OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 26 November 1998 *

I — Introduction

1. In this case, France seeks the annulment of Commission Decision No 97/811/EC of 9 April 1997 concerning aid granted by France to the textile, clothing, leather and footwear industries. [1] The case raises, in particular, the question whether financial assistance provided by public authorities to undertakings in certain sectors in return for commitments by those undertakings to the authorities and to employee representatives regarding the maintenance of employment and the reorganisation of working time, above and beyond the requirements of the general law, constitutes State aid within the meaning of Article 92(1) of the EC Treaty.

II — Legal and factual context

2. The textile, clothing, leather and footwear industries are dominated, both in France and elsewhere in the Community, by small and medium-sized enterprises. Intense competition, both within the Community and from undertakings in third countries with low labour costs, has resulted in a massive reduction in employment in these sectors in the Community. France is not alone in seeing a decline in its combined workforce, in its case from about 600 000 at the beginning of the 1980s to 352 000 in 1995 and to 315 000 in 1997.

3. In France, in the mid-1990s, a series of general measures designed to combat unemployment by relieving employers from certain social security contributions in respect of low-paid workers [2] culminated in a degressive reduction in employers' contributions in respect of employees earning between 100 and 133% of the guaranteed minimum wage (hereinafter 'the SMIC'). [3] On 26 March 1996, France notified the Commission of certain additional proposals specific to the textile, clothing, leather and footwear industries. These were enacted in Article 99 of Law No 96-314 of 12 April 1996 implementing various economic and financial provisions (hereinafter 'Law No 314'), which permitted the State, on an experimental and temporary basis (until 31 December 1997), to grant to employers in the sectors in question additional reductions in social charges in respect of low-paid employees in consideration for their adoption of framework

* Original language: English.

1 — OJ 1997 L 334, p. 25 (hereinafter 'the contested Decision').

2 — Quinquennial Law No 93-1313 of 20 December 1993 concerning work, employment and professional training, extended by Law No 95-882 of 4 August 1995 concerning urgent measures for employment and social security.

3 — Article 113 of the Law on Finances No 95-1346 of 30 December 1995. The SMIC is the *salaire minimum interprofessionnel de croissance*. The reduction applied degressively to salaries between 100 and 120% of the SMIC before 1 October 1996.

agreements on the maintenance and development of employment which would take account of negotiations among the social partners in those sectors on the reorganisation and reduction of working time. The reductions were to take the form of a degressive alleviation of employers' social security contributions on salaries between 100 and 150% of the SMIC, in accordance with a scale to be established by ministerial decree. Employers with more than 50 employees were required to sign individual agreements with the State, in addition to the framework agreement, specifying their commitments regarding employment and working time. Failure by a participating undertaking to comply with these commitments would result in the full application, retroactively as well as prospectively, of the contributions normally due.

4. The adoption of Law No 314 enabled the French authorities successfully to exert pressure for the revival of hitherto deadlocked talks between the social partners in the affected sectors regarding the reorganisation and reduction of working time. Sectoral agreements on these issues were concluded between 7 May and 5 June 1996. These provided for an annual limit on overtime work, which varied with the maximum number of hours of overtime a worker could engage in in any given week. [4] Depending on the length of the maximum working week and on the hours actually worked, employers were required to grant workers specified proportional amounts either of time off or of additional pay, or a combination of the two. [5]

5. Shortly afterwards, between 14 May and 28 June 1996, the State concluded framework agreements with the employers' representative bodies of the sectors concerned. These framework agreements contained commitments by each sector in respect of the maintenance of employment and the employment of young people. Each framework agreement also referred expressly to the agreement on the reorganisation and reduction of working time reached by the social partners in the sector concerned as a measure designed to promote the objectives of employment and competitiveness and set out the employment maintenance and creation commitments of the employers in the sector, thereby fulfilling the requirements of Article 99 of Law No 314.

6. Almost contemporaneously, the French authorities adopted Decree No 96-572 of 27 June 1996 (hereinafter 'the Decree'), implementing Article 99 of Law No 314.

4 — For example, in the agreement of 7 May 1996 between the social partners in the textile sector, a 70-hour annual overtime maximum was established where the weekly maximum work did not exceed 44 hours (the normal working week being 39 hours); a 40-hour annual maximum was established for cases where the weekly maximum exceeded 44 hours.

