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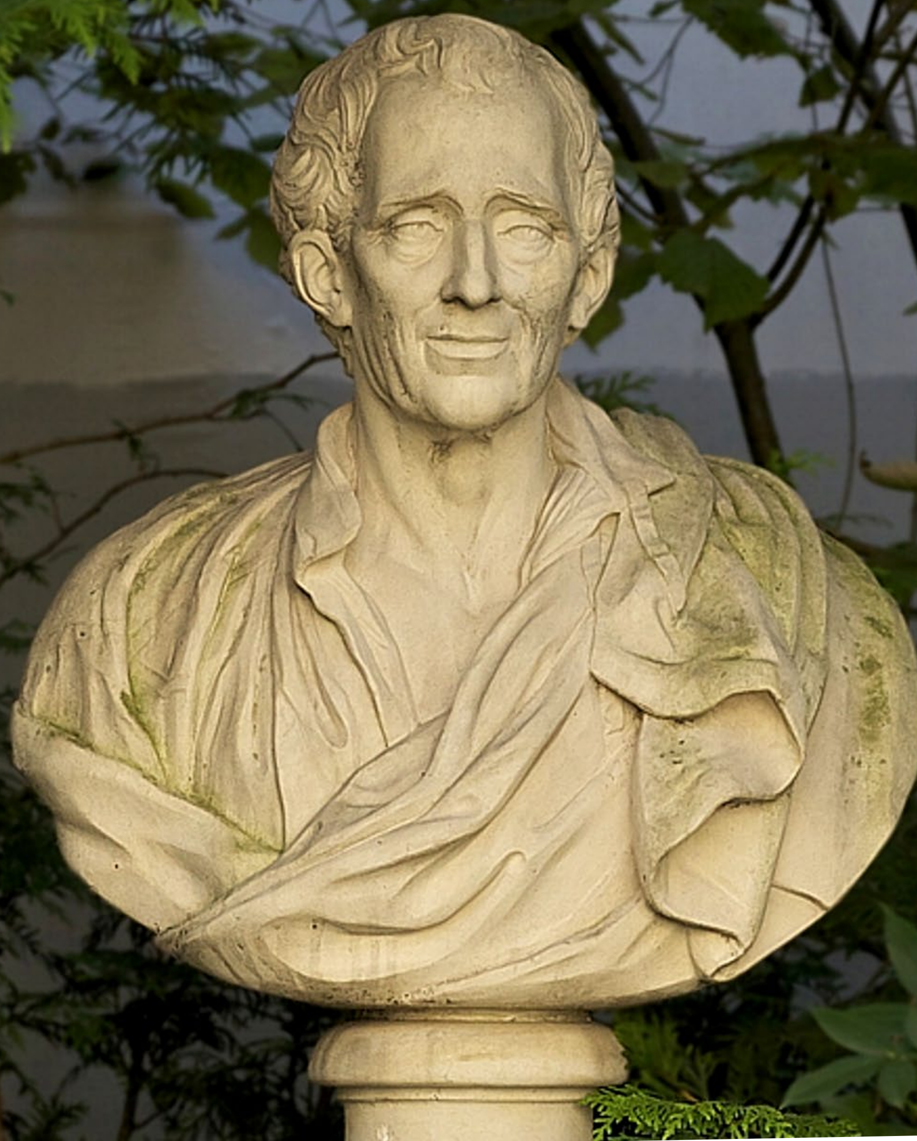

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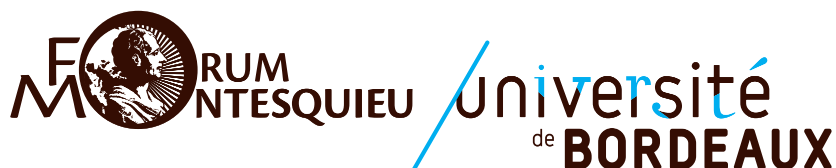

European Law (EU):

The difficulties faced by public establishments in light of competition law: a discussion of the *"La Poste"* case

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In France, "not only do public authorities run the economy, but they also participate therein through public operators" (1). Influenced by European Union law, it appears that the State's direct participation in the market, particularly through public bodies, has become a sensitive subject. Thus, the European Court of Justice's decision on the status of the French incumbent postal operator, La Poste, handed down on 3 April 2014, is a striking illustration of the developments currently faced by the French model of state interventionism.

