

## COMMISSION DECISION

of 14 December 2010

**concerning State aid C 39/96 (ex NN 127/92) implemented by France in favour of Coopérative d'exportation du livre français (CELF)**

(notified under document C(2010) 8938)

(Only the French text is authentic)

(Text with EEA relevance)

(2011/179/EU)

THE EUROPEAN COMMISSION,

## A. First stage

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof <sup>(1)</sup>,

- (4) By letter dated 20 March 1992, Société internationale de diffusion et d'édition (SIDE) drew the Commission's attention to aid measures for promotion, transport and marketing granted by the French authorities to CELF, aid which had not been notified to the Commission's services in advance.

Having called on interested parties to submit their comments in accordance with the above Article <sup>(2)</sup>, and having regard to those comments,

- (5) By letter dated 2 April 1992, the Commission, having pointed out to the French authorities that any plans to grant or alter aid had to be notified to its services in advance, asked the said authorities to inform it as to the nature and purpose of the aid measures referred to by SIDE.

Whereas:

## 1. PROCEDURE

- (1) By judgment of 15 April 2008 <sup>(3)</sup> (hereinafter 'the judgment of the Court of First Instance'), the Court of First Instance of the European Union annulled Commission Decision 2005/262/EC of 20 April 2004 on the aid implemented by France in favour of the Coopérative d'exportation du livre français (CELF) <sup>(4)</sup> <sup>(5)</sup>.

- (6) By letter dated 29 June 1992, the French authorities confirmed to the Commission the existence of grants to CELF. They explained that these measures were designed to make French language and literature known in non-French-speaking countries and that CELF had also been asked to manage three schemes of ad hoc aid which were also designed to facilitate access to French books by readers in far-distant places.

- (2) Following the judgment of the Court of First Instance, the Commission must adopt a new decision.

- (7) By letter dated 7 August 1992, the Commission confirmed to SIDE the existence of aid to CELF, explained its purpose and informed the company that the measures at issue had not been notified. It stated, however, that the disputed aid did not seem likely to adversely affect trade between Member States. SIDE was accordingly asked to submit its comments.

- (3) This judgment is the culmination of a procedure the principal stages of which are set out below.

- (8) By letter dated 7 September 1992, SIDE informed the Commission that it intended to submit a complaint with regard to the discriminatory nature of the measures and the consequences for intra-Community trade, without however disputing the cultural purpose of the Ministry of Culture, which was to see the spread of the French language and French literature.

<sup>(1)</sup> As of 1 December 2009, Articles 86, 87 and 88 of the EC Treaty became, respectively, Articles 106, 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). In these three cases, the provisions are, in essence, the same. For the purposes of this Decision, references made to Articles 106, 107 and 108 of the TFEU are to be understood, as appropriate, as referring respectively to Articles 86, 87 and 88 of the EC Treaty.

<sup>(2)</sup> OJ C 366, 5.12.1996, p. 7; OJ C 142, 23.6.2009, p. 6.

<sup>(3)</sup> Case T-348/04 *Société internationale de diffusion et d'édition (SIDE) v Commission* [2008] ECR II-625.

<sup>(4)</sup> OJ L 85, 2.4.2005, p. 27.

<sup>(5)</sup> Coopérative d'exportation du livre français acts under the trading name of 'Centre d'exportation du livre français' (CELF).

(9) By Decision dated 18 May 1993 <sup>(1)</sup>, the Commission concluded that, given the special nature of competition in the book trade and the cultural purpose of the aid schemes at issue, the exemption provided for in former Article 92(3)(c) of the Treaty was applicable to them.

(10) By application dated 2 August 1993, SIDE filed an action for annulment of the Decision. By judgment of 18 September 1995 <sup>(2)</sup>, the Court of First Instance (CFI) partially granted SIDE's request, annulling the Commission Decision of 18 May 1993 but only in relation to the measures granted to CELF with regard to small orders.

(11) The Court concluded that the Commission was in a position to adopt a favourable decision concerning the following three aid schemes administered by CELF on behalf of the State:

(a) subsidies for airfreight or airmail;

(b) the 'Page à Page' programme <sup>(3)</sup> (aid for the dissemination of French-language books in the countries of central and eastern Europe);

(c) the 'Programme Plus' (university textbooks in French for students in sub-Saharan Africa).

(12) The Court held that the Commission had obtained sufficient information on these three schemes to justify the finding that their impact on competition was negligible. The Court stated that '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'. The Court felt bound to conclude that determining the cultural purpose of the aid 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 its purpose was cultural.

(13) On the other hand, the Court found that, as regards the compensation granted exclusively to CELF for small

orders, the Commission should have thoroughly examined the conditions of competition in the sector concerned before expressing an opinion on the compatibility of the measures with the internal market.

(14) The Court therefore concluded (paragraph 76 of the judgment) that the Commission should have initiated the procedure provided by former Article 93(2) EC (now Article 108(2) TFEU), and it was therefore necessary to annul the Commission Decision of 18 May 1993 in so far as it concerned the aid granted exclusively to CELF for the purpose of offsetting the extra costs involved in handling small orders for French-language books placed by booksellers established abroad.

### B. Second stage

(15) In accordance with the Court's judgment of 18 September 1995, the Commission decided, by Decision of 30 July 1996, to open a formal investigation procedure. Interested parties were invited to submit their comments to the Commission, and these were largely received during December 1996 and January 1997.

(16) Once its investigation was complete, on 10 June 1998 the Commission adopted Decision 1999/133/EC <sup>(4)</sup>. It confirmed the cultural purpose of aid for small orders and considered that, on the basis of former Article 87(3)(d) of the Treaty, the said aid was not likely to affect trading conditions and competition in the Union to an extent that was contrary to the common interest with regard to the export market for French-language books.

(17) By a judgment dated 28 February 2002 <sup>(5)</sup>, the Court of First Instance annulled the last sentence of Article 1 of the said Decision. The Court concluded that the Commission should have carried out the necessary verifications in order to obtain relevant data enabling it to distinguish the agency market from that of the export of French-language books in general.

(18) The Court found that, by failing to carry out such verification, the Commission had committed a manifest error of assessment in taking the export market for French-language books in general as the reference market when it was established that the contested aid was intended only for export agencies.

<sup>(1)</sup> Decision NN 127/92 'Aid to exporters of French books' (OJ C 174, 25.6.1993, p. 6).

<sup>(2)</sup> Case T-49/93 *Société internationale de diffusion et d'édition (SIDE) v Commission* [1995] ECR II-2501.

<sup>(3)</sup> Which subsequently became the 'A l'Est de l'Europe' programme.

<sup>(4)</sup> OJ L 44, 18.2.1999, p. 37.

<sup>(5)</sup> Case T-155/98 *Société internationale de diffusion et d'édition (SIDE) v Commission* [2002] ECR II-1179.

- (19) However, in its judgment of 22 June 2000 <sup>(1)</sup>, the Court of Justice rejected the appeal brought by the French authorities against the Commission Decision of 10 June 1998, without going into the substance of the case, and confirmed that, even if the aid could be considered compatible with the common market, this was irrelevant to the obligation to notify and that the obligation to give prior notification meant that the aid had to be suspended.

