OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER delivered on 18 May 2006 [1]

I — Introduction

1. In an action brought under the second subparagraph of Article 88(2) EC, the Commission has asked the Court to declare that, by failing to implement, within the prescribed period, Decision 2002/14/EC [2] on aid granted by certain French local authorities to Scott Paper SA/Kimberly-Clark, France has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of the said decision.

2. The frequency with which the Court is seised of disputes concerning the recovery of aid unlawfully granted to economic operators by Member States is an indication [3] of the difficulties inherent in this area, which, in many cases, are caused by the divergent aims pursued by the different administrations comprised in the structure of each Member State.

3. The Commission alleges that France has failed to fulfil its obligations under Community law by adopting incompatible legislation which, in certain circumstances, gives rise to the automatic suspension of enforceability of an assessment of an amount payable where that assessment is contested in the competent court of first instance.

II — The legal framework

4. Since the failure to fulfil obligations is attributed to the nature of the French

1 — Original language: Spanish.

2 — Commission Decision of 12 July 2000 on the State aid granted by France to Scott Paper SA Kimberly-Clark (notified under document number C(2000) 2183) (OJ 2002 L 12, p. 1). In the application and the defence, the parties refer to the Community act concerned by the document number (State Aid CR 38/1998, ex NN 52/1998). However, owing to the interval between communication of the original text in French and its translation into the other languages of the Community, it would probably be preferable to refer to the instrument by its publication number and, therefore, the title 'Decision 2002/14' will be used hereinafter.

3 — In the same time period within which the present dispute is due to be settled, there are another three cases pending, namely, Case C-119/05 *Lucchini*, Case C-207/05 *Commission* v *Italy*, and Joined Cases C-485/03 to C-490/03 *Commission* v *Spain*.

legislation governing contentious financial proceedings, a comparison of the conflicting Community and national provisions will contribute greatly to a better understanding of the complaints put forward by the Commission.

A — *Community law*

5. Three articles of the EC Treaty govern State aid, namely Articles 87 EC, 88 EC and 89 EC.

6. Article 87 EC provides that State aid is prohibited in principle where certain conditions are fulfilled (paragraph 1), subject to a number of derogations which are compatible with the common market (paragraphs 2 and 3). Article 88 EC governs, in particular, the role of the Commission in reviewing aid (paragraph 1) and in eradicating aid which it considers unlawful, to which end the Commission also has the power to require States to abolish or alter such aid (paragraph 2). Finally, under Article 89 EC, the Council may adopt regulations for the application of those provisions and for the exemption of certain categories of aid.

7. Article 89 EC was the basis for the adoption of Regulation (EC) No 659/1999 [4] which seeks to ensure the fulfilment and effectiveness of the procedures referred to in Article 88 EC, by codifying and reinforcing the consistent practice developed by the Commission in a number of communications. [5]

8. Recital 13 in the preamble to Regulation No 659/1999 refers to the recovery of aid which is contrary to Community law, stating that, in cases of unlawful aid which is not compatible with the common market, effective competition should be restored and the aid, including interest, should be recovered without delay in accordance with the procedures of national law, the application of which should not, by preventing the immediate implementation of the Commission decision, impede competition. Recital 13 also states that, to achieve that result, Member States should take all necessary measures.

9. Those guidelines are embodied in Article 14 of the regulation which is worded as follows:

'Recovery of aid

1. Where negative decisions are taken in cases of unlawful aid, the Commission shall

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 (now Article 88 EC) (OJ 1999 L 83, p. 1).

5 — Recital 2 in the preamble to Regulation No 659/1999.

decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ... The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. ...

3. Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article [242 EC] of the Treaty, 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 implementation of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.'

B — *French law*

10. Under Article L 4 of the Administrative Justice Code, [6] in contrast with ordinary proceedings under French private law, unless the court seised of the proceedings rules otherwise, contentious administrative proceedings do not have suspensive effect save where provided for in special legislative provisions.

11. That rule is derived from the presumption of the lawfulness (*bénéfice du préalable*) of acts emanating from the public authorities and from the nature of administrative law, whose application is governed by the requirement of speed. [7]

12. There is, however, one derogation which is contained in the Local Authorities General Code. The first paragraph of Article L 1617-5 of that code, [8] which comes under Chapter VII: 'Provisions relating to Local Authority Accountants', provides:

'1. Where individual and joint assessments issued by local authorities or by local public institutions are not contested they may be enforced directly against the debtor.

6 — The code entered into force on 1 January 2001 and the operative part was approved by Ordonnance No 2000-387 of 4 May 2000 (JORF No 107, 7 May 2000), which was ratified by Article 31-I, first paragraph, of Law No 2003-591 of 2 July 2003 (JORF No 152, 3 July 2003).

7 — Peiser, P., *Contentieux administratif*, Dalloz, 13th edition, Paris, 2004, p. 116.

8 — Inserted by Article 70 of Law No 96-314 of 12 April 1996 (JORF No 88, 13 April 1996).

However, where an action is brought in court contesting the lawfulness of a final statement of account calculated by a local authority or a local public institution, the enforceability of that statement is suspended. ...'

III — The facts

A — *Summary of the events leading to the adoption of Decision 2002/14*

13. Scott SA, which began operating in France in 1969, owned a household and sanitary paper production plant on the Sologne industrial estate in the municipality of Saint-Cyr-en-Val, *département* of Loiret, which employed some 170 people. [9]

14. The construction of the plant in that location was the result of an agreement concluded in August 1987 with Orléans city council and the *département* of Loiret, pursuant to which Sempel, a local semi-public company providing facilities for the *département*, undertook to carry out the studies and work necessary for developing the land intended for the facilities of Scott SA. [10]

15. When the agreement was concluded, the city council and the *département* undertook to finance the site-preparation costs up to a maximum of approximately EUR 12 300 000. However, it was clear from the statement of final account drawn up by Sempel that the total cost was in the region of EUR 21.4 million. [11]

16. Scott SA acquired 48 hectares at a price of EUR 9.9 per m^2 (EUR 4.7 million in total), which was the sum agreed with Sempel.

