COMMISSION DECISION

of 1 October 1997

concerning alleged State aid granted by France to SFMI-Chronopost

(notified under document number C(1997) 3146)

(Only the French text is authentic)

(Text with EEA relevance)

(98/365/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof,

Having regard to the Agreement establishing the European Economic Area, and in particular of Article 62(1)(a) thereof,

Having, in accordance with the provisions of the abovementioned Articles, given notice to the parties concerned to submit their comments and having regard to those comments,

Whereas:

I. THE FACTS

A. Background

In France express delivery service is an activity open to unrestricted competition, unlike the ordinary postal service, which is subject to the monopoly of the French Post Office.

The French Post Office belonged to the French public administration until the end of 1990. On 1 January 1991, pursuant to the provisions of Law No 90-568 of 2 July 1990, it became an autonomous corporation subject to French public law, and as such is free to operate in sectors open to competition, as well as pursuing public sector activities.

At the end of 1985 and the beginning of 1986, the Post Office entrusted the management of its express delivery service, operated under the name of Postadex, to a private company called Société Française de Messagerie Internationale (SFMI) which had been set up for this purpose. SFMI was incorporated with a share-capital of FRF 10 million held by Sofipost (66 %), a holding company wholly owned by the Post Office, and by TAT Express (34 %), a subsidiary of the airline Transport Aérien Transrégional ('TAT'). SFMI provided the express delivery service under the name of EMS/Chronopost.

The conditions for the operation and marketing of the express delivery service were set out in an order of 19 August 1986 by the French Ministry of Posts and Telecommunications. Under this order the service was to be operated by SFMI using mainly the resources of the Post Office supplemented by those of TAT. The arrangements in the order included the requirement that the post office was to provide SFMI with logistical and commercial assistance. The contractual relations between the Post Office and SFMI-Chronopost are regulated by way of agreements entered into by the two parties. The first agreement, which was concluded in 1986 and was in force until 1992, was replaced by a second agreement which entered into force on 1 January 1993.

In 1992 the structure of the express delivery business changed. Sofipost and TAT set up a new company, Chronopost SA ('Chronopost'), in which their respective holdings were again 66 % and 34 %. Chronopost took over the domestic activity of SFMI, which remained responsible for international business. SFMI was acquired by GDEW France, the French subsidiary of the international common operator GDEW whose participants are the Australian company TNT and the German, Canadian, French, Netherlands and Swedish post offices. It is worth remembering that GDEW is a concentrative joint venture which was authorised by Commission Decision of 2 December 1991 ([1]).

Under this new structure, Chronopost was to act as a service provider and agent on behalf of SFMI (and thus GDEW) in the handling of its international dispatches in France. Moreover, Chronopost could not compete with SFMI and was its exclusive agent until 1 January 1995. Chronopost was also granted until that date exclusive access to the post office's network. (In the course of this Decision reference will be made to 'SFMI-Chronopost', even when only one of the two companies is involved).

([1]) OJ C 322, 13. 12. 1991, p. 19.

B. **SFMI-Chronopost's economic performance**

When SFMI-Chronopost started its operations in 1986, the international express delivery service in France was a market dominated by the company DHL with a market share of over 40 %. The Post Office's international turnover corresponding to its product Postadex was FRF 45 million in 1985 (approximately 10 % of the market). This market has constantly grown since the entry of SFMI-Chronopost in 1986 (total sales grew from FRF 500 million in 1986 to FRF 2,7 billion in 1996).

SFMI-Chronopost has been a successful business. It has conquered market shares and consolidated its market position and been constantly profit-making. SFMI-Chronopost increased its market share from 4 % in 1986 to 22 % in 1996 and has distributed dividends each year. The reasons for its profitability lie in the rapid growth of the express delivery market in France, in SFMI-Chronopost's access to the parent company's network, in the choice of a sound commercial strategy and in the significant advertising investments made.

In particular, especially during the early years of operation, SFMI-Chronopost subcontracted most of its activity to the Post Office and therefore incurred limited start-up costs (in particular, fixed costs). This explains why the company was provided with very limited equity capital (FRF 10 million).

SFMI-Chronopost, unlike its competitors which were mainly active on the international market, decided to enter both the international and the domestic French market. This permitted SFMI-Chronopost to operate in a new market characterised by little competition and to benefit from the synergies stemming from the combined operation of the international and domestic markets.

Moreover, the EMS/Chronopost product was less sophisticated than other products offered by the competitors and in particular than DHL's products. Unlike the latter, EMS/Chronopost was targeted at the casual customer. The characteristics of SFMI-Chronopost's product enabled it to charge prices lower than those of its competitors. In particular, SFMI-Chronopost normally collected the occasional customers' dispatches at the postal offices, while competitors collected dispatches at home. SFMI-Chronopost did not guarantee delivery deadlines, whilst DHL did so. Geograpical coverage was also more limited than DHL's (100 countries in 1988 compared with 175 countries for DHL). Ancillary services, particularly informatics services giving a permanent control of the service provided, were less advanced than those of competitors.

SFMI-Chronopost has enjoyed increasing autonomy from the Post Office, and the share of business subcontracted to the latter has decreased over time (collection decreasing from 67 % in 1987 to 39 % in 1994 and distribution decreasing from 94 % in 1987 to 45,8 % in 1994). In 1996 SFMI-Chronopost employed 1 870 people, had 32 offices, two transit centres, six international exchange centres and 600 vehicles. SFMI-Chronopost dealt with 450 subcontractors, amongst which there was the Post Office.

