OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 17 September 1998 *

1. In these proceedings, the Italian Republic contests the Commission Decision of 22 October 1996, which declared unlawful and incompatible with the common market the fiscal bonus scheme which Italy had introduced for the 1993 and 1994 fiscal years in favour of road-haulage undertakings operating for hire or reward. That scheme was in fact an extension of the one introduced for the 1992 fiscal year, which the Commission prohibited by Decision of 9 June 1993. In its judgment of 29 January 1998, the Court of Justice declared that Italy had failed to comply with the provisions of the latter decision.

The original scheme

2. In the early 1990s, excise duties on fuel in Italy were among the highest in the Community. In April 1990, in response to the unrest in the road-haulage sector, which culminated in a strike which severely disrupted the economic and social life of the country, the Italian Government undertook to reduce the costs which hindered the sector's competitiveness and, in particular, to grant a tax credit to reduce the effective price of diesel fuel.

3. By Ministerial Order of 28 January 1992, [1] the Italian Government, without first informing the Commission, introduced a tax credit for the 1992 fiscal year in favour of national road-haulage undertakings operating for hire or reward. That credit formed part of a bonus which beneficiaries could choose to deduct from their liability for income tax as natural or legal persons, from municipal tax, from value added tax, or from the deductions they were required to make from the remuneration of their workers. The amount of the bonus, subject to certain ceilings, was based on the difference between the average price of diesel fuel purchased by beneficiaries in Italy and that charged in the other Member States. It should be pointed out that the amount of credit per vehicle increased at a rate more than proportionate to the size of the vehicle, thereby favouring larger-capacity lorries. The date and frequency of the bonus varied in accordance with the type of tax chosen for deduction.

4. By letter of 15 April 1992, the Commission asked the Italian Government for detailed information on the new rules, and indicated that the measures provided for therein were liable to constitute an infringement of Article 92(1) of the Treaty establishing the European

* Original language: Spanish.

1 — GURI No 25 of 31 January 1992.

Economic Community (hereinafter 'the Treaty'). The Italian Government replied that the special bonus was not to be regarded as aid within the meaning of Article 92 of the Treaty, but as a measure of a purely fiscal nature which sought to offset the effects of the particularly high taxes on fuel and lubricants levied on transport undertakings, and that it did not give rise to any distortion of competition. By letter of 26 October 1992, the Commission informed the Italian Government of its intention to initiate the procedure provided for in Article 93(2) of the Treaty.

The Decision of 9 June 1993

5. On 9 June 1993, on conclusion of the procedure, the Commission adopted Decision 93/496/EEC, [2] which:

(a) declared the bonus scheme unlawful, in so far as it constituted State aid adopted without first having been communicated to the Commission (in breach of Article 93(3)), and incompatible with the common market, in so far as it did not meet any of the conditions for the exemptions provided for in Article 92(2) and (3) or the conditions in Regulation (EEC) No 1107/70; [3]

(b) ordered Italy to abolish that scheme, and, within two months, to recover the deductions already made, together with the attendant interest, and to inform the Commission of the measures taken.

6. Regard should be had to the following passage from the preamble to the decision: [4]

'The effect of the scheme is a direct cash flow increase in favour of the undertakings of a particular economic sector only. Indeed it should also be pointed out that only operators in the road haulage market registered in

2 — Decision concerning State aid procedure C 32/92 (ex NN 67/92) — Italy (tax credit for professional road hauliers) (OJ 1993 L 233, p. 10).

3 — Council Regulation of 4 June 1970 on the granting of aid for transport by rail, road and inland waterway (OJ 1970 L 130, p. 1), amended on several occasions. Subject to certain conditions, that regulation authorised aid granted as an exceptional and temporary measure in order to eliminate, as part of a reorganisation plan, excess capacity causing serious structural problems.

4 — Last sentence of the 16th recital in part III of the preamble.

Italy can benefit from the measure. Those operators compete with operators in the other means of transport and operators from other Member States. The cash flow which results from the measure thus clearly leads to a distortion of competition in favour of those benefiting from the measure.'

7. The Italian Republic neither contested the decision nor took action to recover the bonuses granted. Moreover, it extended the scheme to the 1993 fiscal year and, at the same time, extended it to transport undertakings from other Member States by granting aid calculated on the basis of the diesel fuel consumed by them in Italy. [5] The amount of that aid, and the procedure for granting it, remained to be confirmed by the corresponding implementing legislation. That legislation has never been adopted.

