

2. Availability of procedures in France

This section will briefly describe the different cases in which the French national Courts (Conseil d'Etat, Cour de Cassation, Cour Administrative d'Appel, Tribunal de Commerce, Conseil de la Concurrence,...) have dealt with State aid issues. There are still few decisions of French Courts applying Articles 92 and 93 of the EC Treaty. The decisions analysed below (the oldest dated 1989) are classified according to chronological order, the reference date being the date of the most recent judgment (or opinion) for each case.

The three cases involving the most significant State aids issues before French Courts, i.e. the so-called "Boussac", "Saumon" and "SFEI/La Poste" cases, will be dealt with in more detail.

As a preliminary remark, some comments may be made concerning the different State aid issues that have emerged in the practice of French Courts during the last decade.

The main questions issued may be divided into the following categories:

- the question of the division of jurisdiction between Administrative Courts and Civil Courts **(1)**;
- French procedures concerning the direct effect of Article 93(3) of the Treaty; **(2)**
- attitudes of national Courts concerning negative and positive decisions of the Commission; **(3)**
- the question of Member States' liability for breach of EC Treaty provisions and, in particular, the obligation to notify proposals to grant State aid imposed by Article 93(3) of the Treaty **(4)**.

2.1 Division of jurisdiction between Administrative Courts and Civil Courts

In principle, litigation regarding State aid in France should be solved before Administrative Courts.

Nearly all decisions to grant State aid are "administrative decisions" which may only be challenged before French Administrative Courts.

However, two main exceptions may be mentioned:

Administrative Courts v. Civil Courts: the example of parafiscal charges

The Administrative Courts have jurisdiction over litigation regarding direct taxes or VAT. By contrast, Civil Courts are responsible for litigation concerning indirect taxes, stamp duties and registration taxes.

Parafiscal charges may belong, according (amongst other things) to the nature of the tax, to either the category of direct or indirect taxes. Therefore, litigation concerning these taxes will be referred either to the Administrative Courts¹, or to the Civil Courts².

The issue of cross-subsidies

A second exception to the jurisdiction of Administrative Courts concerns issues of cross-subsidies, i.e. litigation involving a "state owned company" and its subsidiaries governed by private law.

Such an exception may be highlighted by the SFEI case, which gave rise to important discussion regarding the jurisdiction of Administrative or Civil Courts³.

This question was recently resolved by the "Tribunal des Conflits" (in January 1998) which allocated jurisdiction to the Civil Courts (*Tribunal de Commerce de Paris*) in this matter. In this case, involving a dispute between express delivery firms and the French Post Office, the Commercial Court of Paris referred questions to the Court of Justice for a preliminary ruling as to whether the commercial and logistical assistance provided, without real consideration, by the Post Office to its subsidiaries operating in the express delivery business did, in fact, constitute State aid.

According to the "Tribunal des Conflits", the dispute in question against "La Poste" and its subsidiaries governed by private law was aimed at putting an end to and making good damage caused by commercial practices attributed to "La Poste" and was likely to distort competition. Moreover, such a dispute did not involve activities connected with any exercise of public authority's powers. Therefore, the "Tribunal des Conflits"

¹ See for instance hereafter Administrative Court of Appeal, SA Lesieurs Alimentaire, June 1991.

² See for instance hereafter Civil Supreme Court, Limagnes Sanders, October 1994.

³ See hereafter our comments concerning this case.

concluded that, in these rather exceptional circumstances, the Civil Courts would have jurisdiction.

2.2 Procedures before French Courts concerning the direct effect of Article 93(3) of the Treaty⁴

2.2.1 Administrative Courts

The leading case in this matter is the so-called "Saumon" case⁵, in which the Administrative Supreme Court (*Conseil d'Etat*) annulled in 1993 a Decree of 1985 implementing a parafiscal charge prior to its notification to the Commission.

This annulment strictly covered the period preceding Commission authorisation of the aid which had been granted illegally in the absence of due notification.

It must be noted, however, that the main drawback of such a proceeding is its duration.

Given the workload of the Administrative Courts, judgment on substantive issues is likely to take two to four years.

This period is too long to result in an effective sanction for any breach of the notification rules as the Administrative courts are unlikely to deliver judgment until the Commission has made its decision on the substantive issues. This is too late for competitors, who suffer what may be a significant loss as soon as the aid is granted.

Moreover, it must be noted that the ability to lodge a complaint in summary proceedings to obtain an interim order constitutes an essential part of the duty to safeguard the rights of individuals as laid down by the Court of Justice.

Under French administrative law, however, there is no interlocutory or summary procedure to enable a judge to rule that aid granted prior to notification to the Commission is *prima facie* unlawful and must be repaid.

⁴ As mentioned above, the period covered by this Report ends on 30.6.1998. It should be noted, however, that the Administrative Supreme Court ("Conseil d'Etat") and the Civil Supreme Court ("Cour de Cassation") recently applied the principle of the direct effect of Art. 93, paragraph 3 of the EC treaty in a series of interesting cases which are not reported yet (See Admin. Supr. Court, 6.11.1993, Comité national interprofessionnel de l'horticulture florale et ornementale et des pépinières (CNIH) c/M. Mignon Req. n° 171648; Admin. Supr. Court, 2.12.1998, Comité national interprofessionnel de l'horticulture florale et ornementale et des pépinières (CNIH), and Civil Supr. Court, 26.1.1999, Société des Etablissements Friedrich c/Assoc. nationale interprofessionnelle des vins de table (ANIVIT), not yet published).

A suspension of the carrying out of an unlawful administrative decision is only possible where the decision has not yet been fully implemented. As noted above, the competitor is not, for the most part, able to react until the disputed aid has been paid. Suspending payment is therefore no longer possible.

Finally, although the Act of 8 February 1995 empowers the Administrative Court to impose a restraining order which should allow it to order unnotified aid to be repaid, such an order may only be granted after a ruling has been made on whether, on the substantive issues, the disputed administrative decision is unlawful. This means that the Administrative Court will not give its decision before a long delay as mentioned above.

Faced with such procedural obstacles, the rights reasserted in the SFEI's judgment regarding the repayment of unlawfully granted aid are likely to remain a moot point in France. (See in that respect Maurice-Christian Bergerès, "*National Courts and State aid contrary to Community law*", Recueil Dalloz 1998, 3ème Cahier, Chronique, p. 27, and Olivier d'Ormesson and Anne Wachsmann, "*Do legal proceedings brought by competitors in France against unlawful State aid have any effect?*" (in English), *European Corporate Lawyer*, March/April 1997, p. 43).

Nevertheless, the effectiveness of this solution could develop quickly if the Administrative Courts, applying the principles of the Factortame judgment of 19 June 1990 of the Court of Justice⁶, were to apply interim measures in the field of State aid, even where such a solution is not available under French legislation, in order to safeguard rights of individuals under Community law

2.2.2 Civil Courts

Due to the procedural rules mentioned above⁷, Civil Courts have rarely had to deal with the question of direct effect. However, in the rare cases where Civil Courts may have jurisdiction, summary proceedings to obtain an interim order ("référé"), ordering the repayment of an unnotified aid granted in breach of Article 93 of the Treaty, should be much easier to obtain before those courts than before Administrative Courts.

2.3 Negative and positive decisions of the Commission

⁵ See below.

⁶ ECJ, case C-213/89, "Factortame", Judgment of 19 June 1990, [1990] ECR I-2466.

⁷ See 2.2.1

2.3.1 *Enforcement of negative Commission decisions*

The implementation of negative decisions of the Commission can be challenged before Administrative Courts.

