

JUDGMENT OF THE COURT (Grand Chamber)

12 February 2008*

In Case C-199/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Conseil d'État (France), made by decision of 29 March 2006, received at the Court on 2 May 2006, in the proceedings

Centre d'exportation du livre français (CELF),

Ministre de la Culture et de la Communication

v

Société internationale de diffusion et d'édition (SIDE),

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis, U. Löhmus and L. Bay Larsen (Rapporteur), Presidents of Chambers, A. Borg Barthet, M. Ilešič, J. Malenovský, J. Klučka and E. Levits, Judges,

* Language of the case: French.

Advocate General: J. Mazák,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2007,

after considering the observations submitted on behalf of:

- the Centre d'exportation du livre français (CELF), by J. Molinié, O. Schmitt, P. Guibert and A. Tabouis, avocats,

- the Société internationale de diffusion et d'édition (SIDE), by N. Coutrelis and V. Giacobbo, avocats,

- the French Government, by G. de Bergues and S. Ramet, acting as Agents,

- the Danish Government, by C. Thorning, acting as Agent, assisted by P. Biering and K. Lundgaard Hansen, advokater,

- the German Government, by C. Schulze-Bahr and M. Lumma, acting as Agents,

- the Hungarian Government, by J. Fazekas, acting as Agent,

- the Netherlands Government, by H.G. Sevenster and P.P.J. van Ginneken, acting as Agents,

- the Commission of the European Communities, by V. Di Bucci and J.-P. Keppenne, acting as Agents,

- the EFTA Surveillance Authority, by M. Sánchez Rydelski and B. Alterskjær, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2007,

gives the following

Judgment

¹ This reference for a preliminary ruling concerns the interpretation of Article 88(3) EC.

- 2 The reference was made in the course of proceedings between the Centre d'exportation du livre français (CELFF) (French Book Export Centre; hereinafter 'CELFF') and the Ministre de la Culture et de la Communication (Minister for Culture and Communication), on the one hand, and the Société internationale de diffusion et d'édition (SIDE) (International Distribution and Publishing Company; hereinafter 'SIDE'), on the other, concerning aid paid to CELFF by the French State.

The dispute in the main proceedings and the questions referred for a preliminary ruling

Facts which gave rise to the dispute in the main proceedings, and Community proceedings

- 3 CELFF, a cooperative society in public limited company form, carries on the activity of export agent.
- 4 Under its articles of association, its object is to process directly orders for abroad and the French overseas territories and departments for books, brochures and any communication media and, more generally, to perform any operations aimed, in particular, at increasing the promotion of French culture throughout the world, using the above media.
- 5 It combines small orders for books, thus enabling foreign clients to deal with a single intermediary rather than a host of suppliers, whilst benefiting from the widest possible supply base. It satisfies all the orders of operators, without regard to the size of the orders, even if they are unprofitable.
- 6 CELFF's obligations were reaffirmed in agreements concluded with the French Ministry of Culture and Communication.

- 7 From 1980 to 2002, CELF received operating subsidies from the French State to offset the extra costs of handling small orders placed by booksellers established abroad.
- 8 In the course of 1992, SIDE, a competitor of CELF, asked the Commission of the European Communities whether or not it had been informed, under Article 93(3) of the EC Treaty (now Article 88(3) EC), of the aid granted to CELF.
- 9 The Commission requested of, and obtained from, the French Government information about the measures in favour of CELF.
- 10 The Commission confirmed the aid's existence to SIDE and informed it that the measures in question had not been notified.
- 11 By decision NN 127/92 of 18 May 1993, 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' (OJ 1993 C 174, p. 6), the Commission concluded that, given the special nature of competition in the book trade and the cultural purpose of the aid schemes in question, the derogation provided for in Article 92(3)(d) of the EC Treaty (now Article 87(3)(d) EC) applied to them.
- 12 SIDE brought an action for annulment of that decision before the Court of First Instance of the European Communities.

- 13 By judgment of 18 September 1995 in Case T-49/93 *SIDE v Commission* [1995] ECR II-2501, the Court of First Instance annulled the decision in so far as it concerned 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.
- 14 It decided that the Commission should have undertaken a detailed investigation of the conditions of competition in the sector concerned prior to ruling on the measures' compatibility with the common market. The Commission should therefore have initiated the adversarial procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC).
- 15 On 30 July 1996, the Commission decided to open a formal investigation procedure in respect of the aid in question.
- 16 Following its investigation, it adopted Decision 1999/133/EC of 10 June 1998 concerning State aid in favour of Centre d'exportation du livre français CELF (OJ 1999 L 44, p. 37), in which, first, it found that the aid was unlawful, on the ground that it had not been notified, and, second, declared the aid compatible with the common market on the ground that it satisfied the conditions for derogation under Article 92(3)(d) of the Treaty.
- 17 Two actions were brought for annulment of that decision.
- 18 The first, brought before the Court of Justice by the French Republic on the ground that the Commission had failed to apply Article 90(2) of the EC Treaty (now Article 86(2) EC), was dismissed by judgment of 22 June 2000 in Case C-332/98 *France v Commission* [2000] ECR I-4833.

- 19 The second, brought before the Court of First Instance by SIDE, was upheld by judgment of 28 February 2002 in Case T-155/98 *SIDE v Commission* [2002] ECR II-1179), which, finding a manifest error of assessment in the definition of the relevant market, annulled the Commission's decision in so far as it declared the aid compatible with the common market.
- 20 Following that annulment, the Commission again declared the aid compatible with the common market by 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) (OJ 2005 L 85, p. 27).
- 21 SIDE brought an action for annulment of that decision before the Court of First of Instance. Those proceedings are currently pending before that Court (Case T-348/04).

The national proceedings and the questions referred

- 22 At the same time as the Community proceedings, proceedings were brought before the national authorities and courts.
- 23 Following the Court of First Instance's judgment of 18 September 1995 in *SIDE v Commission*, cited above, SIDE requested the Minister for Culture and Communication that payment of the aid granted to CELF be stopped and that the aid already paid be repaid.

- 24 That request was rejected by decision of 9 October 1996.
- 25 SIDE brought an action for annulment of that decision before the Tribunal administratif de Paris (Administrative Court, Paris).
- 26 By judgment of 26 April 2001, that court annulled the contested decision.
- 27 The Minister for Culture and Communication and CELF appealed against that judgment to the Cour administrative d'appel de Paris (Paris Administrative Court of Appeal).
- 28 By judgment of 5 October 2004, the Cour administrative d'appel de Paris upheld the judgment appealed against and ordered the French State to recover, within three months of the date of notification of the judgment, the sums paid to CELF for handling small orders for books placed by booksellers established abroad and, in default, to pay a penalty of EUR 1 000 per day for delay.
- 29 CELF and the Minister for Culture and Communication appealed to the Conseil d'État (Council of State) to set aside that judgment and the judgment of the Tribunal administratif de Paris.
- 30 In those appeals, the appellants argued, among other things, that the Cour administrative d'appel had made an error of law and an error of legal characterisation by not holding, in the present case, that the fact that the Commission had recognised the

aid's compatibility with the common market precluded the obligation to repay the aid which follows, as a rule, from unlawfulness in the implementation of measures of State aid, contrary to Article 88(3) EC, by the Member State.

- 31 Since it took the view that the resolution of the dispute depended on the interpretation of Community law, the Conseil d'État decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it permissible under Article 88 [EC] for a State which has granted to an undertaking aid which is unlawful, and which the courts of that State have found to be unlawful on the ground that it had not previously been notified to the ... Commission as required under Article 88(3) EC, not to recover that aid from the economic operator which received it on the ground that, after receiving a complaint from a third party, the Commission declared that aid to be compatible with the rules of the common market, thus effectively exercising its exclusive right to determine such compatibility?

(2) If that obligation to repay the aid is confirmed, must the periods during which the aid in question was declared by the ... Commission to be compatible with the rules of the common market, before those decisions were annulled by the Court of First Instance of the European Communities, be taken into account for the purpose of calculating the sums to be repaid?'

The questions referred for a preliminary ruling

The first question

- 32 By its first question, the referring court is asking, in essence, whether the last sentence of Article 88(3) EC is to be interpreted as meaning that the national court is 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.
- 33 In that regard, it is appropriate to note that the first sentence of Article 88(3) EC imposes on the Member States an obligation to inform the Commission of any plans to grant or alter aid.
- 34 Under the second sentence of Article 88(3) EC, if the Commission considers that the plan notified is not compatible with the common market within the meaning of Article 87 EC, it is without delay to initiate the procedure provided for in Article 88(2) EC.
- 35 Under the final sentence of Article 88(3) EC, the Member State which envisages granting aid must not put its proposed measures into effect until that procedure has resulted in a final decision of the Commission.
- 36 The prohibition laid down by that provision is designed to ensure that a system of aid cannot become operational before the Commission has had a reasonable period in which to study the proposed measures in detail and, if necessary, to initiate the procedure provided for in Article 88(2) EC (Case C-301/87 *France v Commission* [1990] ECR I-307, '*Boussac*', paragraph 17).

37 Article 88(3) EC thus institutes prior control of plans to grant new aid (Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 2).

38 Whilst the Commission must examine the compatibility of the proposed 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 Article 88(3) EC (Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, '*FNCE*', paragraph 14). It is, indeed, important to protect parties affected by the distortion of competition caused by the grant of the unlawful aid (see, to that effect, Case C-368/04 *Transalpine Ölleitung in Österreich and Others* [2006] ECR I-9957, paragraph 46).

39 The national courts must in principle allow an application for repayment of aid paid in breach of Article 88(3) EC (see, in particular, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 70).

40 The Commission's final decision does not have the effect of regularising, retrospectively, implementing measures which were invalid because they had been taken in disregard of the prohibition laid down by that article. 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 88(3) EC and would deprive it of its effectiveness ('*FNCE*', cited above, paragraph 16).

41 The national courts must therefore ensure that all appropriate conclusions will be drawn from an infringement of the last sentence of Article 88(3) EC, in accordance with their national law, as regards both the validity of measures giving effect to the aid

and the recovery of financial support granted in disregard of that provision (*FNCE*, paragraph 12, and *SFEI and Others*, cited above, paragraph 40, as well as Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 64, and *Transalpine Ölleitung in Österreich and Others*, cited above, paragraph 47).

⁴² However, there may be exceptional circumstances in which it would be inappropriate to order repayment of the aid (*SFEI and Others*, paragraph 70).

⁴³ In that regard, the Court has already held, in respect of a situation in which the Commission had adopted a negative final decision, that a recipient of illegally granted 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 declining to refund that aid. If such a case is brought before a national court, it is for that court to assess the circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice (Case C-5/89 *Commission v Germany* [1990] ECR I-3437, paragraph 16).

⁴⁴ As regards the Commission, Article 14(1) of Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) provides expressly that where negative decisions are taken it is not to require recovery of the aid if this would be contrary to a general principle of Community law.

⁴⁵ In a situation such as that in the main proceedings, where a claim based on the last sentence of Article 88(3) EC is examined after the Commission has adopted a positive decision, the national court, notwithstanding the declaration of the compatibility of the aid in question with the common market, must adjudicate on the validity of the implementing measures and on the recovery of the financial support granted.

46 In such a case, Community law requires that court to order the measures appropriate effectively to remedy the consequences of the unlawfulness. However, even in the absence of exceptional circumstances, Community law does not impose an obligation of full recovery of the unlawful aid.

47 The last sentence of Article 88(3) EC is based on the preservative purpose of ensuring that an incompatible aid will never be implemented. That purpose is achieved first, provisionally, by means of the prohibition which it lays down, and, later, definitively, by means of the Commission's final decision, which, if negative, precludes for the future the implementation of the notified aid plan.

48 The intention of the prohibition thus effected is therefore that compatible aid may alone be implemented. In order to achieve that purpose, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission's final decision.

49 When the Commission adopts a positive decision, it is then apparent that the purpose referred to in paragraphs 47 and 48 of the present judgment has not been frustrated by the premature payment of the aid.

50 In that case, from the point of view of operators other than the recipient of such aid, its unlawfulness will, first, expose them to the risk, in the result unrealised, of the implementation of incompatible aid, and, second, make them suffer, depending on the circumstances earlier than they would have had to, in competition terms, the effects of compatible aid.

- 51 From the aid recipient's point of view, the undue advantage will have consisted, first, in the non-payment of the interest which it would have paid on the amount in question of the compatible aid, had it had to borrow that amount on the market pending the Commission's decision, and, second, in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts.
- 52 In a situation such as that in the main proceedings, the national court must therefore, applying Community law, order the aid recipient to pay interest in respect of the period of unlawfulness.
- 53 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 (see, to that effect, *SFEI and Others*, paragraph 75, and *Transalpine Ölleitung in Österreich and Others*, paragraph 56).
- 54 As regards the aid itself, it must be added that a measure which consisted only in an obligation of recovery without interest would not be appropriate, as a rule, to remedy the consequences of the unlawfulness if the Member State were to re-implement that aid after the Commission's final positive decision. Since the period between the recovery and the reimplementation would be shorter than that between the initial implementation and the final decision, the aid recipient, would bear, if it had to borrow the amount repaid, less interest than it would have paid if, from the outset, it had to borrow the equivalent of the unlawfully granted aid.
- 55 The reply to the first question referred must therefore be that 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.

The second question

⁵⁶ By its second question, the referring court is asking, in essence, whether, 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, to the period between a Commission decision declaring the aid to be compatible with the common market and the annulment of that decision by the Community court.

⁵⁷ That question concerns either any aid implemented between the two dates in question, as well as interest, if the consequence of the aid's unlawfulness under national law, even in the event of it being declared compatible with the common market, is the recovery of that aid, or the interest alone on the aid received during the same period, if the recovery of compatible unlawful aid is not required by the national law.

- 58 As the main proceedings stand, two periods are involved, running between the decisions adopted by the Commission on 18 May 1993 and 10 June 1998 and, respectively, the judgments of the Court of First Instance which annulled them on 18 September 1995 and 28 February 2002 (see paragraphs 11 to 21 of the present judgment).
- 59 The question referred juxtaposes, on the one hand, the principle that acts of the Community institutions are presumed to be lawful and, on the other, the rule laid down by the first paragraph of Article 231 EC.
- 60 The principle that acts of the Community institutions are presumed to be lawful means that they produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (Case C-475/01 *Commission v Greece* [2004] ECR I-8923, paragraph 18, and the case-law cited).
- 61 Under the first paragraph of Article 231 EC when an action for annulment is well-founded, the Community court must declare the contested act void. It follows that the Community court's decision of annulment leads to the disappearance retroactively of the contested act with regard to all persons (Joined Cases C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* [2006] ECR I-4845, paragraph 43).
- 62 In circumstances such as those at issue in the main proceedings, the presumption of lawfulness and the rule that annulment is retroactive apply in turn.

63 Aid implemented after the Commission's positive decision is presumed lawful until the Community court decides to annul that decision. Subsequently, on the latter decision, the aid in question is deemed, in accordance with the first paragraph of Article 231 EC, not to have been declared compatible by the annulled decision, with the result that its implementation must be regarded as unlawful.

64 It is thus apparent that, in that case, the rule arising from the first paragraph of Article 231 EC puts a stop, retroactively, to the application of the presumption of lawfulness.

65 After the annulment of a positive decision of the Commission, a 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 (see, by analogy, *Commission v Germany*, cited above, paragraph 16, as regards a final negative decision of the Commission).

66 However, the Court has already held, in respect of circumstances where the Commission had initially decided not to raise any objections to the aid in issue, that such fact could not be regarded as capable of having caused the recipient undertaking to entertain any legitimate expectation since that decision had been challenged in due time before the Court, which annulled it (Case C-169/95 *Spain v Commission* [1997] ECR I-135, paragraph 53).

67 The Court has also held that, so long as the Commission has not taken a decision approving aid, and so long as the period for bringing an action against such a decision has not expired, the recipient cannot be sure as to the lawfulness of the proposed aid which alone is capable of giving rise to a legitimate expectation on his part (Case C-91/01 *Italy v Commission* [2004] ECR I-4355, paragraph 66).

68 It must be held, likewise, that where an action for annulment has been brought, the recipient is not entitled to harbour such assurance so long as the Community court has not delivered a definitive ruling.

69 The reply to the second question referred must therefore be that 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 Commission decision declaring the aid to be compatible with the common market and the annulment of that decision by the Community court.

Costs

70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **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.

- 2. 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.**

[Signatures]