

JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
18 September 1995 *

In Case T-49/93,

Société internationale de diffusion et d'édition (SIDE), a company governed by French law, having its registered office at Bagneux (France), represented by Jean-Marie Meffre, Claire Adenis-Lamarre and Nicole Coutrelis, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Michel Nolin and Ben Smulders, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: French.

French Republic, represented by Catherine de Salins, Deputy Director in the Legal Affairs Directorate in the Ministry of Foreign Affairs, and Jean-Marc Belorgey, Chargé de Mission in the same Ministry, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

intervener,

APPLICATION for the annulment of the Commission's decision of 18 May 1993 declaring certain aids (NN 127/92) granted by the French Government to exporters of French-language books compatible with the common market (OJ 1993 C 174, p. 6),

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

composed of: J. L. Cruz Vilaça, President, D. P. M. Barrington, A. Saggio, A. Kalogeropoulos and V. Tiili, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 25 April 1995,

gives the following

Judgment

Facts

- 1 The applicant in this case, the Société Internationale de Diffusion et d'Édition ('SIDE'), is an agency company established in France. Its activities consist in particular of exporting French books to other Member States of the European Union and to non-member countries. According to the applicant, exports of French-language books represent around 50% of its turnover and 96.75% of its book exports go to non-French-speaking areas.

- 2 CELF (Coopérative d'Exportation du Livre Français, acting under the business name 'Centre d'Exportation du Livre Français') is a limited cooperative society whose object, according to the most recent version of its statutes, is 'the direct handling of orders from abroad or the overseas territories and departments for books, brochures and all communications media, and more generally to carry out any transactions for the purpose, in particular, of furthering the promotion of French culture throughout the world by means of the abovementioned media'. According to the French authorities, CELF was set up in 1980 on the initiative of the Ministry of Culture and of the Syndicat National de l'Édition (National Publishing Association) 'with the task of satisfying the demands of small consumers wherever they may be and thereby encouraging the spreading of the French language'. Most of the 85 cooperative members of CELF are publishers established in France, although membership of the cooperative is open to all persons associated with the publication or distribution of French-language books, irrespective of their place of establishment.

- 3 Like SIDE, CELF is commercially active in distributing books, chiefly in countries and areas that are not French-speaking, since in French-speaking areas, particularly Belgium, Canada and Switzerland, that task is performed by the distribution networks set up by publishers.

- 4 In this action, SIDE is asking this Court to annul the Commission's decision which, applying the derogation provided for in Article 92(3)(c) of the EC Treaty, declared that certain aids granted by the French Ministry of Culture towards exports of French books are compatible with the common market; those aids are for the benefit of CELF exclusively or else are distributed by it.

Aims and features of the grants at issue

- 5 The grants concerned by the contested decision are, first, the aid granted solely to CELF to support a public service activity consisting of handling small orders placed by foreign booksellers and, secondly, three aid schemes administered by CELF on behalf of the State, providing subsidies for air freight or airmail going to the overseas departments and territories or to distant foreign countries (FF 4.2 million a year, FF 2 million of which is for the overseas departments), the 'Page à page' programme, which enables readers in Central and Eastern Europe to be offered French-language works at half-price (FF 5.2 million over three years from 1990 to 1993) and the 'Plus' programme, designed to provide half-price text-books for university students in sub-saharan Africa in the first stage of their courses (FF 4 million a year).
- 6 As regards those last three aid schemes, only the 'Plus' programme is still administered by CELF, jointly with the Ministry of Cooperation. The 'Page à page' programme covered three years only, from 1990 to 1993. The aid for air transport for consignments of books was administered by CELF until 1993 and its management has now been entrusted to another body.
- 7 The operating subsidy granted to CELF is intended to offset the extra cost involved in handling small orders from booksellers established abroad. It enables CELF to supply a demand which publishers or their associated distributors do not consider

it profitable to satisfy, given the increased transport costs and the total value of the order involved. Consequently, the grant of that subsidy helps to spread the French language and to propagate French-language literature.

- 8 According to the explanations supplied to the Court by the French Government, other possible ways of achieving the objectives pursued by means of the subsidy granted to CELF, such as granting aid direct to the many bookshops concerned or to the publishers and distributors who would undertake to fill such small orders, were thought to be too costly and likely to create problems of supervision. The solution adopted was the one which, according to the French authorities, appeared to be the most rational in economic terms, the safest in terms of the use of public money and the least disruptive for distribution channels. It consists of administering the scheme at the export agent level by offsetting the extra expense involved in handling booksellers' small orders through provision of a specific subsidy from the Ministry of Culture.

- 9 Among the various operators involved in the distribution of books, agents, who deal only with retailers or organizations but not with the final consumer, enable orders which publishers or their distributors do not find remunerative to be satisfied. The agent collects orders, each inconsiderable in itself, from different customers and approaches the publisher or distributor, who thus needs deliver to only one place. If the customers are booksellers or institutions which wish to place orders for works from different publishers, the agent makes up the respective packages and thus spares his customers the need to place multiple orders with many different suppliers. On account of the fixed costs for handling each order, an agent's involvement makes it possible to make savings at both the distributor level and the customer level, which makes it economically worthwhile.

- 10 According to the French Government, the support mechanism works in the following way. Booksellers who need small quantities of works published by

different publishers place their orders with CELF, which then acts as export agent. The subsidy is specifically designed to make it possible to meet orders to the value of less than FF 500, excluding costs of carriage, which are considered to be below the break-even point. Such small orders represented 27% of orders in 1992, that is more than 9 000, although they made up only 3% of CELF's total turnover. One quarter of the amount of subsidy granted during the previous year is disbursed at the beginning of the year, the balance being granted in autumn, after the public authorities have examined CELF's operational estimates and the fluctuations in the first part of the financial year. Within three months of the end of the financial year, an account showing how the subsidy has been used must be forwarded to the Ministry of Culture and French Language.

- 11 The French Government first told the Commission and the Court that the operating aid granted to CELF reached FF 2.4 million in 1991, 2.7 million in 1992 and 2.5 million in 1993. At the hearing, it further explained that the aid actually used in 1992 came to only FF 1.7 million, notwithstanding that FF 2.7 million had been advanced to CELF by the State for that purpose at the beginning of the year. The unused balance is not, apparently, repaid by CELF but set off against the sums to be granted in subsequent years.

The complaint and the procedure before the Commission

- 12 By letter of 20 March 1992 the applicant's legal adviser drew the Commission's attention to the aids for promoting, transporting and marketing French books which he claimed the French Ministry of Culture was granting to CELF. In that letter, he asked the Commission whether the aids in question had been notified, in accordance with Article 93(3) of the EC Treaty.

- 13 By letter of 2 April 1992, the Commission asked the French Government for information on the measures from which CELF benefited. After recalling the obligations imposed on the Member States by Article 93(3) of the Treaty, the Commission set a time-limit of fifteen working days within which the French Government was to send it a proper answer, failing which the Commission would initiate the procedure provided for in Article 93(2). According to that letter, although a book 'is an exceptional product in competition terms, the Commission cannot immediately rule out the possibility that such aids may distort competition and affect trade within the meaning of Article 92(1) of the Treaty'.
- 14 On 7 April 1992 the Commission gave SIDE's adviser the answer that the aids in question did not appear to have been notified. It informed him, moreover, that although a book 'is an exceptional product in competition terms, the Commission has requested the French authorities to send it the necessary information for it to assess the compatibility of the aids with the common market' and it undertook to let him know the outcome of its enquiries.
- 15 By letter of 29 June 1992 the French authorities sent the Commission information concerning CELF's statutes, the circumstances surrounding its formation and its activities, and also the objectives and terms of the subsidies granted or awarded to it by the French State.
- 16 On 7 August 1992, the Commission department concerned gave the adviser written confirmation that the aids in question had not been notified. The same letter communicated the gist of the information received from the French authorities and stated that *prima facie* 'the aids in question do not seem to be such as to affect trading conditions within the Community to an extent contrary to the public interest'. However, before proposing to the Commission that it should adopt a formal decision in that matter, it requested the applicant to send it any further information which the latter considered relevant, particularly with regard to the effect of the aids on intra-Community trade, SIDE's competitive position and the possibility for it to receive the subsidies distributed through CELF.

- 17 By letter of 7 September 1992, SIDE's legal adviser answered the questions put to him by the Commission department, drawing its attention to the fact that the aid 'for spreading French language and literature' granted to CELF affected intra-Community trade directly, since a quarter of the cooperative's turnover came from exports to Italy and Spain. In his letter, the applicant's adviser also pointed out that SIDE, like the other two book export agents in France — Hexalivre and Amateur du Livre International — was in competition with CELF for small orders from foreign booksellers. He drew the conclusion that his client was unable to meet CELF's competition on certain markets (Spain and Italy, in particular) and that that situation led to a reduction in the supply of books from France and to the maintenance of high prices for books from other Member States. Those high prices, he claimed, were caused by the need for CELF's competitors to spend a great deal of money in order to maintain their place on the French book market. He also pointed out that his client could not receive aid equivalent to that awarded to CELF and enclosed with his letter copies of the correspondence between SIDE and the Ministry of Culture on that issue.
- 18 By letter of 23 February 1993, the Commission department asked the French authorities to answer three further questions so that they could determine whether the aids at issue were compatible with the common market. They wished to have it clearly explained whether CELF was open to all publishers in France, whether publishers of French-language books established in another Member State could also join CELF and also receive the aids in question, and whether the measures to compensate the extra cost of handling small orders were limited to works of some cultural value or were applicable to any kind of book.
- 19 The French authorities replied by fax on 19 April 1993 to those questions. They explained that CELF was a cooperative open to all French-language publishers, wherever they were established, so that those established in other Member States could also receive its grants. As regards the aid to compensate the extra cost of handling small orders, the French authorities stated that it was granted purely on

the basis of the extra expense involved, without any appraisal of the cultural value of the books or other items for which the aid was granted.

- 20 On 18 May 1993, the Commission adopted a decision authorizing the aids in question, notice of which was published in the *Official Journal of the European Communities* of 25 June 1993 under the title 'Aid to exporters of French books', number NN 127/92 (OJ C 174, p. 6).
- 21 By letter of 27 May 1993, the Commission informed SIDE's adviser that it had taken a decision on the compatibility with the common market of the aids for the export of books granted by the French authorities through CELF. It enclosed a copy of the letter sent to the French Government on that subject.
- 22 By letter of 10 June 1993, the Commission informed the French Government that, taking account 'of the special situation of competition in the book sector and of the cultural aim of the aid schemes involved, the Commission has decided to apply the derogation provided for in Article 92(3)(c) of the Treaty'. The Commission expressed regret, however, that the French Government had not fulfilled its obligation to give prior notification of those aids in accordance with Article 93(3) of the Treaty.

Procedure

- 23 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 2 August 1993, SIDE brought an action under the second subparagraph of Article 173 of the EEC Treaty for annulment of the decision of the Commission of 18 May 1993 concerning the State aids in question (NN 127/92).

- 24 By letter registered at the Registry on 10 January 1994, the French Republic asked the Court for leave to intervene in these proceedings in support of the defendant. The President of the Second Chamber of the Court granted leave by order of 7 February 1994.
- 25 The written procedure followed the normal course, the rejoinder having been lodged by the Commission at the Registry of the Court of First Instance on 8 March 1994. The French Government's statement in intervention was registered at the Registry on 15 April 1994. The written procedure ended when the applicant lodged its observations on the statement in intervention on 24 June 1994.
- 26 By decision of the Court of 2 June 1994, the Judge-Rapporteur was assigned to the First Chamber (Extended Composition), to which the case was accordingly assigned. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, it asked the parties to answer certain questions and produce certain documents.
- 27 The oral arguments of the parties were heard and their replies to the Court's questions given at the hearing which took place on 25 April 1995.

Forms of order sought by the parties

- 28 The applicant claims that the Court should:

— annul the Commission's decision of 18 May 1993 by which it authorized aid NN 127/92;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the application as inadmissible in part and unfounded;

— order the applicant to pay the costs.

30 The intervener requests the Court to dismiss the action brought by SIDE.

Admissibility

31 Although it has not raised a formal plea of inadmissibility, the Commission questions the admissibility of the applicant's action as regards the aid of which CELF is not the only recipient and which does not directly affect intra-Community trade, namely aid for airmail, aid relating to Central and Eastern Europe and aid for sales of university textbooks in sub-saharan Africa. While acknowledging that the applicant is justified in believing that its situation is affected by the grant of those aids and it may, on that ground, consider itself directly and individually concerned, the Commission nevertheless points out that SIDE, in its reply to the request for further information sent on 7 August 1992, merely criticized the annual subsidy granted to CELF to compensate the extra cost of handling small orders, recognizing that the other aids in question seem to concern extra-Community trade alone.

- 32 SIDE considers itself directly and individually concerned by the contested decision because it was the source of the complaint which set in motion the Commission's review of the aids in question and because it carries on the business of exporting French books and for that reason is concerned by the authorization of aids described by the Commission as 'aid to exporters of French books'. In its opinion, therefore, it satisfies the conditions for admissibility laid down by the Court of Justice in its judgment in Case 169/84 *Cofaz and Others v Commission* [1986] ECR 391.
- 33 In its reply, the applicant also points out that its complaint referred to all the aids which CELF receives and that it was not at that time in a position to identify them exactly, while suffering from their consequences, particularly on account of the distortions of competition they cause on the export market. The fact that its answer of 7 September 1992 related only to the direct effect of the aids on intra-Community trade was justified by the actual wording of the questions put to it by the Commission in its request for further information.

Findings of the Court

- 34 First, the Commission's plea that the application is partly inadmissible is limited in its scope and does not call into question the fact that the contested decision is of direct and individual concern to the applicant within the meaning of Article 173 of the Treaty. The defendant institution does not dispute SIDE's arguments that it satisfies the conditions for admissibility set out by the Court of Justice in its judgment in the *Cofaz v Commission* case, cited above, which are applicable where an undertaking wishes to challenge a decision taken by the Commission under Article 92 or Article 93 of the Treaty. The issue raised by this plea is whether the applicant is entitled to challenge the contested decision in its entirety if it did not claim at the pre-litigation stage that the three aid schemes administered by CELF were capable of affecting its competitive position or intra-Community trade.

- 35 It should be borne in mind that the complaint sent by the applicant's legal adviser to the Commission on 20 March 1992 referred to a number of aids of various kinds received by CELF, including aids for promotion, transport and marketing. It must therefore be accepted that, as the applicant maintains, its complaint related to all the aids received by CELF.
- 36 It must also be accepted that the explanation given by the applicant for its lack of information, at the pre-litigation stage, about the three aid schemes and their effect on conditions of competition appears convincing. The information supplied by the French Government and reproduced in the letter of 7 August 1992 addressed by the Commission to the applicant demonstrated that those three schemes subsidized exclusively certain ways of exporting books to non-member countries. On the basis of those facts, it was natural that in its reply concerning the effect on intra-Community trade the applicant should concentrate on the more general aid granted to CELF with a view to supporting its activity aimed at spreading the French language and French literature.
- 37 Finally, it should be noted that the decision adopted by the Commission, as a result of the further information provided by the French authorities, covers not only the aid granted directly to CELF but also the three aid schemes administered by the cooperative and applies the same derogation to them, namely that provided for by Article 92(3)(c).
- 38 In the light of the foregoing considerations, the Court considers that the Commission's submission that the applicant may not be allowed to challenge all the aids covered by the decision is unfounded. The Commission's plea must therefore be dismissed and the application held to be admissible in its entirety.

Substance

- 39 The applicant puts forward three pleas in support of its claims. The first alleges breach of the requirement to state reasons, laid down in Article 190 of the EC Treaty. The second, alleging breach of Article 92(3)(c) of the Treaty, is in two parts: (i) the Commission erred in law in considering that, because the disputed aids have a cultural objective, the conditions for application of the derogation provided for in Article 92(3)(c) were satisfied; and (ii) it manifestly erred in assessing competition in the sector concerned. The third plea, which also falls into two parts, is that the Commission (i) infringed rules of procedure in that before adopting the decision it ought to have initiated the procedure provided for in Article 93(2), and (ii) infringed Article 93(3) and Article 155 of the EC Treaty in that it failed to fulfil its obligations by not requiring the French Government to suspend payment of, and order recovery of, aids which had not been notified in draft form.
- 40 The Court considers that it is appropriate to begin its examination with the first part of the applicant's third plea, alleging a substantial procedural defect entailing the illegality of the contested decision.

First part of the third plea: breach of rules of procedure

Arguments of the parties

- 41 The first part of the plea is that the Commission acted in breach of Article 93(3) of the Treaty by declaring the aids in question to be compatible with the common market without initiating the procedure provided for in the second subparagraph

of the same article. The applicant considers that competition in the field of book exports was a matter calling for complex analysis and that because the Commission did not undertake the abovementioned procedure it could not claim that its decision was based on the special nature of competition in the book sector.

- 42 In particular, the applicant considers that, having regard to the information which it had supplied to the Commission and which disclosed highly significant evidence that Articles 85 and 86 of the EC Treaty had been infringed, the defendant ought not to have been satisfied with 'a few very superficial answers from the French Government'. On that point, SIDE refers to paragraphs 41 to 45 of the judgment in Case C-225/91 *Matra v Commission* [1993] ECR I-3203, in which the Court of Justice stated that, in adopting a decision regarding the compatibility of a State aid with the common market, the Commission is required to ensure that the procedure provided for in Articles 92 and 93 does not produce a result which is contrary to other provisions of the Treaty and, in particular, to ensure that the recipient of the aid is not in a position where it contravenes Articles 85 and 86 of the Treaty. According to the applicant, the failure to undertake a serious review thus led the Commission to believe that it was authorizing a scheme of aid to exporters of French books, whereas in fact the aid was going to a single enterprise, CELF, which is one agent among others. SIDE claims that, by granting to CELF alone the subsidy for offsetting the extra cost of handling small orders, in the management of the three specific aid schemes, the French Government was encouraging a restrictive arrangement between the publisher members of that cooperative the effect of which was to prevent booksellers from freely choosing their channels of supply, in breach of Article 85 of the Treaty. The applicant here refers to Commission Decision 82/123/EEC of 25 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/428 — VBBB/VBVB, OJ 1982 L 54, p. 36), upheld by the judgment of the Court of Justice in Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19. The grant of the aids in question also strengthened the dominant position which, according to the applicant, CELF holds on the book export agency market. Those aids make it possible for CELF to charge prices which the other export agents cannot match and which might therefore lead to the elimination of independent competitors on that market and thus to an abuse of CELF's dominant position.

- 43 Furthermore, the applicant states that the correspondence between the Commission and the French authorities shows that the preliminary examination was not sufficient to dispel all doubts about the compatibility with the common market of the aid granted to CELF, a fact considered significant by the Court in its judgment in Case 84/82 *Germany v Commission* [1984] ECR 1451. In addition, it complains that the Commission did not ask it to comment on the further information supplied by the French authorities on 19 April 1993, particularly as the Commission itself attached great importance to it. The applicant considers that the answers given by the French Government are wrong and that the questions put by the Commission are not relevant to an analysis of the compatibility of aid which is designed to support book exports and not their publication. It points out that, although CELF is made up of publishers, it operates on the market as an exporter and is therefore in direct competition with SIDE and the other independent exporters.
- 44 The applicant further argues that initiation of the procedure provided for in Article 93(3) of the Treaty would have given the Commission the chance to study in greater depth the relations between CELF and the public authorities (which, in its view, lack transparency) and, if appropriate, to apply Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relationships between the Member States and public undertakings (OJ 1980 L 195, p. 35). It observes that the various documents relating to CELF, lodged at the registry of the Tribunal de Commerce (Commercial Court), Paris, reveal that in 1980 and 1981 the French authorities took part in the financial rescue of CELF and in an increase of its share capital.
- 45 The applicant accordingly maintains that the Court's case-law (judgments in *Germany v Commission*, cited above, Case C-198/91 *William Cook plc v Commission* [1993] ECR I-2487 and *Matra v Commission*, cited above) placed the Commission under an obligation to initiate the *inter partes* procedure provided for by Article 93(2) of the Treaty, in order to put all the persons concerned in a position to submit their observations and to be fully informed of all the facts of the case before adopting its decision.

- 46 For its part, the Commission considers that it was not obliged to initiate the procedure provided for by Article 93(2), since it entertained no doubts as to the compatibility of the aids with the common market.
- 47 As regards the alleged breaches of Articles 85 and 86 of the Treaty, the Commission observes first of all that these issues were not raised during the administrative procedure prior to authorization of the aids. The plea cannot therefore be admissible, in that the complaint and the application are not consistent with each other. At the hearing, the Commission added that in its opinion this case raises an important matter of principle, regarding the conditions to be satisfied by complaints of State aid made by competitors of the undertakings which receive such aid. On that point, the defendant institution considers that it is for the complainants to supply it with sufficiently accurate, specific and detailed information, supported by evidence, concerning their allegations and the actual effect of the aids which they claim are detrimental to them, otherwise they cannot expect the Commission to undertake a thorough inquiry or to give a decision on complaints of which it has not been informed.
- 48 In any event, the Commission considers that the decision and the judgment concerning the 'VBVB-VBBB' agreement, cited by the applicant, are not relevant to this case. The exclusive dealing and resale price maintenance systems set up by that agreement involved an appreciable restriction of competition in the common market whereas, in the present proceedings, the applicant has not shown how CELF's activities are liable to restrict competition appreciably and to affect trade in French-language books. The Commission considers, on the contrary, that the situation in this case is comparable to that in which a negative clearance in favour of Société Anonyme de Fabricants de Conserves Alimentaires (Safco) (decision of the Commission 72/23/EEC of 16 December 1971 on a procedure under Article 85 of the EEC Treaty (IV/23514 — Safco, Journal Officiel 1972 L 13, p. 44)) was issued. In that decision, the Commission considered that for small producers on a local or purely national market to combine together can even strengthen competition because of new or increased exports.

- 49 The Commission also takes issue with the definition of the relevant market suggested by the applicant and does not accept that CELF is abusing a dominant position. Contrary to what SIDE claims, it considers that the export agency market cannot be considered to be a specific market, separate from the market in French book exports.
- 50 Furthermore, the Commission states that the fact that it asked further questions of the French authorities does not indicate that there were particular problems, but was in keeping with current, well-established practice.
- 51 It considers, moreover, that there was no need to examine more closely the relations between CELF and the public authorities in its decision or to apply Directive 80/723 of 25 June 1980 on the transparency of financial relationships between the Member States and public undertakings, referred to by the applicant.
- 52 The defendant institution points out that the only complaint made by the applicant during the administrative procedure concerned the discriminatory nature of the aid granted exclusively to CELF, inasmuch as it was not granted equally to all exporters of French-language books on the basis of objective and non-discriminatory criteria. The Commission maintains that that discrimination does not infringe other provisions of the EC Treaty, in particular Articles 48, 52, 59 or 95. It was satisfied that membership of CELF was open to all French-language publishers in the Community, which is an indication that the system established by the French authorities does not involve discrimination on the basis of the place of establishment of the publishers who can receive its aid.
- 53 In conclusion, the Commission considers that it has fulfilled its obligations regarding the examination of the compatibility of aid with the common market required by Articles 92 and 93 of the Treaty. First, it ascertained that the aid granted to CELF pursued a legitimate cultural objective, which was not, moreover, denied by the applicant, and that the aid was necessary to attain that objective. Then it

weighed the legitimate objective pursued against the effects of the aid on competition and trade. In that second analysis, it concluded that there was no appreciable restriction of competition or of intra-Community trade. It considered, consequently, that there was sufficient evidence available for it to apply to that aid the derogation set out in Article 92(3)(c) of the Treaty.

- 54 The French Government, intervening, refers to paragraphs 33 and 34 of the judgment in *Matra v Commission*, cited above, and concludes that the Commission was not required to initiate the procedure provided for in Article 93(2) of the Treaty. It considers that, as the Commission has stated, the preliminary examination did not reveal difficulties such as to warrant initiation of such a procedure, since the details which the French authorities were asked to supply were not exceptional in the context of that preliminary examination.
- 55 In any event, the French Government rejects the applicant's contention that the French authorities are lending their support to a restrictive arrangement operated by the publishers who are members of CELF. SIDE has not adduced sufficient evidence to establish the existence either of coordinated competitive behaviour or of the restriction of competition by those publishers, or of a breach of Article 86 of the Treaty by CELF. The French Government also rejects the argument that the applicant purports to derive from the role played by CELF in the administration of the three other aid schemes. The cooperative is confined to applying the criteria for awarding aids set by the public authorities and it has never had any discretion in awarding or refusing the aids in question.
- 56 It goes on to observe that the contributions made by the French authorities to CELF's capital are not at issue in this case, which concerns the aid scheme in support of French-language book exports. According to the French Government, the public authorities' sole contribution to CELF's capital came to FF 500 and cannot seriously be regarded as capable of constituting aid.

57 In answer to the applicant's arguments as to the discriminatory nature of its decision to grant the aid in question only to CELF, the French Government considers that Articles 92 and 93 of the Treaty do not prohibit the grant by Member States of individual aids and do not stop them exercising discretion in implementing an aid scheme. It notes, moreover, that that decision is justified by the aim of ensuring that public money for supporting small orders of French-language books placed by foreign booksellers is actually paid over. The French Government maintains that it does not exclude the possibility of granting SIDE aid similar to that received by CELF. It considers, however, that at present the applicant, unlike CELF, does not provide any assurance that it would use any such aid for the purposes of supporting the distribution of books written in the French language.

Findings of the Court

58 In paragraph 13 of its judgment in Case 84/82 *Germany v Commission*, cited above, the Court of Justice, called upon to rule on the legality of decisions authorizing State aids taken by the Commission at the end of the preliminary examination provided for by Article 93(3) of the Treaty, found as a matter of principle that the procedure under Article 93(2) which guarantees the other Member States and the sectors concerned an opportunity to make their views known and allows the Commission to be fully informed of all the facts of the case before taking its decision, is essential whenever the Commission has serious difficulties in determining whether a plan to grant aid is compatible with the common market. It follows that the Commission may restrict itself to the preliminary examination under Article 93(3) when taking a decision in favour of a plan to grant aid only if it is convinced after the preliminary examination that the plan 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 plan 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).

59 In paragraph 30 of its judgment in Case C-198/91 *William Cook plc v Commission*, cited above, the Court of Justice stated that 'it is for the Commission to determine, subject to review by the Court, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid warrant the initiation of that procedure'.

60 Consequently, it is necessary to consider the assessments on which the Commission based a favourable decision taken at the end of the preliminary examination stage, in order to determine whether, given the objections which have been raised about the alleged anticompetitive effects of the aids in question, they presented difficulties which would warrant initiation of the procedure provided for in Article 93(2). The Court must assess objectively whether any such difficulties existed, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aids with the common market.

61 The contested decision applies the derogation provided for in Article 92(3)(c) of the Treaty on the grounds that the aids in question have a the cultural objective and that competition in the book sector is special. With that reasoning in view, the Court must consider, first, whether the Commission was able to establish that the objective pursued by the French authorities was actually cultural and, secondly, whether it carried out an economic analysis of the sector concerned enabling it to conclude that the grant of the disputed aids does not affect conditions of competition and trade to an extent contrary to the public interest.

62 As regards the cultural purpose of the aids at issue, it is common ground that the aim of the French Government is the spread of the French language and French literature. In that connection, the Court finds also that the information available to the Commission when it adopted its decision, including the facts contained in the letter from the applicant's legal adviser of 7 September 1992, was capable of supporting its assessment that that aim was a real and proper one. Accordingly, the Court must conclude that determining the aim of the aids at issue did not pose any

particular difficulties for the Commission and that it was not necessary for it to obtain further information in order to accept that their purpose was cultural.

- 63 With regard to the assessment of the effects of the disputed aids on conditions of competition and intra-Community trade, the Court considers that the three aid schemes administered by CELF must be distinguished from the subsidy granted to CELF alone in order to compensate the extra cost involved in handling small orders.
- 64 It is apparent from the documents before the Court that, for the purposes of the examination of the compatibility of the three aid schemes with the common market, the Commission had obtained from the French authorities sufficient information to justify its determination that the effect of those schemes on competition and trade between Member States was negligible. It should be borne in mind that none of the three schemes concerned exports of books to other Member States and that any person satisfying the specific conditions drawn up for those schemes could apply to CELF for subsidies.
- 65 During the written procedure, the applicant submitted that the fact that CELF supervised the distribution of those aids reinforced its dominant position on the relevant market, particularly since CELF's competitors were constrained to reveal to it their business secrets in order to obtain subsidies and because the whole system for granting the aids in question lacked transparency. The Court finds, however, that that argument is invalidated by a number of undisputed facts. First, it appears that the applicant, by agreement with CELF, was able to find a solution allowing it to receive airmail aid as well, without being required to give CELF information which it regarded as sensitive. Secondly, since 1993 two of those aid schemes, and in particular air freight aid which the applicant wished to obtain, have no longer been administered by CELF. Thirdly, the French Government has shown that CELF had no margin of discretion in distributing the subsidies provided for by those schemes. Finally, the applicant has adduced no evidence to prove that the

granting of aid under those three aid schemes is liable to affect trade between Member States, nor has it explained how the aid adversely affects it, which would tend to support the favourable decision taken in that regard by the Commission.

- 66 In the light of the foregoing considerations, it must be held that the Commission was able to adopt a favourable decision in respect of the aid schemes administered by CELF and the applicant's arguments challenging the contested decision as regards the compatibility of those three aid schemes with the common market must be dismissed as unfounded.
- 67 As to the aid granted exclusively to CELF, the applicant has put forward a number of arguments to the effect that the Commission ought to have undertaken a thorough examination of competition in the sector in question before coming to a decision on the compatibility of that aid with the common market. It points out in particular the fact that the Commission did not have sufficient information about certain essential facts, such as the characteristics of the relevant market, the exact amounts of the subsidy in question and the network of relations linking CELF and its members to the French public authorities. The Court accordingly considered it appropriate to put to the parties, in particular the defendant institution, written questions designed to establish the truth of the factual circumstances on which its assessments were based.
- 68 The Court finds that the replies given by the Commission to those questions do not dispel the doubts which were raised by the applicant and that in several respects they demonstrate that the information on which the contested decision was based was inadequate. The Commission stated that it did not possess the figures concerning the percentage of French-language works which are published outside France and which receive the aid granted to CELF, or those concerning the total volume of French-language publications on offer in French-speaking countries other than France. Nor did it have available the figures for the relative shares of exports of French-language books effected by export agents on the one hand and

publishers or their distribution subsidiaries on the other. The Commission was also unable to provide the Court with figures on exports to French-speaking countries and areas and exports to non-French-speaking countries and areas. As regards the extent of the aid and the percentage of subsidized sales in relation to total exports of French books, the Commission's replies are based solely on the figures supplied in the French Government's statement in intervention. As to the reasoning which led it to exclude the possibility that the grant of the aid could result in infringement of Articles 85 and 86 of the Treaty, the information given by the Commission also refers in the main to the statements of the intervener, according to which CELF's share is only 2.25% of the total turnover in exports of books from France.

- 69 The Commission's answers show the serious difficulties involved in assessing competition in the field of book exports. There are, however, other factors which would lead the Court to conclude that the Commission was unable to overcome those difficulties which still existed at the end of the proceedings before the Court.
- 70 First of all, the Commission admitted, during the oral procedure, that it did not possess exact data enabling it to define the relevant market. The Commission claims that it is for the applicant to establish that a specific sub-market exists for agency exports and submits that it is required to conduct a thorough investigation of market conditions only where it is supplied with detailed information at the administrative procedure stage.
- 71 While recognizing the extent and difficulty of the task which the Treaty imposes on the Commission in the matter of reviewing State aids, the Court none the less considers that neither of those two arguments can be accepted in a case such as this. On the Commission's argument, competitors of undertakings which are receiving

unnotified State aid must provide it with information to which, in most cases, they have no access and which they can obtain only through the Commission itself from the Member States granting the aid. Furthermore, when the Commission decides to examine a complaint without doubting that a sufficient Community interest exists, and the complaint raises serious doubts about the compatibility of the aid with the common market, it would not appear to be excessive or unreasonable to take the view that it must begin an inquiry, with an exchange of views *inter partes*, so that it is aware of the essential aspects of the matter before it takes a decision.

72 Even though the applicant did not expressly raise the question of possible infringements of Articles 85 and 86 of the Treaty until these court proceedings were under way, the Commission must nevertheless be in a position to examine whether or not the recipient of the aid is in contravention of those provisions of the Treaty. It follows from the case-law of the Court of Justice (see the judgment in Case C-225/91 *Matra v Commission*, cited above, paragraph 42) that the requirement that the Commission should maintain consistency between Articles 92 and 93 and other provisions of the Treaty is all the more necessary where the other provisions also have as their aim, as in this case, undistorted competition in the common market. In the present case, the Commission has not succeeded in showing that it was in a position to arrive at the firm view, based on an economic analysis of the situation, and without any manifest error in the assessment of the facts, that the recipient of the aid was not in contravention of Articles 85 and 86 of the Treaty (see paragraph 45 of the judgment in *Matra v Commission*, cited above).

73 Furthermore, the Commission's argument that the complaint addressed to it by the applicant and the action it brought before the Court are inconsistent with one another in this regard cannot be accepted. In the present case, the Commission did not initiate an *inter partes* procedure before adopting its decision. Consequently, it did not allow the applicant 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 French Government. In those circumstances, the Court considers that the Commission cannot

require the applicant to maintain strict consistency between the pleas put forward during the administrative procedure and those set out in the application, as the case-law on staff appeals would require (see, *inter alia*, the judgments of the Court of First Instance in Case T-58/91 *Booss and Fischer v Commission* [1993] ECR II-147, Case T-4/92 *Vardakas v Commission* [1993] ECR II-357 and Joined Cases T-6/92 and 52/92 *Reinarz v Commission* [1993] ECR II-1047).

74 Finally, by ascribing undue importance to the question whether all French-language publishers, whatever their place of establishment, could join CELF, the Commission demonstrated again that the information available to it was insufficient. The aid granted to CELF is intended to subsidize that cooperative's exports and can therefore benefit publishers only indirectly. Consequently, merely finding that there was no discrimination *sensu strictu* against publishers not established in France was not sufficient to exclude the possibility that the grant of the aid might restrict competition on the export market. First, it is apparent from the evidence before the Court that all publishers of French-language books may, as suppliers, benefit indirectly from the aid when works published by them are ordered from CELF, the status of member not giving publishers any specific advantage with regard to use of the aid. Secondly, it is apparent that sales of books not published in France amount to no more than 4% of CELF's total turnover and that, although membership of the cooperative is open to non-French publishers, only one Belgian publisher has become a member, through a subsidiary established in France.

75 It follows that in circumstances such as those of this case, in which the Commission, in authorizing the aid in question, relied on the purportedly special nature of competition in the book sector, the Commission should have obtained more information about the state of competition and not have relied solely on the information provided to it during the preliminary examination provided for by Article 93(3) of the Treaty. As the Court of Justice held in Case C-198/91 *William Cook plc v Commission*, cited above, 'it should have initiated the procedure under Article 93(2) of the Treaty in order to ascertain, after obtaining all the requisite opinions, whether its assessment — which gave rise to serious difficulties — was correct' (paragraph 38).

- 76 Since the Commission failed to comply with its obligation to initiate the *inter partes* procedure provided for by Article 93(2), the first part of the applicant's third plea must be upheld and the decision must be annulled, in so far as it concerns the aid granted exclusively to CELF for the purpose of offsetting the extra cost involved in handling small orders of French-language books placed by booksellers established abroad.
- 77 The Court must also consider the second part of the plea, since the applicant maintains that the Commission was also obliged to require the French Government to stop paying the aid forthwith and to recover the sums granted in breach of the obligation, laid down in Article 93(3) of the Treaty, to notify aid.

Second part of the third plea: infringement of Article 93(3) and Article 155 of the Treaty

Arguments of the parties

- 78 The applicant claims that the Commission infringed Article 93(3) and Article 155 of the Treaty by failing to order the French Government to suspend the aid and by failing to require it to demand repayment. According to SIDE, it follows from the Commission's Communication of 24 November 1983 (OJ 1983 C 318, p. 3) that aid granted by a Member State without having been notified in the form of a plan is illegal, since the Treaty provides for no exception to the requirement that the Commission should be informed. In order to perform the task which it has under Article 155, the Commission should therefore, in accordance with the 'Boussac' authority (judgment of the Court of Justice in Case C-301/87 *France v Commission* [1990] ECR I-307), have ordered the French Government to suspend payment of the aid pending the outcome of the examination of the aid and to recover the aids illegally granted. By merely regretting the infringement of Article 93(3) by the Member State in question, the Commission deprived that provision of its practical

effect and failed to fulfil its own obligations. Again according to the applicant, the judicial authorities relied on by the Commission in its defence, which recognize the power of national courts to order repayment of aid granted illegally, do not release the Commission from its obligations in this regard.

79 The Commission does not share the applicant's opinion with regard to the obligation to take a decision in the form of an order directed at the French Government. It considers that the 'Boussac' authority does not automatically require it to order the Member State concerned to suspend payment of unnotified aid. The Commission can issue a direction only after giving the Member State concerned an opportunity to submit its views on the compatibility of the aid with the common market, and if that State does not supply all the information necessary for it to be able to assess that compatibility.

80 As regards the question of repayment of the aid, the Commission states that it requires repayment only in the case of aids which are illegal, because not notified, and which are also incompatible with the common market, which is not the position in this case. The Commission points out that in any case the applicant could have sought to secure recovery of the contested aid in the national court by relying on the judgment of the Court of Justice in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires et Syndicat National des Négociants et Transformateurs de Saumon* [1991] ECR I-5505 ('the *Salmon Processors* case') without thereby limiting its right of action under Article 173 of the Treaty.

81 On the basis of the judgments of the Court of Justice in Case C-301/87 *France v Commission*, cited above, and Case C-142/87 *Belgium v Commission* [1990] ECR I-959, the French Government likewise maintains that the power to order

suspension of payment of unnotified aids is, for the Commission, only an optional power which it does not have to use systematically against Member States which have failed to notify aid. Moreover, that power should be exercised only where, after the Member State in question has been given an opportunity to submit its comments, the Commission considers the aid to be essentially incompatible with the common market.

