JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

15 April 2008 *

In Case T-348/04,

Société internationale de diffusion and d'édition SA (SIDE), established in Vitry-sur-Seine (France), represented by N. Coutrelis and V. Giacobbo, lawyers,

applicant,

v

Commission of the European Communities, represented by J.-P. Keppenne, acting as Agent,

defendant,

* Language of the case: French.

supported by

French Republic, represented initially by G. de Bergues and S. Ramet, and subsequently by G. de Bergues and A.-L. Vendrolini, acting as Agents,

intervener,

APPLICATION for annulment of the last sentence of Article 1 of Commission Decision 2005/262/EC of 20 April 2004 on the aid implemented by France in favour of the Coopérative d'exportation du livre français (CELF) (OJ 2005 L 85, p. 27),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili and T. Tchipev, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 May 2007,

gives the following

Judgment

Background to the dispute

1 The applicant, the Société internationale de diffusion et d'édition (SIDE), is an agency established in France, whose business consists in particular of exporting French-language books to other Member States of the European Union and to non-member countries.

2 Agents are among the various operators involved in the distribution of books. They deal with retailers or organisations but not with the final consumer. They enable orders to be satisfied which publishers or their distributors would not find remunerative. The agent collects orders, each inconsiderable in itself, from different customers and approaches the publisher or distributor, who thus needs to deliver to only one place. Similarly, the agent gathers together orders from his bookselling or institutional customers in respect of works from different publishers, thus sparing his customers the need to place multiple orders with many different suppliers.

3 The Coopérative d'exportation du livre français, trading as Centre d'exportation du livre français (CELF), is a limited cooperative society which also operates as an

agent. CELF's object, according to the most recent version of its statutes, is 'directly to handle orders from abroad or the overseas territories and departments for books, brochures and all communications media, and more generally to carry out any transactions for the purpose, in particular, of furthering the promotion of French culture throughout the world by means of the abovementioned media'.

4 Most of the members of CELF are publishers established in France. However, membership is open to all persons engaged in the publication or distribution of French-language books, irrespective of their place of establishment.

5 CELF and the applicant are commercially active chiefly in countries and areas that are not French-speaking. For French-speaking areas, particularly Belgium, Canada and Switzerland, book distribution is performed by the distribution networks set up by publishers.

6 In 1979, since CELF was in financial difficulties, the French authorities decided to grant it a number of subsidies.

7 The subsidies in question were designed to allow export agencies to meet all orders from booksellers established in non-French-speaking areas, irrespective of amount, profitability and destination, in order to promote the dissemination of French literature throughout the world.

8 The only subsidy which is the subject of the present case ('the contested aid') was granted on an annual basis from 1980, although the amount of the subsidy varied as of

that date. The contested aid consisted of a package of annual subsidies, each of which was specifically intended to offset the extra costs incurred each year in handling orders from booksellers established abroad to the value of FRF 500 (EUR 76.22) or less, excluding costs of carriage ('small orders'), which were considered to be below the break-even point.

9 From 1981, one quarter of the amount of subsidy granted during the previous year was disbursed at the beginning of the year, the balance being granted in the autumn, after the public authorities had examined CELF's operational estimates and the fluctuations in the first part of the financial year. Within three months of the end of the financial year, an account showing how the subsidy had been used, together with a list of supporting documents, had to be forwarded to the Ministry of Culture and French Language.

10 By letter of 20 March 1992, the applicant drew the Commission's attention to certain aid for promoting, transporting and marketing French books granted by the French authorities to CELF. It also asked the Commission whether that aid had been notified in accordance with Article 93(3) of the EC Treaty (now Article 88(3) EC).

11 By letter of 7 August 1992, the Commission confirmed to the applicant that certain aid granted to CELF, including the contested aid, had not been notified.

12 On 18 May 1993, the Commission adopted a decision authorising the aid in question under the title 'Aid to exporters of French books' [Decision NN 127/92] (OJ 1993 C 174, p. 6).

13 By judgment of 18 September 1995 in Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, the Court of First Instance annulled that decision in so far as it concerned the contested aid. The Court held that the Commission had failed to comply with its obligation to initiate the inter partes procedure provided for by Article 93(2) of the EC Treaty (now Article 88(2) EC).

14 On 30 July 1996, the Commission decided to open the procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC).

15 On 10 June 1998, the Commission adopted a new decision declaring the contested aid compatible with the common market (Decision 1999/133/EC concerning State aid in favour of CELF) (OJ 1999 L 44, p. 37)

16 By application lodged at the Registry of the Court of First Instance on 29 September 1998, the applicant brought an action before the Court for the annulment of that decision.

17 Decision 1999/133 was also the subject of an application for annulment brought by the French Republic, lodged at the Registry of the Court of Justice on 8 September 1998. The French Republic challenged that decision on the ground that the Commission did not apply Article 90(2) of the EC Treaty (now Article 86(2) EC).

18 Since the two actions concerned the validity of the same act, on 25 March 1999 the President of the Fourth Chamber, Extended Composition, of the Court of First Instance ordered, pursuant to the third paragraph of Article 47 of the Statute of the Court of Justice (now the third paragraph of Article 54 of the Statute of the Court of Justice), that the proceedings be stayed pending delivery of final judgment by the Court of Justice.

19 The Court of Justice dismissed the action of the French Republic in its judgment of 22 June 2000 (Case C-332/98 *France* v *Commission* [2000] ECR I-4833). The proceedings before the Court of First Instance were continued.

20 The contested aid was abolished by the French authorities in 2002.

21 Decision 1999/133 was annulled by judgment of the Court of First Instance of 28 February 2002 (Case T-155/98 ECR I-1179). The Court of First Instance concluded that the Commission had committed a manifest error of assessment as regards the definition of the relevant market.

