JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
12 December 1996 *

In Case T-380/94,

Association Internationale des Utilisateurs de Fils de Filaments Artificiels et Synthétiques et de Soie Naturelle (AIUFFASS), an association governed by the laws of Belgium, established at Ghent (Belgium),

Apparel, Knitting & Textiles Alliance (AKT), a company incorporated under the laws of England, established in London,

represented by Michel Waelbroeck and Jules Stuyck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicants,

v

Commission of the European Communities, represented initially by Jean-Paul Keppenne and Ben Smulders, subsequently by Xavier Lewis and Ben Smulders, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

supported by

United Kingdom of Great Britain and Northern Ireland, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, and at the hearing by Richard Plender QC, of the Bar of England and Wales, acting as Agents, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for annulment of the Commission decision of 31 May 1994, reproduced in Commission Notice 94/C 271/06, authorizing the Government of the United Kingdom under Article 92(3)(a) and (c) of the EC Treaty to grant aid of £61 million in favour of Hualon Corporation for the setting up of a textile producing plant in Northern Ireland (OJ 1994 C 271, p. 5),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: R. García-Valdecasas, President, K. Lenaerts, V. Tiili, J. Azizi and R. M. Moura Ramos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 10 July 1996,

gives the following

Judgment

Relevant legislation

1 Article 92(3) of the EC Treaty authorizes the Commission, by way of derogation from the prohibition of State aid affecting trade between Member States and liable to distort competition, to declare compatible with the common market:

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

[...]

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

2 According to Commission communication 88/C 212/02 on the method for the application of Article 92(3)(a) and (c) to regional aid (OJ 1988 C 212, p. 2, point I 4 and Annex I), Northern Ireland is among the regions covered by Article 92(3)(a).

3 In addition, Northern Ireland qualifies for projects coming under Objective 1 [Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the

other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5)].

4 The Commission laid down rules applicable to the grant of State aid to the textile industry in communication SEC(71) 363 final to Member States of 30 July 1971 (Commission of the European Communities: *Competition law in the European Communities*, Vol. II, 1990, pp. 44 to 47; hereinafter 'the 1971 communication') and in its letter to Member States SG(77) D/1190 dated 4 February 1977 and Annex [Doc. SEC(77) 317, 25.1.1977 (Commission of the European Communities: *Competition law in the European Communities*, Vol. II, 1990, pp. 51 to 54; hereinafter 'the 1977 letter').

5 One of the conditions set out in the 1971 communication is that the aid 'must not lead to increases in capacity'. Since such aids have particularly marked repercussions on competitiveness, they 'must be granted very sparingly'. They should 'find their justification in particularly pressing social problems' and 'be strictly limited to those textile activities faced both with particularly pressing social problems and serious problems of adjustment'. Their aim must be 'to provide the beneficiaries in the short term with a level of competitiveness sufficient to ensure success on the international textile market, taking into account the basic trend towards a progressive opening-up of the markets on a world-wide scale'. The communication also requires 'the conditions imposed by a dynamic development of the market structure within the Community' to be taken into consideration.

6 In its 1977 letter the Commission referred to 'the need to prevent the creation of further excess production capacity in the industry, which already has persistent structural surplus capacity'. It is stated in the annex to that letter that '[t]he term "excess capacity" ... implies that account is taken of a sufficiently varied range of sectors' and 'must also be considered in relation to the expected development of

competitive conditions'. It adds that '[s]pecific national aids to create additional capacity in those sectors of the textile and clothing industry where there is structural excess capacity or persistent stagnation of the market must be avoided'.

Facts underlying the dispute

7 On 21 December 1992 the United Kingdom Government notified to the Commission a proposal to grant aid to the Hualon Corporation ('Hualon'), a newly established textile undertaking, for its plant at Belfast in Northern Ireland. Hualon is owned by the Taiwanese Hualon Group, which operates in the synthetic fibres sector, mainly producing polyamide.

8 The proposed aid, of an intensity of 38%, was to amount to £61 million, for a total investment of £157 million.

9 It was proposed that the investment should be carried out in four phases, phased over seven years, with the aim of producing approximately 23 000 or 23 500 tonnes of finished polyester, polyamide and polycotton fabrics, representing between 140 million and 200 million metres, a year. Hualon's activities would consist in the dyeing and finishing of polyester and polyamide fabrics (first phase), weaving cotton and polyester cotton fabrics (second phase), weaving polyamide and polyester fabrics (third phase) and cotton spinning (fourth phase).

10 By notice published in the *Official Journal of the European Communities* of 5 October 1993, the defendant gave Member States and interested parties notice to submit their observations on the proposed measures in accordance with Article 93(2) of the Treaty (Commission Notice 93/C 269/06 pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties

regarding aid which the United Kingdom plans to grant to Hualon Corporation, OJ 1993 C 269, p. 8).

11 All the observations submitted by interested parties and Member States other than the United Kingdom mainly raised problems of excess capacity and widespread stagnating demand for textiles in the Community.

12 Apparel, Knitting & Textiles Alliance (AKT), a private limited company incorporated under English law which through its sole member, British Apparel & Textile Confederation (BATC), represents 80% of the United Kingdom's clothing and textile industry, submitted its observations on 3 September 1993. Association Internationale des Utilisateurs de Fils de Filaments Artificiels et Synthétiques et de Soie Naturelle (International Association of Users of Yarns of Man-made Fibres and of Natural Silk (AIUFFASS)), representing through its member associations 90% of European weavers of yarns of artificial and synthetic fibres, submitted its observations on 21 October 1993.

13 The defendant authorized the project under Article 92(3)(a) and (c) of the Treaty and Article 61(3) of the EEA Agreement by decision of 31 May 1994 ('the decision'), reproduced in Commission Notice 94/C 271/06 pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid which the United Kingdom has decided to grant to Hualon Corporation, Northern Ireland (OJ 1994 C 271, p. 5; 'the notice').

14 The decision states that the proposed aid qualifies for the derogation provided for in Article 92(3)(a) of the Treaty in that it will benefit a very disadvantaged region of the Community suffering from serious problems of unemployment (Objective 1 Community region). The region concerned is to gain by the creation of 1 800 direct jobs, corresponding to 10.8% of the unemployed in the north and west

Belfast areas, from which much of the workforce is to be drawn, and 1.7% of total unemployment in Northern Ireland. Apart from those direct jobs, the project should cause a further 500 jobs to be generated indirectly in the local economy. Lastly, if the undertaking is successful it will be liable to have an encouraging effect for an area which is facing very serious problems in attracting investment (28th to 31st paragraphs of the notice).

15 In considering the project from the point of view of Article 92(3)(a) and (c) of the Treaty, the Commission states that it balanced the positive regional effects of the proposed investment against its potential negative effects on overall productive capacity and competition (64th paragraph). It considers that the positive regional effects of the assisted project (described in the preceding paragraph of this judgment) outweigh its negative effects on capacity and competition in view of the probable change in the economic context for Hualon's new capacity when it places its products on the market. According to the decision, Hualon will produce mass-produced fabrics with low value added, 'a niche that otherwise would be covered by imports, without notably affecting the evolution of installed capacities' (59th paragraph of the notice).

16 The project should even have a 'positive reversing effect on the delocalization of the European textile industry towards low factor cost countries' outside the Community (64th paragraph). The defendant considers that, although it is likely to affect trading conditions in the European Community, the aid is not expected to do so to an extent contrary to the common interest (64th paragraph). After comparing the expected effects of the proposed investment on competition in the Community and its paramount effect on the economic development of the area concerned, the Commission concluded that the conditions to benefit from the exemptions provided for in Article 92(3)(a) and (c) of the Treaty and Article 61(3) of the EEA Agreement were fulfilled (65th paragraph).

