents due to airports.

11. With regard to the debt totalling EUR 27.4 million owed to the IKA (social security authority), the Greek authorities referred to an agreement and a payment of EUR 5.28 million, so that there was no longer any question of forbearance in relation to a debt.

12. So far as the debt of EUR 33.9 million in respect of airport charges owed to Spata Airport was concerned, the Greek authorities claimed that they had no powers because of the mode of administration of the airport. However, they refer to a payment of EUR 4.83 million on the basis of an agreement in that connection, and produce proof of payment of that amount. The agreement also provides for the debt to be settled in 12 quarterly payments. The authorities stated that the total amount will be repaid by April 2005.

13. As for the debt of EUR 61 million in respect of the so-called 'spatosimo' tax, the Greek authorities referred to a payment of EUR 22.8 million on the basis of agreements in that connection. They produced supporting documents for that amount and for other payments. Regarding the debt of EUR 28.9 million owed to ministries and public institutions, the Greek authorities pleaded that they had no details of the liabilities in question as they had no particulars of the air tickets issued to employees.

14. As the Commission found these statements unsatisfactory, it brought the present action claiming that the Court should:

— declare that, by failing to take, within the prescribed period, all the measures necessary for repayment of the aid found to be unlawful and incompatible with the common market (except that relating to the contributions to the IKA), in accordance with Article 3 of the Decision ... or, in any event, by failing to inform the Commission of the measures taken pursuant to Article 4 of the Decision, the Hellenic Republic has failed to fulfil its obligations under the said articles and the Treaty;

— order the defendant to pay the costs.

15. The Greek Government contends that the Court should dismiss the application and order the Commission to pay the costs.

II — Assessment

A — *Preliminary observations*

16. It appears from the file that the dispute between the Commission and the Hellenic Republic relates to three separate matters:

— the recovery of EUR 41 million, which is the second instalment of restructuring aid referred to in Article 1 of the Decision, paid to Olympic Airways in September 1998. This amount was expressly mentioned in Article 3(1) of the Decision;

— the recovery of the 'new aid' referred to in Article 2 of the Decision. This amount was not expressly mentioned in the Decision itself. The different components of this aid and the corresponding amounts were described in paragraphs 200 to 209 of the Decision;

— the consequences of Law No 3185/2003 ('the Greek Law') [5] for implementing the Decision in the national legal system.

17. I propose to begin my discussion with the third item because, in the national legal system, it could be an obstacle to the implementation of the Decision by making it legally impossible to recover the aid out of the assets which Olympic Airways still owned when the decision was adopted. Furthermore, assuming that the Greek Law could make the proper implementation of the Decision more difficult or even impossible, the question arises whether the enactment of the Law itself amounts to a failure to fulfil obligations under Community law.

18. As I mentioned in paragraph 2 above, this case is concerned only with the alleged failure to fulfil the obligations arising from the Decision. Therefore any submissions concerning alleged errors or inaccuracy in the assessment of the facts and circumstances on which the Decision is based are not admissible in the context of the present proceedings. [6]

5 — FEKA 229/26.9.2003.

6 — See the judgments in Case 226/87 *Commission* v *Greece* [1988] ECR 3611, paragraph 11; Case C-74/91 *Commission* v *Germany* [1992] ECR I-5437, paragraph 10, and Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 57.

B — *The Greek Law*

19. The Commission mentions the Greek Law for the first time in the reply and was clearly not in a position to take account of the enactment of this Law. The application was lodged at the Court Registry on 25 September 2003 and the Law was published in the *Official Journal of the Hellenic Republic* on 26 September 2003.

20. The Commission finds that section 27 of the Greek Law created the necessary basis for the restructuring of the Olympic group. In addition to the transfer of the personnel, this measure effected the transfer of the assets of the former undertaking Olympic Airways, that is to say, the aircraft and the State guarantees relating to them, rights relating to flights, generally called 'slots', the name, market share, contracts and various amounts receivable and recoverable, to the new company Olympic Airlines, free of all debts, and made it impossible to recover the former undertaking's debts from the new company. The latter, to which the liabilities of Olympic Airways were not transferred, is therefore placed under a regime of special protection in relation to the creditors of the former undertaking. In addition, similar treatment was laid down for the other divisions of Olympic Airways.

