OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 23 January 2001 [1]

Facts and procedure

1. By an action brought on 21 October 1998 under the second paragraph of Article 93(2) of the EC Treaty (now the second paragraph of Article 88(2) EC), the Commission has applied for a declaration that the Kingdom of Belgium has failed to comply with Commission Decision 97/239/EC of 4 December 1996 concerning the aid granted by Belgium under the *Maribel bis/ter* scheme [2] (hereinafter the 'Decision').

2. More specifically, the Commission has complained that the Kingdom of Belgium failed to adopt within the period prescribed the measures necessary to recover from the recipient undertakings the aid unlawfully granted under the scheme. In this way, according to the applicant institution, it failed to fulfil its obligations under the fourth paragraph of Article 189 of the EC Treaty (now the fourth paragraph of Article 249 EC) and Articles 2 and 3 of the Decision.

3. As may be seen from the Decision, in 1981 Belgium adopted requirements on the 'general principles of social security for wage earners', on the basis of which 'undertakings employing manual workers [enjoyed] a reduction in social security contributions for all such workers' (the '*Maribel*' scheme). It should be noted that, 'since it was general and automatic, that measure was not deemed to constitute aid falling within the scope of Article 92(1) of the EC Treaty'. [3] In 1993 and 1994, this measure underwent a series of amendments to increase the contribution reductions for undertakings in the sectors most exposed to international competition (*Maribel bis/ter*).

4. These additional reductions were brought to the Commission's attention by a number of undertakings, which complained that they were State aid incompatible with the common market. Following an initial assessment evaluation, the Commission therefore, in consultation with the

1 — Original language: Italian.

2 — OJ 1997 L 95, p. 25.

3 — Point I of the Decision.

parties concerned, initiated the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC) for the purpose of a more detailed examination of the measures complained of.

5. This procedure concluded with the Decision of 4 December 1996. In the decision, the Commission declared that the measures constituted unlawful State aid, in that prior information concerning it had not been given to the Commission in accordance with the provisions of Article 93(3) of the EC Treaty (now Article 88(3) EC). The aid was also held to be incompatible with the common market within the meaning of Article 92(1) of the EC Treaty (now Article 87(1) EC), since it could not qualify for the derogations laid down in paragraphs 2 and 3 of that Article (Article 1 of the Decision). Consequently, the Decision imposed upon the Kingdom of Belgium '[the obligation to] take appropriate measures to terminate forthwith the granting of the increased reductions in social security contributions referred to in Article 1' and to 'recover the illegal aid from the recipient undertakings'. Repayment was to be made in accordance with the procedures and provisions of Belgian law, with interest payable from the date on which the aid was granted up to the date of actual repayment, calculated at a rate equal to the reference rate used to calculate the equivalent subsidy net of the regional aids in Belgium in force at the date such aid was granted (Article 2). Lastly, the Kingdom of Belgium was required to inform the Commission, within two months from the date the Decision was notified, of the measures adopted to comply with it (Article 3).

6. The Decision was notified to the Belgian authorities on 20 December 1996. It was challenged by the Kingdom of Belgium in good time in its action brought on 19 February 1997 (Case C-75/97) but no application was made for precautionary suspension under Article 185 of the EC Treaty (now Article 242 EC). For the present purposes, it should be stressed that among the grounds put forward in support of the action was the absolute impossibility of recovering the *Maribel bis/ter* aid.

7. While the action was pending before the Court, on 5 March 1997 the Belgian Government informed the Commission of its intention to modify the scheme of contribution reductions under *Maribel bis/ter*, by introducing a new system ('*Maribel quater*') that was capable of eliminating the selective nature of the scheme complained of in the Decision. The Commission expressly approved this system, in a letter of 15 April 1997, regarding it as a general measure and as such not subject to Article 92(1) of the EC Treaty (now Article 87(1) EC). The Commission therefore agreed with the Belgian authorities that the introduction of *Maribel quater* put an end to the scheme of aid complained of in the Decision.