Procedure

17 The applicants lodged their application on 29 November 1994.

18 By document lodged at the Court Registry on 1 March 1995, the defendant raised an objection of inadmissibility on the grounds that the applicants were not individually concerned and that AKT's application was out of time.

19 The applicants submitted their observations on the objection of inadmissibility on 15 May 1995.

20 On 14 September 1995 the Court decided to consider the objection of inadmissibility together with the substance.

21 By order of 14 September 1995 the Court gave the United Kingdom Government leave to intervene in support of the form of order sought by the defendant.

22 On 16 February 1996 the Court put written questions to the applicants pursuant to Article 64(3) of the Rules of Procedure on the issue of admissibility. On 13 June 1996 it put written questions to the parties concerning the substantive issues.

Forms of order sought

23 The applicants claim that the Court should:

— declare the application admissible and well founded;

— annul the decision by which the defendant authorized the United Kingdom Government, pursuant to Article 92(3)(a) and (c) of the Treaty, to grant aid of £61 million to Hualon;

— order the defendant to pay the costs.

24 In its objection of inadmissibility, the defendant claims that the Court should:

— declare the application inadmissible on the ground that the applicants are not individually concerned;

— in the alternative, declare the application inadmissible as far as AKT is concerned on the ground that it did not take an active part in the procedure;

— in the further alternative, declare the application inadmissible as far as AKT is concerned on the ground that it is out of time.

25 In its defence the defendant claims that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

26 The intervener claims that the Court should:

— dismiss the application,

— order the applicants to pay the costs, including those of the intervener.

Admissibility of the application

Arguments of the parties

27 The defendant claims that the application is inadmissible. In its view, whether an action relating to State aid is admissible has to be assessed differently depending on the type of decision involved. The principles set forth by the Court of Justice in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203 apply where the Commission, acting under Article 93(3) of the Treaty, declares an aid compatible with the common market without initiating the procedure provided for in Article 93(2). According to that case-law, parties benefiting from the procedural guarantees provided for in that article may only secure compliance therewith if they are entitled to contest the decision taken at the end of the procedure. In contrast, where, as in this case, the procedure provided for in Article 93(2) of the Treaty has been initiated, the admissibility of actions brought by competitors of the recipient of an aid against a decision authorizing that aid will be subject to the following conditions: first, the competitors must have taken an active part in the administrative procedure and, secondly, the contested measure must substantially affect their position on the market (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391).

28 Furthermore, an association is entitled to bring proceedings only if it can show that it has a particular interest in acting, which is distinct from that of its member undertakings (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v

Commission [1988] ECR 219 and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125). The judgments in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849 and Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-150, in which the Community Court allowed representative associations to bring proceedings before it, cannot be relied on in this case because they are concerned with competition law and anti-dumping law, which, unlike the law on State aid, make provision for a procedure for dealing with complaints.

29 The Commission argues that the applicants have no *locus standi* on the ground that they have no particular interest to assert. They are acting only in order to defend the individual interests of their members. What is more, their contacts with the defendant were episodic and generally confined to examining a few specific aids. They never extended to the formulation or interpretation of the rules applicable to State aid in the textile sector which were applied in the contested decision. In view of these facts, the applicants cannot be regarded as being negotiators within the meaning of *Van der Kooy and Others* v *Commission* and *CIRFS and Others* v *Commission* (cited in the preceding paragraph of this judgment).

30 The defendant concedes that AIUFFASS took an active part in the administrative procedure. AKT, in contrast, merely sent a brief letter to mark its involvement in the administrative procedure. AKT therefore does not satisfy the condition of active participation laid down by the case-law of the Court of Justice.

31 Furthermore, since on 15 June 1994 the defendant sent a full copy of the letter closing the administrative procedure to BATC, AKT's sole member, AKT was informed of the decision at the same time as BATC. Consequently, it brought its action outside the time-limit laid down by the fifth paragraph of Article 173 of the Treaty.

32 On the basis of paragraphs 21 and 22 of *Van der Kooy and Others* v *Commission* and paragraph 29 of *CIRFS and Others* v *Commission* (both cited in paragraph 28 of this judgment), the applicants argue that a representative association is individually concerned by a Commission decision relating to State aid where that association took an active part in the administrative procedure.

33 Contrary to the defendant's assertions, AKT did take an active part in the administrative procedure by sending the defendant a letter on 3 November 1993 specifically setting out the position in principle of the United Kingdom industry on the Hualon aid project. Furthermore, since the applicants have taken numerous actions in their members' interests *vis-à-vis* the Commission, they are interlocutors of the Commission in the same way as the International Rayon and Synthetic Fibres Committee (CIRFS) in the case which culminated in the judgment in *CIRFS and Others* v *Commission*, cited in paragraph 28 of this judgment.

34 AKT's status as an interlocutor is evidenced by the following facts:

— a letter of 26 March 1991 from Sir Leon Brittan, the member of the Commission responsible for competition matters, thanking AKT for assisting the Commission in its policy with regard to State aid in the textile sector,

— talks with members of the Commission, Sir Leon Brittan and Mr Millan, and Commission officials on that institution's State aid policy;

— a letter of 22 May 1991 to the member of the Commission, Mr Millan, stating AKT's opposition to the application of Commission Notice 92/C 142/04 to the Member States laying down guidelines for operational programmes which Member States are invited to establish within the framework of a Community initiative for regions heavily dependent on the textiles and clothing sector (OJ

1992 C 142, p. 5; 'the Retex programme') in order to subsidize capital investment carried out by textile undertakings in Greece, Portugal and Spain;

— five letters sent to the Commission between October 1991 and December 1993 setting out AKT's position on the Uruguay Round discussions on the textile industry;

— two letters of 26 March 1993 and 16 July 1993 concerning aid or proposals for State aid.

35 AIUFFASS claims it made the following approaches:

— it sent two letters, dated 16 February 1993 and 25 March 1993, concerning proposed aid to the Texmaco group, which the defendant answered on 24 September 1993;

— it sent a letter, written in cooperation with CIRFS and the Eurocoton association, dated 27 October 1993, in which it asked the defendant to extend the 'synthetic fibres discipline' to cover products manufactured by the members of those associations;

— it held meetings on 9 March 1993, 14 December 1993 and 29 April 1994 with Commission officials on that same subject;

— on 21 January 1994 the Commission met the member associations of Comitextil, an association representing the European textile industry, in order to discuss the transparency of its State aid policy in the textile sector;

— it sent two letters, dated 12 May and 18 June 1993, by which AIUFFASS asked respectively Mr Van Miert, the member of the Commission responsible for competition matters, and Mr Ehlermann, the Director General of the Commission's Competition Directorate (DG IV), to address its annual conference on the subject of aid in the textile sector.

36 In answer to the Court's questions, AIUFFASS states that it is made up of three sections dealing respectively with the weaving of yarns of artificial and synthetic fibres, the weaving and throwing of silk, and the texturizing of chemical fibres. It represents 90% of European weavers of yarns of artificial and synthetic fibres. The position on the market of all the members of the corresponding section is affected, since their activities are largely identical to those of Hualon.

37 In answer to the Court's questions, AKT states that the members of BATC, its only member, are the main trade associations in the United Kingdom active in the apparel and textile sectors, together with major companies present in more than one sector of that industry, such as spinning, weaving, garment manufacture, etc. It considers itself to be representative of the United Kingdom clothing and textile industry in that the aforementioned members account for more than 80% of the industry and it is the only association representing the industry as a whole. AKT claims that Hualon will be in direct competition with BATC member undertakings engaged in spinning, weaving fibres and yarns, and dyeing or finishing fabrics, and hence that the investment at issue will affect their position on the market.

38 AKT denies that its application is out of time, stressing that it is a separate legal entity from BATC and has a different role and different responsibilities. It has not been proven that BATC sent or was bound to have sent it a copy of the decision which it received by letter dated 15 June 1994.