5 — In the textile sector, employers had a choice been rewarding overtime worked in the context of a maximum 44-hour working week with a 25% increase on normal pay or an equivalent increase in time off; the same conditions applied in the case of a higher weekly maximum, but employers were also required to grant a 50% increase on salary after the 48th hour, and to grant at least 10% additional time off per hour worked after the 44th hour, rising to a minimum of 20% after the 48th hour.

The Decree established a degressive scale of reductions in employers' social security contributions in the sectors concerned, the maximum being FF 734 (in addition to the reductions provided for by the general law) in respect of a worker earning the SMIC in the sectors concerned. The cost of the scheme was estimated at FF 2.1 billion, although it ultimately cost between FF 1.8 billion and FF 1.9 billion. The authorities envisaged that 35 000 of the anticipated 60 000 job losses over the subsequent two-year period would be avoided and that 7 000 additional posts would be created for unemployed young people.

7. The Decree entered into force on 1 June 1996 as regards the textile and clothing sectors, and on 1 July 1996 in respect of the leather and footwear sectors. This was in spite of the Commission decision of 31 May 1996 to initiate proceedings under Article 93(2) of the EC Treaty concerning the measures contained in the Decree and in Law No 314. [6] In two letters of 4 and 9 July 1996, the Commission requested information on whether the French measures breached its *de minimis* threshold of a total of ECU 100 000 per undertaking over a three-year period, [7] reminded the French authorities of the suspensive effect of Article 93(2) proceedings and requested them to inform the recipient firms of the initiation of proceedings and that they might have to repay any aid improperly granted. On the basis of additional information provided by France regarding the commitments entered into by the affected employers in return for reductions in their social security contributions, the Commission extended the scope of its inquiry by a decision of 2 October 1996. [8] There was an extensive exchange of correspondence and a number of bilateral meetings between the Commission and the French authorities. In addition, the German, Netherlands, United Kingdom and Austrian Governments, the regional government of Flanders in Belgium and nine industrial and trade associations submitted observations to the Commission which were hostile to the French scheme.

8. France argued, principally, that the scheme for employment maintenance and creation and the reorganisation of working time imposed additional costs on the firms concerned over and above what they would have incurred if they had merely complied strictly with their statutory requirements. Thus, the support provided could not be deemed to be State aid. The net impact of the measures (reductions of social security contributions measured against these additional costs) was neutral: large firms did not ultimately benefit at all, since the costs of reorganising working time were greater for them; other firms with between 50 and 500 employees benefited from a net reduction in costs which remained below the *de minimis* threshold. Any attendant gain in competitiveness would become apparent only in the medium to long term. The fact that the scheme was not necessarily attractive to firms was demonstrated by the non-

6 — OJ 1996 C 206, p. 8.

7 — See Commission Notice on the *de minimis* rule for State aid, OJ 1996 C 68, p. 9.

8 — OJ 1996 C 357, p. 5.

participation of about one third of the eligible undertakings, particularly some of the larger firms in the industries concerned.

9. The Commission notified France of the contested Decision[9] by letter of 5 May 1997. The Commission took the view that the French measures were intended to relieve firms in four specific industries of some of the financial costs arising from the normal application of the general social security system. The costs arising from agreements reorganising working time and involving wage increases or paid holidays but not required by the generally applicable rules should have been borne from their normal budgets. Benefits granted by public authorities which mitigate the burden of such charges constitute State aid. This was the case even though the reduction in the undertakings' contributions was intended to offset additional costs voluntarily assumed to give effect to the government's employment policy. The use of public funds to unblock collective negotiations could not be justified even in pursuit of the dual social and economic aims of employment maintenance and greater efficiency, both of which are desirable in themselves. Nor could the experimental and temporary nature of the measures disguise their sectoral character. Furthermore, the reduction in social security contributions placed firms in the industries concerned at a competitive advantage vis-à-vis competitors in other Member States, who might have carried out similar reorganisations without State support. In this connection, it was material to note, with regard to the measure's likely effect on trade between Member States, that labour costs accounted for up to 80% of production costs in the sectors concerned. The Commission concluded, therefore, that the assistance provided by the State constituted by its very nature, and in its totality, State aid, without it being necessary to examine in detail the calculations submitted by France regarding the net gain (or loss) accruing to firms of different sizes, i.e. whether the costs incurred offset the benefit of the reductions.

