JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
14 December 2000 *

In Case T-613/97,

Union Française de l'Express (Ufex), established in Roissy-en-France (France),

DHL International, established in Roissy-en-France,

Federal Express International (France), established in Gennevilliers (France),

CRIE, established in Asnières (France),

represented by É. Morgan de Rivery, of the Paris Bar, and J. Derenne, of the Brussels and Paris Bars, with an address for service in Luxembourg at the Chambers of A. Schmitt, 7 Val Sainte-Croix,

applicants,

v

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

defendant,

* Language of the case: French.

supported by

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, 8 Boulevard Joseph II,

by

Chronopost SA, established in Issy-les-Moulineaux (France), represented by V. Bouaziz Torron and D. Berlin, of the Paris Bar, with an address for service in Luxembourg at the Chambers of A. May, 398 Route d'Esch,

and by

La Poste, established in Boulogne-Billancourt (France), represented by H. Lehman, of the Paris Bar, with an address for service in Luxembourg at the Chambers of A. May, 398 Route d'Esch,

interveners,

APPLICATION for annulment of Commission Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost (OJ 1998 L 164, p. 37),

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

composed of: V. Tiili, President, P. Lindh, R.M. Moura Ramos, J.D. Cooke and P. Mengozzi, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 21 June 2000,

gives the following

Judgment

Background to the case

1 Syndicat Français de l'Express International (hereinafter 'SFEI'), now known as the Union Française de l'Express, of which the three other applicants are members, is a trade association established under French law, grouping together almost all of the companies offering express courier services competing with Société Française de Messagerie Internationale (hereinafter 'SFMI').

2 On 21 December 1990 SFEI lodged a complaint with the Commission alleging principally that the logistical and commercial assistance afforded by the French Post Office (hereinafter 'La Poste') to SFMI constituted State aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC). In particular, SFEI complained that the remuneration paid by SFMI for the assistance provided by La Poste was not in accordance with normal market conditions. It alleged that the difference between the market price for the purchase of such services and the price actually paid by SFMI constituted State aid. An economic study carried out by Braxton, a consultancy firm, at SFEI's request, was appended to the complaint in order to demonstrate the value of the amount of aid during the period from 1986 to 1989.

3 La Poste, which operates as a legal monopoly in the ordinary mail sector, was an integral part of the French State administration until the end of 1990. Since 1 January 1991 it has been a legal entity governed by public law by virtue of Law 90-568 of 2 July 1990. That law authorises it to perform certain activities open to competition, and particularly express delivery services.

4 SFMI is a company incorporated under private law which has been entrusted with the management of La Poste's express delivery service since the end of 1985. SFMI was formed with a share capital of FRF 10 million held as to 66% by Sofipost, a holding company wholly owned by La Poste, and as to 34% by TAT Express, a subsidiary of the airline Transport Aérien Transrégional (hereinafter 'TAT').

5 The detailed conditions for the operation and marketing of the express delivery service provided by SFMI under the name of EMS/Chronopost were set out in an order from the Ministry of Posts and Telecommunications of 19 August 1986. According to that order, La Poste was to provide SFMI with logistical and commercial assistance. The contractual relations between La Poste and SFMI are governed by agreements, the first of which dates from 1986.

6 In 1992 the structure of the express delivery business carried out by SFMI changed. Sofipost and TAT set up a new company, Chronopost SA, in which their respective holdings were again 66% and 34%. Chronopost, which had exclusive access to La Poste's network until 1 January 1995, concentrated on domestic express deliveries. SFMI was acquired by GD Express Worldwide France, the subsidiary of an international common operator whose participants are the Australian company TNT and the post offices of five countries, a concentration which was authorised by a Commission Decision of 2 December 1991 (TNT/ Canada Post, DBP Postdienst, La Poste, PTT Poste and Sweden Post, Case No IV/

M.102, OJ 1991 C 322, p. 19). SFMI retained the international business, using Chronopost as an agent and service provider in the handling of its international dispatches in France (hereinafter 'SFMI-Chronopost').

7 By letter of 10 March 1992 the Commission notified SFEI of its decision to take no action on the complaint under Article 92 of the Treaty. On 16 May 1992 SFEI together with other undertakings lodged an action with the Court of Justice for annulment of that decision. The Court ruled that it was not necessary to proceed to judgment (order of 18 November 1992 in Case C-222/92 *SFEI and Others* v *Commission*, not published in the ECR) in the light of the Commission Decision of 9 July 1992 to withdraw the decision of 10 March 1992.

8 At the Commission's request, France provided information by letter of 21 January 1993, by fax of 3 May 1993 and by letter of 18 June 1993.

9 On 16 June 1993 SFEI and other undertakings brought an action before the Tribunal de Commerce de Paris (Paris Commercial Court) against SFMI, Chronopost, La Poste and others. A second study by Braxton was attached to the application, updating the information contained in the first study and evaluating the amount of the aid up to the end of 1991. In a judgment of 5 January 1994, the Tribunal de Commerce de Paris referred several questions to the Court of Justice for a preliminary ruling on the interpretation of Articles 92 and 93 of the EC Treaty (now Article 88 EC), one of which sought clarification of the concept of State aid in the circumstances of the present case. The French Government lodged, as an annexe to its observations of 10 May 1994, an economic study by Ernst & Young. In Case C-39/94 *SFEI and Others* v *La Poste and Others* [1996] ECR I-3547 (hereinafter 'the *SFEI* judgment'), the Court ruled that 'the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, is capable of constituting State aid within the meaning of Article 92 of the EC Treaty if the remuneration received in return is less than that which would have been demanded under normal market conditions'.

10 In the meantime, by a letter from the Commission dated 20 March 1996, France was notified of the initiation of the procedure under Article 93(2) of the EC Treaty. On 30 May 1996 France sent the Commission its comments in this regard.

11 On 17 July 1996 the Commission published in the *Official Journal of the European Communities* a notice on the initiation of the procedure under Article 93(2) of the EC Treaty regarding aid allegedly granted by France to SFMI-Chronopost (OJ 1996 C 206, p. 3).