39 It also states that on the date when the decision was communicated to BATC, its chairman and its executive director were also the chairman and the executive director of AKT. However, AKT's board of directors includes representatives of trade unions, which is not the case with BATC's board.

Findings of the Court

1. *The time-limit for bringing an action laid down by the fifth paragraph of Article 173 of the Treaty*

40 The fifth paragraph of Article 173 of the Treaty provides that proceedings must be instituted within two months of the publication of the measure, or of its notification to the applicant or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

41 Although, on the date when the decision was communicated to BATC, the chairman and the executive director of AKT were also BTAC's chairman and director general, it has not been proven that AKT, which is a separate legal person from BATC, actually had notice of the existence and the content of the decision as a result of that communication.

42 Since it has not been established that AKT had notice of the existence and content of the contested decision before it was published, there is no reason to consider that time started running under the fifth paragraph of Article 173 of the Treaty before publication.

43 Since these proceedings were instituted exactly two months after the decision was published, the objection of inadmissibility based on the claim that AKT's application was out of time must be rejected.

2. *The conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty*

44 The fourth paragraph of Article 173 of the Treaty gives any natural or legal person the right to bring proceedings against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former.

45 In this case the contested decision was addressed to the United Kingdom, which is a third party *vis-à-vis* the applicants. It is necessary, therefore, to determine whether the decision is of direct and individual concerned to them.

46 According to the case-law, where there is no doubt that the national authorities wish to act in a certain way, the possibility of their not making use of the option opened up by the Commission decision is purely theoretical, with the result that the applicant may be directly concerned (Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 9; Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraphs 60 and 61; Case T-442/93 *AAC and Others* v *Commission* [1995] ECR II-1329, paragraphs 45 and 46).

47 Since in this case the United Kingdom has sufficiently evinced its firm intention to grant the aid at issue, it must be held that the decision is of direct concern to the applicants.

48 As for whether the applicants are individually concerned, the Court finds in the first place that, since the aid is intended for a manufacturer of synthetic and cotton fabrics, AIUFFASS, as a trade association to whose section for 'weaving yarns of artificial and synthetic fibres' the main international manufacturers of such fabrics belong, is a person concerned within the meaning of Article 93(2) of the Treaty (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16; *Cook* v *Commission* (cited in paragraph 27 of this judgment), paragraph 24; *Matra* v *Commission* (also cited in paragraph 27), paragraphs 18 and 19). The same is true of AKT, whose sole member represents the interests of 80% of the United Kingdom textile and apparel industry, including undertakings operating in the same sector as Hualon.

49 Secondly, the Court finds that both AIUFFASS and AKT took part in the administrative procedure which culminated in the adoption of the contested decision.

50 Furthermore, as the Court pointed out in Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 64, an action for annulment brought by an association of undertakings which is not the addressee of the contested measure is admissible in two sets of circumstances. The first is where the association has a particular interest in acting, especially because its negotiating position is affected by the measure which it seeks to have annulled (*Van der Kooy and Others* v *Commission* (cited in paragraph 28 of this judgment), paragraphs 17 to 25; *CIRFS and Others* v *Commission* (also cited in paragraph 28), paragraphs 29 and 30). The second is where the association, by bringing its action, has substituted itself for one or more of the members whom it represents, on condition that those members were themselves in a position to bring an admissible action (see Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 60).

51 In this case, the applicants have been active in relation both to the general policy on State aid and to specific aid projects in the textile sector in the interests of their members or of members of their members operating in the same sector as the recipient undertaking. Consequently, the position of both AIUFFASS and AKT as

interlocutors of the Commission was affected by the contested decision (*Van der Kooy and Others* v *Commission*, paragraphs 21 and 22, and *CIRFS and Others* v *Commission*, paragraphs 28, 29 and 30; both cases are cited in paragraph 28 of this judgment).

52 In view of the foregoing, it must be held that the applicants are directly and individually concerned. The application must therefore be declared admissible.

Substance

General remarks

53 In its decision, the defendant considered the legality of the contested aid in the light of Article 92(3)(a) and (c) of the Treaty. From the 28th to the 31st paragraph (of the notice), the defendant considered whether the aid qualified for authorization under Article 92(3)(a). From the 32nd to the 63rd paragraph, it assessed the aid from the point of view of Article 92(3)(c). In the 64th and 65th paragraphs the defendant balanced the objectives of points (a) and (c) of Article 92(3) and in the 66th paragraph it authorized the aid under Article 92(3)(a) and (c).

54 As far as regional aid is concerned, Article 92(3)(a) and (c) introduces two derogations from free competition, based on the aim of Community solidarity, a fundamental objective of the Treaty, as may be seen from the preamble. In exercising its discretion, the Commission has to ensure that the aims of free competition and Community solidarity are reconciled, whilst complying with the principle of proportionality. The influence of Community solidarity may vary depending on the circumstances; it has more of an influence to the detriment of competition in the

crisis situations described in paragraph 3(a) than in the cases provided for in paragraph 3(c) (see the Opinion of Advocate General Darmon in Case 248/84 *Germany* v *Commission* [1987] ECR 4013, at 4025 and 4031). In this context, the Commission is under a duty to evaluate the sectoral effects of the planned regional aid, even where regions likely to fall within paragraph 3(a) are concerned, in order to avoid a situation in which, as a result of an aid measure, a sectoral problem is created at Community level which is more serious than the initial regional problem.

55 However, so as not to deprive paragraph 3(a) of its utility, the Commission has a broader discretion in balancing those objectives in the case of an aid project intended to promote the development of a region coming under paragraph 3(a) than it has in the case of identical aid to a region covered by paragraph 3(c).

56 Judicial review of a decision taken in this context must be confined to verifying whether the rules governing procedure and the statement of reasons were complied with, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error in assessing those facts or any misuse of powers (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 11, and the case-law cited therein). In particular, the Court is not entitled to substitute its own economic assessment for that of the author of the decision (*Matra* v *Commission* (cited in paragraph 27 of this judgment), paragraph 23).

57 However, since the undertaking for which the proposed aid is intended is part of the textile sector, the Court must also check that the defendant complied with the guidelines which the defendant itself laid down in the 1971 communication and in the 1977 letter in so far as they are not contrary to the Treaty (Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 22).

58 In this case, the applicants maintain that the decision is a nullity on the ground that the defendant committed manifest errors in assessing, first, the number of jobs likely to be created by the investment at issue and, secondly, the impact of the investment on the excess capacity from which the sector is suffering.

59 In order to establish that the Commission committed a manifest error in assessing the facts such as to justify the annulment of the contested decision, the evidence adduced by the applicants must be sufficient to make the factual assessments used in the decision implausible.

Plea alleging manifest errors in assessing the facts

A — *The evaluation of the number of jobs*

60 The applicants claim that the decision should be annulled because it is based on reasoning which is vitiated by a manifest error in assessing the number of jobs directly created by the investment at issue.

61 Before giving its views on the substance, the defendant contests the admissibility of this complaint.

62 The Court considers that this plea of inadmissibility should be considered first.

1. Admissibility of the complaint alleging that the number of jobs was wrongly assessed

63 The defendant raises a plea of inadmissibility on the ground that the applicants never challenged this figure during the administrative procedure, even though it was clearly mentioned when that procedure was opened.

64 The Court observes that no provision in the field of State aid makes the right for a person directly and individually concerned to challenge a measure addressed to a third party conditional upon all the complaints set out in the application having been raised during the administrative procedure. In the absence of such a provision, the right to bring proceedings of such a person cannot be restricted simply because, whilst he could have submitted observations during the administrative procedure on an assessment made known when the procedure provided for in Article 93(2) of the Treaty was opened, and repeated in the contested decision, he refrained from doing so.