### C. Third stage

- (20) Following the partial annulment of the Decision of 10 June 1998, the Commission asked the French authorities and SIDE, by letters dated 14 June 2002, to give their views on the grounds for the annulment of the Decision and, in particular, on the aspects relating to the relevant market.
- (21) The French authorities were asked to comment in particular on the special features of the CELF offer compared with those of other market operators, including SIDE. SIDE was asked to comment in particular on the notion of small orders and to indicate any special feature its offer might have compared with CELFs and those of the other market operators.
- (22) SIDE sent its reply to the Commission by letter dated 12 August 2002. The French authorities sent their reply by letter dated 17 September 2002.
- (23) Having asked SIDE, by letter dated 19 September 2002, to say whether its reply contained confidential information, and having obtained a negative reply on 30 September 2002, the Commission, by letter dated 17 October 2002, sent SIDE's reply together with its annexes to the French authorities for comment. It also asked them a series of further questions on this occasion.
- (24) By letter dated 30 October 2002, the Commission also asked SIDE some further questions, to which the company replied by letters dated 31 October 2002 and 9 December 2002. Following the Commission's request of 16 December 2002, SIDE informed it, by letter dated 23 December 2002, that its replies contained no confidential information and could be sent to the French authorities for comment.
- (25) Since the French authorities did not reply within the time limit, the Commission was obliged to send them a

reminder by letter dated 27 November 2002. By letter dated 19 December 2002, the French authorities sent a further request for an extension to the Commission.

- (26) On 9 January 2003, the Commission sent SIDE's reply of 23 December 2002 to the French authorities for comment. By letter dated 17 January 2003, the French authorities replied to the Commission's questions sent on 17 October 2002.
- (27) By letter dated 4 February 2003, the French authorities asked the Commission for a further extension in relation to the request for comments on SIDE's second reply, dated 23 December 2002. By letter dated 11 February 2003, the Commission granted the requested extensions in part. By letter dated 11 March 2003, the French authorities sent their reply to the Commission.
- (28) In the meantime, SIDE was received by the Commission's services at its request and was able to explain its view of the case from the beginning, at a meeting held on 4 March 2003.
- (29) At the end of this procedure, the Commission adopted Decision 2005/262/EC, concluding that the disputed aid was compatible on the basis of former Article 87(3)(d) of the Treaty, having established that the aid did not overcompensate for the costs of processing small orders.

### D. Fourth stage

- (30) By its judgment of 15 April 2008, the Court of First Instance annulled the Commission Decision of 20 April 2004.
- (31) It concluded that, with regard to the part of the aid paid to CELF prior to 1 November 1993, the date of entry into force of the Treaty on European Union, the Commission had committed an error of law by considering that the aid at issue was compatible with the common market by virtue of former Article 87(3)(d) when the substantive law in force prior to 1 November 1993 should have been applied. In particular, the Court took into account the fact that the EU Treaty did not include any transitional provisions for the application of former Article 87(3)(d) and that the principle of legal certainty, barring exceptions, precluded a Community measure from taking effect from a point in time before its publication.

<sup>(1)</sup> Case C-332/98 *France v Commission, Aid for the Coopérative d'exportation du livre français* [2000] ECR I-4833.

(32) Moreover, the Court concluded that the Commission had committed a manifest error of assessment when examining the compatibility of the disputed aid by over-estimating the small order processing costs that were actually borne by CELF. In its Decision of 20 April 2004, the Commission did not take account of the actual costs of processing small orders but estimated these costs on the basis of the total costs borne by CELF (allocating a share of the total costs to the processing of small orders, using a different method of apportioning costs for each cost category). Multiplying factors were applied for certain categories of cost, bearing in mind the additional difficulties small order processing would entail in relation to CELF's other activities. The Court, however, considered that these difficulties would have been resolved through the use of tele-transmission, which related to two thirds of small orders. The Court therefore concluded that the Commission had made an error of judgment by applying multiplying factors to some costs (and, in any case, to the tele-transmitted orders) and concluded that, in the absence of the said multiplying factors, the costs related to small order processing would have been reduced and the trading results for the activity relating to small orders would have been positive (FRF 600 000, or EUR 91 469). According to the Court, the Commission had therefore not demonstrated the absence of overcompensation.

#### E. Fifth Phase

(33) Following the Court's judgment of 15 April 2008, the investigation procedure initiated by the Commission Decision of 30 July 1996 therefore remains open and the Commission has to adopt a new decision.

(34) Having regard to the grounds for the Court's judgment of 15 April 2008, and in view of the fact that the decision initiating the procedure dates back to 30 July 1996, the Commission wished to invite the French authorities and the parties concerned to submit their comments again.

(35) The Commission therefore adopted a decision extending the procedure dated 8 April 2009 <sup>(1)</sup> (Decision C(2009) 2481, the 'decision extending the procedure'). By setting a new time limit for the submission of comments, this decision extending the procedure supplemented the decision initiating the procedure on 30 July 1996. It states that the two decisions should be regarded as forming an inseparable whole, that they will give rise to one and the same formal investigation procedure and that, should the description of facts and law or the Commission's preliminary assessment in the decision extending the procedure diverge from the decision

initiating the procedure on 30 July 1996, it would be appropriate to take into consideration only the decision extending the procedure.

(36) The Commission invited interested parties to submit their comments on the measure at issue.

(37) The Commission received comments from the French authorities on 9 June 2009 and from SIDE on 23 July 2009. It sent SIDE's comments to the French authorities on 24 August 2009, giving them the opportunity to comment on them, and received their comments on 24 September 2009.

(38) The French authorities did not, however, provide the detailed elements that were requested by the Commission in its decision extending the procedure and, in relation to the proportionality of the aid, merely referred back to information already provided on 17 September 2002, 17 January 2003 and 11 March 2003, which the Commission could not use as such due to the judgment of the Court of First Instance of 15 April 2008.

(39) By letter of 8 October 2009, the Commission's services therefore reminded the French authorities of their request for information on the specific points mentioned, indicating that if this information were not provided within ten working days, the Commission would have to take a final decision on the basis of the information at its disposal, in accordance with Article 13(1) of the procedural Regulation, after delivering, if appropriate, an information injunction in accordance with Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty <sup>(2)</sup>.

(40) By letter dated 21 October 2009, the French authorities informed the Commission that CELF had been put into receivership by judgment of the Paris Commercial Court dated 9 September 2009 and had ceased trading. Moreover, with regard to the elements requested in the Commission's letter of 8 October 2009, the French authorities indicated that they had no further information to provide and referred back to their comments sent on 9 June 2009.

(41) By decision dated 20 November 2009 (Decision C(2009) 9256, the 'injunction decision'), the Commission therefore decided to order France to present the information requested since, despite repeated requests, this information had not been provided.

<sup>(1)</sup> OJ C 142, 23.6.2009, p. 6.

<sup>(2)</sup> OJ L 83, 27.3.1999, p. 1.



(42) By letter dated 2 December 2009, the French authorities indicated that they had no further information to give the Commission and referred back to their comments sent on 9 June 2009.

(43) It should be noted that, on 2 December 2009, the French authorities also sent a letter relating to the aid scheme known as the 'University and Scientific Books Programme' also called 'Programme Plus'. This aid scheme does not form the object of this Decision.

(44) By letter dated 22 December 2009, the Commission asked the French authorities for information on CELF's situation and applicable liquidation procedure. The French authorities replied on 27 January 2010. Clarifications were also provided on 9 March 2010 and 26 November 2010.

#### **F. Proceedings before the national courts and preliminary questions**

(45) It should, moreover, be noted that proceedings are under way in France before the national courts, and that they have given rise to referrals to the Court of Justice on the basis of Article 267 TFEU (former Article 234 EC). The main stages in these proceedings are briefly outlined below.

(46) SIDE referred the matter of the direct effect of former Article 88(3) EC to the French courts. By judgment of 5 October 2004, confirming a judgment of the Paris Administrative Court of 26 April 2001, the Paris Administrative Court of Appeal ordered the French State to recover the aid paid to CELF.

