2. Orders the French Republic to pay the costs.

	Mertens de Wilmars	Koopmans	Bahlmann
Galmot	Pescatore	Mackenzie Stuart	O'Keeffe
Bosco	Due	Everling	Kakouris

Delivered in open court in Luxembourg on 15 November 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 26 OCTOBER 1983 [1]

Mr President,
Members of the Court,

1. This case is a direct action brought by the Commission, pursuant to the second subparagraph of Article 93 (2) of the EEC Treaty, against the French Republic which is charged with having failed to comply with a Commission decision of 12 January 1983 relating to a system of state aids in favour of textile and clothing undertakings.

To summarize the facts — on 19 February 1982 the French Government notified the Commission of a draft regulation establishing the system to which I have referred and on 1 March brought it into force (Order No 204, Official Journal of the French Republic of 2 March 1982) without waiting for the Commission to make its own observations under Article 93 (3) of the EEC Treaty. The regulation provided for the State to take over temporarily part of the costs arising from social insurance. To obtain the relief, however, the undertaking concerned had to conclude with the State before 31 December 1982 an agreement valid for 12 months giving details of the duties which it assumed with regard to maintaining the level of employment and to the making of new investments. It also provided for the

1 — Translated from the Italian.

possibility of renewing those agreements for a second period of 12 months. The implementing measures for those rules were adopted by Decree No 82-340 of 16 April 1982 (Official Journal of the French Republic No 90 of 17 April 1982).

A few months later, on 12 January 1983, the Commission required France to abolish the scheme described above within a month of notification of the decision. That period expired on 21 January 1983. On the following 23 February the French Government informed the Commission that it had reimplemented the scheme, after amending it in order to ensure better proportionality between the aid given and the effort to invest on the part of the undertaking (see the third annex to the application). The Commission took the view that that behaviour demonstrated an intention not to comply with the decision and brought an action before the Court. It asks the Court to declare that the French Republic has failed to fulfil one of its obligations under the Treaty.

2. It seems to me appropriate to emphasize at the outset that the case does not involve the merits of the French measures. The decision of 12 January 1983 by which the Commission decided that they were contrary to Article 92 of the Treaty was not in fact challenged by the State to which it was addressed and therefore became definitive. The Court's only task is, therefore, to ascertain whether France has complied with the decision by adopting within the prescribed period the necessary provisions to that end.

Let us now examine the content of the decision. The operative part consists of three articles. The first paragraph of Article 1 provides that: "The French Republic shall, within one month of notification of this decision, abolish the aid scheme in favour of the textile and clothing industry under which the State takes over responsibility for part of the social security contributions payable by employers in the industry". The second paragraph adds a further requirement: "The French Republic shall cease to grant aid under the scheme in question from the date of notification of this decision." The specific effect of those requirements is clarified in the preamble. In fact, according to the final paragraph of Part III thereof the abolition of the aid scheme requires that the French Government must not conclude "any contract" and must "terminate any contracts already concluded with firms".

To summarize, therefore, France is required (a) to abolish the scheme in force; (b) to withhold aid already agreed. The first duty, as I have said, requires that contracts concluded before 31 December 1982 should not be renewed. However, during the course of the oral procedure, the French Government has admitted that some of them were renewed; but it added that they were so renewed pursuant to the provisions of another measure, issued in the form of a decree on 7 June 1983.

To understand the scope of that defence, it is necessary to refer to subsequent events. On 5 May 1983, the French Government notified the Commission of the draft of a new provision on the aid scheme in favour of the textile and

clothing industry. Noting that it did not differ substantially from the previous decree and was therefore incompatible with Article 92, the Commission set in motion the administrative procedure pursuant to Article 93 (2); but whilst it was pending, France issued the disputed decree (that is, on 7 June 1983). The Commission then initiated the other administrative procedure under Article 169 of the Treaty; and since that too had no result, it brought an action before the Court (Case 171/83) on 4 August 1983.

However, to that it must be added that we may take note of the second decree, but that we cannot take account of it; in particular we may not ask whether it is limited to reproducing the previous one or whether it presents any fresh features such as to prevent it from conflicting with Article 92. I repeat that the Court is called upon only to ascertain whether contracts concluded on the basis of the first decree have been renewed — and regard being had to the specific admissions of the defendant government, there can be no doubt on that point. It therefore only remains for the Court to find that France has failed to fulfil the first of its obligations under the Commission's decision.

3. I now come to the second requirement, that of ending any aids already agreed and terminating contracts concluded before 31 December 1982. Here too statements made by Counsel for the French Government during the oral procedure are of assistance. At the time when a contract is made, it was said, the undertaking receives an attestation indicating the percentage of social security contributions which it is permitted to withhold on the monthly or quarterly payment dates laid down in the relevant laws. The machinery thereby brought into being is therefore such as to make the execution of the contracts automatic and it is recognized that they have in fact continued to have effect even after notification of the decision, in face of which the defendant government would have had to introduce measures intended to prevent undertakings from continuing to pay contributions at the reduced level. But it is common ground that no such provision was adopted.

France's defence on that point is to the effect that, interpreted on the basis of the principle of the protection of legitimate expectation, the decision did not require it to suspend the execution of contracts; in support of that argument it relies on the judgment of the Court of 12 July 1973 in Case 70/72, *Commission* v *Germany* ([1973] ECR 813). That too was an action brought under Article 93 (2), in which Germany was accused of not implementing a decision requiring it to put an end to the grants given by the authorities, on the basis of national law, for the restructuring of coalfields. The Court pointed out that the decision did not indicate with the necessary clarity the territorial limits within which the benefit was to be considered illegal and it held that that ambiguity was such as to provide exonerating circumstances: the Court stated that the German authorities could not be blamed for applying their rules even after notification of the decision so as "to take account of the legitimate interest of investors operating

within areas which were ultimately to be excluded from benefiting from the aid in question" (paragraph 23 of the decision). The French Government states that that principle is applicable in this case; the decision of 12 January 1983 can only be interpreted as meaning that the legitimate interests (that is, the reasonable expectations) of undertakings, and therefore the contracts in course of execution, are thereby saved. I do not believe, however, that the argument is well founded. In the first place, the facts dealt with in the judgment of 1973 were very different from those before the Court today. That decision was indeed ambiguous; the decision at issue now is not, in view of the Commisison's use of a verb — "abolish" — whose scope could not be clearer. It may be added that if the Court were to inquire whether the decision compromised the interests of the undertakings in receipt of the aid, that would amount to a review of the merits; and, as I have stressd more than once, such an inquiry would be *ultra vires.*

Consequently it must be stated that the French Republic has continued to give effect to contracts already in being and that from that point of view too it has therefore failed to fulfil its obligations.

4. For the reasons which I have mentioned, my opinion is that the Court should declare that the French Republic has failed to comply with the decision adopted by the Commission on 12 January 1983 on an aid scheme in favour of the textile and clothing industry in France, introduced by Order No 82-204 of 1 March 1982, published in the Official Journal of the French Republic of 2 March 1982. The French Republic, having failed in its submissions, must further be ordered to pay the costs in pursuance of the first subparagraph of Article 69 (2) of the Rules of Procedure.