65 It follows that the complaint is admissible.

2. The justification of the complaint alleging that the number of jobs was wrongly assessed

Arguments of the parties

66 The applicants maintain that comparisons with the workforce required in modern, successful textile factories in Western Europe in order to produce the promised output suggest that the project will not create 1 800 direct jobs, but only 950 to 1 050.

67 In view of the fact that it was allegedly after balancing the positive regional effects of Hualon's planned investment against its potential negative effects on overall production capacity and competition that the defendant authorized the United Kingdom Government to grant the contested aid, the applicants claim that the conclusions which the defendant reached are flawed.

68 The figures for jobs to be indirectly created by the project at issue are hard to verify; moreover, a number of those jobs are bound to be of limited duration.

69 Lastly, even if the figures quoted by the defendant should prove accurate, the jobs created by the investment at issue would be at the expense of existing jobs in other regions of the Community.

70 The defendant claims that the existence of a manifest error of assessment has not been made out.

71 In addition, the national authorities responsible had made the grant of aid expressly dependent upon the actual creation of 1 800 jobs.

72 Lastly, the defendant, supported by the intervener, claims that the argument that the jobs to be created by the project at issue will be at the expense of jobs existing in other Community regions is irrelevant, since it is in the nature of any regional aid to improve the relative position of the region benefiting thereby, while commensurately deteriorating the relative position of other regions. What is more, that argument is based on the false premiss that Hualon's output will substitute the production of other Community manufacturers and not imports.

73 The intervener denies that it is possible to estimate the number of jobs on the basis of similar investments carried out by successful firms in the Community, since, on the one hand, there is no completely integrated factory of the same scale in the Community and, on the other, the products in question and processes used are different.

74 The intervener avers that if the number of jobs to be created by the project at issue were to be lower than the number indicated in the contested decision, the conclusions contained therein would still apply *mutatis mutandis*, since in the first place the number of indirect jobs and the amount of construction work would not necessarily be scaled down proportionately, secondly, the number of jobs created would still represent a significant benefit to Northern Ireland and, thirdly, the granting of the subsidy at each stage of development of the plant is dependent upon the creation of further jobs.

Findings of the Court

75 In evaluating whether the project at issue satisfied the necessary conditions in order to qualify for the derogation provided for in Article 92(3)(a) of the Treaty, the defendant found that the region concerned was faced with serious problems of unemployment (24% in north Belfast, of whom 56% had been unemployed for over a year, with male unemployment running at approximately 30%, and 28.5% in west Belfast, of whom 64% had been unemployed for over a year, with male unemployment standing at approximately 35%). It went on to observe that the 1 800 jobs which the investment project would create represent 10.8% of the unemployed in the north and west Belfast areas (29th paragraph of the notice). It further indicated that the project should also create 500 indirect jobs in the local economy (30th paragraph) and considered that it would have a demonstration effect for the area, which otherwise found it very hard to attract investment (31st paragraph).

76 The applicants do not deny that the contested aid is intended to promote the economic development of the area concerned or that there is serious underemployment there. They merely assert that the project at issue will create only between 950 and 1 050 jobs, rather than 1 800. The only evidence which they tender in this regard relates, on the one hand, to the average hourly cost of labour in the United Kingdom and in certain Asian countries and, on the other, to the annual output per employee of Hualon and three European undertakings. However, those factors relate first to aspects of Hualon's production costs and secondly to its productivity, but not directly to the number of jobs that the project will create. As a result, the applicants have not shown that there was an manifest error of assessment in estimating the number of jobs likely to be created by the project or that such an error would be capable of undermining the defendant's conclusions.

77 The assertion — which, is moreover, unproven in this case — that a project benefiting from regional aid helps to create jobs while threatening jobs in other regions of the Community is not as such capable of justifying the annulment of the decision authorizing the aid.

78 Consequently, the complaint alleging that the number of jobs likely to be created by the project in question was wrongly estimated is unfounded.

B — *The evaluation of the repercussions of the project at issue on excess capacity*

79 The applicants accuse the defendant of committing manifest errors in assessing the facts in so far as:

— it states that Hualon's fabrics will not compete with fabrics manufactured by other Community producers and will not contribute towards increasing excess capacity;

— it also analysed the market in the products concerned in a defective manner;

— it based itself on wrong forecasts of future demand.

1. Competition between Hualon and the other Community manufacturers

80 The applicants contest the assertion that Hualon's future production will replace imports without increasing production capacity, cast doubt on the claim that Hualon will produce only low range products, accuse the defendant of not having carefully defined the expressions 'low range' and 'high range' and complain that it failed to take account (a) of the important position which Community producers occupy and will continue to occupy for the foreseeable future in the sector of low-range products and (b) of the fact that air-jet and water-jet looms are used to make high range as well as low range fabrics.

81 The Court will consider those points separately, starting with the defendant's definition of 'low range fabrics'.

The distinction between high range and low range

— Arguments of the parties

82 The applicants claim that the defendant did not define criteria for distinguishing low range from high range products, although that concept is of crucial importance in the contested decision.

83 With regard to the 200 grammes per square metre criterion mentioned in the 18th paragraph of the notice, the applicants observe that a large number of textile products traditionally thought of as being of high value added weigh less than this. 80% of the products intended for the 'women's' or 'children's' clothing market weigh less, yet cannot be described as 'volume products', and the fabrics used for linings and anoraks, mentioned by the defendant in the 43rd paragraph of the notice as falling within the product market on which Hualon will be operating, could be classed as high added-value products despite the fact that they weigh less than 200 grammes per square metre. Lastly, 96% of garment fabrics weigh less than 200 grammes per square metre.

84 The applicants further argue, by reference to the criterion mentioned in the 43rd paragraph of the notice, that the investment in question will have very serious repercussions for Community production. That paragraph reads as follows: 'Hualon will be producing basic fabrics for dyeing, finishing and printing used in products such as suit linings, dresses, blouses and anoraks. EC producers have moved to higher performance closer weave fabrics offering superior handle, drape and textures used in products such as ski-wear and microfibre waterproof jackets.' On the one hand, suit linings and dress, blouse and anorak fabrics account for 80% to 90% of the production of Community undertakings, which manufacture them on both air-jet or water-jet and rapier or projectile looms. On the other hand, in some cases those products might be products with low value added, in other cases products with high value added.

85 The applicants maintain that Community manufacturers operate in the same sector as the one targeted by Hualon, as regards both fabric production and finishing operations, which constitute the first stage of the project at issue.

86 The defendant contends that the validity of its reasoning is not contingent on the identification of mathematical distinguishing criteria, since criteria enabling the main trends to be made out are sufficient. There is no single criterion enabling low range fabrics to be distinguished from high range products. The decision is based on a set of criteria which enable it to be ascertained whether a product tends to be low range or high range, depending, among other things, on whether it is manufactured in large or small runs, on the amount of value added and, above all, on the degree of flexibility of use of the different types of loom.

87 Referring to the article 'Textiles, habillement, chaussures et cuir', in *Panorama de l'industrie communautaire 1994*, by Observatoire européen du textile et de l'habillement and Fitzpatrick Associates, the defendant points out that the most important criterion is flexibility of the production process, since high range products are manufactured in small quantities and for a shorter period than low range products. This is the reason why the contested decision draws a distinction between jet looms and rapier or projectile looms in determining the probable evolution of production capacity for fabrics of the type to be manufactured by Hualon, since jet looms are more inflexible and hence less viable for small series production runs.

88 The defendant concludes by claiming that it did not commit any manifest error of assessment in considering that the project at issue would not have any significant impact on installed capacity in the Community.

89 According to the applicants, the defendant's assertion that there is no single criterion enabling any product to be classed as low range or high range is at odds with the contested decision, which expressly states that 'the product markets are different'.

90 The intervener maintains that four factors, each of which reinforces the others, enable high range and low range markets to be distinguished from each other: the type of products, the nature of demand and supply, the identity of the suppliers and consumers, and the factors affecting their competitiveness.