The Boussac case⁸ concerned a challenge by the purchaser of Boussac, the LVMH Group, to the order for recovery of State aid issued by the French authorities ("Trésor"). This followed a declaration from the Commission that the aid granted to Boussac was unlawful and incompatible with the Common Market. This decision was confirmed by the European Court of Justice.

The action seeking the annulment of the recovery order, was lodged before the Administrative Court of Paris which reaffirmed the purchaser's obligation to repay the aid.

The principle of "legitimate expectations", which was pleaded by LVMH before the French Administrative Court, is very difficult to establish. This is mainly because the notion is narrowly construed by the EC Court of Justice itself⁹, but also follows from the fact that it is very rarely applied by French courts.

2.3.2 *Implementation of positive Commission decisions*

It is not possible for a competitor to challenge a positive decision of the Commission before French Courts. Only the EC Court of Justice has jurisdiction to annul such a decision.

However, during proceedings before a national court contesting the decision of national authorities to grant State aid, a question may be referred to the Court of Justice under Article 177 of the Treaty on the validity of a Commission decision approving a general aid scheme¹⁰.

There have so far been no cases before the French Courts which have dealt with a Commission's decision declaring a State aid compatible with the common market, so giving rise to a referral to the ECJ for a ruling on the validity of such decision.

⁸ See hereafter.

⁹ See, concerning this principle, among others, the ECJ judgment of 20 March 1997, case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland*, [1997] ECR I-1607, point 25.

¹⁰ See CFI judgment of 22 October 1996, case T-330/94, *Salt Union v Commission*, [1996] ECR II-1475

2.4 Liability of Member States for breach of EC State aid law

A non-notified State aid may cause damage to competitors of the recipient. Therefore, a Member State may incur liability for breaching the obligation to notify State aid and will have to make good any resultant damage caused to individuals.

In this respect, the European Court of Justice stated that a Member State may be liable for any breach of Community Law (see "Brasserie du pêcheur"¹¹, "Factortame"¹² and "Francovich"¹³ cases).

More specifically on State aids, Advocate General Jacobs considered in the SFEI case that:

"The various remedies including where appropriate an order for recovery and possibly an award of damages against the Member State, are capable of providing an effective response to a breach of that prohibition"¹⁴.

Therefore, in the case of a non-notified State aid, a Member State may have to make good the consequences of the breach of the obligation to notify and of the damage caused to competitors.

However, the reparation is subject to the fulfilment of very strict conditions under French Administrative law. These include the condition that the rule breached must be intended to confer rights upon individuals and there must be a direct causal link between the breach and the damage sustained by them.

According to the French Administrative Supreme Court, the State may be liable for breach of Community law and even where a law is incompatible with a directive¹⁵.

The liability principle was confirmed by the Administrative Court of Appeal of Paris in July 1996¹⁶.

¹¹ ECJ Judgment of 5 March 1996, joined cases C-46/93 and C-48/93, "Brasserie du Pêcheur SA" [1996] ECR I-1029.

¹² ECJ Judgment of 5 March 1996, C-46/93 and C48/93, "Factortame" [1996] ECR I-1029.

¹³ ECJ Judgment of 19 November 1991, C-6/90, "Francovich v. Italy", [1991] ECR I-5357.

¹⁴ point 82 of the conclusions of Advocate General Jacobs of 14 December 1995, case C-39/94, SFEI V. La Poste, [1996] ECR I-3551

¹⁵ Conseil d'Etat February 1992, Arizona Tobacco Products and SA Philip Morris France, AJDA March 1992, p.210.

¹⁶ CAA Paris, July 1996, J. Dangeville, RFDAdm. 13 (5) Sept. Oct. 1997, p. 1056

Even if this judgment was annulled by the Administrative Supreme Court on procedural grounds it may be noted that, during the course of proceedings, the Court acknowledged the principle of State liability for a law breaching Community law¹⁷.

Therefore under French law, there is no obstacle "in principle" to a competitor claiming damages from the French State, if an aid has been granted before notification or before the Commission's authorization.

However, such an action for damages is to be brought within the strict time limits of the statute of limitation applicable to administrative proceedings. It must be noted that several proceedings of this nature are currently before Administrative Courts, though no formal decision has yet been adopted.

Finally, following the ECJ's judgment (in SFEI), the French "Tribunal de Commerce" will have to decide whether, under French domestic law, the non-contractual liability of the recipient of the aid is affected. This decision will be made on the basis of French unfair competition principles, if such a recipient has accepted State aid knowing that the aid has not been notified to the Commission in breach of Article 93 of the Treaty.

3. List of cases with summaries

3.1 Opinion No 89-A-11 of the Competition Council of 11 July 1989¹⁸ (D)

Opinion n° 89-A of 11 July 1989 of the Competition Council relating to the compatibility of the system of co-operatives for the joint use of agricultural equipment with free competition.

- Nature of aid:

Aids to investment granted by the State to co-operatives for the joint use of agricultural equipment (CUMA).

- Aid notified: no

- Applicant:

The national association of drainage companies (SNED), formed by the competitors of CUMA, requested an opinion of the Competition Council on whether the aid from which CUMA benefitted on the drainage market were compatible with the principles of

¹⁷ CE October 1996, RFDAdm. 13 (5) Sept.-Oct. 1997, p.1056.

¹⁸ BOCCRF, 11 August 1989, p. 204

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freedom of trade and free competition, and in particular with regard to Article 92 of the EC Treaty.

Court referred to: Competition Council ("*Conseil de la Concurrence*"): Independent authority in charge of compliance with the competition rules, 11 July 1989

Legal questions concerning State aid:

Competence of national authorities in the assessment of aid.

- Under conditions fixed by Community regulations (Article 42 of the Treaty) there are derogations in agricultural matters to the principle of the prohibition of aid.

- In addition, according to the Competition Council, "*...it can be seen in Article 92, as interpreted by the Community courts, that the Commission is exclusively competent to give judgment on its applicability to an existing aid, that is an aid prior to the coming into effect of the Treaty or after that date but duly notified to the Commission.*"

On this basis, the Court of Justice of the European Communities has recognised the competence of national authorities to give judgment on whether a new aid falls under Article 92, save for the exclusion of the assessment of its compatibility with the Common Market. In this case, the aid is not of such a kind as to affect trade between Member States, particularly because of the local nature of the drainage market under discussion".

(Opinion of the Competition Council § *in fine*).

3.2 Administrative Court of Appeal, Paris, S.A Lesieur Alimentaire, 27 June 1991¹⁹ (B)

- Nature of aid:

Parafiscal charge instituted by Decree collected on behalf of the Institute of fat products, studies and technical research.

- Aid notified: no

- Applicant:

¹⁹ Case n° 89PA01466

S.A. Lesieur was subject to the tax for the period from 1 October 1983 to 31 October 1986 and disputed the payment of this tax.

- Court referred to: Paris Administrative Court of Appeal ("*Cour Administrative d'Appel*"), 27 June 1991

Paris Administrative Court, 6 July 1988

- Legal questions concerning State aid:

Direct effect of Articles 92 and 93 of the Treaty

"Whereas, on one hand, in the absence of a decision from the Commission of the European Communities under the conditions stated in paragraph 2 of Article 93 or a regulation of the Council enacted under the conditions stated in Article 94, Article 92 of the Treaty does not have direct effect; its violation cannot therefore be invoked by the nationals of Member States before national courts; as a result, the applicant cannot usefully claim that the litigious tax would present for the companies benefiting from it a type of aid falling under the terms of Article 92 of the treaty; therefore there are no grounds for the Court to refer the case for a preliminary ruling to the Court of Justice of the European Communities under the conditions stated in Article 177 of the treaty."