As regards marketing activities, by 1996 SFMI-Chronopost had 95 salesmen and only one quarter of its sales was made through the Post Office.

C. **The complaint and the procedure**

On 21 December 1990, the Syndicat Français de l'Express International ('SFEI'), a consortium of companies providing express delivery services in competition with SFMI-Chronopost, lodged a complaint with the Commission on the grounds that the logistical and commercial assistance provided by the post office to SFMI-Chronopost involved State aid under Articles 92 and 93 of the EC Treaty. This aid allegedly enabled SFMI-Chronopost to charge much lower prices than its competitors. An economic study by Braxton, a consulting firm appointed by SFEI, was attached to the complaint. This study quantifies the amount of the alleged aid received by SFMI-Chronopost over the period 1986 to 1989.

By letter of 10 March 1992, the Commission informed the complainant that the file had been shelved. SFEI and a number of SFMI-Chronopost's competitors brought an action before the Court of Justice for annulment of the letter. The Commission withdrew the letter in order to obtain further information.

At the Commission's request, France provided information by letter of 21 January 1993, by fax from the competent government departments on 3 May 1993, and by letter of 10 June 1993.

SFEI and five of its member undertakings brought an action before the Paris Commercial Court on 16 June 1993 against SFMI-Chronopost, the French Post Office and others. A second study by the consultancy Braxton was attached to the application. This study updated the valuation of the aid carried out in the previous one up to the end of 1991.

On 5 January 1994, the Paris Commercial Court, on the basis of Article 177 of the Treaty, put eight questions relating to the interpretation of Articles 92 and 93 of the Treaty to the Court of Justice. The Commission presented its comments on the matter on 6 May 1994. The French Government, which intervened in May 1994, attached to its comments a study by the firm Ernst & Young, in response to the two Braxton studies.

In February 1996 the Commission opened the procedure provided for under Article 93(2) of the Treaty, in respect *inter alia* of the assistance provided by the Post Office to SFMI-Chronopost over the period 1986 to 1991([2]). The Commission considered that the possibility that State aid had been granted to SFMI-Chronopost by France (directly or through the intermediary of the Post Office) could not be ruled out.

In particular, as regards the assistance by the Post Office to SFMI-Chronopost, the information available suggests that only in 1992 did the prices charged by the postal administration match actual costs plus a profit margin. The Commission did not have sufficient information to rule out the possibility that, during the financial years before and after 1992, SFMI-Chronopost had benefited from State aid.

The Commission did not have sufficiently detailed information to allow it to dismiss the possibility that the establishment of SFMI-Chronopost had involved a transfer of resources from the State in some form or other.

No information was available as to how far there had been observance of one of the conditions to which the participants in the joint venture GDEW had subscribed when the concentration had been authorised. That condition was that, unless it was shown that no cross subsidies had been paid, the parties undertook to offer to competitors the same services as those provided for the joint venture, in accordance with the principle of equal treatment for equivalent transactions, so as to exclude the risk of a transfer of public resources to one of the players on the express delivery market. The same considerations apply to admittance to the postal infrastructures to operators other than the joint venture, as from 1 January 1995.

Nor was any information available on the implementation of the Commission's recommendation contained in the decision on the Post Office's competitive activities ([3]). The Commission urged the need to ensure that the postal administration's accounts showed that there were no subsidies for non-public service activities, since such subsidies would be caught by Articles 92 and 93 of the EC Treaty. Since, under the decision, precise information on this matter was to be submitted annually, an initial check on the situation in the express delivery sector had to be carried out on the basis of the information available at the end of 1995.

The Commission took the view that the series of measures described above, with the exception of the establishment of the joint venture GDEW, had not been notified to the Commission in accordance with Article 93(3) of the EC Treaty. Those measures could involve State aid under Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement. Any such aid would not have been eligible for any of the derogations allowed under Article 92(2) and (3) of the EC Treaty or Article 61(2) and (3) of the EEA Agreement.

France was informed of the opening of the procedure by letter of 20 March 1996.

The Court of Justice gave its ruling on 11 July 1996 ([4]). The proceedings before the Paris court, suspended pending the Court's judgment, recommenced on 24 September 1996.

France sent a note to the Commission on 30 May 1996 setting out its comments pursuant to the Article 93(2) procedure.

SFEI submitted its comments in August 1996, drawing the Commission's particular attention to a number of additional measures which might be regarded as State aid to SFMI-Chronopost. These include the use by SFMI-Chronopost of the Post Office's trade image, and in particular its vehicles as an advertising medium, its privileged access to Radio France's broadcasting programmes, some customs and tax privileges conceded both to SFMI-Chronopost and to the Post Office, and the Post Office's investment in dispatching platforms. SFEI extended its complaint of December 1990 to cover these additional points.

SFEI attached to its comments another economic study by the consultancy Bain & Company (the 'Bain study'). The purpose of this study is also to evaluate the amount of aid involved in the assistance provided by the Post Office to SFMI over the period 1986 to 1991. The Bain study is based on the information contained in the Ernst & Young report and, according to the SFEI, its figures are more accurate than those of the two previous studies by Braxton. SFEI further asked the Commission to take interim measures in respect of the alleged aid granted to SFMI-Chronopost. The complainant repeated its request for interim measures in a subsequent letter of 7 November 1996. The Commission replied to the complainant by two letters of 22 October and 13 November 1996, setting that it did not intend to take interim measures since it was not yet in a position to establish whether State aid was involved.

