OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 6 December 1988 *

Mr President,
Members of the Court,

1. The Commission has brought an action before the Court on the basis of Article 169 of the EEC Treaty since it considers that the French Republic and the United Kingdom have failed to fulfil their obligations under the EEC Treaty by failing to take action for the post-clearance recovery of a specified amount by way of levies, in accordance with Regulation (EEC) No 1697/79, [1] and, in the absence of such recovery, by failing to make the amount in question available to the European Communities as own resources.

The Commission claims that France and the United Kingdom should, in accordance with Regulation No 1697/79, have taken action for the post-clearance recovery of monetary compensatory amounts which, in its view, were payable by a French undertaking and a United Kingdom undertaking.

Background

2. Council Directive 69/73/EEC [2] provides for 'inward processing' arrangements under which an importer of goods is not required to pay any import charges on condition that the imported goods are intended for export in the form of 'compensating products'. The inward processing system therefore grants relief from import charges subject to the exportation of the processed products ('compensating products') without export refunds.

Article 24 of that directive introduces the possibility of 'equivalent compensation'; in certain circumstances, the competent authorities may also treat as compensating products, products derived from the processing of goods of the same kind and quality and having the same technical characteristics as those of the imported goods ('compensation goods'). Moreover, Article 25 of the directive also permits a system of 'prior exportation' of the compensating products to be set up in certain cases. That article provides that, where the circumstances so warrant, the compensating products may, under conditions determined by the competent authorities, be exported (also without export refunds) prior to the importation free of import charges of goods covered by inward processing arrangements.

Commission Directive 75/349, [3] which lays down a set of further rules concerning equi-

* Original language Dutch.

1 — Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have been not required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979, L 197, p 1)

2 — Council Directive 69/73/EEC of 4 March 1969 on the harmonization of provisions laid down by law, regulation or administrative action in respect of inward processing (OJ, English Special Edition 1969, I, p 65)

3 — Commission Directive 75/349/EEC of 26 May 1975 on detailed rules concerning equivalent compensation and prior exportation under inward processing arrangements (OJ 1975, L 156, p 25)

valent compensation, contains two provisions that are relevant to these proceedings. First and foremost, there is Article 5 (1) which provides as follows:

'Compensation goods by their substitution for import goods shall, for customs purposes, take the same status as the latter, in the same way that import goods on substitution shall, for customs purposes, take the same status as compensation goods.'

The other relevant provision is Article 4 of that directive, which provides as follows:

'The competent authorities shall refuse the benefit of equivalent compensation or prior exportation when the use of these would lead to an unjustified advantage in regard to relief from customs duties, charges having equivalent effect, agricultural levies and other charges laid down within the framework of the common agricultural policy, or of a specific system applicable under Article 235 of the Treaty to certain goods which result from processing of agricultural products.'

3. Since the territory of the Community constitutes a customs union in relation to non-member countries, it is self-evident that import and export transactions can be carried out in different countries. At the beginning of 1981 the United Kingdom and French authorities were approached by Rank Hovis Ltd (a company incorporated under United Kingdom law) and Compagnie française commerciale et financière (a company incorporated under French law, hereinafter referred to as 'CFCF'), respectively, which expressed the wish to engage in certain import and export transactions together on the basis of inward processing arrangements involving equivalent compensation. Rank Hovis was to import into the United Kingdom common wheat from Canada free of import duty whereas CFCF was to export flour from France to non-member countries as a compensating product without claiming export refunds. However, Article 11 of Directive 75/349 provides that the importation of import goods may be carried out only by the holder of the prior export authorization or on his behalf.

In view of the novelty of 'triangular traffic', the United Kingdom and French customs authorities raised the matter with the Commission. On 12 June 1981 a meeting was held in Brussels between the Commission, on the one hand, and France, the United Kingdom and the Netherlands, on the other. According to the documents before the Court, the Netherlands was represented at the meeting because a Netherlands undertaking and a French undertaking wished to engage in a similar triangular operation involving the import and export of petroleum products. There is a difference of opinion between the parties as to whether, at the meeting, only the general principles of Directives 69/73 and 75/349 were discussed (the Commission's view) or whether the details of the transactions actually proposed were considered (the defendants' view). At all events it is clear that at that meeting the Commission explained the procedure to be followed in the case of import and export transactions involving equivalent compensation where such transactions were not carried out by

the same undertaking and/or in the same country. The Commission's guidelines were set out in Document SUD/833/81, which was drawn up by the Commission in June/July 1981 and forwarded to the French and the United Kingdom customs authorities. The document states that, where the exporter and the importer are two different persons, the connection between the two required by Article 11 of Directive 75/349 may be established by setting up a temporary association which then becomes the holder of the authorization to set up an inward processing system.

