JUDGMENT OF THE COURT (Fifth Chamber)

22 June 2000 *

In Case C-332/98,

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and F. Million, Chargé de Mission in that directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

applicant,

v

Commission of the European Communities, represented by G. Rozet, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for the annulment of Commission Decision 1999/133/EC of 10 June 1998 concerning State aid in favour of Coopérative d'Exportation du Livre Français (CELF) (OJ 1999 L 44, p. 37),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, L. Sevón, P.J.G. Kapteyn (Rapporteur), P. Jann and H. Ragnemalm, Judges,

Advocate General: A. La Pergola,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 October 1999,

after hearing the Opinion of the Advocate General at the sitting on 14 December 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 8 September 1998, the French Republic brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the partial annulment of Commission Decision 1999/133/EC of 10 June 1998 concerning State aid in favour of Coopérative d'Exportation du Livre Français (CELF) (OJ 1999 L 44, p. 37) ('the contested decision').

2 On 29 September 1998, the Société Internationale de Diffusion et d'Édition ('SIDE') brought an action before the Court of First Instance (Case T-155/98) claiming that the contested decision was not well founded in so far as it declared the aid to be compatible with the common market under Article 92(3)(d) of the EC Treaty (now, after amendment, Article 87(3)(d) EC).

3 Pursuant to Article 47, third paragraph, of the EC Statute of the Court of Justice, the Court of First Instance, by order of 25 March 1999, stayed proceedings in Case T-155/98 until the Court of Justice delivers judgment in the present case.

Background to the dispute

4 CELF was established in its present form in 1980 on the initiative of the French Ministry of Culture and the National Publishing Association in order to deal with

orders from booksellers throughout the world which it would not have been profitable to meet without making the costs of the works prohibitive for the end users. Thus CELF's purpose is the dissemination of French language and literature. For that activity it receives annual grants from the French Ministry of Culture which came to FRF 2.4 million in 1991 and FRF 2.7 million in 1992. CELF also manages three aid schemes on behalf of the State which do not form the subject-matter of the present action.

5 In 1991 SIDE, whose principal business is exporting French books to other Member States and to non-member countries, sought to benefit from the aid scheme here in question. The French Ministry of Culture turned down its request on the ground that SIDE refused to satisfy the requirements of business transparency imposed by the administration.

6 As a result, even though the scheme is not by nature reserved to CELF, only the latter was able to satisfy the requirements imposed by the public authorities.

7 By letter of 20 March 1992, SIDE drew the Commission's attention to the aid which the French Ministry of Culture was granting to CELF, and asked whether the aid had been notified in accordance with Article 93(3) of the EC Treaty (now Article 88(3) EC).

8 Following correspondence and a series of contacts, the Commission adopted on 18 May 1993 a decision declaring the aid for CELF to be compatible with the common market under Article 92(3)(c) of the Treaty (OJ 1993 C 174, p. 6) ('the decision of 18 May 1993'). The Commission informed the French Government thereof by letter of 10 June 1993, stating that the derogation provided for in Article 92(3)(c) of the Treaty applied because of the special nature of competition in the book sector and the cultural purpose of the aid in question. In that letter

the Commission also voiced its regret that the French Government had failed to comply with its obligation to inform it of the aid in advance, in accordance with Article 93(3) of the Treaty.

9 By application lodged at the Registry of the Court of First Instance on 2 August 1993, SIDE brought an action for annulment of the decision of 18 May 1993. The French Republic was granted leave to intervene in support of the forms of order sought by the Commission.

10 By judgment of 18 September 1995 in Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, the Court of First Instance annulled the decision of 18 May 1993 in so far as it concerned the subsidy granted exclusively to CELF to offset the extra cost involved in handling small orders for French-language books placed by booksellers established abroad. This partial annulment was pronounced on the ground that there was a procedural defect, namely the Commission's failure to initiate the *inter partes* procedure provided for by Article 93(2) of the Treaty.