22 On 20 April 2004, the Commission adopted Decision 2005/262/EC on the aid implemented by France in favour of CELF (OJ 2005 L 85, p. 27) ('the contested decision').

23 In the contested decision, the Commission concluded that the contested aid was State aid within the meaning of Article 87(1) EC (recital 127). It went on to consider whether one of the derogations from the general prohibition of State aid provided for in that article was applicable. The Commission expressly excluded the application in the present case of the derogations provided for in Article 87(2) EC as well as those in Article 87(3)(a), (b) and (c) (recital 132). Finally, it took the view that the contested aid had a cultural objective for the purpose of Article 87(3)(d) EC, which provides that aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest may be considered to be compatible with the common market (recitals 134 and 139).

24 As a consequence, the Commission simply checked the compatibility of the contested aid on the export agency market under Article 87(3)(d) EC (recital 186). First of all, it established the relevance of small orders as a criterion for justifying the granting of the contested aid (recitals 187 to 197). Secondly, it verified that the justification for the contested aid was genuine, namely that there were extra costs directly associated with the processing of small orders. Accordingly, the Commission assessed the costs incurred by CELF in processing small orders in 1994 on the basis of accounting figures provided by the French Republic (recitals 203 to 206). It considered that the data for that year was relevant for the purpose of assessing the costs of processing small orders on the ground that the supporting documents and explanations sent by the French Republic for other financial years showed that the structure of small orders remained stable from one year to another (recital 208). Finally, the Commission established that the contested aid did not overcompensate the costs of processing of small orders.

25 For the above reasons, the Commission stated the following in Article 1 of the contested decision:

'The aid to [CELF] for processing small orders of French-language books, implemented by France between 1980 and 2001, is aid that is caught by Article 87(1) [EC]. Since France failed to notify the aid to the Commission before implementing it, the aid was granted unlawfully. It is, however, compatible with the common market under Article 87(3)(d) [EC].'

Procedure and forms of order sought by the parties

26 By application lodged at the Registry of the Court of First Instance on 20 August 2004, the applicant brought the present action.

27 By letter lodged at the Court Registry on 2 December 2004, the French Republic sought leave from the Court to intervene in the present proceedings in support of the form of order sought by the Commission, which was granted by order of the President of the Third Chamber of the Court of First Instance on 20 January 2005.

28 On 22 March 2007, the Court requested the Commission to reply in writing to certain questions and to produce various documents. The Commission complied with that request within the prescribed period.

29 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure.

30 The parties presented oral argument and replied to the Court's questions at the hearing held on 23 May 2007.

31 The applicant claims that the Court should:

— annul the last sentence of Article 1 of the contested decision;

— in the alternative, annul the last sentence of Article 1 of the contested decision in so far as the Commission declared the contested aid compatible before 1999 or, alternatively, 1997 or 1994;

— in the further alternative, annul the last sentence of Article 1 of the contested decision in so far as it declares the contested aid compatible before 1 November 1993;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

33 The intervener contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

34 The applicant relies on three pleas in law in support of its application, the third plea being divided into two parts. The first plea alleges that there is no legal basis for declaring the contested aid compatible with the common market prior to 1 November 1993. The second plea alleges that the contested decision is inconsistent with Article 88(3) EC. The third plea alleges infringement of Article 87(3)(d) EC. The first part of the third plea alleges that the contested aid is discriminatory, whereas the second part is based on alleged manifest errors of assessment.

35 It is appropriate to examine the first plea first of all and subsequently the second part of the third plea.

The first plea, alleging a lack of legal basis prior to 1 November 1993

Arguments of the parties

36 The applicant submits that, by declaring the contested aid compatible with the common market under Article 87(3)(d) EC in the last sentence of Article 1 of the contested decision, the Commission adopted the decision on an incorrect legal basis. The applicant is of the view that, since that provision was introduced by the EU Treaty, which entered into force on 1 November 1993, the contested aid could have been declared compatible with the common market only with effect from that date.

37 The applicant submits that the principle of non-retroactivity prohibits the application of a Community act before the date of its entry into force. There are very few exceptions to that principle, including where express provision is made for transitional measures or where it clearly follows from the objectives or general scheme of the act in question. The applicant submits that the EU Treaty makes no provision for transitional measures and that there is nothing to suggest that the signatories to the treaty intended to give Article 87(3)(d) EC retroactive effect.

38 The applicant refers to the Commission notice of 22 May 2002 on the determination of the applicable rules for the assessment of unlawful State aid (OJ 2002 C 119, p. 22), which confirmed that the compatibility of unlawful State aid with the common market must, as a general rule, be assessed 'in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted'.

39 The applicant considers that, if the aid which was not notified were assessed in the light of the provision in force at the time of the Commission's decision and not at the time when it was granted, the effect would be to reward an unlawful act, since the aid would benefit retroactively from a decision declaring it compatible which would not have been given if the Member State concerned had complied with Article 88 EC and notified the aid to the Commission before granting it.

40 Moreover, the applicant states that the derogation in Article 87(3)(d) EC cannot be regarded as being covered by Article 87(3)(c) EC. It points out that, in the contested decision, the Commission did not apply Article 87(3)(c) EC in the present case. The applicant also submits that the result of such an interpretation would be to deprive the derogation in Article 87(3)(d), introduced by the EU Treaty, of any effect.

41 In its defence, the Commission states that a legal situation is governed by the legislation in force at the time when that situation has become definitive. In the present case, the relevant point of reference is when the decision on the compatibility of the contested aid was adopted.