21. In the Commission's opinion, by placing the assets of the new company, namely Olympic Airlines, under a regime of special protection against its creditors, the national authorities prevented the recovery of the aid pursuant to the Decision. At the same time, Olympic mainly retained the liabilities, without any assets capable of actually paying off the corresponding debts. The resulting obstacle to the actual restitution of the aid was therefore planned at the legislative level and had, to a large extent, already been set up.

22. Furthermore, the Commission considers that, in this particular case, there was no creation of a subsidiary by the company which received the aid, but a transfer to another group company. In this way the Greek State, the sole or principal shareholder of the companies concerned, ensured economic continuity between Olympic Airways and Olympic Airlines by a restructuring operation entailing the takeover by the new company of the most profitable assets of the former undertaking Olympic Airways without the payment of any consideration whatever. Under the Greek Law, the new company is protected from the creditors of the former undertaking. Consequently, almost one year after the adoption of the Decision, the Greek State took legal measures which, from the viewpoint of national law, prevent the actual restitution of the aid. With this attempt to deprive the Decision of any practical effect, Greece did exactly the opposite of what it ought to have done according to the Decision.

23. In the rejoinder, the Greek Government does not reply directly to the substantive

allegations concerning the aims and the economic and legal consequences of the Greek Law.

24. To begin with, the Greek Government contends that the Commission's submissions are inadmissible because, in the absence of a pre-litigation stage, the Commission cannot go beyond the subject of the present proceedings, namely, the implementation of the Decision by the Hellenic Republic. In this context, the Government draws attention to the examination procedure initiated by the Commission by its decision of 16 March 2004 pursuant to Article 88(2) EC, concerning apparently new State aid in favour of Olympic Airways. In the framework of that procedure, one of the main subjects is precisely the Greek Law and the restructuring of the Olympic Airways group by virtue of that Law. As long as the administrative procedure under Article 88(2) EC for the examination of the new aid is still in progress, it is not open to the Commission to put forward arguments and submissions which are the subject of that examination. Otherwise, this would prejudge the outcome of the examination by premature allegations.

25. The Greek Government goes on to give a brief outline of the reasons giving rise to the Greek Law. It provides the statutory basis for the restructuring of Olympic Airways with the object of transferring as rapidly as possible its flight services and facilitating the privatisation of its other activities. By this means the Greek State was enabled to recover as much as possible of all the investments it had made for the benefit of Olympic Airways since 1994. The company kept the Commission informed of these initiatives from the beginning.

26. Finally, the Government contends that the Greek Law does not prevent the recovery of the State aid referred to in the Decision. The recovery procedure has already begun independently and is taking its course in accordance with Greek legislation.

27. It seems to me that the Greek Government's argument that the Commission's submissions concerning the Greek Law are inadmissible cannot be accepted. In this connection, a distinction must be made between, on the one hand, the examination of the compatibility of the operations provided for by the Greek Law with Article 88(1) EC and, on the other hand, the assessment of the legal and financial consequences of the Law for the implementation of the Decision which, moreover, preceded the enactment of the Law.

28. In the context of this action for failure to fulfil obligations, the only question is whether the Greek Law creates legal or economic obstacles to the effective implementation of the Decision.

29. It is clear from the Decision that it has the aim of recovering the aid by means of which the Greek State unlawfully supported the economic and commercial activities of Olympic Airways, thus distorting competition in the civil aviation sector. In order to attain that aim, the financial consequences of recovery must be borne by the undertaking which is actually responsible, from the economic and financial point of view, for the economic activities promoted by the aid in question.

30. The information which the Commission has provided concerning the Greek Law, and which is not disputed by the Greek Government, shows that the implementation of the Law has had the effect of transferring the management of all air transport activities from Olympic Airways to a new company, Olympic Airlines. This transaction entailed the transfer, 'free of all debts', of all the corresponding assets, making it impossible, under national law, to recover the debts of the former Olympic Airways from the new company to which some of the assets were transferred.

31. If the information received from the Commission is correct, the implementation of the Law could frustrate the effective implementation of the Decision. First, the steps already taken to recover the aid from Olympic Airways could no longer lead to the desired result because the company would no longer have sufficient assets to repay the amounts in question. Second, the purpose of the Decision, that is to say, the restoration of undistorted competition in the aviation sector, would be frustrated because the financial burdens of any repayment would no longer fall upon the economic and commercial activities which had been unlawfully promoted by the aid in question. Even in the unlikely eventuality of Olympic Airways having sufficient assets to repay the aid, the new company Olympic Airlines would still have all the competitive advantages resulting from the unlawful aid.