8. But no agreement was reached on recovery of the aid granted in the meanwhile under the *Maribel bis/ter* scheme, and it is specifically this failure to recover which is at the origin of the present dispute. The positions of the parties, as set out at a number of meetings between the Belgian authorities and the Commission departments, and in a substantial exchange of correspondence, can be briefly summarised as follows.

9. First, the Belgian authorities claimed that a precise calculation of the amount to be recovered from each undertaking was made extremely difficult by a number of circumstances. These principally included: the closure or insolvency of some undertakings; confusion as between the reductions under *Maribel bis* and *Maribel ter*; consideration of the various forms of financing to which the undertakings would have been entitled had they not enjoyed the reductions; the accounting difficulties relating to possible deduction of the amount to be repaid from the new *Maribel quater* reductions; the large number of recipient undertakings, for which the reductions would have to be calculated quarter by quarter on the basis of the number of workers employed; and, essentially, the high cost and intolerable burden of work that such an operation would involve for the relevant administration. In order to overcome these difficulties, the Belgian authorities concluded it was necessary to use a flat-rate calculation of the amount of aid to be recovered, but they failed to provide more precise details on this. They stated in any event that under the *de minimis* rule,[4] undertakings with fewer than 50 workers would be excluded from the obligation to repay.

10. For its part, the Commission, while not in principle rejecting the application of the *de minimis* rule or the possibility of a set-off between the amount to be repaid and the amount of the new reductions under *Maribel quater*, more than once, it asked the Belgian authorities to present a *concrete proposal* for recovery of the aid concerned. In particular, the Commission objected to the extremely vague nature of the hypothetical flat-rate calculation of the amount to be recovered and, in any case, ruled out any possible calculation that ignored the amount of contribution reductions actually enjoyed by the various undertakings.

11. It is important to note that the negotiations on compliance with the Decision stretched over many months and that during that time, the Belgian authorities do not appear to have made any attempts to recover the aid concerned and certainly submitted no concrete proposal to overcome the difficulties which they claimed they were encountering in calculating this

4 — On this, reference was made to the Commission's communication on *de minimis* aid, published in OJ 1996 C 68, p. 9.

aid. On the contrary, they gave more than one sign of uncertainty, as when, in a letter of 10 April 1998, they described certain calculation models proposed earlier and accepted by the Commission as purely theoretical and unusable.

12. In order to find a way out of this impasse, therefore, in two successive letters, of 10 March and 4 May 1998, the Commission called upon the Belgian authorities to submit within a brief period (20 and 15 working days respectively) concrete proposals on recovering the aid. It was stated in each of the letters that, if it did not receive such a proposal within the period set, the Commission would be forced to bring an action to the Court for failure to comply with the Decision.

13. The Commission was not satisfied with the Belgian Government's responses to those requests and, on 21 October 1998, decided to bring the present case. In the application, it complains that the Kingdom of Belgium: (a) has not fully fulfilled the obligation of sincere cooperation set out in Article 5 of the EC Treaty (now Article 10 EC) in seeking, jointly with the Commission, a satisfactory solution for recovery of aid under *Maribel bis/ter*; (b) has not taken any action to seek to recover that aid from the recipient undertakings; and (c) has proposed no alternative measures to comply with the Decision and to overcome the difficulties encountered in recovering the aid.

14. The Kingdom of Belgium responded with a defence dated 4 February 1999, in which it claimed that it had taken diligent action to recover the aid concerned but had encountered insurmountable difficulties in the precise, quarter-by-quarter, calculation of the reductions in contributions that the various undertakings had enjoyed. These difficulties could, according to the Belgian authorities, be overcome only by a flat-rate calculation of the amount to be recovered, but the Commission had rejected that approach. In its defence, the defendant government also complained that the Commission had not collaborated constructively in seeking an acceptable solution to the problem of recovery, stressing that the obligation of sincere cooperation is binding on the Community institutions as well as the Member States. Lastly, the Belgian Government stressed that, in the absence of a general solution to this problem, it could not take action only against some of the recipient undertakings without breaching the principle of equality of treatment.