8. By letter of 26 August 1993, the Italian Government informed the Commission that the extension of the contested scheme to undertakings from other Member States removed the main flaw identified in it by the decision. It also stated that, technically, it would be very difficult and onerous for the tax authorities to recover the bonuses granted since they had been deducted from numerous payments on account and amounts remaining due in respect of various taxes.

9. In its reply of 24 November 1993, the Commission stated that it was clear from the wording of the decision that it had taken into account not only the fact that the bonus scheme treated Italian hauliers more favourably than those from other Member States, but also the fact that it was contrary to the common market in so far as it introduced in favour of a particular sector — road haulage for hire or reward — advantages not granted generally, thus distorting competition. The Commission concluded that the extension of the bonus scheme and the failure to recover the bonuses constituted a failure to comply with the decision.

10. The Italian Government none the less extended the scheme to the 1994 fiscal year, [6] limiting it in the second half of that year to the first one hundred vehicles per undertaking.

5 — Decree-Law No 82 of 29 March 1993 (GURI No 134 of 10 June 1993), amended and validated by Law No 162 of 27 May 1993 (GURI No 123 of 28 May 1993), and Decree-Law No 309 of 23 May 1994 (GURI No 119 of 24 May 1994), amended and validated by Law No 459 of 22 July 1994 (GURI No 171 of 23 July 1994).

6 — Decree-Law No 642 of 22 November 1994 (GURI No 273 of 22 November 1994), extended by Decree-Law No 21 of 21 January 1995 (GURI No 17 of 21 January 1995), validated by Law No 84 of 22 March 1995 (GURI No 68 of 22 March 1995), and Decree-Law No 92 of 29 March 1995 (GURI No 75 of 30 March 1995), extended on several occasions, amended and validated by Law No 11 of 5 January 1996 (GURI No 9 of 12 January 1996).

The action for failure to fulfil obligations

11. On 18 August 1995, following a further exchange of correspondence, the Commission brought an action under Article 93(2) of the Treaty seeking a declaration that the Italian Republic had failed to fulfil its obligations under Decision 93/496, in particular the obligation to recover, as from the 1992 fiscal year, the aid first introduced by the Ministerial Order of January 1992.

12. In the proceedings before the Court of Justice, the Italian Government did not call into question the validity of the decision, having failed to contest it in time, but focused its defence on the difficulties involved in recovering the bonuses in question. Having rejected that plea, the Court, in its judgment of 29 January 1998, [7] found that Italy had failed to comply with Decision 93/496.

The amended scheme

13. In the meantime, on 4 December 1995, the Commission had informed the Italian authorities of its intention to initiate a new procedure under Article 93(2), in connection this time with the bonus scheme as applied to the 1993 and 1994 fiscal years. This scheme differed from that introduced by the 1992 Ministerial Order in that it provided for compensation for hauliers from other Member States ('compensation scheme'). The amount of the compensation, once the corresponding implementing legislation had been adopted, was to be equivalent to that provided for under the bonus scheme. In the same letter, the Commission requested the Italian Government to provide it with further information and to suspend the aid scheme immediately.

14. By letter of 26 March 1996, the Italian Republic informed the Commission that it had not yet enacted legislation regarding the amount of the compensation and the conditions governing the application of the scheme.

The Decision of 22 October 1996

15. On 22 October 1996, the Commission adopted Decision 97/270/EC, [8] which was

7 — Case C-280/95 *Commission* v *Italy* [1998] ECR I-259.

8 — Decision 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).

notified to the Italian Government by letter of 4 November 1996. Articles 1 to 3 of its enacting terms read as follows:

'Article 1

The scheme of aid in favour of professional road hauliers introduced by Italy in the form of a tax credit, as provided for in Law No 162 of 27 May 1993 (GURI No 123, 28.5.1993), Law No 84 of 22 March 1995 (GURI No 68, 22.3.1995) and Decree-Law No 402 of 26 September 1995 (GURI No 226, 27.9.1995), is unlawful on the grounds that it was introduced in breach of the procedural rules laid down in Article 92(3), and is also incompatible with the common market within the meaning of Article 92(1) of the Treaty, in so far as it meets none of the conditions for the exemptions provided for in Article 92(2) and (3) nor the conditions in Regulation (EEC) No 1107/70.