"As an organisational technique, public entities have always had a flexible, appropriate legal form, with a view to meeting various objectives of good administrative governance. [...] In the context of market economics, it serves first of all in guaranteeing the competitiveness of some services of general economic interest, by offering them the financial independence that is conferred by legal personality" (2). The legal status of the *établissement public industriel et commercial*, public industrial and commercial establishment or EPIC, is founded on a number of specificities that make it a very different instrument to private companies which, like the EPIC, exercise an economic activity in a given market. The EPIC is an entity governed by public law which can only be created by a public body and has legal personality, which affords it a degree of autonomy in relation to the body that had created it and which, on that basis, is subject to the supervision of the public authority to which it is attached (3). The public establishment does not, however, have any share capital and has, like all "public bodies, the attributes of legal personality, its privileges and its constraints" (4).

Such a mechanism has not passed unnoticed by the authorities of the once European Communities, now the European Union. Indeed, through competition law, and in particular the rules on State aid, EU institutions have examined public operators and by extension public entities in order to ensure that these do not enjoy any unjustified economic advantage as compared to their competitors. La Poste, after EDF (5), suffered a humiliating defeat at the hands of European law as its legal status as a public establishment afforded it an unjustified economic advantage according to the European Commission.

In applying the objective of free and undistorted competition laid down by the Treaty to the French incumbent postal operator, the European authorities mean to guarantee the proper operation of the internal market. The fact remains that the consequences of litigation for the public establishment are significant, even when La Poste had changed status before the ECJ had given judgment (6).

In order to understand all the issues raised by the *La Poste* litigation, we must first go over the elements that formed the basis of the European Commission's findings as to the incompatibility of La Poste's public establishment status in light of the rules on state aid (I) before presenting the

arguments that led the General Court, then the Court of Justice, to dismiss the appeal brought by the French authorities against the European Authority's decision (II).

I. The challenge to the status of public establishment under the law on State aid

Before detailing the reasoning that led the Commission to conclude that public establishment status was incompatible, we must first explain the specificities of that public law status.
A law passed in 1990 (7) transformed the former Directorate-General for Communications into two separate public-law entities: La Poste on the one hand, France Telecom on the other. In doing so, and while the law qualified them as public operators, the newly created bodies became public entities.

On this basis, as for all other public-law entities in France but unlike private companies, both La Poste and France Telecom do not have any share capital and are not subject to the ordinary law on receivership and judicial winding-up of firms in difficulty. As is emphasised in French legal doctrine, "*the particularities of the legal regime for some state-owned companies remain linked to the fact that, behind a uniform title drawn from business law, there indeed remains the specific strength of the public-law nature of those companies that take the form of public entities*" (8).

In the Commission's opinion (9), such a situation constituted an advantage for La Poste that could be described as State aid (10). Indeed, according to the European Competition Authorities, status as a public establishment afforded La Poste a guarantee financed by State resources which, compared to its competitors, allowed it to draw an advantage in capital markets by obtaining, in particular, financing conditions deemed more favourable.

The crux of the European Authority's reasoning therefore rests on the State guarantee from which La Poste allegedly benefited. In the Commission's view, the status as a public establishment affords an implied and unlimited guarantee to operators who have that status. Indeed, in addition to allowing them to avoid insolvency and bankruptcy procedures under ordinary law, their status as legal entities governed by public law renders them subject to Law n° 80-539 of 16 July 1980 (11), whereby it falls to the State representative or the supervisory authority, where a local authority or public establishment is ordered to pay a sum of money, to issue formal notice to generate the necessary resources to the legal entity governed by public law. In addition to this, there is the implementing decree (12) which provides that "*the supervisory authority shall, as appropriate, release the necessary resources […] either by reducing the credits that are assigned to other expenditure and still available for use or by increasing resources*". What is more, it notes that where a public establishment which has a public accountant is dissolved, there is always a transfer of its obligations either to the new public establishment that will take its place or by appointing an assignee for the balance of the liquidation – generally the State (13). All in all, in the Commission's view, "*the procedures described above imply that the State has a role as guarantor of last resort. It may therefore be legitimately concluded that La Poste benefits from an unlimited guarantee owing to its status as a public establishment*" (14). It added that "*La Poste pays no premium for that guarantee and the State therefore waives the remuneration that normally accompanies such guarantees. Furthermore, the guarantee creates the risk of a potential and future commitment of resources held by the State, which may find itself bound to settle debts incurred by La Poste*" and therefore concluded that "*the State's unlimited guarantee for La Poste leads to a transfer of State resources*" (15).