10. The Commission observed that, in any event, the neutrality claimed for the French measures could not be demonstrated. Most of the statistical information provided by France took the form of tables comprising averages in terms of the relevant industry or of French industry as a whole. While the claimed average net savings by undertakings of between 10 and 12% of the total wages bill, or of 8% in the case of an undertaking employing more than 100 people, reported in the specialist and general press, might be overestimates, these figures reflected considerable fluctuations around the averages indicated in the tables provided by France. Thus, in the case of firms with a wage structure differing substantially from the average, the gain from

9 — Loc. cit., cited at footnote 1 above.

the aid could be much higher than that claimed by France. Furthermore, France's calculations made no allowance for gains in productivity through more efficient use of productive plant. Experience in a different French State aid case,[10] and in Austria, suggested that such gains could easily offset the costs of reorganising working time.

11. Having concluded that the French measures constituted State aid within the meaning of Article 92(1) of the EC Treaty, the Commission found that they were not eligible for any of the possible derogations provided for in Article 92(2) and (3) of the Treaty. The Commission decided, therefore, that the reduction in employers' social security contributions introduced by Article 99 of Law No 314 and by the Decree was, as regards the part not covered by the *de minimis* rule, illegal aid in that it was implemented before the Commission had taken a decision on it in accordance with the provisions of Article 93(2) of the Treaty, and was incompatible with the common market. France was required to terminate immediately the grant of the reduction, where its total amount was not covered by the *de minimis* rule, and to recover all aid illegally granted, with interest.

10 — State aid No 731/96 La Lainière de Roubaix.

III — Arguments of the parties

12. By an application registered at the Court on 10 July 1997, France requests the Court to annul the contested Decision and to require the Commission to pay the costs of the proceedings. The Commission, in its defence, requests the Court to reject the application and to require France to pay the costs.

13. France presents two arguments to support the main ground of its application that the Commission decision is inconsistent with Article 92(1) of the Treaty. First, it argues that an advantage conferred by the State in return for a proportionate action by the undertakings concerned in favour of their employees does not constitute aid, where the employers make no net material gain or a net gain which is below the *de minimis* threshold. This was the case where the agreements entered into by employers in the textile, leather and footwear sectors with employee representatives went well beyond those the employers would have consented to without State intervention, as the concessions made were not matched by corresponding concessions on the part of the employees. France submits that such costs cannot be deemed to be 'charges which are normally included in the budget of an undertaking'.[11] The measures in

11 — Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1, p. 19 (hereinafter '*Steenkolenmijnen*').

question would not distort competition, because undertakings in other countries where similar social security reductions were not offered by the State would not be obliged to make similar concessions to their employees.

14. The Commission, on the contrary, treats this as one of a series of cases in which the State undertook costs which should normally be supported by undertakings' budgets. The reduction of social charges has long been treated as an aid. [12] The social or other objectives served by such a measure are irrelevant. [13] The fact that two-thirds of eligible undertakings participated in the scheme demonstrates that it was, on balance, beneficial to them.

15. France alleges, secondly, that the Commission is guilty of a manifest error of appreciation in failing to find that the measures in question were neutral in their effects. The Commission was not entitled to question official French statistics. These statistics were the best available for the period. The Commission must make its decision on the basis of the facts available. [14] In any event, the statistics provided were broken down by reference to different sizes of firms. The alleged savings in participating undertakings' wage bills referred to by the Commission were not credible. Gains in competitiveness were purely potential and difficult to measure and were, moreover, probably outweighed in the short term by costs associated with reorganising working practices.

16. The Commission counters that the information provided by France did not prove the economic neutrality of the measures, in particular because it did not relate to costs and benefits at the level of individual firms, and that the *Kimberly Clark* judgment permitted it to conclude that a measure was an aid on the basis of partial information on its effects. [15] The possible 10% to 12% net gain mentioned in the contested Decision was not supposed to represent the general position, but simply to serve as an indication of the sort of variations which could exist between individual companies' situations and the average. Furthermore, France should have taken into account such concessions as the employers would have made even in the absence of State intervention; the impossibility of identifying these potential commitments showed the impossibility of demonstrating the neutrality of the measures in question. In addition, the Commission takes the view that the reorganisation of working time must inevitably have resulted in gains in competitiveness.

12 — Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 15; Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 41.

13 — Case 173/73 *Italy* v *Commission*, loc. cit., paragraph 13; Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 20 (hereinafter '*Kimberly Clark*').

14 — *Kimberly Clark*, loc. cit., paragraph 40.

15 — Ibid.

17. As a subsidiary ground for annulment of the contested Decision, France contends that the Decision should be annulled because France is required to recover from the participating undertakings the total amount of the sectoral reductions in social security contributions, without taking account of the costs arising from the corresponding commitments regarding employment and working time.

