Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

20 September 2012*

((State aid — Aid allegedly implemented by France in the form of an implied, unlimited guarantee in favour of La Poste as a result of its status as a publicly-owned establishment — Decision declaring the aid incompatible with the internal market — Action for annulment — Interest in bringing proceedings — Admissibility — Burden of proving the existence of State aid — Advantage))

In Case T-154/10,

French Republic, represented initially by E. Belliard, G. de Bergues, B. Beaupère-Manokha, J. Gstalter and S. Menez, and subsequently by E. Belliard, G. de Bergues, J. Gstalter and S. Menez, acting as Agents,

applicant,

v

European Commission, represented by B. Stromsky and D. Grespan, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2010/605/EU of 26 January 2010 on State aid C 56/07 (ex E 15/05) granted by France to La Poste (OJ 2010 L 274, p. 1),

THE GENERAL COURT (Sixth Chamber),

composed of H. Kanninen, President, N. Wahl (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 19 March 2012,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

National law governing the status of La Poste

Status of La Poste as from 1 January 1991 and the legal consequences arising therefrom

1 Under the French Law No 90-568 of 2 July 1990 on the organisation of the public post and telecommunications service (loi française nº 90-568, du 2 juillet 1990, relative à l'organisation du service public de la poste et des télécommunications) (JORF of 8 July 1990, p. 8069), the former Directorate-General for Posts and Telecommunications, which hitherto been under the responsibility of the Ministry of Posts and Telecommunications, was converted into two legal entities governed by public law: France Télécom and La Poste. That law expressly authorised La Poste to develop, alongside its public service tasks, certain activities open to competition.

2 Under Article 1 of the Order of 31 December 1990 granting a State guarantee for PTT bonds and PTT savings bonds issued before 31 December 1990 (arrêté du 31 décembre 1990, accordant la garantie de l'État aux emprunts obligataires PTT et aux bons d'épargne PTT émis avant le 31 décembre 1990) (JORF of 18 January 1991, p. 917), '[s]ervice for interest, depreciation, premiums, commissions, fees and incidentals for PTT bonds and savings bonds issued before 31 December 1990 with a view to competing in the financing of the investment costs for the posts and telecommunications budget schedule, pursuant to Article L. 127 of the Posts and Telecommunications Code …, transferred to La Poste pursuant to Article 22 of the Law of 2 July 1990 …, is guaranteed unconditionally by the State'.

3 By judgment of 18 January 2001, the Cour de cassation (Court of cassation) (2nd Civil Division) held that La Poste is to be deemed equivalent to an establishment of an industrial and commercial character (établissements publics à caractère industriel et commercial) ('EPIC').

4 In French administrative law, EPICs are legal entities governed by public law which have distinct legal personality from the State, financial independence and certain special powers, including the performance of one or more public service tasks.

5 The status of EPIC entails a number of legal consequences, including:

— the inapplicability of insolvency and bankruptcy procedures under ordinary law (see, in particular, Article 2 of Law No 85-98 of 25 January 1985 on the compulsory administration and winding-up of undertakings (loi nº 85-98, du 25 janvier 1985, relative au redressement et à la liquidation judiciaires des enterprises) (JORF of 26 January 1985, p. 1097), now Article L. 620-2 of the Commercial Code (Code de commerce);

— the applicability of Law No 80-539 of 16 July 1980 on the penalties imposed in administrative matters and on the execution of judgments by legal entities governed by public law (loi nº 80-539, du 16 juillet 1980, relative aux astreintes prononcées en matière administrative et à l'exécution des jugements par les personnes morales de droit public) (JORF of 17 July 1980, p. 1799) and also the designation of the State as the party ultimately liable for the recovery of the debts incurred (see Article 1(II) of Law No 80-539; Article 3-1(4) and (5) of Decree No 81-501 of 12 May 1981 for the application of Law No 80-539 (JORF of 14 May 1981, p. 1406), and Article 10 of Decree No 2008-479 of 20 May 2008 (repealing Decree No 81-501) on the enforcement of financial penalties imposed on public entities (Decree nº 2008-479 of 20 May 2008 (décret nº 2008-479, du 20 mai 2008 (abrogeant le Decree nº 81-501) relatif à l'exécution des condamnations pécuniaires prononcées à l'encontre des collectivités publiques).

Change in La Poste's status as from 1 March 2010

6 On 29 July 2009, the French Government tabled draft legislation scheduling La Poste's conversion into a public limited company. That draft led to the enactment of Law No 2010-123 of 9 February 2010 on the publicly-owned undertaking La Poste and postal activities (loi n° 2010-123, du 9 February 2010, relative à l'entreprise publique La Poste et aux activités postales) (JORF of 10 February 2010, p. 2321), which entered into force on 1 March 2010. Article 1(2.I.) of that law provides:

'The legal entity governed by public law La Poste shall be converted into a public limited company, known as La Poste, with effect from 1 March 2010. The company's share capital shall be held by the State, as a majority shareholder, and by other legal entities governed by public law, except for that portion of the capital which may be held by way of employee stock ownership under the terms provided for by the present law. This conversion shall have no bearing on the national public service nature of La Poste.

…

This conversion shall not entail the creation of a new legal entity. The assets, rights, obligations, contracts, agreements and authorisations of any kind of the legal entity governed by public law La Poste, in France and outside France, shall become ipso jure and without formality those of the public limited company La Poste as from the date of the conversion. The conversion shall have no effect on those assets, rights, obligations, contracts, agreements and authorisations and, in particular, shall effect no change to current contracts and agreements concluded by La Poste or any affiliated company for the purposes of Articles L. 233-1 to L. 233-4 of the Commercial Code, or cancel them, or, as the case may be, give rise to advance reimbursement of debts thereunder …'

Administrative procedure

7 By decision dated 21 December 2005, the Commission of the European Communities approved the transfer of La Poste's banking and financial activities to its subsidiary, La Banque Postale. In that decision, the Commission stated that the question of the unlimited State guarantee in favour of La Poste would be dealt with in separate proceedings.

8 On 21 February 2006, the Commission, acting pursuant to Article 17 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), informed the French authorities of its preliminary findings as to the existence of an unlimited State guarantee resulting from La Poste's status and which constituted State aid within the meaning of Article 87(1) EC, and it invited them to submit their comments. Taking the view that that alleged guarantee was in effect before 1 January 1958, when the EC Treaty entered into force in France, the Commission applied the rules of procedure concerning existing aid.

9 The Commission received the French authorities' reply on 24 April 2006.

10 On 4 October 2006, acting pursuant to Article 18 of Regulation No 659/1999, the Commission inter alia called on the French Republic to withdraw, by 31 December 2008 at the latest, the guarantee given to La Poste on all its commitments by virtue of its status.

11 On 6 December 2006 the Commission received a memorandum from the French authorities challenging the findings set out by the Commission in its letter of 4 October 2006 and proposing entering into a discussion in order to dispel the Commission's doubts as to the existence of an unlimited guarantee granted by the French State in favour of La Poste.

12 On 20 December 2006 a meeting of the Commission and the French authorities was held.

13 By letter of 16 January 2007, the French authorities, whilst challenging the Commission's findings but in an attempt to clarify the scope of Law No 80-539, submitted to the Commission a draft amendment to Decree No 81-501.