12 On 17 August 1996 SFEI submitted its observations to the Commission in response to that notice. It attached to its observations another economic study by Bain & Company. In addition, SFEI extended its complaint of December 1990 to cover a number of additional points, including the use of La Poste's brand image, privileged access to the air waves of Radio France, customs and tax privileges and La Poste's investment in dispatching platforms.

13 The Commission passed SFEI's comments to France in September 1996. In reply, France addressed a letter to the Commission, attaching to it an economic study by Deloitte Touche Tohmatsu, a consultancy company (hereinafter the 'Deloitte study').

14 By letter of 7 November 1996 SFEI pressed the Commission to be given a hearing on all aspects of the file. Accordingly, it asked for disclosure of the replies which the French Government had already sent to the Commission and which were not yet in its possession (namely the letters of 21 January and 18 June 1993) and, as and when it arrived, any additional material provided by the French Government to the Commission.

15 By letter of 13 November 1996 the Commission refused SFEI access to the abovementioned items in the file.

16 On 21 April 1997 SFEI addressed another letter to the Commission, asking for information about the progress of the examination of the case and, in particular, requesting the Commission to inform it of the French Government's replies to the letter initiating the procedure and to its comments of 17 August 1996 and also to inform it of the Commission's position and intentions. On 30 April 1997 the Commission refused to disclose the documents in its possession on the grounds that they were strictly confidential.

17 On 1 October 1997 the Commission adopted Decision 98/365/EC concerning alleged State aid granted by France to SFMI-Chronopost (OJ 1998 L 164, p. 37, hereinafter the 'contested decision' or the 'decision'), which was notified to SFEI by letter dated 22 October 1997.

18 In the decision, the Commission stated that it was necessary to distinguish between two sets of measures. The first set is the provision by La Poste of (i) logistical assistance, which consists in making available to SFMI-Chronopost the use of the postal infrastructure for the collection, sorting, transport and delivery of its dispatches, and (ii) commercial assistance, which consists in SFMI-Chronopost's access to La Poste's customers and enjoyment of its goodwill. The second set is made up of individual measures, such as privileged access to Radio France and tax and customs privileges.

19 According to the Commission, SFEI misconstrued the *SFEI* judgment by maintaining that 'the Commission should disregard the group's strategic interests and the economies of scale arising from the privileged access of SFMI-Chronopost to the Post Office's network and infrastructure... because the Post Office has a monopoly.' By contrast, the Commission contended, the Court of

Justice has never suggested that the Commission must apply a different approach if one of the parties to the transaction has a monopoly. Thus, in order to determine whether State aid was involved in the first set of measures, the Commission was not required to take account of the fact that the transactions took place between a parent company operating in a reserved market and its subsidiary operating in a market open to competition.

20 Accordingly, the Commission considered that the relevant question was 'whether the terms of the transaction between [La Poste] and SFMI-Chronopost [were] comparable to those of an equivalent transaction between a private parent company, which may very well be a monopoly (for instance, because of the ownership of exclusive rights), and its subsidiary'. According to the Commission, there was no financial advantage if the internal prices at which products and services were provided between companies belonging to the same group were 'full-cost prices (total costs plus a mark-up to remunerate equity capital investment)'.

21 In this regard, the Commission noted that the payments made by SFMI-Chronopost did not cover total costs over the first two years of operation, but covered all costs other than central and local offices' overheads. It considered, first, that it was not abnormal that payments made by a new undertaking, that is to say, SFMI-Chronopost, covered only variable costs in the start-up period. Secondly, in the Commission's opinion, France had been able to show that as from 1988 the remuneration paid by SFMI-Chronopost covered all the costs incurred by La Poste, plus a return on the equity capital invested by the latter. Furthermore, the Commission calculated that the internal rate of return (IRR) of La Poste's investment as a shareholder was well in excess of the cost of the company's equity in 1986, that is to say, the normal rate of return that a private investor would require under similar circumstances. Consequently, La Poste provided logistical and commercial assistance to its subsidiary under normal business conditions and that assistance therefore did not constitute State aid.

22 With regard to the second category, that is to say, the various individual measures, the Commission considered that SFMI-Chronopost derived no

advantage from the customs clearance procedure, stamp duty, payroll tax or the periods allowed for payment. The use of La Poste's vehicles as advertising media should, in the opinion of the Commission, be regarded as normal commercial assistance between a parent company and its subsidiary, and SFMI-Chronopost enjoyed no preferential treatment for advertising on Radio France. The Commission also maintained that it had been able to establish that the commitments made by La Poste when the common operator was authorised by the Commission Decision of 2 December 1991 did not constitute State aid.

23 In Article 1 of the decision the Commission states: 'The logistical and commercial assistance provided by [La Poste] to its subsidiary SFMI-Chronopost, the other financial transactions between those two companies, the relationship between SFMI-Chronopost and Radio France, the customs arrangements applicable to [La Poste] and SFMI-Chronopost, the system of payroll tax and stamp duty applicable to [La Poste] and its [business secret] investment in the dispatching platforms do not constitute State aid to SFMI-Chronopost.' Article 2 states that the decision is addressed to France.

24 On 2 December 1997 SFEI gave the Commission formal notice to send it, before 17 December 1997, the fax of 3 May 1993, the note of 30 May 1996 and the Deloitte study, all of which are mentioned in the contested decision.

25 By letter of 15 December 1997 the Commission rejected SFEI's request, citing the Code of Conduct concerning public access to Council and Commission Documents (OJ 1993 L 340, p. 41). It stated that if the application relates to a document held by an institution but written by a natural or legal person or a Member State, the application must be sent directly to the author. It also invoked the exceptions for protection of commercial and industrial secrecy and protection of confidentiality.

Procedure and forms of order sought by the parties

26 The applicants brought the present action by application lodged at the Registry of the Court of First Instance on 30 December 1997.

27 On 12 March 1998 the applicants made an interlocutory application for the production of documents, seeking disclosure by the Commission of the documents mentioned in the decision to which they had not had access before its adoption, that is to say, the fax of 3 May 1993, the note of 30 May 1996, the note in response to SFEI's observations of August 1996 and the Deloitte study, which had all been sent to the Commission by the French Government. By letter dated 7 May 1998, the Court of First Instance requested the Commission to produce the last two documents. These documents were sent on 26 May 1998.