Article 2

Italy shall abolish the aid referred to above, refrain from adopting new legislative or regulatory instruments introducing any new aid in the form described above and recover the aid. The aid shall be reimbursed in accordance with the procedures and provisions of Italian law, together with interest calculated by applying the reference rates used for assessment of regional aid, for the period from the date on which the unlawful aid was granted to the date on which it was actually repaid.

Article 3

The Italian Government shall inform the Commission, within two months of the date of notification of this decision, of the measures taken to comply with it.'

16. On 10 January 1997, the Italian Government brought the present action.

17. The scheme at issue in these proceedings has not been extended beyond the 1994 fiscal year.

The plea of nullity raised

18. Italy considers that, by adopting Decision 97/270, the Commission has infringed and misapplied Articles 92 and 93 of the

Treaty. That plea consists of a principal branch and a subsidiary branch.

The principal branch of the plea

19. The Italian Republic maintains that the twofold bonus and compensation scheme introduced for the 1993 and 1994 fiscal years is not a system of State aid incompatible with the common market since it does not entail an allocation — direct or indirect — of State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, thereby affecting trade. Under this head of claim, the applicant essentially puts forward three arguments which can be summarised by saying that the tax bonus and compensation measures declared unlawful and incompatible with the common market by the second adverse decision:

(a) do not constitute a scheme of State aid;

(b) do not, under any circumstances, produce a distortion of competition; and

(c) have not given rise to discrimination between Italian undertakings and undertakings from other Member States.

I shall analyse those three statements below. The clearest way of doing this, however, in my view, is first to examine the classification of the fiscal bonus scheme at issue, with a view to determining whether or not it constitutes State aid within the meaning of Article 92 of the Treaty, and then to address the compatibility of the measure with the common market, by establishing whether it affects trade between Member States and whether it is detrimental to free competition in so far as it favours a particular sector of the transport industry defined in terms of nationality.

(a) Classification of the bonus scheme

20. In the view of the Italian Government, measures consisting in granting to a particular category of transport undertaking a bonus calculated on the basis of consumption of fuel and lubricants are purely fiscal in nature. Proof of this, it contends, lies in the fact that the same result could have been achieved by reducing the excise duty on fuel across the board, an approach rejected because it would have led to an unacceptable fall in tax revenue. The bonus scheme makes it possible to customise the tax burden for each category of user by reducing the amount of tax payable by those who would otherwise be at a genuine disadvantage in relation to foreign competitors. Given the considerable difference in the

price of fuel in Italy as compared with neighbouring countries — France, in particular — and taking into account the autonomy of modern industrial vehicles, European hauliers would have been able to enter Italian territory with a full tank and carry out cabotage work on substantially more favourable terms than their Italian counterparts, had it not been for the bonus measures. Accordingly, the intervention in question is not, in the opinion of the Italian Government, a scheme of financial aid but an indirect refund of part of the excise duty on fuel.

21. Strictly speaking, those arguments are sufficient in themselves to justify rejection of the principal branch of the plea in law put forward by the Italian Government. The bonus scheme whose lawfulness it seeks to defend in these proceedings is manifestly intended to improve the position of a national transport sector with respect to the competition between it and other Member States. That is to say, it is an example of precisely the type of conduct which Community legislation on State aid seeks to eliminate.

Knowing the purpose of the scheme makes it easier to understand its characteristics. Thus, the reason the amount of the bonus increased at a rate more than proportionate to the size of the vehicle was in order to favour larger-capacity vehicles, that is to say, vehicles better able to compete on the international market. It also explains the temporary nature of the arrangement: once the considerable disparity between fuel prices in Italy and those in neighbouring countries had disappeared in 1995 or thereabouts — and along with it the relative disadvantage suffered by Italian hauliers — there was no longer any logical reason for the aid and it was not extended beyond the 1994 fiscal year (see paragraph 17 above). The latter fact was confirmed with absolute clarity by counsel for the Italian Government at the hearing.

I shall none the less proceed with my analysis of the branch of the plea, albeit only for the sake of completeness.

22. First of all, I fully understand the Italian Government's concern to characterise the measure at issue as being purely fiscal in nature. Since 1961, the Court of Justice has consistently interpreted the concept of aid solely by reference to its effects: [9] the decisive criterion is not the form that the intervention takes, nor, of course, its legal nature or the aim it pursues, [10] but the result to which it leads. [11] *Any* intervention which gives rise to an economic advantage, accompanied by a correlative decrease in State resources, and benefits a particular undertaking or sector of

9 — 'Interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking', Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1, p. 19.