14 After examining the information and explanations provided by the French authorities on 1 February and 16 March 2007, concerning, inter alia, the question of possible State liability in the event of La Poste's having insufficient assets, the Commission informed them of its decision to open the formal investigation procedure provided for by Article 88(2) EC, by letter of 29 November 2007. In the publication of that decision in the *Official Journal of the European Union* on 3 June 2008 (OJ 2008 C 135, p. 7), the Commission called on interested parties to submit their comments on the disputed measure.

15 The Commission received no comments on the measure from interested parties. The French authorities did, however, submit comments by letter of 23 January 2008. Moreover, the Commission, following a call for tenders, entrusted an expert with carrying out a study on the unlimited guarantee granted by the French Republic to La Poste. That expert delivered her report on 17 November 2008.

16 Following the appearance of information about the adoption by the French Government of draft legislation approving the change of La Poste's status, on 20 July 2009 the Commission asked the French Republic, whether it would agree to undertake to convert La Poste into a public limited company subject to the compulsory administration and winding-up procedures provided for under ordinary law. Under cover of its letter, the Commission forwarded its expert's report to the French authorities.

17 By memorandum transmitted on 31 July 2009, the French authorities informed the Commission that on 29 July 2009 the French Council of Ministers had adopted draft legislation on La Poste and postal activities, scheduling inter alia La Poste's conversion into a public limited company with effect from 1 January 2010. The French authorities also indicated that they would be sending their comments on the Commission's expert's report.

18 After two reminder letters from the Commission dated 9 September and 6 October 2009, the French Republic made known, by memorandum transmitted on 27 October 2009, its comments on the Commission's expert's report and forwarded an opinion drawn up by another expert.

19 An amendment to the draft law on La Poste and postal activities was tabled on 11 December 2009, postponing La Poste's conversion into a public limited company until March 2010.

20 On 26 January 2010, the Commission adopted Decision C(2010) 133 on State aid C 56/07 (ex E 15/05) granted by France to La Poste ('the contested decision'). That decision, which was notified to the French authorities on 27 February 2010, was published under reference 2010/605/EU in the *Official Journal of the European Union* on 19 October 2010 (OJ 2010 L 274, p. 1).

The contested decision

21 After describing the course of the administrative procedure (recitals 1 to 17 of the contested decision), the content of the disputed measure (recitals 18 to 37 of that decision) and the comments and proposals put forward by the French authorities (recitals 38 to 114 of the contested decision), the Commission went on to examine specifically the issue whether there was, firstly, an unlimited guarantee from the French State in favour of La Poste (recitals 116 to 255 of the contested decision) and, secondly, a selective advantage arising from that guarantee (recitals 256 to 300 of that decision) which was liable to distort competition and affect trade (recital 301 of the contested decision) within the meaning of Article 107(1) TFEU.

22 First, as regards the existence in the present case of an unlimited guarantee, the Commission, after considering numerous arguments put forward by the French authorities, reached the conclusion that La Poste enjoyed such a guarantee from the French State because of certain particularities which were intrinsically linked to its status as a publicly-owned establishment (see, inter alia, recitals 251 to 253 of the contested decision). The Commission takes the view that that guarantee not only results in a transfer of State resources within the meaning of point 2.1. of Commission Notice 2008/C 155/02 on the application of Articles 87 [EC] and 88 [EC] to State aid in the form of guarantees (OJ 2008 C 155, p. 10) ('the 2008 Notice') (recital 254 of the contested decision), but are also attributable to the State (see recital 255 of the contested decision).

23 Regarding, more specifically, the assessment of the existence of an unlimited State guarantee from the French State in favour of EPICs, the Commission observes, as a preliminary point, that La Poste was not subject to the ordinary law rules governing the administration and winding-up of firms in difficulty and that, according to point 1.2, second paragraph, fourth indent of the 2008 Notice, there is aid in the form of a guarantee where more favourable credit terms are obtained by undertakings whose legal status rules out bankruptcy or other insolvency procedures. Observing that the French authorities were contesting the finding that the fact that La Poste was not subject to the ordinary law rules governing the administration and winding-up of firms in difficulty was equivalent to a State guarantee for La Poste, both as regards payment of creditors and the maintenance of its existence if it were to find itself in a situation of insolvency, the Commission considered all of the arguments put forward by the French authorities (see recital 117 of the contested decision).

24 It observed, first of all, that, contrary to the position advocated by the French authorities, French law did not rule out the existence of implied guarantees and, more specifically, of a State guarantee for EPICs, which is, among other things, confirmed by a memorandum from the French Conseil d'État ('the Council of State') drawn up in 1995 in the so-called Crédit Lyonnais case (see recitals 120 to 147 of the contested decision).

25 Next, considering the steps to be taken by creditors of La Poste in order to settle their claims if La Poste were to be in financial difficulty and unable to meet its debts, it found that:

— the conventional obstacles to the settlement of a claim against a body governed by private law were absent in the case of a publicly-owned establishment (recitals 150 to 155 of the contested decision);

— the procedure laid down by Law No 80-539 for the recovery of the debts of publicly-owned establishments that had been found by a court to be in default did not in any way lead to the cancellation of the debt (recitals 156 to 184 of the contested decision);

— the rules governing the liability of the State in the procedure for the recovery of the debts of publicly-owned establishments had all the characteristics of a guarantee mechanism (recitals 185 to 226 of the contested decision);

— even if he were to fail to obtain satisfaction, a creditor could always invoke the effects of a legitimate mistake that he made when his claim arose regarding the prospect that it would always be honoured (recitals 227 to 229 of the contested decision).

26 Lastly, the Commission found that even if, within a reasonable time and after employing the recovery procedures it had described in recitals 150 to 229 of the contested decision, creditors of a publicly-owned establishment did not succeed it obtaining settlement of their claim, they still had a guarantee that their unpaid claims would not be cancelled because, in its submission, the rights and obligations of publicly-owned establishments were always transferred to the State or to another legal entity governed by public law (recitals 230 to 250 of the contested decision).

27 Secondly, the Commission found that the more favourable credit terms obtained by La Poste because of that unlimited guarantee constituted an advantage (recitals 256 to 299 of the contested decision) which was selective in nature (recital 300 of the contested decision) and which was liable to distort competition and affect trade between Member States (recital 301 of the contested decision).

28 Regarding, in particular, the existence of an advantage, the Commission found, first, that the disputed guarantee was an essential component of State support, thanks to which La Poste enjoyed more favourable borrowing terms than it would have obtained had it been judged solely on its own merits. The Commission observed in that regard that borrowing terms were set on the basis of the financial rating in particular (see recital 157 of the contested decision). In the Commission's view, moreover, a number of analyses and methodologies of ratings agencies showed that the guarantee in question, as a determining factor of State support for La Poste, had a positive influence on its financial rating and, therefore, the credit terms that it was liable to obtain (recitals 258 to 293 of the contested decision). The Commission considered that it did not have to demonstrate in the present case the specific effects that the guarantee had had in the past (recital 298 of the contested decision). It added that, having regard to the unlimited nature of the guarantee, it was not possible in this case to calculate the amount of the market premium that La Poste ought to have paid to the State, which made the transfer mechanism proposed by the French authorities inapplicable (recital 299 of the contested decision).

29 Lastly, the Commission found that since all the conditions of application of Article 107(1) TFEU were fulfilled, the disputed guarantee constituted State aid within the meaning of that provision (recital 302 of the contested decision) and that, even if it was amended as suggested by the French authorities, it did not fulfil any of the conditions to be able to be declared compatible with the common market (recitals 303 to 315 of the contested decision).