4. Accordingly, a 'groupement d'intérêt économique' known as 'Minoran' was set up under French law by Rank Hovis and CFCF. On 21 October 1981 Minoran was authorized by the French authorities (with the agreement of the United Kingdom authorities) to carry out the proposed transactions. The authorization was valid for one year. On the basis of that authorization, between February and September 1982 Rank Hovis imported into the United Kingdom on account of Minoran a number of consignments of common wheat from Canada. The flour was exported by CFCF, also on account of Minoran, from France to non-member countries over the same period. All the transactions were carried out without the imposition of import levies or the grant of export refunds. On 9 August 1982 a second authorization of the same kind was granted to Minoran but was suspended following receipt of a telex message from the Commission on 22 September 1982. By letter of 12 July 1984 the Commission informed France and the United Kingdom that, in its view, the transactions gave rise to an 'unjustified advantage' within the meaning of Article 4 of Directive 75/349. In that letter, the Commission requested France and the United Kingdom to recover the 'sums avoided' in accordance with Article 4 and the first subparagraph of Article 2 (1) of Regulation No 1697/79.[4] In response to a request from France and the United Kingdom to specify what amounts the Commission wished them to recover, the Commission explained by letter of 19 December 1984 that they were to take action for the post-clearance recovery of the monetary compensatory amounts payable on the exportation of the flour from France to non-member countries and on the importation of wheat from Canada into the United Kingdom. After an exchange of views between the Member States concerned and the Commission had failed to yield any results, the Commission instituted these proceedings before the Court under Article 169 of the EEC Treaty. In its application of 23 March 1987 the Commission claims that, as a result of the existence of an 'unjustified advantage', the authorizations granted are not valid, in accordance with Article 4 of Directive 75/349, and that the defendants should, pursuant to Article 2 (1) of Regulation No 1697/79, take action for the post-clearance recovery of the monetary compensatory amounts which would have been payable on the transactions in question if those transactions had taken place without any authorizations being granted.

5. It must be pointed out that the applicable legislation has been amended since the material events took place. The problem before the Court no longer arises under the law as it now stands. Article 37 of Council Regulation (EEC) No 3677/86 of 24

4 — Article 2 (1) of Council Regulation No 1697/79 provides as follows:
'Where the competent authorities find that all or part of the amount of import duties or export duties legally due on goods entered for a customs procedure involving the obligation to pay such duties has not been required of the person liable for payment, they shall take action to recover the duties not collected However, such action may not be taken after the expiry of a period of three years from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to the said goods was incurred.'

November 1986 laying down provisions for the implementation of Regulation (EEC) No 1999/85 on inward processing relief arrangements (Official Journal 1986, L 351, p. 1), which is set out in full in the Report for the Hearing, provides that, under the triangular traffic system, monetary compensatory amounts are to be levied in the same way as if the import goods had been sent by the exporter of the compensating products to the importing Member State.

The legal issue

6. The Court must decide whether the French Republic and the United Kingdom were required, on the basis of Regulation No 1697/79 and Directive 75/349/EEC, to take action for the post-clearance recovery of monetary compensatory amounts which, according to the Commission, were payable by Rank Hovis and CFCF and, in the absence of such recovery, whether they are required pursuant to Regulation No 1697/79 to make a corresponding amount available to the Communities as own resources.

The Commission contends that since the authorizations granted to Minoran permitted the latter to avoid paying monetary compensatory amounts altogether on both the imported common wheat and the exported flour, those authorizations gave rise to an 'unjustified advantage', within the meaning of Article 4 of Directive 75/349/EEC, and are consequently invalid, as stated in paragraph 4 above. It therefore claims that the Member States are under an obligation, on the basis of Article 2(1) of Regulation No 1697/79, to take action for the post-clearance recovery of the uncollected charges.