In the second part of its reasoning, the Commission examines whether the State aid, the guarantee in this case, confers an advantage as compared with the competitors of the entity benefiting from the guarantee. Here, insofar as "*the credit terms and conditions are set in particular on the basis of financial ratings […] a company that has a low risk of insolvency will be able to borrow in very favourable terms*" (16). Indeed, according to the Commission, the ratings agencies would bade their decisions on the State guarantee in order to confer a rating to La Poste which would allow it to secure loans from credit companies at more advantageous rates or, at the very least, "*more favourable than those it would have obtained had it been judged solely on its own merits*" (17).

In the third and final part of its reasoning, the Commission examines whether the measure was likely to distort competition and affect trade. In this respect, since the advantage that benefits La Poste alone in the postal market allows it to reduce its operating costs, this favours the public establishment and thus distort competition. Furthermore, as the postal market is partially competitive and broadly open to intracommunity trade, the Commission concludes that "*the existence of an unlimited State guarantee for La Poste is likely to distort competition and affect trade within the meaning of Article* 107 (1) TFUE" (18).

In its decision of 26 January 2010, the Commission imposes a duty on the French authorities to withdraw the aid that constitutes the unlimited guarantee by 31 March 2010 at the latest. Although France had already begun the process of transforming La Poste as a public establishment into a limited company (19), she nevertheless brought an appeal against the decision before the General Court in the first instance, then the European Court of Justice.

II. The dismissal of the appeals brought by the French authorities against the Commission's decision

The French authorities put forward a number of arguments to secure the annulment of the Commission's decision but the European Union's courts, first through a decision of the General Court (20) then a judgment of the Court of Justice (21), considered that the European Competition Authorities had established, to the requisite legal standard, the existence of an advantage resulting from the alleged State guarantee, which sufficed to take the view that the latter amounted to State aid. We will go over the various exchanges of arguments before presenting the lessons to be learned from the *La Poste* litigation.

The main arguments put forward by France relate to the issue whether there was, in this particular case, State aid for a public establishment. Firstly, one argument concerns the existence of the guarantee itself. More specifically, for the requesting State, "*the Commission made errors of fact and law in its examination of the question whether there was an unlimited, implied State guarantee in favour of La Poste*" (22). However, the General Court took the view that "*the Commission made no error in finding that, contrary to the French authorities' assertions, French law did not preclude the possibility for the State to grant an implied guarantee to EPICs*" (23). Indeed, "*contrary to what the French Republic's line of argument might seem to indicate, the Commission did not find that there was a principle of an implied State guarantee under French law […]. It is very clear from the contested decision that […] the Commission inter alia examined the issue whether such a guarantee was precluded under French law. It found that the texts and the case-law did not lead to a definitive conclusion that French law precluded the State from acting as a guarantor for EPICs in respect of commitments they had undertaken with third parties*" (24). This approach was upheld by the Court of Justice, which stated that "*in order to prove the existence of*

such a guarantee, which does not result expressly from any legislative or contractual document, it is permissible for the Commission to rely on the method of a firm, precise and consistent body of evidence to determine whether there is, in domestic law, a real obligation on the State to use its own resources for the purposes of covering losses of an EPIC in default and therefore, in accordance with settled case-law, a sufficiently concrete economic risk of burdens on the State budget" (25).

