

Case T-49/93

Société internationale de diffusion et d'édition (SIDE)

v

Commission of the European Communities

(State aid — Articles 92 and 93 — Actions for annulment of measures —
Aid for exports of books)

Judgment of the Court of First Instance (First Chamber, Extended Composition),
18 September 1995 II - 2504

Summary of the Judgment

1. *State aid — Planned aid — Review by the Commission — Preliminary examination and inter partes procedure — Compatibility with the common market of aid for exports of books for cultural purposes liable to produce effects contrary to specific provisions of the Treaty, especially relating to competition — Difficulties of assessment — Commission required to initiate the inter partes procedure — No requirement for a competitor of the undertaking receiving the aid to provide precise information at the stage of the administrative procedure (EEC Treaty, Art. 85 et seq. and Art. 93(2) and (3))*

2. *Actions for annulment of measures — Pleas in law — Pleas which may be put forward by a complainant against a decision of the Commission declaring, after a preliminary procedure only, aid to be compatible with the common market — No requirement of consistency between the complaint and the action*
3. *State aid — Planned aid — Failure to notify aid — Implementation of aid before the Commission's final decision — Commission not obliged to use its power to order payment of the aid to be suspended and amounts already paid to be recovered*
(EEC Treaty, Art. 93(3))

1. The procedure under Article 93(2) is essential whenever the Commission has serious difficulties in determining whether a plan to grant aid is compatible with the common market. The Commission may restrict itself to the preliminary examination under Article 93(3) when taking a decision in favour of aid for exports of books pursuing a cultural aim only if it is convinced, after a preliminary examination, that the aid is compatible with the Treaty. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to obtain all the requisite views and for that purpose to initiate the procedure provided for in Article 93(2).

Inasmuch as the Commission must maintain consistency between Articles 92 and 93 and other provisions of the Treaty, especially where those other provisions also have as their aim undistorted competition in the common market, it must,

where it does not intend to go further than the preliminary procedure, have arrived at the firm view, based on an economic analysis of the situation, that the recipient of the aid is not in contravention of Articles 85 and 86 of the Treaty, even though the question of possible infringements of Articles 85 and 86 of the Treaty has not been expressly raised in the complaint made to the Commission.

The Commission cannot rely on the fact that the complaint contained insufficient information about market conditions in order to justify its decision not to initiate the procedure under Article 93(2), despite the difficulties encountered in assessing whether the aid complained of is compatible with the common market. Competitors of undertakings which are receiving unnotified State aid cannot be required to provide information to which, in most cases, they have no access and which they can obtain only through the Commission, in so far as it makes use of its powers of investigation with regard to the Member States.

2. Where a complaint is made to the Commission about aid granted by a Member State to an undertaking and the Commission adopts a decision declaring the aid to be compatible with the common market at the end of a purely preliminary procedure, that is to say without initiating an *inter partes* procedure or allowing the complainant the right to state its point of view on all the established facts in the case, in particular on the further information sent by the government concerned, the complainant cannot be required to maintain, in its action for annulment of that decision, strict consistency between the pleas put forward during the administrative procedure and those set out in the application.

3. When the Commission initiates review of a State aid which has been granted without having first been notified to it at the planning stage, it is not obliged to issue an interim decision ordering the Member State in question to suspend payment of the aid, nor is it obliged to order recovery of amounts already paid, since failure to

notify is not of itself enough to enable aid to be declared incompatible with the common market.

The discretion which the Commission enjoys does not conflict with the direct effect of the prohibition on implementation of aid laid down in the last sentence of Article 93(3), in accordance with which a national court, before which an action against measures implementing aid has been brought, is required to declare the measures invalid. There is a fundamental difference between the principal and exclusive role conferred on the Commission by Articles 92 and 93, which is to examine the compatibility of the aid with the common market, even where the Member State has acted in breach of the prohibition in Article 93(3), and the role of the national courts, which do no more than preserve, until the final decision of the Commission, the rights of individuals faced with a possible breach by State authorities of that prohibition, a breach which the Commission's final decision cannot eliminate.