These proceedings were instituted by the Commission against two Member States and are not directed against Rank Hovis and CFCF which, in the Commission's view, are under an obligation to pay certain amounts. Hence it is not the legal position or the conduct of those undertakings that is in issue; it is the conduct of the Member States concerned and the question whether they could reasonably be expected to detect an allegedly unjustified advantage within the meaning of Article 4 of Directive 75/349 and, if so, whether they were required by Regulation No 1697/79 to take action for the post-clearance recovery of the uncollected levies.

The alleged 'unjustified advantage'

7. Let us first consider what the 'advantage' in the contested transaction consisted of, before ascertaining whether that advantage must be regarded as unjustified. Monetary compensatory amounts are, amongst other things, intended to prevent artificial deflections of trade which could arise from differences between the exchange rates of the various 'green currencies' in the Community. Since the Common Customs Tariff is expressed in ecus, but levies and refunds are payable in national currency, undertakings may wish to import goods from non-member countries into Member States whose currency has increased in value or, conversely, to export goods to non-member countries from Member States whose currency has depreciated in value since the establishment of the Common Customs Tariff. Moreover, so far as intra-Community trade is concerned, they may prefer to offer products for sale to intervention agencies in a Member State with a

strong currency on the ground that guaranteed prices are also paid in national currency. The levying of monetary compensatory amounts is aimed at neutralizing those differences as far as possible.

It is apparent from certain figures produced by the Commission that throughout the period under consideration monetary compensatory amounts were levied in the United Kingdom on imports of common wheat ('positive' monetary compensatory amounts). It is also apparent from those figures that since April 1982 refunds on exports of flour have in France been reduced by the levying of monetary compensatory amounts ('negative' monetary compensatory amounts).

As a result of the 'triangular system' set up by Rank Hovis and CFCF, Canadian common wheat was imported into the United Kingdom free of import charges (defined as the duties payable under the Common Customs Tariff plus positive monetary compensatory amounts) and at the same time flour was exported from France without any claim being made for export refunds (defined as the duties payable under the Common Customs Tariff less negative monetary compensatory amounts). Since no transactions took place between France and the United Kingdom, no intra-Community monetary compensatory amounts were levied either. [5]

8. I now turn to the allegation that the advantage described above is 'unjustified'. In that regard, there is a serious difference of opinion between the parties.

According to the Commission, the fact that the contested authorizations led to the avoidance of *both* positive monetary compensatory amounts (on the importation of common wheat from Canada into the United Kingdom) *and* negative monetary compensatory amounts (on the exportation of the flour from France to non-member countries), constituted an 'unjustified advantage'. Initially, the Commission argued that that unjustified advantage arose from the application of Article 5 of Directive 74/349/EEC (set out in paragraph 2, *supra*), according to which the compensation goods take, for customs purposes, the same status as import goods, and import goods take, for customs purposes, the same status as compensation goods. In the Commission's view, it is possible to comply with that rule only where the import goods and the compensation goods are imported into, and exported from, the same Member State. [6] In its view, therefore, the unjustified advantage consisted in avoiding the exportation of the Canadian wheat from France to the United Kingdom and consequently avoiding payment of intra-Community monetary compensatory amounts. The amount of those levies should, according to the Commission, be the subject of post-clearance recovery (even though no intra-Community trade had taken place between France and the United Kingdom).

Subsequently, the Commission made no further reference to Article 5 of Directive 75/349/EEC. In reply to a question from the Court, [7] the Commission pointed out

5 — The United Kingdom contends that the advantage in fact sought by Rank Hovis originated in a growing disparity between, on the one hand, import duties levied on common wheat which tended to increase in the spring of 1981 and, on the other, export refunds on flour which were falling over the same period According to the United Kingdom, Rank Hovis sought refuge in operations involving equivalent compensation in order to limit the loss of revenue that threatened to result from that trend, and the avoidance of monetary compensatory amounts was only a secondary consideration. I do not propose to deal with this 'advantage' in my analysis since neither of the parties has alleged it to be 'unjustified'

6 — See the Commission's letters of 12 July 1984 addressed to the Permanent Representations of France and the United Kingdom.

