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## State Aids Under European Community Competition Law

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Claus-Dieter Ehlermann

## **Abstract**

Part I of this Article describes the historical development of state aid in the European Community. Part II examines “public enterprises” and the need for transparency of state aid. Part III considers the future of regulating state aid in light of the European Economic Area (“EEA”) and the Europe Agreements concluded with the Central and East European Countries. Part IV proposes procedural guidelines with respect to the European Court of Justice, as well as the Commission’s proposal of Council legislation under Article 94 of the Treaty Establishing the European Community (“EC Treaty”).

# STATE AIDS UNDER EUROPEAN COMMUNITY COMPETITION LAW

*Claus-Dieter Ehlermann\**

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## INTRODUCTION

Much attention has rightly been devoted to European Community ("Community" or "EC") and U.S. antitrust and antidumping policies, and to international issues such as the General Agreement on Tariffs and Trade ("GATT").<sup>1</sup> The European Commission's state aid rules are less well known, and international comparisons are impossible. The Commission has the exclusive responsibility to exercise *a priori* control over state aid granted by EC Member States in order to prevent undue distortions of competition. The Commission may order recovery of aid and secure compensation for the distortive effect of the aid that it is prepared to allow. These are responsibilities with major political, economic, and legal implications.

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1. General Agreement on Tariffs and Trades, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187.

Since 1983, there have been many changes. The Commission has devoted significant attention to state aid questions in the public sector, while the Community's courts have developed the scope of judicial review of state aid decisions. Before considering these and other matters in more detail, this Article will examine some of the defining moments in the evolution of state aid policy.

It must be recalled that the Commission has been, and to a large extent still is, alone in the state aid field. There are no models and no precedents, there is little academic debate, and the contrast with antitrust is remarkable. The Commission has had to find its way, often in times of economic crisis, towards the definition of a policy founded on a set of rather general rules addressed to Member States that limit their power to spend their (taxpayers') money as they wish. This was an enormous challenge, and the Author's predecessors in the Directorate General of Competition ("DG IV") deserve great credit for the establishment of a coherent and credible policy in such difficult circumstances.

Part I of this Article describes the historical development of state aid in the European Community. Part II examines "public enterprises" and the need for transparency of state aid. Part III considers the future of regulating state aid in light of the European Economic Area ("EEA") and the Europe Agreements concluded with the Central and East European Countries. Part IV proposes procedural guidelines with respect to the European Court of Justice, as well as the Commission's proposal of Council legislation under Article 94 of the Treaty Establishing the European Community ("EC Treaty").<sup>2</sup>

## I. HISTORICAL DEVELOPMENT

### The European Coal and Steel Community ("ECSC") Treaty

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2. Treaty Establishing the European Community, Feb. 7, 1992, art. 94, [1992] 1 C.M.L.R. 573, 631-32 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 (1992) [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], *amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

sets out a strict ban on state aids in its Article 4(c).<sup>3</sup> The original conception of the authors of the Treaty seems to have been that ECSC aid would replace national assistance to the coal and steel industries. This proved unrealistic, and interventionist industrial policies were followed, with both national and Community funds used to that end.<sup>4</sup> The letter to Member States of April 1977<sup>5</sup> and the "Davignon plan"<sup>6</sup> in November 1977 set out principles linking aid to the restructuring of the European steel industry sector in deep crisis. In ECSC matters, the Council plays an important role.<sup>7</sup>

The rules of the EC Treaty are fundamentally different. The prohibition of state aid that distorts competition is neither absolute nor unconditional. To start with, only aid that affects trade between Member States comes under Article 92(1).<sup>8</sup> Certain kinds of aid must be authorized if the aid meets certain conditions.<sup>9</sup> Under Article 92(3), the Commission has discretion to

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3. Treaty Establishing the European Coal and Steel Community, art. 4(c), Apr. 18, 1951, 261 U.N.T.S. 140, *as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987) [hereinafter ECSC Treaty]. The article prohibits, as incompatible with the common market, "subsidies or state assistance, or special charges imposed by the State, in any form whatsoever." *Id.*

4. *Id.* art. 54.

5. COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTH REPORT ON COMPETITION POLICY ¶ 261 (1978).

6. *See* COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES ¶¶ 148 *et seq.* (1977).

7. ECSC Treaty, *supra* note 3, art. 95.

8. EC Treaty, *supra* note 2, art. 92(1).

Save as otherwise provided in this Treaty, 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 shall, in so far as it affects trade between member-States, be incompatible with the common market.

*Id.*

9. EC Treaty, *supra* note 2, art. 92(2).

The following shall be compatible with the common market:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

*Id.*

authorize state aid measures and to make the necessary economic analyses.<sup>10</sup>

Some problems are common to both Treaties. Neither contains a definition of aid ("in any form whatsoever," as in the ECSC Treaty),<sup>11</sup> and this remains a difficult issue. It is clear what does not constitute aid: a general measure applicable to all firms in a Member State or an investment made by a state body in a company in circumstances in which a private investor would have done likewise. It is also clear that the "state" includes all levels and emanations of public authority.

In the Community, the Council has played a limited role in the development of state aid policy. Recourse to Article 94<sup>12</sup> as the legal basis for legislation was considered a failure in the

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10. EC Treaty, *supra* note 2, art. 92(3). Article 92(3) of the original EEC Treaty provided:

The following may be considered to be compatible with the common market:

- (a) aid to promote the economic development of area where the standard of living is abnormally low or where there is serious underemployment;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. However, the aids granted to shipbuilding as of 1 January 1957 shall, in so far as they serve only to compensate for the absence of customs protection, be progressively reduced under the same conditions as apply to the elimination of customs duties, subject to the provisions of this Treaty concerning common commercial policy towards third countries;
- (d) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

EEC Treaty, *supra* note 2, art. 92(3). After the TEU, Article 92(3)(d) became Article 92(3)(e), and the new Article 92(3)(d) reads, "aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest." EC Treaty, *supra* note 2, art. 92(3)(d).

11. ECSC Treaty, *supra* note 3, art. 4(c).

12. EEC Treaty, *supra* note 2, art. 94.

The Council may, acting by a qualified majority on a proposal from the Commission, make any appropriate regulations for the application of Articles 92 and 93 and may in particular determine the conditions in which Article 93(3) shall apply and the categories of aid exempted from this procedure.