91 High value added products produced in low volumes are high range, whilst conversely low range products consist of low value added products manufactured in large volumes. The decision referred to fabric weight, not in order to distinguish the two classes of product, but in setting out the intervener's description of Hualon's intended production.

92 Demand for low range fabrics is highly sensitive to price, but steady, whilst it is less elastic in the case of high range fabrics, but more apt to shift, since it is subject to fashion.

93 It appears by implication from the decision that the high range market supplies almost directly to retail garment manufacturers, whereas the low range market supplies Community textile manufacturers, which are concentrating to an increasing degree on the final stages of finishing fabrics. On the basis of an article from the specialist literature (Scheffer, M.: 'Internationalization of Production by EC Textile and Clothing Manufacturers', *Textile Outlook International*, Textile Intelligence Limited, January 1994), the intervener states that most imports of basic fabrics are undertaken by Community manufacturers wishing to process the fabrics and take advantage of the outward processing trade.

94 The applicants observe that the contested decision contains no such market analysis, but is on the contrary confused on this point. This is precisely their complaint.

— Findings of the Court

95 The decision states that Hualon's '[p]roduction will be specifically oriented to the lower segment of the textile market (high volume/low value added fabrics of up to 200 gm/m density)' (21st paragraph of the notice). Reporting the United Kingdom Government's observations, the decision states that the textiles in question will be 'low cost/high volume' (11th and 16th paragraphs of the notice) at the 'fiercely price competitive end of the market' (16th paragraph).

96 In order to distinguish that production from that of Community manufacturers, the decision points out that Community manufacturers have opted for 'high quality and less price sensitive niches' (42nd paragraph of the notice), especially 'higher performance closer weave fabrics offering superior handle, drape and textures' (43rd paragraph), that is to say 'specialized and high value added products' (45th paragraph).

97 The criteria listed by the defendant are sufficiently relevant to serve as the basis of its assessment for the purposes of the application of Article 92(3) of the Treaty. The distinction between low range and high range fabrics seems moreover to be recognized in the sector as being sufficiently relevant for the purposes of market analysis (see 'Textiles, habillement, chaussures et cuir' in *Panorama de l'industrie communautaire 1994*, cited in paragraph 87 of this judgment, which refers respectively to 'volume manufactured products' in which there is intense competition from manufacturers in developing countries (p. 14-1) or 'standard articles' (p. 14-7) and 'high range' products (p. 14-7) or 'products of superior quality intended for clearly defined niche markets' (p. 14-1), 'articles of superior quality' (p. 14-6) which are 'less price sensitive and cannot reduced to the same degree of volume

manufacture as standard articles' (p. 14-7); in his article entitled 'Internationalization of Production by EC Textile and Clothing Manufacturers', cited in paragraph 93 of this judgment, at pp. 105 and 114, Mr Scheffer speaks of 'basic qualities' and 'basic products').

98 Consequently, the defendant cannot be accused of failing to define the criteria distinguishing low range from high range products.

99 Consequently, the complaint must be rejected.

Substitution of imports by Hualon production

— Arguments of the parties

100 The applicants dispute the claim that Hualon's future production will replace imports without increasing production capacity on the ground that it should fall solely within a market segment — volume manufactured fabrics with low value added — which, if it were not for Hualon, would be occupied by imports from third countries.

101 On the one hand, contrary to the defendant's contentions, there is no tendency on the part of Community producers steadily to abandon low range products and to move from the Community to third countries. Referring to two articles published by the Observatoire européen du textile et de l'habillement (Prudhommeaux, M.-J.: 'L'industrie de l'habillement: entre délocalisation et Sentier', 1994, Vol. III, No 2, Observatoire européen du textile et de l'habillement; Scheffer, M.: 'The Changing Map of European Textiles', *Production and Sourcing Strategies of*

Textiles and Clothing Firms, 1994, pp. 81 and 82, Observatoire européen du textile et de l'habillement), the applicants state that the phenomenon of relocation does not involve the textile sector proper, but the sector of garment manufacture.

102 On the other hand, they maintain that Hualon will be even less able to replace imports in that it will not be viable, since it will not be competitive with low-wage third countries. For example, the wage cost per metre of polyamide or polyester fabric will be USD 0.31 as against USD 0.013 in Indonesia and USD 0.011 in Vietnam.

103 The contested aid should have been prohibited on the ground that the investment in question is bound to produce a significant rise in overcapacity, which is debarred by the guidelines on aid to the textile industry laid down by the defendant (1971 communication and 1977 letter). In addition, contrary to the objective underlying the Retex programme, cited in paragraph 34 of this judgment, the assisted investment is bound to increase the dependence of the region concerned on the textile sector, whereas employment in the textile and clothing industry already accounts for 25% of overall employment in the manufacturing sector. Those several guidelines for the textile sector put the Commission under a duty to prove in a very well substantiated manner that the project at issue is not liable to increase excess capacity.

104 In any event, the defendant is not empowered to authorize an aid on the basis simply of a market trend or an aid which will have the very consequence of bringing about the assumptions on which its authorization was based. In any case, if it were correct that the Community production concerned was declining to the benefit of production in third countries, such a trend would make it even more necessary to prohibit the aid in question. Community manufacturers of low range

products would have to face competition, not only from imports from outside the Community, but also from Hualon, causing the imbalance between supply — of which there is already a surplus — and demand on the European market to get worse.

105 In the defendant's view, the contested decision is perfectly consonant with the line of conduct which it defined in the 1971 communication and in the 1977 letter. The Retex programme is irrelevant to this case, since employment in the textile and clothing sector in Northern Ireland amounts to only 4.5%. It is not necessary to consider viability in order to evaluate the compatibility of an investment aid. For the rest, the statistics produced by the applicants on wage costs per metre of fabric in the United Kingdom are average figures and include figures for obsolete manufacturing plant which do not take account of the specific situation of the Hualon plant in Northern Ireland. Lastly, the applicants have not showed that there was any manifest error of assessment which played a determinative role in the contested decision.

106 According to the intervener, even if the proposed aid did not take place and the Hualon plant did not open in Northern Ireland, factories in the Community would close under pressure from Asian manufacturers. That such a process is already occurring is shown by the upward trend of job losses in the textile industry in the Community. The level of imports of the products in question is high [40% for MFA 2 products (cotton fabrics) and 25% for MFA 35 products (fabrics of discontinuous synthetic fibres) in 1991, reflecting a 68% rise since 1985]. The trend is continuing (4.3% rise between 1990 and 1992), whilst exporting third countries have not yet utilized their trade quotas in full and the quotas are destined to be abandoned following the agreements in the Uruguay Round.

107 Relying on 'Textiles, habillement, chaussures et cuir' in *Panorama de l'industrie du textile et de l'habillement 1994*, cited in paragraph 87 of this judgment, the intervener states that Community producers have responded to competition from manufacturers with lower costs by turning to higher-quality products.

108 This trend is confirmed by the small percentage of new air-jet or water-jet looms installed in the Community.

109 The Hualon project goes against these trends. Hualon's aim is to compete with low-cost products from Asian countries, while generating profits.

110 It is clear from all these considerations that Hualon's products will compete to a large degree with imported goods only. Moreover, whilst Hualon's operation of new looms will admittedly increase overcapacity, it will not affect structural overcapacity within the meaning of the 1977 letter. That letter is concerned with the problem of looms which are operating at a loss in order to cover a proportion of fixed costs while their owners are unable to raise the capital to replace those capital goods by new, profitable machinery. This is the situation for many of the air-jet and water-jet looms operated in the Community and for the majority of rapier and projectile looms producing low range fabrics.

111 The intervener considers that although it is true that the proposed aid will have an adverse effect on those looms that are at present uneconomic to operate, those machines, which contribute to structural overcapacity, are doomed in any event irrespective of the effects of the proposed aid. The only long-term solution to the overcapacity currently existing in the Community is to replace structural overcapacity by competitive capacity, which, since it would be producing high range products, would not be under threat.

112 Lastly, the intervener maintains that the argument based on the Retex programme is irrelevant, since those guidelines are for Community-aided programmes, not for State aid.

— Findings of the Court

113 The defendant expressly referred in the decision to the 1971 communication and the 1977 letter. Those documents prohibit aid which has the effect of increasing excess production capacity in sectors with overcapacity and set out criteria for applying that principle.

114 First, the annex to the 1977 letter states that the term 'excess capacity' implies that account is taken of a sufficiently varied range of sectors. In this case, the defendant directed its analysis at the sector of low range fabrics.

115 Secondly, the annex to the 1977 letter requires account to be taken of the expected development of competitive conditions in assessing the repercussions of an aided product on excess capacity. It must therefore be considered whether the contested decision takes account of the expected development of competitive conditions.

116 In assessing Community producers' position on the market, the defendant assumed that low range fabrics are mainly manufactured using air-jet or water-jet looms. It appears from the decision that, owing to strong price competition in the low range segment, Community manufacturers' preference for one production technique as opposed to another necessarily reflects a strategy of positioning themselves on the market (42nd paragraph of the notice). On the basis in particular of figures provided by a consultant which show a large difference in the percentage of installations of jet looms as between Asia and the Community, the decision finds that 'the EC industry shows a relative preference for rapier/projectile looms [...] rather than for water-jet or air-jet looms', which is 'confirmed by the trends of substitution of looms in response to strong price competition of extra EC textiles'

(42nd and 44th paragraphs of the notice). According to the decision, Community producers are tending to move out of the low range and switch to a greater extent to high range products (43rd paragraph of the notice), with production of low range fabrics tending to shift to third countries with lower wage costs (36th, 45th and 47th paragraphs). The abandoning of quantitative limitations, provided for under the GATT, should increase imports further (47th paragraph). Lastly, the decision refers to the tendency for production capacity to be reduced in the Community (48th and 49th paragraphs of the notice) and to the trend in consumption (50th, 51st and 52nd paragraphs). It was in the light of this appraisal that the defendant reached the conclusion that Hualon's production would make for import substitution rather than for increased production capacity.

117 The specialized literature produced by the applicants does not invalidate this analysis. Whereas the extract from Mrs Prudhommeaux's article, cited in paragraph 101 of this judgment, describes the relocation of the clothing manufacturing industry to low-wage countries, it contains no evidence to suggest that the same thing is not happening in the case of low range fabrics. Nor does the extract from Mr Scheffer's article, 'The Changing Map of European Textiles', cited in paragraph 101 of this judgment, support their contention. That article deals with the question of the relocation of textile production. The author establishes the link which exists between clothing manufacture and fabric production by pointing out that the success of a clothing manufacturing unit depends on the local availability of services, sources of supply and — in view of technical progress — skilled labour. He also states that some manufacturers buy in their fabric from third countries (that is, countries outside the Community) and supplement their Community production by importing low range items which cannot be manufactured competitively in view of the costs which Community manufacturers have to bear. He also states that in future dyeing and finishing operations may be relocated in countries with less strict environment protection legislation. He assesses the advantages of using a local fabric manufacturer (that is, a non-Community producer) for a Community clothing manufacturer contemplating strategies of relocation of manufacturing, subcontracting and buying in of supplies. He concludes that there are advantages in obtaining supplies of fabrics from a local manufacturer or in setting up factories in the main clothes manufacturing countries.

118 The other specialized articles produced to the Court ('Textiles, habillement, chaussures et cuir', *Panorama de l'industrie communautaire 1994*, cited in paragraph 87 of this judgment; Scheffer M.: 'Internationalization of Production by EC Textile and Clothing Manufacturers', cited in paragraph 93; Sri Ram Khanna: 'Trends in US and EU Textile and Clothing Imports', *Textile Outlook International*, Textile Intelligence Limited, November 1994) are cautious and qualified, but seem to bear out the defendant's analysis rather than invalidate it.

119 It follows that the defendant has carried out a plausible analysis of the expected development of competitive conditions. The applicants have not shown with a sufficient degree of certainty that there are factual errors casting doubt on this analysis and the conclusions based thereon.

120 As for the viability of the project, the defendant took the view that there was no need to contest the United Kingdom's assertion that the project's viability was guaranteed given that the private undertaking in receipt of the aid is contributing more than 60% of the cost of the investment and is bearing the risks involved in its realization (63rd paragraph of the notice). The defendant was justified in not inquiring into this matter in greater depth since it was plausible that the project would be viable and the undertaking competitive on the ground that the group to which the recipient undertaking belongs operates in South-East Asia in countries with moderate wage costs. The defendant was therefore reasonably entitled to infer from the substantial investment to be made by that undertaking in Northern Ireland that the project had financial advantages over production in Asia or, at least, that it would be viable.

121 Lastly, the defendant did not exceed its discretion by authorizing aid with effects apparently contrary to the aim set by the Retex programme. That programme is not intended to prevent a region which is dependent to a large degree on the textile sector, but also suffering from serious economic and social handicaps, from improving its situation through the receipt of aid, albeit at the price of greater

dependence on that sector, especially where the assisted investment should enable other investment to be attracted. If, as the applicants suggest, it were to follow from the Retex programme that the grant of aid in the textile field was prohibited regardless of the other economic features of the region concerned, that programme would have the perverse effect of weakening Northern Ireland economically, whereas, on the contrary, its aim is to strengthen the economic position of the regions to which it applies. Consequently, the existence of the Retex programme cannot as such have the effect of making the contested aid unlawful.

122 It follows from those considerations that the complaint must be rejected.

Hualon's production

— Arguments of the parties

123 The applicants take issue with the assertion contained in the 21st and 43rd paragraphs of the notice that Hualon will confine itself to manufacturing low range fabrics. Hualon's President allegedly stated in an interview given to the BBC on 13 November 1994 that Hualon's aim was to produce fabrics with high value added.

124 The defendant, supported by the intervener, maintains that Hualon officially disassociated itself from that statement.

125 The intervener states that Hualon will produce only high volume, low range products.

— Findings of the Court

126 The contested decision authorizes the grant of an aid for the setting up of a factory for the production of low range fabrics as previously defined by the decision (see paragraphs 95 and 96 of this judgment).

127 The complaint stems from the supposition that Hualon will not produce only low range fabrics. That supposition is mainly based on a statement made by Hualon's President after the decision was taken.

128 A mere statement that one of the conditions on which a decision authorizing the grant of aid was based will not be complied with cannot cast doubt on the legality of the decision. If the recipient undertaking were to fail to observe the conditions of authorization, it would be for the Member State to make sure that the decision was properly carried out and for the Commission to assess whether it was appropriate to demand that the aid be repaid (Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493, paragraph 11).

Community producers' position in the sector of low range fabrics

— Arguments of the parties

129 The applicants complain that the defendant failed to take account of the strong presence of Community producers in the low range products sector. More than 80% of fabrics of category MFA 35 manufactured in the Community weigh less

than 200 grammes per square metre. This percentage considerably exceeds 90% if only the types of product announced by Hualon are considered.