([2]) OJ C 206, 17. 7. 1996, p. 3.
([3]) OJ C 262, 7. 10. 1995, p. 11.
([4]) Case C-34/94, SFEI and Others v. La Poste and Others ('La Poste'), [1996] ECR I-3547.

SFEI's comments were transmitted by the Commission to France in September 1996. In reply to SFEI's comments, France addressed another note to the Commission, attaching to it a comprehensive economic study by the consultancy Deloitte Touche Tohmatsu (the 'Deloitte study'). The Deloitte study examines and replies to the findings of the Bain study. Upon the Commission's request, further information and clarifications were provided by the French authorities.

A number of meetings took place between the Commission and the French authorities. The last meeting took place in Paris on 10 June 1997.

The complainant sent another letter to the Commission on 21 April 1997, asking for information about the progress of the examination of the case. SFEI requested the Commission to provide detailed information on France's reply to the opening of the Article 93/(2) procedure and on the Commission's position and intentions in the matter. The Commission replied to the complainant by letter of 30 April 1997, stating that the information provided by France was commercially sensitive and could not be disclosed and that the Commission had sufficent evidence to take a position on the case. In the same letter the Commission asked the complainant to provide clarification on certain points made previously. SFEI replied to the Commission by letter of 14 May 1997.

D. **The measures at issue**

The measures which the Commission will examine under State aid rules are the following:

1. *Logistical assistance,* which constists in making available to SFMI-Chronopost the usage of the postal infrastructure for the collection, sorting, transport and delivery of its dispatches.

   The price of the logistical assistance is calculated by multiplying the number of items handled (as regards collection, for example) or the total weight of the items transported (as regards forwarding) by the Post Office, by the unit price of the different operations carried out by the Post Office in performing the relevant service. Unit prices are negotiated each year between the Post Office and SFMI-Chronopost. They are based on the costs incurred by the Post Office, plus a margin.

   To calculate the total cost of the assistance to SFMI-Chronopost, the Post Office calculates first the direct operating costs before central and local offices' overheads on the basis of the production range (chain of elementary operations) of the services provided and the actual traffic volumes. The central and local offices' overheads are then allocated in proportion to the operating costs of each service.

   As regards the production range, the Post Office did not have an analytical accounting system which enabled it to calculate the real costs incurred in providing the logistical assistance to SFMI-Chronopost. Until 1992 those costs were calculated on the basis of approximations. The services provided to SFMI-Chronopost were divided into elementary operations, which before 1992 had not bee timed. To establish those costs the Post Office compared the corresponding services to similar existing postal services, whose operations had already been timed and valued (such as the deposit of a registered letter). In 1992 those operations were timed and valued, account being taken of the actual traffic volumes of the express courier activity. This has enabled the Post Office to assess the actual cost of the logistical assistance.

   In order to determine the cost of the logistical assistance more accurately, the Post Office has applied to unit costs in 1992 a discount factor corresponding to the wages growth rate. The choice of this rate is justified by the fact that wages represent the main cost incurred for the logistical assistance (over 75 %). Hence the actual costs of 1992, corresponding to the real production range, have been discounted backwards and multiplied by the actual traffic volumes of each year during the period 1986 to 1991. By means of this method of backward projection the Post Office has been able to arrive at a reliable estimate of the actual costs incurred by the Post Office from 1986 to 1991.

   It is apparent from a comparison of the costs of the logistical assistance with the remuneration paid by SFMI-Chronopost that the cumulative cover rate of total costs was 116,1 % over the period 1986 to 1991 and 119 % over the period 1986 to 1995. It is only in 1986 and 1987 that the revenues from the logistical assistance did not cover the corresponding costs entirely (the cover rates were 70,3 % and 84,3 % respectively). However, revenues covered direct costs before central and local offices' overheads.

   Since 1993, SFMI-Chronopost has been paying annual fixed fees by way of contribution to the postal network (see below); accordingly, unit prices have decreased. However, the remuneration paid by SFMI-Chronopost has been in excess of the costs incurred by the Post Office.

   The advantages derived from the logistical assistance are amplified, according to the complainant, by the fact that SFMI-Chronopost benefits from a preferential customs-clearance procedure (see below) and from delays in payment.

Until 1992 the Post Office sent monthly invoices to SFMI-Chronopost which had to be paid no later than 90 days after the end of the month to which they referred.

2. *Commercial assistance,* which consists in SFMI-Chronopost's access to the Post Office's customers and enjoyment of its goodwill. In this connection, the complainant maintains that in 1986 the Post Office transferred the customers of the Postadex product to SFMI-Chronopost for no consideration (Postadex was replaced by EMS-Chronopost in 1986). In addition, SFMI benefits from promotional and advertising campaigns undertaken by the Post Office.

France has made it clear that the prices paid by SFMI-Chronopost in return for the logistical assistance cover the total costs incurred by the Post Office. Hence those prices cover the costs of the commercial assistance (through the deposit and cashing operations). In addition to this direct remuneration, SFMI-Chronopost pays a fee whose amount depends on SFMI-Chronopost's turnover and its annual increase (*). SFMI-Chronopost paid out the following amounts during the 1986-95 period:

— 1986/1987: FRF 26 million,

— 1988: FRF 31 million,

— 1989: FRF 39 million,

— 1990: FRF 47 million,

— 1991: FRF 49 million,

— 1992: FRF 56 million,

— 1993: FRF 45 million,

— 1994: FRF 56 million,

— 1995: FRF 76 million.