(47) After appealing to the Council of State, by judgment of 29 March 2006 this body confirmed certain aspects of the decision of the Administrative Court of Appeal, particularly the fact that the disputed aid was not of a purely compensatory nature for public service obligations<sup>(1)</sup>, that it could not be described as existing aid by the national judge and that CELF could not claim a legitimate expectation.

(48) Nevertheless, in its judgment of 29 March 2006, the Council of State also decided to stay proceedings on the appeal until the Court of Justice had issued its judgment on the preliminary questions it had raised

with it regarding the national judiciary's obligations in relation to State aid that had not been notified but was subsequently declared compatible with the common market by a decision of the Commission.

(49) In its judgment of 12 February 2008<sup>(2)</sup>, the Court of Justice ruled:

'The last sentence of Article 88(3) EC is to be interpreted as meaning that the national court is not bound to order the recovery of aid implemented contrary to that provision, where the Commission has adopted a final decision declaring that aid to be compatible with the common market, within the meaning of Article 87 EC. Applying Community law, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness. Within the framework of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it, subsequently. It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid.

In a procedural situation such as that in the main proceedings, the obligation, arising from the last sentence of Article 88(3) EC, to remedy the consequences of the aid's unlawfulness extends also, for the purposes of calculating the sums to be paid by the recipient, and save for exceptional circumstances, to the period between a decision of the Commission of the European Communities declaring the aid to be compatible with the common market and the annulment of that decision by the Community court.'

(50) After considering the judgment of the Court of Justice of 12 February 2008, along with the previously mentioned judgment of the Court of First Instance of 15 April 2008, in its judgment of 19 December 2008, the Council of State annulled Articles 2, 3 and 4 of the above-stated judgment of 5 October 2004 of the Paris Administrative Court of Appeal and ruled as follows.

(51) Firstly, the Minister for Culture and Communication was ordered to recover the interest relating to the State aid paid to CELF since 1980 and up to the date of the Council of State judgment, calculated in accordance with Commission Regulation (EC) No 794/2004<sup>(3)</sup>. The Minister was then ordered to take the necessary steps to collect the interest due between the date of the Council of State's judgment and either the date when the compatibility of the aid with the common market was definitively noted or the date when the aid was finally returned.

<sup>(1)</sup> According to the Council of State, the Administrative Court of Appeal was able to legally ground its ruling on the fact that it was not established that the amount of aid did not exceed the costs resulting from the public service obligations imposed on CELF, and on the fact that no prior and transparent definition of the basis of the compensation had been given.

<sup>(2)</sup> Case C-199/06 *Centre d'exportation du livre français (CELF), Ministry of Culture and Communication v Société internationale de diffusion et d'édition (SIDE)* [2008] ECR I-469.

<sup>(3)</sup> OJ L 140, 30.4.2004, p. 1.

(52) In addition, the Council of State decided to stay proceedings until the Court of Justice had issued an opinion on the following preliminary questions:

‘1. May the national court stay proceedings concerning the obligation to recover State aid until the Commission of the European Communities has ruled, by way of a final decision, on the compatibility of the aid with the rules of the common market, where a first decision of the Commission declaring that aid to be compatible has been annulled by the Community judicature?’

2. Where the Commission has on three occasions declared the aid to be compatible with the common market, before those decisions were annulled by the Court of First Instance of the European Communities, is such a situation capable of being an exceptional circumstance which may lead the national court to limit the obligation to recover the aid?’

(53) On 11 March 2010 <sup>(1)</sup>, the Court of Justice deferred judgment on the said preliminary questions and ruled:

‘1. A national court before which an application has been brought, on the basis of Article 88(3) EC, for repayment of unlawful State aid may not stay the adoption of its decision on that application until the Commission of the European Communities has ruled on the compatibility of the aid with the common market following the annulment of a previous positive decision;

2. The adoption by the Commission of the European Communities of three successive decisions declaring aid to be compatible with the common market, which were subsequently annulled by the Community judicature, is not, in itself, capable of constituting an exceptional circumstance such as to justify a limitation of the recipient’s obligation to repay that aid, in the case where that aid was implemented contrary to Article 88(3) EC.’

## 2. DESCRIPTION OF THE DISPUTED MEASURE

(54) The French authorities informed the Commission that, in 1980, the Ministry of Culture had decided, in line with the French Government’s general policy guidelines on promoting French-language books and French literature, to grant aid to export agents accepting any kind of order, irrespective of its amount and profitability. These

measures were presumably introduced to alleviate the effects of market failure and to foster the continuation of activity relating to ‘small non-profitable orders’ in the export agency market.

(55) According to the French authorities, small bookshops, established in essentially non-French-speaking areas, sometimes with difficult access and/or remote, were experiencing serious supply difficulties, since their orders could not be met by the traditional distribution channels when the quantities of books ordered were insufficient or when the unit price of the books ordered was not high enough to make the service profitable.

(56) According to the French authorities, the aid at issue was therefore designed to allow export agencies to meet all orders from booksellers established abroad in essentially non-French-speaking areas, irrespective of amount, profitability or destination. The aim was to ensure, as part of France’s policy of supporting cultural diversity, the optimum distribution of books in the French language, thus promoting the dissemination of French literature throughout the world.

(57) The aid mechanism chosen by the French authorities, the Small Orders Programme, consisted of a grant intended to offset the extra costs of handling small orders, defined by the French authorities as being orders of FRF 500 (approximately EUR 76) or less.

(58) According to the French authorities, the company receiving the grants had to promise to provide the Ministry of Culture’s Book Directorate with all information concerning the general activity of the firm (overall turnover, financial accounts, provisional budgets, copies of the proceedings validating these figures, the auditor’s report where appropriate, and a summary salary scale), along with any documents relating to the activity to be subsidised, including in particular the grant utilisation account, substantiating that the services giving rise to the grant awarded the previous year had been carried out.

(59) In practice, only one firm, CELF, had qualified under the Small Orders Programme. According to the French authorities, the company had to justify the extra costs incurred each year by the small orders service in relation to its application for a grant for the following year. Specifically, one quarter of the grant awarded the previous year was paid at the start of the year, the balance being awarded in the autumn, after the authorities had examined the provisional budget of the recipient firm and the flows recorded in the first part of the financial year. It was agreed that if the amount of aid was not fully utilised, the balance would be deducted from the planned grants for the following year. In addition, the Ministry of Culture attended CELF’s board meetings and general meetings as an invited observer.

<sup>(1)</sup> Judgment of 11 March 2010 in Case C-1/09 *CELF, Ministry of Culture v SIDE*, not yet reported.

(60) After steadily declining from 1997 onwards, the aid at issue was abolished in 2002. Every year from 1980 to the end of 2001, CELF therefore received aid to reduce, according to the French authorities, the costs of processing small orders from abroad for books in French. In all, from 1980 until the end of 2001, CELF received approximately EUR 4,8 million by way of the aid at issue.

Table

**Amounts of aid allocated to CELF since 1980 for processing 'small orders'**

Information supplied by the French authorities

(amounts given in euro)

Year	Amount of aid	Year	Amount of aid
1980	91 469,41	1992	422 283,78
1981	91 469,41	1993	382 647,03
1982	205 806,17	1994	304 898,03
1983	164 644,94	1995	304 898,03
1984	137 204,12	1996	304 898,03
1985	141 777,59	1997	243 918,43
1986	248 491,90	1998	182 938,82
1987	214 953,11	1999	121 959,21
1988	213 428,62	2000	60 979,61
1989	259 163,33	2001	38 112,25
1990	304 898,03	2002	0
1991	373 500,09		

**3. COMMENTS FROM FRANCE AND OBSERVATIONS FROM SIDE FOLLOWING THE EXTENSION OF THE PROCEDURE**

(61) In their reply of 9 June 2009 to the decision extending the procedure, the French authorities made the following comments in particular.