42 The Commission states that it follows from the general principles of law that, as a rule, new laws, including treaty provisions, apply to the future effects of situations which arose under the old law.

43 In any event, Article 87(3)(d) EC must be immediately applicable in view of the objectives and the general scheme of that provision. The Commission submits that a decision on the compatibility of State aid with the common market is not a mere formality requiring a specific legal basis. The Commission is required to consider whether the aid in question would make a real contribution to the attainment of a legitimate objective in the public interest on the one hand and any adverse effects it may have on competition on the other hand. In carrying out that assessment, it must simply determine whether or not, at the time of its examination, the Community interest requires the aid to be repaid, since, from an economic point of view, the effects of unlawful aid do not cease at the time when it is granted but continue as long as the recipient remains active on the market.

44 The Commission states that if it did not apply the new compatibility criterion immediately, its decision would run counter to an objective that is now laid down in the treaty. It considers that aid cannot be required to be repaid on the sole ground that it was disbursed too early.

45 The Commission submits that its view was confirmed by the Court of First Instance in its judgment in Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931.

46 The Commission is of the view that the application of a new rule to its examination of aid that has not been notified does not necessarily constitute a 'reward [of] an unlawful act'. Indeed, such an immediate application could act against the interests of the Member State if stricter compatibility criteria were applied.

47 Finally, the Commission submits that there is no overriding reason in the interest of legal certainty which could justify, in the present case, limiting the temporal scope of Article 87(3)(d) EC.

48 In the alternative, the Commission submits that the derogation relating to cultural objectives, which has appeared in Article 87(3)(d) since 1993, was previously covered by subparagraph (c) of that provision and has simply been more clearly identified by the addition of subparagraph (3)(d).

49 The French Republic adopts the Commission' arguments.

Findings of the Court

50 It is apparent from the last sentence of Article 1 of the contested decision that the contested aid was declared compatible with the common market under Article 87(3)(d) EC. That provision constitutes a derogation from the general prohibition of State aid under Article 87(1) EC, introduced by the EU Treaty, which entered into force on 1 November 1993.

51 The applicant submits, in essence, that such a legal basis could not be used to declare the aid compatible with the common market for the period from 1980 to 31 October 1993.

52 In general, the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, save where, exceptionally, the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (Case 98/78 *Racke* [1979] ECR 69, paragraph 20).

53 Thus, although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, that is not the case with substantive rules (Joined Cases 212/80 to 217/80 *Meridionale industria salumi* [1981] ECR 2735, paragraph 9).

54 In order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to them (see Joined Cases C-74/00 P and C-75/00 P, *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 119 and the case-law cited). That conclusion applies irrespective of whether such rules might produce favourable or unfavourable effects for the person concerned (see, to that effect, Case 234/83 *Gesamthochschule Duisburg* [1985] ECR 327, paragraph 20, and Case C-28/00 *Kauer* [2002] ECR I-1343, paragraph 20).

55 On the other hand, Community legislation applies immediately to the future effects of a situation which arose under the old law (Case 270/84 *Licata* v *CES* [1986] ECR 2305, paragraph 31, and Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraph 50).

56 Against that background, it should be noted that the EU Treaty does not lay down transitional provisions for the application of Article 87(3)(d) EC. Moreover, there is nothing in that provision from which it could be concluded that it is intended to govern situations which arose prior to the date when it entered into force. Indeed, the Commission did not state in the contested decision that Article 87(3)(d) EC had to be applied retroactively in the present case in view of the objectives or the general scheme of that provision, or that it was necessary to ensure that the system of control operated by the Commission in relation to aid granted by the Member States functions properly. Nor did it put forward any such arguments in its defence.

57 It is therefore necessary only to examine whether the contested aid had become definitively compatible or incompatible at the time when the contested decision was adopted.

58 All new aid which has not been notified and has already been disbursed is necessarily incompatible with the common market if it is capable of distorting competition by selectively favouring certain undertakings or the production of certain goods during the period in which it was paid and if it is not covered by any derogation from the general prohibition of State aid under Article 87(1) EC. In any event, once it has produced its effect, the aid in question becomes definitively compatible or incompatible with the common market. That is particularly so in the present case, since the contested aid was awarded and granted by the French Republic and used by CELF in order to offset the extra costs of processing small orders on an annual basis.

59 Therefore, contrary to what the Commission maintains, the analysis as to whether aid that has been paid and not notified is compatible with the common market, especially aid such as that in the present case, does not only require an assessment of whether, at the time when the relevant decision was adopted, the Community interest demanded that the aid be repaid. The Commission must also ascertain whether, during the period in which the aid in question was paid, that aid was likely to distort competition.

60 The Commission enjoys a wide discretion to admit aid by way of derogation from the general prohibition in Article 87(1) EC. The assessment in such cases of whether State aid is or is not compatible with the common market raises problems which presuppose the examination and appraisal of economic facts and conditions which may be both complex and liable to change rapidly (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 15). However, that discretion cannot be used while disregarding the fact that it was during the period in which the aid in question was unlawfully paid that it could have distorted competition in a manner contrary to the Community interest, as determined under the existing legislative framework.

61 It follows that the Commission has erred in law by applying Article 87(3)(d) EC to the period before 1 November 1993 instead of applying the substantive rules in force during the period in question.

62 That conclusion applies *a fortiori*, since, according to established case-law, exceptions to the general rule that State aid is incompatible with the common market, laid down in Article 87(1) EC, must be interpreted strictly (Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 40, and Case T-150/95 *UK Steel Association* v *Commission* [1997] ECR II-1433, paragraph 114). Such strict interpretation also requires that a derogation concerning

State aid be limited in its application to the period after it became effective, at the very least where the aid in question has already been disbursed.