30 The operative part of the contested decision is worded as follows:

'Article 1

The unlimited guarantee given by France to La Poste constitutes State aid that is incompatible with the internal market. France must withdraw it by 31 March 2010.

Article 2

The Commission considers that the effective conversion of La Poste into a public limited company will result in the unlimited guarantee which La Poste enjoys being withdrawn. The effective withdrawal of the unlimited guarantee by 31 March 2010 is a measure that will remove, in accordance with Union law, the State aid referred to in Article 1.

Article 3

France shall provide the Commission, within two months of notification of this Decision, with a detailed description of the measures already taken and planned for the purpose of complying with this Decision.

Article 4

This Decision is addressed to the French Republic.'

Procedure and forms of order sought

31 By application lodged at the Registry of the General Court on 2 April 2010, the French Republic brought the present action.

32 Upon hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure. The parties presented oral argument and answered oral questions put by the Court at the hearing on 19 March 2012.

33 The French Republic claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

34 The Commission contends that the Court should:

— dismiss the action as inadmissible and, in the alternative, as unfounded;

— order the French Republic to pay the costs.

Admissibility

35 Without formally raising an objection of inadmissibility under Article 114 of the Court's Rules of Procedure, the Commission argues that the present action is inadmissible on the ground that the contested decision does not adversely affect the French Republic. It argues, in essence, that that decision, which concerns existing aid which the national authorities decided, for their own reasons, to withdraw, does not produce binding legal effects liable to affect the interests of the French Republic. The Commission observes in that regard that any applicant, including a Member State, must demonstrate that the contested decision has a negative and clear impact on genuine and existing interests, which it has failed to do in the present case.

36 The Court notes that the notion of interest in bringing proceedings requires any natural or legal person who has brought an action for annulment to demonstrate a vested and current interest in seeing the contested measure annulled. Such an interest presupposes that the annulment of the measure must of itself be capable of having legal consequences or, to use a different form of words, the action must be liable, if successful, to procure an advantage for the party who has brought it. Therefore, a measure which gives full satisfaction to that person is not, by definition, capable of adversely affecting it and that person has no interest in seeking its annulment (see, to that effect, Case T-354/05 *TF1* v *Commission* [2009] ECR II-471, paragraphs 84 and 85 and the case-law cited).

37 It should be observed that, like Article 230 EC, Article 263 TFEU draws a clear distinction between the right of EU institutions and Member States to bring an action for annulment and that of legal persons and individuals, in that the second paragraph of Article 230 EC gives all Member States the right to contest the legality of decisions of the Commission by means of an action for annulment without having to establish any legal interest in bringing proceedings. A Member State need not therefore prove that an act of the Commission which it is contesting produces legal effects with regard to that Member State in order for its action to be admissible. However, in order for an act of the Commission to be the subject of an action for annulment, it must be intended to have binding legal effects (see, to that effect, order in Case C-208/99 *Portugal* v *Commission* [2001] ECR I-9183, paragraphs 22 to 24, and Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany* v *Commission* [2011] ECR I-9639, paragraph 36 and the case-law cited), which must be determined by having regard to its substance.

38 In the present case it cannot be denied that the contested decision, in which it was found that there was State aid in the form of an unlimited guarantee in favour of La Poste and that that aid was incompatible with the common market, is necessarily intended to produce binding legal effects and is, therefore, a challengeable act under Article 263 TFEU (see, to that effect, Case C-279/08 P *Commission* v *Netherlands* [2011] ECR I-7671, paragraphs 35 to 42).

39 None of the evidence and arguments put forward by the Commission cast doubt on this conclusion.

40 Firstly, although it is true, as observed by the Commission, that the French Government, for its own reasons and without any constraints placed on it by the Commission, decided, as evidenced by a press release from the French Government dated 29 July 2009 and draft legislation dated the same day aimed at converting La Poste into a public limited company (see paragraph 6 above), to withdraw the measure categorised as existing aid by the contested decision a number of months before it was adopted, the fact remains that the French Republic was legally bound to implement the contested decision, a decision the adoption of which preceded the conversion of La Poste's status into a public limited company. The fact, referred to by the Commission, that in the implementation of the contested decision there may have been a convergence between the interests defended by the Commission and those of the French Republic does not preclude the latter from bringing an action for annulment of that same decision. As rightly pointed out by the French Republic, such an approach, which leads to the Member States being penalised depending on whether or not they had an interest in complying with a Commission decision, is eminently subjective in nature. However, the examination of the question whether a given act is liable to be challenged through an action for annulment because it produces or is intended to produce binding legal effects which affect the applicant's interests must be based on an objective assessment of that measure.

41 Secondly, the line of argument put forward by the Commission, to the effect that it has in no way been established that the contested decision has had a negative and clear impact on genuine and existing interests of the French Republic, refers in reality to the issue of the existence of an interest in bringing proceedings, an issue which must not be confused with the notion of challengeable act and which, as observed in paragraph 37 above, need not be examined in an action for annulment brought by a Member State.

42 Thirdly, the case-law referred to by the Commission is irrelevant to the present case.

43 First, as regards Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, suffice to note that the action was held to be inadmissible because the disputed letter in that case was merely preparatory in nature and, therefore, was not liable or intended to produce legal effects. The Court held that that letter did not constitute a definitive decision which could be challenged through an action for annulment (see paragraph 35 of that judgment).

44 Next, the approach adopted in the order in *Portugal* v *Commission*, referred to above, was based on the fact that the applicant Member State had not sought annulment of the contested decisions because it was the designated addressee of those decisions. The Court held, moreover, that that designation had no autonomous legal effect. In that context, the Court took care to point out that, in order for an act of the Commission to be the subject of an action for annulment, it had to be intended to produce legal effects (Case 114/86 *United Kingdom* v *Commission* [1988] ECR 5289, paragraph 12; Case C-57/95 *France* v *Commission* [1997] ECR I-1627, paragraph 7; and Case C-443/97 *Spain* v *Commission* [2000] ECR I-2415, paragraphs 27 and 28), even where, in the event that it is a Member State which intends to bring such an action, those effects are not to deploy 'with regard to the Member State itself' (paragraph 24 of the judgment).

45 Case C-242/00 *Germany* v *Commission* [2002] ECR I-5603 involves the particular situation where both the content of the contested decision and the context in which it was adopted indicated that that decision had neither the purpose nor the effect of rejecting implicitly a request by the Member State concerned (see paragraph 45 of the judgment). Consequently, that case-law provides no support for the Commission's position.

46 The same is true of Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347, in which an action brought by a recipient undertaking of notified aid, that is, an individual and not a Member State, was dismissed for lack of interest in bringing proceedings on the ground that the aid had been declared compatible with the common market and that the assessment of that compatibility had not affected the interests of that undertaking.

47 Those considerations are also valid with respect to Case T-94/08 *Centre de coordination Carrefour* v *Commission* [2010] ECR II-1015 and Case T-189/08 *Forum 187* v *Commission* [2010] ECR II-1039, which held actions brought by natural or legal persons to be inadmissible on grounds of lack of interest in bringing proceedings.

48 In the light of all those considerations, and without its being necessary to rule on the issue whether the objective pursued by the French Republic in the present action is to obtain annulment of a decision which would constitute a precedent in the examination of the status of other EPICs, the present action must be held to be admissible.