17. In addition, Article 7 of the agreement provided for a preferential rate of water treatment levy for Scott SA, set at 25% of the most favourable current rate. However, in January 1989 Orléans City Council amended that rate and introduced a new coefficient of degressivity based on the volume of consumption in m^3 which was even more advantageous to the undertaking because, without any reason being given, it conflicted with the reasoning underlying the new calculation of that levy, as follows: the rate for volumes up to 50 000 m^3 was reduced;

9 — Points 12 and 13 of Decision 2002/14.

10 — Points 14, 16 and 17 of Decision 2002/14.

11 — Points 18 and 19 of Decision 2002/14.

the rate for volumes of between 50 001 and 150 000 m^3 was increased, the purpose of which was clearly punitive; while the lowest rate of levy was set for consumption in excess of 150 000 m^3, which was the rate for which Scott SA qualified. [12]

18. In January 1996 Kimberly-Clark Corporation purchased the shares of Scott SA.

19. In December 1996, following publication by the French Cour des Comptes (Court of Auditors) of the special public report entitled 'Local Authority Assistance for Firms', the Commission received a complaint concerning the preferential terms on which the sale of the 48 hectares concerned had taken place. [13]

20. In May 1998, based on the additional information provided by the French authorities, the Commission initiated the procedure laid down in Article 88(2) EC in respect of the measures, in view of the doubts it still had about the circumstances in which the French authorities had acted in regard to Scott SA and the compatibility of those measures with the Treaty. [14]

21. Although Kimberly-Clark had announced the closure of the plant in January 1998, its assets, comprising the site and the paper mill, were transferred to Procter & Gamble in June of the same year. [15]

22. When the Commission closed its file it was unable to find any objective grounds why the local authorities should have expected an appropriate rate of return from their investment, namely from the payment which Scott SA made for the transformation of agricultural land into an industrial estate and for the building of a factory warehouse prior to the sale of the site to Scott SA. Nor was the Commission able to find any commercial grounds or general tax policy considerations for setting such a low coefficient for water consumption of in excess of 150 000 m^3, of which Scott SA was the de facto principal beneficiary. [16]

23. Accordingly, the Commission adopted Decision 2002/14, holding that, contrary to Article 88(3) EC, France had illegally granted State aid to Scott SA in the form of an ad hoc preferential price for a 48 hectare industrial site at a present value of EUR 12 300 000, and a preferential rate of water treatment levy in respect of all consumption of water

12 — Points 25 to 27 of Decision 2002/14.
13 — Point 1 of Decision 2002/14.
14 — Point 4 of Decision 2002/14.
15 — Point 13 of Decision 2002/14.
16 — Point 239 of Decision 2002/14.

exceeding 150 000 m^3, which the Commission declared to be incompatible with the common market. [17]

24. The decision called upon France to seek reimbursement of the aid illegally granted to Scott SA. [18] The decision also required recovery without delay in accordance with the procedures of national law, provided that they allowed the immediate and effective implementation of the decision, and stipulated that the aid recovered was to include interest from the date on which the firm first received the aid until the date of its recovery. [19]

B — *The dispute concerning the implementation of Decision 2002/14*

25. On 30 November and 4 December 2000 respectively, Scott SA and the French local authorities lodged applications with the Court of First Instance of the European Communities seeking the annulment of Decision 2002/14. To date, the Court of First Instance has ruled only on the plea that the decision is time-barred, [20] while judgment on the lawfulness of the measure is pending.

26. With a view to recovering the aid granted, the local authorities issued a number of assessments requiring reimbursement of the sums owed by the beneficiary company as a result of the advantages it had received in the form of the site on which its plant was built and the preferential rate of water treatment levy.

27. However, a disagreement arose between the French Republic and the Commission as to the exact cost of the site, although it appears from the application and the defence that, after receiving the amended version of Decision 2002/14, [21] the national authorities adjusted their assessments in line with the amount calculated by the Commission.

28. Following that disagreement, the Conseil général du Loiret presented a new calculation of the balance due in the sum of EUR 4 691 370 while the Orléans city council presented a calculation in the amount of EUR 7 621 937. That covered the total amount required to be repaid, which the Commission had calculated as EUR 12 300 000.

29. Originally, the Orléans city council issued six assessments in respect of the water treatment levy of which only one, in

17 — Article 1 of Decision 2002/14.

18 — Article 2 of Decision 2002/14.

19 — Article 3 of Decision 2002/14.

20 — In the judgments in Case T-366/00 *Scott SA* v *Commission* [2003] ECR II-1763 and Case T-369/00 *Département du Loiret* v *Commission* [2003] ECR II-1789, the Court of First Instance dismissed that plea of the applicants. An appeal on a point of law was lodged against the first judgment but was dismissed by the Court of Justice in Case C-276/03 P *Scott* v *Commission* [2005] ECR I-8437.

21 — Forwarded with the letter from the Commission of 2 March 2001.

the amount of EUR 165 887, was settled by Procter & Gamble, while the other five were replaced by three more recent assessments totalling EUR 881 015.

30. In March 2002, the Commission asked the French Government to update it about the progress of the proceedings to recover the illegally granted aid.