63 In the same vein, with regard to aid covered by the ECSC Treaty which has been paid without prior notification, the Court of Justice has held that applying the rules of the code in force on the date on which the Commission makes a determination on the compatibility of aid paid under an earlier code does indeed result in the retroactive application of Community rules (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 118). The Court considered that the code in force at the time when the Commission adopted the decision contained no provision which provided that that code may be applied retroactively. The Court also considered that it was clear from the general scheme and the objectives of successive aid codes governing the aid in question that those codes had been adopted according to the needs existing at any given period. Accordingly, the application of rules adopted at a particular period, according to the then prevailing situation, to aid paid in the course of an earlier period does not correspond to the general scheme and objectives of that type of rules (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 120).

64 By contrast, the situation in the present case is not comparable to that which gave rise to the judgment in *Ferriere Nord* v *Commission*. That judgment related to aid which had not been implemented before the Commission's decision on compatibility had been adopted. It could not therefore pose a threat to competition during the period before that decision was adopted. On the other hand, aid which has been disbursed before the Commission has taken a decision on its compatibility with the common market can threaten and even distort competition during the period before that decision is adopted.

65 The conclusion that Article 87(3)(d) EC cannot be applied in the present case cannot be affected by any of the additional arguments put forward by the Commission.

66 With regard to the argument that there is no overriding reason in the interest of legal certainty which could justify, in the present case, limiting the temporal scope of that provision, Community law must ensure observance of the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effects of Community legislation must be clear and predictable for those who are subject to it (see, to that effect, *Meridionale industria salumi*, paragraph 10). Community legislation on State aid would be neither clear not predictable for those who are subject to it if aid which could not be regarded as compatible between 1980 and 1993, in the absence of a derogation from the general prohibition of State aid under Article 87(1) EC, which applied to that period, could subsequently be regarded as compatible if such a derogation were made available. The Commission's argument in that connection must therefore be rejected.

67 As regards the Commission's argument that the application of a new rule to its examination of aid that has not been notified does not constitute a reward of an unlawful act, it must be pointed out that to consider that aid which has not been notified can be declared compatible with the common market by virtue of a derogation which was not in force when that aid was paid would result in conferring an advantage on the Member State which granted it in relation to any other Member State which might have intended to grant similar aid but refrained from doing so since there was no derogation authorising this. Similarly, an advantage would be conferred on the Member State in question in relation to any other Member State which, since it intended to grant aid for the same period, notified the aid before the derogation in question came into effect and, as a consequence, obtained a decision from the Commission stating that the aid was incompatible with the common market. That would serve to encourage Member States not to notify aid which they considered incompatible with the common market, in the absence of an applicable derogation, in the hope that such a derogation might be adopted subsequently. The Commission's argument cannot therefore be accepted.

68 Lastly, the Commission's argument in the alternative that the aid paid before 1 November 1993 is in any event covered by the derogation in Article 87(3)(c) EC must be rejected.

69 Without it being necessary to consider whether the derogation in Article 87(3)(c) EC could, before the EU Treaty entered into force, have constituted an adequate legal basis for it to be accepted that State aid to promote culture and heritage conservation was compatible with the common market, it is sufficient to state that, since the Commission chose the legal basis which it considered to be the most appropriate in the present case, namely Article 87(3)(d) EC, it is in the light of that provision alone that it the question whether the contested decision is in conformity with Community law must be examined. Moreover, since the Commission itself stated in the contested decision (recital 186) that it was concerned with checking the compatibility of the aid on the export agency market only under Article 87(3)(d) EC, it cannot rely on the application of a different provision before the Court.

70 It follows from the foregoing that the Commission erred in law in considering that the contested aid was compatible with the common market under Article 87(3)(d) EC as regards that part of the aid paid to CELF before the date on which the EU Treaty entered into force. The last sentence of Article 1 of the contested decision must therefore be annulled in so far as it relates to the period before 1 November 1993.

The second part of the third plea, alleging manifest errors of assessment

Arguments of the parties

71 The applicant submits that the contested aid is totally unrelated to small orders and is simply operating aid granted to CELF on an indefinite basis.

72 According to the applicant, when the contested aid was granted, small orders were not defined. Such a definition, specifying that small orders are orders to the value of less than FRF 500, was introduced only in connection with Case T-49/93. Instead of being set following an economic analysis, the FRF 500 threshold was determined empirically.

73 As regards the relevance of that definition, the applicant submits that 1994 was deliberately chosen as a reference year in order to justify setting the break-even point at FRF 500.

74 In any event, the applicant states that it is not sufficient, on the basis of an examination of the analytical accounts for one year alone, even where that is supported by three other years, to declare that aid paid for over 20 years is compatible. It observes that the Commission has neither justified the choice of one year alone as a point of reference over such a long period nor explained why the method used in 1994 was not applied to the other years. Since no consistent method of calculation was used, the contested aid should be regarded as an operating subsidy, granted irrespective of the extra costs incurred in processing small orders.

75 As regards 1994, the applicant submits that the analytical accounts for CELF were drawn up to demonstrate artificially that the aid disbursed had been used only for the purpose of processing small orders. The costs of processing small orders were increased as a result of a number of accounting devices, namely 'unjustified individual multiplying factors', the 'failure to take account of the actual manner in which orders were completed' and 'various allocation keys'.

76 First of all, the applicant observes that the costs incurred by CELF in processing small orders were assessed by applying individual multiplying factors, which varied

according to the task, on the ground that it was more costly to process small orders than other orders. According to the applicant, there is no objective justification for the multiplying factors applied or the value attributed to them. As a consequence, at least 9.12% of the costs relating to other CELF activities were artificially attributed to small orders.