The Court of Appeal refused to refer the case to the ECJ for a preliminary ruling.

- Similar disputes:

Administrative Court of Appeal, Paris, S.A. Amora, 27 June 1991 (B)

Administrative Court of Appeal, Paris, S.A. Mayolande, 27 June 1991 (B)

Administrative Court of Appeal, Paris, Etablissements Dagousset, 27 June 1991 (B)

Administrative Court of Appeal, Paris, SA Segma-Liebig-Maille, 27 June 1991 (B)

3.3 Administrative Court of Appeal, Nantes, S.A Tartrou, 9 October 1991²⁰ (B)

- Nature of aid:

²⁰ Case n° 89NT01114

France

Parafiscal charge on furniture instituted by Decree on behalf of the Committee for the development of the French furniture industry.

- Aid notified: no

- Applicant:

S.A. Tartrou, who was subject to the above parafiscal charge and disputed payment.

- Court referred to: Nantes Administrative Court of Appeal ("*Cour Administrative d'Appel*"), 9 October 1991

Nantes Administrative Court, 5 January and 20 July 1989

- Legal questions concerning State aid

Direct effect of Articles 92 and 93 of the Treaty

Rejection by the Court of Appeal of the claim for annulment of the judgment by the Administrative Court of Nantes, which refused to consider the product manufactured by SA Tartrou to be installed under household sinks as being incorporated in a property and submitting it to the parafiscal charge on furniture.

"The provisions of Article 92, (...) do not create rights for private individuals which they can exercise before a national court".

Refusal to refer to the ECJ for a preliminary ruling.

3.4 Administrative Court of Appeal, Nancy, SARL Decoster, 26 December 1991²¹ (B)

- Nature of aid:

Professional tax ("*taxe professionnelle*")

- Aid notified: no

- Applicant:

SARL Decoster disputing payment

²¹ Case n° 90NC003144

- Court referred to: Nantes Administrative Court of Appeal ("*Cour Administrative d'Appel*"), 26 December 1991
Lille Administrative Court, 28 December 1989

- Legal questions concerning State aid:

Articles 93, 93(1) and 93(2) do not create rights which private individuals can exercise before national courts. Only Article 93(3) gives such rights. The Article was not invoked in this case.

Refusal to refer to the ECJ for a preliminary ruling.

3.5 Civil Supreme Court, Lener Ignace/Textile, 12 May 1993²² (A)

Simplified chronology

19 February 1982: System of aid in favour of textiles notified to the Commission

1 March 1982: Order of 1 March 1982 providing for this aid scheme

12 January 1983: Decision of the Commission declaring the aid scheme incompatible with the common market (OJ L 137/24 of 26 May 1983)

15 November 1983: Judgment of the ECJ²³ confirming the decision of the Commission

Despite the decision of the Commission, the French Government had continued for 2 years to grant aid to all the relevant companies which had signed a contract before 31 December 1982

30 October 1989: Judgment of the Court of Appeal in Douai
(Rejection of liability action brought by Lener)

12 May 1993: Judgment of the Civil Supreme Court
(Rejection of appeal)

Civil Supreme Court, 1st Civil Division, 12 May 1993

²² Bull.civ. I, n°165, p.114

France

- Nature of aid:

Aid in favour of textiles (the French State contracting to pay the Social Security contributions due by the employers in the sector) as stated in the Order of 1 March 1982.

- Aid notified: Yes

- Applicant:

Lener Ignace SA, potential beneficiary of the aid.

- Court referred to: Civil Supreme Court, Civil Division, ("*Cour de Cassation*")

- Legal questions concerning State aid

Effects of an incompatibility decision of the Commission:

The French Government upheld the enforcement of current contracts despite the decision of incompatibility of the Commission.

The Court of Justice considered that, by not complying with the decision of the Commission within the time stated, France had failed to fulfil its obligation under the Treaty not to grant further aid under the system in question and to abolish this system (in accordance with the decision of the Commission of 12 January 1983). The obligation imposed on the French Republic under that decision of 12 January 1983 consisted of the following:

"... from the date of notification, no longer to grant any aid under the scheme in question and, within a period of one month, to abolish the scheme. However, it is common ground that the French Republic continued to pay the aid for which the scheme provided to any employer who had made a contract and that the French Government took no steps to abolish the aid scheme within the period prescribed by the decision.

In those circumstances, it must be declared that [France] has failed to fulfil its obligations, (...)"²⁴.

²³ ECJ, 15 November 1983, Commission v France, case 52/83, [1983] ECR, p. 3707

²⁴ ECJ, 15 November 1983, Commission v France, case 52/83, [1983] ECR 3707, recitals. 9 and 11

In this case, according to Lener, *"the question was whether (...) Mr. Beauvois and SCP Beauvois-Minne [legal advisers of Lener] by their negligence, which consisted of not lodging the file submitted by the petitioner with a view to obtaining the aid stated by the Order of 1 March 1982, which was still perfectly legal at the time of the deadline for lodging the file, had actually caused damage to Lener by making it lose the benefit of this aid which the French State, despite the Community decision of 12 January 1983, had continued to grant"*²⁵.

The Civil Supreme Court stated that the aid system had been declared incompatible, that the Commission had given formal notice to the French government to abolish this aid system, and that the Court of Justice of the Communities had noted that France had failed in its obligations.

It confirmed that *"the aid system, although shown in French legislative or statutory texts, must be considered to be illegal (...) by the French courts"* and judged that, if the legal adviser had committed an offence, *"(...) there is no damage to be compensated as to indemnify the company would mean taking an aid scheme, which was declared to be contrary to the Community rules, to be legal."*

3.6 Civil Supreme Court, Le Moulin Rouge Ponard, 23 November 1993²⁶ (B)

- Nature of aid:

Tax on flour decreed by Article 1618 seventh part of the General Tax Code.

- Aid notified: no

- Applicant:

Le Moulin Rouge Ponard et Cie, which runs a milling business, complained about the judgment by the Civil court in Dole of 14 May 1991 rejecting its claim for reimbursement of payment of the relevant tax on flour.

The taxation would be discriminatory and would create *"a financial aid by taxation affecting some companies without prior notification to the European Commission, (...) distorting competition (...)"*.

²⁵ Civil Supreme Court, 12 May 1993, bull. civ. I, n° 165, p. 114.

France

- Court referred to: Civil Supreme Court, Commercial Chamber ("*Cour de Cassation*"),

23 November 1993

- Legal questions concerning State aid

Inadmissibility of grounds relating to the incompatibility of the tax in question with the provisions of Community law (Articles 92 and 93 of the Treaty) on procedural grounds. These grounds were not invoked before the judges deciding on the merits of the case:

"Whereas, on one hand, the incompatibility of the tax in question with the provisions of community law was not invoked before the judges deciding on the merits of the case; that this complaint implies the examination of elements of fact such as the basis of assessment, the rate and the methods of recovering the tax, therefore circumstances of fact that the Court of Appeal did not examine, it is inadmissible before the Civil Supreme Court."

3.7 Administrative Supreme Court, "Association la Vache à lait qui refuse de se laisser traire", 17 April 1992²⁷ (B)

- Nature of aid:

Fixing of personal contribution rates of family allowances due by employers and self-employed workers in non-agricultural professions.

- Aid notified: no

- Applicant:

Association "*La vache à lait qui refuse de se laisser traire and Monties*"

- Court referred to: Administrative Supreme Court ("*Conseil d'Etat*") , 17 April 1992

- Legal questions concerning State aid

²⁶ Bull.civ IV, n°424, p.308

²⁷ Case n° 117.604, rep.Lebon, p.721

The provisions of Article 92 of the Treaty do not create rights for private individuals which they can exercise before a national court.