31. France replied that Kimberly-Clark had challenged the five assessments which were still outstanding, that is the two assessments relating to the site and the three assessments in respect of the water treatment levy, by applications lodged with the Tribunal Administratif (Administrative Court), Orléans (France) on 29 October and 27 November 2001, contesting the calculations relating to the site, and on 8 March 2002 contesting the three calculations in respect of the water treatment levy.

32. The French authorities also reported that, under French law, the actions brought in the Administrative Court had the effect of suspending the enforceability of the assessments. The Commission then enquired about the pleas in law which had been put forward to contest those acts; about whether, under national law, it was possible to refrain from applying that suspensive effect and to freeze the sums owed in the accounts of the company concerned; about the timetable for the national proceedings; and about rights of appeal. The Commission also asked for copies of the statements of claim lodged with the national court.

33. In July 2003, the French Government notified the Commission that there were no legal measures available to it to compel a national court to order the repayment of illegal State aid before the Administrative Court had ruled on the substantive issue. The French Government did not provide the Commission with a copy of the procedural document requested, arguing that it was not public because it was protected by judicial privilege.

34. Finally, following a meeting held on 21 January 2004 between the Commission's services and the French authorities to review cases brought against France in the matter of State aid, the Commission sent a letter repeating its requests. Since it did not receive replies to the subsequent reminders dated 9 March and 29 April 2004, the Commission decided to bring legal proceedings.

IV — The procedure before the Court of Justice

35. The application, which was lodged with the Court Registry on 26 May 2005, seeks a

declaration that, by failing to implement, within the prescribed period, Decision 2002/14 on State aid granted by certain local authorities to Scott Paper SA/Kimberly-Clark, France has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of the said decision. The application also seeks an order that the defendant Member State pay the costs.

36. In the defence, lodged on 1 August 2005, the French Government claims that the action should be dismissed as unfounded and that the Commission should be ordered to pay the costs.

37. The written phase of the proceedings concluded following submission of the reply and the rejoinder.

38. Neither party requested an oral hearing and it was therefore dispensed with.

V — Analysis of the action for failure to fulfil obligations

A — *Summary*

39. In a letter dated 2 July 2003, the authenticity of which they have not called into question, the French authorities informed the Commission that the Administrative Court, Orléans, had stayed the proceedings contesting the five unpaid assessments, pending the ruling of the Court of First Instance on the lawfulness of Decision 2002/14.

40. The Commission based its claim that France had failed to fulfil its obligations on the conduct of the French court and on the fact that the local authorities concerned supported that court order.

41. The French Republic denied in the defence that the Administrative Court, Orléans had of its own motion stayed the proceedings of which it is seised. Accordingly, in the reply, the Commission, on the one hand, restricted its original complaint to the automatic nature of the suspension of enforceability provided for in Article L 1617-5 of the Local Authorities General Code and to the absence of any interim measures designed to offset the effect of the stay. However, the Commission put forward additional complaints to the effect that the error in the letter of 2 July 2003 and the silence which followed the Commission's written reminders requesting further information on the matter also amounted to failure by France to fulfil its obligations since, the Commission claims, that conduct is contrary to the duty to cooperate in good faith laid down in Article 10 EC.

42. Since the subject-matter of the dispute is restricted to those complaints, I will confine

my analysis to the question whether the disputed French provision is compatible with Community law, in particular with Article 14(3) of Regulation No 659/1999, and to the matter of the alleged infringement of Article 10 EC.

B — *The automatic suspension of the enforceability of the assessments in the light of Community law*

43. At the root of this problem lies the tension between the procedural autonomy of the Member States and the effectiveness of Community law, which must be resolved by applying the appropriate balance. That balance must be achieved by recourse to general principles of Community law, particularly in relation to its application by the courts of the Member States, and to the jurisprudential principles of effectiveness and equivalence defined by the Court.

1. General considerations: direct effect, primacy and application of Community law by national laws

44. The basic foundations of the Community legal system which I will set out below are well-known but they must not be overlooked because they are important for placing the solution I propose in its context.

45. The journey begins with *Van Gend & Loos*,[22] which laid down the doctrine of the direct effect of Community provisions, to which must be added the additional requirements, specified in *Ratti*[23] and *Becker*,[24] that the subject-matter of the provision concerned must be unconditional and sufficiently precise.

46. Decisions, such as the one contested in the present case,[25] usually fulfil those requirements by virtue of the wording of the fourth paragraph of Article 249 EC which states that decisions are binding in their entirety upon those to whom they are addressed. Moreover, the fact that Member States have no degree of latitude with regard to the result of directives, and may choose only the form and methods of achieving that result, does not prevent those measures from having direct effect.[26]

47. The view put forward in the previous point counters the assertion of the French Republic that, from a legal point of view, the effect of the assessments issued by the local authorities has been suspended rather than that of Decision 2002/14, from which it follows that the obvious consequences for the decision are derived exclusively from the principle of procedural autonomy.

22 — Case 26/62 [1963] ECR 1.

23 — Case 148/78 *Ratti* [1979] ECR 1629.

24 — Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53.

25 — Isaac, G., *Manual de derecho comunitario general*, 3rd edition in Spanish supervised by Germán-Luis Ramos Ruano, Ariel SA, Barcelona, 1995, p. 196.

26 — Isaac, G., op. cit., p. 192.

48. The line of argument put forward by the defendant entails an acceptance that there was a breach of the division of powers laid down in Regulation No 659/1999, which confers on the Commission the power to assess State aid and require its reimbursement, and on the Member States the power to choose the method of recovering aid found to be illegal and incompatible with the common market. Indeed, that division of powers would lead to absurd consequences if it enabled Member States to deprive Community acts of effect by employing the tactic of adopting implementing measures, which are readily open to challenge, in order to avoid or mitigate undesired results, thereby restricting the effectiveness of those acts.