15. These issues are the subject of the present dispute and will be examined below in the legal section of this Opinion. However, for the sake of completeness, I must note that, after the case was brought, the parties have continued to negotiate on

compliance with the Decision. In particular, in response to one question from the Court, it was stated that, in February and March 1999, the Belgian authorities examined and discussed with the Commission a number of versions of a 'draft protocol' which they prepared to resolve the problem of recovering *Maribel bis/ter* aid.

16. In its latest version, of 19 May 1999, this document essentially provided: (a) that recovery would be carried out over three years (from 1 April 2000 to 1 April 2003) but there would be no recovery where the reductions in contributions were below the *de minimis* thresholds; (b) that, in calculating the amount to be recovered, it would be taken into account that contributions not paid because of the *Maribel bis/ter* reductions were tax-deductible, and this amount would therefore be reduced correspondingly; (c) that interest accruing from the date of grant of the aid would be calculated at the average reference rate of 6.36%; (d) that the circumstances of undertakings in difficulties or undergoing restructuring would be subjected to special examination; (e) that much of the amount to be recovered would be re-distributed by means of a generalised reduction in social security contributions and a further portion would be used within the limits permitted by the *de minimis* thresholds.

17. The methodology proposed in the document has essentially been accepted by the Commission, which has confined itself to asking the Belgian authorities for some further detail. For the present purposes it should particularly be emphasised that, in its letter of 1 July 1999, the Belgian Government stated that the amount to be recovered was determined for each undertaking on the basis of the number of workers actually employed at the time, when the aid was granted.

18. Provision was then made in the Law of 24 December 1999 [5] for the *Maribel bis/ter* aid to be recovered and, it appears, that is now proceeding; according to information from the Belgian authorities, on 3 November 2000, recovery had already been effected from three-quarters of the undertakings concerned. However, the Commission has objected to some arrangements for recovery and has pointed out to the Belgian authorities the need to make some changes to the text of the law. At the moment, it seems, the parties have not yet reached agreement on only two specific aspects of this law: on the possibility of applying the *de minimis* rule by means of an automatic and generalised deduction of EUR 100 000 from the sum which each undertaking is required to repay; and on an ambiguity in the law itself, which appears to allow the undertakings concerned double tax deduction from the sum to be repaid.

19. Lastly, it should be noted that, while the written proceedings in the present

5 — Published in *Moniteur Belge* of 31 December 1999, 3rd ed., p. 50476.

dispute were still continuing, the Court gave its decision on the application by the Belgian Government for annulment of the Decision (Case C-75/97). In its judgment given on 17 June 1999,[6] it dismissed the application and — *inter alia* — rejected the argument based on unlawful imposition of an obligation to recover 'whose implementation would, from the beginning, be impossible in objective and absolute terms'.[7] The Court held in particular that 'the administrative and practical difficulties which will incontestably arise owing to the large number of undertakings involved' do not 'warrant regarding recovery as technically impossible. Despite the incontestable existence of the difficulties referred to by the Belgian Government at the time when the Commission ordered the aid to be recovered, there is nothing to prove that it is absolutely impossible for recovery to be carried out and that such absolute impossibility already existed when the Commission took its contested decision.'[8]

Legal analysis

Subject-matter of the case

20. In undertaking an examination of the present dispute, it is necessary first of all to identify its precise extent and consider the relevance of the events occurring after the case was brought. This Court has consistently held that, in the context of cases under Article 169 of the EC Treaty (now Article 226 EC), 'whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes'. (...) 'It follows that the laws or regulations adopted after that period cannot be taken into account'.[9]

21. I consider that this settled case-law has to apply also in an action under the second paragraph of Article 93(2) of the EC Treaty (now the second paragraph of Article 88(2) EC), which the Court has itself described as 'a variant of the action for a declaration of failure to fulfil Treaty obligations, specifically adapted to the special problems which State aid poses for competition within the common market'.[10] If the obvious parallel which the Treaty establishes between both types of proceedings is to be meaningful, it is clear that the principle according to which the Court must assess the situation as it existed at the end of the period laid down for fulfilment of the obligation must apply also in actions under the second

6 — ECR I-3671.