*Id.*

1960's<sup>13</sup> and is now viewed as a Pandora's Box too dangerous to open. In 1990, the Italian Government tried to provoke Council discussion of state aid policy under Article 94.<sup>14</sup> This was resisted by the Commission, which feared an attack on its rigorous approach, as well as a fruitless attempt to find a consensus among the Member States in the Council. The Commission agreed instead to present the annual Competition Report to the Council, to hold regular meetings with the Member States to discuss state aid issues (known as "multilaterals"),<sup>15</sup> and to increase the transparency of its work by publishing a compendium of texts.<sup>16</sup>

Therefore, there are no procedural regulations and no block exemptions. The Commission has gradually developed policy through cases, general policy frameworks, and notices. Procedural rules have been established by case law drawing on general principles.

The first decade of the European Community witnessed a slow start in policy development. There were no general guidelines and no real debate was engaged with the Member States. Protective measures (customs duties) still existed, but were progressively abolished under an accelerated timetable leading to the establishment of a true customs union in July 1968. The political difficulties of the mid-1960s slowed progress in this area. The "empty French chair" crisis,<sup>17</sup> finally solved by the so-called Luxembourg Compromise,<sup>18</sup> hindered the Community's decision-making affairs, and undermined the Commission's self-confidence for many years.

Against this background, it is noteworthy that only two EEC and three ECSC aid cases were brought before the Court of Jus-

13. Proposition d'un Reglement du Conseil, COM (66) 95 Final (Mar. 1966), *modified by Modifications a la Proposition d'un Reglement du Conseil*, COM (66) 457 (Nov. 1966) (withdrawn in 1975); Proposition d'un Reglement du Conseil, COM (72) 1523 Final (Dec. 1972) (withdrawn in 1976).

14. Council of the European Communities, General Secretariat, Press Release No. 9139/90 (Presse 150), Nov. 1, 1990 (discussing meeting of Council of Industry Ministers in Luxembourg, Oct. 15, 1990).

15. See COMMISSION OF THE EUROPEAN COMMUNITIES, XXTH REPORT ON COMPETITION POLICY 127-28, ¶ 170 (1991).

16. *Id.*

17. B:2 ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW B10120/2, ¶ B10-336 (describing French boycott of Community institutions and Luxembourg Compromise).

18. *Id.*; Extraordinary Session of the Council, 9 E.C. BULL., no. 3, at 8 (1976); see J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2423 (1991).

tice before 1970. Some sectors of the economy had special treatment in the Treaty. State aid policy in the agricultural sector was, and remains, shaped by the common agricultural policy and its successes, crises, and reforms. The transport sector also has a common policy with special provisions in the Treaty. The first Council decision in this area dates from May 1965 (inland transport),<sup>19</sup> and numerous regulations have been adopted since, including an exemption from the obligation to notify certain aid measures under Article 93(3).<sup>20</sup> Consideration of the special features of the shipbuilding sector, where competition takes place in an open, worldwide market with widespread subsidies, was also necessary. The Organisation for Economic Co-operation and Development ("OECD") has played a central role in establishing a discipline over subsidy schemes. The first Council Directive in this field was adopted in 1969, on the basis of a Commission proposal of 1965, where aid ceilings were set corresponding to the harm suffered by Community shipyards in the world market.<sup>21</sup>

An important turning point transpired in 1971 when regional policy developments compelled the Commission to establish a framework for a coordinated solution to the problem of regions outbidding each other to secure mobile investment, attracted by the growing success of what was then called the "common market."<sup>22</sup> These issues took on greater urgency and scope as the Community expanded in 1973. This was reflected in the creation of the European Regional Development Fund ("ERDF") at the Paris European Summit in December 1974.<sup>23</sup>

The first sectoral framework in the textile industry was es-

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19. Council Decision No. 65/271/EEC, O.J. 88/67 (1965).

20. Council Regulation No. 1191/69/EEC, J.O. L 156/1 (1969), O.J. Eng. Spec. Ed. 1969, at 276; *see* EC Treaty, *supra* note 2, art. 93(3).

The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

*Id.*

21. Council Directive No. 69/262, O.J. L 206/25 (1969).

22. *See* Commission Communication of 23 June 1971, followed by Council Resolution of 20 October 1971, O.J. L 111 (1971).

23. Council Regulation No. 724/75, O.J. L 73/1 (1975).



tablished in July 1971.<sup>24</sup> The origin of this initiative was the crisis caused by slow adjustment to technological change, slow growth of domestic demand, and cheap imports from developing countries. The approach followed resembled the one adopted regarding regional aid schemes: coordination with Member States to avoid escalation of aid from countries seeking to protect their own industries, leading to "beggar thy neighbor" spirals.

Legislation was usually eschewed in favor of "soft law" in the form of Commission communications setting out disciplines coordinated with the Member States.

The oil shocks of the 1970's gave rise to a vogue for industrial policy of sectoral interventionism in favor of "national" or at best "Community" champions; civil servants would pick industrial winners. A high point was the 1972 Commission memorandum to the Council on the "industrial and technology policy measures to be adopted in the aircraft production industry."<sup>25</sup> This was unashamedly *dirigiste*,<sup>26</sup> including an exception to the ban on export aid (the most heinous state aid offense).

The synthetic fibers code dates from 1977,<sup>27</sup> and was followed by a new textile communication to Member States in 1977<sup>28</sup> and a sectoral aid communication in May 1978.<sup>29</sup> The steel code was adopted in 1980 by means of a Commission decision after unanimous assent of the Council.<sup>30</sup>

These texts all sought to deal with the phenomenon of state aid as a matter to be judged by reference to the Community interest, for coordination, containment, and harmonization. They are more an exercise in damage limitation than an expression of policy driving for a reduction of aid and the attainment of the Treaty's "system of undistorted competition."

The competitiveness of European firms in international markets was a constant concern. The Commission's enforce-

24. Communication to Member States, SEC (71) 363 Final (July 1971).

25. COMMISSION OF THE EUROPEAN COMMUNITIES, FIRST REPORT ON COMPETITION POLICY 138-39, ¶¶ 176-78 (1971).

26. *Dirigiste* is a French term referring to a government-controlled economy.