This remuneration is structured in such a way as to encourage the Post Office to promote the subsidiary's products. To this end the Post Office launches advertising campaigns regularly.

This system of remuneration was amended in 1993. Remuneration now consists of a fixed part, which is an annual contribution of FRF 25 million to the sales network, and a variable part, namely a premium on SFMI-Chronopost's sales. In addition, since 1994 SFMI-Chronopost has been paying a contribution to the Post Office's distribution network (FRF 30 million in 1994 and FRF 33 million in 1995).

(*) Business secret.

3. *Use of the Post Office's vehicles as advertising media* for SFMI-Chronopost's operations.

4. *Acces to Radio France's advertising spots.* SFEI maintains that SFMI-Chronopost advertised its product Skypack on Radio France under preferential conditions.

5. *Tax, customs and other privileges.* SFEI claims that the Post Office was exempted from 'taxe sur les salaires' (payroll tax) until October 1994, the equivalent aid being FRF 457 million in 1994. It maintains that the Post Office is exempted from stamp duty, equivalent to aid amounting to FRF 800 million a year. SFMI-Chronopost could have benefited from those advantages in relation to the activity subcontracted to the Post Office. In addition, SFMI-Chronopost enjoys a privileged customs regime, as opposed to the common regime applicable to private undertakings. SFMI-Chronopost benefits under assistance from French Bureau d'échange which performs the customs clearance procedures for its dispatches. Finally, SFEI claims that SFMI-Chronopost benefits from an investment of FRF 1,2 billion made in 1995 by the Post Office to construct a number of dispatching platforms.

E. **The complainant's arguments**

SFEI's main arguments may be summarised as follows:

— the logistical and commercial assistance provided by the Post Office to SFMI-Chronopost involves State aid. The total amount involved was FRF 1,516 billion over the period 1986-1991,

The aid is the difference between the normal price of the logistical assistance and the actual remuneration paid by SFMI to the Post Office. The complainant, on the basis of his interpretation of the abovementioned preliminary ruling of the Court in *La Poste*, maintains that this normal market price is what an undertaking 'operating in normal market conditions, should have charged for the services in question, no account being taken of the economics of scale enjoyed by the Post Office by virtue of its monopoly, since those economics were precisely the root-cause of the distortion in competition'.

The Bain study quantifies the aid element involved in the logistical assistance at FRF 1,048 billion (FRF 725 million for the international operations) over the period 1986 to 1991. The valuation is based on two

methods, the 'market price' method and a method based on a comparison between SFMI's estimated costs and the actual costs incurred by a group of competitors. The first method calculates the cost of the main components of the logistical assistance (wages and leases) and deducts from it the actual price paid by SFMI. It values the cost that an undertaking would incur in setting up and operating a network similar to the Post Office's. The second method refers only to the international activity of SFMI and values the aid at FRF 725 million.

As regards the commercial assistance SFEI values the corresponding aid at FRF 468 million (FRF 126 million for the international operations) during the 1986 to 1991 period. Of this amount, FRF 230 million is the difference between the amount actually paid by SFMI-Chronopost and an amount corresponding to the marketing costs incurred by the private undertaking members of SFEI (20 % of the tunover during the first years and 6 % afterwards); FRF 38 million is the aid corresponding to the free transfer of Postadex customers to SFMI in 1986 (the aid corresponds to Postadex's estimated turnover in 1985); and FRF 200 million is the aid stemming from the advantageous conditions of access to the Post Office's counters. It has to be pointed out the complainant and the Bain study do not explain how this last figure has been calculated.

In support of its reasoning the Bain study points out a number of elements. which are supposed to prove that SFMI-Chronopost benefits from State aid. In particular, SFMI-Chronopost's growth was abnormally rapid during the period 1986 to 1991. Growth has slowed down since then, as the amount of aid granted by the Post Office has decreased. In addition, SFMI-Chronopost has a better balance sheet structure than its competitors, and the return on the Post Office's investment in SFMI-Chronopost is particularly high,

— the Commission should examine under Articles 92 and 93 the other measures mentioned above (credit periods, use of the Post Office's vehicles, privileged access to Radio France, tax and custom privileges, and use of the dispatching platforms), which constitute ad hoc aid to SFMI-Chronopost. The Commission should also look at SFMI-Chronopost's and the Post Office's customs arrangements and the Post Office's tax system in respect of payroll tax and stamp duty. Any benefit accrued to the parent could be passed on to the subsidiary. Such benefits are claimed to decrease the Post Office's costs and to enable it to offer its assistance at lower prices.

F. **The French authorities' reply**

France rejects all SFEI's allegations as unfounded.

In general, the Post Office has behaved like a private investor under normal market conditions in setting up and operating the subsidiary SFMI-Chronopost. After a two-year period, which corresponds to the period in which the subsidiary started up its operations, the Post Office has been able to cover the total costs of the assistance, and the investment has been fully profitable. The Post Office's behaviour is comparable to that of a holding company or a group of undertakings pursuing a structural policy, global or sectoral, and guided by long-term profitability aims. To support its statements France has provided detailed information covering the period 1986 to 1995. This information relates *inter alia* to the remuneration of the logistical and commercial assistance, and SFMI-Chronopost's financial performance over that period.