32. In this connection, the judgment in Joined Cases *Italy and SIM 2 Multimedia* v *Commission* [7] is of particular significance, as the Commission rightly observed. In those cases, assets were transferred by an undertaking in difficulty.

33. In paragraphs 76, 77 and 78 of that judgment the Court observed that the possibility of a company experiencing difficulties taking measures to rehabilitate the business cannot be ruled out a priori because of requirements relating to recovery of State aid which is incompatible with the common market. However, permitting such an undertaking, without any condition, to create, during the formal inquiry into the aid granted to it, a subsidiary to which it then transfers its most profitable activities, would amount to accepting that any company may

7 — Joined Cases C-328/99 and C-399/00 [2003] ECR I-4035.

remove such assets from the parent undertaking when aid is recovered, which would risk depriving the recovery of the aid of its effect in whole or in part. In order to prevent the effectiveness of the decision from being frustrated and competition from continuing to be distorted, the Commission may be compelled to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms.

34. The present case does not involve the creation of a subsidiary by the company which received the aid, but the transfer to another group company, by virtue of a legislative measure, of the main assets of the former Olympic Airways, which retains most of the liabilities. It seems to me that the Greek State, the sole or principal shareholder of the companies concerned, intended to ensure, with the assistance of the legislature, economic continuity between Olympic Airways and Olympic Airlines on the above-mentioned conditions. That amounts to obstructing, from the viewpoint of national law, the actual restitution of the aid and, consequently, to the continued distortion of competition.

35. It follows from the foregoing that the consequences of the Greek Law are contrary to the Decision and therefore constitute a failure on the part of the Greek Government to fulfil in good faith its obligations arising from the Decision. In addition, it must be found that the Government has an obligation to remove any obstacle created by the Greek Law to implementation of the Decision which is in conformity with its meaning, that is to say, which leads to the elimination of the distortion of competition caused by the aid.

36. I add this last condition in order to make it clear that any repayment of the aid which is not borne by the economic activities actually promoted cannot be regarded as bona fide implementation of the Decision. In other words, repayment must produce the effects intended by the Decision on competition conditions.

C — *The restitution of the aid of EUR 41 million*

37. Under Article 4 of the Decision, the Hellenic Republic must, within two months of the date of notification of the Decision, inform the Commission of the measures taken to comply with it.

38. Under Article 3(2) of the Decision, recovery of the aid referred to in Articles 1 and 2 of the Decision is to be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of the decision.

39. With regard to the recovery of the EUR 41 million referred to in Article 1 of the Decision, as to which there was no uncertainty, the Greek Government only informed the Commission by letter of 26 June 2003 that it was going to take a decision to recover the aid 'before the end of August 2003'. Finally, on 25 September 2003 the competent authorities adopted the measure declaring the debt of EUR 41 million, plus interest, owed by Olympic Airways to the Greek State. According to the Greek Government, that statement is the document necessary for recovery.

40. In pursuance of the statement of debt, the statutory individual demand for payment of the debt was issued on 1 October 2003. On 23 October 2003 Olympic Airways lodged an objection to the demand with the appropriate administrative court, in accordance with national law, and at the same time lodged an application for a stay of enforcement of the demand. A stay was granted by order of 26 January 2004.

41. At the hearing, the Greek Government gave as the reason for the delay in recovering the EUR 41 million the difficulties encountered in identifying and quantifying the aid referred to in Article 2 of the Decision. According to the Greek Government, it wished to achieve a solution of these problems with the Commission before recovering the whole of the aid. The Government then acted in accordance with the rules of national administrative law concerning the recovery of money sums from private persons.

42. It must be observed that, since the notification of the Decision, there has been no further uncertainty concerning the obligations arising from it for the Greek authorities. In addition, the terms of the Decision make a clear and specific distinction between the aid of EUR 41 million and the other aid concerned. Consequently there was no further legal or practical obstacle preventing the Hellenic Republic from recovering the EUR 41 million within the period allowed by the Decision. It follows that the Greek Government, by not taking timely action to recover the aid in question, failed to fulfil the obligations imposed upon it by the Decision.