49. Regard must also be had to the principle of primacy, initially referred to in *Costa*, [27] which, in the words of another great French legal writer, defined that basic concept with respect to Community law as a whole. [28] In the event of conflict, that principle stipulates that Community law takes precedence vis-à-vis the government and administrative authorities, the legislature and the judiciary. [29]

50. The wisdom of those principles is demonstrated in *Simmenthal* in which the Court assigned to national courts the duty to give full effect to provisions of Community law, [30] if necessary refusing of their own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and also held that it is not necessary for national courts to request or await the prior setting aside of such provision by legislative or other constitutional means. [31]

51. The conclusiveness of those statements enables a proper interpretation of the principle of national procedural autonomy, which is not aimed at devolving to Member States, even partially, the power to adopt provisions or to adjust the application of those provisions to suit their own interests, but rather at reinforcing the effect of Community law, thereby enabling its full application [32] in a uniform, direct and immediate manner. [33]

52. In that context, the freedom of the Member States vis-à-vis methods of implementing the *acquis communautaire* in their own legal systems takes the form of a cooperation mechanism which pursues the

27 — Case 6/64 *Flaminio Costa* v *ENEL* [1964] ECR 585.

28 — Simon, D., *Le système juridique communautaire*, Presses universitaires de France, 3rd edition, Paris, 2001, p. 410.

29 — Simon, D., op. cit., p. 411.

30 — In my Opinion in Joined Cases C-392/04 and C-422/04 *i-21 Germany and Isis Multimedia* (pending judgment), I observe at point 90 et seq. that the development of that doctrine with regard to directives amounts to an anomaly caused by the failure to recognise their horizontal direct effect (point 91). Clearly, that approach may not be transposed to regulations or decisions which, by definition, are already endowed with that quality.

31 — Judgment in Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24.

32 — Judgment in Case 48/71 *Commission* v *Italy* [1972] ECR 529, paragraph 7.

33 — Judgment in Case 13/68 *Salgoil* [1968] ECR 453, in particular p. 463.

same aim as the Community legislature, which is to contribute to the whole body of Community legal provisions, rather than acting as an obstacle capable of impeding that progress. Notwithstanding that, in the absence of a Community provision, the Court may invoke the procedures of each of the Member States, [34] those States must refrain from jeopardising the attainment of the objectives laid down in the Treaty. [35]

53. On those grounds, it would be possible to hold that the Administrative Court, Orléans is at fault for failing to set aside Article L 1617-5 of the Local Authorities General Code in order to accelerate the settlement of the sums calculated by the French local authorities, just as in *Factortame III* the Court called on the High Court of Justice to set aside the condition imposed by English law requiring proof of an abuse of power (misfeasance in public office) in order for the public authorities to be held liable, which was inconceivable in the case of the legislature. [36]

54. However, it would be rash to adopt that approach because the Court subsequently refined its case-law and, as described at point 52 of this Opinion, defined the principle of procedural autonomy within more precise parameters. It is therefore appropriate to examine the developments brought about by the principles of effectiveness and equivalence.

2. The principle of effectiveness

55. The Commission argues that the five years which have passed between the adoption of Decision 2002/14 and the present action suffice to demonstrate that, with the exception of the EUR 165 887.4 repaid by Procter & Gamble, France has not recovered the State aid illegally granted to Scott SA, contrary to Article 14(3) of Regulation No 659/1999.

56. The Commission attributes that situation to the automatic nature of the stay of proceedings at national level [37] which, together with the absence of any means of offsetting that stay through other channels, infringes the principle of effectiveness laid down in the aforementioned article.

34 — Judgment in Case 39/70 *Norddeutsches Vieh- und Fleischkontor* [1971] ECR 49. See also the judgments in Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989, and Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2043.

35 — Constantinesco, V., 'L'article 5 C.E.E., de la bonne foi à la loyauté communautaire', *Du droit international au droit de l'intégration, Liber Amicorum Pierre Pescatore*, Nomos Verlag, Baden-Baden, 1987, p. 97.

36 — Judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, in particular paragraph 73.

37 — The Commission draws attention to the exceptional nature of that legal construction in French law and contrasts it with the general principle of French administrative law enshrined in Article L 4 of the Code de Justice Administrative (Administrative Justice Code), citing Chapus, R., *Droit du Contentieux administratif*, 11th edition, Domat, Paris, 2004, point 457 et seq.

57. In that connection, the Commission also draws attention to the strict conditions which, according to the settled case-law of the Court, national legal systems are required to fulfil to ensure that Community measures are not deprived of effect. In particular, the Commission claims that, in the case of the aid granted to Scott SA, no evidence has been adduced that the contested measure was suspended as a matter of urgency in order to avoid serious and irreparable damage to that party. [38]

58. With regard to its failure to effect recovery without delay, France does not claim that it was completely unable to satisfy that requirement but rather that it took all steps necessary to recover the aid granted to Scott SA. France further asserts that it will be possible to obtain reimbursement because the suspension is provisional in nature pending the judgment of the national court.

59. To justify its conduct, the French Government argues that the principle of effectiveness is founded on a historical interpretation, since the final version of Regulation No 659/1999 did not include the wording which appeared at the end of Article 14(3) in the previous draft, [39] to the effect that '[r]emedies under national law shall not have suspensive effect'. In the opinion of the French Government, that omission proves that it was the intention of the Community legislature to allow suspensive effect.

