

JUDGMENT OF THE COURT
4 April 1995 *

In Case C-348/93,

Commission of the European Communities, represented by Antonino Abate, Principal Legal Adviser, and Vittorio Di Bucci, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Krem-lis, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Department for Legal Affairs in the Ministry of Foreign Affairs, acting as Agent, and Pier Giorgio Ferri, Avvocato dello Stato, with an address for service in Lux-embourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by failing to abolish and recover within the prescribed period the aid improperly paid to the Alfa Romeo Group in the amount of LIT 615.1 thousand million plus default interest calculated from September 1991 to the date of payment of the amount in question, and/or by failing to notify the Commission of the measures adopted to that end, the Italian Republic has failed to fulfil its obligations under 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 (OJ 1989 L 394, p. 9),

* Language of the case: Italian.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler (Rapporteur) (President of Chamber), G. F. Mancini, J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward and J.-P. Puissochet, Judges,

Advocate General: F. G. Jacobs,
Registrar: Lynn Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 6 December 1994,

after hearing the Opinion of the Advocate General at the sitting on 2 February 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 7 July 1993, the Commission of the European Communities brought an action under the second subparagraph of Article 93(2) of the EEC Treaty for a declaration that, by failing to abolish and recover within the prescribed period the aid improperly paid to the Alfa Romeo Group in the amount of LIT 615.1 thousand million plus default interest calculated from September 1991 to the date of payment of the amount in question, and/or by failing to notify the Commission of the measures adopted to that end, the Italian Republic has failed to fulfil its obligations under 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 (OJ 1989 L 394, p. 9) ('the decision').

2 In the decision the Commission found that the aid in the form of capital contributions totalling LIT 615.1 thousand million awarded by the Italian Government through the public holding companies IRI and Finmeccanica to the Alfa Romeo Group was incompatible with the common market under Article 92(1) of the Treaty on the ground that it had been provided in contravention of the rules of procedure laid down in Article 93(3) of the Treaty and did not satisfy the conditions for exemption provided for in Article 92(3) (Article 1 of the decision). The Commission decided that the Italian Government was under an obligation to abolish that aid and to recover it from Finmeccanica within two months of notification of the decision. If repayment was not made within that period, the recipient was also required to pay default interest (Article 2 of the decision). The Italian Government was required to inform the Commission within two months from the date of notification of the decision of the measures taken to comply therewith (Article 3 of the decision).

3 The amount of LIT 615.1 thousand million comprised LIT 206.2 thousand million in the form of budgetary allocations granted to IRI by the Italian Government for the purpose of recapitalizing Alfa Romeo and LIT 408.9 thousand million paid by Finmeccanica to Alfa Romeo through bonds issued by IRI under legislation authorizing it to issue interest-bearing bonds redeemable by the State.

4 By judgment of 21 March 1991 in Case C-305/89 *Italy v Commission* [1991] ECR I-1603, the Court dismissed an application for the annulment of the decision.

5 After several requests by the Commission that it implement the decision and notify the Commission of the measures adopted to that end, the Italian Government informed it on 13 March 1992 that Finmeccanica, considered to be the recipient of the aid as a holding company of which Alfa Romeo formed part at the material time, would repay the aid plus interest thereon to the State holding company IRI.

- 6 By correspondence of 26 June 1992 the Commission informed the Italian Government that it ought to have demanded that Finmeccanica repay the aid not merely to IRI but to the Italian State.
- 7 On 12 February 1993 the Italian authorities informed the Commission that Finmeccanica had repaid LIT 719.1 thousand million to IRI, comprising the principal sum of LIT 615.1 thousand million and interest of approximately LIT 104 thousand million. The principal sum covered the capital contribution of LIT 206.2 thousand million and LIT 408.9 thousand million financed by IRI through bonds redeemable by the State. The Italian Government stated that the 1991 Finance Law, No 405 of 29 December 1990 (*Gazzetta Ufficiale della Repubblica Italiana* No 303 of 31 December 1990), had abolished the obligation to pay LIT 1 269 thousand million to IRI in respect of the bonds which the latter had issued.
- 8 In support of its application, the Commission argues that the Italian Republic infringed Article 93(2) of the Treaty by failing to take steps to recover the aid within two months of notification of the decision, by incorrectly calculating the interest and by failing to require IRI to repay the aid to the Italian State.

Admissibility of the application

- 9 The Italian Republic raises the objection that the application is inadmissible in so far as the Commission seeks a declaration that it has failed to fulfil an obligation which does not follow from the decision, namely ensuring that the aid is repaid by IRI to the Italian State. Moreover, the application does not, contrary to Article 38(1)(c) of the Court's Rules of Procedure, set out a summary of the pleas in law alleging that failure to recover the aid from IRI is contrary to the decision.

