OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 4 October 1989 *

My Lords,

1. In this case the French Republic seeks the annulment of Decision 87/585/EEC of the Commission of 15 July 1987 (Official Journal 1987, L 352, p. 42). In that decision, the Commission ruled that the French Government, by granting aid to Compagnie Boussac Saint Frères, had acted in breach of Article 93(3) of the EEC Treaty, that the aid was incompatible with Article 92, and that a part of the aid should be withdrawn by recovery. The United Kingdom has intervened in support of the defendant Commission.

The history

2. The textile sector in the European Community is a sensitive and difficult one. It is exceptionally fragmented both in that there are a very large number of small firms and in terms of the number of different products. In the 1960s and 1970s, increased competition from low labour-cost countries and opening-up of the textile and clothing market caused severe difficulties for the Community industry. The Commission points out in the contested decision that one million jobs, representing nearly 40% of total employment in the industry, were lost between 1975 and 1985.

3. The Boussac group was mainly established before the Second World War and became at one time after the war the biggest French textile company. However, it did not adapt well to the changing conditions referred to above and on 30 May 1978 a receiver was appointed ('règlement judiciaire'). Through its subsidiary Saint Frères, the Willot group took over the Boussac company to form Boussac Saint Frères. However, despite efforts at reorganization and closing down of unprofitable lines, in 1981 almost all the companies comprising the group were put into receivership. At the end of 1981, it became clear that no industrial or financial group was prepared to offer a rescue package for the whole of the group. Its dismantling was not considered appropriate for various reasons, including the social costs thereof, and so public money stepped in. The firm Arthur D. Little was instructed to make a detailed study and proposed a reorganization. The IDI (Institut de développement industriel) and secured creditors (banks) contributed the capital to a new management company which would oversee the operations of what was now to become Compagnie Boussac Saint Frères or CBSF (to which I shall refer as 'Boussac'). It is not disputed that considerable further sums of capital were then given to the company by Sopari (the Société de participation et de restructuration industrielle) which is a

* Original language: English.

subsidiary of IDI. Both these bodies have been accepted, for the purposes of this case, as organisms of the State.

The procedure

4. I must set out the procedural steps in some detail, since the details are essential to an assessment of several of the procedural issues on which France seeks the annulment of the Commission's decision.

5. On the basis of information derived from sources other than the French authorities, the Commission by telex of 12 July 1983 requested the French Government to provide information relating to the amount and form of aid envisaged for Boussac in the hygienic paper sector. Receiving no reply, the Commission sent a further telex on 22 February 1984. On 22 March 1984, the French authorities sent a brief reply to the effect that Boussac was planning a new production site for its Peaudouce subsidiary at Roanne (Loire) as part of the development plan for Boussac, the development plan as a whole being financed by Sopari, which was referred to as the majority shareholder in Boussac. The reply concluded by stating that no special public assistance was envisaged for the Roanne investment, the cost of which was approximately FF 120 million.

6. By a further telex of 12 July 1984, the Commission asked for a list of all measures taken by IDI for the benefit of Boussac since December 1981, the date on which, the Commission claimed, specific instructions were given by the French Prime Minister to IDI to rescue Boussac. The Commission also stated that it had learned that IDI had decided to make a loan of FF 180 million to Boussac at a reduced rate of interest, such a loan being an aid which had to be notified to the Commission as a proposal under Article 93(3) of the Treaty. The Commission reminded the French Government that any aids granted contrary to the Treaty might have to be repaid.

7. In a further somewhat laconic letter dated 22 August 1984, the French Government informed the Commission that IDI had provided FF 100.1 million (50.1%) of the initial capital of the new company and that that holding had later been transferred to Sopari. It added that Sopari had, at the beginning of 1984, provided FF 180 million to Boussac and that a further grant of FF 200 million was in the course of being made. By letter dated 3 December 1984, the Commission informed the French Government that it was commencing the procedure provided for in Article 93(2) of the Treaty, and gave the government notice to submit its comments. In its letter, the Commission pointed out that, while the government had provided some information by the letter of 22 August 1984 in response to the Commission's three telexes, the Commission had still not received a notification under Article 93(3) of the Treaty. On 4 February 1985, the French Government replied, again very briefly, mentioning the above interventions of FF 100.1 million, 180 million and 200 million, and suggesting that they fell within Article 92(3)(c) of the Treaty.

8. The Commission requested further information on 14 March 1985 and, receiving no

reply, sent a reminder on 14 May 1985. On 4 June 1985, the French Government provided further information which was then supplemented by letters of 11 October 1985, 5 February and 19 June 1986. That further information consisted largely of various technical notes seeking to show that the financial interventions were part of a restructuring and development plan for the company resulting in a reduction in both capacity and employment. Three meetings also took place between officials of the Commission and of the French Government on 18 October 1985, 14 May and 4 July 1986, and further information was supplied to the Commission under cover of a letter dated 21 July 1986.

9. The Commission presumably having made it clear that it was not satisfied by the arguments of the French Government, the French Minister for Industry, Post and Telecommunications and Tourism wrote on 10 November 1986 to the then Commissioner for Competition, Mr Sutherland, expressing the Minister's concern that reports in the press were indicating that a large sum would have to be recovered and requesting him to think again. Mr Sutherland replied by letter of 4 December 1986 stating that he could not accept the arguments of the Minister and would be recommending the Commission to take a negative decision.

10. On 8 December 1986, the then Prime Minister of France, Mr Chirac, wrote to the President of the Commission, Mr Delors, suggesting that there were still misunderstandings and divergencies between the two sides as to the exact amount and the purpose of the aid provided and suggesting that a further examination would lead to a solution of the problems. On 17 December 1986, the Commission decided that the aid was not in conformity with the common market but also decided to discuss further with the French Government the amount of aid provided, the amount that should be recovered and the methods of recovery. Several further approaches by the Commission, including a reply by Mr Delors to Mr Chirac, produced no immediate response.

11. In a letter dated 19 February 1987, the French Prime Minister nominated an 'interlocutor', Mr Gadonneix, to examine with the Commission services the extent to which any support given to Boussac might contain elements of aid incompatible with Community rules. On 27 March and 21 May 1987, two memoranda drawn up by Mr Gadonneix were sent to the Commission. In a covering letter sent with the first of these memoranda, he drew particular attention to three elements which should be taken into account by the Commission. These elements were, first, that notice should be taken of the extent of restructuring and of the importance of reduction in capacity on the part of Boussac; secondly, that State assistance had been accompanied by considerable private investment and thirdly, that the company was in a fragile financial situation which should not be destabilized further.