(62) They first stated that they shared the Commission's analysis that the aid to CELF represented State aid and that the exemptions laid down in Article 107(2) and Article 107(3)(a) and (b) TFEU were not applicable.

(63) In terms of assessing the aid under Article 107(3)(c) and (d) TFEU, the French authorities did not provide any new information with regard to the proportionality of the aid.

(64) The French authorities also stated that they considered that the tasks allocated to CELF formed a public service within the meaning of Article 106(2) TFEU.

(65) The French authorities finally, and above all, pleaded the existence of exceptional circumstances that should lead the Commission not to recover the aid.

(66) As previously indicated, the French authorities did not therefore provide the detailed elements that were requested by the Commission in its decision extending the procedure, and merely referred back, with regard to the proportionality of the aid, to information already provided in 2002 and 2003, which the Commission could not use as such due to the Court judgment of 15 April 2008. After a reminder letter dated 8 October 2009, the Commission therefore decided, on 20 November 2009, to order the French authorities to submit the requested information, in application of Article 10(3) of Regulation (EC) No 659/1999. By letter dated 2 December 2009, the French authorities replied that they had no further information to give to the Commission.

(67) In its comments of 23 July 2009, SIDE made the following observations in particular.

(68) SIDE recalled that only CELF had benefited from the aid when, in its opinion, this activity was not specific to CELF since the act of honouring orders of all sizes, however small, coming from geographically dispersed bookshops, in order to group them together and issue larger orders to publishers, was specifically, in SIDE's opinion, the definition of the activity of an export agent. SIDE also stated that it was not due to an alleged lack of transparency that it had been refused the aid but because it was a private company and not a publishing cooperative.

(69) Moreover, SIDE contested in detail the fact that the aid was necessary. In this context, it considered, in particular, that the notion of 'small orders' was arbitrary and rejected the figures presented by the French authorities.

(70) In addition, SIDE considered that the aid could not be justified on the basis of Article 106(2) TFEU and based its opinion particularly on national rulings with regard to CELF's activity.

(71) Finally, SIDE indicated that it considered that, in this particular case, there were no exceptional circumstances that would enable the obligation to recover the aid to be limited.

**4. ASSESSMENT OF THE AID**

(72) It must be established whether the measure at issue constitutes State aid and whether it can, if appropriate, be considered compatible with the internal market. In the context of its assessment, the Commission must, in particular, take note of the judgment of the Court of First Instance of 15 April 2008.

### A. Assessment of the measure pursuant to Article 107(1) TFEU

- (73) Article 107(1) TFEU provides that 'Save as otherwise provided by the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (74) By way of introduction, as already stated in the decision extending the procedure, the Commission recalls that the Commission's conclusion that the measure at issue constitutes State aid within the meaning of the Treaty has never been challenged, either at the different stages of the procedure before the Commission or before the courts of the European Union <sup>(1)</sup>, nor even, moreover, before the national courts <sup>(2)</sup>. Thus in their reply of 9 June 2009 to the decision extending the procedure, the French authorities indicated that they shared the Commission's analysis that the aid to CELF was State aid.
- (75) The Commission considers that the measure in question constitutes State aid within the meaning of Article 107(1) TFEU (former Article 87(1) EC), for the following reasons.
- (76) Firstly, the measure gives CELF an advantage, since it enables it to reduce the cost of its small orders. It is selective, given that in practice it has only benefited CELF.
- (77) Moreover, the measure is financed from the budgetary resources of the French State, i.e. from state resources. Its implementation was decided by the Ministry of Culture and the measure is therefore attributable to the French authorities.
- (78) Furthermore, the measure is likely to affect trade between Member States and distort competition. The aid is granted to French agents (in practice to CELF) who

export books in the French language principally to non-French-speaking countries. French agents are therefore competing, at least potentially, with other agents for the export of French-language books that may be established in other French-speaking countries of the EU (Belgium and Luxembourg). The fact that the impact on trade and the distortion of competition as a result of the measure seem to be small does not alter this conclusion. In line with the Court of Justice's established case law, the Commission is not required to determine the actual impact of aid on trade between Member States and the actual distortion of competition; it is sufficient that the aid is likely to have an impact on trade and distort competition.

- (79) Finally, the Commission considers that the conditions for application of the *Altmark* case law are not met. In its judgment of 24 July 2003 <sup>(3)</sup>, the Court of Justice specified the conditions under which a grant to a company responsible for managing services of general economic interest does not constitute State aid: 'First, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined; second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner; third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations; fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.'
- (80) In this particular case, and without it being necessary to consider each of the conditions individually since they are cumulative, the Commission notes that the choice of CELF was not made in the context of a public procurement procedure and that the level of compensation was not determined on the basis of an analysis of the costs incurred by a typical undertaking, well run and adequately provided with production resources.
- (81) In these circumstances, the aid granted to CELF constitutes State aid within the meaning of Article 107(1) TFEU, since all the constituent elements of the concept of State aid are present.

<sup>(1)</sup> In its judgment of 15 April 2008, the CFI did not annul the first and second sentences of Article 1 of the Commission Decision of 20 April 2004, according to which 'The aid to the Coopérative d'exportation du livre français (CELFL) for processing small orders of French-language books, implemented by France between 1980 and 2001, is aid that is caught by Article 87(1) [EC]. Since France failed to notify the aid to the Commission before implementing it, the aid was granted unlawfully.'

<sup>(2)</sup> For example, in its judgment of 19 December 2008, the Council of State considered that 'the way in which the sums paid to CELF are defined as State aid and the obligation to notify them as such cannot be separated'. In fact, in its interlocutory judgment of 29 March 2006, the Council of State had already, in particular, concluded that 'the Administrative Court of Appeal has neither misrepresented the file documents nor inaccurately defined the facts submitted to its appreciation by judging that the aid in question was not of a purely compensatory nature with regard to public service obligations and formed State aid subject to an obligation to notify the Commission in advance'.

<sup>(3)</sup> Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark* [2003] ECR I-7747.



(82) And yet the French authorities did not notify the Commission of the measure in question. The aid was therefore granted in violation of Article 108(3) TFEU, which stipulates that the Commission must be informed of projects aimed at instituting or amending aid in sufficient time to be able to submit its comments. The aid was therefore granted unlawfully.

(83) As the measure in question thus constitutes State aid, it is necessary to assess its compatibility with the internal market.

#### **B. Assessment of the measure pursuant to Article 107(2) and (3) TFEU**

(84) The Commission considers that the exemptions listed in Article 107(2) TFEU are not applicable in this case, since the measures in question were clearly not intended to achieve the objectives defined therein.

(85) Nor does the aid satisfy the conditions for the exemption established in Article 107(3)(a) TFEU, since it was not intended to promote the development of the areas that were eligible for this provision. The exemption provided for in Article 107(3)(b) concerning the promotion of the execution of an important project of common European interest cannot be applied in this case either, since the aid in question was not intended to promote this kind of project. Since the aid was also not intended to remedy a serious disturbance in the French economy, the exemption in the second part of Article 107(3)(b) is not applicable in the case in point.

(86) The Commission must therefore look into the applicability of Article 107(3)(c) and (d) TFEU (former Article 87(3)(c) and (d) EC).

(87) Given the judgment of the Court of First Instance of 15 April 2008, a distinction must be made between the aid granted after the entry into force of the Treaty on European Union (1 November 1993) and that granted before its entry into force, to which the substantive rules in effect during the period in question must be applied.