27. Commission letter to Member States, SG (77) D/7633 (July 1977).

28. Commission Letter to Member States, SG (77) D/1190 (Feb. 1977), and Annex, SEC (77) 317 (Jan. 1977).

29. Communication to the Council on Commission Policy on Sectoral Aid Schemes, COM (78) 221 Final (May 1978).

30. Commission Decision No. 257/80/ECSC, O.J. L 29/5 (1980) (establishing Community rules for specific aids to steel industry).

ment focus was mainly on regional and sectoral aid (e.g., investment, restructuring) to boost economic recovery. The 1975 and 1977 competition reports specifically featured aid for employment.<sup>31</sup> It is only in 1994, several economic cycles later, that the Commission is contemplating issuing guidelines on this issue.

In 1972, the Commission introduced a system of scrutiny for general investment schemes through individual notifications<sup>32</sup> due to difficulties experienced in assessing the regional or sectoral impact of such schemes. These thresholds were raised in 1979.<sup>33</sup>

The 1980's began with new, firm policy intentions. The Commission's *Philip Morris* decision in 1979, prohibiting aid by the Dutch government to the U.S. tobacco company, was a watershed.<sup>34</sup> In 1980, the Court of Justice followed with its judgment on appeal.<sup>35</sup> Due to three years of recession, it was not until 1983 that the effects of the new policy became apparent. Better and more systematic use of the procedures provided for in the Treaty improved the scrutiny of state aid. Substantive reforms, such as the reduction of thresholds and the elimination of certain types of aid, followed in 1989 and the early 1990's.<sup>36</sup>

The general political climate turned in favor of a rigorous state aid policy in the 1980's. The role of the state in the economy was questioned closely. An increase in enforcement is reflected in the number of cases before the Court of Justice, which rendered sixty-two state aid judgments in the 1980's, as opposed to twenty-two in the 1970's. The Commission began to use the Article 93(2) procedure more systematically, encouraged by the

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31. COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTH REPORT ON COMPETITION POLICY 95-99, ¶¶ 137-47 (1976); COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTH REPORT ON COMPETITION POLICY 165, ¶¶ 233-41 (1978).

32. See COMMISSION OF THE EUROPEAN COMMUNITIES, SECOND REPORT ON COMPETITION POLICY 101-05, ¶¶ 116-21 (1973); COMMISSION OF THE EUROPEAN COMMUNITIES, THIRD REPORT ON COMPETITION POLICY 94 ¶¶ 112 *et seq.* (1974); COMMISSION OF THE EUROPEAN COMMUNITIES, FOURTH REPORT ON COMPETITION POLICY 96, ¶¶ 166 *et seq.* (1975).

33. COMMISSION OF THE EUROPEAN COMMUNITIES, NINTH REPORT ON COMPETITION POLICY 111, ¶ 184 (1980).

34. Commission Decision No. 79/743/EEC, O.J. L 217/17 (1979) (Netherlands government aid to Philip Morris).

35. *Philip Morris Holland B.V. v. Commission*, Case 730/79, [1980] E.C.R. 2671, [1981] 2 C.M.L.R. 321.

36. See COMMISSION OF THE EUROPEAN COMMUNITIES, XXTH REPORT ON COMPETITION POLICY 128, ¶ 171 (1991).

*Intermills* judgment in 1984.<sup>37</sup>

The Commission insisted on compliance with the notification procedure<sup>38</sup> and began to require recovery of incompatible aid in 1983, even though the Court had spoken of abolition and alteration of aid in 1973.<sup>39</sup> It took ten years for the Commission to send a letter to the Member States announcing a systematic recovery obligation<sup>40</sup> and implementation of a procedure clearly provided for in the EC Treaty since the outset.

Progress was made in the 1980's on the public enterprises front. The environment was also emerging as an important issue. In October 1972, the Community adopted the "polluter pays" principle, and the First Action Programme for the Environment followed in July 1973.<sup>41</sup> In November 1974, the first guidelines on environmental aid were issued.<sup>42</sup> Protection of the environment as a Community policy objective did not come about until the Single European Act,<sup>43</sup> and the guidelines were not amended, except for aid threshold reductions, until December 1993.<sup>44</sup>

In the area of research and development ("R&D"), interest in the 1970's arose mainly via consideration of the problems of the aircraft industry. In general, there was relatively little interest in this issue until the early 1980's with a survey of existing measures in the Member States, most of which had never been examined.<sup>45</sup> A framework was adopted in 1985.<sup>46</sup>

The first comprehensive survey on state aid in all Member States was published in 1989.<sup>47</sup> This marked a major turning

37. SA *Intermills v. Commission*, Case 323/82, [1984] E.C.R. 3809, [1983-1985 Transfer Binder] Common Mkt. Rep. (CCH) at 15,876.

38. See Commission Letter to Member States, SG (81) 12740 (Oct. 1981).

39. *Commission v. Federal Republic of Germany*, Case 70/72, [1973] E.C.R. 813, [1973] C.M.L.R. 741.

40. Commission Communication, O.J. C 318/3 (1983).

41. Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment, O.J. C 112/1 (1973).

42. Commission Letter to Member States, S/74/30.807 (Nov. 1974), and Annex I.

43. SEA, *supra* note 2.

44. Commission Guidelines on State Aid for Environmental Protection, O.J. C 72/3 (1994).

45. Community Framework for State Aids for Research and Development, O.J. C 83/2 (1986).

46. *Id.*

47. See European Commission, First Survey on State Aid in the European Commu-

point. The survey raised many basic issues that had not yet been resolved. What, for example, was state aid? What were general social measures to which Article 101 might apply? The survey revealed to the general public the overall high levels of aid. The questions then asked about the usefulness of this expenditure provided a strong basis for a more aggressive policy to reduce aid. Existing general investment aid schemes were reviewed and abolished by 1993.

All Member States view their motor vehicle industries as important components of their economies in terms of production, the creation of income and employment, and external trade. They have therefore been willing to grant aid to attract investment, or to keep plants in operation, with all the attendant dangers of competitive bidding spirals. Where there were serious threats of bankruptcy, rescue aid was provided generously. Such aid started on a large scale after the first oil crisis in 1975. Estimates of the amount of aid given to the industry from 1981 to 1986 are approximately eleven billion ECU.