130 If, as the defendant considers, it is assumed, that the type of loom used is a relevant indicator of the type of fabric manufactured, account should have been taken of the number of air-jet and water-jet looms operated in the Community and their average time in use, rather than the rate of utilization of new looms. In addition, the defendant wrongly included looms intended for the manufacture of woollen products. There is a major woollen industry in Europe, which uses only projectile looms in view of the nature of the fibres. The defendant should have confined its estimate to fabrics belonging to the market affected by the contested aid, namely polyester, polyamide, cotton and polycotton fabrics. If the number of new projectile looms used for woollen products were subtracted from the total number of projectile looms brought into service in the Community, it would be found that 29.9% of the new looms brought into service in 1991 were air-jet and water-jet looms and 32.5% in 1992. The corresponding percentages are 38.4% for 1989 and 40.7% for 1991 if allowance is made for the fact that major investments in air-jet and water-jet looms were made in the Community in the years preceding those mentioned by the defendant (1991 and 1992), especially in 1989 and 1990. These factors evidence the strong presence of Community manufacturers in the low range sector. The defendant should have taken account of this, since it is essential in order to assess the effects of the investment at issue on competition. The applicants have also produced a table based on a survey carried out at AIUFFASS member undertakings in the eight main manufacturing countries of the European Community which shows that almost 50% of the looms used to produce fabrics of categories MFA 35 and MFA 36 were of the air-jet or water-jet type.

131 Even on the basis of the Commission's method and figures, a conclusion to the effect that Hualon's investment will have considerable repercussions for the Community industry is inevitable.

132 Lastly, the applicants refer to the 44th paragraph of the notice, which reads as follows: 'ITMF reports that, within the EC, 24% of installations of looms without shuttle are air-jet or water-jet in 1991, and 29% in 1992, whereas in Asia 74% in 1991 and 69% in 1992'. Those figures prove the opposite of the defendant's contention that there is a tendency for Community production gradually to abandon low range products and switch to high range products.

133 The defendant does not cast doubt on the assertion that the Community textile industry still has a strong presence in the low range sector, but points out that it started from the premiss that the assisted investment will not have a significant effect on the development of installed capacity in Europe. It based itself on the development of the market, which is characterized by the fact that the other Community producers are gradually abandoning the low range sector, which will be taken over by third countries, to switch increasingly to the manufacture of high range fabrics, with the result that the assisted investment will not have a significant effect on the development of installed capacity in Europe.

134 In order to determine the expected development of the sector, the rate of installation of new looms is a more relevant criterion than that advocated by the applicants of the number of air-jet and water-jet looms operated in the Community and their average time in use.

135 Lastly, the figures quoted in the 44th paragraph of the notice do not prove that Community production is increasing in the low range segment, but that the percentage installation of looms suited to the manufacture of low range fabrics is markedly lower in Europe than it is in Asia.

136 In the intervener's view, the defendant was perfectly justified in not excluding from its calculations looms used for woollen products, since Japan, the United States and China are also major producers of woollen and wool predominant fabrics.

137 In their observations on the statement in intervention, the applicants deny that the Community producers are operating obsolete looms at a loss. It appears from the report by Kurt Salmon Associates produced by the intervener that all the looms operated by those producers have been replaced. In addition, it is viable to manufacture low range products on rapier or projectile looms and high range products on jet looms.

— Findings of the Court

138 The decision is based on an assessment of the effects of the assisted project having regard to the expected development of the market.

139 As is clear from paragraphs 117, 118 and 119 of this judgment, the applicants have not shown that the defendant's analysis of the future development of the market is wrong, nor have they established that Community producers will continue to occupy a major position in the market niche targeted by Hualon.

140 Contrary to the applicants' claims, it is clear from the decision that the defendant took account of the future presence of Community producers on the low range market, but found that it would be small (53rd, 55th, 56th and 57th paragraphs of the notice).

141 Lastly, the applicants have not proven that the method used by the defendant in order to evaluate the Community producers' future position on the low range market was manifestly inappropriate. They have merely stated that it would have been preferable to determine the number of looms currently operated and their useful life, yet that method cannot predict what decision a manufacturer will take at the end of the period of utilization of the looms which he is currently operating, and hence does not enable an estimate to be made of the Community producers' future position on the market segment considered.

142 In view of the foregoing, the complaint must be rejected.

Use of the different types of loom

— Arguments of the parties

143 The applicants complain that the defendant did not inquire whether jet looms may be used to manufacture high range products, in which, according to the contested decision, the Community producers specialize.

144 It is very common, and economically viable, to manufacture high range products on air-jet or water-jet looms, the choice of machine being essentially determined by undertakings' strategy. There is no clear correlation between the type of loom used and the types of fabric manufactured. Experts in the industry generally acknowledge that water-jet looms are more suited than others to the production of polyester fabrics intended for use in the manufacture of women's clothes, such as crepe, and high added value technical items, such as airbags. The applicants mention by way of example two companies which manufacture articles with high added value on jet looms. Lastly, they observe that in the Korean Republic, where

textile undertakings are steadily diversifying their production towards items with high added value owing to increasing fierce competition from products manufactured in countries such as Indonesia and Thailand, approximately 75% of new shuttleless looms installed in 1994 were jet looms and not rapier or projectile looms.

145 The defendant states that, in taking the view that low range fabrics tend to be produced on jet looms and high range products on rapier or projectile looms, it based itself, not on any purely technical criterion, but on aspects of economic viability.

146 It considers that in view, first, of the better productivity exhibited by jet looms for low range, volume production and, secondly, of the technical characteristics of the proposed investment, it was reasonable to take the view that the assisted investment was going to be positioned more towards volume production tending to fall within the low range market, as the British authorities had stated in their notification.

147 The intervener produced the report by Kurt Salmon Associates, which sets out the characteristics, advantages and drawbacks of the various types of loom and allegedly fully supports the defendant's conclusion.

— Findings of the Court

148 The applicants' arguments, which chiefly seek to show that it is common and viable to produce high range articles on jet looms, do not invalidate the defendant's proposition that it is more viable to produce low range fabrics on jet looms rather than on rapier or projectile looms. Nor do those arguments weaken the considerations relating to the tendency for Community producers to abandon the low range market.

149 The applicants merely go on to assert that there is no clear correlation between the type of loom used and the type of fabric manufactured, without adducing any evidence of this. In particular, they have not contested or undermined the technical and economic explanations of the various looms set out in the report by Kurt Salmon Associates which was produced by the intervener.

150 Consequently, the applicants have not proved that the defendant made a manifestly erroneous assessment of the facts in finding that low range products manufactured on rapier looms cannot compete with products imported from third countries which are manufactured on air-jet or water-jet looms, owing to the characteristics of those types of loom, and in using that finding as the basis for analysing the expected development of competitive conditions.

151 It follows that the complaint cannot be upheld.

2. The other gaps in the analysis of the market

Solely taking account of the weaving stage

— Arguments of the parties

152 The applicants submit that the defendant made a manifest error of assessment in basing itself solely on the weaving stage in order to assert that Hualon will be competitive with imports from third countries and that its production may therefore replace such imports, whereas the investment at issue constitutes an integrated project covering dyeing and finishing, weaving and spinning operations. On average and taking all products together, the weaving stage accounts for only 30% of

the aggregate costs of a finished product, whereas those of spinning and finishing account, on average and taking all products together, for 30% and 40% respectively.

153 The defendant, supported by the intervener, denies that it had regard only to the weaving stage in order to establish Hualon's competitiveness with products imported from third countries.

— Findings of the Court

154 By accusing the defendant of failing to take account of production stages other than weaving in evaluating Hualon's competitiveness with competitors from third countries, the applicants are, in point of fact, casting doubt on Hualon's competitiveness.

155 The Court considers that this complaint cannot be upheld for the reasons set out in paragraph 120 of this judgment.

Taking account solely of the period when Hualon's maximum capacity will be reached

— Arguments of the parties

156 The applicants further complain that the defendant took account only of the fact that the situation which will arise when Hualon is operating at full capacity, that is to say, as the defendant maintains, between the years 2000 and 2003 (according to

the 40th paragraph of the notice) or in 1998-1999 (according to the 36th paragraph), and failed to take account of Hualon's future activities over the coming seven, eight or nine years.

157 The defendant's decision to take a dynamic approach in assessing the effects of the assisted project does not warrant its having set the starting point for assessing those effects at the date when Hualon will be operating at full capacity, especially since that date is remote and the contested decision is based exclusively on Hualon's weaving activities, which Hualon will take up very quickly.