7 — Paragraph 86.

8 — Paragraph 90.

9 — Judgment in Case C-58/99 *Commission* v *Italy* [2000] ECR I-3811, paragraphs 17 and 19. On this point see also (among many others) the judgments cited there: in Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 20 and in Case C-302/95 *Commission* v *Italy* [1996] ECR I-6765, paragraph 13.

10 — Judgment in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 23.

paragraph of Article 93(2). Of course, since in the context of the latter actions, unlike the situation in actions for failure to fulfil obligations, no pre-litigation phase is prescribed and therefore no reasoned opinion is issued prescribing for the Member States a period for compliance, the reference period in such cases will either be as specified in the decision which it is alleged has not been complied with or the date subsequently set by the Commission.

22. Turning to the case in point here, and considering that, in any event, the failure to fulfil an obligation still existed when the Commission brought its action, I would point out that, under Article 2 of the Decision, the Belgian Government was required to terminate the granting of aid 'forthwith' and to proceed to recover it. Then, under Article 3, it was required to inform the Commission within two months from notification of the Decision of the measures adopted to comply with it. Furthermore, it has already been stressed that the Commission had twice (on 10 March and 14 May 1998) given the Belgian authorities a period (20 and 15 working days respectively) to submit a concrete proposal for recovery of the aid, stating that, if they did not, it would bring the matter before the Court. I therefore consider that existence of the failure to fulfil an obligation, as alleged in the present case, has to be established at the latest upon expiry of the period set by the Commission in the letter of 4 May 1998. For this purpose no account should be taken of the steps taken by the Belgian authorities after that date (actually several months after the present case was brought), such as in particular the 'draft protocol' on recovery of the aid and the law of 24 December 1999. At most, such steps may in fact be taken into account to determine whether, at the end of the period set by the Commission, it was or was not absolutely impossible to proceed to recovery of the *Maribel bis/ter* aid.

Absolute impossibility of proceeding to recovery

23. As has been seen, it is not in dispute in this case that the Belgian authorities have not proceeded to recover the *Maribel bis/ter* aid within the period set by the Commission; the argument turns rather on the justifications produced by those authorities for not doing so.

24. Here it is appropriate to note that, '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. (...). However, that condition is not satisfied where the defendant government merely informs the Commission of the legal and practical difficul-

ties involved in implementing the decision, without taking any step whatsoever to recover the aid from the undertakings in question, and without proposing to the Commission any alternative arrangements for implementing the decision which would have enabled the alleged difficulties to be overcome'. [11] 'Absolute impossibility, therefore, cannot be merely surmised, but, rather, must be demonstrated by the failure of attempts made in good faith to recover illegal aid, and must be accompanied by cooperation with the Commission, in accordance with Article 5 of the Treaty, with a view to overcoming the difficulties encountered'. [12]

25. In the case now under consideration, I consider that the Belgian authorities have not provided convincing evidence that it was absolutely impossible to proceed to recovery of the *Maribel bis/ter* aid. In practice, they have merely reported the existence of difficulties of a technical and administrative nature in such recovery, essentially stemming from the large number of undertakings concerned (about 1 200) and from the need to determine the amount of aid (quarter by quarter) on the basis of the number of workers actually employed in those undertakings. But it is not shown that they have taken 'any steps whatsoever to recover the aid from the undertakings in question' and that 'attempts made in good faith to recover illegal aid' have failed.

