

JUDGMENT OF THE COURT  
13 July 1988 \*

In Case 102/87

**French Republic**, represented by Gilbert Guillaume and Régis de Gouttes, acting as Agents, and Bernard Botte, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy,

applicant,

v

**Commission of the European Communities**, represented by its Legal Advisers, Antonio Abate and Thomas F. Cusack, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission Decision of 14 January 1987 on an FIM (Industrial Modernization Fund) loan to a brewery is void (Official Journal 1987, L 152, p. 27),

THE COURT

composed of: Lord Mackenzie Stuart, President, O. Due (President of Chamber), T. Koopmans, U. Everling, Y. Galmot, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz  
Registrar: D. Louterman, Administrator

\* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 27 April 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 June 1988,

gives the following,

### Judgment

- 1 By application lodged at the Court Registry on 4 April 1987, the French Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that the Commission decision of 14 January 1987 on an FIM (Industrial Modernization Fund) loan to a brewery is void. That decision, of which notice was given to the French Government by letter of 29 January 1987, was subsequently published in the Official Journal (Official Journal 1987, L 152, p. 27).
- 2 The fonds industriel de modernisation (FIM) was set up by the French Government in 1983 and was abolished in 1986. Its purpose was to provide financial support for industrial undertakings which made investments, of whatever kind, for the purpose of modernizing manufacturing processes or developing new products and processes. The FIM's projects were to be aimed primarily at the achievement of certain objectives, among which was the installation of high technology plant and equipment in undertakings. The applicable rules provided that the FIM could provide loans to industrial undertakings which would be guaranteed by the State.
- 3 Loans from the FIM were financed out of 'comptes de développement industriel' (Industrial Development Accounts) (known as 'Codevi') which were private very-short-term deposit accounts intended to enable French households, through their savings, to share in the industrial modernization contemplated by the French Government. The interest received by holders of such accounts was fixed by the

State at a much lower level than the market rate but was exempt from the payment of income tax. Part of the funds so raised was allocated to a French financial institution, namely the *caisse de dépôts et consignations* to be used by the FIM for the purpose of granting loans. The interest on those loans was equal to the cost of the Codevi funds, namely the interest paid to savers, plus a bank commission of 2% and a contribution to the cost of managing the system.

- 4 In February 1984, the Commission initiated the procedure under Article 93 (2) of the EEC Treaty in regard to loans granted by the Fund on the ground that such loans constituted State aid and it was necessary to consider whether or not they were compatible with the common market under Article 92 (3) of the Treaty. That procedure led to the adoption of Commission Decision 85/378/EEC of 19 December 1984 on the French system of assistance to industry comprising special investment loans, subsidized loans to enterprises, additional re-financing loans and FIM (Industrial Modernization Fund) loans (Official Journal 1985, L 216, p. 12). The French Government did not challenge that decision before the Court.
- 5 The preamble to Decision 85/378 states in particular that the rate of interest on FIM loans is always fixed at a level below that of loans obtained at the market rate by virtue of the fact that FIM loans are financed by Codevi savings, the funds thus obtained being used to finance long-term loans to industry. The possibility of gathering funds at such a low rate of interest and in such great quantities is due to the tax exemption granted to Codevi by the State, which is thereby forgoing considerable tax revenue. In those circumstances, the combination of the tax exemption for Codevi and the use of the money deposited on such accounts to finance FIM loans amounts to granting an interest subsidy to the borrowing undertakings to the detriment of the State's tax revenue. Thus, the granting of FIM loans at a concessionary rate is in the nature of State aid within the meaning of Article 92 (1) of the Treaty.
- 6 The preamble to Decision 85/378 states that the compatibility of that aid scheme with the common market must be considered in specific cases, since there are many cases in which aid can be granted in circumstances which do not alter the conditions of trade. The Commission must therefore be put in a position, in 'significant individual cases' in which the granting of aid is likely to affect intra-

Community trade to an extent contrary to the common interest, to appraise the compatibility of the aid with Article 92 of the Treaty.

