Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 26 March 2015 [1]

Case C-63/14

European Commission
v

French Republic

(Failure of a Member State to fulfil obligations — State aid — Obligation of recovery — Compensation for public service delegation)

I – **Introduction**

1. This case is one of a long line of cases concerning State aid given by the French Republic to Société Nationale Maritime Corse-Méditerranée (SNCM) SA ('SNCM'). [2]

2. By its application lodged on 10 February 2014, the European Commission seeks a declaration from the Court that, first, by failing to take, within the prescribed periods, all the measures necessary to recover from the beneficiaries the State aid declared unlawful and incompatible with the internal market by Article 2(1) of Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée and the Compagnie Méridionale de Navigation [3] ('the decision at issue'); secondly, by failing to cancel, within the prescribed periods, all the aid payments referred to in that Article 2(1); and, thirdly, by failing to inform the Commission, within the prescribed period, of the measures taken to comply with that decision, the French Republic has failed to fulfil its obligations under Article 288 TFEU, fourth paragraph and Articles 3, 4 and 5 of that decision.

II – **Legal background**

3. Article 108(2) TFEU provides as follows:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

1 — Original language: French.

2 — See judgment of the Court of Justice in *SNCM and France* v *Corsica Ferries France* (C-533/12 P and C-536/12 P, EU:C:2014:2142); judgments of the General Court in *Corsica Ferries France* v *Commission* (T-349/03, EU:T:2005:221), and in *Corsica Ferries France* v *Commission* (T-565/08, EU:T:2012:415); and order of the General Court in *Corsica Ferries France* v *Commission* (T-231/05, EU:T:2006:2). See also *France* v *Commission* (T-366/13), *SNCM* v *Commission* (T-454/13), *France* v *Commission* (T-74/14) and *SNCM* v *Commission* (T-1/15) (cases pending before the General Court of the European Union).

3 — OJ 2013 L 220, p. 20

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 [TFEU] and 259 [TFEU], refer the matter to the Court of Justice of the European Union direct.

…'

4. Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] [4] states:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the Court of Justice pursuant to Article [278 TFEU], recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to [EU] law.'

III – **Factual background**

A – *The facts leading to the decision at issue*

5. By a Resolution of 7 June 2007, the Corsican Assembly awarded to the group consisting of SNCM and the Compagnie Méridionale de Navigation SA ('CMN') the public service delegation for the ferry service between the port of Marseille and the Corsican ports. By a decision of the same day, the President of the Executive Council of the Corsican regional authorities ('the CRA') was authorised to sign the public service delegation contract ('the PSDC').

6. The PSDC was signed for the period from 1 July 2007 to 31 December 2013. Article 1 defines the purpose of the PSDC as the provision of scheduled maritime transport services on all lines of the public service delegation between the port of Marseille and the Corsican ports of Ajaccio, Balagne, Bastia, Porto-Vecchio and Propriano.

7. The specifications contained in Annex 1 of the PSDC define the nature of these services and distinguish between:

— the permanent 'passenger and freight' service which the SNCM-CMN group must provide throughout the year ('the basic service'), and

— the additional 'passenger' service to be provided during peak periods, for approximately 37 weeks, on the Marseille — Ajaccio and Marseille — Bastia routes and during the period from 1 May to 30 September on the Marseille — Propriano route ('the additional service').

4 — OJ 1999 L 83, p. 1

8. Under the PSDC, the two concession holders receive an annual contribution from the Office des Transports de la Corse (Corsican Transport Board) ('the OTC') in return for the basic service and the additional service. The final financial compensation for each concession holder for each year is limited to the operating deficit resulting from compliance with its contractual obligations, allowing for a reasonable return on the capital employed in proportion to the days when it was actually used for crossings made in performance of those obligations. To deal with the eventuality of the revenue received being lower than the forecast revenue set out by the concession holders in their tenders, the PSDC provides for an adjustment of the public compensation.

9. After it was signed, the PSDC was amended so as to cancel over 100 crossings a year between Corsica and Marseille, to reduce the annual amounts of the 'reference' financial compensation by EUR 6.5 million for the two concession holders and to place a ceiling on the annual revenue adjustment mechanism for each concession holder.

B – *The decision at issue*

10. Following a complaint made by the French company Corsica Ferries Frances SAS ('Corsica Ferries') concerning illegal State aid incompatible with the interior market allegedly received by SNCM and CMN under the PSDC, the Commission, by letter of 27 June 2012, informed the French authorities of its decision to initiate the formal investigation procedure under Article 108(2) TFEU in respect of potential aid to SNCM and CMN contained in the PSDC. [5]

11. In deciding that the compensation awarded under the PSDC constituted illegal State aid incompatible with the internal market, the Commission held that two of the four criteria laid down by the Court in the judgment in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415) had not been fulfilled.

12. The Commission found, first, that the additional service provided by SNCM was neither necessary nor proportionate for the purpose of meeting a genuine public service need. Secondly, the Commission was of the opinion that not only had the terms and conditions set out in the call for tenders failed to ensure effective competition but also that the financial compensation had not been defined by reference to a base cost established in advance, or by comparison with the cost structure of other comparable shipping companies.

13. The Commission concluded that the compensation received by SNCM and CMN for the additional service constituted State aid. It found that the aid was unlawful to the extent that it had been granted without prior notification to the Commission. In addition, the Commission found that the compensation received by SNCM and CMN in respect of the basic service was compatible with the interior market, but that was not the case with the compensation received by SNCM after 1 July 2007 in respect of the additional service.

14. In the light of the above mentioned factors, the Commission held in the decision at issue as follows:

'Article 1

The compensation awarded to SNCM and CMN under the [PSDC] of 7 June 2007 constitutes State aid within the meaning of Article 107(1) TFEU. That aid was granted in breach of the obligations laid down in Article 108(3) TFEU.

5 — See summary appearing in the *Official Journal of the European Union* of 5 October 2012 (OJ 2012 C 301, p. 1).