Next, a second line of argument relates to the existence of an advantage. According to the French authorities, it was impossible that the ratings agencies should have used the unlimited State guarantee for public entities as the basis of their decision to award the good rating that was allegedly the underlying cause of the economic advantage, insofar as that guarantee, being implied, had not been identified prior to the Commission's intervention. For the General Court, this argument had to be dismissed as "*the French Republic has not succeeded in proving that the finding, made on the basis of methodological documents drawn up by the ratings agencies, according to which the ratings agencies were, in general, aware of the legal status of the entities rated, in this case the fact that they enjoyed the status of EPIC, was incorrect*" (26). Equally, despite the uncertainty surrounding the relationship between the existence of the guarantee and that of the advantage, the Court of Justice took the view that "*the General Court correctly found that the Commission had observed the burden and the level of proof on it in order to establish whether an implied and unlimited State guarantee constitutes an advantage, specifying that such a guarantee enables the borrower 'to enjoy a lower interest rate or provide a lower level of security'*" (27).

The dismissals of the French appeals by the European courts do not answer the various criticisms made of the line of reasoning followed by the Commission (28). In our view, some aspects developed over the course of the proceedings – which were not able to flourish as they were not taken up by the European institutions – deserve to be highlighted as they suggest that the case could be reopened.

On the one hand, the French authorities pointed out (29) that the *Campoloro* (30) case law, on which the Commission relied in recognising the State guarantee, had been developed in a civil liability case concerning a local authority. Consequently, it seems that the European Authorities' analyses were based on a confusion, in that they did not make the distinction between public entities and local authorities on the grounds that they have in common a legal personality governed by public law that is separate from that of the State. It may be considered that placing local and regional authorities in the same category as public entities is, at the very least, debatable, and that there is a very real difference between the two legal personalities. This difference, clumsily justified by the French authorities on the basis of the constitutional status of local and regional authorities, deserved to be adopted and better supported particularly in light of the principle of a State's strict liability.

Recognising an implied and unlimited State guarantee for local authorities is justified. Indeed, in the context of a unitary State, it is fairly logical that the central authority should alleviate the failure of a public authority. Consequently, the impossibility on the part of a local authority to honour its debts easily constitutes unusual and special damage that can then engage the State's strict liability. This does not seem to be the case in the scenario where a public establishment defaults. On the one hand, this situation does not constitute unusual and special damage insofar as, in the business world, operators are sometimes forced out of existence. On the other hand, a

public establishment, although it may be responsible for the performance of public service tasks, does not take on the same powers and does not have the same authority as a public authority.
On the other hand, as was brought out by the Advocate General in his conclusions (31), "*the implied nature of a measure precludes any certainty that it exists. An implied guarantee inferred from a body of evidence must therefore be deemed to exist unless and until it is proved not to*". According to the Advocate General, "[*i]n the present case it would be relatively easy to adduce such proof by pointing to specific cases where the debts of an EPIC or of a French territorial, local or regional authority persistently remained unpaid, despite there being no formal bankruptcy or insolvency procedure. In fact, such a defence of a Member State enables the view to be taken that the Commission decision is based on premises which are in fact erroneous*" (32).

Finally, and this is an element that suggests that the phrase "public establishment" may continue to be used in future by public authorities (33), the organic law of 1 August 2001 on finance laws (34) imposes a requirement that each State guarantee be written beforehand into a budgetary bill (35), thus rendering any implied guarantee illegal since it came into force on 1 January 2005.

France lost the *La Poste* case, but the ongoing litigation between the French authorities and European institutions may not be over, for all that. As has already be stated, the fate of La Poste had already been decided before the EU courts gave judgment. The appeals brought by the French authorities are inextricably linked to their wish to see the SNCF, the incumbent rail operator, retain its status as a public establishment, which may incite the Commission to launch a new investigation

Notes:

