OPINION OF ADVOCATE GENERAL JACOBS

delivered on 27 January 2005 [1]

1. In the present case Mr Le Pen is appealing against the judgment of the Court of First Instance dismissing as inadmissible his application for annulment of an alleged decision in the form of a declaration of the President of the European Parliament of 23 October 2000 on his disqualification from holding office as a Member of the European Parliament ('the contested act'). [2]

2. The appellant challenges in particular the ruling that the contested act was not capable of being the subject of an action for annulment under Article 230 EC since it was not intended to produce legal effects.

I — Legal background

A — *Community law*

3. Article 190(4) EC provides that the European Parliament is to draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all the Member States, or in accordance with principles common to all the Member States, and that the Council, acting unanimously, is to lay down provisions, which it is to recommend to the Member States for adoption.

4. On 20 September 1976 the Council adopted Decision 76/787/ECSC, EEC, Euratom relating to the Act concerning the election of representatives to the European Parliament by direct universal suffrage; [3] the Act ('the 1976 Act')was annexed to that Decision.

1 — Original language: English.

2 — Case T-353/00 *Le Pen* v *Parliament* [2003] ECR II-1729.

3 — OJ 1976 L 278, p. 5.

5. Under Article 3(1) of the 1976 Act, the Members of the European Parliament 'shall be elected for a term of five years'.

6. Article 6(1) of the 1976 Act sets out the functions with which the office of Member of the European Parliament is to be incompatible, and provides, in paragraph 2, that each Member State 'may, in the circumstances provided for in Article 7(2), lay down rules at national level relating to incompatibility'.

7. Article 6(3) provides:

'[Members of the European Parliament] to whom paragraphs 1 and 2 become applicable in the course of the five-year period referred to in Article 3 shall be replaced in accordance with Article 12.'

8. Article 7(1) of the 1976 Act requires the Parliament to draw up a proposal for a uniform electoral procedure. At the time of the facts in the present case, notwithstanding drafts prepared by the Parliament, no uniform system had been adopted.

9. Article 7(2) provides:

'Pending the entry into force of a uniform electoral procedure and subject to the other provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.'

10. Article 12 of the 1976 Act provides:

'(1) Pending the entry into force of the uniform electoral procedure referred to in Article 7(1) and subject to the other provisions of this Act, each Member State shall lay down appropriate procedures for filling any seat which falls vacant during the five-year term of office referred to in Article 3 for the remainder of that period.

(2) Where a seat falls vacant pursuant to national provisions in force in a Member State, the latter shall inform [the Parliament], which shall take note of that fact.

In all other cases, [the Parliament] shall establish that there is a vacancy and inform the Member State thereof.'

11. Rule 7 of the Rules of Procedure of the European Parliament ('the Rules of Procedure') [4] is headed 'Verification of credentials'. Point 4 provides:

'The committee [responsible] shall ensure that any information which may affect the performance of the duties of a Member of the European Parliament or the ranking of the substitutes is forwarded without delay to Parliament by the authorities of the Member States or of the Union, with an indication of the date of effect where an appointment is concerned.

Should the competent authorities of the Member States initiate a procedure which might lead to the disqualification of a Member from holding office, the President shall ask them to keep him regularly informed of the stage reached in the procedure. He shall refer the matter to the committee responsible. On a proposal from that committee, Parliament may adopt a position on the matter.'

12. Rule 8(6) of the Rules of Procedure provides:

'The following shall be considered as the date of the end of the term of office and the effective date of a vacancy:

— in the event of resignation: the date on which the vacancy is established by Parliament, in accordance with the notification of resignation;

— in the event of appointment to an office incompatible with the office of a Member of the European Parliament, either in respect of national electoral law, or in respect of Article 6 of the [1976 Act]: the date notified by the competent authorities of the Member States or of the Union.'

13. Rule 8(9) of the Rules of Procedure provides:

'Parliament shall reserve the right, where acceptance or termination of office appears to be based on material inaccuracy or vitiated consent, to declare the appointment under consideration to be invalid or refuse to establish the vacancy.'