Article 2

1. The compensation paid to SNCM for implementing the additional capacity provided for under sections I(a)(2), I(b)(2) and I(d)(1.4) of the specifications of the above-mentioned [PSDC] is incompatible with the internal market.

2. The compensation paid to SNCM and CMN for the operation of other services provided under the above-mentioned [PSDC] is compatible with the internal market.

Article 3

1. France is required to make the beneficiaries repay the aid referred to in Article 2(1).

2. The sums to be recovered shall bear interest from the date on which they were placed at the disposal of the beneficiary until the date of their actual recovery.

3. Interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

4. France shall cancel all outstanding payments of the aid in Article 2(1) with effect from the date of adoption of this Decision.

Article 4

1. The recovery of the aid specified in Article 2(1) shall be immediate and effective.

2. France shall ensure that this Decision is implemented within four months following the date of its notification.

Article 5

1. Within two months of notification of this Decision, France shall submit the following information to the Commission:

(a) the total amount (principal and interest) to be recovered from the beneficiary;

(b) a detailed description of the measures already adopted and planned for the purpose of complying with this Decision;

(c) the documents proving that the recipient has been ordered to repay the aid;

(d) the date and the exact amount of monthly instalments and annual adjustments made from the entry into force of the agreement until the date of adoption of this Decision.

2. France shall keep the Commission regularly informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2(1) has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

Article 6

This Decision is addressed to the French Republic.'

15. The Commission calculated the amount of aid to be recovered as approximately EUR 220 224 000 as at the date of the decision at issue.

C – *The behaviour of the French authorities following the adoption of the decision at issue*

16. The French authorities were informed of the decision at issue on 3 May 2013. Actions for annulment of the decision at issue were lodged at the General Court on 17 July 2013 by the French Republic and on 27 August 2013 by SNCM.[6] The decision at issue was also the subject of an application for interim measures made by the French Republic which was dismissed at first instance by the President of the General Court[7] and on appeal by the Vice-President of the Court of Justice.[8]

17. By letter of 20 June 2013, the President of the Executive Council of the CRA, Mr Giacobbi, asked the Vice-President of the Commission, Mr Almunia, about ways of implementing the decision at issue.

18. On 10 July 2013, the Prefect of Corsica sent to the President of the Executive Council of the CRA a letter enclosing the decision at issue. In that letter, the Prefect of Corsica asked the President to inform him of the action he would be taking as a result. The Prefect of Corsica also stated that the French Government was intending to contest the Commission's decision by means of an action for annulment and an application for interim measures.

19. On the same date, the Prefect of Corsica sent to the President of SNCM a copy of the letter addressed to the President of the Executive Council of the CRA and a copy of the decision at issue.

20. By letter of 17 July 2013, the Vice-President of the Commission told the President of the Executive Council of the CRA that, pursuant to the decision at issue, the compensation payments made to SNCM for the additional service had to be immediately suspended, that the time-limit set in the decision at issue for supplying the information referred to in Article 5(1) had already expired and that the time-limit for implementation set in Article 4(2) of the decision at issue must be adhered to. In that letter, the Vice-President of the Commission recalled that, in principle, the aid 'must be recovered by the body that awarded it, on the basis of a full writ of execution issued by that body (on condition that the body is lawfully empowered to do so) or, alternatively, by another public authority with that power. In the present case, the duty of recovery therefore appears to fall on the Executive Council [of the CRA] since it was the Executive Council that awarded the incompatible aid, as observed in paragraph 28 of the decision [at issue].'

21. By letter of 29 July 2013, the President of the Executive Council of the CRA informed the Vice-President of the Commission that he had taken the necessary measures to cancel payment of the compensation relating to the additional service. He added that he was encountering some difficulties 'with the French State authorities, in particular the Prefect of Corsica's department and the regional Audit Chamber who are disputing the validity of the Commission's decision and denying that it is enforceable'.

22. By letter of 2 September 2013, the Commission asked the French authorities to inform it within ten days following the date of that letter of the measures that they had taken to implement the decision at issue. In that letter, the Commission reminded the French authorities that, as long as a State aid recovery decision has not been legitimately suspended, it remains fully and directly enforceable. The Commission also asked the French authorities to clarify the consequences of implementing the decision at issue on SNCM's financial situation since, according to the French authorities, implementation of the decision at issue would inevitably lead to the company's insolvency

6 — *France* v *Commission* (T-366/13) and *SNCM* v *Commission* (T-454/13), pending before the General Court.

7 — See order of the President of the General Court in *France* v *Commission* (T-366/13 R, EU:T:2013:396).

8 — See order of the Vice-President of the Court of Justice in *France* v *Commission* (C-574/13 P(R), EU:C:2014:36).

and liquidation. In this connection, the Commission raised a number of questions about information it possessed indicating that, on the basis of an OTC report, the Executive Council of the CRA was contemplating proposing that the Corsican Assembly sign a new PSDC with the group comprising SNCM and CMN for the transport of passengers and goods between Marseille and the Corsican ports for the period 2014 to 2023.

23. Having obtained no reply from the French authorities, the Commission, by a letter of 20 September 2013, 'once again invite[d] the French authorities to proceed immediately to the recovery of the aid, including interest, to cancel (and if need be, to recover) the aid due to be paid for the additional service following the date of notification of the [decision at issue] and to report on the state of the recovery, including an explanation of how interested has been calculated'. The Commission stated that this information must be provided within 20 working days following the date of the letter. Finally, the Commission stated that this further time-limit in no way altered the obligation to immediately implement that decision and that, if this was not done, its staff would be obliged to suggest that proceedings be brought against the French Republic under Article 108(2) TFEU.

24. Two months later, on 29 November 2013, the French authorities informed the Commission that the CRA had suspended compensation payments for the service described as 'additional' with effect from the end of July 2013, on the basis of a provisional estimate calculated from the amounts mentioned in the decision at issue. The French authorities expressed their difficulties in calculating the total amount of compensation to be recovered from the beneficiaries (as principal and as interest), since, they said, the distinction drawn by the Commission between 'basic service' and 'additional service' was artificial as those two services were inseparable and had as their purpose territorial continuity.