7 — Written reply of 27 April 1988 to the Court's question of 2 March 1988.

that the expression 'unjustified advantage' relates to an advantage not resulting from the 'normal application of the (inward processing) arrangements or other permitted transactions'. A 'normal' application of the inward processing system means, according to the Commission, that the import and export transactions (in this case the import of wheat and the export of flour) have been carried out within the same Member State (namely France), so that triangular traffic should not offer the possibility of avoiding payment of intra-Community monetary compensatory amounts.[8] 'Abnormal' applications of that system, as in this case, give rise to an unjustified advantage and entail, the Commission maintains, the invalidity of the authorizations granted and consequently of the relief from import and export duties, including extra-Community monetary compensatory amounts. On grounds of fairness, however, the Commission seeks only the post-clearance recovery of the extra-Community monetary compensatory amounts.

In that regard, it is unimportant, according to the Commission, whether monetary compensatory amounts were levied in France and the United Kingdom at the time of the *grant* of the authorization. In its view, it was sufficient that monetary compensatory amounts were levied continuously in the United Kingdom, and for a time in France as well, *during* the period of validity of the authorizations.

9. The United Kingdom rejects the aforesaid definitions given by the Commission and contends that the fact that the authorization enables payment of monetary compensatory amounts to be avoided is a normal consequence of the existence of the customs union and the rules on equivalent compensation as applied at the time of the contested transactions. The United Kingdom also points out that the rules applicable at the time of the contested transactions provided *either* for the grant of authorization (with relief from import and export duties and monetary compensatory amounts) *or* for the refusal to grant authorization. Hence the grant of authorization subject to payment of monetary compensatory amounts was not one of the possibilities envisaged.[9] The United Kingdom also disagrees with the Commission's contention that the existence of an 'unjustified advantage' must be inferred from the fact that monetary compensatory amounts were applicable *during* the period of validity of an authorization. Finally, the United Kingdom contends that the Commission's interpretation is unacceptable inasmuch as it would lead to the levying of charges without there being a clear legal basis for their imposition.[10]

The French Government's defence is akin to that of the United Kingdom. It raises the question why an authorization which enables payment of monetary compensatory amounts to be avoided should constitute an 'unjustified advantage', whereas an authorization which permits differences between import levies and export refunds to be exploited is indisputably valid. The French Government also contends that Article 4 of Directive 75/349 does not impose an obligation on the Member States to ascertain

8 — See the Commission's application, pp. 5 and 9.

9 — The existing rules, the United Kingdom points out, do provide for that possibility, particularly in Article 37 of Regulation No 3677/86 (supra, paragraph 5).

10 — With reference to the Court's judgment of 9 July 1981 in Case 169/80 *Gondrand frères* [1981] ECR 1931.

whether a given transaction follows 'from the normal application of the system'.

Does the failure to establish the existence of an 'unjustified advantage' constitute a failure by the Member States concerned to fulfil their obligations?

10. In the light of the substantial difference of opinion between the parties, referred to earlier, concerning the definition, the existence and the legal basis of an 'unjustified advantage', it is necessary to consider whether, by failing to detect an 'unjustified advantage' within the meaning of Article 4 of Directive 75/349/EEC, the defendants failed in practice to fulfil one of their obligations under Community law. In answering that question, account must be taken of the fact that both the Commission and the Member States enjoy a wide discretion when it comes to determining the scope of such an 'open' concept. That applies particularly where, as in this case, during the period in respect of which the authorizations were granted no decided cases or practical precedents were available in which the concept of an 'unjustified advantage' had been interpreted.

In general, it must be acknowledged that the defendants cannot be reproached for failing to fulfil their obligations if they remained within the bounds of a reasonable and prudent exercise of their discretion. If that principle is applied to the specific circumstances of this case, it is apparent, in my view, that the defendants did not exercise their discretion in an unreasonable or imprudent manner in failing to detect an 'unjustified advantage' in the proposed transactions. My opinion is based on the following circumstances:

11. It cannot be disputed that in 1981 it was unclear whether 'triangular traffic' could be brought within the scope of Directive 75/349/EEC. Article 11 (1) of that directive provides that 'importation of import goods may be carried out only by the holder of the authorization of prior exportation or on his behalf'.[11] It was precisely for that reason that a meeting was convened on 12 June 1981, as a result of which the Commission forwarded Document SUD/833/81 to the French and the United Kingdom authorities. That document indicated how the requirements of Article 11 could be satisfied:

'This provision [Article 11] is designed to establish a link between the importer and the exporter/operator. If the operator and the importer are two different persons, whether located in a single Member State or in different Member States, such a link can be formed[12] by setting up a temporary association (a company constituted under civil law) to act as holder of the inward processing relief authorization.'