43. It has become clear that, since the first (late) step taken by the said Government, no progress has been made in the recovery of the EUR 41 million. Such dilatoriness cannot be justified by merely pleading the provisions of national law. The Court has consistently held that, in the absence of Community provisions relating to the procedure applic-

able to the recovery of unlawful aid, such recovery must take place, in principle, in accordance with the relevant provisions of national law. Such provisions must however be applied in such a way that the recovery required by Community law is not rendered impossible in practice and the interests of the Community are taken fully into consideration. [8]

44. The Community interest in the proper implementation of decisions for the recovery of unlawful aid also means that they must be implemented promptly. As I observed on a previous occasion, [9] the period within which competition conditions which have been distorted must be restored is certainly important from an economic viewpoint. Undertakings which have received unlawful State aid can sometimes distort competition to such an extent that the competition structure is permanently altered. That is why the obligation to observe the time-limits prescribed for the recovery of unlawful aid also serves the interest protected by Article 87 EC, namely to prevent the distortion of competition within the Community. I conclude from this that the strict conditions laid down by the Court to justify the non-fulfilment, or incorrect fulfilment, of the obligation of recovery are also applicable to the situation of non-observance of the prescribed time-limit. In that case also the criterion of 'absolute impossibility' applies.

45. In that connection there is nothing in the file to show that the Greek Government proceeded assiduously to implement the Decision whether during the prescribed period or after the time-limit expired. On the contrary, as shown by my analysis of the consequences of the Greek Law, the Government, by means of that Law, made the correct implementation of the Decision if not impossible, at least more complicated in the national legal system. Therefore I conclude that the said Government also failed in its obligation to pursue diligently the implementation of the Decision, which was already late in starting.

D — *The restitution of the aid mentioned in Article 2 of the Decision*

46. The feature common to the grants of aid referred to in Article 2 of the Decision is that they relate to various payments which were statutorily or contractually owed by Olympic Airways, but the Greek State tolerated the non-payment, or the deferred payment, of those sums.

8 — *Commission* v *Portugal*, cited above, paragraph 55.

9 — See point 18 of my Opinion in Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695.

47. Details of the amounts in question for the different kinds of contributions, charges, contractual obligations and taxes were given in paragraphs 205 to 209 of the Decision.

48. The Decision has given rise to disputes between the Commission and the Greek Government, which have continued in the course of the present proceedings, as to the classification of these measures as grants of aid, the determination of the amounts and the method of recovery.

49. The disputes relate to three subjects:

— first, the classification of the persistent non-payment of the various debts as State aid;

— second, the determination of the amounts in question in each case;

— third, the arrangements agreed upon for the recovery of the said amounts.

50. In the opinion of the Greek Government, the grants of aid referred to in Article 2 do not correspond exactly to the amounts stated in the Decision, but are rather the 'benefit' derived from the continued tolerance of non-payment of the debts. On this point, it is necessary to take into account the difference between the Greek Government's tolerance of persistent non-payment and the forbearance which a private investor would have shown.

51. To begin with, I refer to my observation that, in proceedings concerning failure to implement a Community measure, it is not permitted to dispute the legality of the measure, whether entirely or in part. If the Greek Government had wished to challenge the legality of the classification of persistent non-payment of the various debts as State aid, it ought to have brought an action for annulment. [10]

52. Let me add that, so far as this point is relevant, the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as the subsidies themselves, but also measures which, in various forms, mitigate the normal burdens on the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect. [11]

10 — See the judgments cited in footnote 6.

11 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13.

53. Such aid is especially likely to distort competition because it specifically reduces the operating costs of an undertaking, to the detriment of those that regularly discharge their tax liabilities and contractual obligations.

54. The distortion of competition resulting from this can be eliminated only by the prompt and full payment of the outstanding debts, including interest and penalties. Furthermore, the very existence of generous payment facilities for a debtor could give him a considerable advantage, particularly when he is in financial difficulties, because he is thereby enabled lawfully to avoid his financial obligations, contrary to normal commercial practice.

55. Finally, the argument that in a comparable situation a private creditor would have acted in the same way as the tax authorities and the Greek airports seems to me untenable. On the contrary, in the event of a genuine risk of the debtor's insolvency, a private creditor would have tried to obtain payment of the outstanding amounts as soon as possible and by any means.