Moreover,

— as regards customs clearance, France has confirmed that since February 1987 SFMI has been carrying out its customs clearance operations at its own international centre, without making any use of the Post Office's centres, contrary to the complainants' allegations on this specific point. In addition, SFMI is subject to the usual customs clearance rules provided for by law. Before that date (from April 1986 to February 1987) it was the Post Office which carried out customs clearance operations for SFMI-Chronopost's international business. However, this had not conferred any advantages on SFMI-Chronopost,

— as regards the credit periods allowed to SFMI-Chronopost, France has confirmed that these were aimed at offsetting the latter's loss of earnings due to the period needed by the Post Office for crediting to SFMI-Chronopost the revenues received on its behalf. Those credit intervals were due to accounting practice and were on average longer than the credit periods granted to SFMI-Chronopost. By way of example: in 1989 the average period for the Post Office's payments was 132 days whereas the average credit period for SFMI-Chronopost's payments was 105 days. Since 1992 shorter periods have been granted to SFMI-Chronopost for the payment of its monthly invoices. If this deadline is not adhered to, the Post Office is entitled to the principal plus interest,

— as regards the condition undertaken by the participants of the joint venture GDEW, France maintains, first, that it has been able to prove the absence of cross-subsidy in favour of SFMI-Chronopost. Secondly, the Post Office has received so far no application seeking access to its network,

— as regards the implementation of the recommendation in the Commission's decision relating to the Post Office's competitive activities ([5]), France has stated that since 1995 the Post Office has been improving its accountancy. The Post Office's analytical accountancy is based upon a distinction between the following areas: postal delivery services, financial services, 'Réseau Grand Public' (offices open to the public), supporting services and overheads. The Conseil de la Concurrence has examined the Post Office's accounting system and confirmed the validity of the methodology employed. The Conseil has concluded that the analytical accountancy put in place by the Post Office points to a presumption that there is no cross-subsidy,

— as regards commercial assistance, France has pointed out that SFMI-Chronopost carries out its own advertising campaigns, which are separate from those of the Post Office. As to the use of the Post Office's vehicles as a medium for the subsidiary's advertisement, this is very limited since SFMI-Chronopost may use the Post Office's vehicles only when there is spare space available,

— as regards Radio France's advertising activities, France maintains that SFMI-Chronopost paid the market price for the advertising of Skypack. SFMI-Chronopost carried out its advertising campaign for Skypack without the help of the Post Office. SFMI-Chronopost consulted an advertising agency, which contacted six radio stations, including Radio France. It was the advertising agency which negotiated and concluded the contract with the radio stations on behalf of SFMI-Chronopost,

— as regards payroll tax and stamp duty, France has explained that SFMI-Chronopost is a company subject to the same tax arrangements as are applicable to its private competitors. On the other hand, the Post Office is subject to a special scheme which is less favourable than the common scheme applicable to private companies. The Post Office is exempted from VAT under Article 13 A of the Sixth Council Directive on VAT ([6]). Consequently, it cannot deduct or obtain reimbursement of VAT paid on its purchases. Private companies, on the other hand, are subject to VAT and may deduct the whole amount of VAT paid out. The Post Office is now subject to a payroll tax, which is a fiscal substitute for VAT, while private companies are exempted from this tax. As far as the dispatching platforms are concerned France has informed the Commission that SFMI-Chronopost's dispatches did not use them.

([5]) See footnote 2.
([6]) OJ L 145, 13. 6. 1977, p. 1.

II. ASSESSMENT

Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement provide that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between the Member States, incompatible with the common market.

The Treaty and the Agreement set up the principle of neutrality with regard to the system of property ownership in the Member States and the principle of equality between publicly owned and private undertakings (Articles 222 and 90 of the Treaty and Articles 125 and 59 of the Agreement). In accordance with those principles the Commission must not prejudice or favour publicly owned undertakings, in particular when examining an operation in the light of Article 92 of the Treaty and Article 61 of the Agreement.

In this case it is necessary to distinguish between two sets of measures:

— the provision by the Post Office, as subcontractor of SFMI-Chronopost, of logistical and commercial services,

— the individual measures, such as the privileged access to Radio France and the tax and customs privileges.

In respect of the first set of measures, by way of a preliminary remark it should be noted that France has been able to show that the cumulative remuneration paid by SFMI-Chronopost for the Post Office's logistical support was higher than the total operating costs incurred over the period 1986 to 1995.

Marketing and commercial costs are included among the operating costs. Fixed costs have been allocated in proportion to the business carried out by the Post Office on behalf of the subsidiary. Therefore the remuneration paid by SFMI-Chronopost covers the marketing costs incurred by the Post Office. The fixed costs were apportioned in accordance with the scale of the services provided by the Post Office for the benefit of the subsidiary.

With regard to the period 1986 to 1991, the Commission considers that the calculation of the costs by backward projection from the actual unit costs in 1992 is a sound and conservative approach. The structure of the produc-

tion range in 1992 was more complex and sophisticated (that is, more costly) than in the early years of operation. Thus backward projection produces figures which in the absence of any contrary indication cannot be lower than the costs actually incurred by the Post Office during 1986 to 1991.

The figures provided by France show that the estimation of the cost of the logistical assistance (FRF 1,048 billion) and the marketing costs (FRF 230 million) made by the complainant is inaccurate.