Substance

49 The French Republic puts forward three pleas in law in support of its action. The first plea alleges an error of law in that the Commission has not established to the requisite legal standard that there is State aid. By its second plea, the French Republic argues that the Commission made errors of law and fact in finding that La Poste, by virtue of its status as an EPIC, enjoyed an implied and unlimited State guarantee for its debts. The third plea alleges that there is no advantage for the purposes of Article 107(1) TFEU.

Preliminary considerations

50 Article 107(1) TFEU provides that '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal markets'.

51 Under the fourth indent of the second paragraph of point 1.2 of the 2008 Notice, '[t]he Commission regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures …'.

52 According to settled case-law, for a measure to be classified as aid within the meaning of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled. Firstly, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer an advantage on the recipient by favouring certain undertakings or the production of certain goods. Fourthly, it must distort or threaten to distort competition (see, to that effect, Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 74 and 75, and Case T-34/02 *Le Levant 001 and Others* v *Commission* [2006] ECR II-267, paragraph 110).

53 First, it seems that the pleas put forward in support of the present action are aimed, in essence, at demonstrating that the Commission was incorrect in finding that there was an advantage for La Poste resulting from an implied, unlimited State guarantee, the existence of which is also questioned. Those pleas relate, in essence, to the determination of whether or not there is an advantage.

54 Although the French Republic did, at the reply stage, also raise the issue of the transfer of State resources, it is clear that that line of argument is not an additional argument supplementing a plea put forward earlier, directly or by implication, in the application initiating the proceedings and closely linked to it. That line of argument relates to another condition of application of Article 107(1) TFEU (see, to that effect, judgment of 4 March 2009 in Case T-424/05 *Italy* v *Commission*, not published in the ECR, paragraphs 103 to 105).

55 Accordingly, the argument alleging disregard of the requirement that there be a transfer of State resources must be declared inadmissible under Article 44(1)(c), read in conjunction with Article 48(2) of the Rules of Procedure, from which it follows that the application initiating proceedings must contain, inter alia, a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which have come to light in the course of the procedure (see Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 39 and the case-law cited).

56 In the present case, it has not been established or even alleged that the plea alleging that there has been no transfer of State resources is based on elements of fact or law which have come to light in the course of the proceedings. Even if the late submission of that plea could be explained by the fact that judgment was given after the present proceedings were lodged in Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others* v *Commission* [2010] ECR II-2099, referred to by the Commission in its reply, that judgment cannot be regarded as a new matter justifying tardy submission of that argument. A judgment which merely confirms law which ought to have been known to the applicant when it brought an action cannot be regarded as a new matter allowing a fresh plea to be raised (see, to that effect, Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17, and Case T-521/93 *Atlanta and Others* v *European Community* [1996] ECR II-1707, paragraph 39).

57 When questioned on the point at the hearing, the French Republic acknowledged that its line of argument related solely to the requirement that there be an advantage for the purposes of Article 107(1) TFEU, note of which was made in the record of the hearing.

58 Second, as regards the nature and scope of the judicial review, it must be borne in mind that the notion of State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Union judicature must in principle and having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see, to that effect, Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 111).

59 Next, it must be pointed out that the legality of a Commission decision concerning State aid must be assessed in the light of the information available to the Commission when the decision was adopted (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16, and Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 31). It follows in particular that, since the concept of State aid must be applied to an objective situation appraised on the date on which the Commission takes its decision, it is the appraisals carried out on that date which must be taken into account in the conduct of the judicial review (Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 144).

60 The Court finds it appropriate to begin by considering the second plea in law.

The second plea: errors of fact and law as regards the existence of an unlimited State guarantee for La Poste

61 By its second plea, the French Republic alleges that the Commission made errors of fact and law in its examination of the question whether there was an unlimited, implied State guarantee in favour of La Poste. This plea consists of four parts aimed at demonstrating that the Commission made a number of errors:

— in finding that under French law there is a general principle of State guarantee resulting from the status of EPIC;

— in the determination of the inferences to be drawn from the inapplicability of insolvency and bankruptcy procedures under ordinary law to EPICs;

— in equating the conditions triggering State liability with an automatic, unlimited State guarantee mechanism for La Poste's liabilities;

— in the determination of the potential consequences of transfers of the public service obligations of a wound-up EPIC.

First part: error by the Commission in finding that under French law there is a general principle of State guarantee resulting from the status of EPIC

62 The French Republic submits that the Commission made an error in finding that under French law there is a general principle of State guarantee granted to EPICs.

63 In support of its allegation, the French Republic argues, in essence, firstly, that the case-law of the Conseil d'État precludes the very principle of such a guarantee; secondly, that the extract from the 1995 annual report of the Conseil d'État on which the Commission based itself has no general scope and binding effect, in the light of inter alia an opinion from the Conseil d'État delivered on 8 September 2005; thirdly, that French law on public finances precludes, on principle, any notion of 'implied guarantee'; and, fourthly, that there are no measures designed to uphold the rights of an EPIC's creditors in the event of a change in the EPIC's status.

64 In the present case, the determination of whether there is an unlimited State guarantee involves an accurate and specific examination of the mechanisms put in place by French law in the event of an EPIC such as La Poste defaulting on its creditors.

65 In that regard, it should be borne in mind that, in proceedings concerning State aid, the assessment of facts and evidence falls within the Court's complete discretion. In addition, in that context, the question whether and to what extent a rule of national law applies to the case in point falls within the scope of a factual assessment by the Court and is subject to the rules on the taking of evidence and on the apportionment of the burden of proof.

66 Moreover, contrary to what the French Republic's line of argument might seem to indicate, the Commission did not find that there was a principle of an implied State guarantee under French law, basing itself essentially on an extract of a report from the Conseil d'État. It is very clear from the contested decision that, in order to establish that there was a State guarantee in favour of La Poste, the Commission inter alia examined the issue whether such a guarantee was precluded under French

law (see recitals 120 to 136 of the contested decision). It found that the texts and the case-law did not lead to a definitive conclusion that French law precluded the State from acting as a guarantor for EPICs in respect of commitments they had undertaken with third parties.

67 That finding cannot be called into question.

68 First of all, regarding the issue whether the case-law of the Conseil d'État precludes the very principle of a State guarantee for publicly-owned establishments, it is clear from the parties' written submissions that they disagree, essentially, on which interpretation should be given to the case-law deriving from the judgment of the Conseil d'État (Assemblée) of 1 April 1938, *Sociétés de l'Hôtel d'Albe* (*Recueil des décisions du Conseil d'État*, p. 341).

69 In that judgment, the Conseil d'État refused to uphold the claim of a creditor of an EPIC addressed directly to the relevant State minister, stating that the minister could not be held liable for debts incurred by the EPIC. As rightly observed by the Commission in recital 123 of the contested decision, the situation at issue which gave rise to that judgment is quite different from one where an EPIC is insolvent, which is the only relevant factor for the purpose of considering whether the State guarantee is liable to come into play. According to that judgment, the fact that, under French law, publicly-owned establishments have legal personality and financial independence does not necessarily mean that the State cannot be guarantors of last resort for those establishments. Consequently, the Commission did not make an error of assessment in finding that it could not be inferred from the case-law that the very principle of a State guarantee for EPICs was precluded.