Moreover, the Administrative Supreme Court considered that: *"It is clear from Article 93 of the Treaty that fixing the rates of personal contributions of family allowances concerning employers and self-employed workers does not constitute an "aid" as referred to in this Article."*

3.8 Opinion n° 94-A-15 of the Competition Council of 10 May 1994²⁸ (C)

Opinion n° 94-A-15 of the Competition Council of 10 May 1994 relating to a request for an opinion on the competition problems raised by the diversification of the activities of Electricité de France (EDF) and Gaz de France (GDF).

- Nature of aid:

Cross-subsidies

- Aid notified: no

- Applicant:

The Ministry of the Economy referred a request for an opinion to the Competition Council on the present and potential competition effects of the diversification of EDF and GDF, under the provisions of Article 92 of the Treaty.

- Court referred to: Competition Council ("*Conseil de la Concurrence*"): Independent authority dealing with compliance with the rules of competition

- Legal questions concerning State aids

According to the French Competition Council,

"... the subsidiaries can at present have access, for example, to the infrastructure of the commercial network EDF-GDF Services, the equipment for electricity and gas [...] Provided that these facilities are not the subject of financial reciprocal arrangements on a real cost-basis, they can be interpreted as subsidies from the public establishment towards activities outside the core business[...] Moreover, they constitute factors which

²⁸ BOCCRF, 20 October 1994, p. 463

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may distort competition, because by subsidising diversification activities, they give the subsidiaries considerable advantages over their competitors" (point 1.3)

The Competition Council also considered that:

"diversification does not seem to create a particular problem with regard to [the requirements of Article 92], but it is certain that the principle of prohibition applies to subsidiaries of public companies, through the many different types of aid they may receive directly or indirectly from the State (for example regular payments of capital, subsidies and guarantees or assurances for exports)" (point 2.2c).

3.9 Administrative Supreme Court, SCA du Piada, 1 June 1994²⁹ (B)

- Nature of aid:

Fee for taking water collected by the Adour-Garonne water authorities.

- Aid notified: no

- Applicant:

SCA du Piada requested the annulment of the judgment of the Administrative Court of Appeal of Bordeaux, which had rejected its request for the annulment of the decision of the director of the Adour-Garonne water authorities refusing exemption from payment of the fee for taking water, to which it was subject under the 1985 irrigation campaign.

- Court referred to: Administrative Supreme Court ("*Conseil d'Etat*") (1 June 1994)

Administrative Court of Appeal of Bordeaux (rejection of claim of SCA du Piada); (9 July 1991)

Administrative Court of Toulouse (23 March 1989)

- Similar disputes:

Administrative Court of Appeal, Bordeaux, 9 July 1991, Tydens (B)

²⁹ RJF 8-9/94 n° 928, p. 550.

Administrative Court of Appeal, Bordeaux, 9 July 1991, Ferry (B)

Administrative Court of Appeal, Bordeaux, 9 July 1991, Gelley (B)

Administrative Court of Appeal, Bordeaux, 9 July 1991, Rivoyre (B)

Administrative Supreme Court, M. Letierce, 1 January 1994 (B)

- Legal questions concerning State aids:

Rejection of application before the "Conseil d'Etat".

On the ability to make a preliminary ruling for a national court:

"...by abstaining from referring the question of the interpretation of the provisions invoked [...] of Article 92 of the treaty setting up the European Economic Community to the Court of Justice of the European Communities, the Administrative Court of Appeal of Bordeaux only exercised its discretionary power as stated in Article 177 of the treaty."

On Article 92 of the treaty:

"...by setting aside the means taken from the failure to apply Article 92 of the treaty setting up the European Economic Community on the grounds that this Article does not create rights for individuals which they can exercise before a national court, the court has not committed any error in law."

The Administrative Supreme Court came to the same conclusion in another judgment concerning the same tax (M. Letierce, 1 January 1994³⁰) (B)

3.10 Civil Supreme Court, Limagne Sanders, 18 October 1994³¹ (B)

Simplified chronology

24 September 1980: Parafiscal charges applicable to cereals (Decree)

³⁰ Case n° 129727 et 129829

³¹ Case n° 92.15.667

France

1986: Claim by Limagne Sanders for reimbursement of tax before the administrative judge (who declares that he is not competent to do so) against the Tax Authorities following the annulment of the Decree of 1980 by the Administrative Supreme Court

8 April 1992: Judgment of the Civil court of Riom
(inadmissibility of action to return aid)

18 October 1994: Judgment of the Civil Supreme Court, Commercial Chamber
(rejection of appeal)

- Nature of aid:

Storage tax collected on behalf of ONIC on the basis of the Decree of 24 September 1980 relating to the parafiscal charges applicable to cereals.

- Aid notified: no

- Applicant:

Limagne Sanders, subject to this tax, criticised the Civil court of Riom (8 April 1992) for declaring its action to return the tax inadmissible, while the ECJ (19 November 1991) asked the Court to clarify whether this tax was a tax with effect equivalent to a customs duty, a discriminatory internal tax or prohibited public aid.

- Court referred to: Civil Supreme Court ("*Cour de Cassation*"), 18 October 1994

- Legal questions concerning State aid

Rejection of appeal brought by Limagne Sanders. The ECJ did not declare the tax in question contrary to community law in its judgment of 19 November 1991. The action brought was therefore not an action for the recovery of undue payment based on Community law but an action to dispute the tax subject to procedures under the Tax Code and consequently inadmissible.

3.11 Administrative Supreme Court, Société Saumon Pierre Chevance, 9 November 1994³² (B)

Simplified chronology

³² Case n° 136.761, Report. Lebon p.888; RJF 1/95 n° 79, p. 46

23 March 1989: Judgment of the Administrative Court in Nantes

19 February 1992: Judgment of the Administrative Court of Appeal in Nantes

9 November 1994: Judgment of the Administrative Supreme Court

- Nature of aid

Parafiscal charge collected on behalf of the Institut Français de Recherche pour l'Exploitation de la mer (IFREMER – French Research Institute for the Exploitation of the Sea).

- Aid notified: no

- Applicant:

Saumon P. Chevance disputed payment, for the period from 9 July 1984 to 31 December 1984, of the taxes which would be due under Decree no. 72-1161 of 20 December 1972. This request had already been refused by the Administrative Court of Appeal in Nantes in a judgment of 19 February 1992.

- Court referred to: Administrative Supreme Court ("*Conseil d'Etat*")

- Legal questions concerning State aid

Rejection of application before the Conseil d'Etat.

"The provisions of Article 93 of the Treaty invoked by the "Société Saumon Pierre Chevance" do not create rights for private individuals which they can exercise before a national court".

The Court referred to Article 93 (and not Article 92) of the EC Treaty. This may be because the applicant failed to refer precisely to the last sentence of the third paragraph of Article 93.

The Court reached the same conclusion in two other cases: Administrative Supreme Court, Ledun, 9 November 1994³³; Pêcherie de Fécamp, 9 November 1994³⁴.

³³ Case n° 137368, 8th and 9th s.-s.

3.12 Civil Supreme Court, Bourgogne Sanders, 20 February 1996 (B)

- Nature of aid:

Parafiscal charge on storage of cereals.

- Aid notified: no

- Applicant:

Appeal by the General Director of Customs and indirect duties (recovering the tax in question) against two judgments of the Civil court of Chalon-sur-Saône which stated that the tax in question was contrary to Community law by constituting "*an internal customs duty and prohibited public aid*" and ordered the reimbursement of the tax to Bourgogne Sanders SNC.