B — *French law*

14. Article 5 of Law 77-729 of 7 July 1977 on the election of representatives to the Assem-

4 — OJ 1999 L 202, p. 1.

bly of the European Communities, as amended ('the 1977 Law'),[5] provides that ineligibility arising during the term of office of Members of the European Parliament is to bring that term to an end and that ineligibility is to be declared by decree.

15. Article 25 of the 1977 Law provides:

'The election of [Members of the European Parliament] may, within 10 days of the declaration of the results of the voting and in respect of any matter concerning the application of this law, be challenged by any voter before the Conseil d'État. The decision shall be given in plenary session.

The application will not have suspensory effect.'

II — Facts

16. The appellant was elected as a Member of the European Parliament on 13 June 1999.

17. By judgment of 23 November 1999, the French Cour de cassation (Criminal Chamber) dismissed the appellant's appeal against the decision of the Cour d'appel de Versailles of 17 November 1998, finding him guilty, inter alia, of assault on a person in public office acting in the course of her duties and when the victim's status was apparent or known to the perpetrator of the assault. For that offence the appellant received a suspended sentence of three months' imprisonment and a fine of FRF 5 000. By way of further sentence, he was declared ineligible for election for a period of one year.

18. In the light of that conviction and pursuant to the second subparagraph of Article 5 of the 1977 Law, the French Prime Minister declared, by decree dated 31 March 2000 ('the decree'), that 'the ineligibility of Mr Jean-Marie Le Pen brought to an end his term of office as a representative in the European Parliament'.

19. The Secretary General of the French Ministry of Foreign Affairs notified the appellant of the decree by letter dated 5 April 2000. In that letter, it was stated that the appellant could bring proceedings challenging the decree before the French Conseil d'État within two months of notification.

5 — JORF of 8 July 1977, p. 3579.

20. The report of the plenary session of the European Parliament of 3 May 2000, under the heading 'Withdrawal of [the appellant's] parliamentary mandate', states as follows:

'The President [of the Parliament] announced that she had received from the French authorities on 26 April 2000 a letter from Mr Védrine, French Foreign Minister, and Mr Moscovici, Minister in Charge of European Affairs, dated 20 April 2000, enclosing a dossier concerning the withdrawal of [the appellant's] parliamentary mandate. She announced that she would refer this dossier to the Legal Affairs Committee pursuant to Rule 7(4), second subparagraph ...'

21. The Legal Affairs and Internal Market Committee ('the Legal Affairs Committee') examined the appellant's legal options in closed sessions on 4, 15 and 16 May 2000.

22. In the plenary session of 18 May 2000, the President of the Parliament, after stating that she had asked for the opinion of the Legal Affairs Committee on the French authorities' communication on the disqualification of the appellant from holding office, read out a letter received on 17 May 2000 from the Chairman of that Committee which was worded as follows:

'Madam President,

The Legal Affairs Committee and Internal Market Committee resumed the examination of the position of Mr Jean-Marie Le Pen at its meeting on 16 May 2000. The Committee is aware that the French Prime Minister's decree, notified to Mr Le Pen on 5 April 2000 and published in the *Journal officiel de la République française* on 22 April 2000, is now enforceable. However, the Committee notes that, as mentioned in the letter notifying the party concerned of the decree, the latter is entitled to bring proceedings before the Conseil d'État accompanied by a request for suspension of operation of the decree.

In the light of the decision yesterday not to recommend for the time being that the Parliament take formal note of the decree concerning Mr Le Pen, the Committee considered the possible ways forward. In support of this decision, the case of Mr Tapie was raised as a precedent to be followed, with the effect that the European Parliament should take formal note of the decree of disqualification from holding office only after expiry of the period prescribed for bringing proceedings before the Conseil d'État, or after the decision of that court, as the case may be.'

23. The President of the Parliament then stated that it was her intention to follow the 'opinion of the Legal Affairs Committee'.

24. By application to the French Conseil d'État dated 5 June 2000, the appellant sought the annulment of the decree.

25. By letter dated 9 June 2000 to Mr Védrine and Mr Moscovici, the President of the Parliament stated:

'Following the opinion of our Legal Affairs and Internal Market Committee, it seems to me to be right, having regard to the irreversible nature of disqualification from holding office, that the European Parliament should take formal notice of the decree only after expiry of the period prescribed for bringing proceedings before the Conseil d'État or after the decision of the latter, as the case may be.'