25. On 18 December 2013, the President of the Executive Council of the CRA sent to the National Secretary for Transport of the Syndicate of Corsican Workers, Mr Mosconi, a letter stating the aims he was pursuing and, in particular, stating that 'the CRA [would] not issue any writ or launch any proceedings which would result in hastening the fate of [SNCM]'.

26. Various events took place following the bringing of the present action for failure to fulfil obligations on 10 February 2014.

27. At the hearing, the French Republic stated that an action brought on 29 October 2014 by Veolia-Transdev, seeking early repayment of the loan it had made to SNCM, had led to a declaration of cessation of payments by that company on 4 November 2014.

28. The French Republic also added that, on 7 and 19 November 2014, the OTC had issued two collection orders to recover the aid declared to be incompatible, but for a sum of around EUR 198 million which, according to the Commission, fell short of that stated in the decision at issue, namely EUR 220 224 000.

29. On 28 November 2014, the President of the Tribunal de Commerce de Marseille (Commercial Court, Marseille, France) declared the cessation of payments by SNCM and placed it under court-supervised administration for six months.[9] The judgment ordering commencement of the court-supervised administration was published on 14 December 2014, opening a two-month period in which for creditors to declare their claims.

30. On 9 January 2015, the French authorities recorded the aid declared to be incompatible as a liability of SNCM amounting to around EUR 198 million.

9 — See newspaper article in *Le Monde*, 29 November 2014, p. 16, entitled '*SNCM: quatre repreneurs étudieraient le dossier*'.

31. At the hearing, the French Republic also informed the Court that various offers to buy SNCM (the press mentions five offers and two letters of intent) [10] were lodged at the Tribunal de Commerce de Marseille on 2 February 2015 in the context of the court-supervised administration.

32. It appears from certain information in the press that those offers were subject to conditions precedent, namely the transfer of the public service delegation between Corsica and mainland France, the renegotiation of social agreements and the 'erasure' of the obligation to reimburse the unlawful aid. [11]

D – *Context of the dispute*

33. As I mentioned in point 1 of this Opinion, this case is one of a long line of cases concerning State aid given by the French Republic to SNCM. This aid falls into two types: aid granted to SNCM for restructuring and aid granted to it as financial compensation for the public service delegation. These two types gave rise to two sets of proceedings which should not be confused, especially given that they concern very similar amounts (approximately EUR 220 million).

1. First set of proceedings

34. The first of the two sets of proceedings began with a dispute over the aid paid to SNCM under its 2002 restructuring plan. Corsica Ferries, a private company and a rival of SNCM, brought an action for annulment of the Commission's decision of 9 July 2003 that had declared the aid compatible with the common market. [12]

35. By a judgment of 15 June 2005, the General Court annulled that decision and held that the Commission had failed to take into account 'the aggregate of the proceeds of disposal of the non-essential assets in determining whether the aid was limited to the minimum'. [13] No appeal was brought against the General Court's judgment.

36. On 8 July 2008, the Commission adopted a new decision, [14] which stated, first, that the measures under the 2002 restructuring plan constituted unlawful State aid but were compatible with the common market and, secondly, that the measures under the 2006 privatisation plan did not constitute State aid within the meaning of Article 87(1) EC (now Article 107(1) TFEU).

37. That decision was annulled by the judgment of the General Court in *Corsica Ferries France* v *Commission* (T-565/08, EU:T:2012:415), delivered on 11 September 2012. An appeal against that judgment was dismissed by a judgment of the Court of Justice delivered on 4 September 2014. [15]

10 — See newspaper article in *Le Monde*, 4 February 2015, entitled '*SNCM: quatre offres de reprise sont jugées sérieuses*', available online [in French] at the following address: http://www.lemonde.fr/economie/article/2015/02/04/sncm-quatre-offres-de-reprise-sont-jugees-serieuses_4569801_3234.html.

11 — See '*Nouveau rendez-vous judiciaire le 18 mars pour la SNCM*', *France 3*, 5 February 2015, available online [in French] at the following address: http://france3-regions.francetvinfo.fr/provence-alpes/2015/02/05/nouveau-rendez-vous-judiciaire-le-18-mars-pour-la-sncm-648939.html.

12 — See Commission Decision 2004/166/EC of 9 July 2003 on aid which France intends to grant for the restructuring of the Société Nationale Maritime Corse-Méditerranée (SNCM) (OJ 2004 L 61, p. 13).

13 — Judgment in *Corsica Ferries France* v *Commission* (T-349/03, EU:T:2005:221, paragraph 315).

14 — See Commission Decision 2009/611/EC of 8 July 2008 concerning the measures C 58/02 (ex N 118/02) which France has implemented in favour of the Société Nationale Maritime Corse-Méditerranée (SNCM) (OJ 2009 L 225, p. 180).

15 — Judgment in *SNCM and France* v *Corsica Ferries France* (C-533/12 P and C-536/12 P, EU:C:2014:2142). It should be noted that the Commission was not joined to the appeals brought by the SNCM and the French Republic and did not intervene in them.

38. In the meantime, on 20 November 2013, the Commission ordered the recovery of the amounts under the restructuring plan referred to in those judgments.[16] Actions for annulment of that decision were brought before the General Court by France and by SNCM in January 2014 and January 2015 respectively.[17]

2. Second set of proceedings

39. The second set of proceedings concerns the PSDC signed in 2007 providing for financial compensation in favour of SNCM and CMN. In 2013, the Commission declared the compensation for the additional service to be illegal and ordered its recovery.

40. That decision is currently the subject of actions for annulment brought before the General Court by the French Republic and SNCM. It is in the context of those actions that an application for interim measures made by the French Republic, with the aim of suspending the operation of the Commission's decision, was dismissed at first instance by the President of the General Court[18] and on appeal by the Vice-President of the Court of Justice.[19]

41. It is also the failure to implement the decision at issue that is at the centre of the present action for failure to fulfil obligations.

42. During the hearing, the Commission added that, in September 2013, the French authorities had again paid considerable amounts to SNCM, without notifying the Commission, and had awarded SNCM, among other benefits, a new public service delegation for ten years on highly controversial terms.