26. On the other hand, it should also be stressed that this Court has already had occasion to make it clear that difficulties of a technical and administrative nature, of the type referred to by the Belgian authorities, do not of themselves make it absolutely impossible to recover aid. I refer, in particular, to Case C-280/95 (*Commission* v *Italy*) where the defendant State had invoked the absolute impossibility of proceeding to recover aid granted in the form of tax reductions, claiming that such a recovery would have required 'the number of beneficiaries to be determined (around 100 000), and then each individual situation would have to be examined over one or more years... . [and then] checking the tax credit actually used, the allocation of the total credit used by each beneficiary to the different tax headings, preparing the documents in support of each recovery demand and the demand itself, on the basis that each department is to recover the taxes within its area of competence, both by reference to geographical territory and to the type of tax'. [13] But the Court rejected those arguments on the basis of the consideration that, 'even if recovery of the tax credit does present difficulties from an administrative point of view, that fact is

11 — Judgment in Case C-280/95 *Commission* v *Italy* [1998] ECR I-259, paragraphs 13 and 14. On this see also (among many others) the judgments cited there: in Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 16, in Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 10 and in Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 20.

12 — Opinion of Advocate General Fennelly in Case C-280/95, point 13.

13 — Paragraph 18.

not such as to enable recovery to be deemed to be technically impossible'. [14] The obligation to recover aid granted unlawfully cannot be removed by the mere presence of practical difficulties; for that purpose, it is necessary that fulfilment of the obligation be objectively and absolutely impossible.

27. In this instance, therefore, even if the Belgian authorities did actually — in the course of unsuccessful attempts — encounter serious difficulties in recovering the *Maribel bis/ter* aid, they should at all events have 'propos[ed] to the Commission any alternative arrangements for implementing the decision which would have enabled the alleged difficulties to be overcome'. [15] However, it does not seem to me that such a proposal was made in this instance. At all events, I do not consider that one can so regard the hypothesis, put forward in extremely vague terms by the Belgian authorities, of a flat-rate calculation of the aid to be recovered. Indeed, as far as can be seen, the Belgian Government offered the Commission no indication to explain what this criterion consisted of and, in particular, which elements had to be taken into account on a 'flat-rate' basis. That is, it did not explain whether the flat-rate calculation had to relate to the amount of aid received by each undertaking (regardless of the number of workers actually employed) or whether it had to relate to other elements, as for example the rate applicable for calculating the interest on that sum (the rate which, in the 'draft protocol' and the subsequent Law of 24 December 1999, was calculated on the basis of the average of rates charged during the reference period). And, for lack of more precise indications, I consider that the Commission could not do other than declare unacceptable any flat-rate calculation which ignored the amount of contribution reductions that the various undertakings had actually enjoyed.

28. But what is of greater importance in this case is that the alleged impossibility of calculating exactly the amount of the *Maribel bis/ter* aid seems in reality to be refuted by the facts. This is shown first of all by the commitment given by the Belgian authorities in the letter of 1 July 1999 (in response to the Commission's further particulars on the 'draft protocol') to calculate the sum to be recovered on the basis of the number of workers actually employed in the recipient undertakings at the time the contribution reductions were granted; and it is shown even more clearly by the statement by the Belgian Government that, after the Law of 24 December 1999 was adopted, it had proceeded within a few months to recover the aid from three-quarters of the undertakings concerned. But, if it is true that in such a short space of time it was possible to recover a large part of the aid concerned, I do not see how it could be validly claimed, until a short time

14 — Paragraph 23.
15 — Paragraph 14.

before then, that it was absolutely impossible to effect that recovery.

29. To conclude this point, I consider therefore that the Kingdom of Belgium cannot justify the failure to comply with the Decision within the time prescribed by invoking an alleged impossibility of recovering the *Maribel bis/ter* aid.

Duty of sincere cooperation

30. In my view it also follows from the above that the Belgian Government has not met its obligation to cooperate sincerely with the Commission to seek, within the period set, an acceptable solution to the problem of recovery.