The decision

12. The Commission was not persuaded, and on 15 July 1987 it adopted the contested decision, finding that the

measures at issue did indeed constitute unlawful aid. The decision is a complex one but, if one works back from the operative part, one finds that the decision focused on three measures or series of measures. First, there were the capital injections of FF 333.1 million made by Sopari in July 1982 to restore and increase the company's capital, and further capital injections of FF 110 million in June 1984 and FF 190 million in January 1985, making a total of FF 633.1 million. Secondly, there were advances by Sopari of FF 36.8 million granted in June 1984 and loans at low interest rates totalling FF 295 million made at various dates between December 1982 and January 1985, producing a further total of FF 331.8 million. Thirdly, the sum of FF 35 million was paid to the company in June 1983 by way of reduction in employers' social security contributions, in breach of an earlier decision of the Commission, Decision 83/245/EEC of 12 January 1983 (Official Journal 1983, L 137, p. 24), a decision with which the Court found in Case 52/83 *Commission* v *French Republic* [1983] ECR 3707 that France had failed to comply. Of the grand total thus established of FF 999.9 million, the Commission calculated that the net economic advantage granted to Boussac was FF 685.86 million. Of that total amount of aid, the Commission discounted, for reasons set out at point X of its decision, the sums paid out by Boussac to meet the cost of transferring certain production sites and employees to independent companies which had subsequently ceased production, sums amounting to FF 347.3 million. That left FF 338.56 million to be repaid by Boussac.

13. Reflecting those findings, Article 1 of the Commission's decision is drawn up in the following terms:

'The capital injections of FF 633.1 million provided by Sopari, after transfer from IDI, loans of FF 331.8 million at reduced interest rates and reductions in social security charges of FF 35 million granted under the respective textile and clothing aid scheme, all awarded to Boussac Saint Frères, a major producer of textiles, clothing and paper products, during the period between 1982 and 1985, and of which the French Government belatedly informed the Commission by telex of 22 March and letter of 23 August 1984, and under the procedure of Article 93(2) by letters of 4 February, 4 June and 11 October 1985, 5 February, 19 June and 21 July 1986, and 27 March and 21 May 1987 are illegal as they were provided in violation of the provisions of Article 93(3) of the EEC Treaty. Moreover, they are incompatible with the common market within the meaning of Article 92 of the Treaty.'

Article 2 of the decision required that of the FF 685.86 million paid, a total sum of FF 338.56 million should be recovered ('withdrawn by recovery'; in the French text 'restituée').

The grounds of challenge

14. By application lodged at the Court on 4 October 1987, the French Republic seeks annulment of that decision. It relies on four sets of submissions: first, it raises a series of procedural issues; secondly, it submits that the decision was in breach of Article 190 of the Treaty in that in various respects it was based on insufficient reasoning; thirdly, it contends that the decision was in various

respects contrary to Article 92 of the Treaty; and finally, it submits that the decision infringed the principle of proportionality.

15. The Commission, supported by the United Kingdom, rejects all these submissions. I shall consider the submissions in turn, adopting in each case the sequence followed by the French Republic in its application.

I — Procedural issues

16. I start then with the procedural issues raised by the French Government.

Notification

17. The French Government first submits in effect that even if, which it denies, the measures were aids which it was required to notify, then it did comply with its obligations under Article 93(3) of the Treaty. Article 93(3) reads as follows:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

18. Article 93(3) thus requires that a proposed aid must be notified to the Commission before it is implemented. The suggestion advanced by the French Government that it complied with its obligations under Article 93(3) cannot be accepted, since it is plain that the Commission was not informed in advance of the aid being given. The aid was provided between 1982 and 1985 and the first indication from France that any aid was being given at all was in the letter of 22 March 1984. That letter related as I have mentioned to assistance for the Peaudouce subsidiary of Boussac which is not in issue in these proceedings and contained no reference to the various measures which are in issue. The first indication of the measures which are in issue was given in the letter of 22 August 1984 but no proper notification was made either then or thereafter and it was not until the note sent to the Commission on 21 July 1986, that is, more than 18 months after the Commission had initiated the procedure provided for by Article 93(2), that all the aid given was assembled together in one comprehensible memorandum. In those circumstances, I consider that the French Republic has manifestly failed to comply with its obligation to notify the Commission in advance of the aid being given.

19. As for the French Government's argument to the effect that it is not open to the Commission to lay down the formal requirements of prior notification, and that such requirements can only be laid down by the Council pursuant to Article 94 of the Treaty, that argument is of no assistance to the government where it has failed, as here, to notify in any form. The French Government's contention that the guidance given by the Commission's letter of 2 October 1981 on the form of notification must be regarded as indicative and not normative is therefore not in point. In any

event, the obligation to notify proposed aids is of such manifest importance for the functioning of the common market that, in the absence of any Council regulations on the matter, it is plain that the obligation must be rigorously observed both as to content and as to form, and that it is essential, in particular, that the notification should make it clear beyond doubt that its purpose is to enable the Commission to submit its comments under Article 93(3) and if necessary to initiate the procedure provided for in Article 93(2) before the proposed aid is implemented. I consider also that, as is submitted by the United Kingdom, compliance with the guidance given by the Commission's letter of 2 October 1981, on the information required by the Commission to enable it to carry out its tasks under Article 93(3), is a matter to be taken into account in determining whether a Member State has complied with its obligations under the Treaty, having regard also to Article 5 of the Treaty.

Delay

20. The French Government next complains of delay by the Commission. First, it is said that the Commission did not comply with the requirements laid down by the Court in Case 120/73 *Lorenz* v *Federal Republic of Germany* [1973] ECR 1471 and Case 84/82 *Federal Republic of Germany* v *Commission* [1984] ECR 1451. There the Court held that the Commission must act diligently and with due expedition during the preliminary phase of the procedure under Article 93(3) and must take a position within a reasonable period, which the Court set at two months, on the expiry of which the Member State concerned may implement the proposed aid, after giving the Commission prior notice. If the Commission considers, after its preliminary examination, that the aid is not compatible with the common market, then it must initiate the procedure provided for in Article 93(2) without delay. Here the French Government contends that the Commission was informed of the measures on 22 March 1984 but did not initiate the procedure under Article 93(2) until 3 December 1984. However, the letter of 22 March 1984 related, as already mentioned, to measures which are not in issue in these proceedings, and the subsequent information was provided after the financial assistance in question had already been granted. Consequently, it is not open to the French Government to rely on the principles laid down by the Court in relation to proposals to grant aid which are duly notified in advance.