28 By application lodged with the Registry on 2 June 1998, France applied to intervene in support of the defendant. By applications lodged with the Registry on 5 June 1998, Chronopost and La Poste also applied to intervene.

29 By orders of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance of 7 July 1998, France, Chronopost and La Poste were given leave to intervene in support of the defendant.

30 On 23 July 1998 the applicants lodged with the Registry a second interlocutory application for the production of documents. By letter of 10 November 1998, the Court of First Instance notified the applicants of its decision not to accede to their request at that stage.

31 In their reply, the applicants requested that all the documents listed in Annex 10 of the reply be treated as confidential and that only the Court of First Instance have access to these documents. By letters of 5 January and 10 February 1999, the applicants specified that this request related only to La Poste and Chronopost. By order of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance of 5 March 1999, the application for confidential treatment of certain information with regard to La Poste and Chronopost was granted.

32 Upon reading the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure. By way of measures of organisation of procedure, it asked the defendant to reply in writing to certain questions and to produce certain documents.

33 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 21 June 2000.

34 The applicants claim that the Court should:

— annul the contested decision;

— order the defendant to pay the costs.

35 The defendant claims that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

36 The interveners contend that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

Substance

37 The applicants put forward four pleas for annulment in support of their application. The first plea alleges infringement of the rights of the defence, in particular the right of access to the file. The second plea alleges an inadequate statement of reasons. The third plea alleges errors of fact and manifest errors of assessment. Finally, in their fourth plea, the applicants allege failure to apply the concept of State aid.

38 As the questions relating to the fourth plea must be regarded as preliminary to the other pleas, it is necessary to examine them first.

The fourth plea, alleging failure to apply the concept of State aid

39 This plea is in two parts, alleging that the Commission failed to apply the concept of State aid, first by not taking account of normal market conditions when analysing the remuneration for the assistance provided by La Poste to SFMI-Chronopost, and second by finding that this concept did not cover various measures from which SFMI-Chronopost allegedly benefited. It is necessary first to examine the complaint regarding the analysis of the remuneration for the assistance provided by La Poste.

Arguments of the parties

40 In this part of the plea the applicants claim that the Commission erred in law by ruling out, in the contested decision, the very existence of aid in the form of cross-subsidies with regard to logistical and commercial assistance provided by La Poste to SFMI-Chronopost.

41 According to the applicants, a legal monopoly does not necessarily pass on to its subsidiary all the costs incurred 'in normal market conditions' for services rendered, as the holder of the monopoly operates outside such conditions. Hence, in their view, it is necessary to check whether account was taken of the advantages deriving from relations between a subsidiary and a monopoly undertaking. However, the Commission did not carry out such a check. La Poste

did not have to bear, *inter alia*, the network costs which are borne by the State. These costs are costs which an undertaking operating in normal market conditions would have had to bear and pass on in the price of the assistance provided.

42 The applicants observe that the normal remuneration for the services provided by La Poste to SFMI-Chronopost should not comprise solely the short-term marginal cost but also the long-term marginal cost and the fixed costs of acquiring and maintaining infrastructure in the form of buildings, equipment and staff from which SFMI-Chronopost benefited. They contend that the Commission's guidelines on the application of the EEC competition rules in the telecommunications sector (OJ 1991 C 233, p. 2, hereinafter the 'guidelines for the telecommunications sector'), set out the Commission's position with regard to cross-subsidies.

43 Furthermore, they observe that the guidelines for the telecommunications sector prohibit a monopoly from granting preferential conditions for the start-up of new competitive activities. In the present case it is clear from the statements of the French Government and the Commission that SFMI-Chronopost already benefited from State aid during the first two years of its activity (1986 and 1987) because the start-up was financed by revenue from the monopoly, a fact that is admitted. Moreover, these start-up costs were not covered by the remuneration for the services provided during the period from 1986 to 1991.

44 The applicants claim that the Commission failed to take account of the very clear import of paragraphs 54 to 62 of the *SFEI* judgment. In their view, 'the remuneration which La Poste therefore had to claim from its subsidiary for the services provided should be calculated on the basis of the price which a private investor would have had to pay, in normal competitive conditions, for equivalent logistical and commercial support'.

45 The applicants then criticise the Commission's view that it is necessary to take into account 'economies of scale' and 'of scope', strategic considerations and the synergies deriving from the fact that La Poste and SFMI-Chronopost belong to the same group. In addition, the applicants take issue with the Commission's reasoning that the specific nature of the parent company's business does not create a special relationship between itself and its subsidiary.

46 This position adopted by the Commission differs fundamentally from that adopted by the Court of Justice in the *SFEI* judgment. It excludes from the scope of Article 92 of the EC Treaty all the advantages which a parent company like La Poste enjoys by virtue of its legal monopoly (for the creation, maintenance and development of activities within the ambit of that monopoly), even where the said advantages are transferred free of charge to its subsidiary operating in a market open to competition.

47 The applicants consider that the Court of Justice, when holding that it was necessary to take into account 'all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided', certainly did not intend to mean that it was necessary, in the present case, to envisage the case of an 'undertaking placed in the same situation as La Poste'. In this regard, Community case-law indicates that undistorted competition can only be such competition as results from the adoption of methods which do not differ from those governing normal competition in products or services.

48 Lastly, the applicants observe that by not stating in the *SFEI* judgment that it was necessary to examine the full costs of La Poste in order to determine whether the remuneration from SFMI-Chronopost was sufficient, the Court of Justice deliberately ruled out the method adopted by the Commission, which, they allege, takes into account only the short-term marginal costs. Hence, as La Poste bore the long-term marginal costs, that constitutes cross-subsidies to the benefit of SFMI-Chronopost. Furthermore, these cross-subsidies resulting from a public monopoly constitute State measures (*SFEI* judgment, paragraph 58).

49 The defendant states that it shares the applicants' opinion that the remuneration for the supply of premises, equipment, experts and/or services for the activities of SFMI-Chronopost must be normal remuneration and that it is for that reason that it took account of full costs. As regards the guidelines for the telecommunications sector, the defendant notes that the same document refers to the need for an entirely proportional distribution of all costs between reserved and non-reserved activities, an exercise which was carried out in the present case.