Although that passage is not drafted in conclusive terms, it indicates incontestably that it is permissible to make use of the preferential system of equivalent compensation by setting up a *de jure* association between two undertakings in different Member States. It is significant that the Commission did not in any way, either at the meeting held on 12 June 1981 or in Document SUD/833/81, discuss the impli-

11 — That provision does not rule out the possibility of engaging in triangular traffic as such for a company established in two different Member States; however, Article 11(2) of that directive also provides that the competent authorities may prescribe in the authorization that the export and import transactions must be carried out at the same customs office.

12 — The French text reads ' . ce lien pourrait se réaliser '

cations for the levying of monetary compensatory amounts of the use of a temporary association by undertakings in different countries. However, the legal device involved has special characteristics which vary from one Member State to another and is characterized by a low level of legal personality (if any) and a high level of transparency towards the shareholders. The use of that device has led to a substantial extension in the scope of Article 11 of Directive 75/349/EEC. It permits the inward processing system to be opened up in the case of two completely independent undertakings which are established in different Member States. If one of the objectives of Directive 75/349 lay, as the Commission contends, in the exclusion of triangular traffic in cases in which the payment of monetary compensatory amounts on intra-Community trade in goods was avoided, the Commission's conduct has undeniably detracted from the achievement of that objective. [13]

12. It must therefore be stated that, at the meeting held in Brussels on 12 June 1981 and in the aforesaid document, the Commission suggested an interpretation of Directive 75/349 of which it did not itself foresee the consequences. It is therefore difficult to comprehend its allegation that the defendants did not treat the advantage resulting from the contested authorizations [14] as an 'unjustified advantage'. Indeed, at the hearing, the Commission submitted that its own error was 'so serious' and 'so obvious' that the Member States concerned should have noticed it and should have placed no further reliance on the Commission's indications. Leaving aside the question whether the Commission's error really was so obvious, I do not consider that argument to be relevant. Instead, it must be stated that the Member States concerned exercised due care in submitting (at least the structure of) the proposed transactions to the Commission, and that in those circumstances they were entitled to rely upon the interpretation suggested by the Commission.

The possibility of post-clearance recovery

13. Even if the Court should decide that, by failing to regard the contested transactions as the cause of an unjustified advantage the defendants failed to fulfil an obligation under Community law — which would imply that they overstepped the bounds of a reasonable and prudent assessment, which is not the case — it is still necessary to ascertain whether it is possible to take action for the post-clearance recovery of the sums in question, as required by the Commission.

The Commission requests the defendants to take action for the post-clearance recovery of those sums on the basis of Article 2 (1) of Regulation No 1697/79. In that connection, account must at the same time be taken of Article 5 (2) of that regulation, which provides as follows:

'The competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have

13 — The Commission stated at the hearing 'that it was possible that 'byintroducing the possibility of granting triangular traffic authorizations to entities with such a degree of transparency it had paved the way for possible abuses. See the transcript of the hearing, French version, pp. 33 to 35.

14 — To the extent to which there was one. As stated above (paragraph 7), at the time of the grant of the authorization no monetary compensatory amounts were applicable on transactions involving exports from and imports into the French Republic.

been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned.'

14. In its judgment in *Foto-Frost*,[15] the Court decided that where the three conditions laid down by Article 5 (2) of Regulation No 1697/79 are fulfilled, the competent authorities may no longer take action for the post-clearance recovery of the sums in question and the person liable is *entitled* to the waiver of the recovery of those sums. In such a case, the Member State concerned may not be reproached for refusing to take action for the post-clearance recovery of those sums. Nor, in those circumstances, is the Member State required to make the corresponding own resources available to the Community. Indeed, Article 9 of Regulation (EEC) No 1697/79 provides as follows:

'Until the implementation of Community provisions specifying the conditions under which Member States shall establish the own resources accruing from the imposition of import duties or export duties, Member States are not obliged, where, pursuant to this regulation, they have taken no action for the post-clearance recovery of such duties, to establish the corresponding own resources within the meaning of Regulation (EEC, Euratom, ECSC) No 2891/77.' (Emphasis added.)