As regards the logistical assistance, the Commission is of the opinion that there is no point in evaluating the cost of setting up *ex novo* an alternative network (and infrastructure) to the Post Office's. SFMI-Chronopost does not need to create it since such a network is already in existence. Moreover, comparisons with private companies competing with SFMI-Chronopost must be treated with care. Those companies have a different cost structure; unlike SFMI-Chronopost in 1986 to 1991, they are integrated concerns which had their own network and made limited use of subcontractors.

As regards commercial assistance, the Commission considers that the complainant overestimates the cost of the marketing support given by the parent company to the subsidiary (FRF 230 million). The complainant does not take into account SFMI-Chronopost's own marketing efforts and exaggerates the costs of the promotional activity of SFMI-Chronopost's products. The cost of providing space for the display of advertising posters and of placing leaflets on post office counters should be negligible. The only possible significant cost is the proportion of post office staff's time spent on providing information on the products or directing the customers to SFMI-Chronopost's salesmen. Again, taking into account the wide range of services provided by such staff and the similar nature of the service provided it is unlikely that this expense is material. In any event the figures provided by France contradict the complainant's valuation.

The Commission believes that when the complainant talks about commercial assistance it refers not only to the direct marketing business but also to the more general use of the Post Office's trade image.

As regards the use of the trade image, it is worth recalling that the complainant values the aid at FRF 38 million for Postadex and at FRF 200 million for advantageous conditions of access to the Post Office's network. The Commission is of the opinion that the calculation of the value of these forms of commercial support by the Post Office to its subsidiary is highly subjective. The commercial assistance includes the use of the Post Office's goodwill (as in the case of the transfer of Postadex's customers to SFMI-Chronopost), which is an intangible asset. Access by a subsidiary to the parent company's customers and goodwill is a common feature of any relationship within a group of companies. The transfer of Postadex's customers to SFMI-Chronopost is the logical corollary of the creation of SFMI-Chronopost as the subsidiary in charge of the Post Office's express delivery activities, and therefore of Postadex. For these reasons the Commission does not consider that the transfer, which does not entail any cash advantage for SFMI-Chronopost, represents State aid to the latter.

In its abovementioned preliminary ruling, the Court of Justice upheld the view that '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, without normal consideration in return is capable of constituting State aid within the meaning of Article 92 of the Treaty' ([7]). The Court concluded that '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 EC Treaty if the remuneration received in return is less than that which would have been demanded under normal market conditions' ([8]).

According to the Advocate-Generalis conclusions in *La Poste*, State aid is involved if the assistance is provided 'on financial terms that are more favourable than those which the undertaking could obtain from a comparable commercial investor [...] in deciding whether there is a subsidy, it seems to me that it is necessary to consider whether a commercial investor would be satisfied with the level of the consideration received for the assistance, having regard to factors such as the cost of providing the assistance, the size of its investment in the undertaking and its return from it, the importance of the activity of the undertaking to the investing group as a whole, conditions on the market in question and the period for which the assistance is granted' ([9]).

According to the complainant, the Court's ruling shows that in deciding whether there is State aid, the Commission should examine whether SFMI-Chronopost paid the 'normal market price' for the logistical and commercial services provided by the Post Office. The complainant does not give a precise definition of normal market price.

([7]) *La Poste, ante,* at paragraph 57.
([8]) *La Poste, ante,* at paragraph 62.
([9]) Advocate-General Jacob's conclusions in *La Poste, ante,* at paragraph 61.

However, it may be inferred from its reasoning that it is the price at which a comparable private company would provide the same services to an unrelated company. This price should include a fee for the access to the postal network.

The complainant claims that the Commission should disregard the group's strategic interests and the economies of scale arising from the privileged access of SFMI-Chronopost to the Post Office's network and infrastructure. According to the complainant, such considerations could not be taken into account in this case because the Post Office has a monopoly. SFMI-Chronopost should bear the costs that a private undertaking would incur in creating a network equivalent to that of the Post Office.

The complainant's reasoning reflects a fundamental flaw in the interpretation of the Court's judgment.

Nothing in the Court's case-law suggests that the Commission should disregard the strategic considerations and the synergies stemming from the fact that the Post Office and SFMI-Chronopost belong to the same group. On the contrary, strategic considerations, such as the wish to penetrate a new market, play an important role in the investment decision-making process of a holding company. This principle applies directly to this case, where we are considering the behaviour of a parent company and its subsidiary.

The fact that the transaction takes place between an undertaking operating in a reserved market and its subsidiary operating in a competitive market is of no relevance to this case. The Court of Justice has never suggested that in determining whether State aid is involved the Commission must apply a different approach if one of the parties to the transaction has a monopoly.

Accordingly, the relevant question is whether the terms of the transaction between the Post Office and SFMI-Chronopost are comparable to those of an equivalent transaction between a private parent company, which may very well be a monopoly (for instance, because of the ownership of exclusive rights), and its subsidiary. The 'normal market price' criterion put forward by the complainant does not answer this question since it overlooks the fact that the transaction takes place between two companies within the same group. In this context it is worth remembering that the Court in *La Poste* took the view that to establish whether State aid is involved one has to verify if the parent company received the normal consideration in return from the subsidiary.