IV — Analysis

18. It is clear that neither of France's two main arguments nor its single subsidiary argument can succeed if its first argument fails. If the reduction in employers' social security contributions does not lose its character of a gratuitous advantage amounting to State aid [16] by reason of the corresponding costs to the employers of implementing the reorganisation of working time, then the claimed neutrality of the French scheme becomes irrelevant and with it the claim that any obligation to repay the aid should be limited to the net benefit to the employers. In the light of the view I take regarding the first French argument, I shall confine myself in this Opinion to outlining my reasons for taking that view.

19. France's argument is, essentially, that the reduction in employers' social security contributions in the relevant sectors represents one side of a bargain. The bargain as a whole should be considered when determining whether or not aid has been granted from public resources. It is, of course, the case that public authorities may enter into many kinds of bargains with undertakings without giving rise to a grant of State aid, provided that they act as would a normal economic agent. At its simplest, public authorities may purchase goods and services from undertakings, including those which are provided to the public on those authorities' behalf. The purchasing authorities must, of course, pay the market price. By the same token, public authorities or public undertakings may sell goods or services to undertakings, provided that a price lower than the market price is not charged without objective economic justification. [17] Public authorities may also purchase shares in undertakings, [18] or lend them money, [19] or guarantee their

16 — Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, paragraph 22; see also Case 61/79 *Amministrazione delle Finanze dello Stato* v *Denkavit Italiana* [1980] ECR 1205, paragraph 31.

17 — Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 28 to 30; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 10.

18 — Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraphs 31 and 32; Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraphs 20 and 21; Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraphs 18 to 20.

19 — Case C-301/87 *France* v *Commission*, loc. cit., footnote 12 above, paragraphs 38 to 41.

borrowings.[20] Again, however, the authorities must act in all such cases as would a private investor or economic agent of similar size.

20. The position becomes more complicated where public authorities engage to pay undertakings to provide goods or services or more intangible benefits, in the general public interest. Such benefits could include the adoption of good environmental practices in a particularly sensitive sector,[21] the inclusion of a certain amount of public-interest content in broadcasts,[22] the guaranteeing of a specified level of service on an unprofitable transport route,[23] or the provision of some other service of general economic interest.[24] Depending on the precise circumstances in which the authorities 'purchase' such benefits at market prices, it is possible to argue either that there is no aid element at all, or that there is aid which is, at least potentially, compatible with the common market. It is not necessary, for present purposes, to identify where precisely the dividing line lies. Suffice it to say that any argument that no aid is granted in such circumstances depends on the fact that the State or other public authority secures, in return for its direct or indirect payment to the providers, some valuable good *external to the undertakings concerned*. It is natural that public authorities are also concerned with the economic well-being of their territories and of undertakings established or operating therein, but any payment to certain undertakings designed simply to secure the interests of the latter — for example, improved profitability, better employee relations, or their very survival — without the provision of some *distinct* and *commensurate* good to the authorities must constitute aid within the meaning of Article 92(1) of the Treaty.

20 — Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 14.

21 — See, for example, Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206, p. 7.

22 — See Article 92(3)(d) of the EC Treaty. This issue was raised in the complaint underlying Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407. See also the protocol on the system of public broadcasting in the Member States attached to the Amsterdam Treaty amending the EC Treaty, which has not yet come into force.

23 — See, for example, Article 4(h) of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ 1992 L 240, p. 8, and, more generally, Article 77 of the Treaty, which refers to reimbursement for the discharge of certain obligations inherent in the concept of a public service as '*aid* ... compatible with the Treaty' (emphasis added).

24 — See, for example, Article 4c of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ 1990 L 192, p. 10, as amended by Commission Directive 96/19/EC of 13 March 1996 amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets, OJ 1996 L 74, p. 13, and, more generally, Article 90(2) of the Treaty.

21. In the present case, France argues that it provided for reductions in the social security contributions normally payable by employers in the sectors concerned in order to secure a benefit for the workers which would have no net effect on, or would result in only a *de minimis* net improvement in, the competitive position of the employers. Without affecting the overall cost structure of the employing undertakings, the existing workers could work for shorter periods without suffering proportionate losses in pay or holidays, fewer of them would be made redundant, and a certain number of unemployed young people would be engaged — all public-interest benefits which France would contend are external to the specific interests of the undertakings and payment for which by the authorities, through a bargain with the employers, falls, thus, outside the scope of the Treaty provisions on State aids.