The Commission was hampered in trying to control and possibly reduce such aid. Regional aid was usually given under approved schemes, so the Commission received no notification. The same was true of R&D aid, which was given frequently for normal model renewals. The introduction of the R&D framework in 1986, which required notification of individual cases above a threshold of twenty million ECU, helped matters. However, notifications of rescue and restructuring aid were frequently late or were simply not made at all. In addition, public sector companies could obtain additional advantages by receiving opaque aid in the form of preferential loans and state guarantees. This partial and limited control was seen as insufficient in a sector characterized by intense competition and price sensitivity. The Commission saw a need for a comprehensive set of rules, and in the late 1980's began to develop a stricter and more consistent approach towards rescue and restructuring aids in a series of cases.<sup>48</sup>

The set of rules was contained in a framework adopted in

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nity, ISBN 92-825-9531/39; COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTEENTH REPORT ON COMPETITION POLICY 143-44, ¶¶ 162-63 (1989).

48. *E.g.*, Commission Decision No. 88/454/EEC, O.J. L 220/30 (1988) (French government aid to Renault); Commission Decision No. 89/661/EEC, O.J. L 394/9 (1989), [1990] 1 CEC (CCH) 2024 (Italian government aid to Alfa Romeo).

1989.<sup>49</sup> It provided the means for comprehensive control of all state aid to the motor vehicle sector, with substantive rules to guide the Commission's assessment. Transparency and clarity were major objectives of the framework, as was the enforcement of a stricter discipline on aid to this sector, based on previous experience. There is no question, however, of any attempt to impose an industrial policy strategy on the sector.

The general concept behind the assessment of all cases is that aid should always be in proportion to the problems it seeks to resolve. The framework itself spells out the criteria for the different types of aid in more detail.<sup>50</sup> In application of the criteria for regional aid, DG IV has developed a specific methodology that is based on a comparative cost-benefit analysis of the regional handicaps faced by an investor in an assisted area. A detailed technical analysis of individual cases is carried out in order to distinguish between basic research and applied research and development, and to distinguish these from normal modernization.

State aid policy toward small and medium-sized enterprises ("SMEs") had been outlined in the Sixth Report.<sup>51</sup> Full guidelines followed much later in 1992,<sup>52</sup> together with quicker procedures for processing of notifications<sup>53</sup> and a *de minimis* rule that removed the notification obligation for aid of minor importance.<sup>54</sup> This measure caused controversy because of its institution by Commission notice, rather than Council legislation pursuant to Article 94.

A constant feature of the challenges faced by state aid policy has been pressure on Governments to give aid and on the Commission to accept them whenever there is a recession.<sup>55</sup>

49. Community Framework on State Aid to the Motor Vehicle Industry, O.J. C 123/3 (1989).

50. *Id.*

51. COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH REPORT ON COMPETITION POLICY 131, ¶ 253 (1977) (using broader definition of SMEs than present definition).

52. Community Guidelines on State Aid for Small and Medium-Sized Enterprises (SMEs), O.J. C 213/2 (1992).

53. *Id.* ¶ 3.2, O.J. C 213/2, at 5 (1992).

54. *Id.* ¶ 3.2, O.J. C 213/2, at 4 (1992).

55. See COMMISSION OF THE EUROPEAN COMMUNITIES, TENTH REPORT ON COMPETITION POLICY 111-58, ¶¶ 158 *et seq.* (1981); COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 111-54, ¶¶ 175 *et seq.* (1982); COMMISSION OF THE EUROPEAN COMMUNITIES, TWELFTH REPORT ON COMPETITION POLICY 109-54, ¶¶ 158 *et seq.* (1982).

What does the future hold? Employment aid guidelines will be issued soon, as will a communication on short-term export credit insurance. A guide to procedures will be published and the European courts will no doubt continue to refine procedural requirements. A general horizontal, non-sectoral framework, taking into account competition problems arising from aid for capital-intensive investments, would be welcome. However, the establishment of guidelines is made increasingly difficult by international concerns. On the one hand, the impact of GATT/WTO and other international rules must be considered. On the other hand, the risk of delocalization is of great concern, as other industrialized or rapidly industrializing nations move to attract mobile investment.

Calls are heard for consolidation and simplification of some of the Commission's rules. The increased openness of the EC system will attract the interest of public authorities and companies keen to turn the rules to their advantage. Lawyers, never the most shy followers of regulatory trends, will keep all parties on their toes.

There is more and more talk of "fairness" in this field. Is it fair to export unemployment from one place to another? There is also much more awareness of the amounts of money wasted on delaying inevitable economic adjustments. The pursuit of coherence between state aid and other Community policies is a major preoccupation. Here, two trends are perceptible. First, state aid policy is becoming more competition-oriented; second, other Community objectives are more clearly defined as a result of the successive amendments to the founding Treaties and enhanced management by objectives in the Commission. The privatization wave will help transparency and improve the efficiency of the firms concerned, thus reducing their appetite for aid.

The convergence requirements laid down in the Treaty on European Union for the transition to an Economic and Monetary Union impose budgetary constraints and disciplines on the Member States, making them think long and hard about spending priorities and the role of the state in the economy. Should Governments spend on welfare and education, or on airlines, steel, and shipbuilding companies? One does not have to be a political scientist to guess most voters' answers to that question.

## II. PUBLIC ENTERPRISES

What has been seen as a "public turn" and a "dramatic shift in the system's substantive focus"<sup>56</sup> at the end of the 1980's and beginning of the 1990's has not been, in the field of state aid, as brutal as it may appear. The concerns of the Commission about competition between private and public sectors and opaque flows of state aid are not new. It was necessary to achieve transparency before any action could be taken. The greater visibility and confidence of competition policy from the mid-eighties onwards, and the first directives on public service monopolies, led to greater awareness in industry of the "public" aspects of competition policy.

There had been a slow start in the early 1970's. At the Parliament's request, a study of distortions of competition between public and private enterprises<sup>57</sup> showed many gaps in the Community's knowledge. The data were simply not available. In 1975, complaints and written questions by Members of the European Parliament and acknowledgement that there was a lack of transparency in the financial relationships between Member States and their public enterprises hampered the Commission's work. The Commission therefore announced the preparation of a directive based on Article 90(3).<sup>58</sup> This provision, which had been present in the Treaty since 1958, had been neglected, which was of interest to academic lawyers who tended to find its interpretation a difficult challenge.

In 1979, during consultation on the steel code, the Council, the ECSC Consultative Committee, and the European Parliament expressed concern about possible discrimination between public and private firms.<sup>59</sup> The political climate was changing, as the Reagan-Thatcher era began. Little did anyone know that in the EC Treaty lay Sleeping Beauty (in the shape of Article 90) awaiting her political and judicial princes!