77 Secondly, the applicant considers that, even if the application of an individual multiplying factor could be justified, such an application should be limited to orders that were not tele-transmitted. Tele-transmission significantly reduces the costs of processing and receiving orders and usually obviates the need to have recourse to messengers as the majority of suppliers deliver the tele-transmitted order themselves.

78 Even though more than two-thirds of CELF's small orders were tele-transmitted in 1994, the Commission failed in the contested decision to distinguish between tele-transmitted orders and those in written form. Consequently, the costs associated with small orders was increased by FRF 40 421 (EUR 6 162.14) as regards messengers' expenses, FRF 143 703 (EUR 21 907.38) as regards the costs associated with receiving goods and FRF 235 567 (EUR 35 911.96) as regards business expenses.

79 In addition, the applicant observes that the French authorities switched the number of tele-transmitted orders and that of orders in written form and sent them to the Commission in that form. Contrary to the Commission's assessment that the effect of that switch was only minor, according to the applicant, it had a significant impact.

80 Thirdly, the applicant criticises the choice of 'allocation keys' in the contested decision, namely the criteria according to which costs are allocated to the processing of

small orders or to other activities. The accountancy costs and supply costs relating to small orders were calculated on the basis of the number of invoices issued (47%) rather than that of the number of books issued (5%). However, the other expenditure on administrative staff associated with small orders was calculated by taking the number of books supplied as the point of reference. The accounts department does more than simply issue invoices, however.

81 The applicant concludes from all of the above that the costs associated with processing small orders were considerably lower than those presented by CELF. The total costs associated with small orders were increased by at least FRF 1 384 222 (EUR 211 023.28) for the 1994 reference year.

82 Finally, the applicant submits that any consideration relating to an alleged general interest objective on the part of CELF is inadmissible. First, the issue of classification as State aid is not the subject of the present proceedings. Secondly, neither Article 86(2) EC nor the *Altmark* case-law (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747), which invoke the concept of general interest objective, can be applied in the present case.

83 The Commission states that the contested decision is based on complex economic assessments. In those circumstances, judicial review is confined to ascertaining whether the Commission complied with the rules of procedure and the rules relating to the duty to give reasons, that the facts relied on in making the disputed decision were accurate and that there was no manifest error in the assessment of those facts or misuse of powers. The contested decision is not the outcome of a mathematical exercise but of a comprehensive assessment in order to ascertain whether the aid paid was disproportionate and whether it led to a distortion of competition.

84 With regard to the alleged manifest errors of assessment, the Commission refers to the broad powers it enjoys for determining whether aid is compatible under Article 87(3) EC. It is of the view that the Court of First Instance concluded in its judgment in Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, as regards the Commission's assessment of a restructuring plan for an undertaking in difficulty, that 'it is only in cases where the Commission has committed a particularly manifest and serious error when assessing such a plan that the Court may rule against the authorisation of State aid intended to finance such restructuring'. Therefore, the Community court should not substitute its own assessment, especially in the economic field, for that of the Commission.

85 On the basis of those considerations, the Commission is of the view that the burden of proof on the applicant is particularly onerous. It is for the applicant to rebut the presumption that the contested decision is lawful by putting forward evidence capable of casting doubt on the findings set out in the contested decision.

86 In that regard, the Commission states, first, that the cultural objective of the aid at issue was not called into question by the applicant and, second, that the contested aid did not overcompensate the costs relating to the activities in question, even though the file submitted by the French authorities is not without its weak points and provides no guarantee as to exactly how all the sums were used.

87 In fact, the Commission is of the view that, if the French authorities had submitted to it beforehand a complete file guaranteeing absolutely that the sums paid were strictly to offset the extra costs associated with the public service objectives pursued by CELF, the Commission could have concluded, by reference to the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, that there was no State aid.

88 The Commission submits that the evidence produced by the applicant in order to dispute that there was a sufficient link between the aid paid and the small orders is of a very general nature. That evidence sought to deny the obvious, namely that it is more costly to process small orders than large orders. The Commission refers to a document entitled 'CELF — CELF Profitability', which gave details of the reasons for the extra costs associated with processing small orders, the latter representing almost half of CELF's orders.

89 First of all, with regard to the alleged accounting devices, the Commission states that the use of individual multiplying factors is justified as the processing costs per book are, according to the French authorities, greater, on average by approximately 50%, for small orders by comparison with other orders. The use of individual multiplying factors was explained in detail in a letter from the French Government of 5 March 1998.

90 Secondly, as regards the fact that tele-transmission was taken into account, the Commission points out that the contested decision was based on the information which was provided by the French authorities in 1998 and adjusted in 2003. The cost of a small order was adjusted from EUR 27.44 per book to EUR 27.20 per book. By way of comparison, the costs associated with ordinary orders were EUR 18.44 per book.

91 The Commission argues that each small order, whether or not tele-transmitted, entails extra costs. For example, when the books are stored, a small order occupies the same space as a larger order, which was not disputed by the applicant.

92 Furthermore, the average number of books per line is almost twice as low in the case of small orders, which increases the costs accordingly.

93 Thirdly, with regard to the allocation keys, the Commission is of the view that the number of invoices is a better criterion for calculating the accountancy costs associated with small orders than the number of books. By contrast, the number of books is more relevant for the purpose of the other services. The Commission states, in addition, that the applicant's argument concerning CELF's accounting devices is based essentially (almost two-thirds of the costs being as a result adjusted) on that unfounded criticism of the allocation keys.

94 The French Republic submits that CELF benefited from the contested aid on account of its general interest objective of meeting unprofitable orders placed by foreign booksellers.