10 — Unless, as in this case, that aim is diametrically opposed to the *ratio legis* of the provisions of the Treaty.

11 — 'Article 92 does not distinguish between the measures of State intervention concerned by reference to their causes or aims, but defines them in relation to their effects', Case 173/73 *Italy* v *Commission* [1974] ECR 709, point 13, second paragraph.

production, is in principle State aid for the purposes of Article 92 of the Treaty. The presence of those three factors is therefore sufficient for its classification as such.

23. There is no doubt that any bonus of a fiscal nature — such as, therefore, the measure at issue — creates an advantage for its beneficiaries and a correlative decrease in State revenue. The scheme at issue in these proceedings cannot be said to apply uniformly across the economy without favouring certain undertakings or sectors. [12] Quite the contrary, its stated objective is to benefit exclusively road hauliers operating for hire or reward, that is to say, a sufficiently defined sector of production. In principle, therefore, it falls within the scope of Article 92(1).

24. However, there are at least three situations where, despite the presence of the aforementioned factors, the intervention does not constitute State aid in the strict sense of the term, namely:

(a) where the State conducts itself like a private commercial operator; [13]

(b) where the State is discharging obligations of a civil nature such as the obligation to make reparation for loss and damage or to pay back sums unduly acquired; [14] and

(c) where the exceptional measure forms part of a general system — of taxation or social security, for example — and is justified by the nature or general scheme of the system. [15]

25. The Commission focuses at some length on arguing against the applicability of the first situation in this case. [16] I do not see how the State's conduct in granting the bonuses at issue can even remotely be likened to that of a private investor operating under normal market economy conditions.

I likewise find it inconceivable that the tax credit was granted pursuant to obligations of

12 — See the definition of general measures proposed in the 'Second Survey on State Aids in the EC in the Manufacturing and Certain Other Sectors', Commission of the European Communities, Luxembourg, 1991, pp. 4 and 5.

13 — This criterion is based on the opportunities open to the undertaking of acquiring the amounts in question on the capital market; see the judgment in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 39.

14 — See Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205, paragraph 31.

15 — *Italy* v *Commission*, cited in footnote 11, point 15, third paragraph.

16 — See the fourth recital in part IV of Decision 97/270.

a civil nature binding on the State, with the result that the second situation provided for is not applicable either.

26. More serious attention should be given, in my view, to the Italian Government's contention that the scheme covered by the contested decision is of a piece with the logic of its industrial policy, and is comparable in its effects with the systems of differentiated taxation on energy — the rate of which varies depending on whether the energy is for domestic or industrial use — in existence in several Member States. If that were the case, the adverse effects which that scheme would have on competition in the Community could be addressed only by means of an approximation of laws as provided for in Article 100 et seq. of the Treaty.

27. I recognise that the dividing line between measures which may constitute public subsidies, on the one hand, and measures forming part of a State's general system of taxation, on the other, may sometimes be difficult to draw. However, any system of fiscal bonuses has the effect of exempting a group or sector of taxable persons from the tax system generally applicable. Such exemptions [17] often pursue objectives different from what might be called primary taxation requirements. [18] They serve to meet social aims, industrial or regional development aims and other similar objectives. In terms of their function, they are so similar to direct aid granted by States that, for the purposes of Article 92 of the Treaty, they must in principle be treated as such. Where that is the case, it will be for the State which introduces them to show that they are, on the contrary, what have come to be known as 'measures of a general nature' and that, as such, they fall outside the scope of Article 92. To that end, the State must make clear which aspect of the system's internal logic those measures obey, and thereby prove that they do not in any way seek to improve the position of one particular sector in relation to its foreign competitors. That, however, is precisely the rationale underpinning the rules at issue. They serve no other purpose than to grant financial aid which reduces the relative disadvantage suffered by Italian transport undertakings as a result of the high cost of fuel and lubricants in Italy; in other words, to improve the competitiveness of Italian transport undertakings. That is the only industrial policy reason which is given.

17 — What matters is not the formal name given to the measure (exemption, reduction, bonus, deduction, relief etc.) but its nature as a fiscal provision creating an exceptional situation in favour of one or more taxable persons.