IV – **Procedure before the Court of Justice**

43. The Commission lodged its application on 10 February 2014. The French Republic lodged its defence on 23 April 2014 and the Commission lodged its reply on 2 June 2014. The written procedure ended with the French Republic lodging its rejoinder on 14 July 2014.

44. A hearing was held on 5 February 2015, at which the Commission and the French Republic presented their oral observations.

V – **Alleged failure by the French Republic to fulfil its obligations**

45. In its application, the Commission maintains that:

— by failing to take, within the prescribed periods, all the measures necessary to recover from the recipient the State aid declared illegal and incompatible with the internal market by Article 2(1) of the decision at issue;

— by failing to cancel, within the prescribed periods, all the aid payments referred to in that Article 2(1), and

16 — See Commission Decision 2014/882/EU of 20 November 2013 concerning the State aid SA.16237 (C58/02) (ex N118/02) implemented by France in favour of SNCM (OJ 2014 L 357, p. 1).

17 — See *France* v *Commission* (T-74/14) and *SNCM* v *Commission* (T-1/15), both pending before the General Court.

18 — See order of the President of the General Court in *France* v *Commission* (T-366/13 R, EU:T:2013:396).

19 — See order of the Vice-President of the Court of Justice in *France* v *Commission* (C-574/13 P(R), EU:C:2014:36).

— by failing to inform the Commission, within the prescribed period, of the measures taken to comply with that decision,

the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 288 TFEU and Articles 3, 4 and 5 of that decision.

A – *First ground for complaint: failure to recover the illegal aid*

1. Introduction

46. When the Commission declares aid to be illegal, the recovery ordered takes place on the terms set out in Article 14(3) of Council Regulation No 659/1999 of 22 March 1999, under which:

'… recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to [EU] law.'

47. The French Republic does not dispute that the measures necessary to recover the State aid declared unlawful and incompatible with the interior market by Article 2(1) of the decision at issue have not been taken by the French authority with the power to do so, namely the CRA.

48. The documents annexed to the Commission's application are sufficient evidence of this.

49. First, in his letter of 29 July 2013, the President of the Executive Council of the CRA, Mr Giacobbi, informed the Vice-President of the Commission, Mr Almunia, of the 'difficulties that [he was] experiencing with *the French State authorities*, in particular the Prefect of Corsica's department and the regional Audit Chamber who are *disputing the validity of the Commission's decision and denying that it is enforceable*'. [20]

50. Secondly, in his letter of 18 December 2013, he reassured the National Secretary for Transport of the Syndicate of Corsican Workers, Mr Mosconi, that '*the CRA will not issue any writ* or launch any proceedings which would result in hastening the fate of the company'. [21]

2. The arguments of the French Republic

51. Faced by this implementation refusal, the French Republic pleads that it was absolutely impossible for it to properly implement the decision at issue, this being, according to settled case-law, 'the only defence available to a Member State in opposing an application by the Commission under Article [108(2) TFEU] for a declaration that it has failed to fulfil its obligations'. [22]

20 — My emphasis.

21 — My emphasis.

22 — Judgment in *Commission* v *France* (C-214/07, EU:C:2008:619, paragraph 44). See also, to that effect, judgments in *Commission* v *Belgium* (52/84, EU:C:1986:3, paragraph 16); *Commission* v *Germany* (94/87, EU:C:1989:46, paragraph 9); *Commission* v *Greece* (C-183/91, EU:C:1993:233, paragraph 19); *Commission* v *Portugal* (C-404/97, EU:C:2000:345, paragraph 39); *Commission* v *France* (C-261/99, EU:C:2001:179, paragraph 23); *Commission* v *Spain* (C-404/00, EU:C:2003:373, paragraph 45), and *Commission* v *Spain* (C-177/06, EU:C:2007:538, paragraph 46).

52. In this instance, the French Republic submits that it would have been impossible for it to implement the decision at issue because that would inevitably have led to the insolvency and liquidation of SNCM,[23] which in turn would lead to serious social unrest and the risk of a break in territorial continuity between mainland France and Corsica.

53. In relation to the insolvency of SNCM, the French Republic submits that, given that SNCM's accounts for the financial year 2012 show the company's available assets at 31 December 2012 as being worth EUR 87 831 000, recovering a sum of EUR 220 224 000 would inevitably have led to all payments by the company being suspended. Since SNCM's cashflow was largely dependent on a medium-term loan of EUR 87.3 million granted by its majority shareholder, Veolia-Transdev, which could have demanded early repayment of the loan at any time, to implement recovery of a sum of EUR 220 224 000 would have had the inevitable effect of making it impossible to finance the continued operation of the company. In addition, given that at the end of 2012 the business declared a net loss of EUR 14 251 000, to which would have to be added the EUR 220 224 000, it is highly unlikely that any business would be interested in buying SNCM, which would therefore inevitably have gone into liquidation.

54. The French Republic also submits that the liquidation of SNCM would be likely to lead to serious disturbances of law and order, given the already fragile social climate within SNCM and the port of Marseille. During the 2005 strikes that followed the announcement of SNCM's privatisation, strikers occupied vessels in the port of Marseille, preventing thousands of passengers from departing, hijacked a ship and kidnapped the Chairman/Managing Director of SNCM. Those strikes spread and led to a general blockade of the port of Marseille, affecting the transportation of passengers, freight and petrochemical traffic.

55. The social climate did not subsequently improve within SNCM, with new strikes breaking out at the beginning of 2011. In March 2014, the three unions in SNCM and a seafarers' union in Marseille called a strike of all the workers, following supervisory board meetings in February and March at which Veolia-Transdev declared its opposition to ordering any new ships and favoured insolvency proceedings for SNCM.

56. The strike in June 2014 highlighted the difficulties faced by the Corsican economy against a national background marked by a generalised crisis situation and a growing number of redundancy schemes and mass lay-offs. As such, and in response to the Commission's allegations, the French authorities submit that they are the ones best placed to assess the risk of unrest or disturbances to public order and the risk of deploying or not deploying the security forces to prevent or put an end to those disturbances.