50 The defendant submits that the full cost method applied in the contested decision appears to be the most prudent for calculating the costs associated with the subsidiary's activities. A 'stand-alone' analysis (referring to the costs calculated for an activity commencing from scratch) which the applicants appear to propose would not be more accurate, because it too relies on market data. Moreover, the applicants have not shown that the costs calculated in this manner would be higher than full costs. Lastly, even if that were the case, it would not demonstrate the existence of cross-subsidies, let alone State aid. In this regard, the defendant states that economists do not recommend a pure 'stand-alone' analysis but a far more sophisticated examination, in which no cross-subsidy exists if the price asked falls between the incremental cost (the additional cost occasioned by the new activity) and the 'stand-alone' cost.

51 The defendant indicates, in the alternative, that because of the discretionary element present in any commercial investment, cross-subsidisation within a public group does not always constitute State aid. It notes that within a group of undertakings such financial arrangements may serve a longer-term strategy to the benefit of the group as a whole.

52 With regard to the relationship between parent company and subsidiary and membership of the same group, the defendant maintains that a monopoly undertaking can conclude balanced bilateral contracts. The particular nature of the parent company's activities does not make the relationship with its subsidiary special. Case-by-case analysis is therefore needed, as was carried out in the

present case on the basis of full costs. This analysis shows that the subsidiary paid more than the full costs. Consequently, the applicants' arguments regarding the parent company's reserved market *vis-à-vis* the subsidiary's competitive market and regarding the alleged calculation of short-term costs is not relevant and in fact incorrect.

53 The defendant submits, for the sake of completeness, that economies of scale and scope, synergies and strategic considerations within a group of undertakings cannot be criticised in themselves. Such considerations do not affect the analysis of State aid if, in the relationship between parent company and subsidiary, all costs are taken into account when calculating the remuneration for services rendered.

54 The defendant also notes that, in accordance with the Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services (OJ 1998 C 39, p. 2), the tariffs for competitive services provided by post offices should in principle at least equal the total average cost of provision. That implies covering direct costs and an adequate part of the common costs and indirect costs incurred by the monopoly operator. In this way the method used in the contested decision, which demonstrates the absence of cross-subsidies, meets these requirements.

55 With regard to the commencement of diversification activities, the defendant maintains that the applicants' argument, based on the guidelines for the telecommunications sector, is not applicable in the present case. Moreover, according to the guidelines, there is a requirement that an operator in a privileged situation usually (but not always) receive normal remuneration for investment in competitive activities. Moreover, the applicants' assertion that too little remuneration had been received for the provision of services is not at all substantiated. Indeed, it is disproved by the Deloitte study, from which it emerges that the slight underpayment before 1989 was offset by overpayment after that date.

56 The defendant points out that, given the neutrality of the EC Treaty as regards systems of property ownership in the Member States and the principle of equal treatment of publicly owned and private undertakings, it is permissible for Member States to carry out economic activities and to make investments. In this regard the defendant refers to the case-law of the Court of Justice, according to which strategic considerations, synergies, a pooling of elements of goodwill (brand image, clientele) may, when a subsidiary is created, establish conduct by the State corresponding to that of a private investor and which thus does not entail State aid.

57 Chronopost criticises the applicants' interpretation of the *SFEI* judgment in general. It accuses the applicants of having a subjective and theoretical view of the market to which the Court of Justice referred. By arguing as though La Poste did not exist and taking as a basis a market consisting solely of private undertakings, the applicants are confusing conduct and structure. The Court simply pointed out that the conduct of public undertakings in the market has to be compared with the conduct of private undertakings. The Court was referring to the case of an undertaking placed in a situation similar to that of La Poste and the fact that the latter had to behave as though it had acted like a private undertaking in 'normal market conditions'.

58 Chronopost maintains that the applicants' reasoning disregards the *de facto* and *de jure* situation of La Poste. The position adopted by the applicants means not only that conduct should be examined solely on the basis of the private investor model but also that the yardstick should be a market without public undertakings or legal monopolies.

59 Finally, Chronopost states that the applicants' approach is contrary to the objective of the competition rules. If the existence of State aid within a group had to be judged not by the amount which the public undertaking should have

charged in normal market conditions but by what a company incorporated under private law and competing with the public undertaking charges to its subsidiary, the price set by the competitors would become the reference price for assessing whether State aid existed or not.

60 France states first that an express mail operator can perfectly well carry on its business without using the infrastructure of La Poste, for example by means of an integrated network of the type established by the members of SFEI. This is confirmed by the absence of interest on the part of the applicants in the network of La Poste. Moreover, as the markets in ordinary mail and express mail are very different, the latter network, which was designed to serve a public service activity, does not really offer synergies with the activities relating to express mail.

61 Secondly, France considers that the applicants are making a confusing mixture of the structures of undertakings which must serve as a reference for assessing, on the one hand, the normality of the conduct of the public undertaking and, on the other, the normality of the conduct of the undertaking in question. The structure to be taken into consideration should be that of an undertaking with resources comparable to those of La Poste, in particular an equivalent network. It is not evident either from the letter or from interpretation of the *SFEI* judgment that the Commission should assess the concept of normal conduct differently, according to whether or not the undertaking has a monopoly over some of its activities.

62 Thirdly, France observes that acceptance of the applicants' contention would prevent a public undertaking with a reserved sector for its public service activities from diversifying in the competitive market. Endorsement of the applicants' argument that a parent company with a legal monopoly should be subject to greater restrictions than those applicable between a parent company and its subsidiary in a private group would affect the ability of a parent company with a reserved sector to diversify under economically acceptable conditions.

63 La Poste states that Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14) imposes no restrictions on the ability of universal service providers to perform other activities, provided that the accounts clearly distinguish between these two types of business. With regard to the concept of normal market conditions, La Poste states that the line of argument put forward by the applicants is an artificial one, in which the normal price of logistical and commercial assistance corresponds to the price of 'leasing' each part of a network, whatever the use to which it is put. The applicants' analysis is aimed at establishing the price needed to create a network. Lastly, the possibility for third parties to have access to the postal network shows that such access is not selective, an essential criterion for characterising aid. Furthermore, if SFMI-Chronopost had derived substantial aid from access to the network, the applicants would have had every interest in seeking the benefit of such access.