(88) To this end, the Commission takes note of the fact that the grant awarded the previous year was paid to CELF at the start of the year, the balance being awarded in the following autumn, after the authorities had examined the provisional budget of the recipient firm and the flows recorded in the first part of the financial year. If the amount of aid was not fully utilised, the balance would be deducted from the planned grants for the following year. The grant paid for 1993 was therefore paid partly at the start of 1993 and the balance allocated in autumn 1993. The decision to grant aid for 1993 was taken by the French authorities at the end of 1992 or at the start of 1993, and in any case before the entry into force of the Treaty on European Union. The Commission

therefore considers that the aid paid in 1993 should be assessed according to the legal rules applicable prior to the entry into force of the Treaty on European Union.

#### *(a) Assessment of the aid pursuant to Article 107(3)(d) TFEU*

(89) Article 107(3)(d) TFEU (former Article 87(3)(d) EC) states that 'Aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest may be considered to be compatible with the internal market'.

(90) It is therefore necessary to verify whether the aid paid to CELF between 1994 and the end of 2001 did indeed have a cultural purpose and whether it affected trading conditions and competition in the European Union to an extent that was contrary to the common interest or not.

#### *(i) Cultural purpose*

(91) Firstly, the Commission recalls that the cultural purpose of the aid paid to CELF was admitted by the Court of First Instance in the above-cited judgment of 18 September 1995. Thus in paragraph 62 of its judgment, the Court stated that '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.'

(92) The French authorities stated that the aid at issue had a cultural purpose consisting of encouraging the distribution of French-language books in non-French-speaking countries. It was thus a proactive policy aimed at safeguarding and encouraging cultural diversity at the international level.

(93) The preservation and promotion of cultural diversity are among the founding principles of the European model. They are set out in Article 167(1) TFEU (former Article 151(1) EC). 'The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore', and again in Article 167(4), which states that 'The Union shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures'.

- (94) The Commission considers, therefore, that the aid granted to CELF by the French authorities for marketing French-language works did indeed pursue a cultural purpose.
- (ii) The criterion of affecting trading conditions and competition in the Union to an extent that is contrary to the common interest
- (95) The Commission must verify whether the measures in question were really necessary and proportional in relation to the cultural policy objective pursued by the French authorities.
- (96) By way of introduction, it should be recalled that, in line with the above-cited judgment of the Court of First Instance of 28 February 2002, the measures at issue must be considered within the context of the export agency market for French-language books.
- (97) Firstly, the need for the aid must be questioned.
- (98) According to the French authorities, the measures were designed in 1980, by the Ministry of Culture, at a time when certain actors in the industry (Groupe Hachette and Messageries du livre) wanted to quit the export agency market. According to the French authorities, the disputed mechanism was introduced to encourage operators to become involved in the market, so that all orders for French-language books from bookshops in non French-speaking areas could be met. This ensured that French-language books could reach all bookshops, including the very smallest in far distant countries, even if they only needed a few books, and often, moreover, published by different publishers.
- (99) For its part, SIDE indicated that, particularly in the context of the comments it sent following the decision extending the procedure, the aid in question was not necessary. Whilst it is true that some actors had withdrawn from the export agency business in 1980, SIDE recalls that it was precisely at this time that it was itself created to intervene on the market. Moreover, SIDE contests the fact that CELF had the specific activity of processing small orders. In particular, SIDE questions the figures provided by the French authorities and considers that data for CELF and SIDE with regard to proportion, each company's respective turnover, number of invoices and number of order lines were, in fact, quite similar. More broadly, SIDE questions the notion of 'small orders' as defined by the French authorities. According to SIDE, this notion is arbitrary as the cost of processing an order does not depend on its amount but on the number of lines.
- (100) The Commission considers that there is no need to draw a definitive conclusion with regard to the need for the aid since the conditions of need and proportionality are cumulative and it will be concluded in recital (123) that the condition of proportionality is not shown to be fulfilled.
- (101) Secondly, the Commission considers that the impact on trade within the European Union and distortion of competition caused by the measure are very low, given in particular the amounts in question, the very low substitutability of books in the French language and those of another language, and the considerable gap existing between the volume of French-language books exported to non-French-speaking countries from France, on the one hand, and Belgium and Luxembourg, on the other.
- (102) More specifically, with regard to the export agency market for books in French, the Commission notes that, as part of their export agency activity, CELF and SIDE distribute books in non-French-speaking countries and territories. In French-speaking countries, the local market is covered by large publishers through their subsidiaries or representatives. The export agency has only a very marginal role, therefore, in the French-speaking markets, which are, however, the main outlets for books in French.
- (103) In the national export agency market for French-language books, there are general agents such as SIDE and CELF and, to a lesser extent, specialist agents who also sell, on a very small scale, directly to end users and who would therefore in some way be in competition with the two general agents, along with a certain number of bookshops servicing orders for foreign bookshops and online booksellers even on an occasional basis, whose activity was, however, relatively low at the time of the measures in question.
- (104) In the relevant market, the complainant was therefore the main operator affected by the disputed measures. On the one hand, the French authorities state that the Small Orders Programme was in principle accessible to any firm applying, provided it accepted the conditions on which the aid was granted. They state that the Ministry of Culture's rejection of SIDE in 1991 was justified by SIDE's refusal to submit to the required obligation of transparency in order to benefit from the said aid. On the other hand, SIDE indicated that the French authorities' rejection was linked to the fact that it was a private company and not a publishing cooperative. Moreover, in 1996, following the annulment of the Commission Decision of 18 May 1993, the Ministry of Culture, wishing to put an end to the proceedings, pointed out to SIDE that the aid scheme for small orders was not by nature reserved for CELF. By letter dated 3 September 1996, the Ministry offered the company a meeting to examine whether it was able to provide, under the same conditions of transparency, the same services as CELF. During a meeting on 26 September 1996, SIDE executives told the Ministry of Culture that they refused to benefit from a programme whose compatibility with Community law could be called into question by the Commission.

- (105) In any case, the elements mentioned above in recitals (103) *et seq.* seem to indicate that the impact on trading conditions and competition in the European Union on the part of the measures in question was relatively limited.
- (106) In order to establish if the measure is proportional, however, the Commission must also compare, thirdly, the amount of aid received with the costs borne by CELF in achieving the purpose pursued by the French authorities.
- (107) To this end, the different stages in the orders handling process must be recalled, and on which the different parties agree:
- (a) receipt of the bookseller's order form;
  - (b) encoding of the order;
  - (c) inputting of the order;
  - (d) dispatch of the order to the publisher;
  - (e) receipt of the books;
  - (f) allocation of space ('compartment') to each customer for storage of the books ordered;
  - (g) packaging.
- (108) According to the French authorities, CELF bore certain costs linked to the processing of 'small orders'. The French authorities consider that, within the export agency market, some orders generate extra costs such that the service cannot be profitable. The French authorities stated that they had taken the threshold of FRF 500 (EUR 76,22) as the definition of a 'small order' and that this threshold had been empirically determined. They explained that some orders of less than FRF 500 might be profitable, whereas others, above that amount, might not. The objective was to find an economically acceptable solution, so that CELF wanted to take on small orders even if they were not profitable enough.
- (109) As the Commission indicated in its decision extending the procedure, it is for the French authorities, in the context of analysing compatibility, to establish the amount and veracity of costs borne by CELF.
- (110) In this regard, in its decision extending the procedure, the Commission asked the French authorities to provide a certain number of elements in order to be able to
- draw conclusions from the judgment of the Court of First Instance and rule on the proportionality of the aid. The Commission asked, in particular, for the following information:
- sufficient justification of the reasons why the data relating to costs linked to small orders was not available for the different years in question and sufficient demonstration of the reasons why an extrapolation solely on the basis of 1994 was considered acceptable;
  - data enabling consideration of actual costs (and not mere estimates) for the processing of small orders in 1994 (at least for some cost categories) and possible sufficient justification of the reasons why an estimate of the costs on the basis of the total costs incurred by CELF was considered acceptable;
  - convincing methods for apportioning costs that would enable part of the total costs to be allocated to small order processing, and which could in particular be applied to each cost category during the whole period in question;
  - information on trends in the proportion of orders tele-transmitted over the years in question;
  - the costs related to small orders in the absence of unjustified multiplying factors;
  - calculations of the costs incurred by CELF for the processing of small orders without the application of multiplying factors, or with multiplying factors applied only in the case of orders which were not tele-transmitted;
  - the position of the French authorities on the calculation of the Court of First Instance by which, in the absence of the said multiplying factors, the costs linked to small order processing had been reduced by more than FRF 635 000 (EUR 96 805,13), even without taking into account cost categories other than those for which a multiplying factor of 'three' had been applied. It should be recalled that, according to the Court's calculation, the operating results from small order processing would consequently have been positive by more than FRF 600 000 (EUR 91 469,41);
  - the French authorities' position on the possibility of CELF obtaining a reasonable profit.