(1) S. Nicinski, *Droit public des affaires*, Montchrestien – Lextenso éditions, 2009, 619 p., p. 19.
(2) B. Plessix « *Fasc. 135 : Etablissements publics – Notion Création Contrôle* », JurisClasseur Administratif, Mars 2014.
(3) According to the *Conseil d'État*, "*any public establishment must be technically attached to a legal person*" (CE, avis, 16 juin 1992 : EDCE 1992, p. 419) and as highlighted by B. Plessix (cf. « *fasc. 135 : Etablissements publics – Notion Création Contrôle* », cited above), "*the attachment above all involves an intervention on the part of the relevant authority in the organisation and operation of the public establishment*".
(4) Cf. B. Plessix « *fasc. 135 : Etablissements publics – Notion Création Contrôle* », cited above: "Under a classic presentation, these attributes are both prerogatives and constraints, assets and handicaps [...]:
the possibility of resorting to expropriation procedures in the public interest (See. JCl. Administratif, Fasc. 136);
the possibility of owning State property (See. JCl. Administratif, Fasc. 136);
the ability, for those public establishments with a public accountant (the vast majority), to recover their credits by means of enforceable receipts and allowing automatic recovery (See. JCl. Administratif, Fasc. 136);
the benefit of a four-year limitation period for the repayment of debts (See. JCl. Administratif, Fasc. 136) ;
the unattachable nature of assets implying the impossibility of exercising private-law enforcement procedures against a public establishment (See JCl. Administratif, Fasc. 136) ;
the impossibility for private debtors to bind public establishments to the off-setting of credits held with them;

the inapplicability of the Law of 25 January 1985 on receivership and the compulsory liquidation of undertakings (See JCl. Administratif, Fasc. 136) ;
exemption from payment of premiums for wage-guarantee insurance (Cass. soc., 29 févr. 2000 : Dr. soc. 2001, p. 149, note B. Hatoux) ».

(5) Cf. invitations to submit comments in application of Article 88 (2) of the EC Treaty, concerning the aid measures in favour of Electricité de France (EDF) in the form of the State's unlimited guarantee linked to the status of industrial and commercial public establishment (OJEC n° C 280 of 16/11/2002, p. 8 - 18 and OJEC n° C 164 of 15/07/2003, p. 7 - 13). The Commission had already taken the view that "the granting by French authorities of EPIC status to EDF carries with it the granting of a guarantee covering all of that enterprise's commitments. In granting that status, the State renders inapplicable to EDF all normal provisions governing insolvency and bankruptcy under ordinary French commercial law and consequently cancels out the risk of it failing to meet its commitments, including its borrowing. In the absence of the guarantee that EPIC status carries with it, EDF's rating would fall steeply and the costs of its borrowings would rise as a reflection of the company's real and intrinsic financial stability".

(6) *Cf. Loi n° 2010-123, 9 févr. 2010, relative à l'entreprise publique La Poste et aux activités postales, JORF du 10 Février 2010*

(7) Cf. *Loi n°90-568 du 2 juillet 1990 relative à l'organisation du service public de la poste et des télécommunications, JORF n°157 du 8 juillet 1990 page 8069*

(8) M. Lombard, « *Les conséquences juridiques du passage de l'Etat propriétaire à l'Etat actionnaire : les contraintes du droit de la concurrence* », Revue française d'administration publique 2007/4, n° 124, p. 573-584.

(9) Cf. Decision C(2007)5778 final of the Commission of 29 November 2007 proceeding with the opening of the review procedure provided under Article 108 (2) TFUE (Unlimited State guarantee in favour of La Poste)

(10) Cf. Communication of the Commission on the application of Articles 107 and 108 TFEU (ex 87 and 88 of the EC Treaty) to State aid in the form of a guarantee OJEC C 71, 11.03.2000, pages 14-18

(11) *Loi n° 80-539 du 16 juillet 1980 relative aux astreintes prononcées en matière administrative et à l'exécution des jugements par les personnes morales de droit public*

(12) *Décret N°81-501 du 12 mai 1981 pris pour l'application de la loi du 16 juillet 1980 relative aux astreintes prononcées en matière administrative et à l'exécution des jugements par les personnes morales de droit public.*

(13) *L'instruction codificatrice N° 02-060-M95 du 18 juillet 2002 sur la réglementation financière et comptable des établissements publics nationaux à caractère industriel et commercial,* published in the *Bulletin Officiel de la Comptabilité publique*

(14) Decision C(2010)133 final of the European Commission of 26 January 2010, pt 253.