Findings of the Court

64 The aim of Article 92(1) of the Treaty is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products (Case C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 12, Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 26, and *SFEI*, paragraph 58).

65 The concept of aid thus encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect (*SFEI*, paragraph 58, *Banco Exterior de España*, cited above,

paragraph 13, and Case C-200/97 *Ecotrade* v *Altiforni e Ferriere di Servola* [1998] ECR I-7907, paragraph 34). In Case T-358/94 *Air France* v *Commission* [1996] ECR II-2109, paragraph 67, the Court of First Instance stated, with regard to Article 92 of the EC Treaty:

'That provision therefore covers all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector'.

66 Furthermore, as the Court of Justice held in Case 78/76 *Steinike & Weinlig* v *Germany* [1977] ECR 595, paragraph 21, regard must primarily be had to the effects of the aid on the favoured undertakings or producers and not the status of the institutions distributing or administering the aid.

67 It follows that the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 52, and Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraph 83).

68 The interpretation of the concept of State aid in the circumstances of the present case was given by the Court of Justice in the *SFEI* judgment, namely that 'the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to

free competition, is capable of constituting State aid within the meaning of Article 92 of the EC Treaty if the remuneration received in return is less than that which would have been demanded under normal market conditions'.

69 It follows from the above considerations that in order to determine whether the measures in question constitute State aid, it is necessary to examine the situation from the point of view of the recipient undertaking, in this case SFMI-Chronopost, and to establish whether it received the logistical and commercial assistance in question at a price which it would not have obtained under normal market conditions (*SFEI* judgment, paragraph 60, *SIC* v *Commission*, paragraph 78, Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41, and Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 22).

70 In the *SFEI* judgment the Court of Justice found that such a determination presupposes an economic analysis taking into account all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided (paragraph 61).

71 In the present case, the Commission observes in the contested decision that 'the fact that the transaction takes place between an undertaking operating in a reserved market and its subsidiary operating in a competitive market is of no relevance to this case. The Court of Justice has never suggested that in determining whether State aid is involved the Commission must apply a different approach if one of the parties to the transaction has a monopoly'.

72 Consequently, the Commission considered that the internal prices at which products and services are provided between companies belonging to the same group 'do not involve any financial advantage whatsoever if they are full-cost prices (total costs plus a mark-up to remunerate equity capital investment)'.

73 It is evident from these statements that the Commission did not base its decision on an economic analysis of the kind required by the *SFEI* judgment in order to show that the transaction in question would be comparable to a transaction between undertakings operating in normal market conditions. On the contrary, in the contested decision the Commission merely verified the costs incurred by La Poste in providing logistical and commercial assistance and the extent to which those costs were reimbursed by SFMI-Chronopost.

74 Even supposing that SFMI-Chronopost paid La Poste's full costs for the provision of logistical and commercial assistance, that would not be sufficient in itself to show that no aid within the meaning of Article 92 of the EC Treaty was granted. Given that La Poste might, by virtue of its position as the sole public undertaking in a reserved sector, have been able to provide some of the logistical and commercial assistance at lower cost than a private undertaking not enjoying the same rights, an analysis taking account solely of that public undertaking's costs cannot, in the absence of other evidence, preclude classification of the measures in question as State aid. On the contrary, it is precisely a relationship in which the parent company operates in a reserved market and its subsidiary carries out its activities in a market open to competition that creates a situation in which State aid is likely to exist.

75 The Commission should thus have examined whether those full costs took account of the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided. Hence, the Commission should at least have checked that the payment received in return by La Poste was comparable to that demanded by a private holding company or a private group of undertakings not operating in a reserved sector, pursuing a structural policy — whether general or sectorial — and guided by long-term prospects (see to this effect Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 20).

76 It follows from the foregoing that, in the contested decision, by ruling out the very existence of State aid without checking whether the remuneration received by La Poste for the provision of commercial and logistical assistance to SFMI-

Chronopost corresponded to the price that would have been asked under normal market conditions, the Commission based its decision on an incorrect interpretation of Article 92 of the Treaty.

77 This interpretation is not invalidated by the Commission's submission that Article 222 of the EC Treaty (now Article 295 EC) provides that the Treaty in no way prejudges the system of property ownership in Member States. To require that the remuneration which a public undertaking with a monopoly receives in return for the provision of commercial and logistical assistance to its subsidiary should correspond to the payment which would have been demanded under normal market conditions, does not prohibit such a public undertaking from entering an open market but subjects it to the rules of competition, as the fundamental principles of Community law require. Such a requirement does not adversely affect the system of public ownership and merely ensures that public and private ownership are treated equally.

78 It follows that the first part of the fourth plea is well founded.

79 The first article of the contested decision must therefore be annulled in so far as it finds that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost does not constitute State aid to SFMI-Chronopost, and it is not necessary to examine the second part of this plea or the other pleas in so far as they relate to the logistical and commercial assistance provided by La Poste to SFMI-Chronopost. In particular, it is not necessary to examine the second plea, in which the applicants allege that the statement of reasons for the contested decision regarding logistical and commercial assistance is inadequate.

The first plea, alleging infringement of the rights of the defence and, in particular, of the right of access to the file

Arguments of the parties

80 The applicants maintain that participation in the procedure provided for under Article 93(2) of the Treaty, if it is to be effective, requires the Commission to submit to the parties concerned, for comment, the essential arguments expressed by the Member State involved subsequent to publication of the notice in the Official Journal announcing the initiation of the procedure. In this regard they note that the contested decision is based mainly on documents supplied to the Commission by the French Government (letter of 21 January 1993, fax of 3 May 1993, letter of 18 June 1993, note of 30 May 1996, note in response to the comments of SFEI of August 1996 and the Deloitte study appended thereto) and that, despite repeated requests, SFEI never had access to these documents (with the exception of two letters in the context of the preliminary procedure which led to the *SFEI* judgment).