- Court referred to: Civil Supreme Court, Commercial Chamber ("*Cour de Cassation*")

20 February 1996

- Legal questions concerning State aid

Annulment of the judgment of the Civil court mentioned above ordering the return of taxes paid by Bourgogne Sanders

"Considering Articles 9, 12, 92 and 93 of the Treaty of Rome;

(...)

Whereas to order the return of the sums paid by Bourgogne Sanders, the judgment states that the parafiscal charge for storage has been declared contrary to community law, as it constitutes an internal customs duty and a prohibited public aid;

Whereas by making this judgment, while no decision had been given by the Court of Justice of the European Communities or by the Civil Supreme Court, the Court of Appeal has breached the provisions mentioned above."

In this case, a confusion is created, the result of which leads to the negation of the direct effect of Article 93 of the Treaty. A judgment of the EC Court of Justice is not necessary to declare an aid incompatible with the common market (as well as a

³⁴ Case n° 137419, 8th and 9th s.-s.

judgment of the Civil Supreme Court!), a negative decision may only be given by the Commission.

**3.13 Civil Supreme Court, Société Minoterie Joseph Nicot, 20 February 1996³⁵
(B)**

- Nature of aid:

Parafiscal charge applicable to the storage of cereals (Decree of 30 September 1953)

- Applicant:

Appeal by the General Director of Customs and Indirect Duties

- Aid notified: no

- Court referred to: Civil Supreme Court, Commercial Chamber ("*Cour de Cassation*"), 20 February 1996; Civil Court of Chalons-sur-Saône (9 April 1991 and 4 May 1993) declaring the tax incompatible with Community law

- Legal questions concerning State aid:

Annulment of the judgment of the Civil Court but not on grounds related to State aid.

The Civil Supreme Court gave the same judgment concerning the same tax in a judgment of 13 June 1995, SNC Bourgogne Sanders³⁶ (B).

3.14 Opinion n° 96-A-10 of the Competition Council of 25 June 1996³⁷ (D)

Opinion n° 96-A-10 from the Competition Council of 25 June 1996 relating to the operation of the financial services of "La Poste" (the Post Office) with regard to competition.

- Nature of aid:

Cross-subsidies:

Technical and material support for the financial services of "La Poste" due to their belonging to the public institution "La Poste".

³⁵ Case n° 93-21.661

³⁶ Case n° 93-21.417

³⁷ BOCCRF, 3 September 1996, p. 444

France

- Applicant:

AFB (French Association of Banks) referred a request for an opinion to the Competition Council. The request related to the competition implications of the operation of the financial services of "La Poste".

- Court referred to: Competition Council ("*Conseil de la Concurrence*"): Independent authority dealing with compliance with competition rules.

- Legal questions concerning State aid:

The Council considered in this case that the question of whether the fact that the financial services of "La Poste" have a competitive advantage over their rivals is likely to raise difficulties under the Community State aid provisions (Article 92), but decided that such a question did not fall under its jurisdiction.

3.15 Civil Supreme Court, Société Guyomarch, 26 November 1996³⁸ (B)

- Nature of aid:

Parafiscal charge applicable to the storage of cereals (Decree of 17 August 1987)

- Aid notified: no

- Applicant:

Appeal by the General Director of Customs and Indirect Duties

- Court referred to: Civil Supreme Court, Commercial Chamber ("*Cour de Cassation*")

Civil Court of Vannes declaring the tax incompatible with Community law, 17 May 1994

- Legal questions concerning State aid:

Annulment of the judgment of the Civil Court of Vannes

The Civil Court of Vannes had considered the Decree of 17 August 1987 as being contrary to Community law, as it was implemented without prior notification to the Commission, though certain provisions of the Decree may constitute State aid (parafiscal charge), within the meaning of Article 92 of the EC Treaty.

³⁸ Case n° 94-18.467; RJF 3/97, n° 288, p. 203

However, the principle of a parafiscal charge applicable to the storage of cereals would have been stated by a decree of 30 September 1953.

For the Civil Supreme Court, " ... coming to this conclusion without determining whether the aids whose validity were challenged were new or modified aids under Article 93 (3) of the Treaty, the Court has not legally justified its decision".

3.16 Civil Supreme Court, Société Sanders Aliments SNC, 7 January 1997³⁹ (B)

- Nature of aid:

Storage tax

- Aid notified: no

- Applicant:

Sanders Aliments SNC

- Court referred to: Civil Supreme Court, Commercial Chamber ("*Cour de Cassation*"), 7 January 1997

Civil Court of Evry declaring the tax incompatible with Community law, 3 November 1994

- Legal questions concerning State aid:

" ... it does not arise from the conclusions of "Société Sanders" that it set out why the parafiscal charge applicable to storage collected in 1986-87 and 1987-88 constituted a "new aid" when compared to the one collected since 1953; having not justified that Article 93, paragraph 3, of the Treaty of Rome was applicable to it, "Société Sanders" cannot reproach the Court for not having considered the compliance of the aid with the provisions of that paragraph".

³⁹ Case 95-10.099

France

The Civil Supreme Court reached a similar conclusion in another judgment concerning the same tax⁴⁰.

3.17 Administrative Supreme Court, Société Baxter e.a., 28 March 1997⁴¹ (B)

Nature of aid:

Emergency measures aiming at the re-establishment of the balance of Social Security, and consisting of exceptional contributions which have to be paid by companies involved in the operation of pharmaceuticals (Article 12 of Ordinance of 24 January 1996). One of these contributions provides for a deduction, when calculating the amount of tax payable, of the research and development expenses in France incurred by companies subject to the tax.

Aid notified: No

Applicant:

Baxter, B. Braun Medical SA and Fresenius France companies

Court referred to: Administrative Supreme Court, 28 March 1997

Legal questions concerning State aid:

The Administrative Supreme Court ("*Conseil d'Etat*") raised the question of the infringement of Article 93(3) of the Treaty and observed that this issue was subject to whether the deduction from the tax of the R&D costs incurred in France constituted an aid within the meaning of Article 92 of the EC Treaty.

The Administrative Supreme Court applying Article 177 of the EC Treaty, agreed to stay proceedings (on the request of the Baxter company to annul Article 12 of the Ordinance of 24 January 1996) and to refer the case for a preliminary ruling to the ECJ.

The questions referred for a preliminary ruling concern Articles 52, 58, 95 and Article 92 of the EC Treaty: "*Is the deduction of the R&D expenses incurred in France from the basis of taxation considered as an aid according to Article 92 of the EC Treaty ?*"

⁴⁰ Rental Languedoc, 27 May 1997, Case n° 95-13.053 (B)

The case is now pending before the ECJ ⁴².

3.18 Civil Supreme Court, Société Ralston Purina France, 27 May 1997 ⁴³ (B)

- Nature of aid:

Parafiscal charge applicable to the storage of cereals

- Aid notified: no

- Applicant:

Appeal by the General Director of Customs and Indirect Duties

- Court referred to: Civil Supreme Court, Commercial Chamber ("*Cour de Cassation*"), 27 May 1997

Civil Court of Evreux declaring the tax incompatible with Community law, 19 May 1995

- Legal questions concerning State aid:

The tax was on the basis of a decree of 30 September 1953 ("existing aid").

„*Considering Article 93(3) of the EC Treaty*“

"Whereas to decide that the tax in question constitutes a State aid contrary to the provisions of the Treaty of Rome, the Civil Court holds that the tax corresponds to the criteria established by the Commission to define State aids, since cereals and some exported derived products are exempted from the tax;

Whereas to so decide, without establishing that new or modified aids, according to Article 93(3) of the Treaty of Rome, had been granted through the tax in question without prior notification to the European Commission, the Court has not legally justified its decision";

[...]

„*Considering Articles 92 and 93 of the EC Treaty*“

⁴¹ RJF 5/97 n° 508, p. 349; RFD adm. 13(3), May-June 1997, p. 450

⁴² Case C-254/97, *Baxter v. France*, the Opinion of the Advocate General is expected for December 1998

⁴³ Case n° 95-19.372

France

Whereas to decide that the tax in question constitutes a State aid contrary to the provisions of the Treaty of Rome, the Court holds that the European Commission judged so the 24 September 1991 and the 18 March 1992;

Whereas, the Court based its decision on the ground of elements which do not indicate that the Commission, under the provisions of Article 93 of the Treaty of Rome, decided on the compatibility of the tax with Article 92 of the Treaty, the Court has not justified its decision".

The Civil Supreme Court reached the same judgment in another case concerning the same tax (*Société Normande d'alimentation*, 27 mai 1997 ⁴⁴ (B)).

3.19 Civil Supreme Court, Société Chambe, 2 December 1997 ⁴⁵ (B)

- Nature of aid:

Parafiscal charge applicable to the storage of cereals

- Aid notified: no

- Applicant:

Appeal by the General Director of Customs and Indirect Duties

- Court referred to: Civil Supreme Court, Commercial Chamber ("*Cour de Cassation*"), 2 December 1997

Civil Court of Lyon declaring the tax incompatible with Community law, 2 July 1993

- Legal questions concerning State aids:

The parafiscal charge has been introduced by a decree of 30 September 1953 ("existing aid").

„*Considering Articles 92 and 93 of the Treaty of Rome;*“

" ... the judgment [of the Civil Court] holds that the tax in question constitutes a public aid prohibited under Article 92 of the Treaty; the judgment holds that the European Commission judged so the 24 September 1991;

⁴⁴ Case n° 95-19.371

Whereas, the Courts based its decision on the ground of elements which do not indicate that the Commission, under Article 93 of the Treaty of Rome, decided on the compatibility of the tax with Article 92 of the Treaty, the Court has not justified its decision".

3.20 Civil Supreme Court, Commercial Chamber, Huttepain Maine Aliments SA, 16 June 1998 (B)

- Nature of aid:

Parafiscal charge applicable to the storage of cereals

- Aid notified: no

- Applicant:

Appeal by the Huttepain Maine Aliments SA company

- Court referred to: Civil Supreme Court, Commercial Chamber ("*Cour de Cassation*"), 16 June 1998

Civil Court of Le Mans, 2 July 1996 (The Civil Court refused to exempt the company from the payment of the storage tax on the ground that the national authority would have infringed the provisions of the last sentence of Article 93§3 EC Treaty)

- Legal questions concerning State aids:

The Huttepain Maine Aliments SA company, which disputed the payment of the storage tax on the basis of the infringement by the French authority of the provisions of the last sentence of Article 93§3 EC Treaty, appealed the decision of the Civil Court of Le Mans of 2 July 1996.

The Civil Court of Le Mans rejected its claim, as, in the absence of a decision of the Commission, the Court had no jurisdiction to determine, on the request of a private person, whether the disputed tax was likely to constitute a State aid incompatible with the common market and whether the French authority had violated its Community obligations imposing such a tax.

⁴⁵ Case n° 96-10.575

According to the company, national Courts have a duty to safeguard the rights of private individuals faced with an infringement by national authorities of the prohibition of the implementation of State aids under the last sentence of Article 93§3 EC Treaty, which has direct effect.

Private individuals may challenge such an infringement even if the Commission did not initiate a State aid control investigation procedure. Therefore, by rejecting the request of the applicant on the ground of the absence of a decision of the Commission, the Court incorrectly applied the last sentence of Article 93§3 EC Treaty, as the national judge must examine whether the disputed aid constitutes a new aid or an amended aid and whether its implementation must be suspended under the procedure in Article 93§3.

However, the Supreme Civil Court, which partially annulled the judgment of the Le Mans Civil Court (but on the basis of another ground: infringement of the non-retroactivity principle) considered that the Huttepain company did not demonstrate that the storage tax collected for the 1986-87 and 1987-88 campaigns was a "new aid" when compared with the tax which was levied since 1953, and failed to prove that Article 93§3 was applicable in that case.

It must be noted that the parafiscal charge in this case had been introduced by a decree of 30 September 1953 ("existing aid").

3.21 The "Boussac" case (A)

Simplified chronology

June 1982 to August 1984: Capital contributions to Boussac Saint Frères

3 December 1984: Commission opens procedure under Article 93(2) of the Treaty

1985-86: Petition in bankruptcy of Agache-Willot-Boussac Group taken over by LVMH

15 July 1987: Decision of the Commission declaring the aid illegal and incompatible and ordering the return of 338.56 million FF

14 February 1990: Judgment by ECJ, France v. Commission, confirming the decision of the Commission

29 May 1990: Issue by the Legal Officer of the Treasury of an instrument for enforcement for the recovery of 338.56 million FF plus interest as from publication of the Commission's decision

11 October 1990 and 10 July 1991: Litigation before the Administrative Court of Paris where LVMH requested the annulment of the instrument of enforcement

16 February 1994: Judgment of the Administrative Court, Paris

Confirmation of the obligation of repayment by the Administrative Court of Paris, but annulment of the instrument of enforcement insofar as it also claims payment of interest, which was not stipulated in the Commission's decision

February 1995: LVMH returns the aid to the French State.

Decision of the Commission of 15 July 1987 ⁴⁶

Aid granted by the French Government to Boussac Saint Frères, manufacturer of textiles for clothing and paper based products

Contribution of new capital

Amount of 338.56 million FF

Aid notified: no

Decision:

The Commission could not pass judgment on the compatibility of the aid before its implementation because of the failure to notify. The aid was therefore illegal from the moment it was granted. In addition, this aid was incompatible with the Common Market:

"... this aid had to be notified to the Commission as provided by Article 93 (3). Since the French Government failed to notify in advance the aids in question, the

⁴⁶ OJ L 352 of 15 December 1987, p. 42

France

Commission was unable to state its views on the measures before they were implemented. Thus, the aid is illegal under Community law from the time that it came into operation. (...) At the same time, this aid is incompatible with the common market under Article 92 of the EEC Treaty". (III, § 8 & 9).

"A total sum of FF 338.56 million shall be recovered " (Article 2).

ECJ of 14 February 1990, France vs Commission⁴⁷

The ECJ rejected the claim of the French Government and confirmed the decision of the Commission of 15 July 1987 declaring the State aid granted to the Boussac company illegal and incompatible with the Common market.

In the Boussac case, the ECJ judged that, once it has established that aid has been granted or altered without notification, the Commission has power to issue an interim decision requiring the immediate suspension of the payment of such aid pending the outcome of its further examination (point 19).

Administrative Court of Paris, 16 February 1994

- Applicants:

Augefi and Sèvres Participation, successors of Boussac Saint-Frères (in bankruptcy).

The said companies dispute the instrument for enforcement issued by the Treasury ("Trésor") for the recovery of the sum.

- Court referred to: Administrative Court of Paris ("*Tribunal Administratif*") (Administrative court with possibility of appeal)

On the jurisdiction of the Administrative Court:

The action by which the French Government complies with the decision of the Commission, by proceeding with the recovery of the sums granted as aid which are incompatible with the common market, is in the nature of an administrative action taken by the national authorities under their public authority prerogative and with a view to fulfilling their international commitments.