The Commission considers that internal prices at which products and services are transacted between companies belonging to the same group do not involve any financial advantage whatsoever if they are full-cost prices (total costs plus a mark-up to remunerate equity capital investment). In this case payments made by SFMI-Chronopost did not cover total costs over the first two years of operation, but covered total costs before central and local offices' overheads. The Commission considers that this situation is not abnormal since revenues from the operations of a new firm belonging to a group of companies may cover only variable costs in the start-up period. Once the undertaking has stabilised its position on the market, the revenues generated by it must be in excess of variable costs so as to make a contribution to the fixed costs of the group. Over the first two years (1986 to 1987) of operation payment made by SFMI-Chronopost covered not only variable costs, but also some fixed costs (such as buildings and vehicles). France has shown that as from 1988 the remuneration paid by SFMI-Chronopost for the assistance covers all the costs incurred by the Post Office, plus a contribution by way of interest on its equity capital. Therefore, the logistical and commercial assistance was provided by the Post Office to its subsidiary under normal business conditions and did not constitute State aid.

The Commission has also considered whether the Post Office behaviour as a shareholder of SFMI-Chronopost was commercially justified under the market economy investor principle. Under that test, to establish whether a transaction between a Member State and an undertaking contains State aid, it is necessary to verify whether the undertaking would have been able to obtain the monies on the private capital markets. To assess whether the Post Office has behaved like a market economy investor the Commission has to look at the return to the parent company in terms of dividends distributed and capital growth.

No State aid arises if the internal rate of return ('IRR') of the investment exceeds the cost of capital of the company (that is to say, the normal rate of return that a private investor would require under similar circumstances). To work out the IRR the Commission has taken into account, on the one hand the equity injection by the Post Office in 1986, and on the other hand the dividends distributed by SFMI-Chronopost over the period 1986 to 1991, and the value of that company in 1991. The Commission following standard investment appraisal techniques, has calculated SFMI-Chronopost's value in 1991 by inflating the cashflow generated by that company

in that year, using a multiplier coefficient. That multiplier coefficient is a function of both the average growth rate (10 %, which was the expected growth rate of the delivery express market in France at the end of 1991) of the cashflow and the discounting rate used (13,91 %). The latter is the cost of equity ([10]). The formula used is,

C/r-g

where

C is the cashflow in 1991,

r is the cost of equity,

g is the growth rate.

The Commission has, on this basis, valued SFMI-Chronopost at FRF 564 million at the end of 1991. The reliability of this figure is confirmed by the price of FRF 180,4 million paid by GDEW in June 1992 for the acquisition of the international business of SFMI-Chronopost, which accounted for approximately one-third of the total business (FRF 180,4 × 3 = FRF 541,2 million).

The analysis carried out by the Commission covers the period 1986 to 1991 (before SFMI was transferred to GDNEW). This is the start-up period when, according to the complainant, SFMI-Chronopost received the largest amount of State aid.

The Commission has worked out the IRR and compared it with SFMI-Chronopost's cost of equity in 1986 (13,65 %) ([11]) the year when the company was incorporated and started its operations. This has permitted it to verify whether the profitability of the whole capital venture has been adequate. The IRR calculated by the Commission is largely in excess of the cost of equity in 1986. Therefore no State aid was involved in the financial transactions between the Post Office and its subsidiary over the years 1986 to 1991. This conclusion is all the more valid for the years subsequent to 1991, when the amount of dividends paid out was higher than in the previous period.

The Commission has stated above that it does not endorse the complainant's claim that SFMI-Chronopost should pay a fee to have access to the parent's network and goodwill. However, even taking into account the alleged aid involved in SFMI-Chronopost's access to the Post Office's goodwill and network (FRF 238 million) the conclusion that the relationship between the Post Office and its subsidiary is commercially justified remains valid. To that end the Commission has calculated the global IRR on the Post Office's investment in its subsidiary. Amongst the elements of the calculation the Commission has taken into account on the one hand the equity injections and the costs incurred by the Post Office in providing the assistance and on the other hand the dividends distributed, the subsidiary's value in 1991 and the remuneration paid for the assistance. The Commission has treated the sum of FRF 38 million corresponding to the free transfer of Postadex as an equity capital injection, which took place in 1986, and the sum of FRF 200 million as a one-off fee, paid in 1986, to have access to the Post Office's network over the period 1986 to 1991 ([12]). The calculation carried out by the Commission shows that even taking into account those amounts the IRR is again higher than the cost of equity in 1986.

As regards the customs clearance procedure, France has informed the Commission that since 4 February 1987 SFMI-Chronopost has carried out the customs clearance procedure in its own customs centre and has been subject to the normal customs arrangements applicable to private companies (see above). Before that date, those customs procedures were performed by the Post Office on behalf of SFMI-Chronopost. Therefore, SFMI-Chronopost's dispatches were subject to a special scheme only for the period from April 1986 (when the company started to operate) to February 1987. The Commission has verified that the temporary application of the special arrangements involved no financial advantage granted out of State resources to SFMI-Chronopost. Moreover, the Commission does not hold any evidence showing that SFMI-Chronopost derived any economic advantage whatsoever from the application of the special scheme during its first months in business. In any case, even if the special scheme applicable to the Post Office was more favourable than the common regime (inasmuch as customs clearance procedure would be more rapid), the corresponding advantage would be very modest, since SFMI-Chronopost's level of activity was at that time very small. In 1986 (the first year of operation) SFMI-Chronopost's turnover corresponding to its international activity, which was launched in October 1986, was approximately only FRF 2,9 million before tax, corresponding to 10 500 packages. Of those, only some 15 % were taxable packages (meaning that approximately 1 600 packages were subject to the customs clearance procedure). The others were non-taxable packages which, given their modest value, were exempted from the normal customs procedure.