22. Such an argument ignores, however, the real competitive situation of employers. Labour is one of the factors of production, and the terms on which workers make their labour available to undertakings constitute one of the key variables which will determine a company's competitiveness. The price, quality, periods of availability and flexibility in conditions of supply of labour are as important to undertakings as those of raw materials, capital goods and capital. It is one of the tasks of management to negotiate the best possible terms for the supply of all of these cost inputs. If the State intervenes to enable employers to pay for a concession by employee representatives regarding the reorganisation of working time which they were unable to achieve without such payment (as is evidenced by the stalled negotiations between the social partners in the present case), then the undertakings in question can be said to have been favoured through the use of State resources. As we have seen, the use of State resources, without objective economic justification, to subsidise cheap raw materials or credit for certain undertakings constitutes a grant of State aid. The situation should be no different where the State intervenes to enable employers to make concessions to workers regarding more flexible conditions for the supply of their labour. [25] In such cases, 'the authorities are taking over part of those firms' labour costs, which are normal expenditure incurred in their own interest and conferring a financial advantage that improves their competitive position'. [26]

25 — The situation is obviously different where the State makes *ex gratia* payments of a social nature to workers who have been made redundant over and above those which their former employer was required by law to make, as this has no effect on the labour costs of the undertaking. See Commission Decision 91/1/EEC of 20 December 1989 concerning aids in Spain which the central and several autonomous governments have granted to Magefesa, producer of domestic articles of stainless steel, and small electric appliances, OJ 1991 L 5, p. 18, discussed by Advocate General Jacobs in his Opinion in *Kimberly Clark*, loc. cit., paragraphs 67 to 69, and Commission Decision 92/328/EEC of 20 December 1989 concerning aid granted by the French Government for the disposal of assets of the MFL Group (Machines Françaises Lourdes), producer of heavy-duty machine tools, OJ 1992 L 182, p. 94.

26 — See paragraph 11 of the Commission Guidelines on Aid to Employment, OJ 1995 C 334, p. 4.

23. In such circumstances, the claimed public-interest aspect of the workers' enjoyment of the benefits outlined in paragraph 21 above strikes me as being less compelling. They enjoy, in effect, the subsidised price for their labour which the State enables certain undertakings to pay. Similar public-interest benefits, in terms of employment maintenance, are probably claimed in all cases where State operating aid saves an undertaking from insolvency, even though the net result may simply be the exportation of unemployment to other Member States [27] and pressure for equivalent subsidies there. [28]

24. The Court has already taken a similar view regarding the subsidisation of labour costs in *Steenkolenmijnen*. [29] In that case, the German Government sought to ensure an adequate labour supply for coalmining undertakings, without raising the price of coal for consumers, at a time when workers were being drawn away from the sector by more attractive pay and conditions in other fields. It did so by paying to each miner, for each full shift worked, a tax-free shift bonus to be paid by undertakings by deduction from tax paid on wages. In the light of the prevailing economic circumstances, although the bonus involved no financial concession by the undertakings concerned, it 'relieve[d] them of an addition to their costs which the undertakings would otherwise have [had] to bear and ..., although it [did] not reduce the present costs, the miners' bonus reduce[d] costs which they would inevitably [have] incur[red]'. [30] The Court included in the definition of aid 'interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking', [31] and concluded that the bonus constituted aid within the meaning of Article 4(c) of the ECSC Treaty.

25. Similarly, the Court found in Case 173/73 *Italy* v *Commission* that 'the partial reduction of social charges pertaining to family allowances devolving upon employers in the textile sector [was] a measure intended partially to exempt undertakings of a particular industrial sector from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system'. [32] The alleged 'social aim of the measure in

27 — Ibid.

28 — It appears that the scheme at issue in the present case led to pressure for similar aid in Germany. See footnote 11 to the Commission Notice on monitoring of State aid and reduction of labour costs, OJ 1997 C 1, p. 10.

29 — Loc. cit.

30 — Ibid., p. 27.

31 — Ibid., p. 19.