57. The French Republic adds that the public unrest linked to the liquidation of SNCM would inevitably lead to a break in the territorial continuity between mainland France and Corsica, as happened during the strikes of 2005, when Corsica faced serious supply problems in relation to medicines, blood products, fuel and essential goods. This break in continuity would also affect the transportation of several thousand passengers: professionals, tourists and residents.

58. The French Republic maintains that this break in continuity would persist once the social situation stabilised. The French authorities submit that SNCM's share of the Corsican service is significant, amounting to 34.2% of passenger traffic and 39% of freight.

23 — The debate in this case concerns only SNCM since CMN did not receive financial compensation other than for the basic service which was declared by the Commission as illegal aid but compatible with the interior market under Article 106(2) TFEU (see paragraph 213 of the decision at issue).

59. No other company to date has offered to serve all the ports that SNCM currently serves (namely Balagne, Porto-Vecchio and Propriano) and it is unlikely that Corsica Ferries or CMN have sufficient capacity to operate the maritime routes out of Marseille on the terms of the public service delegation for the period 2013 to 2024. The same would be true of any group that might be formed between CMN and Corsica Ferries to operate the routes between the mainland and Corsica.

60. In other words, according to the French Republic, it would be foolish to think that other operators could, in the short term, set up a transport service between Corsica and Marseille which would fill the gap left by SNCM, with reference to paragraph 146 of the decision at issue which states that 'the other market operators admit they have been unable to provide [the basic] service'.

3. Assessment

61. In my opinion, the grounds put forward by the French Republic to justify the non-recovery of the illegal aid in question do not fulfil the criterion of this being absolutely impossible to implement, as required by the Court's case-law.

a) The argument that the inevitable consequence of implementing the decision at issue would be the liquidation of SNCM

62. According to the French Republic, implementation of the decision at issue would inevitably lead to SNCM being wound up because the amount of aid to be recovered significantly exceeds SNCM's assets.

63. I disagree.

64. First, implementation of the decision at issue at the time of its notification to the French Republic did not inevitably mean the winding-up of SNCM but meant, as a first step, taking restrictive measures under national law on the basis of which the amount of the aid could then be recovered.

65. As the Vice-President of the Commission stated in his letter of 17 July 2013 to the President of the Executive Council of the CRA, 'the aid must be recovered by the body that awarded it, *on the basis of a full writ of execution issued by that body*'. [24]

66. The issue of such a writ would not automatically entail the liquidation of SNCM. EU law does not prohibit the national courts from suspending the effects of such a writ in order to avoid serious and irreparable damage to the company concerned.

67. That would also have been true in the case of a judgment for failure to fulfil an obligation in the present case, had SNCM not been placed under court-supervised administration on 28 November 2014.

68. As the President of the General Court held at the time of the application for enforcement of the decision at issue to be suspended, the decision at issue obliges the French authorities to take binding measures 'which would be capable of suspension if proceedings were taken at national level … which could prevent the French authorities from completing the recovery procedure'. [25]

24 — My emphasis.

25 — See order of the President of the General Court in *France* v *Commission* (T-366/13 R, EU:T:2013:396, paragraph 41), confirmed on appeal by the order of the Vice-President of the Court of Justice of 21 January 2014 in *France* v *Commission* (C-574/13 P(R), EU:C:2014:36).

69. According to settled case-law, 'when an undertaking benefiting from State aid asks a European Union court to stay the execution of a decision by the Commission ordering the recovery of that aid, the fact that there are internal remedies available to the business to defend itself against recovery measures at a national level may enable the business to avoid serious and irreparable damage resulting from repayment of the aid.[26]

70. This clearly shows that for the French authorities to have taken binding measures to implement the decision at issue would not automatically have led to the liquidation of SNCM, as suggested by the French Republic.

71. The contrary view, that the prospect of winding-up makes implementation an absolute impossibility, would ensure total impunity for granting illegal aid to undertakings in difficulties who could simply rely on insolvency to escape liability for the amounts in question in insolvency proceedings.

72. Secondly, even if the liability relating to the repayment of the aid in question in the present case had been registered in the schedule of liabilities within the prescribed time-limits and for the whole amount,[27] it is settled case-law that registration on the schedule of liabilities could 'meet the recovery obligation only if, where the State authorities [were] unable to recover the full amount of aid, the insolvency proceedings result[ed] in the winding up of the undertaking which received the unlawful aid, that is to say, in the definitive cessation of its activities',[28] which is not the situation in the present case.

73. It follows that, as the Court of Justice held in paragraph 37 of its judgment in *Commission* v *Spain* (C-499/99, EU:C:2002:408), '[t]he absence of recoverable assets is … *the only way* for the Spanish Government to show the absolute impossibility of recovering the aid',[29] which is not the situation in the present case either.

74. Thirdly, I note that the obligation to issue a writ of execution enabling the recovery of the amounts of aid declared illegal by the decision at issue was also imposed in the present case by the Tribunal de Commerce de Marseille placing SNCM under court-supervised administration on 28 November 2014.

75. Consequently, the task entrusted to the court administrators by the Tribunal de Commerce de Marseille of finding buyers in order to save SNCM[30] involves informing those buyers of SNCM's liability to repay the amounts of aid to the French State.

26 — See order of the President of the Court of Justice in *Alcoa Trasformazioni* v *Commission* (C-446/10 P(R), EU:C:2011:829, paragraph 46). See also, to that effect, orders of the President of the Court of Justice in *Deufil* v *Commission* (310/85 R, EU:C:1986:58, paragraph 22), and *Belgium* v *Commission* (142/87 R, EU:C:1987:281, paragraph 26), and of the President of the General Court in *France* v *Commission* (T-366/13 R, EU:T:2013:396, paragraph 44).

27 — By way of reminder, this occurred only on 9 January 2015 and for a sum less than the EUR 220 224 000 provided for in the decision at issue. According to the Commission, issuing a writ of execution is only the 'commencement of implementation of the decision at issue.