81 According to the applicants, the Commission should have provided them with sufficient information to permit them effectively to state their views and exercise their right to participate in the administrative procedure, even in the absence of an express obligation set out in Article 93(2) of the EC Treaty. They state that the factual basis and reasoning of the French Government were adopted almost verbatim by the Commission in the contested decision.

82 They note that where State aid is concerned a plaintiff's competitive position is significantly affected by the Commission's decision that State aid does not exist. They contend that its position is no different from that of a plaintiff in the context of Articles 85 and 86 of the Treaty (now Articles 81 EC and 82 EC) with regard to decisions addressed to persons other than the plaintiff. In such cases, it is undisputed that the plaintiff has the right to a fair hearing, even if that right is not

as extensive as the rights accorded to the addressee of the decision and is laid down in a regulation.

83 Hence, the applicants contend that, by refusing SFEI access to the documents and especially to the Deloitte study, the Commission infringed the fundamental principle of respect for the rights of the defence and, in particular, the right of access to the information on which an administrative decision was based.

84 The defendant, supported by the interveners, disputes this line of argument. It states that a decision terminating the examination of the compatibility of an aid with the common market is always addressed to the Member State concerned. Only this Member State must be given notice to make known its views on the Commission's arguments and the comments of the interested parties (including the plaintiffs). In order to enable it to do so, that Member State alone has the right of access to the file.

Findings of the Court

85 According to settled case-law, respect for the right to be heard is, in all proceedings initiated against a person which may lead to a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of specific rules. That principle requires that the undertaking concerned be afforded the opportunity during the administrative procedure to make known its views on the truth and relevance of the facts, charges and circumstances relied on by the Commission (Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 32).

86 The administrative procedure regarding aid is initiated only against the Member State concerned. The competitors of the recipient of the aid, such as the applicants, are only regarded as 'parties concerned' in this procedure.

87 It is also settled case-law that, during an examination under Article 93(2), the Commission is required to give notice to the parties concerned to submit their comments (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 22, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 59).

88 With regard more specifically to the Commission's duty to inform the parties concerned in the context of the administrative procedure under Article 93(2) of the Treaty, the Court of Justice has ruled that the publication of a notice in the Official Journal is an appropriate means of informing all the parties concerned that a procedure has been initiated (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17), while also pointing out that 'the sole aim of this communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action' (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19, and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256).

89 This case-law confers on the parties concerned the role of information sources for the Commission in the administrative procedure instituted under Article 93(2) of the Treaty. It follows that, far from enjoying the same rights to a fair hearing as those which individuals against whom a procedure has been instituted are recognised as having, the parties concerned have only the right to be involved in the administrative procedure to the extent appropriate in the light of the

circumstances of the case (Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraphs 59 and 60).

90 In the present case the applicants complain that they have not had access to the documents provided to the Commission by the French Government in the administrative procedure. In view of the limited nature of the abovementioned rights to participation and to information, the Commission is not obliged to forward to interested parties the observations or information it has received from the Government of the Member State concerned. However, it should be observed that the limited nature of the rights of parties concerned does not affect the Commission's duty under Article 190 of the EC Treaty (now Article 253 EC) to provide an adequate statement of reasons for its final decision.

91 This plea must therefore be dismissed as unfounded.

The third plea, alleging errors of fact and manifest errors of assessment

Introductory remarks

92 It should be noted that some of the complaints made by the applicants in connection with the third plea, namely those which the applicants term cost evaluation, the so-called 'backward projection' method, access to the counters of La Poste, reasons for the profitability of SFMI-Chronopost and internal rates of return of SFMI-Chronopost, are arguments associated with the assessment of whether the logistical and commercial assistance which La Poste provided to its subsidiary SFMI-Chronopost should or should not be deemed to be State aid.

93 Similarly, as concerns the argument based on the application of the reduced rate of payroll tax in favour of La Poste, the applicants seek to show that, even if only the full costs incurred by La Poste in providing the logistical and commercial assistance were to be taken into account, these costs would be lower than those which a private undertaking would have incurred, as La Poste is exempt from VAT and subject to a reduced rate of payroll tax. Since this argument is put forward in the context of the application for annulment of the contested decision, it must be regarded as seeking to show that SFMI-Chronopost benefited from State aid when receiving assistance from La Poste.

94 As the Court has already found that Article 1 of the contested decision must be annulled in so far as it states that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost does not constitute State aid to SFMI-Chronopost, there is no need to examine the arguments mentioned above.

Advertising on Radio France and the customs clearance procedure for dispatches of SFMI-Chronopost

— Arguments of the parties

95 As regards advertising on Radio France, the applicants contend that the fact that SFMI-Chronopost has access to Radio France in itself constitutes a State aid whatever the price paid for such access. Access to the air waves of Radio France was achieved in violation of the mandate granted by the State to Radio France, as no brand publicity may be broadcast. In their opinion, such advertising gave an advantage to SFMI-Chronopost by granting it public resources not available to its competitors. Furthermore, State resources were diverted from their proper purposes to the benefit of an undertaking, which gave rise to an additional cost

for the State by depriving Radio France of broadcasting time for its public services. Hence the Commission committed a manifest error in assessing the facts by claiming that access to the air waves of Radio France did not entail a use of State resources.

96 The defendant states that the applicants do not dispute that SFMI-Chronopost approached an advertising agency and that, under the contract signed by the latter with, in particular, Radio France, it paid the market price. The procedure followed, the parallel advertising on other radio stations and the remuneration paid to Radio France ensured that the State was remunerated in accordance with market conditions. Consequently there was no transfer of public funds, nor even a loss of income, but a net benefit for the State.

97 With regard to the customs clearance procedure for SFMI-Chronopost's dispatches during the period from April 1986 to January 1987, the applicants maintain that customs clearance formalities for SFMI-Chronopost were carried out by La Poste on its premises, using a special procedure. The application of this procedure to SFMI-Chronopost gave it an advantage, above all in the speed of performing this service, which is a real benefit in the international express courier business. This advantage is not denied in the contested decision, which notes that the special scheme is more favourable than the ordinary procedure 'inasmuch as customs clearance procedure would be more rapid'.