95 The French Republic is of the view that the alleged errors identified by the applicant do not affect the accuracy of the facts relied on by the Commission in the contested decision. It would be unreasonable to contend that the cost of processing small orders is not considerably greater than that of other orders. The French Republic states, finally, that there is not necessarily any link between small orders and small publishers.

Findings of the Court

96 By virtue of Article 87(3) EC, the Commission has a wide discretion the exercise of which involves complex economic and social assessments which must be made in a Community context. Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the

facts relied on and that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 83). In particular, it is not for the Community court to substitute its economic assessment for that made by the institution which adopted the decision (Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 34).

97 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 in question implausible (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 59, and Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933, paragraph 138).

98 In exercising its discretion, the Commission has to ensure that the aims of free competition and those of the derogation are reconciled, whilst complying with the principle of proportionality (see, by analogy, *AIUFFASS and AKT* v *Commission*, paragraph 54). Thus, Member States are not permitted to make payments which may improve the situation of the undertakings receiving the aid but which are not necessary for the attainment of the objectives specified in Article 87(3) EC (see, to that effect, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 17).

99 In particular, operating aid, that is to say, aid intended to relieve an undertaking of the expenses which it would itself normally have had to bear in its day-to-day management or its usual activities, does not in principle fall within the scope of Article 87(3) EC. The effect of such aid is in principle to distort competition in the sectors in which it is granted, whilst nevertheless being incapable, by its very nature,

of achieving any of the objectives of the abovementioned derogations (see, to that effect, Case C-301/87 *France* v *Commission*, paragraph 50; Case C-86/89 *Italy* v *Commission* [1990] ECR I-3891, paragraph 18; Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 37; and Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 48).

100 It is in the light of those principles that it is necessary to consider whether the applicant has succeeded in demonstrating that the contested decision is vitiated by a manifest error of assessment as regards the examination of whether the contested aid is compatible with the common market.

101 In the present case, the object of the contested aid was to disseminate French language and literature by means of a mechanism offsetting the extra costs of handling small orders.

102 The Commission therefore declared the contested aid compatible with the common market after weighing the objectives of promoting French culture against those of safeguarding free competition. It took account, in particular, of the fact that the aid granted by France did not overcompensate the costs associated with processing small orders.

103 It is therefore necessary to consider whether, as the applicant maintains, the Commission overestimated the abovementioned costs with the effect that the amount of aid paid clearly exceeded the cost of processing small orders and, therefore, went beyond the pursuit of the sole cultural objective covered by the derogation in Article 87(3)(d) EC which was identified by the Commission in the contested decision.

104 The applicant essentially puts forward two main arguments. First, it considers that the Commission committed an error by calculating the costs directly associated with small orders during the whole period in which the contested aid was paid on the basis of an extrapolation of the data for 1994 alone. Second, the applicant submits that the calculation of the costs for 1994 is, in any event, incorrect.

105 If the applicant's second argument were justified, it would not be necessary to consider its first argument. Indeed, whether the Commission's conclusions for all of the period in question, which are based on an extrapolation of the data for 1994, are correct depends on whether its conclusions for that year are accurate. It is therefore necessary to ascertain whether the contested decision is vitiated by a manifest error of assessment with regard to the analysis of the aid received by CELF in 1994.

106 The applicant argues, in essence, that the costs directly associated with processing small orders were arbitrarily overestimated by the Commission by means of three mechanisms, namely unjustified individual multiplying factors, a failure properly to take account of the actual manner in which the orders were completed and incorrect allocation keys. The applicant therefore considers that a significant part of the expenses associated with other CELF activities were allocated to the processing of small orders. The applicant thereby concludes that the contested aid was in actual fact used to finance CELF'S overall activities.

107 It must be pointed out that the Commission calculated the costs directly associated with processing small orders on the basis of explanations provided to it by the French Republic in the procedure in which the contested aid was examined. At recital 206 of the contested decision, the Commission concluded, on the basis of those explanations, that the cost of processing small orders in 1994 was FRF 4 446 706 (EUR 677 895.96), whereas the turnover for those activities was FRF 2 419 006 (EUR 368 775.09). Consequently, given that the total contested aid

paid to CELF in 1994 amounted to FRF 2 000 000 (EUR 304 898.03), the Commission concluded that there was an operating loss relating to small orders for that year of FRF 27 700 and that, accordingly, the aid received did not overcompensate the costs of those activities (recitals 206 and 207 of the contested decision).

108 The Commission also explained the way in which it calculated the costs directly associated with processing small orders in Annex IV to the contested decision. First of all, that annex consists of a table containing the various categories of expenditure associated with CELF's activities as an export agency — such as the cost of purchasing books, staff costs, overheads etc — as well as the costs which, in each of those categories, should have been incurred by CELF, according to the Commission, in processing small orders. Secondly, that annex contains comments and explanations of the way in which some of those costs were allocated to the processing of small orders rather than to other CELF activities.

109 It is apparent from the annex in question that the Commission failed to take account of the actual costs of processing small orders. On the contrary, the Commission made an estimate of those costs on the basis of the total costs incurred by CELF for each category. In order to do this, the Commission allocated part of the total costs to the processing of small orders by using an allocation key that was predetermined and, as the applicant pointed out, not necessarily the same for each category. Thus, for example, in order to calculate the cost of purchasing books for small orders, the Commission divided the total cost of the books purchased by CELF by the number of those books. It then multiplied that figure, corresponding to the average cost per book, by the number of books forming part of small orders.

110 However, the Commission followed a different procedure when calculating CELF's turnover for small orders. In that case, it did not simply calculate the average turnover per book and multiply that figure by the number of books covered by the activity in question but took into account the actual turnover.