70 Secondly, the French Republic argues that the Commission incorrectly based itself on a sentence taken from the 1995 annual report of the Conseil d'État, when the binding scope and value of that report is doubtful.

71 That line of argument cannot succeed, for a number of reasons. First of all, as pointed out by the Commission, the extract to which the Commission referred (see recital 139 of the contested decision), which itself is taken from a memorandum drawn up in 1995 when a publicly-owned establishment was established to support the financial assistance granted by the French State to assist the recovery of Crédit Lyonnais, is written in unequivocal terms. The Conseil d'État stated clearly that '… there was a State guarantee for this establishment which derived without any express legislative provision from the very fact that it was a publicly-owned establishment'. Moreover, the passage taken from that report is merely one of the specific pieces of evidence relied on by the Commission in order to demonstrate the existence of a State guarantee. In particular, recitals 146 and 147 of the contested decision indicate that the Commission referred, in support of its position, to a memorandum from the French Minister for Economic Affairs, Finance and Industry of 22 July 2003, concerning a 'Census of implied and express guarantee arrangements granted by the State', and the documents annexed thereto. Contrary to the interpretation advocated by the French Republic, it would appear that that memorandum does not concern only the scenario where the liability of the French State might be incurred in its capacity as shareholder, inter alia on the basis of an action to make good a shortfall in assets, as it refers explicitly in its explanatory notice to the creation of publicly-owned establishments. Lastly, the opinion of the Conseil d'État of 8 September 2005 did not contradict the Commission's finding on this point. As the French Republic has partially acknowledged, that opinion, which was delivered in relation to the creation of a commission to monitor insurance, mutual companies and pension funds (Commission de contrôle des assurances, des mutuelles et des institutions de prévoyance (CCAMIP)) whilst observing the principle that all legal entities governed by public law must answer to liability actions brought against them, does not rule out the possibility that there may be a State guarantee which may be triggered in the event of a publicly-owned establishment becoming insolvent.

72 Thirdly, the French Republic argues that, since the entry into force of the Organic Law of 1 August 2001 governing the Finance Act (loi organique du 1er août 2001 relative aux lois de finances (LOLF)), no third-party guarantee or debt recovery by the State can be implemented without authorisation under the Finance Act.

73 That standpoint cannot be endorsed. It is clear from decision No 2001-448 DC of the Conseil constitutionnel (Constitutional Council) of 25 July 2001 (*Recueil des decisions du Conseil constitutionnel*, p. 99) that 'the purpose of Article 61 [of the Finance Act] is to ensure that Parliament is informed of guarantees given by the State, and not to bring an end to any guarantees given in the past which have not been authorised within the time laid down …'. In the absence of clarification as to the nature of the guarantees referred to by the Constitutional Council in that decision, there is nothing to indicate that the implied guarantees covering pre-existing debts at the time the Finance Act entered into force (1 January 2005) had also lapsed. In that regard the Commission made no error of assessment in stating, in recital 126 of the contested decision, that, in order to determine whether or not the implied guarantee given by the State to La Poste had lapsed as a result of the Finance Act, what had to be considered was not the dates on which the debts were contracted by La Poste, but the date from which La Poste had enjoyed the guarantee.

74 Although, as pointed out by the French Republic, the expert appointed by the French authorities expressed doubts as to whether the reasons which led the Constitutional Council to find that guarantees do not lapse merely because they are not expressly authorised by finance legislation apply to implied guarantees as much as to express guarantees, that reading does not have any solid support in the wording of the Constitutional Council's decision. The Commission was moreover correct in stating, in recital 131 of the contested decision, that it was not bound by the categorisation under French law of the guarantee measure at issue, or even by the fact that it was a guarantee coming within the scope of the Finance Act.

75 Fourthly, nor is the argument, to the effect that the absence of measures aimed at protecting the rights of creditors of EPICs in the event of a change in their status, as was the case when France Télécom, Gaz de France, Électricité de France and Aéroports de Paris were converted into public liability companies, is an indicator that there is no guarantee whatsoever, convincing.

76 The fact that the French State decided to grant explicit guarantees in certain scenarios does not prove that the grant of an implied guarantee was precluded in the present case. That conclusion is not affected by the fact that creditors' rights are constitutionally protected under French law on an equal footing with the right of property, as evidenced by a number of decisions of the Constitutional Council. Furthermore, the case-law of the Constitutional Council referred to by the French Republic was not included in the evidence submitted to the Commission and which it could therefore have in its possession at the time it adopted the contested decision. It follows that, in accordance with the case-law referred to paragraph 59 above, the case-law of the Constitutional Council relating to the protection of creditors' rights is not one of the factors in the light of which the lawfulness of the contested decision is to be appraised.

77 The French Republic's reference, in the reply, to the Conseil d'État's study report on publicly-owned establishments, adopted by the plenary assembly of the Conseil d'État (Assemblée plénière du Conseil d'État) on 15 October 2009, according to which 'the very existence of a guarantee granted by the State to publicly-owned establishments is very questionable', and a scholarly article published on 28 June 2010 following that report, it is clear that those publications, even if they could be relied on in the present proceedings, do not contain any new fact that is directly relevant to the issue whether French law precludes, as a matter of principle, there being an implied State guarantee in favour of EPICs. In that study report, the Conseil d'État merely noted general assessments as to whether it was possible to detect, in the European Union case-law, the existence of State aid 'based solely on evidence from [the entity's] statutes'. Ruling on the issue whether competition law called into question the existence of publicly-owned establishments, the authors of that report limited themselves to stating that it was

necessary 'to relativise the risk that relations between the State and its publicly-owned establishments fall systemically to be categorised as State aid within the meaning of Article 87 [EC]'. The scholarly article dated 28 June 2010 concerns a debate which began following the publication of that study report on the fate of entities having the status of publicly-owned establishment, inter alia, although not solely, from the angle of State aid law. It should be noted in regard to the latter aspect that there is no discussion of an essential pillar of the reasoning followed by the Commission in the contested decision, namely the finding that entities enjoying the status of publicly-owned establishment under French law cannot be made subject to the insolvency and bankruptcy procedures under ordinary law.

78 It follows from all of those considerations that the Commission made no error in finding that, contrary to the French authorities' assertions, French law did not preclude the possibility for the State to grant an implied guarantee to EPICs. The first part of the second plea must accordingly be dismissed.

Second part: errors of law and fact by the Commission as to the inferences to be drawn from the inapplicability to La Poste of insolvency and bankruptcy procedures under ordinary law

79 The French Republic considers that, contrary to the view put forward by the Commission, the inapplicability of insolvency and bankruptcy procedures under ordinary law to La Poste, namely Law No 85-98, which is merely a 'procedural law', does not mean that La Poste cannot go bankrupt or find itself in a situation of insolvency. The French Republic observes that specific procedures, which do not give creditors any guarantee that they will recover all of their claims, are applicable to EPICs. Law No 80-539 in particular and the legislation adopted to give it effect, the primary objective of which was to regulate situations in which public entities, although solvent, refused to honour certain debts, established a scheme of enforcement remedies, which give the governing body the power to substitute itself for the executive of a publicly-owned establishment so as to release the 'necessary credits' – and not State resources – in that establishment's budget, with a view to satisfying potential creditors. That law, however, confers no authority and even less the obligation on the State, whose role can be compared to that of an ad hoc legal representative, to release State resources for the benefit of potential creditors of publicly-owned establishments. This interpretation is supported both by Opinion No 381-088 of the Conseil d'État (avis nº 381-088 du Conseil d'État) of 25 March 2008 and the French administrative case-law. Lastly, the existence of the programmes identified by the Commission in recitals 174 to 178 of the contested decision, allowing advances to be made to organisations distinct from the State that manage public services, do not mean that an implied guarantee mechanism has been established.