26. In a letter dated 13 June 2000, Mr Moscovici informed the President of the Parliament that the French Government formally challenged the position taken by that institution in its session of 18 May 2000, in refusing to take note of the appellant's disqualification, by the decree, from holding office. It stated that in doing so the Parliament was in breach of Article 12(2) of the 1976 Act and that the reason given did not justify such a breach. The Parliament was therefore invited to take note of the disqualification 'forthwith'.

27. The President of the Parliament replied by letter dated 16 June 2000 stating that the Parliament 'would take note of Mr Le Pen's disqualification from holding office once [the decree] was no longer open to challenge', which was not yet the case since annulment proceedings had been instituted before the French Conseil d'État. The President justified this position by reference to the precedent set in the case of Mr Tapie, and the requirement of legal certainty.

28. On 6 October 2000, the French Conseil d'État dismissed the appellant's application.

29. On 17 October 2000, the French Permanent Representation to the European Union forwarded to the President of the Parliament a letter dated 12 October 2000 from Mr Védrine and Mr Moscovici. The two ministers stressed that the French Government had at all times 'strongly disputed' the European Parliament's decision to await the outcome of the appellant's proceedings before the French Conseil d'État challenging the decree, which it regarded as a breach of the 'letter and spirit of the 1976 Act'. After stating that the French Conseil d'État had dismissed the appellant's action, they added:

'We expect the European Parliament to act in compliance with Community law and take note, by means of a vote, of Mr Le Pen's disqualification from holding office as soon as possible, failing which we reserve the right to take legal action.'

30. According to the minutes of the debates of the session of 23 October 2000, under the rubric 'Announcement of the President', the President of the Parliament announced as follows:

'I must inform you that on 19 October 2000, I received official notification from the relevant authorities of the French Republic of a ruling by the Council of State on 6 October 2000 rejecting the appeal lodged by Mr Jean-Marie Le Pen against the decree of the French Prime Minister on 31 March 2000 terminating his mandate as Member of the European Parliament.

I must also inform you that I have received a copy of a request for clemency for Mr Le Pen presented to Mr Jacques Chirac, President of the Republic, by Mr Charles de Gaulle, Mr Carl Lang, Mr Jean-Claude Martinez and Mr Bruno Gollnisch.'

31. The President then handed over to the Chairman of the Legal Affairs Committee, who said:

'Madam President, the Legal Affairs and Internal Market Committee, following its deliberations of 15 and 16 May last, recommended the suspension of the communication in plenary session of the Parliament's declaration of the disqualification of Mr Jean-Marie Le Pen from holding office. I stress that the Legal Affairs Committee recommended that this communication be suspended until the expiry of the period available to Mr Le Pen for bringing proceedings before the French Conseil d'État or the resolution of those proceedings. I quote here the letter of 17 May that you yourself, Madam President, read out to the Parliament.

The Conseil d'État — as you have stated — has dismissed those proceedings and has duly informed us of this fact. Consequently, there are no further grounds for postponing this announcement to the Parliament, which is mandatory as a matter of primary law, specifically under Article 12(2) of the [1976 Act].

The request for clemency that you have mentioned, Madam President, does not alter the situation, because it is not a legal proceeding. As its name suggests, it is the act of a public authority that does not concern the decree of the French Government which, in accordance with the recommendation of the Legal Affairs Committee, must be notified in plenary session.'

32. Then the President of the Parliament declared:

'Pursuant to Article 12(2) of the [1976 Act], the European Parliament takes note of the

notification from the French government confirming the removal from office of Mr Jean-Marie Le Pen.'

33. She therefore invited the appellant to leave the auditorium and suspended the session in order to enable him to do so.

III — The proceedings before the Court of First Instance

34. By application lodged at the Registry of the Court of First Instance on 21 November 2000, the appellant brought an action for the annulment of the contested act.