18 — Only then are they genuine 'bonuses'; of the various deductions provided for in respect of different types of tax, those which conform to the same taxation principle as the taxes themselves are not, technically speaking, bonuses but absolute tax rules in the same way, for example, as provisions for calculating the tax base (see in this regard Joachim Lang, *Systematisierung der Steuervergünstigungen*, 1974, p. 73 et seq., cited by Karl Alois Frick, *Einkommensteuerliche Steuervergünstigungen und Beihilfeverbot nach dem EG-Vertrag*, 1994, p. 28). Thus, deductions for dependent children permitted in respect of income tax are not bonuses *per se*, since they are based on the same principle of taxable capacity as the tax itself.

28. It must therefore be concluded that the scheme covered by the contested decision unquestionably constitutes State aid within the meaning of Article 92 of the Treaty.

(b) Compatibility of the measure with the common market

29. While the function performed by the bonus scheme makes it instantly distinguishable from measures adopted by a State within the general framework of its tax system, the effects which that scheme produces require further examination in order to determine whether it is compatible with the common market. Article 92 prohibits any type of State aid which meets the following conditions: it must distort or threaten to distort competition, and it must affect trade between Member States.

30. According to the information sent by the Member States to the Commission — which is contained in the 17th recital in part IV of the contested decision — approximately 16% of Italian road haulage operations for hire or reward in 1992 were international operations. Furthermore, between 1990 and 1993, 14% of Community road cabotage was carried out in Italy. Taking into account the additional impact which the gradual liberalisation of road-haulage services has had since January 1993, [19] there can be no doubt — and the Italian Government does not deny it — that the aid in question affects intra-Community trade. The second of the two conditions set out above is fulfilled in this case, and it only remains to determine whether the contested scheme adversely affects free competition, actually or potentially.

31. In its decision, the Commission states that the scheme of aid to Italian road-haulage undertakings operating for hire or reward produces a distortion of competition in respect of both non-Italian Community road hauliers and Italian own-account hauliers. In the defence, the Commission also points out that the ceiling on eligibility for bonuses of one hundred vehicles per undertaking, which was introduced for the second half of the 1994 fiscal year, also distorted competition between large and small transport undertakings.

I shall now examine each of those three contentions, after which I shall conclude with an overall assessment.

19 — Pursuant to Council Regulation (EEC) No 881/92 of 26 March 1992 on access to the market in the carriage of goods by road within the Community to or from the territory of a Member State or passing across the territory of one or more Member States (OJ 1992 L 95, p. 1) and Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1).

— Distortion with respect to non-Italian Community undertakings

32. The Italian Government maintains that Community transport undertakings in a similar situation to that of the Italian undertakings benefiting from the measures at issue could have claimed compensation under a scheme introduced by the Decree-Law of 26 January 1993, [20] Article 14(4) of which entitled the former undertakings to apply for aid in respect of diesel fuel consumption over distances covered in Italian territory; the amount of that aid, and the procedure for granting it, were to be laid down in the corresponding implementing legislation. That legislation has never been adopted and no compensation has been granted on that basis.

The Italian Government states on the one hand that notification of the contested decision led to the procedure for adopting the implementing legislation being frozen and, on the other, that the lack of such legislation did not prevent Community hauliers from making the relevant applications under Article 14 of the Decree-Law. The reason no such applications were made, it maintains, lies in the fact that it was not in the economic interests of non-Italian undertakings to do so, the easier alternative for them being to enter Italian territory with their tanks full of fuel.

20 — GURI No 21 of 27 January 1993.

33. I consider those contentions to be irrelevant and highly contrived. With regard to the first, I agree with the Commission that the same diligence in complying with its decisions could have been exercised in relation to the very first version of the bonus scheme, which was declared contrary to the Treaty by the Commission in 1993. Why is it that the Italian Government took no action to suspend the tax credit then, but did so subsequently in connection with the compensation scheme? As regards the second contention, in view of the wording of the aforementioned Article 14, and in the absence of any implementing legislation and, consequently, any specific indication as to the amount of the compensation or the procedure for granting it, it would have been surprising if an undertaking *had* applied for compensation. [21]

34. In reply to the Italian Government's contention that the contested scheme, far from distorting competition, placed national undertakings on an equal footing with Community competitors by reducing the greater financial burden which the former were previously required to bear, it must be stated, to paraphrase the judgment in *Italy* v *Commission* (cited in footnote 11), that the point of departure must necessarily be the competitive position existing within the common market before the adoption of the measure at issue. This position is the result of numerous factors having varying effects on production costs in the different Member States. The unilateral

21 — At the hearing, counsel for the Italian Government suggested that such applications could have been submitted by way of protest.

modification of one of those factors in a given sector of the economy of a Member State may have the effect of disturbing the existing equilibrium.