80 In that regard, the Court observes that the parties agree that Law No 85-98 excluded from its scope all public entities, in particular EPICs. Under Article 2 of that law, now Article L. 620-2 of the Commercial Code, in the version thereof in force until 1 January 2006, '[r]ecovery and judicial winding-up shall be applicable to all traders, all persons registered in the business directory, all farmers and all legal entities governed by private law'. The corresponding provision in force on the date of adoption of the contested decision provides, in the same vein, that '[t]he safeguard procedure shall be applicable to all persons pursuing commercial activities or crafts, all farmers, all other natural persons pursuing independent professional activity, including the liberal professions subject to legislative or regulatory status or whose title is protected, and also to all legal entities governed by private law'. Moreover, it is apparent from the case-law of the French Cour de cassation, referred to by the French Republic in its written pleadings, that the legislation indicated 'that property not belonging to private persons shall be administered and alienated according to the specific rules applicable to them; that, in respect of property belonging to public entities, even those pursuing industrial and commercial activities, the principle of non-seizability of that property precludes recourse to private-law enforcement remedies; that only the creditor who has obtained an enforceable favourable judicial decision having acquired the force of res judicata and ordering a public entity to pay, even provisionally, an amount of money, may have enforced the specific rules deriving from Law

[No 80-539]' (see judgment of the Cour de cassation (1st civil chamber) of 21 December 1987, *Bureau de recherches géologiques et minières (BRGM)* v *Sté Llyod continental*, *Bulletin des arrêts de la Cour de cassation* I, No 348, p. 249).

81 The parties disagree, however, as the inferences to be drawn from the inapplicability of ordinary law rules governing compulsory administration or winding-up to EPICs with a view to determining whether there is a State guarantee in favour of La Poste.

82 It should be noted at the outset that, according to the contested decision (see recitals 118 and 119), the Commission took the view that, in order to establish whether there was a guarantee for individual claims, it was appropriate, after examining the national legislation and case-law (see first part of the second plea above), to begin by considering whether, in order to determine whether the procedure followed by a creditor of La Poste in order to settle its claim in the event of La Poste being in financial difficulty was comparable to that followed by the creditor of an undertaking subject to commercial law. Contrary to the impression the French Republic's line of argument might give, the Commission's approach was not aimed at finding that an EPIC, by virtue of the fact that it was subject to the application of ordinary law rules governing compulsory administration or winding-up, could not go bankrupt.

83 In the event, the Commission reached the conclusion that the creditors of EPICs were in a more favourable situation than private creditors on the ground that, contrary to what happened under the application of ordinary law rules governing compulsory administration or winding-up, the creditor of a publicly-owned establishment did not run the risk of seeing his claim cancelled because of a judicial winding-up procedure being triggered (see recital 150 of the contested decision).

84 This conclusion is to be endorsed. As acknowledged by the French Republic in the application, Law No 80-539 provides for a mechanism that is different from that established under ordinary law procedures governing compulsory administration or winding-up. That law and the legislation adopted to give it effect implement a claims recovery procedure which, unlike a winding-up procedure under ordinary law, does not, when triggered, extinguish claims but at the most postpones the payment of them. Thus, the creditors of publicly-owned establishments are necessarily in a more favourable situation than creditors of persons coming within the scope of Law No 85-98 which, in the event of insufficient assets on the part of the debtor person or entity, may see their claim cancelled.

85 As shown by the description of the procedures applicable to EPICs under Law No 80-539 (see, inter alia, recitals 23 to 28 of the contested decision), in the event of an EPIC having insufficient assets, the payment of claims will be postponed or the competent governing body will release resources in order to honour the claims. It follows that creditors of publicly-owned establishments are necessarily in a more favourable situation than creditors of persons governed by private law.

86 Moreover, although, as observed by the French Republic and as not disputed by the Commission (see inter alia recital 160 of the contested decision), Law No 80-539 does not provide explicitly that the State is bound to release State resources in order to enforce a judicial decision under Article 1-II of that law, the Commission made no error in asserting that, once a defaulting publicly-owned establishment's own resources have been exhausted, State funds will in all likelihood be used to honour the debts of the publicly-owned establishment debtor.

87 Nor did the Commission make an error of assessment in referring, in recitals 174 to 176 of the contested decision, to certain financial tasks and programmes with a view to highlighting the existence of State resources which might be used in the event of an EPIC defaulting and, therefore, an indication of the effectiveness of the implied State guarantee in favour of EPICs.

88 In the light of the foregoing, the conclusions set out in recitals 179 and 180 of the contested decision as to the consequences arising from the application of Law No 80-539, as indicia of the existence of an unlimited State guarantee in favour of EPICs, must be endorsed.

Third part: the Commission erred in equating the possibilities of incurring State liability in the event of default by an EPIC with an automatic, unlimited guarantee of liabilities

89 By the third part of the second plea, the French Republic submits that, contrary to the Commission's assertions, the creditors of La Poste could not count on State liability regularly coming into play in the event of default by it. It disputes, inter alia, the finding that State liability may be automatically triggered merely because the financial situation of a publicly-owned establishment at a given moment did not enable it to honour its debts. In the French Republic's submission, State liability coming into play, which is subject to strict conditions under the case-law of the Conseil d'État, must not be equated with an automatic and unlimited guarantee mechanism. It submits in that respect that, in order for State liability to be incurred, not only must the loss suffered by the creditor be abnormal and specific, there must also be a causal link between the action or failure to act by the State and the loss suffered.

90 It should be borne in mind as a preliminary point that only objective findings leading to the conclusion that the State is legally bound to settle the claims of the creditors of an EPIC such as that at issue in the present case would permit a finding that there is a State guarantee (see, to that effect, Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, paragraph 126).

91 In the present case, the parties agree that there are undeniably differences between, on the one hand, a guarantee mechanism consisting in the State substituting itself, automatically and indefinitely, for a debtor in the event of the debtor being unable to meet its financial commitments and, on the other, a liability scheme under which the liability arises out of something which is directly attributable to the person liable and which involves factors specific to each scenario being taken into account.

92 In the contested decision, the Commission's reasoning is based on the decision of the Conseil d'État of 18 November 2005, *Société fermière de Campoloro et autre* (*Recueil des decisions du Conseil d'État*, p. 515), which, according to recital 124 of that decision, establishes that a scheme of State liability in proceedings for the recovery of the debts of publicly-owned establishments displays all the characteristics of a guarantee mechanism. The recital in principle of that decision is worded as follows:

'In the event of a failure on the part of a local or regional authority to ensure the application of a judgment no longer open to appeal, after proper notice, the legislature here sets out to give the representative of the State the power to step into the shoes of that authority, in order to release or create the resources that will allow the judgment to be enforced in its entirety. The representative of the State consequently has a duty, subject to judicial review, to take the measures necessary in the light of the situation of the authority and the requirements of the public interest. Such measures include the possibility of selling assets belonging to the authority, provided they are not indispensable to the proper operation of the public services for which the authority is responsible. If the prefect refuses or neglects to exercise the prerogatives conferred on him by law, a creditor of the authority is entitled to bring an action against the State in case of serious fault committed in the exercise of the supervisory power. In addition, if, having regard to the situation of the local or regional authority, and in particular to an insufficiency in its assets, or by reason of requirements of the public interest, the prefect legitimately refuses to take certain measures with a view to ensuring that the judgment is enforced in full, the State as holder of public authority may be liable for any injury caused to a creditor of the local or regional authority if the injury is of an abnormal and specific kind.'