15. I consider that, in this case, the three conditions referred to in *Foto-Frost* are fulfilled, at least if we proceed, as I now do, on the (in my view incorrect) assumption that the defendants' assessment was erroneous.

15 — Judgment of 22 October 1987 in Case 314/85 *Foto-Frost* v *Hauptzollamt Lubeck-Ost* [1987] ECR 4199

The *first condition*, namely that the failure to collect the levies is the result of an error made by the competent authorities, is therefore — on the assumption that such an error was made — fulfilled.

The *second condition* which must be fulfilled for Article 5 (2) of Regulation No 1697/79 to apply, namely that the person liable could not reasonably have detected the error made by the customs authorities, is also fulfilled in this case. In *Foto-Frost*, the Court laid emphasis on the fact that even the specialist judges of the German court had expressed the view that it was doubtful whether or not the duties in question were payable, and that in those circumstances an undertaking could not be reproached for failing to detect the error made by the customs authorities. In this case as well, I consider that the undertakings concerned, whilst they may be large undertakings, could not have detected the error made by the French and United Kingdom authorities, even on the assumption that such an error was made. Since both undertakings raised the question whether the proposed transactions were permissible with their respective customs authorities — which in their turn consulted the Commission thereon — and took account of the fact that at the time of the contested transactions the Commission was also far from clear as to the meaning of the concept of 'unjustified advantage', the undertakings concerned could not reasonably have been expected to detect the error made by the competent authorities.

It follows from the fact that the undertakings concerned took the lead in establishing contact with the competent authorities and from the fact that the Commission has not claimed that those undertakings submitted incorrect or incomplete customs declarations that the *third condition* is also fulfilled.

Costs

16. According to Article 69 (2) of the Court's Rules of Procedure, the unsuccessful party is to be ordered to pay the costs 'if they have been asked for in the successful party's pleading' (the French text reads: 's'il est conclu en ce sens'). On that point, a problem arises in Case 92/87 as regards the French Republic. During the written procedure, the French Republic did not ask for the Commission to be ordered to pay the costs. But it did apply for an order to that effect during the oral procedure, namely in its written comments on a document submitted by the Commission in response to a request made by the Court at the hearing. The question which arises, therefore, is whether it is possible to consider the costs as having been 'asked for' in an application made on that occasion.

In my view, that question must be answered in the negative. In principle, it must be stated that a party may 'ask for' costs only during the written procedure (that is to say, in the case of France, in its defence or rejoinder). It is no longer appropriate to ask for costs in observations made after the hearing in a document which is intended to comment on a document submitted by the Commission. Therefore the French Republic has not asked for costs (in due time) and must bear its own costs (see the judgments of 29 October 1980 in Case 139/79 *Maizena* v *Council* [1980] ECR 3393, paragraph 39 of the decision, and of 6 October 1982 in Case 59/81 *Commission* v *Council* [1982] ECR 3329, paragraph 41 of the decision).

Conclusion

17. In the light of the foregoing analysis, I propose that the Court should:

(1) declare that the defendants, the French Republic and the United Kingdom, have not in this case exercised their discretion under Article 4 of Directive 75/349/EEC in an unreasonable or imprudent manner and have not therefore, by failing to take action on the Commission's request for the post-clearance recovery of a specified amount by way of levies or by not making a corresponding amount available to the Communities as own resources, failed to fulfil their obligations under the EEC Treaty;

(2) alternatively, declare that even if the defendants, the French Republic and the United Kingdom, have exercised their discretion under Article 4 of Directive 75/349/EEC in an unreasonable or imprudent manner, they were under no obligation, having regard to Articles 2 (1), 5 (2) and 9 of Regulation No 1697/79, to take action for the post-clearance recovery of the amount in question as required by the Commission or to make a corresponding amount available to the Communities;

(3) order the Commission to pay the costs, except those of the French Republic which are to be borne by the French Republic itself.