60. I find the position of the French Government untenable for the following reasons:

61. The principle of effectiveness has its origins in the judgments in *Rewe* and *Comet*, [40] although it was first applied in *San Giorgio*, [41] where the Court held that 'a Member State cannot make the repayment of national charges levied contrary to the requirements of Community law conditional upon ... rules of evidence which render the exercise of that right virtually impossible'. [42]

62. The principle was subsequently developed in cases concerning provisions of Community law which confer powers on individuals, as a result of which it has been pointed out that there is a close conceptual relationship between the principle and the

38 — Judgments in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 23 et seq., and Case C-465/93 *Atlanta Fruchtgesellschaft and Others* [1995] ECR I-3761. It is also important to recall the other conditions set out in the former judgment, which are: there must be serious doubts as to the validity of the Community measure; the question of validity must be referred for a preliminary ruling by the court which orders the interim measure, unless it has already been referred; and the interests of the Community must be taken into account, in that Community provisions must not be set aside.

39 — Proposal for a Council Regulation (EC) laying down detailed rules for the application of Article 93 of the EC Treaty (COM(98) 73 final — CNS 98/0060) (OJ 1998 C 116, p. 13).

40 — Cited in footnote 34.

41 — Case 199/82 *San Giorgio* [1983] ECR 3595.

42 — Judgment in *San Giorgio*, paragraph 18.

obligation imposed on Member States to enable all Community citizens whose rights are infringed to have access to the judicial process,[43] and it has been linked, with consistent logic, to the right to a process which comprises the full range of safeguards (*droit au juge*).[44]

63. It would therefore be possible to dispute that the Commission may rely on that basic principle to require the implementation of its decisions, by questioning whether it has the status of a 'Community citizen'. However, that controversy must be avoided because Article 14(3) of Regulation No 659/1999 clearly states 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 implementation of the Commission's decision'.

64. That provision is so clearly imbued with the principle of effectiveness that the Commission does not need to establish that it has the status of a Community citizen who seeks reparation for an infringement of his legal rights. The principle of effectiveness is not a general principle, because it is enshrined as a legal requirement in a legislative measure which bears out the claim of the Commission.

65. The argument put forward by the French authorities that they are not at fault because they have exhausted all their powers of action requires some clarification.

66. The French local authorities did indeed issue the assessments and forward them to Scott SA for settlement reasonably swiftly. As far as the public authorities were concerned, the contentious proceedings contesting those assessments brought to an end the recovery of the aid since the enforceability of the assessments was automatically suspended.

67. However, in the light of that legal and legislative obstacle, and in accordance with the *Simmenthal* [45]case-law, the French court ought to have at least considered whether it was appropriate to render Article L 1617-5 of the Local Authorities General Code inapplicable with a view to ensuring that Decision 2002/14 had full effect, provided that, pursuant to *Kraaijeveld and Others*[46] and

43 — Obligation laid down in Case 222/84 *Johnston* [1986] ECR 1651.

44 — Girerd, P., 'Les principes d'équivalence et d'effectivité: encadrement ou désencadrement de l'autonomie procédurale des États membres?', *Revue trimestrielle de droit européen*, 38 (1), January/March 2002, p. 86.

45 — Cited in footnote 31.

46 — Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403.

Eco Swiss, [47] the automatic suspension of the implementation of the decision did not preclude it from examining of its own motion the primacy of Community law, [48] as explained above. [49]

68. However, the French courts are unable to counteract an automatic suspensive effect under the provisions of domestic law, a factor whose consequences I will address below.

69. Moreover, in the interests of strengthening the principle of effectiveness, the Court sets a very high standard of proof for Member States seeking to demonstrate that they have fulfilled their obligations despite failing to recover State aid which has been declared illegal and incompatible with the common market.

70. Thus, according to settled case-law, the only defence available to a Member State in opposing an application under Article 88(2) EC 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. [50]

71. However, the French authorities explicitly deny that they have invoked that defence and it is therefore not appropriate to examine it since it does not fall to the Court to adduce such evidence of its own motion.

72. By pleading that it did all that it could to implement the decision, the French Government is attempting to introduce a new defence into the practice of the Court. However, by failing to state the grounds on which that defence is based, the French Government appears to rely on provisions specific to its domestic legal system, namely the suspension of enforceability of the assessments.

73. In accordance with settled case-law which precludes that type of defence, [51] the Court has dismissed a claim that, because recovery of the aid concerned took the form of a retroactive tax, that recovery was contrary to the constitutional law of the Member State in question. [52] If France were

47 — Case C-126/97 *Eco Swiss* [1999] ECR I-3055.

48 — Indeed, Advocate General Darmon was much more emphatic, and convincing, in point 19 of the Opinion he delivered in Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, where, based on the principle of the primacy of Community law, he asserts that the national court has not merely the power but the duty to raise of its own motion the existence of a Community rule.

49 — In Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* [1995] ECR I-4705, the Court held that national courts have a passive role when it comes to examining of their own motion provisions of Community law in civil proceedings governed by the principle that it is for the parties to take the initiative, thereby restricting the scope of the principle of effectiveness. However, that case-law is not material to these proceedings. Nor is it possible to rely on the more recent judgment in Case C-234/04 *Kapferer* v *Schlank* [2006] ECR I-2585 since that case concerned a national court which was required to deal with a judgment which was incompatible with Community law but which nevertheless had the force of res judicata.

50 — Judgments in Case C-349/93 *Commission* v *Italy* [1995] ECR I-343, paragraph 12; Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 16; and Case C-261/99 *Commission* v *France* [2001] ECR I-2537, paragraph 23.

51 — Judgment in Case 225/86 *Commission* v *Italy* [1988] ECR 2271, paragraph 10.

52 — Judgment in Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 17.

to argue that the provisional nature of the suspensive measure is sufficient to prove that recovery is still possible it would be enough to invoke the delay of more than five years to counter that claim.