11 Following that judgment, the Commission resumed contact with the French authorities by letter of 17 October 1995 with a view to initiating the *inter partes* procedure on 30 July 1996. The procedure culminated in the adoption of the contested decision, Article 1 of which provides:

'The aid granted to CELF for the handling of small orders of books in the French language constitutes aid within the meaning of Article 92(1) of the EC Treaty. As the French Government failed to notify the aid to the Commission prior to its implementation, the aid has been granted unlawfully. It is, however, compatible aid as it satisfies the conditions for derogation under Article 92(3)(d) of the Treaty.'

12 The French authorities were notified of the decision by letter of 2 July 1998.

Admissibility of the action

13 The French Republic requests the Court to annul the contested decision in so far as Article 90(2) of the EC Treaty (now Article 86(2) EC) was not applied.

14 In particular, the French Government challenges the Commission's conclusion in Part XII of the contested decision that 'the aid accorded to CELF constitutes State aid within the meaning of Article 92(1) of the Treaty, and that it is compatible with the common market under Article 92(3)(d). In accordance with the case-law' (judgment in Case C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 21), 'there is no need for the Commission to consider CELF's State-aided activities in the light of Article 90(2), since the application of Article 92 does not obstruct the performance by CELF of the task of handling small orders, an activity for which it receives aid from the State'.

15 According to the applicant, its legal interest in bringing proceedings stems from the fact that throughout the administrative procedure the French authorities had sought to show the Commission that the aid in question was covered by the derogation from the competition rules provided for in Article 90(2) of the Treaty, with the result that they were under no obligation to notify the aid in issue.

16 Analysis of this question, the applicant argues, thus has considerable practical implications. Should the Court confirm that Article 90(2) of the Treaty was properly not applied, CELF might be required to reimburse the grants paid to offset the costs of handling small orders for the entire period prior to the

contested decision. Furthermore, the French Republic might, in proceedings brought by SIDE at national level, be found liable for infringement of Article 93(3) of the Treaty.

17 While not raising a formal objection of inadmissibility, the Commission has none the less expressed serious misgivings as to the admissibility of the action.

18 According to the Commission, the abovementioned judgment in *SIDE*, on which there was no appeal to the Court, rendered definitive the classification, in the decision of 18 May 1993, of the disputed measure as 'State aid' and even as 'unlawful aid', in so far as it had been introduced without prior notification. Consequently, the contested decision in fact merely confirms a definitive finding contained in a previous measure and is therefore not an act that is challengeable within the meaning of Article 173 of the Treaty.

19 It should be borne in mind that the Court of First Instance ruled, in paragraph 66 of the judgment in *SIDE*, that the Commission was able to adopt a favourable decision in respect of the aid schemes administered by CELF, but annulled the decision of 18 May 1993, to the extent to which it concerned aid granted exclusively to CELF for handling small orders of French-language books, on the ground that there was a procedural defect, namely the Commission's failure to initiate the *inter partes* procedure provided for by Article 93(2) of the Treaty.

20 Contrary to the Commission's submissions, the annulment on that ground does not render the decision of 18 May 1993 *res judicata* in so far as it held the measure to be 'State aid', introduced without prior notification, and therefore 'unlawful'. The Commission was not bound by the *SIDE* judgment except in so far as it was required to allow interested parties to take part in the detailed examination procedure. For the rest, the Commission retained its discretionary powers of assessment in regard to the substance of the measure in question.

21 In those circumstances, it is clear that the contested decision does not confirm a definitive finding contained in an earlier measure. The action is therefore admissible.

Substance

22 In support of its action for annulment of the contested decision in so far as Article 90(2) of the Treaty has not been applied, the French Government relies on three pleas in law, one of which is set out as the primary plea and the remaining two as alternative pleas.

23 In its primary plea, the French Government criticises the Commission for having taken the view that, since the aid had been declared compatible with the common market pursuant to Article 92(3)(d) of the Treaty, it was unnecessary to consider further the activities of CELF in the light of Article 90(2) since application of Article 92 of the Treaty would not obstruct the performance by CELF of its task of handling small orders, an activity for which it receives aid from the State. In thus applying to new aid that reasoning, which makes sense only in the case of existing aid, the Commission, it argues, erred in law.