21. It is also argued by France that the Commission's decision was vitiated by the length of time taken and that that delay gave rise to a legitimate expectation that the Commission would not in the end object to the aid. A lengthy delay on the part of the Commission may indeed give rise to such a legitimate expectation: see judgment of 24 November 1987 in Case 223/85 *Rijn-Schelde-Verolm Machinefabrieken en Scheepswerven NV* v *Commission* [1987] ECR 4617. While the period involved in this case was indeed long, the reasons for that are largely attributable to the conduct of the French authorities. As already mentioned, it was not until 22 August 1984 that the Commission received any information about the involvement of IDI and Sopari in Boussac. During 1985 and most of 1986 the Commission was experiencing difficulty in getting coherent information from the French authorities and, as I have

suggested above, it was not until 21 July 1986 that the full amount of the aid given became clear. Mr Sutherland's letter of 4 December 1986 in reply to the French Minister for Industry makes it clear that he, as Commissioner responsible for competition, was proposing to recommend a negative decision to the Commission at its meeting of 17 December 1986. It is apparent from the facts set out above that further delay was the result of pressure from the French authorities themselves and it is not open to the French Government in my view to criticize that delay. Moreover, even when the French Minister for Industry and then the Prime Minister urged the need for further discussion and clarification, the President of the Commission made it clear in his letter of 20 January 1987 to the French Prime Minister that, as far as the Commission was concerned, that discussion would be limited to establishing the exact amounts of the aid given and the method of recovering it, rather than to establishing whether or not the aid was illegal. Following the two further memoranda from the French interlocutor (which themselves required some prompting from the Commission), the Commission finally took its decision on 15 July 1987.

22. In these circumstances, the Commission cannot in my view be criticized for delay in the first part of the period in question down to July 1986, since it was unable to obtain full and clear information on the transactions concerned; and even if after that date it might have acted more swiftly and perhaps also more robustly in response to pressure, it is not open to the French Government to criticize delay in that respect, still less to invoke legitimate expectations.

The right to a fair hearing

23. The French Government submits that the 'rights of the defence' were not respected by the Commission in that it did not disclose the comments received, under the Article 93(2) procedure, from interested third parties. It appears that the Commission received comments from four Member States, six federations and one individual undertaking. It is well established that the right to be heard is a fundamental principle of Community law and in Case 259/85 *France* v *Commission* [1987] ECR 4393, the Court held, following its previous decisions in Cases 234/84 and 40/85 *Kingdom of Belgium* v *Commission* [1986] ECR 2263 and 2321, that that principle requires that the Member State in question must be enabled effectively to make known its views on the observations which interested third parties have submitted under Article 93(2) and upon which the Commission proposes to base its decision. The Court further held that, in so far as the Member State has not been afforded the opportunity to comment on those observations, the Commission may not use them in its decision against that State. Since the Court referred in Case 259/85 *France* v *Commission* to observations 'on which the Commission proposes to base its decision' (a form of words slightly different from that used in the cases brought by Belgium just cited) there may be room for disagreement about the precise scope of the principle and its application to the facts. There may also be, in some cases, practical difficulties of a kind alluded to by the Commission at the hearing if third parties were deterred from submitting observations. In my view, it is for the

Commission to find solutions to any such difficulties, since the Commission must scrupulously observe the correct procedure under Article 93(2), including respect for the rights of the Member State concerned, just as Member States must scrupulously comply with their obligations under Article 93(3).

24. In the present case I consider that the Commission did not observe the correct procedure. It is unnecessary to elaborate the point, however, since that irregularity does not here entail the annulment of the Commission's decision. The Court made it clear in Case 259/85 *France*, cited above, that for such an infringement of the right to a fair hearing to result in annulment it must be established that, had it not been for that irregularity, the outcome of the procedure might have been different. In the present case the Commission offered, at a late stage in the proceedings, to produce the observations in question and did in fact produce them in response to a request from the Court. While that of course does not cure the irregularity, it is clear from reading those observations that they added nothing to the sum of the Commission's knowledge; nor was it suggested by the French Government, after the observations were finally communicated, that they could have affected the outcome of the procedure. Such a contention might in any event have been difficult to sustain, given the very close and lengthy consultations between the Commission and the French authorities throughout the later stages of the proceedings. I therefore do not consider that the Commission's decision should be annulled on this ground.

Effects of failure to notify

25. The final procedural issue raised by the French Government concerns the effects of a failure to notify a proposed aid. The issue is that of the scope of the Commission's powers in a case where a Member State fails to fulfil its obligation to notify a proposed aid under Article 93(3) of the Treaty. The subject has been raised in several cases currently before the Court and has been fully expounded in the recent Opinion of Advocate General Tesauro in Case 142/87 *Kingdom of Belgium* v *Commission*. I will confine my discussion to the issue as it falls to be decided in the present case. Here it arises in the following way. In the operative part of its decision the Commission held that the measures in question 'are illegal as they were provided in violation of the provisions of Article 93(3) of the EEC Treaty'. The Commission went on to find, as if on a subsidiary basis, that the measures were also incompatible with the common market within the meaning of Article 92. In the reasoning given for its decision (point III), the Commission stated as follows:

'Therefore, all this aid had to be notified to the Commission as provided for by Article 93(3). Since the French Government failed to notify the aids in question in this case in advance, the Commission was unable to state its views on the measures before they were implemented. Thus, the aid is illegal in relation to Community law from the time that it came into operation. The situation produced by this failure to fulfil obligations is particularly serious since the aid has already been paid to the recipient. Furthermore, as confirmed by the French Government, FF 290 million had been granted even after the Commission had initiated the formal examination and procedure under Article 93(2) on 21 November 1984. Hence, all the aid is regarded

as being illegal under Community law. In this respect it has to be recalled that, in view of the imperative character of the rules of procedure as laid down in Article 93(3) which also are of importance as regards public order (in the French text "compte tenu du caractère impératif et d'ordre public des règles de procédure fixées par l'article 93 paragraphe 3"), the direct effect of which the Court of Justice has recognized in its ruling of 19 June 1973 in Case 77/72, the illegality of the aids at issue here cannot be remedied *a posteriori*. The illegal character of all aid at issue here results from the failure to respect the rules of procedure as laid down in Article 93(3). At the same time, this aid is incompatible with the common market under Article 92 of the EEC Treaty.

Moreover, in cases of aid incompatible with the common market the Commission making use of a possibility given it by the Court of Justice in its judgment of 12 July 1973 in Case 70/72 confirmed in the judgment of 24 February 1987 in Case 310/85, can require Member States to recover aid granted illegally from recipients.'

26. In its application, the French Government characterizes the Commission's reasoning as follows. The non-observance of the procedural rules laid down by Article 93(3) of the Treaty makes the measures in question unlawful *per se*, and definitively, so that those measures can no longer be rendered lawful. The illegality for procedural defects therefore makes pointless any examination on the substance and in itself justifies a sanction of recovery.

27. The French Government denies that the measures in question can be regarded as unlawful by reason of a procedural infringement. It argues that the Commission's reasoning is illogical: while stating that an examination of the merits is unnecessary because of the *per se* illegality of the aid, the Commission has in fact carried out such an examination. It is moreover contrary to the principles of equality of treatment and the protection of legitimate expectations for the Commission to raise the issue of *per se* illegality in relation to a breach of procedural rules which occurred some four or five years previously. The French Government argues that it follows from the scheme of Article 92(2) and (3) and from the case-law of the Court that the Commission is obliged to carry out an examination of the merits before finding that an aid is illegal. It adds in its reply that failure to carry out such an examination could result in perfectly acceptable aids being struck down on purely formal grounds.

28. It will be observed that the French Government's version of the Commission's reasoning does not precisely tally with the actual reasoning used in the decision: in particular, it appears from the final paragraph of the extract from the decision given above that the Commission relies not on the breach of Article 93(3) as providing a basis of recovery, but rather on the aid's alleged incompatibility with the common market.

29. None the less, the reasoning of the Commission as it emerges from its pleadings in this case does come very close to the version given by the French Government. In its defence the Commission argues that the breach of formal requirements is quite distinct from the substance and constitutes

an autonomous ground of illegality, a form of *per se* illegality which, as it stated also in the reasoning of its decision, cannot be remedied *a posteriori*. Here the Commission appears to take the view that in such a case it, and consequently the Court, *cannot* consider the compatibility of the aid. Indeed, the Commission states that it attaches importance to the Court's drawing all the consequences from the breach of procedural rules and not proceeding to consider the merits. Such an approach (which the Commission concedes is a new one) would result, it considers, in important savings of work and time in regard to the procedure for the investigation of aids under Article 93(2). It would also discourage Member States from avoiding their obligation to notify and would 'help to resolve problems in connection with the recovery of aids'.

30. The United Kingdom in its intervention contests the Commission's view that a failure to respect the rules of procedure provided for under Article 93(3) would make the aids unlawful *per se*. It argues that the Court's case-law concerning the direct effect of the last sentence of Article 93(3) is perfectly compatible with the view that a Member State's failure to notify an aid does not exonerate the Commission from the duty to establish that the aid is prohibited by Article 92. Moreover, the view that an aid is illegal purely by reason of a failure to notify is inconsistent with the language and objective of Article 93 and could result in the condemnation of a Member State whenever it failed to notify, irrespective of the nature of the alleged aid and even where the failure to notify was the result of an innocent omission. The United Kingdom also submits that it is unnecessary for the Court to resolve the issue in this case, on the ground that the payments are of such a magnitude and character that the Court can readily determine whether they were liable to affect trade between Member States; and can also determine whether the Commission had before it information to warrant its conclusion that the payments amounted to aid incompatible with the common market.

31. Attractive though it is, I am unable to accept the United Kingdom's contention that it is unnecessary for the Court to resolve the issue raised by the French Republic. The decision of the Commission which is challenged in this case was based primarily, in the terms of Article 1, on the violation of the provisions of Article 93(3) of the Treaty. If the French Government is correct in its contentions on that issue, then the Commission's decision must be annulled in that respect at least. Moreover, given the importance which the issue of *per se* illegality and its implications assumed in the argument before the Court, and in particular at the hearing, I must in any event express a view.

32. Before doing so, I would recall that, while Article 93 does not on face value empower the Commission to initiate the Article 93(2) procedure where an aid has not been notified, the Court held in Case 173/73 *Italy* v *Commission* [1974] ECR 709 that the Commission does have that power. The Court also held that the Commission is not required in such a case to follow the Article 93(2) procedure in all

respects: in particular, there was no requirement in such a case to fix a time-limit for compliance. The Court held (at paragraph 14) that an interpretation of Article 93 to the effect that a new aid granted in breach of Article 93(3) should be subject only to the procedure prescribed in Article 93(2), including the compulsory fixing of a time-limit, was

'unacceptable because it would have the effect of depriving the provisions of Article 93(3) of their binding force and even that of encouraging their non-observance'.

The Court added (at paragraph 16):

'Moreover, the spirit and general scheme of Article 93 imply that the Commission, when it establishes that an aid has been granted or altered in disregard of paragraph (3), must be able, in particular when it considers that this aid is not compatible with the common market having regard to Article 92, to decide that the State concerned must abolish or alter it, without being bound to fix a period of time for this purpose and with the possibility of referring the matter to the Court if the State in question does not comply with the required speed.

In such a case, the means of recourse open to the Commission are not restricted to the more complicated procedure under Article 169.'

33. The question resolved in Case 173/73 was whether the Commission could use the Article 93(2) procedure at all, and if so subject to what modifications, where an aid had not been notified. But the above extracts from the judgment are helpful also in considering the present issue, which is whether a finding of illegality under Article 93(2) can be based upon a breach of Article 93(3).