74. Likewise with regard to strengthening the effectiveness of Community law, the Court has also held that, when implementing a Commission decision relating to State aid, a Member State must submit to the Commission for consideration any unforeseen and unforeseeable difficulties it encounters, together with proposals for suitable amendments. In such a case the Commission and the Member State concerned must respect the principle of genuine cooperation underlying Article 10 EC, and must work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, and in particular the provisions on aid. [53]

75. It is clear from the case-file that the conduct of the French authorities at no time satisfied those criteria since they did not carry out any review of the contested measure.

76. It is also appropriate to dismiss the claim to the effect that the deletion of the final sentence of Article 14(3), contained in the draft of Regulation No 659/1999, proves that the actions brought under national law have suspensive effect.

77. The reference by the French Government in the defence to the opinion of the Committee of the Regions [54] merely bears out the fact that the Community legislature wisely refrains from encroaching on the powers of the Member States in the field of proceedings for the recovery of State aid. However, the French Government incorrectly infers from that conduct that the suspensive effect must be regarded as lawful in all circumstances, since it is not entitled to circumvent principles of Community law whose application is compulsory.

78. The deletion of the last sentence of Article 14(3) of the proposal for Regulation No 659/1999, in the final version of the measure, served to preserve the status quo by not amending Community law. Accordingly, the conditions enabling national courts to order a suspension of national administrative acts implementing Community measures, which were set out by the Court in

53 — Judgments in Case 94/87 *Commission* v *Germany* [1989] ECR 175, paragraph 9, and Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 40.

54 — The French Government refers to the Opinion of the Committee of the Regions on the 'Proposal for a Council Regulation (EC) laying down detailed rules for the application of Article 93 of the EC Treaty', and the 'Regional and local room for manoeuvre in economic policymaking and EU State aid control' [CdR 284/98 fin] (OJ 1999 C 93, p. 64).

Zuckerfabrik, continue to apply. It must be noted that, in that judgment, the Court imposed the same conditions as the ones which must be satisfied for the adoption of interim measures in proceedings brought before it. [55]

79. Before taking such a step, the national court must assess whether the conditions allowing it to grant a suspension are satisfied. By maintaining the automatic nature of the disputed provision, the French legislature assumes that those conditions are satisfied in all proceedings to which the provision applies in which the effectiveness of Community law is at stake, an attitude which is completely incompatible with the exceptional status accorded to interim measures by the Treaty.

80. Furthermore, the French legislation prevents French courts from considering whether the Community measure would be deprived of all effectiveness if it were not immediately implemented, which it is required to do pursuant to *Zuckerfabrik*, [56] by precluding them from considering Community law of their own motion, especially since French law makes no provision for offsetting the effects of Article L 1617-5 of the Local Authorities General Code. [57]

81. Accordingly, that article, in particular its impact on the assessments issued pursuant to Decision 2002/14, is contrary to the principle of effectiveness since it gives rise to interim protection which is disproportionate in that it is granted automatically and prevents the national court from exercising its powers within the parameters set in *Zuckerfabrik*.

82. In summary, it not possible to uphold the claim put forward by the defendant to the effect that it took all possible steps to comply with Decision 2002/14 and, in the light of all of the foregoing, it is appropriate to find that the French Republic failed to fulfil its obligations by implementing that Community measure by means of a procedure which restricts the effectiveness of Community law, with the result that the State aid illegally granted to Scott SA has not been recovered.

55 — Judgment in *Zuckerfabrik*, paragraph 27 et seq.

56 — Judgment in *Zuckerfabrik*, paragraph 31.

57 — As far as the outcome is concerned, the French legislation has certain similarities to the Belgian legislation which gave rise to Case C-312/93 *Peterbroeck* [1995] ECR I-4599 in which the Court held that Community law precludes the application of a national procedural rule which prohibits the national court from examining of its own motion whether a measure of national law is compatible with a provision of Community law which was not invoked by the litigant within a certain period. The automatic application of Article L 1617-5 means that the French court is precluded from considering the suspension of enforceability of the assessments, from which it follows that it is also precluded from invoking Community law of its own motion.

3. The principle of equivalence

83. The Commission complains that France breached the principle of equivalence because, under French law, a challenge to a measure leads only to the suspension of the duty to pay the charge concerned when the competent court makes an order to that effect, [58] and argues that all forms of payment obligation arising as a result of a negative final decision must be dealt with under the national rules which are most capable of ensuring the immediate and effective implementation required by Regulation No 659/1999.

84. For its part, the French Government counters that the procedure chosen by the local authorities does not differ according to whether the assessments of the sums to be repaid originated at Community or national level and, therefore, the French Government maintains that the procedure is impartial and does not infringe the principle of equivalence.

85. According to that general principle, which has gradually lost its initial rigour, [59] in the absence of Community rules, it falls to the legal systems of the Member States to determine 'the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law'. [60]

86. Furthermore, the Court has held that it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law comply with the principle of equivalence. [61] When carrying out that task, the national court must establish the criteria for identifying a similar claim under national law and confirm that its application would be more advantageous than that of actions alleging an infringement of Community law. [62]

87. Since it is therefore the national courts alone which have knowledge of the procedural rules governing that comparison, [63] it is logical that compliance with the principle of equivalence is, to a large extent, the responsibility of the national courts. In the present case, however, the automatic nature of Article L 1617-5 of the Local Authorities General Code affords the Administrative Court, Orléans virtually no opportunity to exercise its powers, as I pointed out above.

58 — The Commission refers to *Memento Fiscal 2004 Francis Lefebvre*, Ed. Francis Lefebvre, 8th edition, 2003, p. 1033, § 7010 et seq.