111 If the Commission had calculated the turnover for small orders in accordance with the method it used to calculate the cost of purchasing books for small orders, the resulting turnover would have been much higher than that calculated in the contested decision, which would have had an impact on whether the contested aid was classified as excessive in relation to the cultural objective covered by the derogation in Article 87(3)(d) EC which was identified by the Commission in the contested decision. In fact, it is apparent from that decision, in particular from tables 3(a), 3(b), 3(c) and table 4, that the actual average price of the books sold as part of small orders is much lower than the average actual price of books sold by CELF.

112 The Court nevertheless considers that it is appropriate to leave aside the above consideration and to continue its analysis of the contested decision.

113 It is also apparent from Annex IV to the contested decision that, for certain categories of costs, the Commission multiplied the figure calculated in accordance with the method set out at paragraph 110 by a given coefficient in order to establish the final cost to be allocated to small orders. Thus, the costs grouped under the headings 'Reception (of works), direct labour' and 'Sales department, direct labour' were calculated on the basis of the average cost per book for each of those headings. That average cost per book was multiplied by the number of books forming part of small orders. That figure was then again multiplied by three to calculate the final cost of processing small orders for the heading in question.

114 According to the Commission, the application of a multiplying factor of three is justified by the additional difficulties entailed in processing small orders in comparison with other CELF activities.

115 The Commission considered that those costs had to be higher for small orders, since the operator handling them would have to repeat the same physical operations for each order, irrespective of the amount. The Commission is of the view that the individual multiplying factors enable the additional costs associated with small orders to be taken into account.

116 In particular, with regard to the heading 'Reception (of works), direct labour' in Annex IV to the contested decision, the Commission justified the application of a multiplying factor of three on the basis that the reception of works from large publishers or distributors is computerised using the EAN code, which makes recognition of the work by optical scanning possible. It points out that, conversely, works published by small publishers often do not contain a bar code, which means that manual recognition is necessary. Moreover, it pointed out that large publishers delivered to Parisian customers for a contribution to the transport costs fixed by the trade association which is FRF 0,75/kg (EUR 0.11/kg), whereas the price paid to messengers is FRF 6,5/kg (EUR 0.99/kg) for the packages used for works from small distributors. However, those facts have a bearing only on the category of transport costs for purchases and messengers for which, as will be seen below (paragraph 128), no multiplying factor should have been applied, at least in part, as is apparent from the letter of the French authorities to the Commission of 11 March 2003.

117 As regards the costs grouped under the heading 'Sales department, direct labour', the Commission justified the application of a multiplying factor of three in Annex IV to the contested decision on the ground that small orders involve more onerous processing as regards sales administration. The Commission explained that choice by stating that, for example, if there are difficulties with coding orders, further work is needed. Similarly, the Commission stated that research is required before an order can be inputted, namely the ISBN, publishers' catalogues, various data bases, checks on the availability (or not) of the work and checks on the match between order and publisher. It explained in that connection that difficulties associated with

the quality of the order form will give rise to extra costs. It added that such difficulties occur more often in the case of small orders, given that large bookshops, which have a considerable turnover with CELF, generally use high-performance tools to enable them to rationalise their management, and in particular to transmit orders containing clear identification features. By contrast, according to the Commission, small bookshops do not always use modern international business resources and their orders are sometimes difficult to decipher and incomplete, which entails additional processing costs.

118 With regard to the category 'overheads', which includes, for example, telephone, telex and collection charges etc, it is not possible to ascertain from Annex IV to the contested decision whether the costs allocated to small orders were calculated on the basis of the average cost per book sold, as in the case of staff costs, on the basis of the turnover on small orders, as in the case of certain individual, indirect fixed charges, or on the basis of the average cost per invoice issued, as in the case of overheads which include the costs of administrative supplies. However, it is apparent from that annex that that calculation, irrespective of the manner in which it was carried out, was multiplied by a coefficient of 2.5.

119 The Commission justified the application of that coefficient in Annex IV to the contested decision on the ground that telephone costs vary in accordance with many factors, in particular 'customer replies' and 'publisher searches'. It added that those costs concern several operations, including reception of the order form from the bookseller, coding the order, inputting the order and accounting, whose purpose is to record all the flows relating to the operations described.

120 It is therefore necessary to establish whether, as the applicant claims, even if the allocation keys used for small orders and those used for the rest of CELF's activities for the various categories of costs incurred by the latter are correct, the choice of those individual multiplying factors is arbitrary and whether, in any event, the Commission should not have applied those individual multiplying factors to tele-transmitted orders.

121 According to the explanations provided by the Commission and the applicant in their written pleadings and at the hearing, a tele-transmitted order is an order received by electronic means, which facilitates the subsequent processing of the order in comparison with an order in written form, since the latter must be reprocessed by a member of staff so that it can be adapted to the administrative system, which is now computerised.

122 The significance of tele-transmission of orders was pointed out during the procedure for examining the contested aid. Thus, in an annex to the letter from the French Republic to the Commission of 5 March 1998, entitled 'Justification as to why the subsidy is proportionate', the French authorities argued that, where an order was not tele-transmitted, an extra cost was undeniably incurred in processing the order. The French authorities therefore maintained that one of the factors justifying the contention that processing small orders entails an extra cost in comparison with processing other orders was that, often, they are sent to small publishers with whom automatic tele-transmission procedures are not possible. The French authorities stated, finally, that tele-transmission made it possible for each work to be recognised by optical scanning.

123 Similarly, as had been stated (see paragraphs 114 to 119 above), in Annex IV to the contested decision, and in particular at points 2, 4 and 9 of the comments and explanations, on a number of occasions the Commission justified the use of individual multiplying factors on the ground that, often, small orders require manual processing, since the reception of works is not computerised or requires prior research

where there are difficulties with coding orders. In the same way, in order to justify the use of a coefficient for overheads — telephone, telex and collection charges —, the Commission relied on the fact that additional work was necessary to codify them.