24 In the alternative, the French Government argues that the Commission erred in fact in deciding that the public authorities had not entrusted CELF with the operation of a service of general economic interest, and erred in law in deciding that Article 90(2) of the Treaty can in any event apply only where the body

entrusted with the performance of a service of general economic interest enjoys a monopoly.

25 In these alternative pleas, the applicant refers to Part XII of the contested decision, in which the Commission found that there was no need to take a position on the question of the application of Article 90(2) of the Treaty, but none the less assessed the subsidised activities in the light of that provision.

26 It follows that examination of those alternative pleas can serve a useful purpose in the context of the present action only if the Court were to take the view that the Commission erred in law in not applying Article 90(2) of the Treaty.

27 In the primary plea the French Government submits that it follows from Articles 92 and 93(2) and (3) of the Treaty that new aid, unlike existing aid, cannot be implemented until it has been declared compatible with the common market. There is, however, one instance in which such aid may be implemented without a decision on compatibility having been taken: that is where, precisely, the undertaking receiving the aid may qualify for the derogation from the competition rules provided for in Article 90(2) of the Treaty.

28 The French Government points out in this regard that the possible applicability of Article 90(2) of the Treaty would allow a derogation, not from the obligation of prior notification, an administrative formality unlikely to hinder fulfilment of the specific task assigned to CELF, but rather from the obligation of temporary suspension.

29 According to the applicant, State aid covered by Article 90(2) of the Treaty requires, by its very nature, special treatment in regard to procedural matters. In particular, that provision allows the obligation of temporary suspension following from Article 93(3) of the Treaty to be set aside in cases where that obligation is liable to frustrate performance of the public service task concerned.

30 The French Government therefore concludes that the obligation of suspension is necessarily and automatically inapplicable in the case of aid for undertakings entrusted with the operation of services of general economic interest, such as those referred to in Article 90(2) of the Treaty, in order to avoid disruption of those services.

31 According to settled case-law, the aim of Article 93(3) of the Treaty is to prevent implementation of aid contrary to the Treaty (Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, point 4). The Court has further stressed on several occasions that the final sentence of Article 93(3) is the means of safeguarding the machinery for review laid down by that article which, in turn, is essential to ensure the proper functioning of the common market. It follows from that case-law that, even if the Member State takes the view that the aid measure is compatible with the common market, that fact cannot entitle it to defy the clear provisions of Article 93 of the Treaty (see orders in Cases 31/77 R and 53/77 R *Commission* v *United Kingdom* [1977] ECR 921, paragraphs 17 and 18, and Case 171/83 R *Commission* v *France* [1983] ECR 2621, paragraph 12).

32 It follows that the purpose served by the provision introduced by Article 93(3) of the Treaty is not a mere obligation to notify but an obligation of prior notification which, as such, necessarily implies the suspensory effect required by the final sentence of Article 93(3). That provision does not therefore, contrary to the French Government's argument, have the effect of disjoining the obligations laid

down therein, that is to say, the obligation to notify any new aid and the obligation to suspend temporarily the implementation of that aid. The primary plea in law must for that reason be rejected.

33 That conclusion is particularly evident where, as in the present case, the aid was at no time notified to the Commission. Even if the disjunction advocated by the applicant existed in law — a submission rejected in the preceding paragraph of this judgment — it would not, in the absence of notification, have justified a finding that Community law had not been infringed.

34 The primary plea in law must for those reasons be rejected. It is thus unnecessary to consider the two alternative submissions raised by the applicant.

35 In those circumstances, the action must be dismissed in its entirety.

Costs

36 Under Article 69(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 applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the French Republic to pay the costs.**

Edward Sevón Kapteyn

Jann Ragnemalm

Delivered in open court in Luxembourg on 22 June 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber