

Case C-39/94

Syndicat Français de l'Express International (SFEI) and Others

v

La Poste and Others

(Reference for a preliminary ruling
from the Tribunal de Commerce, Paris)

(State aid — Jurisdiction of national courts when the matter
is also pending before the Commission — Definition of State aid —
Consequences of infringement of the last sentence of Article 93(3) of the EC Treaty)

Opinion of Advocate General Jacobs delivered on 14 December 1995 I - 3551
Judgment of the Court, 11 July 1996 I - 3577

Summary of the Judgment

1. *Preliminary rulings — Reference to the Court — Conformity of the decision to refer with the rules of national law governing the organization of the courts and their procedure — Not a matter for the Court to determine*
(EC Treaty, Art. 177)
2. *State aid — Planned aid — Grant of aid in breach of the prohibition laid down in Article 93(3) of the Treaty — Duties of the national courts where a matter has also been referred to the Commission — Complete protection of the rights of individuals — Possibility of consulting the Commission or referring questions to the Court for a preliminary ruling*
(EC Treaty, Arts 5, 92, 93(2) and (3) and 177)

3. *State aid — Definition — Logistical and commercial assistance provided by a public undertaking to its subsidiaries which are governed by private law and carry on an activity open to free competition — Included — Condition — Remuneration less than that demanded under normal market conditions*
(EC Treaty, Art. 92)
4. *State aid — Planned aid — Grant of aid in breach of the prohibition laid down in Article 93(3) of the Treaty — Duties of national courts adjudicating on a claim for repayment*
(EC Treaty, Art. 93(3))
5. *State aid — Planned aid — Grant of aid in breach of the prohibition laid down in Article 93(3) of the Treaty — Liability of the recipient — No basis in Community law — Possible application of national law*
(EC Treaty, Art. 93(3))

1. Under the procedure laid down in Article 177 of the Treaty, it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organization of the courts and their procedure. The Court must abide by the decision from a court of a Member State requesting a preliminary ruling in so far as it has not been overturned in any appeal procedures provided for by national law.
2. A national court, seised of a request that it should draw the appropriate conclusions from an infringement of the prohibition on implementation of planned aid laid down in the last sentence of Article 93(3) of the Treaty, where the matter has also been referred to the Commission, which has not yet given a final decision on the question whether the State measures at issue constitute State aid, is not required to declare that it lacks jurisdiction or to stay proceedings until such time as the Commission has adopted a

position on how the measures in question are to be categorized.

The initiation by the Commission of a preliminary examination procedure under Article 93(3) or the consultative examination procedure under Article 93(2) cannot release national courts from their duty to safeguard the rights of individuals in the event of a breach of the requirement to give prior notification. Any other interpretation would have the effect of encouraging the Member States to disregard the prohibition on implementation of planned aid, since the Commission can do no more than order further payments to be suspended so long as it has not adopted its final decision on the substance of the matter, and the effectiveness of Article 93(3) would be weakened if the fact that the Commission was seised of the matter were to prevent the national courts from drawing all the appropriate conclusions from the infringement of that provision.

In that context, a national court may have cause to interpret and apply the concept of aid in order to determine whether a State measure introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to that procedure. Where it entertains doubts, it may seek clarification from the Commission which must, as a consequence of the duty of sincere cooperation resulting from Article 5 of the Treaty, respond as quickly as possible. Furthermore, a national court may or must, in accordance with the second and third paragraphs of Article 177 of the Treaty, refer a question to the Court of Justice for a preliminary ruling on the interpretation of Article 92. Where it consults the Commission or refers a question to the Court, it must decide whether it is necessary to order interim measures in order to safeguard the interests of the parties pending final judgment.

governed by private law and carry on an activity open to free competition, is capable of constituting State aid if the remuneration received in return is less than that which would have been demanded under normal market conditions. As regards that last condition, it is for the national court to determine what is normal remuneration for the services in question, such a determination presupposing an economic analysis taking into account all the factors which an undertaking acting under normal market conditions should have taken into consideration when fixing the remuneration for the services provided.

3. The concept of aid within the meaning of Article 92 of the Treaty encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect.

It follows that the provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are

4. Having regard to the importance for the proper functioning of the common market of compliance with the procedure for prior review of planned State aid under Article 93(3) of the Treaty, a national court requested to order the repayment of aid must grant that application if it finds that the aid was not notified to the Commission, unless by reason of exceptional circumstances repayment is inappropriate. Any other interpretation would encourage the Member States to disregard the prohibition laid down in Article 93(3), since if national courts could only order suspension of any new payment, aid already granted would subsist until the Commission's final decision finding the aid incompatible with the common market and ordering its repayment.

5. The recipient of aid who does not verify that the aid has been notified to the Commission in accordance with Article 93(3) of the Treaty cannot incur liability solely on the basis of Community law. The machinery for reviewing and examining State aid established by Article 93 does not impose any specific obligation on the recipient of aid.

If, however, according to national law concerning non-contractual liability, the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators may in certain circumstances cause him to incur liability, the principle of non-discrimination may lead the national court to hold that the recipient of aid paid in breach of Article 93(3) of the Treaty has incurred liability.