- 7 According to Article 1 of the decision, the Commission has no objection to the implementation of aid schemes in the form, *inter alia*, of FIM loans on condition that the French Government notifies significant cases to it in advance in accordance with Article 93 (3) of the Treaty. Article 2 determines which specific significant cases must be notified to the Commission by laying down variable thresholds according to the intensity of the aid expressed in terms of net grant equivalent. The decision also provides that notice is to be given of both new and existing aid schemes.
- 8 By note of 26 April 1985, the French authorities communicated to the Commission the files concerning undertakings which had been granted loans from the FIM since its inception in cases which the Commission regarded as 'significant'. The note pointed out that although they were communicating the files, the French authorities denied that FIM loans constituted aid within the meaning of Article 92 (1) of the Treaty. Among the files transmitted was that concerning a loan granted to the société européenne de brasserie. It is in regard to that loan that the Commission adopted the decision of 14 January 1987 which is the subject of these proceedings.
- 9 The contested decision found that the FIM loan of FF 40 million granted to a brewery and notified to the Commission by letter of 30 April 1985, the date on which the Commission received the note of 26 April, contained elements of aid within the meaning of Article 92 (1) of the Treaty in view of the interest subsidy of 4.75 percentage points, that it had been granted unlawfully in infringement of Article 93 (3) of the Treaty and was incompatible with the common market within the meaning of Article 92 of the Treaty. Article 2 of the decision provided that the aid in question had to be recovered and the French Government was to inform the Commission of the measures it took to comply therewith.
- 10 Reference is made to the Report for the Hearing for a fuller account of the background to the dispute, the submissions and arguments of the parties and the replies to the questions put by the Court which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

- 11 The French Government's submissions allege infringement of Article 92 (1) of the Treaty, breach of essential procedural requirements and infringement of the general principle of legal certainty. The first two submissions both concern the nature of the contested loan as aid incompatible with the common market and the way in which the Commission calculated the interest subsidy. Those two questions must be considered successively both from the point of view of the substance of the case and from that of the reasons on which the decision is based.

**A — The question whether the loan at issue constitutes aid incompatible with the common market**

- 12 The French Government claims first that the FIM loan to the société européenne de brasserie does not give rise to State aid of such a nature as to make it incompatible with the common market.
- 13 In reply to a question from the Court as to whether or not, by bringing no action before the Court against Decision 85/378, it had accepted the criteria for determining the aid element contained therein, the French Government replied that, according to that decision, even aid constituting a 'significant individual case' is not necessarily unlawful. Thus, the definition of such significant cases is of only procedural and not substantive interest.
- 14 It must be pointed out that the preamble to Decision 85/378 contains a detailed analysis of the process by which loans are granted by the FIM from which it was concluded that such loans contain an element of aid consisting, in particular, in concessionary interest rates, reinforced by a financial guarantee on the part of the State and by the way in which the State channels funds from savings accounts to industry. Although the French Government did indeed protest against FIM loans being regarded as aid, it none the less did not ask the Court to review the Commission's assessment. Furthermore, it complied with Decision 85/378 by notifying the Commission of 'significant individual cases' of aid within the meaning of that decision.
- 15 In those circumstances, the French Government, in proceedings against a decision concerning one significant individual case, cannot merely state that it denies that FIM loans are aid without putting forward any arguments other than those already

considered by the Commission in the preamble to Decision 85/378. However, the French Government has put forward no new factor in the context of this case.

- 16 Since the fact that the loan at issue constitutes aid can no longer be contested, it must be considered whether or not the aid in question must be regarded as incompatible with the common market within the meaning of Article 92.
- 17 In that regard, the French Government claims that the loan at issue cannot be regarded as affecting trade between Member States and competition. It also alleges that there is nothing in the decision to elucidate the Commission's reasoning on that point.
- 18 It must be observed that the contested decision examines the beer market in France. After noting that between 1975 and 1985 the annual consumption of beer per head stagnated in most of the Member States and fell slightly in France, the decision points out that France traditionally imports just over 10% of its requirements from the other Member States. French exports to other Member States declined slightly over the same period and represent only about 1.5% of French production. The undertaking in receipt of the loan at issue is wholly owned by a French group whose beer production accounts for over 50% of total French production and which participates in intra-Community trade in beer. The undertaking itself controls about 20% of the French market.
- 19 Those facts were not contested by the French Government. However, it pointed out that the Commission neither found over-capacity in the brewing sector nor indicated the borrowing undertaking's share of exports to other Member States. However, aid to an undertaking may be such as to affect trade between the Member States and distort competition where that undertaking competes with products coming from other Member States, even if it does not itself export its products. Such a situation may exist even if there is no over-capacity in the sector at issue. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that, in circum-

stances such as those found to exist by the Commission, undertakings established in other Member States have less chance of exporting their products to the market in that Member State. Such aid is therefore likely to affect trade between Member States and distort competition.

- 20 It must therefore be held that, taken together, the considerations relied on by the Commission could justify the Commission's conclusion that the aid was unlawful.
- 21 Accordingly, the complaints as to the question whether the loan constitutes aid, including those as to the statement of the reasons on which the decision is based, must be rejected.