158 There is no doubt that the aid, given its size and the large volume of fabrics which the factory will be capable of processing over the coming seven, eight or nine years, will harm Community undertakings carrying out the same activities as Hualon over that period to a significant degree.

159 The defendant, supported by the intervener, avers that it took due account of the progressive development of the investment and of the market, although admittedly it examined in more detail the stage at which Hualon will reach its maximum production capacity in order to assess the long-term effects of the aid. It offers as proof of this the first sentence of the 56th paragraph of the notice, where it draws a parallel between the progressive development of the investment, on the one hand, and that of the Community textile sector, on the other (it expects that Hualon should 'partially or totally compensate the reductions of capacity produced by the obsolescence of facilities and relocation').

160 The intervener adds that, since the market for textiles is highly volatile, it is necessary to examine long-term trends and overall production in the market in order to carry out a dynamic appraisal as required by the 1977 letter. Consequently, account should be taken of Hualon's situation when it reaches full production and not when it is primarily overcoming start-up costs.

— Findings of the Court

161 It appears from the 56th paragraph of the notice, cited by the defendant, and likewise from the 62nd, which refers to the changes under way and the possibility that Community producers might be compelled to leave the market as a result of the contested aid, that the defendant took account of the situation which is liable to arise between the time when the project at issue starts to be implemented and the time when Hualon will be operating at full capacity.

162 Therefore the complaint is unfounded and must be rejected.

Taking into account solely categories MFA 2 and MFA 35

— Arguments of the parties

163 The applicants accuse the defendant of failing to take account of products of category MFA 3 (fabrics of discontinuous synthetic fibres), it having considered only products of categories MFA 2 and MFA 35. Yet Hualon is to produce cotton and polycotton (cotton/polyester) fabrics which, depending on the proportions of cotton and polyester in the mix, will fall either within category MFA 2 or within category MFA 3.

164 If category MFA 3 were included in the market analysis, this would disclose a trend of declining demand for the products to be manufactured by Hualon, since demand for MFA 3 fabrics fell by 23% between 1990 and 1994. By failing to take account of fabrics of category MFA 3, the defendant's analysis of the market for the products affected by the aid was completely inadequate.

165 According to the defendant, there is nothing to suggest that the development would be different if category MFA 3 were to be included in the analysis.

166 Relying on an examination of 34 samples provided by Hualon showing that none of them fell within category MFA 3, the intervener claims that Hualon will not be producing fabrics of that category. On the basis of the report by Kurt Salmon Associates, it adds that, in any event, the market for MFA 3 products exhibits exactly the same characteristics as the markets for MFA 2 and MFA 35 products. That market includes high and low range products and is suffering from structural overcapacity, falling Community production and rising import penetration. In a document produced on 8 July 1996 before the hearing, which was served on the parties at the beginning of the hearing, the intervener states that between 1988 and 1993, imports of MFA 3 fabrics rose from 31% to 54% (there was a rise from 35% to 44% in the case of MFA 2 fabrics and from 16% to 28% in the case of MFA 35 products), whilst Community production declined by 24.6% (8.5% in the case of MFA 2 and 18.7% in the case MFA 35 fabrics). The rate of import penetration in the Community came to 56% in 1995 (46% in the case of MFA 2 and 38% in the case of MFA 35 fabrics). Consequently, the distinction between MFA 2 and MFA 35 products, on the one hand, and MFA 3 products, on the other, is irrelevant for the purposes of assessing the expected development of the market.

167 The applicants argue in response that the samples provided by Hualon do not in any way constitute a guarantee as to Hualon's future production.

— Findings of the Court

168 At the hearing the applicants did not challenge the admissibility or the content of the document produced by the intervener shortly before the hearing began. That document indicates that trends on the market in MFA 3 fabrics are similar to those characterizing the market in MFA 2 and MFA 35 fabrics, namely declining production in the Community and rising imports. If it is assumed that Hualon's production will act as an import substitute rather than competing with the other

Community manufacturers, declining demand would be apt to strengthen the contested findings, rather than undermine them. Declining demand could only speed up the deterioration in the Community producers' position on the market and hence favour the imports for which Hualon's production is precisely intended to act as a substitute. Consequently, the complaint could only succeed if it were proven that the analysis that Hualon's production will assist import substitution was false. However, the applicants have not proved that that analysis was wrong.

169 In view of the foregoing, the complaint cannot be upheld.

3. The forecasts for demand for products of categories MFA 2 and MFA 35

— Arguments of the parties

170 The applicants regard as implausible the forecasts set out in the 52nd paragraph of the notice to the effect that demand for MFA 2 and MFA 35 products is to grow and the statement in the 57th paragraph that the increase in consumption might be satisfied almost exclusively by imports.

171 Demand for MFA 2 and MFA 35 (and MFA 3) products should more probably decline owing to the relocation of the clothing manufacturing industry for which those products are intended, as is confirmed by some of the figures quoted in the 50th paragraph of the notice. At all events, those forecasts cannot justify the major restrictions of competition which will ensue as a result of the investment at issue.

172 The defendant considers that it was entirely relevant to take account of the development of demand, as an ancillary assessment factor, in order to appraise the impact of the contested aid on competition. It denies having drawn the conclusion that this factor alone justifies the restriction of competition caused by the investment.

173 In addition, the figures produced by the applicants in an annex to the reply show an increase in demand for MFA 2 and MFA 35 products.

174 Lastly, it claims that the applicants are merely disputing the credibility of its forecasts generally, without producing any evidence capable of casting doubt on them.

175 The intervener states that the demand growth rates of 0.75% and 2% quoted in the contested decision relate to total consumption of finished product in the Community and not to demand for MFA 2 and MFA 35 products, which is forecast to fall by 4% and 7% respectively, as a growing proportion of garments is made using fabrics supplied from outside the Community. It stresses that Hualon's entry on to a declining market should be seen in the broader context of rising imports, a trend which it will be making an effort to reverse.

176 The applicants object that the figures quoted in the decision expressly refer to MFA 2 and MFA 35 fabrics and not to finished products and infer from the intervener's statements that Hualon's production will worsen the trend as far as installed capacity is concerned.

— Findings of the Court

177 As has been held in paragraph 168 of this judgment, the impact of any decline in demand should be assessed having regard to the initial hypothesis, which the applicants have not invalidated, of increasing imports — for which Hualon will attempt to substitute its production. In this context, declining demand strengthens the findings made in the contested decision, which, properly, considers the problem of demand in relation specifically to increasing imports (see paragraph 168 of this judgment).

178 Since the applicants have not established that the defendant's analysis with regard to Hualon's production acting as an import substitute was wrong, this complaint cannot succeed, even if the figures for demand quoted in the decision were incorrect. Consequently, the complaint must be rejected.

179 It follows from the foregoing that the applicants have not established that there was a manifest error of assessment in evaluating the repercussions of the project on competitive conditions and excess capacity in analysing the market or in evaluating demand.

Conclusion

180 The applicants have not established that the defendant wrongly authorized the contested aid under Article 92(3)(a) and (c) of the EC Treaty. The application must therefore be dismissed as unfounded.

Costs

181 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful and the Commission has applied for costs, they must be ordered to pay the Commission's costs in addition to bearing their own. Under Article 87(4) of the Rules of Procedure, Member States intervening in the proceedings are to bear their own costs; it must therefore be held that the United Kingdom must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

hereby:

1. Dismisses the application;

2. Orders the applicants to bear their own costs and jointly and severally to pay the Commission's costs;

3. Orders the United Kingdom to bear its own costs.

García-Valdecasas Lenaerts Tiili

Azizi Moura Ramos

Delivered in open court in Luxembourg on 12 December 1996.

H. Jung R. García-Valdecasas

Registrar President

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