35. By separate document, lodged at the Registry on the same day, the appellant sought suspension of operation of the contested act by way of interim relief.

36. In response to a request by the President of the Court of First Instance to the Parliament at the hearing on 15 December 2000, the Director General of Finances and Financial Control of the Parliament confirmed, inter alia, in a statement of 18 December 2000, that the appellant had 'received travel and accommodation allowances, and all the other allowances provided for ... up to the end of his term of office'.

37. The French authorities, by letter dated 5 January 2001, confirmed, also in response to a request from the President of the Court of First Instance at the hearing, that they had continued to pay the appellant's salary until 24 October 2000.

38. By order of the President of the Court of First Instance of 26 January 2001, the operation of 'the decision in the form of a declaration of the President of the European Parliament of 23 October 2000, in so far as it constitutes a decision of the European Parliament taking note of the appellant's disqualification from holding office as a Member of the European Parliament', was suspended. [6]

IV — The judgment of the Court of First Instance

39. The Parliament, supported by France as intervener, had argued that the application was inadmissible on the grounds first that

6 — Case T-353/00 R *Le Pen* v *Parliament* [2001] ECR II-125.

there is no 'Community competence where the incompatibility or ineligibility of its Members results from national law' and second that there is no measure open to challenge under Article 230 EC.

40. With regard to the second argument, the Court of First Instance ruled as follows:

'77. According to settled case-law, only measures which produce binding legal effects such as to affect the interests of an applicant, by bringing about a distinct change in his legal position may be the subject of an action for annulment under Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraph 37). Thus, an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42).

78. In the present case, the contested act is the declaration of the President of the Parliament in the plenary session of 23 October 2000 by which, "in accordance with Article 12(2) of the [1976 Act], the ... Parliament takes note of the notification of the French Government declaring the disqualification of [the applicant] from holding office".

79. It is, therefore, necessary to examine whether that declaration produced binding legal effects such as to affect the interests of the applicant by bringing about a distinct change in his legal position.

80. It is necessary, in that respect, to note the legal context in which that declaration was made.

81. It is not in dispute that, at the material time in the present case, no uniform electoral procedure for the election of Members of the European Parliament had been adopted.

82. Accordingly, pursuant to Article 7(2) of the 1976 Act, the electoral procedure for that election continued to be governed by the national provisions in each Member State.

83. Thus, in particular, it follows from the first subparagraph of Article 12(2) of the 1976 Act, that the application of "national provisions in force in a Member State" could bring about a vacancy for a seat of a Member of the European Parliament.

84. In application of the 1976 Act, the French Republic adopted, in particular, the 1977 Law. Article 2 of that law provides that the election of Members of the European Parliament is governed by "Title I of Book I of the Electoral Code and the provisions of the following chapters". Article 5 of the same law, placed in Chapter III on "Conditions of eligibility, ineligibility and incompatibility", provides in particular that "Articles LO 127 to LO 130-1 of the Electoral Code shall apply to the election of [Members of the European Parliament]", that "ineligibility arising during the term of office shall bring that term to an end" and that "ineligibility will be declared by decree".

85. Article 12(2) of the 1976 Act draws a distinction between two situations in which seats of Members of the European Parliament become vacant.

86. The first situation, referred to in the first subparagraph of that provision, covers cases where the vacancy arises from the application of "national provisions". The second situation, referred to in the second subparagraph of the same provision, covers "all other cases".

87. Contrary to the applicant's contention in that regard, the first situation is not at all confined to the cases of incompatibility referred to in Article 6 of the 1976 Act, but also includes cases of ineligibility. Whilst it is true that Article 6(3) of the 1976 Act states that Members of the European Parliament to whom "paragraphs 1 and 2" become applicable are to be replaced "in accordance with Article 12", it cannot be inferred from that reference that that article concerns solely cases of incompatibility covered by Article 6(1) and (2). It is to be observed, furthermore, that nowhere does Article 12 refer to the concept of "incompatibility", but uses the much wider concept of "vacancy [of the seat]".