34. Plainly, Article 93(2) does not explicitly confer any such power: by its terms, it enables the Commission to condemn an aid on the ground of incompatibility with the common market, not on the ground of breach of Article 93(3). The issue must, however, as the Court indicated in Case 173/73 *Italy*, be considered in the light of the scheme and purpose of Article 93, and in particular of paragraphs 2 and 3. Article 93(2) establishes a procedure of prior examination by the Commission of proposed aids with a view to preventing the introduction of aids which are incompatible with the common market. To that end, Article 93(3) requires Member States to notify plans for new aids to the Commission and not to implement those plans unless and until the Commission has given its approval. It would be inconsistent with that scheme and purpose if a Member State could ignore the requirements of Article 93(3) without fear of sanction.

35. Moreover, it is already plain that the powers of the Commission under Article 93(2) cannot be confined by the literal wording of that article. For instance, the language of Article 93(2), which empowers the Commission to decide that aid shall be abolished or altered, appears to be addressed only to existing aids, but the power of the Commission to act under that provision in respect of proposed aids is undisputed. Nor, as the Court expressly recognized in Case 173/73 *Italy*, is the language of Article 93(2) to be read literally

in relation to an aid implemented without notification since in such a case, as the Court there held, the Commission is not required to fix a period of time for compliance with its decision. In addition, the literal wording of Article 93(2) does not of course confer on the Commission the power to order recovery of an aid, a power which the Court has nevertheless recognized. All the above considerations suggest, at the least, that the Commission's powers under Article 93(2) should not be viewed restrictively.

36. The argument to the effect that the obligations imposed on Member States by Article 93(3) are only procedural, and that no substantive prohibition can be derived from them, must also be rejected. As a preliminary point, it may be mentioned that the prohibition under Article 92(1) expressly applies to all aid of the type there specified, 'save as otherwise provided in this Treaty'. It could even be contended that aid which has been implemented in breach of Article 93(3) has not been granted 'as provided in the Treaty' and is therefore prohibited by Article 92(1) as incompatible with the common market on that ground alone.

37. But there are broader considerations which support the conclusion that a failure by a Member State to comply with its obligations under Article 93(3) may have substantive consequences. That is indeed implicit, in my view, in the previous case-law of the Court on the direct effect of the last sentence of Article 93(3), which, although not directly relevant in the present case, is rightly relied upon by the Commission, even if the Commission has not explained its significance. As the Court stated (at paragraph 8) in Case 120/73 *Lorenz* already cited:

'... the direct effect of the prohibition extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period, and where the Commission sets in motion the contentious procedure, up to the final decision'.

It follows, in my view, that in the event of an infringement of the prohibition, whether because a new aid is implemented without having been notified, or because a notified aid is implemented prior to clearance by the Commission, the national courts, on application by any interested party, are required to give effect to the prohibition. In giving effect to that prohibition, it is clear, in my view, that the national courts are not limited to procedural measures, consisting of a provisional block on further implementation. On the contrary, they are required to decide that any measures already taken in defiance of the last sentence of Article 93 are unlawful, and to provide for all appropriate available remedies, including the repayment of assistance already paid. Only in that way can they satisfy the requirement of providing an effective remedy, a requirement which is inherent in the notion of a directly enforceable right.

38. If it is open to national courts to find that an aid implemented without notification is illegal on the ground of failure to notify, then it must, in my view, also be open to the Commission, which has the principal responsibility for the control of State aids, to decide that such an aid is illegal solely on that ground.

39. But the essential consideration in determining the scope of the Commission's powers is, in my view, to be found in the principle of effectiveness (*effet utile*). That principle requires a broad interpretation of those powers, in view of the essential importance of the provisions of Article 93 for ensuring the proper functioning of the common market, a significance which has been repeatedly emphasized by the Court (see, for example, Joined Cases 91 and 127/83 *Heineken Brouwerijen BV* v *Inspecteur der Vennootschapsbelasting* [1984] ECR 3435, paragraph 20). At the hearing, the Commission's agent stressed the difficulties created by the repeated failure of certain Member States to comply with their obligations under Article 93(3) of the Treaty. It is self-evident that the Commission is hindered from exercising in such cases the powers which the Treaty confers upon it under Article 93(2). From the very fact that Member States are required by the Treaty not to implement proposed aid until it has been cleared by the Commission, it can in my view properly be inferred that where a Member State acts illegally, the Commission must be regarded as vested with the broadest powers.

40. It will be recalled that the Court relied on considerations of effectiveness in Case 173/73 *Italy* when ruling that the Commission need not fix a time-limit when using the Article 93(2) procedure in relation to a non-notified, implemented aid. An extensive interpretation of the Treaty, considered necessary to make the Treaty provisions effective, has also been adopted in the context of the enforcement provisions on State aids, where the Court has accepted that the Commission can obtain an interim order against a Member State in proceedings brought under Article 93 or Article 169: see Cases 31/77 R and 53/77 R *Commission* v *United Kingdom* and *United Kingdom* v *Commission* [1977] ECR 921 and Case 61/77 R *Commission* v *Ireland* [1977] ECR 1411. Moreover, in Case 70/72 *Commission* v *Federal Republic of Germany* [1973] ECR 813, paragraph 20, the Court stated that Article 93(3) 'involves the power of the Commission to take immediate interim measures, where necessary'. It is relevant to add that the Court has adopted a similar approach in relation to proceedings of the Commission for the enforcement of Articles 85 and 86 of the Treaty — articles which are contained in the same chapter of the Treaty, entitled 'Rules on Competition', as are Articles 92 to 94 on aids granted by States (see, for example, Case 792/79 R *Camera Care Ltd* v *Commission* [1980] ECR 119).

41. Although in the present case the Commission has combined in one decision its findings on illegality for breach of Article 93(3) and for incompatibility with the common market, it is in my view open to the Commission to take an interim decision once it finds a breach of Article 93(3), with the possibility subsequently of examining the substantive issues of the compatibility of the aid with the common market.

42. For these reasons, the Commission is in my view entitled to take a decision under Article 93(2) finding that an aid implemented without notification is on that ground unlawful. I am not persuaded by the argument of the French and United Kingdom Governments that this approach could result in the condemnation of aids

which are not in fact incompatible with the common market: the way to avoid this potential problem is precisely the notification procedure foreseen in Article 93(3). In any event, as mentioned above, the substantive illegality of an aid for breach of the Article 93(3) requirements can already be relied upon before national courts, regardless of whether the aid in question could on a proper construction be regarded as compatible with the common market.