59 — Sevón, L., 'El juez nacional como juez comunitario: el principio de autonomía procesal y sus límites', *Coloquio sobre la cooperación entre el Tribunal de Justicia y los órganos jurisdiccionales nacionales*, Comunidades Europeas, Luxembourg, 2003, p. 62.

60 — Judgment in *Rewe*, paragraph 5, third subparagraph.

61 — Judgment in Case C-326/96 *Levez* [1998] ECR I-7835, paragraph 39. See also the judgment in Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 33.

62 — Girerd, P., op. cit., p. 79. See also Kapteyn, P.J.G. and VerLoren van Themaat, P., *An Introduction to the Law of the European Communities: from Maastricht to Amsterdam*, Kluwer, 3rd edition, London, 1998, p. 561.

63 — Judgment in *Levez*, paragraph 43.

88. Thus, on the one hand, it is not for the Court of Justice to assess provisions of French law. However, on the other hand, the Court held in *Edis*, a case whose subject-matter was also financial, that observance of the principle of equivalence implies that the procedural rule at issue applies without distinction to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the same kind of charges or dues, but that the principle cannot be interpreted as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law. [64]

89. Since it is common ground that the contested assessments were subject to the same procedure as assessments arising under French legal provisions, there does not appear to have been discrimination in the implementation of Decision 2002/14. The situation would be different if the Commission had preferred a different method of enforcing its request for repayment of the aid illegally granted to Scott SA, but that difficulty takes the matter into the scope of the principle of effectiveness which has already been examined.

90. In accordance with the foregoing observations, I propose that the Court declare that the French Republic has failed to fulfil its obligations in that, although the method selected for recovery of the aid did not infringe the principle of equivalence, the automatic suspension of enforceability of the assessments issued by the national authorities precludes the State aid from being recovered without delay, as required by Regulation No 659/1999, thereby compromising the effectiveness of Community law.

C — *The question whether France has breached the duty to cooperate in good faith* [65]

91. Strictly speaking, the finding that France has breached the principle of effectiveness renders it unnecessary to address the consequences arising from the conduct of the French Republic during the period prior to these proceedings. Accordingly, the considerations in this section of the Opinion will take the form of a summary and are presented by way of an alternative.

92. The Commission complains that France provided it with incorrect information about the progress of the implementation of Decision 2002/14; specifically, the Commis-

64 — Judgment in Case C-231/96 *Edis* [1998] ECR I-4951, paragraph 36.

65 — The admissibility of this claim is not in doubt since, notwithstanding that it was submitted in the reply, which might render its admissibility doubtful, it is based on a fact known to the applicant prior to the commencement of the proceedings before the Court.

sion refers to the fact that, in its letter of 2 July 2003, France reported that 'the court stayed the proceedings pending a ruling from the [Court of First Instance] on the validity of the Commission decision'.

93. France has not submitted any pleas in that connection.

94. Although, on a proper construction, the duty of cooperation laid down in Article 10 EC requires Member States to work in good faith with the Community institutions, it is not the case that any error, however glaring it may be, will automatically justify a declaration that a Member State has failed to fulfil its obligations.

95. There is absolutely no doubt that the error in the letter from the French authorities hindered the proceedings brought by the Commission which framed the action around the conduct of the national court. However, without wishing to minimise the significance of such an unfortunate oversight, resulting from a lack of care and attention which one does not expect from the authorities of the Member States, the error did not deprive the Commission's claim of substance or affect the other complaints put forward.

96. Accordingly, it will suffice to issue the French authorities with a warning and ask them to continue to act with their usual diligence. To great effect, France, one of the founding States of the Community, has always been a driving force behind European integration, displaying a committed and constructive attitude.

97. It is appropriate to settle in the same manner the Commission's complaint that France breached the duty of cooperation by ignoring and failing to reply at all to a number of its letters.

98. Notwithstanding the fact that such conduct is discourteous and jeopardises good relations between Member States and the Community institutions, it is not possible to attribute legal consequences to it. Moreover, Member States are free to choose the defence strategy which bests suits their interests.

99. In the light of the foregoing, I consider that the Court should dismiss the claim that the conduct complained of amounts to a breach of the duty to cooperate in good faith laid down in Article 10 EC.

D — *Final observations*

100. If anyone had ever suggested to me that Samuel Beckett might have found inspiration for his famous play *Waiting for Godot* [66] in proceedings for the recovery of State aid, I probably would not have believed it. However, as I conclude this Opinion, the tenacious patience of the Commission as it awaits the repayment of the aid reminds me of that great work of the theatre of the absurd.

101. More than 20 years after the State aid was granted to Scott SA and nearly six years since the aid should have been reimbursed, just over one per cent of it has been repaid by an undertaking which — irony of fate — is not even required to do so under Decision 2002/14!

102. Accordingly, in the light of the increase in cases with the same subject-matter pending before the Court, which I referred to above, I find it very difficult to share the optimism of certain academic writers with regard to the removal of the risk of an unsatisfactory and inconsistent application of the rules governing the repayment of State aid, owing to the gradual delimitation of the principle of the procedural autonomy of Member States arising from actions for failure to fulfil obligations, actions for annulment and references for preliminary rulings. [67]

103. While not wishing to criticise the work of the Court of Justice in this field, which, moreover, it must carry out using the limited mechanisms available under the Treaty which does not provide for enforcement proceedings, the unfortunate reality of the situation and the paltry sums recovered must serve as grounds for a detailed review of the causes.