⁴⁷ Case C-301/87. [1990] ECR I-307

On the disputed instrument of enforcement:

- Direct effect of the decisions of the Commission

This instrument of enforcement can be issued against the recipient of the aid and, insofar as it merely gives effect to the decision of the Commission, it does not have to be notified to the recipient.

- The applicant cannot successfully plead against the French State (which has to comply with the decision of the Commission) neither the fact that the action to return the aid in question was in breach of the principle of legitimate expectations, nor the fact that the national authorities apparently gave the applicant assured the applicant that the sums paid to Boussac would not be subject to repayment.

Nevertheless, the decision of the Commission did not require that the sums in question are accompanied by interest on overdue payments. Consequently, the applicants were justified in requesting annulment of the instrument of enforcement insofar as it claims payment of interest.

3.22 The "Fenacomex" case known as the "Saumon" case (D)

Simplified chronology

1982: Intention expressed by the Commission to open the 93(2) procedure with regard to the actions of the FIOM (Fonds d'Intervention et d'Organisation des Marchés de la Pêche – Fund for Intervention and Organisation of Fish Markets) in France (Decree of 1975).

27 July 1984: Decision to open proceedings concerning the parafiscal charge benefitting the FIOM.

31 December 1984: Notification to the Commission of the planned parafiscal charge.

15 April 1985: Signature of interministerial order (Publication in the Official Journal of the French Republic on 20 April 1985). The aid is put into effect on 20 April 1985.

France

Opening of the examination procedure by the Commission.

21 June 1985: Request before the French Conseil d'Etat by the National Federation for the Foreign Trade of Food Products (Fenacomex) and the National Association of Salmon merchants and processors (relating to the annulment of the interministerial order of 15 April 1985 for failure to comply with Article 93(3) of the EC Treaty).

9 October 1985: Decision to authorise aid by the Commission (which does not have the effect of retroactively validating the order for the period prior to the authorisation)

26 October 1990: Judgment of the Conseil d'Etat⁴⁸. Judgment to stay proceedings and refer for a preliminary ruling.

21 November 1991: Judgment of the ECJ, Fenacomex vs France (annulment limited in time and relating to the premature implementation of the tax)

2 June 1993: Judgment of the Administrative Supreme Court (Conseil d'Etat)

Administrative Supreme Court ("*Conseil d'Etat*"), 26 October 1990

- Nature of aid:

Parafiscal charge to benefit the central committee for sea fishing, local committees for sea fishing and the French Research Institute for the Exploitation of the Sea (IFREMER).

- Aid notified: Opening of procedure before notification

- Applicant:

The Federation Fenacomex.

- Court referred to: Administrative Supreme Court ("*Conseil d'Etat*"),
26 October 1990

- Legal questions concerning State aid

The provisions of Articles 92 and 93(1) and 2 of the Treaty do not create rights which private individuals can exercise before national courts.

⁴⁸ Case no. 69.726 and 69.727, Rep. Lebon p. 294

Question for preliminary ruling of the *Conseil d'Etat* (Article 93(3) of the Treaty):

"Will non-compliance with Article 93(3) affect the validity of actions involving the implementation of aid measures, taking into account a subsequent decision of the Commission declaring the compatibility of the measures in question?"

ECJ, 21 November 1991⁴⁹

- Answer to the question for preliminary ruling:

According to the ECJ, "... the last sentence of Article 93(3) of the Treaty is to be interpreted as imposing on authorities of Member States an obligation the infringement of which will affect the validity of measures giving effect to aid, and that the subsequent adoption by the Commission of a final decision declaring the measures compatible with the common market does not have the effect of regularising the invalid measures *ex post facto*" (Recital. 17)

Administrative Supreme Court ("*Conseil d'Etat*"), 2 June 1993⁵⁰

Enforcement of the solution given by the ECJ to the dispute.

On the basis of Article 93(3) of the Treaty, the "*Conseil d'Etat*" annulled the decree granting the aid up to the decision of the Commission declaring this aid compatible with Article 92 of the Treaty (i.e. for the period 20 April 1985 to 25 October 1985).

3.23 The "SFEI" vs "la Poste" case (F)

Simplified chronology:

21 December 1990: Complaints lodged by SFEI with the Commission (Articles 85 and 86, Articles 92 and 93 of the Treaty) and with the Competition Council (Article 7 and 8 of the French Order of 1986).

10 March 1992: Decision by the Commission to reject complaint

⁴⁹ National Federation for Foreign Trade of Food Products (Fenacomex) v. France. case C-354/90, [1990] ECR 5505.

⁵⁰ RJF 7/93 n° 1086, p. 619; Opinion of the "*Commissaire du Gouvernement*", *Droit fiscal* 1993, n° 2097, p. 1766.

France

16 May 1992: Appeal for annulment against this decision (case C-222/92)

9 July 1992: Withdrawal of this decision by the Commission and pursuit of enquiry by the Commission (supplementary instruction)

18 November 1992: Order of no grounds for judgment by the ECJ

16 June 1993: Given the slow progress of the Commission's enquiry, summons by SFEI of "La Poste" (the Post Office), SFMI and Chronopost before the Commercial Court.

5 January 1994: Judgment of the Commercial Court of Paris (judgment to stay proceedings and 8 questions to the ECJ for a preliminary ruling. (Article 177)

11 July 1996: Judgment of the ECJ (Article 177)

OJ 17 July 1996: Opening of procedure 93(2) with regard to the provisions adopted by "La Poste" in favour of SFMI-Chronopost

18 March 1997: Preliminary judgment of the Commercial Court in Paris

1 October 1997: Decision by the Commission (non-applicability of Article 92(1) of the Treaty to the alleged State aid granted by France to SFMI Chronopost) (OJ L 167/37 of 9 June 1997) (OJ L 164/37 of 9 June 1998)

19 January 1998: Judgment of the Tribunal des Conflits (Jurisdictional Court) deciding that the Civil Court is competent

1998: Judgment of the Commercial Court on the merits of the case.

Commercial Court of Paris of 5 January 1994

- Nature of aid:

Logistical and commercial assistance granted by "La Poste" to its private law subsidiaries, SFMI and Chronopost, which are active in the express delivery business.

- Aid notified: no

- Applicants:

French Express Union (SFEI),
DHL International and others, being private companies competing with SFMI and Chronopost in express delivery

- Court referred to: Commercial Court ("*Tribunal de Commerce*") (Court with possibility of appeal).

- Object of the action brought:

- to judge whether the logistical and commercial assistance constituted State aid in accordance with Article 92 of the Treaty;
- to determine the illegal nature of the aid in the absence of notification (violation of Article 93(3) of the Treaty)

And, consequently, to:

- instruct "La Poste" to stop granting illegal aid;
- order SFMI to return aid received;
- award damages to compensate for losses suffered.

The defendants ("La Poste" and subsidiaries) requested the Commercial Court to declare its lack of jurisdiction in favour of the Commission and, subsidiarity, in favour of the Administrative Courts (Administrative Supreme Court), or to delay proceedings while awaiting a decision from the Commission.

- Questions for preliminary ruling put to the ECJ (Article 177 of the EC Treaty)

1. Do the measures in question constitute State aid ?
2. Consequences of the breach of the prohibition laid down by Article 93(3) ?
 - immediate suspension of financial support
 - recovery of financial support already granted
3. Liability of the company benefiting from the aid in the event of the breach of Article 93(3) ?
4. Question of compensation for loss sustained by companies in competition with the recipient of the aid, under the rules of national law.