- (111) In particular, as already indicated in its decision extending the procedure, in the absence of additional explanations and updated data from the French authorities, the Commission is not in a position to use the grant utilisation statements for small order processing that the French authorities provided for the years 1994 to 2001 in their letter dated 17 January 2003, nor the explanations as to how the analytical compatibility analysis was conducted, provided in the letter dated 5 March 1998.
- (112) The French authorities did not, however, provide the detailed information that was requested by the Commission in its decision extending the procedure, and merely referred back, with regard to the proportionality of the aid, to elements already provided on 17 September 2002, 17 January 2003 and 11 March 2003, which the Commission could not use due to the judgment of the Court of First Instance of 15 April 2008.
- (113) By letter of 8 October 2009, the Commission's services therefore reminded the French authorities of their request for information on the specific points mentioned, indicating that if this information was not provided within a period of ten working days, the Commission would have to take a final decision on the basis of the information at its disposal, in accordance with Article 13(1) of Regulation (EC) No 659/1999, after issuing, if appropriate, an information injunction, in application of Article 10(3) of Regulation (EC) No 659/1999.
- (114) By letter dated 21 October 2009, the French authorities indicated that they had no further information to provide and referred back to their comments sent on 9 June 2009.
- (115) By a decision dated 20 November 2009 (the 'injunction decision'), the Commission therefore decided to order France to present the information requested since, despite repeated requests, this information had not been provided.
- (116) By letter dated 2 December 2009, the French authorities indicated that they had no further information to give the Commission and referred back to their comments sent on 9 June 2009.
- (117) Article 13 of Regulation (EC) No 659/1999 states that 'The examination of possible unlawful aid shall result in a decision ... If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.'
- (118) As previously indicated, the French authorities did not provide the Commission with the information that it had requested on several occasions and, most recently, in its injunction decision of 20 November 2009.
- (119) In accordance with Article 13 of the procedural Regulation, the Commission is therefore taking a decision on the basis of the available information, recalling, in any case, that it is for the French authorities to demonstrate the compatibility of the aid in question with the internal market, and thus the proportionality of this aid.
- (120) In the light of the judgment of the Court of First Instance of 15 April 2008 and the elements available to the Commission, it does not seem justified to extrapolate on the basis of estimated costs for processing small orders in 1994. Nor does it appear possible to use measures for apportioning costs that are not justified and to base one's argument on data to which unjustified multiplying factors have been applied, particularly to tele-transmitted orders. In the light of the costs calculation linked to the processing of small orders that appears in the Court judgment, and given that the French authorities have failed to provide the Commission with information that would enable it to clarify the doubts it raised in its decision extending the procedure, with regard to the proportionality of the aid, the loss-making nature of the activity of small order processing has not been established.
- (121) The Commission therefore considers that it has not been demonstrated that the aid paid during the period 1994-2001 was in line with the criterion of proportionality.
- (122) This aid is therefore not compatible on the basis of Article 107(3)(d) TFEU.
- (b) *Assessment of the aid pursuant to Article 107(3)(c) TFEU*
- (123) Article 107(3)(c) TFEU (former Article 87(3)(c) EC) states that 'Aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest may be considered to be compatible with the internal market'.
- (124) In accordance with the judgment of the Court of First Instance of 15 April 2008, the exemption stipulated in Article 107(3)(d) TFEU (former Article 87(3)(d) EC) cannot be applied to the aid that was paid to CELF over the period 1980 to 1993. It is therefore necessary to establish whether the exemption stipulated in Article 107(3)(c) TFEU (former Article 87(3)(c) EC) could be applicable.



- (125) Such consideration should also be given to the aid paid between 1994 and the end of 2001, for which the Commission concluded in recital (124) above that the exemption stipulated in Article 107(3)(d) TFEU (former Article 87(3)(d) EC) was not applicable.
- (126) In order to determine whether Article 107(3)(c) TFEU could serve as a basis for compatibility, the Commission must verify whether the aid in question did indeed have a common interest purpose and whether it affected trading relations to an extent that was contrary to the common interest.
- (127) The Commission considers that the aid was in pursuit of a common interest, as previously identified. It should, in this regard, be recalled that the introduction, in the Treaty on European Union, of the exemption stipulated in former Article 87(3)(d) EC (now Article 107(3)(d) TFEU) confirmed the policy followed by the Commission on the basis of former Article 92(3)(c) prior to the entry into force of the Treaty on European Union. The Commission had in the past authorised aid with a cultural purpose on the basis of this Article. This practice was confirmed by the European Union courts, for example, in the above-cited judgment of the Court of First Instance of 18 September 1995 in which the Court concluded that the Commission was in a position to adopt, on the basis of former Article 92(3)(c) EC, a favourable decision with regard to three aid schemes managed by CELF (aid to air freight, the 'Page à Page' programme and 'Programme Plus').
- (128) On the other hand, the Commission considers that it has not been demonstrated that the aid was proportional to the intended purpose.
- (129) In its decision extending the procedure, and later in its injunction decision, the Commission asked the French authorities to present their comments on the proportionality of the aid pursuant to Article 107(3)(c) TFEU.
- (130) As previously indicated, the French authorities did not provide the Commission with the information that would enable the proportionality of the aid paid since 1980 to be demonstrated, a request most recently made to them in the Commission's injunction decision of 20 November 2009.
- (131) In accordance with Article 13 of Regulation (EC) No 659/1999, the Commission is therefore taking a decision on the basis of the available information, recalling, in any case, that it is for the French authorities to demonstrate the compatibility of the aid in question with the internal market, and thus the proportionality of this aid.
- (132) *Mutatis mutandis*, the reasoning stated previously with regard to the proportionality of the aid in the context of Article 107(3)(d) TFEU, is transposable here.
- (133) The Commission therefore considers that it has not been demonstrated that the aid paid was in line with the criterion of proportionality.
- (134) In conclusion, the Commission considers that the measure in question is not compatible with the internal market on the basis of Article 107(3)(c) TFEU.
- C. Assessment of the measure pursuant to Article 106(2) TFEU**
- (135) The French authorities have argued on many occasions that CELF was entrusted with a public service task and that, consequently, the disputed measures had to be assessed pursuant to Article 106(2) TFEU (former Article 86(2) EC).
- (136) This Article states that 'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.'
- (137) Firstly, in this particular case, the question must be asked as to whether there was a service of general economic interest. It emerges from the Court of Justice's case law that, with the exception of sectors for which this issue already forms the object of EU regulations, the Member States have a wide margin of discretion regarding the nature of services that would be classified as being services of general economic interest. Consequently, it is the Commission's task to ensure that this margin of discretion is used without manifest error when it comes to defining services of general economic interest.
- (138) In this particular case, the French authorities indicated on several occasions that CELF had been given a specific public service task of a cultural nature, consisting of honouring all orders for French-language books coming from bookshops abroad, whatever the volume and nature of the order. The Commission considers that this task could, in fact, form a service of general economic interest.