104. First, attention must be drawn to the ambiguous position of Member States which grant State aid without reservations, probably with laudable reasons but in contravention of Community law. When those States are subsequently asked to provide the necessary cooperation to recover illegally granted aid, the most extraordinary arguments are put forward as a defence in the proceedings for failure to fulfil obligations which the Commission is required to bring because other action has repeatedly failed to yield satisfactory results. That is, of course, in the event that the Commission receives a reply at all and is not, as in the present case,

66 — Beckett, S., *Waiting for Godot*, Faber and Faber, 3rd edition, London, 2006.

67 — Lenaerts, K., 'L'articulation entre ordres juridiques à l'œuvre: le régime de récupération des aides d'État versées en violation du droit communautaire', *Problèmes d'interprétation: à la mémoire de Constantinos N. Kakouris*, Bruylant, Brussels, 2004, p. 282.

faced with a situation similar to that of the colonel to whom no one wrote. [68]

105. Second, the Commission might oversee more effectively the requirement for repayment in this field, since it has a wide discretion, but has not been provided with the most suitable mechanisms for preventing obstacles to the recovery of State aid and, moreover, has fluctuated between an attitude which on occasions is too flexible and on others is too Utopian and obstinate and has been correctly labelled 'external rigour'. [69]

106. Frequently, the last resort of the Commission is to bring an action before the Court for a declaration that the defaulting Member State concerned has failed to fulfil its obligations. However, the meagre results obtained lead me to two conclusions.

107. First, the judgments handed down in proceedings brought under Article 226 EC or, as in the case of the present action, under the second subparagraph of Article 88(2) EC do not compensate for the absence of enforcement proceedings under Community law and, as a result, their effectiveness is reduced considerably. It is almost childish to claim that those decisions lay the foundations for a subsequent fine under Article 228 EC because it plays into the hands of those whose sole aim is to delay the repayment of State aid. In that situation, it might be appropriate to suggest a more selective use of proceedings for failure to fulfil obligations by assessing which cases are actually capable of serving as an example and which reveal the poor level of cooperation by Member States. The Commission is well aware of the criteria for establishing the most urgent cases.

108. Second, the range of procedures available for addressing this type of dispute is excessive and does not bear any relation to the low rewards obtained by way of repayments. There is nothing to preclude a decision concerning the recovery of State aid from being contested before the Court of First Instance or a subsequent appeal on a point of law. The methods of enforcing Community measures in a Member State may also be open to challenge, with frequent attendant difficulties, as this case has highlighted. It is also possible for a national court to refer for a preliminary ruling a question concerning the validity of the Community decision giving rise to the national administrative action or concerning the compatibil-

68 — In his novella *No One Writes to the Colonel*, translated by J.S. Bernstein, Penguin, London, 1974, Gabriel García Márquez tells the tale of another absurd, tragic wait, namely that of a colonel who, for many years, has gone down to the river each week to meet the boat which brings the mail and, perhaps, the longed-for letter from the capital confirming that he has been granted a pension for his participation in one of the revolutions which shook the country where the action is set. Since he does not hold any office or carry on any trade and is relying on the pension to enable him to live more comfortably, the colonel falls deeper and deeper into poverty. At the end, when his wife puts stones in the food she cooks so that the neighbours do not think they have not got enough to eat, the letter bearing the good news has still not arrived.

69 — Karpenschif, M., 'La récupération des aides nationales versées en violation du droit communautaire à l'aune du règlement nº 659/1999: du mythe à la réalité ?', *Revue trimestrielle de droit européen*, 37 (3), July/September 2001, p. 551 et seq., in particular p. 563.

ity of national measures implementing that decision. Moreover, the Commission freely resorts to proceedings for failure to fulfil obligations when repayment is not forthcoming.

109. The use of that arsenal of measures takes many years and does not overcome the stubborn delay which infiltrates these situations because there are few examples of Member States with a structure designed for repayment and a policy of abolishing State aid which bear even the slightest resemblance to those of the Community.

110. Finally, regard must be had to the requirement that competition must be restored retroactively to the time when the aid was paid. In the present dispute, to invoke that fundamental reason behind the legislation on State aid [70] borders on the absurd, because the distortion of the market began nearly 20 years ago. The undertakings which demanded the restoration of the previous situation will surely no longer exist or will have attempted to secure similar advantages for themselves. It is clear that the Utopian goal does not adequately reflect the real needs which prevail in this field.

111. In short, in view of the situation in this field of Community law, it is clear that it is vital to harmonise more closely the mechanisms for attaining the objectives set in Regulation No 659/1999, [71] thereby avoiding an endless stream of actions that are as unnecessary as they are ineffective.

VI — Costs

112. In accordance with Article 69(2) of the Rules of Procedure, the unsuccessful party in the proceedings must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since I propose that the Court allow the action brought by the Commission, which applied for costs against the French Republic, that State must be ordered to pay the costs.

70 — I must make it clear that I am not criticising the settled case-law of the Court pursuant to which the recovery of unlawful aid is the logical consequence of the finding that it is unlawful (see, inter alia, the judgment in Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 41). However, by extending that approach to the reparation of the damage caused to the market, in accordance with recital 13, Regulation No 659/1999 becomes fictitious, artificial, a mere pipe dream.

71 — The same general view is expressed by Karpenschif, M., op. cit., p. 590 et seq. See also Peleki-Vellios, C., 'Le principe de l'autonomie procédurale à la lumière de la jurisprudence Peterbroeck et Van Schijndel', *Actualités du droit*, 1998,'p. 68 et seq., in particular p. 92, who advocates a more general harmonisation of the procedural rules of the Member States.

VII — Conclusion

113. In the light of the foregoing considerations, I propose that the Court:

(1) Declare that, by failing to implement, within the prescribed period, Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott Paper SA Kimberly-Clark, and to recover the aid concerned, the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 249 EC and Articles 2 and 3 of that decision.

(2) Order the French Republic to pay the costs.