98 The applicants then point out that they had already indicated in detail in their comments of 17 August 1996 the cost of this advantage, that is to say an average of FRF 140 per dispatch subject to customs clearance, consisting of customs formality charges (administrative, operational, financial and liability charges) which the private companies had to bear but from which SFMI-Chronopost was exempt. This amount represents the difference between the price of dispatching a 'document' (a dispatch of negligible value) and that of dispatching a 'package' (a dispatch of non-negligible value). By way of example they take the expenses

incurred by an individual company for a customs declaration: DHL France would pay its subsidiary specialising in customs clearance a sum of between FRF 60 and 95, depending on destination, plus a comparable amount upon importation, giving an average total of FRF 140. The applicants point out that the tariffs of SFMI-Chronopost do not differentiate between dispatches of negligible value and others, in contrast to those of other courier companies. According to the applicants, this is explained by the absence of charges for customs clearance.

99 As regards the period after January 1987, the applicants maintain that SFMI-Chronopost benefited from several advantages due to the simplified postal procedures by comparison with the ordinary procedures applied to private express courier companies. It benefited in particular from simplified customs treatment (accelerated customs clearance; the goods are released more rapidly, thanks to label C1 or form C2/CP3), a commercial advantage (no invoice up to a certain value), the absence of taxation for samples and gifts beyond the exemption threshold upon entry to France or the destination country, simplified administrative treatment (no preparation of documents) and low operating cost (hence the tariffs set at the same level as for non-taxable dispatches).

100 The defendant states that the extremely technical arguments put forward by the applicants are not relevant from the point of view of State aid. The existence of such aid presupposes the allocation of public resources. In this case, even supposing that SFMI-Chronopost's dispatches were cleared through customs more easily, this simplified treatment did not entail any transfer of State resources.

101 The defendant concedes that in the period from April 1986 to January 1987 the customs clearance formalities were carried out by La Poste. However, the Director General of Customs confirmed in his letter of 3 June 1986 that 'the customs procedure applicable to courier companies must be applied to the activity of SFMI, as regards the customs clearance of dispatches [... and] the

customs clearance of taxable goods will give rise to the lodging of customs declarations under the ordinary procedure'. The defendant deduces from these statements that SFMI-Chronopost enjoyed no advantage. The defendant adds that SFMI-Chronopost reimbursed La Poste for the expenses incurred by the latter under the customs procedure.

102 Moreover, with regard to the claimed additional cost of FRF 140 and differences in the tariffs applied, the defendant observes that these practices reflect the commercial policy of an undertaking. DHL, for example, no longer charges different tariffs for a weight of 10 kg, whether for a package or for documents. SFMI-Chronopost, like its competitor Federal Express International, chose not to differentiate between documents and packages. Consequently, the sum of FRF 140 is arbitrary and bears no relationship to the costs incurred by SFMI-Chronopost.

103 The defendant points out that the only change as from February 1987 was SFMI-Chronopost's status as a customs agent, the customs clearance procedure remaining that set out in the letter of 3 June 1986. Moreover, it states that the period from the beginning of 1987 to the end of 1991 was governed by agreements between each express courier company and the customs administration in accordance with the latter's administrative decision 86-88 of 13 May 1986 and that the applicants have not demonstrated that they were at a disadvantage in relation to SFMI-Chronopost.

104 The defendant adds that an office circular of La Poste of 16 January 1987 confirms that the normal rules apply to SFMI-Chronopost as regards the customs clearance of exports. Moreover, the defendant explains that, from 1986 to 1992, SFMI-Chronopost marketed products of the Universal Postal Union and that, for this reason, it was subject to the additional formalities constituted by documents C1, C2/CP3 prescribed by that Postal Union. With regard to destination countries, the defendant states that forms C1 and C2/CP3 have no impact on

national customs clearance procedures, which are under the exclusive jurisdiction of the countries concerned and can therefore not be attributed to France.

— Findings of the Court

105 The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State (Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* [1993] ECR I-887, paragraph 19, Case C-189/91 *Kirsammer-Hack* v *Sidal* [1993] ECR I-6185, paragraph 16, and Joined Cases C-52/97 to C-54/97 *Viscido and Others* v *Ente Poste Italiane* [1998] ECR I-2629, paragraph 13).

106 The expression 'aid' also implies advantages constituting an additional charge for the State or for bodies designated or established for that purpose (*Ecotrade* judgment, paragraphs 35 and 43).

107 Moreover, it has already been pointed out that the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 44, *SFEI*, paragraph 58, and *Banco Exterior de España*, paragraph 13).

108 The mere fact of accepting that SFMI-Chronopost can advertise on Radio France cannot be considered State aid since such access entails no transfer of State

resources, nor an additional charge for the State or for bodies designated or established by the State for that purpose, nor a mitigation of the charges normally included in the budget of SFMI-Chronopost, as the latter paid the market price for its advertising.

109 Consequently, SFMI-Chronopost's ability to advertise on Radio France does not constitute State aid, even supposing that the granting of air time infringed the regulations governing Radio France.

110 As regards the customs clearance procedure for dispatches of SFMI-Chronopost, it must be noted that, even supposing that the dispatches of SFMI-Chronopost were cleared more easily, this simplified treatment would not imply any transfer of State resources or an additional charge for the State. Indeed, the applicants have not even attempted to show the extent to which the alleged simplified treatment entails a transfer of State resources or an additional charge for the State. As for the charges which would normally be included in the budget of SFMI-Chronopost in the absence of the logistical assistance provided by La Poste, it is not necessary to examine them, as the Court has already found that Article 1 of the contested decision must be annulled in so far as it states that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost does not constitute State aid to SFMI-Chronopost.

111 Nevertheless, the applicants also allege that the customs expenses, which would normally be paid by SFMI-Chronopost, were borne by La Poste during the period from April 1986 to January 1987. In this regard the French Government has admitted, and the Commission for its part has pointed out, that customs clearance operations were carried out by La Poste on behalf of SFMI-Chronopost. However, the Commission has explained, and was not contradicted by the applicants, that the customs expenses were repaid in full by SFMI-Chronopost. Enjoyment by SFMI-Chronopost of advantages owing to the fact that customs clearance formalities relating to its international activities were carried out by La Poste before 1987 may possibly involve logistical assistance, the remuneration of

which must be assessed by the Commission in the same manner as all other logistical assistance. Hence there is no need either to examine the complaint alleging that La Poste provided customs assistance before 1987, which merges with those examined in connection with the fourth plea.

112 It follows from the foregoing that the complaint regarding advertising on Radio France must be dismissed.

Stamp duty

— Arguments of the parties

113 The applicants observe that stamp duty of FRF 4 (previously a lower amount) applies 'to waybills and all other equivalent documents' relating to a transport contract. They maintain that SFMI-Chronopost enjoyed exemption from stamp duty on letters and postal packages not containing goods. By contrast, the other express courier companies had to pay such a duty on all their consignments, including letters and postal packages not containing goods.

114 They state that numerous tax disputes involving considerable sums charged to companies in the sector, with the exception of SFMI-Chronopost, show that the Commission is wrong in its assertion that the exemption from stamp duty relates to the dispatches (not containing goods) of all operators. In order to prove their claim, the applicants adduce minutes from the French Directorate of Tax Affairs relating to recovery procedures against the company DHL.

115 The defendant maintains that SFMI-Chronopost paid the stamp duty generally owed by all operators for dispatches containing goods (which excludes documents) in accordance with Articles 925 and 313 of the French General Tax Code. The defendant refers to a tax document concerning SFMI-Chronopost, noting that the exemption mentioned in that document for dispatches not containing goods is not specific to SFMI-Chronopost but relates to all operators in the sector. Moreover, the notice from the French Finance Ministry concerning the verification of the accounts of SFMI-Chronopost confirms that no refund was made since it attests that none of the stamp duty and similar duties paid by SFMI-Chronopost was repaid between 1st January 1985 and 31st December 1994.

116 The defendant then notes that the applicants confirm the legal position because they state that contracts for the carriage of dispatches not containing goods are exempt from stamp duty. Since the non-imposition of the said duty on such dispatches is consistent with the provisions of the General Tax Code, the applicants are complaining of the alleged incorrect application of those provisions to their dispatches. They are no longer objecting to the exemption allegedly granted to SFMI-Chronopost but challenging the illegal taxation to which they had been subject.

117 In any case, it cannot be deduced from the possible illegal taxation of one operator that another operator which was correctly taxed received a State aid. Accordingly, no allocation of State resources occurred in the sense of a transfer of funds or a loss of profit, since the sole consequence of the tax authorities' alleged error in relation to DHL led to additional financial revenues for the State.

118 Chronopost points out that the scope of the duty provided for in Article 925 et seq. of the General Tax Code was limited generally by the administrative principle that only contracts for the carriage of goods are subject to stamp duty

on transport contracts. It asserts that it is therefore not SFMI-Chronopost which is exempted but transport contracts not relating to goods.

— Findings of the Court

119 According to the defendant and the interveners, SFMI-Chronopost did not benefit from a special exemption, because stamp duty is not applicable to transport contracts not relating to goods.

120 The applicants' assertions fail to prove the contrary. The applicants refer to the minutes of the Board of Directors of SFMI of 20 December 1988, which indicate that the improvement in SFMI's gross profit margin for 1988 was due, among other things, to 'the agreement obtained from the administration regarding exemption from stamp duty [...] on documents'. Moreover, they add that this agreement emerged in SFMI's statement of accounts for 1988, which made a provision for risks and liabilities entitled 'stamp duty on documents' amounting to FRF 12 385 374 with the note 'Following reply from the Ministry of Economic Affairs, Finance and the Budget dated 23 September 1988, SFMI is exempt from stamp duty on letters and postal packages not containing goods'. Finally, they state that the favourable treatment of SFMI-Chronopost was mentioned in a Parliamentary report of 1997 on La Poste, according to which La Poste is exempt from stamp duty on the conveyance of correspondence or other packages.

121 In this regard, it must be noted that the first two documents do not prove that there is no exemption from stamp duty for all transport contracts other than those relating to goods. These documents simply state that SFMI-Chronopost, at least, benefited from this exemption. As to the Parliamentary report, it is common ground that only La Poste is mentioned in this extract.

122 As regards the minutes of the Directorate of Tax Affairs regarding recovery procedures against the company DHL, it is sufficient to note, as does the Commission, that it cannot be deduced from the possible illegal taxation of one operator that another — correctly taxed — operator received a State aid. Moreover, it must be pointed out that DHL itself maintains, in its objection of 2 September 1997 against the recovery notice of 15 July 1997, that 'only contracts for the carriage of goods are subject to the stamp duty provided for under Article 925 et seq. of [the General Tax Code]'.

123 This argument must therefore be dismissed as unfounded.

124 In these circumstances, it is necessary to reject the third plea to the extent that it does not relate to complaints which merge with those that have been examined in connection with the fourth plea.

The requests for the production of documents

125 In the light of the foregoing, it is unnecessary to order the production of additional documents.

Costs

126 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other grounds, order costs to be shared or order each party to bear its own costs. As the action has been

only partially successful, the Court considers it fair in the circumstances of the case to order the applicants to bear 10% of their own costs and to order the Commission to bear its own costs and to pay 90% of the costs incurred by the applicants.

127 The French Republic, Chronopost and La Poste, which intervened in the proceedings, shall bear their own costs pursuant to the first and third subparagraphs of Article 87(4) of the Rules of Procedure.

On those grounds,

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

hereby:

1. **Annuls Article 1 of Commission Decision 98/365/EC of 1 October 1997 concerning alleged State aid granted by France to SFMI-Chronopost in so far as it finds that the logistical and commercial assistance provided by La Poste to its subsidiary SFMI-Chronopost does not constitute State aid to SFMI-Chronopost;**

2. Dismisses the remainder of the application;

3. Orders the applicants to bear 10% of their own costs;

4. Orders the Commission to bear its own costs and to pay 90% of the costs incurred by the applicants;

5. Orders the French Republic, Chronopost SA and La Poste to bear their own costs.

Tiili Lindh Moura Ramos

Cooke Mengozzi

Delivered in open court in Luxembourg on 14 December 2000.

H. Jung V. Tiili

Registrar President