93 The Commission's reasoning is also based on a 1995 memorandum from the Conseil d'État (recital 139 of the contested decision) and on the judgment of the European Court of Human Rights of 26 September 2006 in *Société de gestion du port de Campoloro et Société fermière de Campoloro* v *France* (No 57516/00) (recital 204 et seq. of the contested decision).

94 The Commission made no error in coming to the conclusion that, in essence and in the light of those judgments, State liability could be incurred where the arrangements arising from the implementation of Law No 80-539 did not enable a creditor of an EPIC, such as La Poste in the present case, to recover its claim.

95 None of the arguments put forward by the French Republic are such as to cast doubt on that conclusion.

96 First, it is apparent from the case-law of the Conseil d'État, referred to in paragraph 92 above, that a creditor is entitled to bring an action against the State in case of serious fault committed in the exercise of the supervisory power and also hold the State as holder of public authority liable where, having regard to the situation of the legal entity governed by public law in question, including the insufficiency of its assets, or due to imperative reasons in the public interest, that creditor has suffered an abnormal and specific loss arising from the refusal by the prefect to take the steps necessary to protect that creditor's rights.

97 Moreover, the outcome of the dispute in the case relating to the port of Campoloro (France), as resulting from *Société de gestion du port de Campoloro et Société fermière de Campoloro* v *France*, was that, despite the arguments put forward by the applicant, the State proceeded to take over the obligation to ensure payment to creditors, thereby setting the precedent that the State could ultimately be held liable. As observed in recital 208 of the contested decision, in the judgment referred to above the European Court of Human Rights considered that it was for the State to ensure that creditors were paid, as they had borne a specific and exorbitant burden due to the non-payment of the amounts that they ought to have received.

98 Secondly, as regards the assertion that in order for State liability to be incurred there must be a causal link proven between the State's action and the loss suffered by the creditors, suffice it to note that, as acknowledged by the French Republic, when an EPIC that has been entrusted with a public service task does not meet its debt obligations and is ordered to pay them by court decision, the State is automatically appointed to recover the necessary funds. Should it refuse to have the EPIC bear the costs of the claim in question by recourse to all necessary measures, including the sale of assets, it places itself in a situation that is likely to trigger its liability. As observed by the Commission, the State cannot be required to proceed with the sale of all of La Poste's assets. In accordance with the requirement of continuity of public service, which under French law is a constitutional principle and is imposed on State authorities through Law No 80-539, the assets necessary for the EPIC to accomplish its public service task cannot be transferred.

99 Thirdly, the French Republic argues that the Commission referred, first, to the case-law of the European Court of Human Rights relating to the non-implementation of judicial decisions, which itself gave rise to an infringement of the right of property, in particular *Société de gestion du port de Campoloro et Société fermière de Campoloro* v *France* (see recitals 204 to 211 of the contested decision) and, second, the theory of appearance, in that the creditors of the EPICs were led to believe in the existence of a State guarantee. It is clear that recourse to that theory was put forward merely superfluously. The Commission thus stated, in recital 227 of the contested decision, that '[u]se of the theory of appearance enables what has been demonstrated to be confirmed'. Therefore, the argument to the effect that the theory of appearance cannot apply in a scenario such as the present case, where the establishment of claims is at issue, must be held to be ineffective. An incorrect ground need not

lead to annulment of the measure thereby vitiated if it is superfluous and there are other grounds which provide a basis for it (see judgment of 7 April 2011 in Case C-321/09 P *Greece* v *Commission*, not published in the ECR, paragraph 61 and the case-law cited).

Fourth part: error by the Commission as to potential consequences of the transfer of the obligations of a wound-up EPIC

100 The French Republic argues that any possible upholding of certain claims linked to La Poste's public service obligations is unrelated to the status of EPIC. Whilst recognising that the principle of continuity of public service entails, in the event of a publicly-owned establishment ceasing to exist, a transfer of those tasks and of the assets allocated to the accomplishment thereof, it considers that there is nothing preventing an EPIC from ceasing to exist, provided that the public service tasks it performs may be continued.

101 It is clear that the French Republic's line of argument, which is not such as to invalidate the finding that the Commission found correctly that there was an unlimited State guarantee solely on the basis of findings made in relation to the first three parts of this plea, must be held to be ineffective (see the case-law cited in paragraph 99 above).

102 In any event, the French Republic explicitly recognised that the principle of continuity of public service entailed, in the event of a publicly-owned establishment performing a public service task ceasing to exist (which is the situation with La Poste), a transfer of that task and of the assets used to perform that task and, therefore, a transfer of the rights and obligations allocated to that task. The transfer of the rights and obligations attached to a public service task entails, in principle and as evidenced by the findings made by the Commission, a concomitant transfer of the rights and obligations of the establishment charged with that task.

103 It follows from all of those considerations that the second plea must be dismissed.

The third plea: alleged infringement of the notion of advantage under Article 107(1) TFEU

104 The third plea relied on by the French Republic is divided into two parts.

First part: the Commission found incorrectly that the existence of a State guarantee, assuming it was established, gave rise to an advantage for La Poste

105 In the first part, the French Republic submits that, even if it were established that there is an unlimited State guarantee in favour of EPICs, it has not been demonstrated that it gives rise to an advantage for La Poste. It submits, in essence, that it was on the basis of analyses done by ratings agencies, which echo directly the Commission's conclusions relating to other EPICs and the Commission's recommendation to the French authorities of 4 October 2006 (see paragraph 10 above), that there was found to be a guarantee and, therefore, an advantage for La Poste. Thus it was by entirely circular reasoning that the Commission found that there was an advantage granted to La Poste.

106 The grant of a guarantee on terms which are not equivalent to market conditions, such as an unlimited guarantee granted without consideration, is, as a rule, liable to confer an advantage on the recipient of those terms, in that that party thereby enjoys an improvement in its financial position through a reduction of charges which would normally encumber its budget. In response to a question put at the hearing, the French Republic acknowledged that, under the 2008 Notice, it was a fact that, once an undertaking, by virtue of its legal status, was exempt from bankruptcy or equivalent proceedings, it was able to obtain more favourable credit terms and, therefore, to enjoy an advantage for the purposes of Article 107(1) TFEU.

107 It should be recalled that, according to settled case-law, the definition of aid is more general than that of subsidy, because it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 35, and Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* [2006] ECR I-5293, paragraph 29 and the case-law cited). According to settled case-law, in order to determine whether a State measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (see C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60, and *Commission* v *Netherlands*, paragraph 87 and the case-law cited).

108 An unlimited State guarantee enables its recipient inter alia to obtain more favourable credit terms than what it would have obtained on its own merits alone and, therefore, eases the pressure on its budget.