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56. David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L L.J. 97, 137 (1994).

57. See COMMISSION OF THE EUROPEAN COMMUNITIES, SECOND REPORT ON COMPETITION POLICY 111, ¶ 127 *et seq.* (1973).

58. COMMISSION OF THE EUROPEAN COMMUNITIES, FIFTH REPORT ON COMPETITION POLICY 105, ¶ 159 (1976).

59. COMMISSION OF THE EUROPEAN COMMUNITIES, NINTH REPORT ON COMPETITION POLICY 103, ¶ 169 (1980).

At the heart of Article 90 is the neutrality principle.<sup>60</sup> Competition rules must apply with the same rigor to private and public enterprises, subject to the public service limitations of Article 90(2). The same rules, however, cannot apply in the same way if the situation is not as transparent for public enterprises as it is for private firms. In 1980, the transparency directive was adopted<sup>61</sup> and annulment proceedings brought by several Member States were dismissed by the Court of Justice.<sup>62</sup> In 1984, the Commission issued a Communication to Member States on the participation of public authorities in the capital ownership of enterprises.<sup>63</sup> This enshrined the private investor principle, though it already had been featured in the preambles of the 1981 Steel Code<sup>64</sup> and the Council Directive on shipbuilding.<sup>65</sup>

The Commission was not alone in developing this principle. The Council and Parliament also endorsed the principle in the context of the steel code (the Council gave unanimous assent to the Commission's proposal for aid to Finsider/Ilva)<sup>66</sup> and the shipbuilding directives. In the 1980's, the Court of Justice upheld a series of important decisions applying the private investor principle in particular cases.<sup>67</sup> There were numerous decisions in which the Commission applied the principle.<sup>68</sup>

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60. See EC Treaty, *supra* note 2, art. 90.

61. Commission Directive No. 80/723/EEC, O.J. L 195/35 (1980) (amended by Commission Directive No. 85/413/EEC, O.J. L 229/20 (1985), which added previously excluded sectors).

62. France, Italy & UK v. Commission, Joined Cases 188-90/80, [1982] E.C.R. 2545, [1982] C.M.L.R. 144.

63. Public Authorities' Holdings in Company Capital, 17 E.C. BULL. No. 9, at 93 (1984).

64. Commission Decision No. 257/80/ECSC, O.J. L 228/14 (1981) (establishing Community rules for aids to steel industry); COMMISSION OF THE EUROPEAN COMMUNITIES, ELEVENTH REPORT ON COMPETITION POLICY 117, ¶ 187 (1982).

65. Council Directive No. 81/363, O.J. L 137/39 (1981).

66. Commission Decision No. 89/218/ECSC, O.J. L 86/76 (1989) (Italian government aid to public steel sector).

67. *E.g.*, Re Aid to Eni-Lanerossi: Italy v. Commission, Case C-303/88, [1991] E.C.R. I-1433, [1993] C.M.L.R. 1; Italy v. Commission, Case C-305/89, [1991] E.C.R. I-1603 (Alfa Romeo); France v. Commission, Case C-301/87, [1991] E.C.R. I-307 (Bousac).

68. Commission Decision No. 84/496/EEC, O.J. L 276/34 (Meura); Commission Decision No. 82/670/EEC, O.J. L 280/30 (1982) (Intermills); Commission Decision No. 87/585/EEC, O.J. L 352/42 (1987) (Boussac); Commission Decision No. 89/661/EEC, O.J. L 394/9 (1989) (Alfa-Fiat); Commission Decision No. 85/53/EEC, O.J. L 59/21 (1985) (Boch/Noviboch); Commission Decision No. 88/282/EEC, O.J. L No. 119/



Then came a 1991 communication.<sup>69</sup> Its objective was still transparency (requiring annual reports). It also systematized the private investor principle as the test for identifying aid in transactions between public authorities (in whatever form) and their public enterprises.

In June 1993, the Court of Justice annulled the 1991 communication because it had used the wrong legal basis to impose the reporting obligation, not foreseen by the transparency directive.<sup>70</sup> The sting, however, had left the debate on substance; nobody seriously disputed the private investor principle and its application. A new directive was quickly issued, modifying the transparency directive<sup>71</sup> and imposing a reporting obligation for all financial transactions with public enterprises in the manufacturing sector with a turnover of more than 250 million ECU. A new communication was also issued,<sup>72</sup> the substance of which was unchanged, except for the removal of the reporting obligation that had been transferred to the directive. DG IV now has a task force, which monitors the implementation and analysis of the reports.

The same rules apply in the service sector. There is no reporting obligation at present, because it is necessary to prioritize limited resources. Some time is also needed to deal with technical difficulties in the service sector, such as the particular relationships between the Member State and the banking sector and public service utilities. Nevertheless, cases in this area are more and more frequent and action will soon be necessary to increase transparency and monitor developments.

New guidelines on restructuring and rescue aid were adopted on July 27, 1994. They codify and consolidate years of case practice. In aid cases, a restructuring plan is needed that charts a path to viability and reduction of capacity if the sector is

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38 (1988) (Pinault-Isoroy); Commission Decision No. 88/454/EEC, O.J. L 220/30 (1988) (Renault).

69. Commission Communication, O.J. C 273/2 (1991) (to Member States on application of Articles 92 and 93 of EEC Treaty and of Article 5 of Commission Directive 80/723 to Public Undertakings in Manufacturing Sector), *annulled in part by France v. Commission*, Case C-325/91, slip op. at 6 (Eur. Ct. J. June 16, 1993) (not yet reported); see Commission Directive No. 93/84/EEC, O.J. L 254/16 (1993); Commission Communication, O.J. C 307/3 (1993).

70. *France v. Commission*, slip op. at 6.

71. Commission Directive 93/84/EEC, O.J. L 254/16 (1993).

72. Commission Communication, O.J. C 307/3 (1993).

suffering from structural overcapacity; the aid must be limited to what is strictly necessary. There must be a counterpart (*contrepartie*) showing what the aided firm is doing to improve the structure of the market on which it operates. If the market concerned has structural, as opposed to cyclical, excess capacity, the aided firm must help by cutting its own capacity. If there is no such excess capacity, must the aided firm still do something to diminish the competitive disadvantages at which the aid places its competitors by limiting its production or cutting its capacity? In the Author's view, state aid policy is, more than other branches of competition policy, about fairness as well as economic efficiency. Firms that receive aid to help them restructure and stay in business must sacrifice some of their productive capacity for the benefit of their competitors who are denied the chance to gain from the disappearance of the firm that would have failed without state aid.