- (139) Secondly, it should be verified whether CELF had actually been given responsibility for this service of general economic interest. In accordance with EU case law, the companies in question must have been entrusted with managing the service by the State by means of one or more official acts, the form of which may be determined by each Member State.
- (140) In this particular case, the French authorities produced a number of agreements signed between CELF and the Ministry of Culture which they consider demonstrate that CELF was indeed given responsibility for the service of general economic interest in question. According to the French authorities, the Book and Reading Directorate concluded annual agreements with CELF, up until 2001.
- (141) However, despite the Commission's requests, including in its injunction decision, the French authorities have not produced copies of the public service agreements for each of the years in question.
- (142) In addition, the precise nature of the public service obligations is not established in the agreements available to the Commission (and thus the amount at which orders are considered 'small orders' is not stated in the agreement). It emerges that, even for these years, there is no document indicating the public service obligations entrusted to CELF with sufficient clarity.
- (143) Consequently, the Commission considers that it has not been demonstrated that CELF was actually entrusted with the public service in question by means of an official act for each of the years in question.
- (144) Finally, and without it being necessary to conclude as to the condition of necessity, since the conditions are cumulative, the Commission considers that the condition of proportionality has not been met.
- (145) In the agreements available to the Commission, there is no explanation of the way in which the amount of aid was calculated. Moreover, CELF's obligation to provide grant utilisation statements for the aid was not accompanied by a clear definition of the parameters of the calculation or monitoring of the cost of the public service activity, which would enable verification that there was no overcompensation. In addition, while the agreements did anticipate a carry forward from 1 year to another if part of the grant was not used, they contained no clarity as to how this mechanism would operate. It would seem, moreover, that this mechanism was not applied. Finally, in more general terms and in the context of analysing the proportionality criterion with regard to Article 107(3) TFEU, the French authorities did not provide any new information demonstrating the proportionality of the aid with regard to the different points of the Court's judgment.
- (146) The French authorities thus did not provide the Commission with the information that would enable the proportionality of the aid in the context of Article 106(2) TFEU to be demonstrated, and this was last requested of them in its injunction decision of 20 November 2009.
- (147) In accordance with Article 13 of the procedural Regulation, the Commission is therefore taking a decision on the basis of the available information, recalling, in any case, that it is for the French authorities to demonstrate the compatibility of the aid in question with the internal market, and thus the proportionality of this aid.
- (148) For the same reasons as those mentioned in the context of the analysis of the proportionality of the aid pursuant to Article 107(3)(d) TFEU, the Commission therefore considers that it has not been demonstrated that the aid paid was in line with the criterion of proportionality.
- (149) The Commission therefore considers that the conditions for application of Article 106(2) TFEU are not met.
- (150) In conclusion, the Commission therefore considers that the aid mechanism known as the Small Orders Programme, implemented by France in favour of CELF between 1980 and the end of 2001, constitutes aid incompatible with the internal market.
- 5. LIMITATION PERIOD, EXCEPTIONAL CIRCUMSTANCE, LEGITIMATE EXPECTATION, PRINCIPLE OF LEGAL CERTAINTY, PRINCIPLE OF PROPORTIONALITY**
- (151) When a State aid is unlawful and incompatible, the Commission must first order the Member State in question to take all necessary measures to recover the aid from its recipient. Article 14 of Regulation (EC) No 659/1999 states that, 'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary.'
- (152) The Commission must, nevertheless, take the following elements into account.

- (153) Firstly, Article 15 of Regulation (EC) No 659/1999 stipulates that the powers of the Commission to recover aid are subject to a limitation period of 10 years. The limitation period commences on the day when the unlawful aid is granted to the beneficiary, and any measure taken by the Commission, or a Member State acting at the request of the Commission, with regard to the unlawful aid suspends the limitation period.
- (154) As already stated in its decision extending the procedure, without receiving specific comments on this point from the interested parties, the Commission considers that the limitation rule mentioned in the previous recital is applicable in this particular case. In its judgment of 5 October 2006 in the *Transalpine* case <sup>(1)</sup>, the Court of Justice held that, in so far as Regulation (EC) No 659/1999 contains rules of a procedural nature, these are applicable to all administrative procedures in relation to State aid pending before the Commission at the time when Regulation (EC) No 659/1999 entered into force, namely on 16 April 1999. This case falls within the context of the formal investigation procedure opened on 30 June 1996.
- (155) In this particular case, the aid having been paid each year since 1980 and the Commission having asked for information from the French authorities in April 1992, the aid paid to CELF in 1980 and 1981 cannot be recovered because it is time barred.
- (156) Secondly, the Commission is not calling for recovery of the aid if, by so doing, it would run counter to a general principle of EU law. According to European Union case law, the Commission is required to take exceptional circumstances into consideration that might justify its waiving the order for recovery of the aid unlawfully granted when the said recovery runs counter to a general principle of EU law.
- (157) It was in this context that, in its decision extending the procedure, the Commission called on the French authorities, the beneficiary of the aid and any other interested parties to submit their comments on the application, in this case, of the principle of legitimate expectation, the principle of legal certainty, or any other principles which might lead the Commission not to require the recovery of the aid.
- (158) The Commission notes that, in their comments, the French authorities considered that exceptional circumstances did exist that would enable the obligation to recover the aid to be limited. In contrast, SIDE considered that such exceptional circumstances were not present.
- (159) In this regard, the Commission recalls that, in the context of the preliminary questions raised in the Court of Justice in the above-cited *CELF* case, the court that referred the case had asked, in essence, whether the Commission's adoption of three successive decisions declaring aid compatible, which were then annulled by the Community judicature, was not in itself likely to form an exceptional circumstance that might justify a limitation of the beneficiary's obligation to return this aid.
- (160) In its above-cited judgment of 11 March 2010, the Court of Justice first referred to its judgment of 12 February 2008, in which it indicated in paragraphs 65 et seq. that, after the annulment of a positive decision of the Commission, the recipient of unlawfully implemented aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus from declining to refund that aid <sup>(2)</sup>.
- (161) Nevertheless, the Court of Justice also stated that a legitimate expectation on the part of an aid recipient could not arise from a positive decision of the Commission either when that decision was challenged within the deadlines for judicial appeal then annulled by the EU Courts, or when the deadline for appeal had not passed or, in the case of an appeal, so long as the EU Courts have not delivered a definitive ruling <sup>(3)</sup>.
- (162) In this particular case, in its judgment of 11 March 2010, the Court of Justice indicated that the annulment of the Commission's third positive decision by judgment of the Court of First Instance on 15 April 2008 was not, in itself, liable to give rise to a legitimate expectation or to constitute an exceptional circumstance <sup>(4)</sup>.
- (163) The Court of Justice added that the unusual succession of three annulments demonstrated, *a priori*, the complexity of the case and, far from giving rise to a legitimate expectation, was more likely to increase the beneficiary's doubts as to the compatibility of the aid in question. It acknowledged that a succession of three actions leading to three annulments amounted to a very unusual situation. Such circumstances, however, arose as part of the normal operation of the judicial system, which granted individuals who believed that they had suffered as a result of the unlawfulness of aid the possibility of bringing proceedings for the annulment of successive decisions which they considered to be the cause of that situation.

<sup>(1)</sup> Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 34.