31. In truth, the Belgian Government claims that in this case it is not itself but the Commission which has breached its obligation under Article 5 of the EC Treaty (now Article 10 EC) to cooperate sincerely. And indeed it is true that, in the case-law of this Court, 'relations between the Member States and the Community institutions are governed, according to Article 5 of the EEC Treaty, by a principle of sincere cooperation' and that 'that principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law'... 'but also imposes on Member States and the Community institutions mutual duties of sincere cooperation'.[16] But it is clear that, in this case, the positions of the Kingdom of Belgium and of the Commission are substantially different and that the reciprocal obligations of cooperation take quite different forms. There are at least two types of reasons for this.

32. First, because the problems regarding recovery of the aid unlawfully granted would simply not have arisen if the Belgian State had fulfilled the obligation of giving prior notice under Article 93(3) of the EC Treaty. The judgment in *Belgium* v *Commission* (Case C-75/97), cited above, also shows that, shortly after adoption of the *Maribel bis/ter* scheme, the Commission had sought clarification from the Belgian authorities regarding this operation and had stressed 'that any aid granted unlawfully was liable to be the subject of a demand for repayment', so that 'the Belgian Government must have been aware of the possibility that the unlawful aid would be required to be recovered' (paragraphs 77 and 79). In these circumstances, it seems obvious to me that the Kingdom of Belgium had a particular responsibility for removing the distorting effects of the aid unlawfully granted, by adopting all measures to overcome the relevant difficulties.

16 — Order in Case C-2/88 IMM *Zwartveld and Others* [1990] ECR I-3365, paragraph 17. To the same effect, see also the judgment in Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraph 37.

33. Second, it is well known that 'it is settled case-law that, in the absence of provisions of Community law concerning the recovery of amounts unduly paid, the recovery of aid improperly granted must be carried out in accordance with the rules and procedures laid down by national law'. [17] It is consequently for the national authorities — though under the Commission's control — to define the rules and procedures appropriate to effecting such recovery.

34. It is for these very reasons, as has been said, that the case-law of the Community has made it clear that if serious difficulties are encountered in recovering unlawful aid under a Commission decision, the national authorities are obliged to propose alternative arrangements for compliance with that decision to make it possible to overcome those difficulties. And they cannot escape that obligation by putting onto the Commission the burden of independently identifying a solution for the problems raised by recovery. It is clear that only a concrete proposal from the national authorities enables the Commission to collaborate constructively in seeking a solution that ensures recovery 'whilst fully observing the Treaty provisions and, in particular, the provisions on aid'. [18]

35. Therefore, since the Belgian Government has not within the period prescribed proposed any concrete proposal to overcome the difficulties created by recovery of the *Maribel bis/ter* aid, it certainly cannot charge the Commission with lack of cooperation in seeking a solution for those problems. On the other hand, the documents in the case show that the Commission has carefully followed the problems revealed by the Belgian authorities, from time to time expressing its own evaluation of them. It is also clear that the Commission has repeatedly requested those authorities to submit concrete proposals, without which its own contribution could only be marginal.

36. I therefore consider that, in this respect too, the Belgian Government's arguments must be rejected and that therefore the Commission's application must be allowed.

17 — Judgment of the Court in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 82. To the same effect, see, among many others, the judgments of the Court in Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 12, in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 61 and in Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 24. This principle has also been confirmed recently in Council Regulation (EC) No 659/99 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1) Article 14(3) of which provides that 'recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision'.

18 — Judgment in Case C-75/97 [1999] ECR I-3671, cited above, paragraph 88.

Costs

37. Under Article 69 of the Rules of Procedure, the unsuccessful party is to pay costs, if applied for. Since the Commission has asked for costs and I have just proposed that the application be allowed, I consider its request must be granted.

Conclusion

For the reasons set out above, I therefore propose that the Court should declare that:

(1) By failing to comply within the period prescribed in Commission Decision 97/239/EC of 4 December 1996 on aid granted under the *Maribel bis/ter* scheme, the Kingdom of Belgium has failed to fulfil its obligations under the fourth paragraph of Article 189 of the EC Treaty (now the fourth paragraph of Article 249 EC);

(2) The Kingdom of Belgium is ordered to pay the costs.