### III. *THE FUTURE: INTERNATIONAL ASPECTS OF STATE AID POLICY*

Rules to control state aids are becoming a more and more essential element not only at the "intra-Union-level," but also at an international level. In some ways, the logic of the internal market can be easily transposed to international trade. As trade becomes more liberalized at the world level, companies will feel the effects of aids granted to their competitors in other countries more keenly, and the distortions of competition that can result from the granting of aid will become more serious.

This is why the Community, in its international agreements with its partner countries, emphasizes provisions and mechanisms to provide for the effective control of state aids. The two most recent examples are the Agreement on the European Economic Area<sup>73</sup> and the Europe Agreements, concluded with the Central and East European Countries.<sup>74</sup>

#### A. *The Agreement on the European Economic Area*

The Agreement on the European Economic Area ("EEA

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73. Agreement on the European Economic Area, O.J. L 1/3 (1994) [hereinafter EEA].

74. See, e.g., Europe Agreement with Hungary, O.J. L 347/275 (1993).

Agreement”), which entered into force on January 1, 1994,<sup>75</sup> is based to a large extent on rules of European Community law adapted to the EEA context. It provides that the “four freedoms” as foreseen under Community law (free movement of goods, persons, services, and capital) apply, with some exceptions, such as agriculture, between the Community and the other EEA States (i.e., Austria, Finland, Iceland, Norway, and Sweden), including not only the basic Community Treaty provisions but also secondary Community legislation such as directives, regulations, and decisions. The same applies to a number of other Community policies in which EEA partner states participate, including competition and state aid control.

The main substantive state aid rules are set out in Articles 61 to 64 of the EEA Agreement. These provisions are a copy of the relevant Articles of the EC Treaty. Annex XV to the EEA Agreement contains a list of all the state aid *acquis communautaire* that must be used when interpreting Article 61 of the EEA.<sup>76</sup> It is therefore fair to say that the whole Community *acquis communautaire* has been extended to cover the whole European Economic Area;<sup>77</sup> special provisions update the relevant provisions in the EEA Agreement in line with newly adopted Community acts, so as to ensure legal homogeneity in the future. In a joint declaration of the Contracting Parties, the EC and participating European Free Trade Area (“EFTA”) states declare that aid granted through EC structural funds and all other financial instruments shall be in keeping with Article 61 of the EEA.<sup>78</sup> Regular exchanges of information and views shall take place about this aid. This declaration facilitates a coherent approach to state

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75. EEA, *supra* note 73, O.J. L. 1/3 (1994); see, e.g., SVEN NORBERG ET AL., THE EUROPEAN ECONOMIC AREA, EEA LAW, A COMMENTARY ON THE EEA AGREEMENT (1993); THÉRÈSE BLANCHET ET AL., THE AGREEMENT ON THE EUROPEAN ECONOMIC AREA (1994). As of January 1, 1995, Austria, Finland, and Sweden will join the European Community. Hugh Carnegie, *Sweden Gives Clear Yes to EU: Vote in Favour of Membership Keeps Enlargement Timetable on Course*, FIN. TIMES, Nov. 14, 1994, at 1.

76. EEA, *supra* note 73, annex XV, O.J. L 1/3, at 457 (1994); see *id.* art. 61, O.J. L 1/3, at 17 (1994).

77. See Claude Rouam, *L'Espace Économique Européen, un Horizon Nouveau Pour la Politique de Concurrence?* 1992 CHRONIQUE DU DROIT DE LA CONCORRENCE 53; Thinaam Jakob-Siebert, *Wettbewerbspolitik im Europäischen Wirtschaftsraum (EWR)*, 1992 WIRTSCHAFT UND WETTBEWERB 387.

78. EEA, *supra* note 73, Joint Declaration on Aid Granted Through the EC Structural Funds or Other Financial Instruments, O.J. L 1/3, at 538 (1994).

and EC aids: EC structural funds and other financial instruments have to be in conformity with Article 61.

Rules, however, are not enough. They must be enforced. The EEA Agreement created the EFTA Surveillance Authority<sup>79</sup> ("Authority"), an independent institution with powers mirroring those of the Commission. Our procedures are followed by this Authority, and it has been busy all year with state aid and other work. The Authority has received more than 400 notifications already.

The EEA Agreement provides for close cooperation between the Commission and the EFTA Surveillance Authority in order to ensure the uniform implementation of the state aid rules throughout the EEA's seventeen countries.<sup>80</sup> This cooperation, which gives DG IV a great deal of extra work, is based on regular exchanges of information on general policy issues, as well as on individual state aid programs and cases.

The EEA regime is an ambitious international initiative in the state aid field. It demonstrates the Community's conviction that market liberalization must go hand in hand with effective scrutiny of governmental action that may distort competition. The Agreement has worked very well, and relations between the EFTA Surveillance Authority and the Commission have been excellent.

### *B. Agreements with the Central and East European Countries*

In comparison with the EEA, the Europe Agreements<sup>81</sup> concluded on a bilateral basis with the Central and East European Countries ("CEEC") provide for a lesser degree of market integration. Consequently, the system set up in those agreements to ensure the control of state aid is less elaborate than that provided for in the EEA. Because the Europe Agreements were concluded on a bilateral basis between the Community and the individual countries concerned, it was not possible at the time of conclusion to foresee the creation of a "supranational" authority common to those countries, similar to the EFTA Surveillance

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79. *Id.* art. 108, O.J. L 1/3, at 26 (1994); *see id.* Protocol 26, O.J. L 1/1, at 193 (1994) (defining powers and functions of EFTA Surveillance Authority in field of state aid).

80. *Id.* art. 62(2), O.J. L 1/3, at 18 (1994); *see id.* Protocol 27, O.J. L 1/3, at 193-94 (1994) (establishing rules for cooperation).

81. *E.g.*, Europe Agreement with Hungary, O.J. L. 347/275 (1993).

Authority. All the agreements contain provisions stating that state aids that restrict competition and affect trade between Contracting Parties are incompatible with the functioning of those agreements. Furthermore, it has been agreed that these provisions must be interpreted in accordance with Article 92 of the EC Treaty, that all the countries benefit from the derogation set forth in Article 92(3)(a) of the EC Treaty for a (renewable) period of five years, and that implementing rules must be drawn up between the parties to ensure effective enforcement of the state aid provisions.<sup>82</sup> This demonstrates the Commission's continued emphasis on effective enforcement.