- 82 As regards the question of repayment of the aids, the French Government points out that 'the Court did not find that the Commission had the power to declare aid illegal solely on the ground that the obligation to notify had not been complied with and without having to investigate whether the aid was compatible with the common market' (see the judgment in the *Salmon Processors* case, paragraph 13). The French Government concludes from that Court finding that failure to notify is not enough to oblige the Commission to demand repayment of the aid in question, particularly since in this case the Commission regarded the aid as compatible with the common market.

Findings of the Court

- 83 According to the case-law of the Court of Justice, the direct effect of the prohibition on implementation of aids, referred to in the last sentence of Article 93(3), extends to all aid implemented without being notified and, in the case of notified aid, operates during the preliminary phase and, if the Commission sets in motion the procedure for exchange of views, stays in operation until the final decision (see the judgment in Case 120/73 *Lorenz v Germany* [1973] ECR 1471, point 8, and the judgment in the *Salmon Processors* case, paragraph 11). However, as the Commission and the intervener point out, that case-law does not mean that the Commission is required automatically to order the Member State concerned to suspend payment of aid which has not been notified in accordance with that article. The Court of Justice has held that, where the Commission finds 'that aid has been granted or altered without notification, (it) therefore has the power, after giving the Member State in question the opportunity to submit its comments on the matter, to issue an interim decision requiring it to suspend immediately the payment of such aid pending the outcome of the examination of the aid and to provide the Commission, within such period as it may specify, with all such documentation,

information and data as are necessary in order that it may examine the compatibility of the aid with the common market' (judgment in Case C-301/87 *France v Commission*, cited above, paragraph 19). According to the Court of Justice, therefore, the Commission has the power to adopt such a conservatory measure when it embarks on examination of aid which has not been notified, but the Court by no means imposes an obligation in the form suggested by the applicant.

- 84 Furthermore, although in paragraph 22 of the judgment in Case C-301/87 *France v Commission*, cited above, the Court of Justice also held that the Commission has the power to require amounts of aid already paid to be recovered, it has not held that the Commission has the power to declare aid illegal solely on the ground that the obligation to notify it was not observed by the Member State concerned, and without investigating whether the aid in question is compatible with the common market, in particular with regard to Article 92(3) (see the judgments in Case C-301/87 *France v Commission*, Case C-142/87 *Belgium v Commission* and in the *Salmon Processors* case, cited above). In the light of that body of case-law, it must be concluded that the Commission was not obliged to require the aid amounts already paid to be recovered, even though the aid had been granted by the French Government in breach of the obligation laid down in Article 93(3) of the Treaty.
- 85 That conclusion is confirmed by the judgment in the *Salmon Processors* case, cited above, in which the Court explained that 'the principal and exclusive role conferred on the Commission by Articles 92 and 93 (...) is fundamentally different from the role of national courts. (...) Whilst the Commission must examine the compatibility of the (...) aid with the common market, even where the Member State has acted in breach of the prohibition on giving effect to aid, national courts 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 the prohibition laid down by the last sentence of Article 93(3) of the Treaty' (paragraph 14 of the judgment cited above). The Court stated further that 'the Commission's final decision does not have the effect of regularizing *ex post facto* the implementing measures which were invalid because they had been taken in breach of the prohibition laid down by the last sentence of Article 93(3) of the Treaty, since otherwise the direct effect of that

prohibition would be impaired and the interests of individuals, which, as stated above, are to be protected by the national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance by the Member State concerned of the last sentence of Article 93(3) and would deprive that provision of its effectiveness' (paragraph 16).

86 It follows that, contrary to the applicant's line of argument, where the Commission does not exercise its power to require unnotified aid to be returned, the last sentence of Article 93(3) of the Treaty is not thereby deprived of its effectiveness. Since the Court of Justice has recognized that that provision has direct effect, individuals may turn to national courts for protection of their rights. Furthermore, as was stated in the judgment in the *Salmon Processors* case, even when the Commission's final decision declares the aid to be compatible with the common market, national courts may be called on to declare invalid the implementing measures adopted by the State authorities contrary to the abovementioned provision of the Treaty.

87 In those circumstances, the second part of the applicant's third plea in law must be dismissed. Since the Court has already upheld the first part of the plea and annulled the Commission's decision for breach of procedural rules, it is no longer necessary to consider the other pleas put forward by the applicant in support of its action.

Costs

88 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. However, the third subparagraph of that article provides that the Court

may order costs to be shared if each party succeeds on some and fails on other heads. Since the Commission has been unsuccessful in all essential respects, it must be ordered to pay two thirds of the applicant's costs, in addition to its own costs. The applicant is ordered to pay one third of its own costs.

89 In accordance with Article 87(4) of the Rules of Procedure, the intervener must be ordered to bear its own costs.

On those grounds,

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

hereby:

1. **Annuls the Commission's decision of 18 May 1993 declaring certain aids (NN 127/92) granted by the French Government to exporters of French-language books to be compatible with the common market, in so far as it concerns the subsidy granted exclusively to CELF to offset the extra cost involved in handling small orders for French-language books placed by booksellers established abroad;**
2. **Dismisses the rest of the application;**
3. **Orders the Commission to pay two thirds of the applicant's costs in addition to its own costs;**

4. Orders the applicant to pay one third of its own costs;

5. The French Republic, which has intervened in the proceedings, is to bear its own costs.

Cruz Vilaça

Barrington

Saggio

Kalogeropoulos

Tiili

Delivered in open court in Luxembourg on 18 September 1995.

H. Jung

J. L. Cruz Vilaça

Registrar

President