<sup>(2)</sup> Paragraphs 42 et seq.

<sup>(3)</sup> Paragraphs 66 to 68.

<sup>(4)</sup> Paragraphs 50 et seq.

- (164) The Court of Justice considered, moreover, that in this particular case the existence of an exceptional circumstance could not be upheld in the light of the principle of legal certainty <sup>(1)</sup>. So long as the Commission had not taken a decision of approval and so long as the period for bringing an action against such a decision had not expired, the recipient could not be certain as to the lawfulness of the aid, with the result that neither the principle of the protection of legitimate expectations nor that of legal certainty could be relied upon.
- (165) In addition, as the Court of Justice indicated in its judgment of 11 March 2010, <sup>(2)</sup> the existence of an exceptional circumstance could not be upheld in the case in point in the light of the principle of proportionality. Abolishing unlawful aid by means of recovery was the logical consequence of a finding that it was unlawful. Accordingly, the recovery of such aid, for the purpose of restoring the previously existing situation, could not in principle be regarded as disproportionate to the objectives of the provisions of the Treaty relating to State aid.
- (166) Consequently, the Court of Justice concluded that the adoption by the Commission of three successive decisions declaring aid to be compatible, which were subsequently annulled by the Community judicature, was not in itself capable of constituting an exceptional circumstance such as to justify a limitation of the recipient's obligation to repay that unlawful and incompatible aid.
- (167) Given the above, and in the absence of any other fact capable of constituting an exceptional circumstance, the Commission therefore concludes that in this particular case there is no exceptional circumstance capable of limiting CELF's obligation to repay the aid in question (apart from the sums paid in 1980 and 1981, as previously explained).
- (170) In application of Article 14(2) of Regulation (EC) No 659/1999, the aid to be recovered must include compound interest from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery.
- (171) Nevertheless, it follows from the judgment of the Court of Justice of 12 October 2000 in the *Magefesa* case <sup>(4)</sup> that, when a company is in liquidation, and the national legislation so provides, interest falling due after the company's declaration of insolvency on the amount of aid unlawfully received before such declaration is not due.
- (172) In this regard, it should be noted that, in their note sent on 27 January 2010, the French authorities informed the Commission of CELF's current situation.
- (173) Given CELF's financial situation, the company was placed in a solvency safeguard procedure on 25 February 2009. A receiver was appointed.
- (174) In the context of the dispute over State aid, the French State declared the following claims: EUR 11 885 785,02 (by way of interest payments, in accordance with the above-stated judgment of the Council of State of 19 December 2008) and EUR 4 814 339,9 (by way of possible reimbursement of the aid capital received over the period 1980-2001).
- (175) According to the French authorities, the debt statement showed that, out of total declared liabilities of EUR 21 254 232,29, the contested debts totalled EUR 17 045 039,50.
- (176) Noting that a recovery plan was clearly impossible, the insolvency administrator requested that the solvency safeguard procedure be replaced with an official ruling of bankruptcy, particularly in the light of the claims declared by the State.
- (177) By judgment of 9 September 2009 noting the existence of liabilities that ruled out the prospect of a continuation plan, the Paris Commercial Court ruled on the insolvency of CELF and appointed a receiver. The Court set a two-year period at the end of which the completion of the bankruptcy proceedings would be examined. The French authorities have indicated that disputes under way and/or to come could nonetheless justify delaying the date of completion of bankruptcy proceedings.

## 6. RECOVERY

- (168) In application of Article 14 of Regulation (EC) No 659/1999, the French authorities must therefore recover the amount of aid paid to CELF by way of the Small Orders Programme during the years 1982 to 2001.
- (169) As can be seen from Table <sup>(3)</sup>, the total amount of aid to be recovered from CELF, received during the years 1982 to 2001, amounts to EUR 4 631 401, to which interest should be added.

<sup>(1)</sup> Paragraph 53.

<sup>(2)</sup> Paragraph 54.

<sup>(3)</sup> See Table in recital 60 of this Decision.

<sup>(4)</sup> Case C-480/98 *Commission v Spain* ('*Magefesa*') [2000] ECR I-8717.



(178) The French authorities have indicated that all of CELF's staff were made redundant and that the liquidation unit was dissolved on 31 December 2009. The only operations under way were aimed at recovering the remaining debts due to clients.

(179) The French authorities indicated in an e-mail dated 9 March 2010 that the liquidation procedure implemented in respect of CELF was in line with the normal rules for company liquidation procedures.

(180) According to the information that the Commission has received from the French authorities, CELF is therefore no longer exercising any economic activity.

(181) Consequently, given the liquidation procedure under way for CELF, and given their obligation to recover the incompatible aid, the French authorities must ensure that the applicable case law is followed in the case of the liquidation of the beneficiary company<sup>(1)</sup>. This assumes, in particular, that CELF's assets will be sold at their market price, that the State will register its claims with regard to recovering the incompatible and unlawful aid in the liabilities of the bankrupt company, and that it will fully enforce its creditor's claim at all stages of the procedure until the liquidation is complete.

(182) With regard to the calculation of interest, it should be noted that, in French law, Article L 622-28 of the Commercial Code stipulates that 'the issuance of the commencement order [of the safeguard procedure] shall stay the legal and contractual interest, as well as any interest due to late payment and surcharges.'

(183) Consequently, in this case, the sums paid to CELF give rise to interest from the date on which they were placed at its disposal until 25 February 2009, the date of the decision of the Paris Commercial Court opening the insolvency safeguard procedure which led to a ruling on its formal receivership on 9 September 2009.

## 7. CONCLUSION

(184) The Commission finds that France unlawfully implemented aid in favour of CELF, in violation of Article 108(3) TFEU.

<sup>(1)</sup> See paragraphs 63 *et seq.* of the Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, p. 4).

(185) This aid is incompatible with the internal market and must be recovered by the French authorities, with the exception of sums paid in 1980 and 1981, which are time barred.

(186) The French authorities must therefore recover from CELF an amount of EUR 4 631 401, to which interest should be added for aid paid annually since 1982. The sums to be recovered give rise to interest from the date on which they were placed at the disposal of the beneficiary until 25 February 2009, the date of the decision of the Paris Commercial Court commencing the insolvency safeguard procedure,

HAS ADOPTED THIS DECISION:

### Article 1

The State aid granted unlawfully by France, in violation of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Coopérative d'exportation du livre français (CELF) is incompatible with the internal market.

### Article 2

1. France is required to obtain reimbursement of the sum of EUR 4 631 401, corresponding to sums received by CELF over the period 1982 to 2001 by way of the aid referred to in Article 1.

2. The sums to be recovered shall give rise to interest from the date on which they were placed at the disposal of the beneficiary, until 25 February 2009, the date of the decision of the Paris Commercial Court commencing the insolvency safeguard procedure.

3. Interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

### Article 3

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.

2. France shall ensure that this Decision is implemented within 4 months of the date of its notification.

### Article 4

1. Within 2 months of notification of this Decision, France shall provide the following information:

(a) the total amount (principal and interest) to be recovered from the beneficiary;

(b) a detailed description of the measures already taken and planned in order to comply with this Decision;

well as detailed information concerning the amounts of aid and interest already recovered from the beneficiary.

(c) documents demonstrating that the beneficiary has been given formal notice to repay the aid.

*Article 5*

This Decision is addressed to France.

2. France shall keep the Commission informed of the progress of the national measures taken to implement this Decision until complete recovery of the aid referred to in Article 2. It shall immediately forward to the Commission, at the latter's request, any information on the measures already taken and planned in order to comply with this Decision, as

Done at Brussels, 14 December 2010.

*For the Commission*

Joaquín ALMUNIA

*Vice-President*

---