In respect of the other points raised by the Commission at the time of the opening of the Article 93(2) procedure and the other issues raised by the complainant, the Commission has arrived at the following conclusions.

([10]) *Source:* Eurostat and Associés en Finance.
([11]) *Source:* Eurostat and Associés en Finance.
([12]) The other figures estimated by SFEI (i.e. FRF 1,048 billion for the logistical assistance and FRF 230 million for the commercial assistance) cannot be taken into account since they have been proved inaccurate (see above).

As regards the conditions subscribed by the Post Office within the framework of the authorisation of the GDEW joint venture, the Commission has been able to prove that no State aid has been granted to SFMI-Chronopost. Moreover, France has informed the Commission that the Post Office had received no application to gain access to its network. This is acknowledged by SFEI, which admits to being unaware of any such application lodged with the Post Office. SFEI's member undertakings are integrated firms, which are not interested in access to the Post Office's network.

As regards the alleged tax exemptions, by way of a premlimary remark the Commission points out that SFMI-Chronopost is a normal company which is subject to the same tax system as its private competitors. The Commission has verified in this case whether SFMI-Chronopost benefits from any direct or indirect advantage in relation to stamp duty and payroll tax. In respect of stamp duty, France has informed the Commission that SFMI-Chronopost's dispatches are subject to this tax irrespective of whether they are transported by the Post Office or not. Consequently, as far as this tax is concerned SFMI-Chronopost enjoys no special treatment or financial advantage over its competitors.

As regards the payroll tax, the complainant's claim about the Post Office being exempted from this tax until October 1994 is unfounded. Before that date the Post Office was subject to a reduced tax rate of 4,25 %. The tax charge borne by the Post Office ranged from FRF 1,049 billion in 1986 to FRF 1,136 billion in 1990. The ordinary tax rate of 9,25 % has been in force since October 1994. However, the tax treatment of the Post Office in the dispatching sector (including express courier) has always been in this respect less favourable than the common tax system. The Post Office is exempted from VAT under Article 13 A of the Sixth VAT Directive. Hence the Post Office pays VAT on its purchases but is unable to deduct or apply for reimbursement of the tax paid out. On the other hand, the Post Office, unlike the ordinary companies which are subject to VAT, is subject to a payroll tax, which is an alternative to VAT. As a result the tax charge borne by the Post Office is heavier than that of ordinary companies irrespective of the reduced rate of payroll tax.

France has demonstrated that in 1993 (namely before the introduction of the normal tax rate) the Post Office was in a disadvantageous position compared to the companies subject to the common tax system. The Post Office paid FRF 78 million by way of payroll tax, and the non-refundable VAT was FRF 274 million. The Post Office's turnover in the dispatches sector was FRF 5,465 billion in 1993. Of the corresponding customers 16,6 % were not subject to VAT and 83,4 % were subject to VAT. It follows from the calculation carried out by the French authorities that the Post Office enjoyed a theoretical advantage in respect of the customers not subject to VAT (the advantage is theoretical because this is a segment of the dispatching market which is not operated by the competitors). On the other hand, the Post Office suffered from a FRF 278 million disadvantage in respect of the customers which are subject to VAT. The global net disadvantage stemming from the exemption from VAT and the payment of payroll tax is at least FRF 174,6 million. 1993 was a typical year in terms of volume of activity and expenses of the Post Office and the conclusions drawn for that year are valid for the other years prior to 1994. Therefore, as regards stamp duty the Post Office did not profit from any particular tax benefit which might have been transferred to SFMI-Chronopost.

As regards the periods allowed for payment, the Commission is satisfied with the information provided by France, which clearly show the absence of any kind of advantage for SFMI-Chronopost.

As regards the utilisation of the Post Office's vehicles as advertisting media, the Commission considers that this forms part of the commercial assistance provided by the Post Office to SFMI-Chronopost. The considerations set out above for the commercial assistance are also valid in this respect.

As regards Radio France's advertising, the Commission has no evidence that SFMI-Chronopost paid a price below the market price for the advertising of Skypack. It is clear from the information provided by France that SFMI-Chronopost enjoyed no preferential treatment.

As for the dispatching platforms, France has stated that SFMI-Chronopost's dispatches do not transit on them. Therefore, SFMI-Chronopost does not benefit from any advantage in relation to that investment.

As regards the recommendation in the Commission's decision on the Post Office's competitive activities, the Commission is satisfied with the general methodology and principles underlying the Post Office's analytical accountancy. A correct implementation of them will ensure transparency and allow verification that there is no cross-subsidy between the various businesses run by the Post Office,

HAS ADOPTED THIS DECISION:

Article 1

The logistical and commercial assistance provided by the Post Office to its subsidiary SFMI-Chronopost, the other financial transactions between those two companies, the relationship between SFMI-Chronopost and Radio France, the customs arrangements applicable to the Post Office and SFMI-Chronopost, the system of payroll tax and stamp duty applicable to the Post Office and its (*) investment in the dispatching platforms do not constitute State aid to SFMI-Chronopost.

(*) Business secret.

Article 2

This Decision is addressed to the Republic of France.

Done at Brussels, 1 October 1997.

For the Commission
Marcelino OREJA
Member of the Commission