28 — See judgment in *Commission* v *Spain* (C-610/10, EU:C:2012:781, paragraph 104). See also judgments in *Commission* v *Poland* (C-331/09, EU:C:2011:250, paragraphs 63 to 65) and *Commission* v *Italy* (C-454/09, EU:C:2011:650, paragraphs 35 and 36).

29 — My emphasis.

30 — See point 29 of this Opinion and newspaper article in *Le Monde*, 29 November 2014, p. 16, entitled '*SNCM: quatre repreneurs étudieraient le dossier*'.

76. In this respect, if it is correct that the offers to buy SNCM lodged at the Tribunal de Commerce de Marseille were conditional on the 'erasure' of the obligation to repay the illegal aid by the creation of an economic split between SNCM and a new structure,[31] I would reiterate that, according to settled case-law, in the event that a new undertaking were to be created in order to pursue some of the activities of the undertaking that received the illegal aid but that was subsequently put into liquidation, recovering the illegal aid would no longer be an impossibility because 'the pursuit of those activities may, where the aid concerned is not recovered in its entirety, prolong the distortion of competition brought about by the competitive advantage which that company enjoyed in the market as compared with its competitors. Accordingly, such a newly created company may, if it retains that advantage, be required to repay the aid in question. That is inter alia the case where it is established that that company continues genuinely to derive a competitive advantage because of the receipt of that aid, especially where it acquires the assets of the company in liquidation without paying the market price in return *or where it is established that the effect of that company's creation is circumvention of the obligation to repay the aid*.'[32]

b) The argument that there would be a risk of serious social unrest and a break in territorial continuity between mainland France and Corsica

77. Unlike the argument based on the alleged inevitability of the winding-up of SNCM should the decision at issue be implemented, these arguments relate to 'risks' or a fear that certain occurrences may be provoked by implementation of the decision at issue.

78. According to settled case-law of the Court of Justice, 'although insuperable difficulties may prevent a Member State from complying with its obligations under [EU] law …, *mere apprehension of such difficulties cannot justify a failure by a Member State to apply [that] law correctly*'.[33]

79. In addition, where a Member State '[makes] no attempt to recover the [aid] in question, implementation of the decision to effect recovery cannot be shown to be impossible'.[34]

80. More specifically on the subject of the risk of social unrest, two judgments of the Court of Justice, in *Commission* v *France* (C-52/95, EU:C:1995:432) and *Commission* v *France* (C-265/95, EU:C:1997:595), are of assistance.

81. The case giving rise to the judgment in *Commission* v *France* (C-52/95, EU:C:1995:432) concerned the failure by the French authorities to bring criminal or administrative proceedings against the persons responsible for vessels operating under the French flag and carrying out anchovy fishing and fishing-related activities in respect of anchovy stocks, in breach of Commission regulations prohibiting this.[35]

31 — One of the entrepreneurs bidding for the company declared that 'the key [to the file] is knowing whether the successful offer meets the criteria of legal discontinuity sought by the European Commission. If not, the buyer selected might in fact have to repay the illegal aid. All the offers, and in any event, mine, are conditional on that risk being removed …', see newspaper article in *Corse-Matin* 6 February, entitled '*SNCM: "Nous serons très attentifs aux attentes de la Corse"*' available online [in French] at the following address: http://www.corsematin.com/article/derniere-minute/sncm-%C2%ABnous-serons-tres-attentifs-aux-attentes-de-la-corse%C2%BB.1689605.html. See also points 31 and 32 of this Opinion.

32 — Judgment in *Commission* v *Spain* (C-610/10, EU:C:2012:781, paragraph 106). My emphasis. See also, to that effect, judgment in *Germany* v *Commission* (C-277/00, EU:C:2004:238, paragraph 86).

33 — Judgment in *Commission* v *Italy* (C-280/95, EU:C:1998:28, paragraph 16). See also, to that effect, judgments in *Commission* v *France* (C-52/95, EU:C:1995:432, paragraph 38); *Commission* v *France* (C-265/95, EU:C:1997:595, paragraph 55); *Commission* v *France* (C-441/06, EU:C:2007:616, paragraph 43), and *Commission* v *Poland* (C-331/09, EU:C:2011:250, paragraph 72).

34 — Judgment in *Italy* v *Commission* (C-6/97, EU:C:1999:251, paragraph 34).

35 — These are: Commission Regulation (EEC) No 1326/91 of 21 May 1991 concerning the stopping of fishing for anchovy by vessels flying the flag of France (OJ 1991 L 127, p. 11), and Commission Regulation (EEC) No 942/92 of 13 April 1992 concerning the stopping of fishing for anchovy by vessels flying the flag of France (OJ 1992 L 101, p. 42).

82. The French Republic had submitted that 'the socioeconomic climate during the anchovy fishing year [had been] so difficult that there was a risk of major disorders likely to give rise to serious economic problems. The competent authorities [had been] thus forced to refrain from taking action against the persons responsible for infringements.' [36]

83. The Court of Justice rapidly dismissed that argument, holding that 'mere apprehension of internal difficulties cannot justify a failure to apply the rules in question'. [37]

84. Meanwhile, the judgment in *Commission* v *France* (C-265/95, EU:C:1997:595), concerned the import to France of agricultural products (in particular, strawberries) from Spain and other Member States.

85. The French Republic was justifying its failure to take the necessary steps to guarantee free trade within the European Union of agricultural products on its territory by claiming that 'the situation of French farmers was so difficult that there were reasonable grounds for fearing that more determined action by the competent authorities might provoke violent reactions by those concerned, which would lead to still more serious breaches of public order or even to social conflict'. [38]

86. On that occasion, the Court held that '[i]t [was] for the Member State concerned, unless it [could] show that action on its part would have *consequences for public order with which it could not cope by using the means at its disposal*, to adopt all appropriate measures to guarantee the full scope and effect of [EU] law so as to ensure its proper implementation in the interests of all economic operators' [39] and that, 'in [that] case the French Government ha[d] adduced no concrete evidence proving the existence of a danger to public order with which it could not cope'. [40]

87. In my view, the French Republic has equally failed to show in the present case that taking binding measures in order to implement the decision at issue would have consequences for public order with which it could not cope by using the means at its disposal.