Discussions on these implementing rules is currently at an early stage, but it is clear that effective state aid control will be closely linked to the question of trade measures (if there is a viable competition system including proper state aid control, there may be no more need for trade measures). This has been set out in the Commission's Communication to the Council on a pre-accession strategy for the CEEC.<sup>83</sup> One of the major problems in this area will be transparency. The CEEC will have to provide for mechanisms allowing for a close monitoring of aids granted. This will be one of the CEEC's and the Community's main challenges for the future. Effective state aid control is in the interest of the CEEC themselves, whether or not the aid affects trade between the country concerned and the Community. It is only when that trade is affected that there is reason for the Community to become legally involved.<sup>84</sup>

When comparing the Commission's proposal for the structure of state aid monitoring for the CEEC with the GATT arrangement of the Subsidy Code, the former is preferable be-

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82. See, e.g., COMMISSION OF THE EUROPEAN COMMUNITIES, XXIII<sup>RD</sup> REPORT ON COMPETITION POLICY ¶¶ 101 *et seq.* (forthcoming 1994).

83. Commission of the European Communities, Communication from the Commission to the Council, *The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession*, COM (94) 320 (July 1994); Commission of the European Communities, Communication from the Commission to the Council, *Follow-up to Commission Communication on "The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession,"* COM (94) 361 (July 1994).

84. For recent developments, see Claude Roume et al., *La Politique de la Concurrence de la Communauté à l'Échelle Mondiale: L'Exportation des Règles de Concurrence Communautaires*, 1 *EC COMPETITION POL'Y NEWSL.* 7 (1994); Pierre Delsaux et al., *Aspects Internationaux de la Politique de la Concurrence*, 1 *EC COMPETITION POL'Y NEWSL.* 57 (1994).

cause it offers an *a priori* approach to the problem. The CEEC structure is preventive, whereas the GATT arrangement deals with damage repair or remedies. The CEEC arrangements allow for smoother intervention and cause less disruption, and are more transparent and economically efficient, both internally for the countries involved and in terms of international trade relations.

In concluding the EEA Agreement and the Agreements with the CEEC, the Community has taken a decisive step forward. It has changed its approach from one of adopting defensive trade measures *a posteriori* to one of trying to prevent such measures by relying *a priori* on a viable competition policy system. Where markets are open, market access is not hampered by state regulation, and a viable system of state aid control is established, there will be less need to resort to traditional trade measures, such as antidumping or countervailing duties. The economic basis for such measures will have been eliminated, or at least considerably reduced. Thus, in the EEA, antidumping duties have been abolished. The Community approach therefore sends a positive signal to international trade and its policy-makers. At the same time, by providing for more transparent rules, it will enhance legal certainty for industry. State aid issues are inextricably bound up with international trade liberalization.

#### IV. PROCEDURES

##### A. *The European Court of Justice, the Court of First Instance, and Third Party Rights*

In recent years, there has been a marked increase in the number of actions brought under Article 173 of the EC Treaty<sup>85</sup> against Commission state aid decisions. From third parties who took part in the Commission's procedure<sup>86</sup> to those who complained that there was no procedure to take part in,<sup>87</sup> the European courts have been willing to hear actions against state aid decisions. The new jurisdiction of the Court of First Instance in

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85. EC Treaty, *supra* note 2, art. 173 (governing competency of parties to bring actions before Court of Justice reviewing legality of Council or Commission acts "other than recommendations or opinions").

86. *Compagnie Française de l'Azote (Cofaz) S.A. v. Commission*, Case 169/84, [1986] E.C.R. 391, 415, ¶ 25, [1986] 3 C.M.L.R. 385, 411.

87. *Cook v. Commission*, Case C-198/91, [1993] E.C.R. I-2487, [1993] 3 C.M.L.R. 206.

state aid matters will not arrest the growth of state aid procedures.

State aid procedures are conducted largely between the Commission and the Member State concerned. Strictly speaking, therefore, the would-be recipient of aid is also a third party. This Article shall concentrate on the procedural rights of the beneficiary's competitors.

In cases where the Commission has initiated the procedure provided for in Article 93(2), a complainant who responds to the invitation to comment, and whose position on the market is significantly affected by the measure concerned, may seek judicial review of a Commission decision.<sup>88</sup> But what if the Commission does not initiate the procedure, or considers that a measure is not state aid requiring notification?

Here the situation is similar to that prevailing under Regulation 4064/89 (merger regulation),<sup>89</sup> where the Commission does not receive a notification or issues a decision under Article 6(1)(a)<sup>90</sup> that a notified concentration does not fall within the scope of the regulation.<sup>91</sup> In the state aid field, a Commission decision that a measure: (i) is not state aid within the meaning of Article 92(1); (ii) is state aid, but does not affect trade between Member States; or (iii) is state aid, but is found to be compatible with the common market without any initiation of the Article 93(2) procedure, may be brought before the Court of First Instance by a competitor of the recipient, or before the Court of Justice by a Member State.

How does a competitor know what is going on? Discussions about whether a given measure should be notified take place between the Commission and the Member State concerned. Letters sent to a Member State stating that no notification is required are not published. Decisions that state aid is compatible with the common market without initiation of procedure are summarized in brief statements in the Official Journal. It has been suggested recently that the Commission should publish a

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88. Opinion of Advocate General van Themaat, *Cofaz*, [1986] E.C.R. at 407, [1986] C.M.L.R. at 405.

89. Corrigendum to Council Regulation No. 4064/89, O.J. L. 257/13 (1990).

90. Council Regulation No. 4064/89, art. 6(1)(a), O.J. L. 257/14, at 19 (1990).

91. See *Air France v. Commission*, Case T-3/93, [1994] E.C.R. II-121 (discussing such issues in full).

register of all aid measures notified to it.<sup>92</sup> This raises questions of confidentiality and international relations. Why should Member States be required to announce information they may wish to withhold, and why should the Community as a whole give possible ammunition to its trading partners in international trading disputes, where those trading partners are under no similar obligation to publicize subsidies? In any case, unnotified measures that a competitor may wish to characterize as aid would remain undisclosed even if a register of notifications were made public.