32 — Loc. cit., paragraph 15.

issue [could] not shield it from the application of Article 92'. [33]

26. *Kimberly Clark* [34] concerned the provision of public funds to support part of the costs of a social plan, which undertakings were obliged to draw up when laying off workers so as to contribute to the redeployment of workers and to post-redundancy training. The precise contents of such plans were not prescribed by law and might go beyond the requirements of the generally applicable rules. France argued that the mechanisms in question did not constitute State aid 'since their implementation [did] not help undertakings to meet their legal obligations and [called] for additional efforts on their part over and above the cost to them of strictly complying with the requirements of the ordinary law'. [35] Undertakings could decline to avail of the financial support available and devise their own minimal social plan. The disputed mechanisms, on the other hand, were 'intended to enable undertakings to do more than the minimum necessary to discharge their legal obligations regarding social plans'. [36] It transpired, however, that the French Government had failed to respond to the Commission's specific request for information on what the costs of a social plan would have been in the circumstances of that case if it had been limited to the minimum prescribed by French legislation. [37] The Commission was, thus, in the Court's view, entitled to conclude, on the information available to it when it adopted its decision in that case, that the funds provided for Kimberly Clark's social plan, rather than merely permitting a gratuitous additional benefit for employees, had relieved Kimberly Clark of certain legal obligations *vis-à-vis* its employees. [38] As a result, the Court did not take a position on France's argument regarding the subsidisation of voluntary additional commitments by undertakings to their workers or former workers. However, in the course of its reasoning, the Court reiterated the definition of aid as encompassing 'advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking'. [39] This definition makes no distinction between the voluntary or obligatory nature of the charges at issue.

27. The applicability to the facts of the present case of the above-quoted rulings of the Court on the definition of State aid is not, in my view, affected by the voluntary aspect of the employers' 'bargain' with the French State. In fact, this ensured that the aid need only be availed of by those

33 — Ibid., paragraph 13.
34 — Loc. cit.
35 — Ibid., paragraph 26.
36 — Ibid.
37 — Ibid., paragraph 36.
38 — Ibid., paragraphs 37, 39 and 40.
39 — Ibid., paragraph 34. This is a restatement in an EC context of the test set out in *Steenkolenmijnen*, loc. cit., p. 19, cited above; see also Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13.

employers who perceived that they could derive a net benefit from the combination of reductions in contributions, reorganisation of working time, maintenance of employment levels and concessions to workers. [40] Indeed, given the risk, of which any well-advised company should have been aware [41] (and to which the Commission asked the French Government to alert all participants in the scheme), that the aid would have to be repaid, it would have been unwise to accept the State's terms without the prospect of significant net gains. Furthermore, labour-related costs cannot be converted from a 'normal' budgetary charge into a 'special' one, outside the reach of Article 92 of the Treaty, by a series of agreements linked to a State regulatory regime, all of which agreements are designed to establish a link between the benefit and the obligation. As the Commission has pointed out, it is impossible to determine what concessions the employers would have agreed to in return for the reorganisation of working time if the State had not intervened. [42] More to the point, it is normally the purpose of aid to induce or enable undertakings to take steps which are not otherwise open to them in competitive conditions, whether it be to maintain employment, to engage in restructuring, or simply to continue operations in the face of otherwise imminent insolvency. This does not take away from the entirely 'normal' budgetary character of expenditure incurred by companies in such circumstances.

28. I would conclude, therefore, to use the terms already employed by the Commission in the contested Decision, that the sectoral reduction in employers' social security contributions at issue in the present case 'constitutes by its very nature and in its totality State aid'. It is not open to France to place the cost of the reductions in the balance with the cost of the employers' concessions to their workers in order to determine whether the State was engaging in contractual relations with the employers with a view to securing some distinct public benefit when it was, in reality, granting aid. Those concessions, if they were excessive in relation to what the employers would otherwise have been prepared to agree to, merely represent the inevitable distortion of participating employers' operating costs resulting from their acceptance of State aid on the State's terms. Thus, for reasons set out at the beginning of this section, there is no need to address France's second and third arguments.

40 — See the Opinion of Advocate General Jacobs in *Kimberly Clark*, loc. cit., paragraph 45, and that of Advocate General Darmon in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* [1993] ECR I-887, paragraph 44.

41 — See, for example, the Commission Communication of 24 November 1983, OJ 1983 C 318, p. 3.

42 — Even in a situation of extensive lay-offs, where an undertaking might be thought to have greater bargaining power over its workers, Advocate General Jacobs took the view that it could, none the less, derive certain advantages from concluding an agreement providing for more than the legally prescribed minimal benefits: see paragraph 62 of his Opinion in *Kimberly Clark*, loc. cit.

V — Conclusion

29. In the light of the foregoing, I recommend that the Court:

(1) dismiss the French Republic's application for the annulment of Commission Decision 97/811/EC of 9 April 1997 concerning aid granted by France to the textile, clothing, leather and footwear industries; and

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