88. Even if it was necessary to deploy law enforcement authorities, which is a matter solely for Member States, the French Republic has not shown that it would be absolutely impossible to deploy those authorities if the feared social unrest were to arise.

89. First, it must be remembered that, contrary to the fears of the French Republic, the belated issue of collection orders by the OTC on 7 and 19 November 2014, and registration of these on the schedule of liabilities on 9 January 2015, which constitute the first steps of implementation of the decision at issue, did not provoke any social unrest. [41]

90. In addition, the documents annexed to the French Republic's defence show that, during the protracted strike in 2005, the French authorities were able to deal with the threat of social unrest. Law enforcement authorities were deployed to restore free movement in the port of Ajaccio, regain control of the ship hijacked by the strikers and remove the strikers who were blockading two oil terminals at Fos-sur-Mer and Lavéra.

36 — Judgment in *Commission* v *France* (C-52/95, EU:C:1995:432, paragraph 37).

37 — Ibid. (paragraph 38).

38 — Judgment in *Commission* v *France* (C-265/95, EU:C:1997:595, paragraph 54).

39 — Ibid. (paragraph 56). My emphasis.

40 — Ibid. paragraph 57).

41 — I fail to see how taking those steps after the decision of the Tribunal de Commerce de Marseille would have dispelled all risk of social unrest, as the French Republic claimed during the hearing.

91. The French Republic also pleads that there is a risk of physical damage caused by strikers, but without being more specific or setting this against the context of the general interest served by implementation of the decision at issue.

92. For the sake of completeness, I would point out that the French Republic previously raised this type of argument in order to justify the grant of aid for the restructuring of SNCM [42] and that it was rejected by the Court, which held that 'summary references to the brand image of a Member State, as a global player [which could be tarnished by strikes] are not enough to support a finding that there is no aid, for the purposes of EU law'. [43]

93. The same goes for the arguments raised by the French Republic in relation to the risk of a break in the territorial continuity between mainland France and Corsica which would threaten Corsica's supplies of medicines, blood products, fuel and essential goods.

94. It is, of course, true that a protracted strike by SNCM workers, together with a blockade of the port of Marseille and of the Corsican airports, as well as solidarity strikes in the Corsican ports (as happened in 2005), present difficult challenges for the French authorities.

95. However, without repeating what I have already said about the events of 2005, [44] I would also cite to the same effect the note from the French Ministry of Civil Defence and Security of 30 September 2005 indicating the availability of the military airport of Solenzara (maintaining the possibility of supplies being airlifted), adding that the Prefect for Haute-Corse had taken other necessary measures to ensure supplies for Corsica, for example restricting sales of fuel, and that he envisaged other measures being taken such as the requisitioning of transport companies.

96. The e-mail from the French Minister for Sustainable Development of 6 October 2005 also shows that supplying Corsica with petroleum products was perfectly possibly 'with the unloading in Ajaccio — *under the protection of the security forces* — of a tanker that arrived from Barcelona'. [45] That e-mail concludes by saying that 'almost all the service stations on the island have been refuelled'.

97. It therefore seems to me that arguments based on the risk of very serious public unrest and the risk of a break in territorial continuity between mainland France and Corsica should be dismissed.

98. Any other conclusion would have the unacceptable effect of making the effectiveness of EU law dependent on the good (or ill) will or on the greater or lesser blockading capacity of certain groups whose interests are adversely affected by decisions by the European institutions or by decisions taken by Member States to comply with them. [46] Just as the Commission does, I consider that the French Republic's reasoning is that it would have no other option than to give in to any threat to public order made by those groups. To that effect, as the Commission put it very succinctly at the hearing, political discomfort is not the same thing as an absolute impossibility of implementation.

42 — See also my Opinion in *SNCM and France* v *Corsica Ferries France* (C-533/12 P and C-536/12 P, EU:C:2014:4, points 72 et 73).

43 — Judgment in *SNCM and France* v *Corsica Ferries France* (C-533/12 P and C-536/12 P, EU:C:2014:2142, paragraphs 40 and 41). See also, to that effect, judgment in *Corsica Ferries* v *Commission* (T-565/08, EU:T:2012:415, paragraphs 103 and 104).

44 — See point 88 of this Opinion.

45 — My emphasis.

46 — See, to that effect, judgment in *Commission* v *France* (C-121/07, EU:C:2008:695, paragraph 72) where the Court held that, even on the assumption that the social unrest referred to by the French Republic is in fact attributable in part to the implementation of Community rules, a Member State may not plead difficulties of implementation which emerge at the stage when a Community measure is put into effect, including difficulties relating to opposition on the part of certain individuals, to justify a failure to comply with obligations and time-limits laid down by Community law'.

4. Lack of sincere cooperation

99. I would add that, if a Member State experiences difficulties in implementing a decision of the Commission, the case-law of the Court of Justice obliges the Commission and the Member State 'pursuant to the rule imposing on the Member States and the [EU] institutions reciprocal duties of genuine cooperation, which underlies, in particular, Article [4(3) TEU], [to] work together in good faith with a view to overcoming those difficulties whilst fully observing the Treaty provisions and, in particular, the provisions on State aid'. [47]

100. The Court has held, on several occasions, that 'the condition that it be absolutely impossible to implement a decision is not fulfilled where the defendant Member State merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real steps to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled those difficulties to be overcome'. [48]

101. It is clear from the file that the French Republic did not take any steps of that sort with the undertakings concerned and did not propose to the Commission any alternative arrangements for implementing the decision which could have enabled the alleged difficulties to be overcome.

102. Consequently, the French Republic failed in its duty to take, within the prescribed periods, all the measures necessary to recover from the undertakings concerned the State aid declared unlawful and incompatible with the internal market by Article 2(1) of the decision at issue.

B – *Second ground for complaint: failure to cancel all payments of illegal aid*

103. In its application, the Commission complains that the French Republic did not, within the prescribed periods, cancel all payments of aid referred to in Article 2(1) of the decision at issue.