88. In the first situation covered by Article 12(2) of the 1976 Act the role of the Parliament is confined to "taking note" that the seat of the person concerned is vacant. In the second situation, which covers, for example, the resignation of one of its Members, the Parliament "shall establish that there is a vacancy and inform the Member State thereof".

89. In the present case, since the contested act was adopted pursuant to the first subparagraph of Article 12(2) of the 1976 Act, it is necessary to determine the scope of the process of "taking note" prescribed by that provision.

90. It should be pointed out, in that regard, that the process of "taking note" refers not to the disqualification from office of the person concerned but to the simple fact that his seat has become vacant as a result of the application of national provisions. In other words, the role of the Parliament is not to "bring about" the disqualification from office, as the applicant claims, but merely to take note of the declaration, already made by the national authorities, that the seat is vacant, that is to say, of a pre-existing legal situation resulting exclusively from a decision of those authorities.

91. The Parliament's power of verification in that context is particularly limited. It is essentially confined to verifying whether the seat of the person concerned is in fact vacant. In particular, contrary to the applicant's contention, it is not for the Parliament to verify that the procedure laid down by the applicable national law or the fundamental rights of the person concerned have been respected. That power belongs exclusively to the competent national courts or, as the case may be, to the European Court of Human Rights. It should be noted, moreover, in that regard that, in the present case, the applicant has specifically asserted his rights before both the French Conseil d'État and the European Court of Human Rights. It should also be noted that the Parliament itself never claimed, either in its written pleadings or at the hearing, to have a power of verification as wide as that alleged by the applicant.

92. It should be added that such a wide concept of the Parliament's power of verification under the first subparagraph of Article 12(2) of the 1976 Act would imply that it would be open to that institution to challenge the very lawfulness of the disqualification declared by the national authorities and to refuse to take note that a seat was vacant if it considered that it was faced with an irregularity. Rule 8(9) of the Rules of Procedure alone contemplates the possibility for the Parliament to refuse the vacancy of a seat and then only where it is called upon to "establish" such a vacancy and where there is "material inaccuracy" or "vitiated consent". It would be paradoxical if the Parliament were to have a greater discretion in cases where it is required simply to take note of the vacancy of a seat established by the national authorities than in cases where it itself establishes the vacancy of a seat.

93. Those findings are in no way contradicted by the wording of the second

subparagraph of Article 7(4) of the Rules of Procedure. As the Parliament and the French Republic rightly point out, that provision applies "upstream of the disqualification" and therefore of the vacancy of the seat. It provides for the President of the Parliament to refer the matter to the competent committee where "the competent authorities of the Member States initiate a procedure which might lead to the disqualification of a [Member of the European Parliament] from holding office". Once that procedure is completed and the vacancy of the seat of the person concerned has been established by the competent national authorities, it remains only for the Parliament to take note of that vacancy, pursuant to the first subparagraph of Article 12(2) of the 1976 Act. In any event, pursuant to the principle of the hierarchy of norms, a provision of the Rules of Procedure cannot allow derogation from the provisions of the 1976 Act and confer on the Parliament wider powers than it holds under that act.

94. Nor are those findings undermined by the fact that, until 23 October 2000, the applicant continued to sit in the Parliament and to receive the allowances from that institution and that, until 24 October 2000, the French authorities paid him his salary. It is not in dispute between the parties that the decree of 31 March 2000 was enforceable. The fact that the Parliament did not take note of that decree as soon as it was notified by the French authorities, but at a later date, and the fact that certain practical consequences for the applicant flowed from it cannot alter the legal consequences which attach to that notification pursuant to Article 12(2) of the 1976 Act.

95. The applicant's arguments, first, that Article 5 of the 1977 Law compromises parliamentary independence and constitutes an intolerable interference in its functions and, second, that there is a general principle that "the disqualification must be declared by the parliamentary assembly concerned", are unfounded. As has already been pointed out in paragraph 83 above, it is plain from the express wording of the first subparagraph of Article 12(2) of the 1976 Act that a seat of a Member of the European Parliament may become vacant pursuant to the "national provisions in force in a Member State". Since no uniform electoral procedure had been adopted at the material time, that provision, and therefore the 1977 Law, were fully applicable. Whatever the development of the Parliament's powers, new powers cannot render inapplicable provisions of primary law, such as the 1976 Act, in the absence of express repeal by a text of equal rank.

96. For the same reasons, the applicant's argument founded on the primacy of

Community law is wholly irrelevant. In the present case, there is neither contradiction nor conflict between national law and Community law.

97. It follows from all the foregoing considerations that, in the present case, the decree of 31 March 2000 is the measure which produced binding legal effects such as to prejudice the interests of the applicant. The contested act was not intended to produce legal effects of its own, distinct from those of that decree.

98. It must, therefore, be found that the contested act is not capable of being the subject of an action for annulment under Article 230 EC. Accordingly, the present application must be dismissed as inadmissible without there being any need to address the other pleas in law and arguments on admissibility.'

V — The appeal

41. On appeal the appellant challenges the ruling of the Court of First Instance that the contested act was not capable of being the subject of an action for annulment and in particular that it had no legal effects distinct from those of the decree.

42. In connection with the appeal the appellant also sought from the Court of Justice suspension of the operation of the contested act. That application for interim relief was dismissed by the President. [7]

43. The Parliament submits that the appeal is in large part inadmissible: most of the pleas simply reproduce those already raised before the Court of First Instance, without specifically identifying any error of law vitiating the judgment of that Court. The appeal neither indicates which part of that judgment it contests nor produces legal arguments specifically criticising it.

44. I am not persuaded by that argument. While it is true that much of the appeal simply reproduces much of the application to the Court of First Instance (as the Parliament points out, paragraphs 25 to 35 exactly replicate paragraphs 21 to 31 of that application, paragraphs 39 to 45 exactly replicate paragraphs 32 to 38 and paragraphs 46 to 60 exactly replicate paragraphs 82 to 96), none the less there is further material in the appeal from which may be deduced the elements of the judgment of the Court of First Instance that are impugned by the appellant (as may be seen by the summary below).

7 — Case C-208/03 P-R *Le Pen* v *Parliament* [2003] ECR I-7939.

45. I will accordingly turn to the substance of the appeal, the essence of which is that the Court of First Instance committed an error of law in dismissing the application for annulment on the ground that the contested act is not capable of being the subject of an action for annulment under Article 230 EC.

46. More specifically the appellant submits first that there is a contradiction between the statements of the Court of First Instance that, on the one hand, the contested act was not intended to produce legal effects of its own, distinct from those of the decree (paragraph 97 of the judgment), and that, on the other hand, the Parliament had a power of verification, albeit limited (paragraph 91).

47. I am not persuaded by that argument.

48. Paragraph 91 is best read in its context. In paragraphs 85 to 88, which the appellant does not appear to contest, the Court of First Instance considered the scope of Article 12 (2) of the 1976 Act, explaining that that provision 'draws a distinction between two situations in which seats of Members of the European Parliament become vacant', namely between 'cases where the vacancy arises from the application of "national provisions"' and 'all other cases'. In the first situation, which 'includes cases of ineligibility', 'the role of the Parliament is confined to "taking note" that the seat of the person concerned is vacant. In the second situation, which covers, for example, the resignation of one of its Members, the Parliament "shall establish that there is a vacancy and inform the Member State thereof".

49. The next two paragraphs, which are set out above, explain the concept of 'taking note'.

50. In paragraphs 91 and 92, as set out above, the Court of First Instance expands on the precise scope of the Parliament's powers when taking note of a declaration emanating from the national authorities.

51. I cannot see anything in those paragraphs which conflicts with the conclusion of the Court of First Instance that the contested act was not intended to produce legal effects of its own. On the contrary, they lead to that conclusion. As the citations above show, the Court of First Instance clearly explains that (i) the 'taking note' refers to the fact that a seat has become vacant as a result of national provisions and (ii) the Parliament may verify whether that seat is in fact vacant, for example by checking whether any domestic right of appeal has been exhausted, but no more. It follows from that limited power of verification that the 'taking note' by the Parliament has no legal effect distinct from the legal effect of the national provisions whose application led the national authorities to inform the Parliament of the fact

that the seat had, in consequence, fallen vacant.