35. It is established, then, that during the 1993 and 1994 fiscal years, a particular sector of the Italian transport industry enjoyed economic aid from which non-Italian Community competitors were excluded, in breach — in my view — of Article 7 of the Treaty. That fact is in itself sufficient to prove the compatibility of the contested decision with Article 93(2) of the Treaty, thereby invalidating this action (see paragraph 21 above). Once again, I shall proceed with my analysis, albeit only for the sake of clarity.

— Distortion with respect to own-account transport undertakings

36. The Italian Government does not deny that this distortion actually exists. It merely points out that the economic disadvantage which own-account operators suffer as a result of being excluded from the bonus scheme has only a marginal impact on their production costs.

37. That contention does not appear to be substantiated and is, in any event, irrelevant. If, as the Italian Government asserts above, the scheme of aid to own-account transport undertakings was intended to put such undertakings on an equal footing with their Community competitors, it cannot at the same time be maintained that that scheme has no impact on the choice available to undertakings between using their own haulage resources or someone else's. The amount of the bonus is not decisive anyway. [22] What matters is that the bonus scheme made haulage for hire or reward relatively more attractive than own-account haulage, in breach of the principles of free competition.

— Distortion with respect to undertakings with more than one hundred vehicles

38. According to the Italian Government, large transport undertakings are better able to

22 — According to the information supplied by the Commission, for the three years during which it was in force, the measure accounted for between 9.7% and 24.3% of the actual cost of fuels and lubricants borne by a road haulier, percentages which are by no means insignificant given the very considerable bearing which those costs have on a transport undertaking's final accounts.

contend with exclusion from the aid scheme, in so far as their economies of scale serve to mitigate the economic disadvantage they suffer as a result of such exclusion.

39. I would simply reiterate that the impact of the bonus is not a decisive criterion. Furthermore, the granting of State aid in order to eliminate or reduce the economic advantages achieved through the proficient organisation of the means of production is in particular contrary to the objectives pursued by free competition.

— Assessment

40. The Italian Government's concern regarding the considerable disparity in the rates of tax applied to fuels in the various Member States is understandable. Given the technical characteristics of modern road haulage, it is possible — as the Italian Government argues — that such disparity gives rise to distortions of competition which must be eliminated. However, the proper framework for correcting such distortions is the approximation of laws provided for in Article 100 et seq. of the Treaty, not the unilateral introduction of State aid which, in addition to being discriminatory, distorts conditions of competition in the Community.

The subsidiary branch of the plea in law

41. In the alternative, the Italian Government claims that the Court should annul the provision of the Decision of 22 October 1996 imposing on Italy the obligation to recover the amounts granted under the aid scheme declared unlawful and incompatible with the common market (see paragraph 15 above). It maintains that it is absolutely impossible for it to recover the bonuses authorised because of the insuperable difficulties and the social unrest which any attempt at recovery would entail.

42. In the meantime, on 29 January 1998, the Court of Justice gave judgment in *Commission* v *Italy* (see paragraph 12 above), which also concerned an application for a declaration that Italy had failed to fulfil its obligation to recover aid granted under the scheme introduced in 1992. As I have already indicated, the bonus scheme at issue in these proceedings is an extension of the one introduced in 1992, to which was added a compensation scheme in favour of non-Italian Community hauliers which has never been implemented. The introduction of that compensation does not in any event affect the obligation to recover the bonuses. The plea of absolute

impossibility raised in the alternative in these proceedings was put forward as a preliminary objection in the earlier case and was rejected. The same finding should therefore be reached here; that is to say, the plea of absolute impossibility should be rejected. Moreover, the Italian Government appears to have acknowledged this by declining to put forward the subsidiary plea at the hearing.

Costs

43. Should the Court dismiss the action in its entirety, as I propose, it must, under Article 69(2) of the Rules of Procedure, order Italy to pay the costs.

Conclusion

44. Having regard to the foregoing considerations, I propose that the Court of Justice:

— dismiss the application by which the Italian Republic seeks annulment of Commission Decision 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);

— order the Italian Republic to pay the costs.