124 It is clearly inconsistent to argue that, where orders are not tele-transmitted, extra costs are incurred, and at the same time to apply the same individual multiplying factor to orders that have been tele-transmitted and those which have not been so transmitted.

125 With regard to the absence of tele-transmission, it would be acceptable to apply a multiplying factor to the costs incurred in processing small orders only if tele-transmission was clearly less widely used in processing small orders than in other orders. The validity of that premise is apparent from the annex to the letter from the French Republic to the Commission of 5 March 1998 entitled 'Justification as to why the subsidy is proportionate'. In fact, the French authorities informed the Commission that only one third of small orders were tele-transmitted whereas 58% of other CELF orders were so transmitted. Those figures formed the basis of the Commission's analysis of the cost of processing small orders.

126 However, as the Commission acknowledged in the contested decision (recital 212), in their letter of 5 March 1998 the French authorities switched the percentage of tele-transmitted orders and that of orders not so transmitted. The actual figures showed that two-thirds of small orders were tele-transmitted and one third was not. It is therefore clear that, in 1994, tele-transmission was much more widely used in processing small orders than in other CELF activities, as the French authorities acknowledged and informed the Commission in their letter of 11 March 2003.

127 The Commission nevertheless took the view in the contested decision (recital 212) that the effect of the French authorities' error, repeated in its own calculations, was not such as to call into question the proportionate nature of the contested aid, since the financial incidence of the switch of tele-transmitted orders and orders not so transmitted amounted to the modest sum of EUR 0.24 per book. That conclusion reiterates the explanations provided by the French authorities in the annex to their letter to the Commission of 11 March 2003. According to those explanations, only one category of costs, namely messenger costs, was affected by that switch, in so far as an individual multiplying factor was applied — incorrectly — to the costs attributed to small orders.

128 As the applicant argued at the hearing, the Commission's position, which consisted, on the one hand, of accepting the calculations provided by the French authorities in their letter of 5 March 1998 — which, essentially, were based on the premise that the low rate of tele-transmission for small orders accounted, to a large degree, for the extra costs of processing such orders — and on the other hand, accepting and endorsing the position of the French authorities, set out in its letter of 11 March 2003, that the fact that two-thirds as opposed to one third of small orders was tele-transmitted had only a minor impact on whether the contested aid was proportionate, is manifestly inconsistent.

129 The Commission's position is also clearly incorrect. As is apparent from Annex IV to the contested decision, both the alleged low rate of tele-transmission for small orders and the difficulties entailed in processing those orders, which were, theoretically, to a large extent resolved by tele-transmission, were used as factors to justify the application of various individual multiplying factors. The argument that the fact that the percentages of tele-transmitted small orders and those not so transmitted were switched affected only messengers' expenses therefore has no factual basis.

130 It must therefore be concluded that the Commission committed a manifest error of assessment by applying to its initial assessment of the costs associated with

processing small orders individual multiplying factors, which were justified on the basis of additional technical processing difficulties which could be resolved by the use of tele-transmission. That is clearly the case with regard to the reception of works costs, the direct labour costs of the service department and telephone, telex and collection charges. In the light of the content of the Commission's responses to the written questions of the Court, that was also the case with regard to messengers' expenses.

131 In order to ascertain the effect that error had on the Commission's assessment in the contested decision as to whether the contested aid was excessive, the Court asked the Commission to provide it with a calculation of the costs associated with small orders without individual multiplying factors.

132 The Commission did not provide a precise figure in response to that question. However, it is perfectly clear from its response that, without those multiplying factors, the costs of processing small orders would have decreased by more than FRF 635 000 (EUR 96 805.13), even where the categories of costs other than those to which a multiplying factor of three was applied were not taken into account.

133 Therefore, had it not applied individual multiplying factors, the Commission would not have been able to establish, on the basis of the figures it used in Annex IV to the contested decision, that the aid received by CELF did not overcompensate the costs incurred in processing small orders. In fact, but for the application of individual multiplying factors, the operating profit from those activities would have been in excess of FRF 600 000.

134 In any event, even if the Commission could apply an individual multiplying factor to the categories of costs referred to at paragraph 130 above, it would have committed a manifest error of assessment by also applying such factors to tele-transmitted orders, given that such orders clearly did not give rise to the difficulties relied on as the main justification for using those multiplying factors.

135 It is therefore clear, in any event, that two-thirds of the increase in costs resulting from the application of individual multiplying factors is attributable to a manifestly incorrect assessment.

136 Accordingly, the applicant is justified in claiming that the Commission overestimated the costs of processing small orders which were actually incurred by CELF and were supposed to be strictly and proportionately offset by the contested aid.

137 In the light of the foregoing, the second part of the third plea, alleging a manifest error of assessment in the examination of the compatibility of the contested aid, must be upheld.

138 Therefore, without it being necessary to examine the applicant's other arguments and pleas, the last sentence of Article 1 of the contested decision must be annulled.

Costs

139 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 Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

140 In accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the French Republic must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Annuls the last sentence of Article 1 of the Commission's Decision of 20 April 2004 on the aid implemented by France in favour of the Coopérative d'exportation du livre français (CELF).

2. Orders the Commission to bear its own costs and those of the Société internationale de diffusion et d'édition SA (SIDE).

3. Orders the French Republic to bear its own costs.

Jaeger Tiili Tchipev

Delivered in open court in Luxembourg on 15 April 2008.

E. Coulon M. Jaeger

Registrar President