52. Second, the appellant submits that the Court of First Instance distorted the scope of Article 12 of the 1976 Act by finding that the decree was the only act which produced binding legal effects such as to prejudice his interests. [8] The appellant refers to examples from the case-law where the Community judicature accepted that a Commission code of conduct, [9] a Commission communication [10] and a statement by the spokesman for a Commissioner [11] were acts which could be challenged. He adds that the intention of the author of the act is also relevant. In the present case the Legal Affairs Committee and the President of the Parliament regarded the Parliament's taking note as modifying the appellant's status. It was accordingly specious for the Court of First Instance to distinguish between the legal and practical effects of the contested act by stating that the fact that the Parliament did not take note of the decree as soon as it was notified and the fact that certain practical consequences for the appellant flowed from it could not alter the legal consequences which attached to that notification pursuant to Article 12(2) of the 1976 Act. [12]

53. The appellant further submits that the Court in its case-law does not draw a clear distinction between legal and practical effect, and by way of illustration refers to decisions holding that the simple fact of imposing an obligation on a person constitutes a legal effect, [13] as does a decision exposing a person to a pecuniary risk [14] as does a request for information by way of decision taken under Article 11(5) of Regulation No 17 [15] since the undertaking concerned may be fined if it fails to provide the information requested. [16]

54. Much of the analysis in paragraphs 48 to 51 above is also relevant in the context of the appellant's second argument. As is clear from the relevant paragraphs of its judgment, which are summarised or set out above, the Court of First Instance explains carefully why it considers that the contested act had no binding legal effects. Its analysis appears to me to be correct. Article 12(2) of the 1976 Act refers explicitly to the situation where a seat falls vacant 'pursuant to national provisions in force in a Member State'. The national provisions in question provide, with specific reference to the European Parliament, that ineligibility arising during the term of office 'shall bring that term to an end

8 — See paragraph 97 of the judgment.

9 — Case C-303/90 *France* v *Commission* [1991] ECR I-5315.

10 — Case C-325/91 *France* v *Commission* [1993] ECR I-3283.

11 — Case T-3/93 *Air France* v *Commission* [1994] ECR II-121.

12 — See paragraph 94 of the judgment.

13 — Joined Cases 32/58 and 33/58 *SNUPAT* v *High Authority* [1959] ECR 127, p. 137.

14 — Case T-19/91 *Vichy* v *Commission* [1992] ECR II-415.

15 — Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty, OJ, English Special Edition 1959-1962, p. 87.

16 — Case T-46/92 *Scottish Football Association* v *Commission* [1994] ECR II-1039, paragraph 13 of the judgment.

[and] shall be declared by decree'.[17] The appellant's ineligibility was so declared, the Parliament was notified and, as required by Article 12(2), it took note of that fact.

55. Third, the appellant notes that the Parliament, through its President, ruled on his legal situation, which demonstrates that the contested act did not flow automatically from another text; on the contrary, it implies that that act was based on an assessment of fact and law.

56. It is not clear to me which point in the judgment is being criticised by the appellant; the third ground of appeal may therefore be inadmissible for that reason. I will assume however that the appellant is referring to the procedure leading up to the contested act, and in particular the fact that the President of the Parliament seised the Legal Affairs Committee. That decision was taken pursuant to the second subparagraph of Rule 7 (4) of the Rules of Procedure.[18]

57. The last sentence of that subparagraph admittedly suggests some discretion. However it seems clear that in the present case the Parliament was keeping its position open until the appellant had exhausted the national avenues of legal appeal open to him, at which point it 'took note' of the decree; in so doing, it had no scope for discretion. Although the second paragraph of Rule 7(4) provides that, on a proposal from the relevant committee, the Parliament 'may adopt a position on the matter', that does not mean that there is a discretion where the position to be adopted by the Parliament is clearly dictated by other provisions. I do not consider that the mere fact of seeking legal advice is evidence of the existence of a power of discretion: the advice may after all be that there is no discretion. In the present case, the President of the Parliament exercised a power to seek advice, but the relevant step, and the 'decision' which the appellant seeks to challenge under Article 230 EC, is the 'taking note', and as is demonstrated in the context of the appellant's other grounds of appeal there was no discretion at that point.