- 10 In that regard, it must be held that the Commission merely submits that the Italian Republic has not complied with the decision, the alleged breach of which forms the subject-matter of these proceedings. The question whether the decision imposes on the Italian Republic an obligation to recover the aid from IRI has to be examined in connection with the issue whether the application is well founded and cannot adversely affect its admissibility.
- 11 Moreover, the application clearly sets out the facts and arguments relied on by the Commission, in accordance with the requirements of Article 38(1)(c) of the Rules of Procedure, and has enabled the Italian Government to submit a detailed defence.
- 12 The objection of inadmissibility must accordingly be rejected.

Failure to implement the decision

- 13 It is necessary to examine in turn the three complaints relied on by the Commission.

The complaint alleging failure to recover the aid within the prescribed period

- 14 The decision clearly sets out the obligation on the Italian Government to seek repayment of the aid within two months of 31 July 1989, the date on which the decision was notified.

15 It was not until 12 February 1993 that the Italian authorities informed the Commission of the repayments made by Finmeccanica to IRI.

16 According to consistent case-law, the only defence available to a Member State in opposing an application by the Commission under Article 93(2) of the Treaty for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to implement the decision properly (see, most recently, the judgment in Case C-349/93 *Commission v Italy* [1995] ECR I-343, paragraph 12, and the case-law cited therein).

17 The Court has also held that a Member State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences overlooked by the Commission, must submit those problems to the Commission for consideration, together with proposals for suitable amendments to the decision in question. In such cases, the Commission and the Member State must, by virtue of the rule imposing on the Member States and the Community institutions a duty of genuine cooperation which underlies, in particular, Article 5 of the Treaty, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions and, in particular, the provisions on aid (see the above judgment in Case C-349/93 *Commission v Italy*, paragraph 13, and the case-law cited therein).

18 The Italian Republic has not referred to any absolute impossibility as regards implementation or to any unforeseen and unforeseeable difficulties.

19 In those circumstances, the application must be held to be well founded in so far as the Italian Republic failed to take steps to implement the decision within the prescribed period.

The complaint alleging incorrect calculation of the default interest

20 At the hearing the Commission pointed out, without being contradicted by the defendant, that in the form of order sought in its application it stated by mistake that default interest was payable as from September 1991, instead of September 1989, being the date referred to in the text of the application. The Commission emphasized that in fact '1989' is the year that was meant.

21 Article 2 of the decision provides that the interest is to be calculated from the expiry of the two-month period following notification of the decision to the Italian Government, in this case therefore from 30 September 1989.

22 The Italian Government does not deny that it calculated the interest from 28 February 1990, the date on which the period of two months following publication of the decision in the *Official Journal* expired.

23 It must therefore be held that the application is also well founded in so far as the Commission charges the Italian Republic with having incorrectly calculated the default interest.

The complaint alleging failure by IRI to repay the aid to the Italian State

24 In order to rule on this complaint, it is necessary to refer to the purpose of the obligation to recover unlawful aid and to the scope which that obligation has in the decision.

- 25 Article 93(2) of the Treaty provides in this connection that if the Commission finds that aid granted by a State or through State resources is not compatible with the common market, it shall decide that the State concerned is to abolish or alter such aid within a period of time to be determined by the Commission.
- 26 The Court has consistently held that the obligation on a State to abolish aid regarded by the Commission as being incompatible with the common market has as its purpose to re-establish the previously existing situation (see the judgment in Joined Cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 75, and the case-law cited therein).
- 27 That objective is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient, in this case Finmeccanica, to IRI, the public body responsible for managing State holdings. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored.
- 28 Furthermore, in Article 2 of the decision, the Commission merely required the Italian Government to abolish the aid and oblige Finmeccanica to repay it within a certain period, with default interest after the expiry of that period.
- 29 However, while it cannot be ruled out that the allocation of funds by the State to a public body such as IRI may constitute State aid within the meaning of Article 92 of the Treaty, the Commission, contrary to its submissions, did not find in the decision, on completion of the procedure laid down in the Treaty, that the fact that funds were made available by the State to IRI also constitutes aid incompatible with the common market.

30 In those circumstances, the application must be considered to be unfounded in so far as the Commission charges the Italian Republic with failing to require IRI to repay the aid to the Italian State.

Failure to notify the measures implementing the decision

31 The Court does not need to examine the form of order sought against the Italian Republic for failing to notify the Commission of the measures implementing the decision since the Italian Republic did not in fact implement the decision within the prescribed period.

2 It must therefore be held that, by not taking steps to implement the decision within the prescribed period and by incorrectly calculating the default interest, the Italian Republic has failed to fulfil its obligations under the Treaty.

Costs

3 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the defendant has been essentially unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- 1. Declares that, by failing to abolish and recover within the prescribed period the aid improperly paid to the Alfa Romeo Group in the amount of LIT 615.1 thousand million plus default interest calculated from 30 September 1989 to the date of payment of the amount in question, the Italian Republic has failed to fulfil its obligations under 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;**
- 2. Dismisses the remainder of the application;**
- 3. Orders the Italian Republic to pay the costs.**

Rodríguez Iglesias

Schockweiler

Mancini

Moitinho de Almeida

Murray

Edward

Puissochet

Delivered in open court in Luxembourg on 4 April 1995.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President