5. Where a national court hears an application, under its national civil law for the appropriate response to a State measure put into force without fulfilling procedure under the last sentence of Article 93 (3) of the Treaty, is it under an obligation to declare that it lacks jurisdiction if a complaint has been submitted to the Commission in order to obtain a finding that the contested measure is incompatible with the Common market, even though the Commission has not given its final decision and has not even ruled on whether or not the contested measures constitute State aid ?
6. In the same situation is a national court that has declared that it has jurisdiction nevertheless obliged to stay the proceedings pending a decision from the Commission as to whether the contested measures are State aid ?
7. The role of a national court where the plaintiff has expressed the urgent need to terminate the harmful consequences for it of the infringement of the last sentence of Article 93 (3) ?
8. Direct effect of Article 93(3) of the Treaty.

- Question of the jurisdiction of the Commercial Court

See below (3).

ECJ, 11 July 1996, SFEI vs "La Poste" ⁵¹

(answers to the questions for preliminary ruling of the Commercial Court in Paris)

In its judgment, the ECJ first dealt with Questions 5 to 8 of the Commercial Court as they concerned the issue of the national court's jurisdiction, then with Questions 1 to 4 which concerned the concept of State aid and the remedies to be granted in the event of an infringement of the last sentence of Article 93(3).

Questions 5 to 8 of the Commercial Court (Jurisdiction of the national judge in the case of parallel referral to the Commission)

"(...) A national court, seised of a request that it should draw the appropriate conclusions from an infringement of 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

⁵¹ Case C-39/94, [1996] ECR I-3547

final decision as to whether the State measures 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. With a view to determining whether those measures should have been notified to the Commission, a national court may have cause to interpret and apply the concept of aid. In case of doubt, it may ask the Commission for clarification. Furthermore, it 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. 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." (Recital.53).

Question 1 of the Commercial Court (Qualification for aid)

"(...) The provision of logistical and commercial assistance by a public undertaking to its subsidiaries, which are governed by private law and carry on an activity open to free competition, is capable of constituting State aid within the meaning of Article 92 of the Treaty if the remuneration received in return is less than that which would have been demanded under normal market conditions." (Recital 62)

Question 2 of the Commercial Court (Jurisdiction of the national court to order the recovery of aid not notified)

"... 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." (Recital 71)

Questions 3 and 4 of the Commercial Court (Liability of the beneficiary of aid not notified)

(...)

"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." (Recital 76)

„That does not, however, prejudice the possible application of national law concerning non-contractual liability." (Recital 75)

Commercial Court of Paris, 18 March 1997 (preliminary judgment)

- Question of the allocation of roles between the national court and the Commission

- The assessment of the compatibility of aid is exclusively within the competence of the Commission, within the framework of a procedure against the State as grantor of the aid;
- National courts cannot give judgment on this compatibility (...) however, it is up to them to guarantee to those under their jurisdiction that all the consequences of a violation of Article 93(3) of the Treaty will be taken in accordance with national law (validity of actions of implementation and recovery of financial support granted in defiance of this provision);
- The national judge must examine the non-contractual liability of the beneficiary of State aid which is not notified;
- The national judge may have to:

- interpret and apply the concept of aid; with a view to determining whether aid should have been notified to the Commission;
- order the return of sums paid unduly;
- state any interim measures;
- and give judgment on any civil liability.

- Question of jurisdiction (legal or administrative)

On the rationae personae jurisdiction of the Commercial Court:

The subsidiaries of "La Poste" are private companies governed by private law; "La Poste" is a national public institution registered in the Trade and Companies Register.

Relations between "La Poste" and third parties are governed by private law and disputes relating to these relations are brought before Civil Courts (jurisdiction of the Commercial Court).

On the rationae materiae jurisdiction of the Commercial Court:

The jurisdiction of the Commercial Court must only be set aside if the disputes fall under administrative jurisdiction by their nature.

The liability of the State is not involved in this case.

In addition, the referral to the Commercial Court does not relate to the variation of administrative actions allowing the alleged aid to be granted but to the compensation of loss caused by certain practices attributable to a public institution.

Non-contractual liability for unfair competition, based on Article 1382 of the Civil Code, does not involve here ordering the State to recover the criticised aid, but ordering SFMI to return it to "La Poste".

However, if the annulment of any administrative action is not requested, it is a question of annulling de facto the effects of a decision taken originally by the Ministry for Post and Telecommunications (by repayment by the recipient of the alleged aid) and of obtaining compensation for any third parties affected.

The competence of the administrative judge is limited to decisions (*"prérogatives de puissance publique"*) taken by the administration in exercising the powers of public authority.

In this case, the dispute relates to aid which was claimed to have been given by "La Poste" to a subsidiary operating on the express delivery market, a service which can be dissociated from the general mail service, and which is subject to the rules of the competitive sector.

Thus the Commercial Court is competent.

Order to determine which Court is competent by the "Préfet de Paris", 14 April 1997 (claim of competence for the Administrative Court)

The claim of SFEI before the Commercial Court requires an assessment of the legality of the State aid granted to SFMI by "La Poste".

The decisions of the Minister of Post and Telecommunications by which he would have decided to grant this State aid constitute administrative decisions.

The civil or commercial judge cannot assess the legality of administrative decisions.

France

Therefore, the Administrative Court is the competent court.

Jurisdictional Court ("*Tribunal des Conflits*"), 19 January 1998

(Jurisdictional Court deciding on the question of the jurisdiction of the Commercial Court or Administrative Court: annulment of order of 14 April 1997).

The dispute does not call into question the exercise of the postal service's powers of public authority ("*prérogatives de puissance publique*").

Therefore, jurisdiction lies with the Civil Courts, subject to any referral of questions for preliminary ruling to the Administrative Courts on the assessment of the legality of the administrative decisions relating to the organisation and operation of the postal service.

Judgment on merits of the case of the Commercial Court

(not given yet, 7th chamber of the Commercial Court in Paris)

CONCLUSION

If the number of decisions adopted by the French courts in the field of State aids since 1989 was to be the only criterion taken into consideration in order to evaluate the degree of enforcement of State aid rules by French courts, it might appear that such rules are more frequently applied in France than in other Member States.

However, such a conclusion, if drawn, would be misleading. Indeed, it must be strongly tempered by the fact that a very important number of the decisions described hereabove concerned the same and one measure which is not very significant from a legal point of view., i.e a storage tax for cereals qualified as "existing aid".

Only three cases gave rise to substantial developments before French Courts as far as State aid rules are concerned, i.e the "Boussac" case, the "Saumon" case and also the "SFEI" case which is still pending before the Commercial Court of Paris.

In this respect, it should be noted that the Boussac case is the only one which led to a clear decision of French courts, requiring the recovery by the French State of aid considered by the Commission as illegal and incompatible with the common market.

Most of the other cases concerned non-notified aids, among which the existence of State aids was not even ascertained.

Except for the Saumon case, where the Administrative Supreme Court undoubtedly applied the direct effect of Article 93(3) of the Treaty, both Administrative and Civil French Courts refused to apply the direct effect of this provision, either because this last sentence was not precisely invoked by the applicant, or because the aid was existing before the entry into force of the EC Treaty ("existing aids").

Decisions of French courts in the field of State aids (1989 - June 1998)

TABLE

1. Opinion n° 89-A-11 of the Competition Council of 11 July 1989
2. Administrative Court of Appeal, Paris, S.A Lesieur Alimentaire, 27 June 1991
Administrative Court of Appeal, Paris, S.A Amora, 27 June 1991
Administrative Court of Appeal, Paris, S.A Mayolande, 27 June 1991
Administrative Court of Appeal, Paris, Etablissements Dagousset, 27 June 1991
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3. Administrative Court of Appeal, Nantes, S.A Tartrou, 9 October 1991
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