(15) Ibid., pt 254.

(16) Ibid., pt 257.

(17) Ibid.

(18) Ibid., pt 301

(19) In Decision C(2010)133 final, cited above, the Commission published a letter dated 31 July 2009 from the French authorities in why they communicated the proposed law on La Poste and postal services, adopted by the Council of Ministers on 29 July 2009, setting a date 1 January 2010 for the transformation of *La Poste* in to a limited company. Furthermore, under Article 2 of the Decision, the Commission asserts that "the effective transformation of La

Poste into a limited company would thus remove the unlimited guarantee that it currently enjoys. The effective removal of this unlimited guarantee by 31 March 2010 at the latest constitutes a measure, in accordance with the law of the Union, the State aid found in Article 1”.

(20) Case T 154/10, *French Republic v European Commission* [2012]

(21) Case C-559/12 P, *French Republic v European Commission* [2014].

(22) Case T 154/10, pt 61. In the view of the French authorities, the European institution was mistaken on the determination of the consequences to be drawn from the inapplicability to public establishments of receivership and compulsory liquidation under ordinary law ; on the existence in French law of a principle of an implicit State guarantee resulting from public establishment status; on the conditions under which the State’s liability is incurred in a mechanism for the automatic and unlimited guarantee of La Poste’s liabilities and on the consequences of any potential transfer of the public service liabilities of a public establishment that has been wound up.

(23) Case T 154/10, pt 78.

(24) Ibid., pt 66.

(25) Case C-559/12 P, pt 65.

(26) Case T 154/10, pt 116.

(27) Case C-559/12 P, pt 104.

(28) Cf. in particular C. Barthélemy, « *La garantie impliede, gratuite et illimitée de l’Etat aux établissements publics : mythe ou réalité ?* », R.J.E.P./C.J.E.G., 2004, p. 423 and subsequent; or S. Nicinski, « *La transformation des établissements publics industriels et commerciaux en sociétés* », R.F.D.A., 2008, p. 35 and subsequent.

(29) Cf. Decision C(2010)133 final, pt 212.

(30) *Conseil d'Etat, 10 novembre 1999, société de gestion du port de Campoloro, recueil du Conseil d'Etat p.348; Conseil d'Etat, 18 novembre 2005, société de gestion du port de Campoloro, recueil du Conseil d'Etat p 515.*

(31) Conclusions of Advocate General Niilo Jääskinen presented on 21 November 2013 on Case C 559/12 P, French Republic v European Commission

(32) Ibid.

(33) This aspect, developed in Decision C(2010)133 final, cited above, (cf. pt 43), surprisingly disappears completely from the remainder of its reasoning to such an extent that by the end of the Decision, the Commission considers that only the effective transformation of La Poste into a limited company can remove the unlimited guarantee enjoyed by a public establishment (cf. Article 2).

(34) Cf. *Loi organique du 1er août 2001 relative aux lois de finances, JORF n°177 du 2 août 2001, p. 12480.*

(35) Cf. article 34 § II. - *Dans la seconde partie, la loi de finances de l'année [...] 5o Autorise l'octroi des garanties de l'Etat et fixe leur régime*.

(36) Cf. The Law adopted definitively by the French Parliament at the end of July 2014, which contains the new Article L. 2101-1 of the *Code des transports* (Transport Code): "The SNCF, SNCF Réseau and SNCF Mobilités constitute the public railway group within the national railway system. These three entities are indissoluble. The group fulfils a mission, jointly undertaken by each of the public establishments within the scope of the powers granted to them by law, intended to operate the national railway network and provide the public with railway transport services. It performs tasks relating to the provision of regular ground transportation services for persons, the transportation of merchandise and the management

of railway infrastructure, in the interests of sustainable development and economic and social efficiency". "Chapter II of Title II of Book II of the first part is applicable to all three establishments within the public railway group. For its application to the SNCF and SNCF Réseau, the organising authority within the meaning of the same Chapter II is to be understood as being the State".