109 It should be noted that it was only with a view to establishing that La Poste enjoyed more favourable terms of credit and, therefore, a financial advantage, that the Commission referred to the findings of the ratings agencies and, more specifically, to the principal findings. The Commission observes in that regard that, since Fitch and Standard & Poor's are two leading ratings agencies and it is established that the market takes account of their ratings in assessing the credit to be granted to a given undertaking, a rating by either or both of those agencies which is better than would have been given without a guarantee is liable to procure an advantage for La Poste that it would not have obtained under normal market conditions.

110 The French Republic was thus incorrect in finding that the Commission used circular reasoning. The reference to the ratings methods employed by recognised agencies was merely to confirm that the State guarantee for EPICs was liable to give rise to an advantage for them in the form of more favourable credit terms (see, inter alia, recital 257 of the contested decision) and not to establish that such a guarantee existed.

111 In any event, the statement that those findings merely reflect the Commission's assertions lack a factual basis. Nor has the French Republic demonstrated that the reason behind the ratings agencies' taking into account of a State guarantee was Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (OJ 2005 L 49, p. 9). The mere fact that the documents originating from the ratings agencies referred to by the Commission are subsequent to that decision is not sufficient to prove that the reason behind the ratings agencies' taking into account of a State guarantee was necessarily the adoption of that decision. The Commission cannot be criticised for referring to documents contemporaneous to the contested decision rather than to reports dating from well before the date of adoption of that decision.

112 Accordingly, the first part of the third plea is unfounded.

Second part: the Commission was incorrect in finding that the alleged State guarantee was liable to give rise to an advantage for La Poste because of the positive influence it had on its financial rating

113 In the second part, the French Republic argues that the Commission found incorrectly that there was an advantage because of the positive influence the guarantee was liable to have on its rating. It submits, first of all, that the Commission disregards the fact that La Poste's rating results from the ratings agencies' apprehension of State support as a whole, which requires that a number of factors must be taken into account, not only whether or not there is a guarantee. It states, second, that even if there were no such guarantee, the rating given to La Poste by the ratings agencies, which are

particularly sensitive to the fact that it is owned by the State, remains unchanged. Like those agencies, the Commission does not distinguish clearly between what derives from La Poste's status and what derives from the ownership of its capital.

114 The French Republic's line of argument cannot be accepted.

115 First of all, it should be noted that the Commission does not deny that, in addition to the State guarantee which an undertaking may enjoy, the financial rating takes account of all the parameters indicating the expected support from the State (see recital 280 of the contested decision).

116 Next, the French Republic has not succeeded in proving that the finding, made on the basis of methodological documents drawn up by the ratings agencies, according to which the ratings agencies were, in general, aware of the legal status of the entities rated, in this case the fact that they enjoyed the status of EPIC, was incorrect.

117 In the light of the foregoing, the third plea must be dismissed.

The first plea: error of law by the Commission in not establishing the existence of State aid to the requisite legal standard

118 The French Republic submits that the Commission did not satisfy its obligations in terms of burden of proof or level of proof in State aid matters. Inter alia the Commission based its examination on negative presumptions, conjecture and speculation and, therefore, failed to demonstrate positively the existence of aid in favour of La Poste, contrary to the principles enshrined in the case-law. This is true both as regards the demonstration of the existence of an implied guarantee by the French State in favour of La Poste (see recitals 129, 134, 136, 152, 154, 160, 161, 165, 169, 179, 195, 202 and 251) and in the examination of whether there is an advantage, by examining precisely the effects of the disputed measure, as required by the case-law. It is not sufficient to demonstrate that the measure is 'liable' to give rise to an advantage in order to categorise it as State aid, particularly when it is existing aid. Lastly, the French Republic states in the reply that the Commission failed to adduce proof that the alleged advantage for La Poste resulted from a transfer of State resources.

119 It follows from the case-law that the Commission cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage. In that perspective, the Commission is, at the very least, required to ensure that the information at its disposal, even if incomplete and fragmented, constitutes a sufficient basis on which to conclude that an undertaking has benefited from an advantage amounting to State aid (see, to that effect, Case C-520/07 P *Commission* v *MTU Friedrichshafen* [2009] ECR I-8555, paragraph 56).

120 In that regard the nature of the evidence the Commission must adduce depends, to a large extent, on the nature of the State measure at issue. In particular, proof of the existence of an implied State guarantee may be inferred from a bundle of converging facts having a certain degree of reliability and coherence, taken inter alia from an interpretation of the relevant provisions of national law and, in particular, be inferred from the legal effects flowing from the legal status of the recipient undertaking. In that regard, memoranda and interpretation bulletins may be considered relevant for demonstrating that a State has granted an implied financial guarantee which, by definition, is not explicitly provided for by national law, to an undertaking having a particular status.

121 In the present case, the considerations set out in the examination of the second plea show that the Commission made a positive finding as to the existence of an unlimited State guarantee in favour of La Poste. It took into account a number of concordant facts which provided a sufficient basis to establish

that La Poste, by virtue of its status as an EPIC, enjoyed an implied, unlimited State guarantee. Those objective indicia are derived, first of all, from the objective fact that La Poste was not subject to the ordinary law rules governing the compulsory administration or winding-up of firms in difficulty (recital 117 of the contested decision); secondly, that Law No 80-539, to which La Poste was subject, did not produce the same effects as a winding-up procedure under ordinary law and put the creditors of EPICs in a much more favourable situation than creditors of private persons (recitals 148 to 180 of the contested decision); and, thirdly and for the sake of completeness, that, 'in the unlikely event that the procedure laid down by [Law No 80-539] does not result in payment' (recital 184 of the contested decision), the creditor could also obtain satisfaction in having recourse to the liability of the State (recitals 185 to 222 of the contested decision).

122 The fact that the Commission found it appropriate to show, in response to the arguments put forward by the French authorities during the administrative procedure, that nothing in French law precluded the existence of an implied State guarantee in favour of EPICs (see recitals 120 to 138 of the contested decision), is merely the point of departure in the reasoning it set out clearly in recitals 116 to 255 of the contested decision. Accordingly it cannot be argued that the Commission relied on mere negative presumptions and speculation in order to establish that point. As stated in paragraph 71 above, the Commission referred explicitly to a 1995 memorandum from the Conseil d'État (recital 139 of the contested decision) and to a memorandum from the French Minister for Economic Affairs, Finance and Industry of 22 July 2003 (recitals 146 and 147 of the contested decision), which are drafted in the most unambiguous terms possible.

123 Similarly, the Commission adduced sufficient evidence in order to establish that that guarantee constituted an advantage. It follows from the case-law that the Commission is not required to demonstrate the actual effects of the disputed measure in respect of aid already granted (see Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraph 110 and the case-law cited). It is not necessary to draw any distinction whatsoever between existing aid and unlawful aid.

124 Moreover, the actual effect of an advantage conferred by a State guarantee may be presumed. Such a guarantee enables the borrower to enjoy a lower interest rate or provide a lower level of security. It follows from the case-law that even an advantage granted in the form of a potential additional burden for the State is liable to constitute State aid (Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 43, and Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 80). This is most often the situation with guarantees which are generally linked to a loan or other financial obligation entered into by a borrower with a lender.

125 The first plea in law must accordingly also be dismissed as unfounded.

126 It follows from all those considerations that the action must be dismissed in its entirety.

Costs

127 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 French Republic has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Dismisses the action;

2. Orders the French Republic to pay the costs.

Kanninen Wahl Soldevila Fragoso

Delivered in open court in Luxembourg on 20 September 2012.

[Signatures]