58. The appellant adds that the reference by the Court of First Instance to the fact that he had asserted his rights before both the French Conseil d'État and the European Court of Human Rights shows that there was an assessment of facts and law by the Parliament and hence a genuine act susceptible to challenge.[19]

59. I cannot accept that argument. The Court of First Instance in paragraph 91 of its judgment was in fact saying precisely the opposite of what the appellant claims:

17 — See paragraph 14 above.

18 — Set out in paragraph 11 above.

19 — See paragraph 91 of the judgment. It may be noted that in 2001 the European Court of Human Rights dismissed the appellant's action against the sentence imposed in France.

namely that 'it is not for the Parliament to verify that the procedure laid down by the applicable national law or the fundamental rights of the person concerned have been respected. That power belongs exclusively to the competent national courts or, as the case may be, to the European Court of Human Rights'. The Court of First Instance then mentioned that the appellant had indeed asserted his rights before those courts: in doing so, that Court was simply setting out a fact which demonstrates that the appellant had other avenues in which to exercise his right to seek judicial review of national measures affecting him and that he had availed himself of those opportunities. It cannot be inferred from that reference that the Parliament therefore had a power of verification of fact and law such as to make its 'taking note' an act susceptible to challenge under Article 230 EC.

60. Fourth, the appellant submits that the contested act itself required implementing measures, [20] in particular given that France continued to pay his salary after the decree and until the contested act.

61. It may be assumed that by this ground of appeal the appellant is criticising the statement by the Court of First Instance in paragraph 94 of its judgment that its findings that the Parliament's power of verification is particularly limited are not 'undermined by the fact that, until 23 October 2000, the applicant continued to sit in the Parliament and to receive the allowances from that institution and that, until 24 October 2000, the French authorities paid him his salary'. But as the Court of First Instance went on to say, it is not in dispute between the parties that the decree was enforceable. As is clear from the letter of 17 May 2000 from the Legal Affairs Committee to the President of the Parliament, read out in Parliament the following day, [21] the Parliament did not take note of the decree immediately on notification by the French authorities because it had decided to wait until 'expiry of the period prescribed for bringing proceedings before the Conseil d'État, or after the decision of that court, as the case may be'. As the Court of First Instance notes, 'certain practical consequences for the applicant flowed from [that delay in taking note]'; that Court however went on to state, correctly in my view, that those practical consequences 'cannot alter the legal consequences which attach to that notification pursuant to Article 12(2) of the 1976 Act'.

62. Finally, the appellant interprets paragraph 97 of the judgment, in which the Court of First Instance stated that the contested act was not intended to produce legal effects of its own, distinct from those of the decree, as an expression of the principle that a confirmatory act cannot be challenged under Article 230 EC. According to the appellant, that principle, articulated in particular in *Irish Cement*, [22] is applicable only where the operative part of the confirmatory act is

20 — As in Case 108/83 *Luxembourg* v *Parliament* [1984] ECR 1945, paragraphs 21 and 22 of the judgment.

21 — See paragraph 22 above.

22 — Joined Cases 166/86 and 220/86 [1988] ECR 6473.

identical to that of the earlier measure, which is not so in the present case. Moreover the two decisions were taken in different contexts, since the Parliament took into account the new legal factors which had arisen in the meantime, including the decision of the Conseil d'État.

63. I cannot however see anything in paragraph 97 of the judgment which suggests that the Court of First Instance had in mind the concept of a confirmatory act. Indeed the whole tenor of the judgment, of which paragraph 97 is the penultimate paragraph (other than those concerning costs) and the preface to the final conclusion, is designed to demonstrate — correctly in my view — that the decree and the contested act are conceptually and practically distinct.

64. As appears from the above, I consider that all the grounds of appeal raised by the appellant are unfounded and/or inadmissible; I accordingly conclude that the appeal should be dismissed.

Conclusion

65. For the reasons given above I am of the opinion that the Court should:

(1) dismiss the appeal;

(2) order the appellant to bear the costs.