56. Regarding the calculation of the aid to be repaid by Olympic Airways, the Greek Government submits that the amounts referred to in Article 2 of the Decision are determined only approximately in paragraphs 205 to 209 of the Decision. Consequently the part of this application relating to the amounts in Article 2 should be dismissed because of its vagueness.

57. The question arising here is whether Commission decisions concerning the recovery of unlawful aid must always specify the exact amounts to be repaid.

58. On this point, it must be said that neither case-law nor any provision of Community law requires the Commission to specify the amount of aid in question when it orders the recovery of aid found to be incompatible with the common market. The Commission can legitimately confine itself to a general finding that the recipient has an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amount. This task falls within the scope of the wider obligation of loyal cooperation which is mutually binding on the Commission and the Member States in implementing Article 88 EC.

59. In the present case, the amounts to be repaid can easily be established by reading Article 2 of the decision in conjunction with paragraphs 205 to 209 thereof. If there is still any imprecision, it would have to be clarified by way of cooperation.

60. The correspondence between the Commission and the Greek Government between February and September 2003 shows that the latter disputed the description of aid in Article 2 of the decision and the amounts to be repaid. The Government then adduced a number of legal difficulties which were said to make it impossible to execute Article 2 in the national legal system, and pleaded that it had no power to order Spata Airport to recover the arrears of airport charges from Olympic Airways.

61. Nevertheless, it is apparent that the Greek Government began to execute certain parts of Article 2, albeit in a dilatory and hesitant manner:

(a) the rents owed to airports, totalling EUR 2.46 million, were the subject of a procedure for a declaration, so that the period for recovery could begin;

(b) the VAT relating to the sale of spare parts and fuel to Olympic Aviation has to be paid, together with statutory penalties and increases, on the basis of the VAT return for 2003;

(c) the charges owed to Spata Airport totalling EUR 33.9 million were the subject of a debt settlement agreement concluded on 2 April 2002 by Olympic Airways, by means of a transfer of the revenue of that undertaking for public-interest services;

(d) with regard to the so-called 'spatosimo' tax totalling EUR 61 million, the Greek Government refers to a number of payments which are proved by supporting documents for a total of approximately EUR 22.8 million. Finally, the Government states that it sent the Commission a copy of the said debt settlement agreement, which provided for the payment by Olympic Airways of approximately EUR 58.3 million in 48 monthly instalments in respect of the 'spatosimo' tax. This agreement was replaced on 31 March 2004 by a second agreement, also for a term of four years. The Commission submits that the second agreement was not adhered to;

(e) as for the debts to ministries and public services totalling EUR 28.9 million, according to the Greek Government, they can be set off against the claims of Olympic Airways, so that payment of the debts is unnecessary. However, as there is no accounting evidence of such claims, their existence has not yet been established by the Commission.

62. On the basis of the foregoing, I find that the Greek Government has failed in its obligations arising from Article 2 of the Decision. In so far as it has complied with those obligations, it has done so in a dilatory and incomplete manner and it cannot show that its conduct is justified on the ground of absolute impossibility.

63. These findings might have been sufficient if the Greek law had not been enacted. As I have shown in points 19 to 22 above, the implementation of the law may result in the performance of the settlement agreements concluded by Olympic Airways becoming totally or partly impossible for want of sufficient assets. Furthermore, the transfer of most of the latter's assets to Olympic Airlines prevents, at the national level, the aid from being recovered from the company which has taken over the economic activities benefiting from the aid. This obstacle to the implementation of the decision justifies, on its own, the finding that the Greek Government has manifestly failed to fulfil its obligations under Articles 2 and 3 of the Decision.

III — Conclusion

64. On the basis of the foregoing, I propose that the Commission's application be allowed and that the Court:

(1) Declare that, by failing to take, within the prescribed period, all the measures necessary for the repayment of the aid found to be unlawful and incompatible with the common market (with the exception of that relating to contributions to the IKA), in accordance with Article 3 of Commission Decision 2003/372/EC of 11 December 2002 on aid granted by Greece to Olympic Airways, the Hellenic Republic has failed to fulfil its obligations under the said decision and the EC Treaty;

(2) Order the Hellenic Republic to pay the costs of the action.