#### **B — The method of calculating the interest subsidy**

- 22 The French Government claims that the contested decision refers to an interest subsidy of 4.75 percentage points without providing any justification for that figure. Since loans were made from the FIM at 9.25%, the Commission probably relied on the assumption that the market rate for a loan of that kind is 14%. That assumption, which is not mentioned in the decision, is incorrect since the market rate at that time was lower.
- 23 The Commission claims that the market rate of 14% stems from information supplied by the French Government itself for the purposes of implementing the coordination of regional aid. In that context, the average rate of interest on the market to be taken into account was that applied to loans for plant and equipment made by the *crédit national*, which at the time was 14%.
- 24 It can be seen from the documents in the case and from the oral argument presented to the Court that in 1971 and 1979, the Commission and the Member States coordinated their efforts with a view to laying down detailed rules for the application of the principles for the coordination of general regional aid schemes. Those rules were published in the form of Commission Communications. The Communication of 1971 (Official Journal 1971, C 111, p. 7) sets out a common method of assessing aid which includes the fixing of a reference rate in order to assess the size of any possible reduction in interest rates. The Communication of 1979 (Official Journal 1979, C 31, p. 9) provides that the reference rate is

henceforth to be fixed by a table setting out the rate to be taken into account for each Member State. For France, the Communication refers to the 'rate used for plant and equipment loans from the *crédit national*'. It is common ground that that rate was 14% at the material time.

- 25 The French Government claims first that the *crédit national* rate, which is used in the context of regional aid, cannot be applied to other types of aid. That argument must be rejected. Although it is true that the *crédit national* rate was used in the 1979 Communication in order to promote the transparency of the national regional aid schemes and to permit the Commission and other interested parties to determine any element of aid in regional loan schemes, the same rate must none the less be regarded as a valid — and recognized — indication of the market rate for loans for industrial investment.
- 26 The French Government also claims that in assessing the scale of the aid, account should be taken not of the general rate of 14% on which the Commission based itself but of a much lower rate in view of the more favourable conditions which the undertaking could have obtained from financial institutions since the loan was for investment in high technology by a very large undertaking.
- 27 However, it must be pointed out in that regard that although the French Government has produced some evidence, limited though it may be, in support of its application, it is clear from the arguments presented to the Court that at no stage in the administrative procedure which preceded the adoption of the contested decision did it submit that evidence to the Commission and it thereby refused to cooperate fairly with the Commission. In those circumstances, the French Government cannot argue that the Commission was wrong to use the rate of 14%, which was the sole reference at its disposal and one which had not been contested before it.
- 28 For all the foregoing reasons, the Commission was entitled to base itself on a market rate of 14% in this case.

- 29 With regard to the complaints concerning the statement of the reasons on which the decision is based, it must indeed be noted that the explanation of how the interest subsidy is calculated is concise. However, that statement must be considered in the light of the reasons underlying Decision 85/378, in application of which the contested decision was taken. As regards FIM loans, Decision 85/378 lays emphasis precisely on the interest subsidy resulting from the difference between the concessionary rate fixed by the French Government and the market rate. That the latter rate is the one offered by the *crédit national* for plant and equipment loans follows from a parameter fixed by agreement between the Commission and the French authorities and well known to the latter.
- 30 In that context, and having regard to the French Government's involvement, in accordance with Article 93 of the Treaty, in the drafting of both the contested decision and Decision 85/378, that Government had available to it all necessary information to assess whether or not the decision was well founded. Moreover, the statement of the reasons on which those two decisions are based has permitted the Court to exercise fully its powers of judicial review.
- 31 Consequently, the French Government has not succeeded in showing that the statement of the reasons for the contested decision was inadequate.

### **C — The general principle of legal certainty**

- 32 In its third submission, the French Government claims that the operative part of the contested decision is not sufficiently clear, in particular inasmuch as it requires the French Government to recover 'the aid in question' without specifying what that aid is. As a result, the addressee of the decision is unable to determine the actual amount of the aid it must recover.
- 33 That submission must be rejected. Article 1 of the contested decision states that the interest subsidy is of 4.75 percentage points and that it relates to a loan of FF 40 million. The addressee of the decision is therefore able to determine without overmuch difficulty the amount which must be recovered under the decision.

34 It follows from the foregoing that the application in its entirety must be dismissed.

**Costs**

35 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- (1) Dismisses the application;**
- (2) Orders the French Republic to pay the costs.**

Mackenzie Stuart	Due	Koopmans	
Everling	Galmot	Kakouris	O'Higgins

Delivered in open court in Luxembourg on 13 July 1988.

J.-G. Giraud  
Registrar

A. J. Mackenzie Stuart  
President