43. On the question whether a finding of illegality for breach of Article 93(3) alone could provide a basis for recovery, it does not appear necessary for the Court to decide that point in this case. This is because the Commission has not relied on that ground as a basis for recovery in the contested decision; as pointed out above, although the Commission's pleadings are not unambiguous on this issue, its decision bases the requirement of recovery not on the *per se* illegality of the aid, but on the incompatibility of the aid with the common market. None the less, if it were necessary to decide the point, I would agree with the view expressed by Advocate General Tesauro in Case 142/87 *Belgium* v *Commission* that the Commission has the power to order recovery of an aid on grounds of breach of Article 93(3) alone.

44. A further question is whether, having found that an aid is illegal for breach of the Article 93(3) notification requirements, the Commission is empowered or required to go on to examine the merits of the aid. I consider, contrary to the position which the Commission has taken in argument in this case, that the Commission may go on to examine the compatibility of a non-notified aid. In the absence of any implementing legislation adopted pursuant to Article 94, the Commission must be regarded as having both a wide range of powers and the maximum flexibility in exercising them. The position in respect of Article 93 is different from the position under Article 85 of the Treaty, where implementing legislation in the form of Article 6 of Council Regulation 17, of 6 February 1962, first regulation implementing Articles 85 and 86 of the EEC Treaty (Official Journal, English Special Edition 1959-62, p. 87), expressly precludes the Commission from granting an exemption to an agreement which has not been notified: see Case 30/78 *Distillers* v *Commission* [1980] ECR 2229. In my view, the Treaty neither requires the Commission to go on to examine the compatibility of an aid in every case — and this is the one point on which I venture to disagree with the Opinion of Advocate General Tesauro in Case 142/87 *Belgium* — nor does it prevent it from doing so where appropriate. In deciding whether to consider the compatibility with the common market of aid which has not been notified, the Commission is entitled to take account of such factors as the nature of the failure to notify, the nature of the aid and any consequences which may already have followed from the failure to notify, such as whether the aid has been repaid. As Advocate General Tesauro points out in Case 142/87 *Belgium* (paragraph 12), it may sometimes be important in the general interest to establish whether or not the aid is lawful on the merits. As for the Commission's submission that neither the Commission nor the Court can consider the compatibility of a non-notified aid, it perhaps goes without

saying that, where the Commission does choose to examine the compatibility of the aid, its decision on that issue will be subject to review by this Court, even if the Commission has also found that the aid is illegal for breach of Article 93(3).

45. To sum up: the Commission has in this case based its decision that the aids were illegal both on breach of Article 93(3) and on the incompatibility of the aids with the common market: I consider that it was entitled to base that decision on both factors. The Commission has based its order for recovery on the latter ground, as it was plainly entitled to do. Although the Commission's reasoning and arguments are in some respects open to criticism, it succeeds in my view on the essential points. I would therefore reject the final submission raised by the French Republic on the procedural issues in this case.

II — Reasoning of the Commission's decision

46. The French Government contends that in various respects the Commission's decision is inaccurately or inadequately reasoned.

Market share and effect on trade

47. The French Government first contends that the Commission's decision contains incorrect statements on the undertaking's market share and on trade. The French Government criticizes in particular the Commission's statement in its decision that 'in the period between 1982 and the end of 1984, that is when the aid was granted, textile exports to other Member States increased by 32%'. The French Government also refers to the Commission's statement that about 40% of the products of the French textile industry is exported and says that the figure is only 16% for Boussac which moreover has less than 0.5% of the European market. In my view, these points are concerned not so much with the adequacy of the Commission's reasoning, as with its assessment of the impact of the aid on trade and competition, an issue which is considered below (at paragraphs 57 to 63).

The Commission's alleged failure to show why liquidation of the undertaking was preferable to restructuring

48. Relying on a passage in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, at p. 3832, paragraph 39, the French Government submits that the Commission 'has not shown why the applicant's activities on the market, following the conversion of its production with the assistance of the aid granted, were likely to have such an adverse effect on trading conditions that the undertaking's disappearance would have been preferable to its rescue'.

49. The passage is, however, taken out of context. When it is read in the context of the whole of the relevant part of the *Intermills* judgment (paragraphs 34 to 39), then it is plain that the passage reflects the special circumstances of that case and cannot be given a broader significance. In the *Intermills* case, the Court found that the Commission had failed to show why an aid

in the form of a capital holding in an undertaking had adversely affected competition to an extent contrary to the common interest in circumstances where the contested Commission decision had acknowledged that a restructuring operation had taken place and where the Commission had moreover failed to explain why the aid in question could not be seen as part of that restructuring operation. In the present case, the Commission has set out fully, at parts V to VIII of its decision, its reasons for finding that there was no genuine restructuring of Boussac. In my view, there is therefore no parallel to be drawn with the *Intermills* case, and this submission must be dismissed.

Other alleged defects of reasoning

50. Nor do I consider that the Commission confined its assessment, as the government alleges, to a mechanical check on the compatibility of the aid with its own guidelines and failed to take account of Boussac's reductions in staff and capacity. On the contrary, the decision shows that the Commission fully considered the application of its guidelines and specifically refuted the government's claims concerning the alleged decrease in output.

III — Substance

51. The next set of grounds relied on by the French Government raises issues of substance.

Whether the assistance constituted aid

52. In the first place, the French Government contends that the sums provided were not aids within the meaning of Article 92 of the Treaty. The French Government points out that the relevant test was laid down in Case 234/84 *Kingdom of Belgium* v *Commission* [1986] ECR 2263, where the Court held:

'In the case of an undertaking whose capital is held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question . . .

. . . a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganization.'

53. The French Government argues that the aid to Boussac fulfilled that test. It also fulfilled the criteria laid down by the Commission itself in a document concerning holdings by public authorities (SG(84) D 11839) in that it must be regarded as having been granted 'in circumstances which would be acceptable to a private investor operating in the normal conditions of a market economy'. In this context, the French Government points to the analysis by the firm Arthur D. Little which suggested that the undertaking was viable and could by means of restructuring reach a normal level of profitability within a reasonable period. It

also points out that a restructuring programme was adopted and regularly revised and updated. In addition, the French Government argues that substantial contributions were made by the private sector and that this was ignored by the Commission. Indeed, it asserts in its application, on the basis of the figures set out in the memorandum of 21 May 1987 from the 'interlocutor', Mr Gadonneix, that sums amounting to FF 1 401 million were supplied in the form of capital investment, loans and short-term credit lines, so that the private sector contribution in fact exceeded the amounts received from public funds. Finally, the French Government also challenges the Commission decision on the ground that it fails to mention that the private investor who took over the company for a symbolic sum of one franc later also contributed, under the takeover agreement, a sum of FF 400 million to the capital of the company.

54. The French Government is of course correct in pointing out that the relevant test is laid down in Case 234/84. However, I think that it should also be borne in mind that in that case the Court, after the passage cited above, went on to find that the Commission was right to consider that the undertaking at issue would very probably have been unable to raise the necessary sums on the private capital markets, *inter alia* because that undertaking had for several years been making substantial losses and because its products had to be sold on a market in which there was excess capacity. Similar considerations of course apply in the present case.

55. As regards the question of private sector contributions and the specific figure cited by the French Government, it must be conceded that the point is not specifically dealt with in the Commission's decision and was not fully answered in its defence. At the hearing, there was some debate as to whether the contributions in question were indeed provided by the private sector in view of the alleged links between the French public authorities and the banks. However, in my view what is decisive is that it emerges clearly from the same memorandum of Mr Gadonneix, relied on by the French Government, that the additional contributions in question were committed as part of an overall package to rescue Boussac. It is a reasonable, perhaps even inevitable, inference that those contributions — bearing in mind the company's dire financial position and the situation of the relevant market — would not have been forthcoming in the absence of direct contributions from public funds. While it would have been more satisfactory if the contested decision had specifically addressed the nature and scope of private-sector contributions, I therefore consider that the decision was correct in its essential conclusion that Boussac would not have been able to raise all the capital needed for its survival on the open market, and that the contributions from public funds must therefore be regarded as aids.

56. As to the contribution made by the private investor which took over the company, on the French Government's own admission this was not provided until the end of 1985, that is to say, after the entirety of the assistance from public funds which formed the subject of the Commission's decision. The private investor's contribution is therefore irrelevant to the issue whether the assistance from public funds amounted to aid.

Effects on trade and on competition

57. The French Government next argues that the aid to Boussac did not fall within Article 92(1) because it did not distort or threaten to distort competition or affect trade between Member States.

58. As regards the effect on competition, the French Government argues that the alternative to the provision of assistance to Boussac would have been even more disruptive of competition: if the company had been allowed to go to the wall, its assets would have been purchased at prices well below market value by competing undertakings thus helping to perpetuate the problem of excess capacity. It also argues that the Commission has not shown that Boussac engaged in anti-competitive conduct.

59. It is not necessary to dwell on these arguments. For Article 92(1) to apply, it is necessary only that an aid distorts or threatens to distort competition; that an alternative course of action, e.g. allowing an ailing undertaking to go into liquidation, might have led to greater distortions of competition than the provision of the aid is essentially irrelevant. Also irrelevant in terms of Article 92(1) is the conduct of the undertaking in question.

60. As regards the effect on trade, the French Government argues that Boussac has a very small share of the Community textile market — only 0.3%. It also argues that the Commission was wrong in its decision to state that Boussac exports increased by 32% between 1982 and 1984: this ignores the fact that the inflated figure for 1984 was due to a short-term increase in the demand for linen. The French Government argues that the Commission should instead have taken into consideration the period 1982-86 during which, it states, the value of Boussac exports to other EEC Member States declined in real terms by 33%. The French Government also produces figures which, it argues, show that during that period the French domestic market for a number of textile products of the type produced by Boussac was increasingly penetrated by exports from other EEC Member States.

61. The Commission assesses Boussac's share of the Community market at 0.38% and points out that in a highly fragmented market, where even the largest producer has only 0.8%, this share is not insubstantial. It also points out that Boussac's share is considerably larger in certain sub-markets.

62. The differences between the parties on these issues are not in my view of decisive importance. In Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, the Court stated (at paragraph 11):

'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid.'

63. In the present case, it is not disputed that Boussac is an important Community producer, the third largest in France and the fifth in the Community. It is also not disputed that Boussac engages in international trade, exporting some 16% of its products to other Member States. It is furthermore not in doubt that the amounts of aid given to Boussac were very substantial, and would have enabled it to reduce its costs at a time when all Community textile producers were experiencing difficulties. In these circumstances, it appears to me that the Commission could properly decide that the aid affected trade between Member States and distorted or threatened to distort competition. I would therefore dismiss the submission relating to Article 92(1).

Whether the aid was compatible with the common market under Article 92(3)

64. Article 92(3) provides:

'The following may be considered to be compatible with the common market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) ...

(c) aid to facilitate the development of certain economic activities or of certain economic areas where such aid does not adversely affect trading conditions to an extent contrary to the common interest ...

(d) ...'

65. In the contested decision, the Commission found that the aid did not meet the criteria for derogation under Article 92(3)(a) or (c). As regards Article 92(3)(a), the Commission considered that the level of unemployment in the regions affected by the aid was not sufficiently serious; in any event, it argued, the aid was made to a particular enterprise, irrespective of its geographical location, and could not therefore be regarded as a regional aid. The French Government submits that, on the contrary, the aid was provided in regions where the level of unemployment is considerably higher than the national or Community average.

66. The Commission is clearly correct on this issue. In Case 248/84. *Germany* v *Commission* [1987] ECR 4013, the Court ruled at paragraph 19 that:

'... the use of the words "abnormally" and "serious" in the exemption contained in Article 92(3)(a) shows that it concerns only areas where the economic situation is extremely unfavourable in relation to the Community as a whole'.

The French Government points out that in three out of the four regions concerned by the aid, namely, Nord, Pas-de-Calais and Picardy, the rates of unemployment in 1986 were 13.5%, 14.85% and 12.53% respectively. However, although those rates

were indeed somewhat higher than the Community average of 11.5%, it cannot be said that they point to an 'extremely unfavourable' situation in relation to the Community as a whole.

67. As regards Article 92(3)(c), the Commission argued in its decision that the French aids were subject to the Commission guidelines on aids to the Community textile industry laid down in 1971 and 1977, and to the special criteria for aid to the French textile industry laid down in 1983 as a condition of the Commission's withdrawal of its objections to French aid in the form of a reduction of social security costs. In the Commission's view, the aid to Boussac failed to meet the criteria either of the Community or of the special French regime, in particular because it did not involve a genuine restructuring of the undertaking. The concept of restructuring was more fully defined by the Commission in its defence as the fundamental reorganization of an undertaking with a view to maintaining or restoring its competitiveness and involving fundamental changes to the labour force, the means and the process of production, production capacity and other aspects of the undertaking's activities. Although the Commission accepted that there had been a reorganization of Boussac, involving in particular a substantial reduction in the work-force, it took the view that the changes did not go beyond a simple modernization or rationalization of the company's activities.

68. In the Commission's view, the aid to Boussac was a rescue measure, but one which did not meet the criteria for the approval of rescue aids laid down by the Commission in its letter to Member States of 24 January 1979. This was because the aid was not designed to provide a short-term lifeline to an ailing but potentially competitive undertaking pending the urgent adoption of restructuring measures, but was instead provided over a long period with a view to maintaining Boussac artificially in existence without any requirement as to fundamental restructuring. In addition, the Commission found that the aid failed to satisfy the negative condition laid down in Article 92(3)(c) in that it did adversely affect trading conditions to an extent contrary to the common interest. In this context, the Commission argued that the artificial maintenance in existence of Boussac in a Community market characterized by overcapacity and fierce competition must have weakened the competitive position of other textile producers which have had to carry out the necessary reorganization of their activities without the benefit of State aid.

69. The French Government, while not challenging the Commission's guidelines, argues that they do not have the force of law; and the Commission should not apply the guidelines in a rigid, mechanical fashion, but should carry out an individual examination of the merits of the aid. In any event, the aid to Boussac did satisfy the criteria of the guidelines and the Commission therefore committed a manifest error in failing to apply the derogation. In particular, the aid involved a genuine restructuring of the undertaking, as shown by the substantial reductions in manpower, in production capacity and in production lines. The French Government adds that the

aid should not be seen purely as a rescue measure, since it was given as part of a restructuring plan for what was, in view of the scale of the reorganization, a short period of time.

70. In evaluating these opposing standpoints, it should first be observed that the derogation in Article 92(3)(c), as an exception to the general prohibition of Article 92(1), must be narrowly interpreted and applied. In addition, as the Court pointed out in the *Philip Morris* case, cited above, in the application of Article 92(3)

'... the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a Community context'.

71. Both the drawing up of guidelines for the grant of aid to particular sectors of industry, and the assessment of individual aids in the light of such guidelines must be seen as involving an exercise of discretion with which the Court will not interfere unless the exercise is tainted by a manifest error or exceeds the limits of the discretion. The central issue between the parties in the context of Article 92(3)(c) is whether the aid to Boussac involved a genuine restructuring of the company. That issue is quintessentially one involving complex economic and social assessments. While there are differences between the parties as to the evidence to be relied on and the weight to be attached to that evidence, the French Government has not in my view succeeded in showing that the Commission's evaluation of the scope of the reorganization of Boussac involved a manifest error. In any event, the precise qualification of the degree of reorganization appears somewhat academic. The simple facts of the matter are that in 1980 there was considerable overcapacity in the Community textile industry and all textile companies were forced to consider their future. In 1981, Boussac Saint Frères was in receivership with enormous debts. By 1986, the successor company, Boussac, was showing a small profit and better results were expected in 1987. In the meantime, very large sums of public money had been provided for Boussac's use. In those circumstances, there is a heavy onus on the French Government to show that the aid given was not primarily a rescue aid, albeit, of course, given under conditions that the group should modernize itself, and in my view this onus has not been discharged.

72. In addition, as the Commission stated in its decision, the grant of substantial sums of aid to Boussac would have enabled the company to reduce its costs, thereby strengthening its position as against its competitors in the Community. Since Boussac was a major textile producer, exporting a significant proportion of its production to other Member States, and since the Community market at the relevant time was characterized by excess capacity and intense competition, the Commission in my view clearly did not exceed the limits of its discretion in finding that the aid to Boussac

adversely affected trading conditions to an extent contrary to the common interest.

73. I would add that in considering the Commission's exercise of its discretion the Court can have regard only to the information available to the Commission in reaching its contested decision. It is therefore in the interest of Member States to ensure that all the relevant information is placed before the Commission at that stage; and in any event it is not open to a Member State to seek to introduce substantial fresh evidence before the Court, as the French Government has done in these proceedings.

IV — The principle of proportionality

74. Finally, France contends that the decision is in breach of the general principle of proportionality. It says that the decision does not take account of the costs of restructuring. Moreover the decision is not commensurate with the objectives of rationalization of the textile sector, since if Boussac's recovery had not been secured, it would have been put into liquidation, with serious consequences not only for the creditors, but also in social and regional terms, and for the textile market in general. The course followed by the French authorities led to excess capacity being closed down rather than being bought out at well below market price, thus contributing to overcapacity.

75. I am satisfied that there was no breach of the principle of proportionality in this case. The question of whether or not a genuine restructuring took place has already been considered above. In calculating the amount of the State aid or 'net grant equivalent' the Commission gave credit for the very substantial sums paid in respect of the transfer of production sites which have since closed down. Moreover, in the light in particular of the submissions made by the United Kingdom at the hearing, it appears that the Commission may well have underestimated the true amount of the grant equivalent to the advantage of the French Government. In any event, there can in my view be no question of a breach of the principle of proportionality by a decision, such as that in issue in the present case, which merely requires the recovery of aid granted in breach of the Treaty and does so moreover after repeated warnings by the Commission that any aid granted in breach of the Treaty may have to be repaid.

Costs

76. Since the French Republic has failed in its submissions, it must be ordered to pay the costs of the Commission. As for the costs of the United Kingdom as intervener, it is well established that a successful intervener is entitled to its costs if it specifically seeks an order to that effect. The United Kingdom has submitted that the Court should order the applicant to bear the costs. That submission can reasonably be interpreted as requesting the Court to order the applicant to bear the costs of the intervener.

Conclusion

77. Accordingly, in my opinion the application should be dismissed and the French Republic should be ordered to bear the costs, including the costs of the United Kingdom.