104. According to the Commission, despite what is laid down in Article 3(4) of the decision at issue, those payments were neither immediately suspended nor cancelled. In its application, the Commission explains that the OTC's initial budget for 2013, adopted by its Board of Directors on 25 June 2013, included two financial compensation payments in favour of SNCM and CMN, of EUR 78 014 930 and EUR 32 627 141 respectively. These sums apparently cover both the basic service and additional service, given the corresponding sums for previous years.

105. The Commission also refers to the e-mail of 29 November 2013 [49] in which the French authorities assert that they stopped payment of compensation for the additional service in July 2013, as evidenced by a payment order from the OTC to SNCM recording payment relating only to the basic service.

106. However, according to the Commission, that payment order does not prove that payment of the compensation for the additional service was stopped in July 2013, but simply records the payment relating to the basic service, without the slightest indication on the part of the French authorities of the way in which that amount has been calculated.

47 — Judgment in *Commission* v *France* (C-214/07, EU:C:2008:619, paragraph 45). See also, to that effect, judgments in *Commission* v *Italy* (C-348/93, EU:C:1995:95, paragraph 17); *Commission* v *France* (C-261/99, EU:C:2001:179, paragraph 24), and *Commission* v *Spain* (C-485/03 to C-490/03, EU:C:2006:777).

48 — Judgment in *Commission* v *France* (C-214/07, EU:C:2008:619, paragraph 46). See also, to that effect, judgments in *Commission* v *Spain* (C-404/00, EU:C:2003:373, paragraph 47); *Commission* v *Italy* (C-99/02, EU:C:2004:207, paragraph 18); *Commission* v *Greece* (C-415/03, EU:C:2005:287, paragraph 43), and *Commission* v *Spain* (C-485/03 to C-490/03, EU:C:2006:777, paragraph 74).

49 — See point 23 of this Opinion.

107. In its defence, the French Republic affirms that payment of compensation for the additional service was indeed stopped with effect from July 2013. It relies on:

— the payment order concerned which, according to the French Republic, shows that for the month of July 2013 the OTC paid to SNCM only EUR 2 880 160 in respect of the basic service;

— the extracts from SNCM's bank statements annexed to its defence showing that, with effect from July 2013, SNCM received only EUR 2 880 160 for the basic service instead of EUR 6 130 160 received in June 2013 for the basic service and the additional service; and

— the application for interim measures lodged by SNCM at the Tribunal Administrative de Bastia (Administrative Court, Bastia, France) on 12 December 2013 seeking an order that the OTC pay a sum of EUR 16 225 000 for non-payment of the compensation in relation to the additional service.

108. The French Republic also states that, in order to calculate the amount of compensation to be paid to SNCM in respect of the basic service for the months of July to December 2013, the OTC used the method employed by the Commission at paragraph 218 of the decision at issue.

109. In view of these factors, the Commission, in its reply, abandoned that ground for complaint, inasmuch as it concerned the failure to suspend compensation payments to SNCM for the additional service with effect from 23 July 2013 and the lack of satisfactory information about that suspension.

110. Nevertheless, the Commission maintains its ground for complaint based on the lack of suspension of compensation payments to SNCM for the additional service in respect of the period running from the notification of the decision at issue to the French Republic, which occurred on 3 May 2013, until 23 July 2013. It would appear from SNCM's bank extracts that, during that period, the French authorities made three monthly payments to SNCM, each of EUR 6 130 160.

111. In its rejoinder, the French Republic does not dispute that fact, as it confirmed during the hearing.

112. The suspension of payment of compensation for the additional service was supposed to take place from notification of the decision at issue to the French Republic, namely on 3 May 2013, as set out in Article 3(4) of that decision. As the Commission observes, there is no indication, nor even an allegation by the French authorities, that payments for the additional service between 3 May and 23 July 2013 were suspended or cancelled. Neither is there any sign of any recovery by the French authorities of the sums that would have been paid during that period.

113. Consequently, by not having cancelled, within the prescribed periods, all of the aid payments referred to in Article 2(1), the French Republic failed to fulfil its obligations under Article 3(4) of the decision at issue.

C – *Third ground for complaint: failure to inform the Commission*

114. As the French Republic did not take, within the prescribed periods, the necessary measures to cancel future aid payments or to recover the amounts of aid already paid, it also failed in its obligation to inform the Commission of the measures taken within the two months following notification of the decision at issue, as required by Article 5 of that decision.

115. That finding is supported by the fact that the French Republic also failed to respond to the observations and requests for clarification sent to it by the Commission in the absence of any communication from the French authorities.

116. I quote, by way of example, the letter from the Commission to the French Permanent Representation to the European Union, dated 20 September 2013, in which the Commission complained about the fact that its observations and requests for clarification '[had] not met with any reply' and that 'at the end of the various periods prescribed by the [decision at issue], the French authorities [had] not supplied the Commission staff with *the slightest piece of information* about the implementation of the decision'.[50] The French authorities took two months to react to this reminder letter, via their e-mail of 29 November 2013.

VI – **Costs**

117. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

118. In the present case, the Commission has applied for costs against the French Republic and the French Republic should, in my view, be found unsuccessful in all essential respects. The French Republic should therefore be ordered to pay the whole of the costs.

VII – **Conclusion**

119. On the basis of the above considerations, I propose that the Court should order as follows:

(1) By failing to take, within the prescribed periods, all the measures necessary to recover from Société Nationale Maritime Corse-Méditerranée (SNCM) SA the State aid declared illegal and incompatible with the internal market by Article 2(1) of Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée and the Compagnie Méridionale de Navigation; by not having cancelled, within the prescribed periods, all the aid payments referred to in that Article 2(1); and, by not having informed the European Commission, within the prescribed period, of the measures taken to comply with that decision, the French Republic has failed to fulfil its obligations under the fourth paragraph of Article 288 TFEU and Articles 3, 4 and 5 of that decision.

(2) The French Republic is ordered to pay the costs.

50 — My emphasis.