Suspicious competitors should watch market developments carefully and not hesitate to ask the Commission whether aid has been paid, notified, or approved in a given case. Competitors will find the Court of First Instance receptive to actions for annulment of Commission decisions that aid is compatible with the common market or that a measure is not state aid.<sup>93</sup> It has been pointed out that the ease of access to the Community's courts is, in a way, compensation for the lack of procedural rights for third parties before the Commission in state aid cases prior to or in the absence of an initiation of procedure.<sup>94</sup> This compensation may be unsatisfactory for third parties faced with the opacity of relations between the Commission and the Member State concerned. The Commission's commitment to openness, transparency, and proximity to the citizen would suggest that greater efforts should be made to render the system of enforcement of the state aid rules more accessible to interested parties. While it remains true that the Treaty creates a set of obligations and procedures, whose main actors are the Commission and the Member States, the purpose of that system is to ensure that aid does not unduly favor certain undertakings or the production of certain goods (Article 92(1)), in pursuit of the overall aim of a sys-

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92. CONFEDERATION OF BRITISH INDUSTRY, CONTROLLING STATE AIDS: MAKING THE SINGLE MARKET WORK (1994); see BUNDESVERBAND DER DEUTSCHEN INDUSTRIE, EU-BEIHILFENPOLITIK: DIE TATBESTANDSMERKMALE DES ARTIKELS 92 ABSATZ 1 EG-VERTRAG (1994).

93. See *Cook v. Commission*, Case C-198/91, [1993] E.C.R. I-2487, [1993] 3 C.M.L.R. 206; *Air France v. Commission*, Case T-3/93, [1994] E.C.R. II-121. The analogy between the merger regulation and state aid procedure is striking, and was specifically drawn by the Court of First Instance in its reference to *Cook* in *Air France*. *Air France*, [1994] E.C.R. at II-162, ¶ 81.

94. Luc Gyselen, *La Transparence en Matière d'Aides d'État: Les Droit des Tiers*, 1993 CAHIERS DE DROIT EUROPÉEN 417.



tem of undistorted competition (Article 3(g)).<sup>95</sup> It is therefore important to ensure that third parties are given enough information to assert their rights.

The Commission will publish a Guide to Procedures setting out the manner in which state aid cases are dealt. The developing case law of the Court of First Instance is likely to prove influential in protecting the interests of third parties. Perhaps in the future, a procedural regulation will be enacted pursuant to Article 94.<sup>96</sup> Until legislation or case law alters the balance of the system, it must be understood that the state aid rules are addressed to Member States with third parties playing a limited role in their application. For the time being, therefore, one must beware analogies with the competition law enforcement system developed under Regulation 17<sup>97</sup> and other procedural rules for the application of Articles 85 and 86.<sup>98</sup>

#### B. *Article 94*

It is well known that the Commission is reluctant to propose Council legislation under Article 94. It is perhaps less well known that, with occasional exceptions, there is little call from the Member States for such proposals, possibly because there is no consensus among them on a state aid policy different from the one developed by the Commission. In the absence of such legislation, a number of interesting legal issues arise.

The only provision of the state aid rules under the EC Treaty that is directly effective in the courts of the Member States is the last sentence of Article 93(3):

The Commission shall be informed, in sufficient time to enable to submit its comments, of any plans to grant or alter aid.

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95. EC Treaty, *supra* note 2, art. 3(g). "[T]he activities of the Community shall include . . . a system of ensuring that competition in the internal market is not distorted." *Id.*

96. See Snyder, *Soft Law and Institutional Practice in the European Community* (1993) (EUI Working Paper LAW No. 93/5, European University Institute, Florence) (discussing role of "soft" law in development of state aid law and policy).

97. Council Regulation No. 17/62, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-1962, at 87.

98. EC Treaty, *supra* note 2, arts. 85-86 (competition rules). Article 85 of the Treaty prohibits actions that cause "the prevention, restriction or distortion of competition within the common market." *Id.* art. 85. Article 86 prohibits such acts as limiting production to influence the market for a good, unfair pricing practices, and unfair trading practices. *Id.* art. 86.

If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. *The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*<sup>99</sup>

The national court will have to consider whether the "proposed measures" constitute *state aid* within the meaning of Article 92(1)<sup>100</sup> before reaching a decision under the last sentence of Article 93(3). The Commission's decisions and the case law of the Court of Justice devote considerable attention to this important question. In particular, the national court must interpret the notion of state aid widely to encompass not only subsidies, but also tax concessions and investments from public funds made in circumstances in which a private investor would have withheld support.<sup>101</sup> The aid must come from the "state," which includes all levels, manifestations, and emanations of public authority.<sup>102</sup> The aid must favor certain undertakings or the production of certain goods. This serves to distinguish state aid to which Article 92(1) applies from general measures to which it does not.<sup>103</sup>

Is the national court also empowered to consider the other conditions of Article 92(1), or must it stop at the characterization of the measure as state aid? This controversial question is of

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99. EC Treaty, *supra* note 2, art. 93(3) (emphasis added). "Existing" aid, however, may be implemented until the Commission has decided that it is incompatible with the common market. See *Banco de Crédito Industrial, now Banco Exterior de España v. Ayuntamiento de Valencia*, Case C-387/92, [1994] E.C.R. I-877; *Namur - Les Assurances du Crédit v. Office National du Ducroire and Belgium*, Case C-44/93 (Eur. Ct. J. Aug. 9, 1994) (not yet reported).

100. See *Steinike und Weinlig v. Federal Republic of Germany*, Case 78/76, [1977] E.C.R. 595, 610, ¶ 14, [1977] 2 C.M.L.R. 688, 722. In *Steinike*, the Court stated that "a national court may have cause to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to this procedure." *Id.*

101. See Opinion of Advocate General Jacobs, *Spain v. Commission*, Joined Cases C-278-80/92, ¶ 28 (Court decision not yet reported) ("State aid is granted whenever a Member State makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying normal commercial criteria and disregarding other considerations of a social, political or philanthropic nature.").

102. See *Re Regional Aid Plans: Federal Republic of Germany v. Commission*, Case 248/84, [1987] E.C.R. 4013, [1989] 1 C.M.L.R. 591; *Van der Kooy v. Commission*, Joined Cases 67-68, 70/85, [1988] E.C.R. 219, [1988] 2 C.M.L.R. 804.

103. Opinion of Advocate General Darmon, *Sloman Neptun*, Joined Cases C-72-73/91, [1993] E.C.R. I-887 (stating distinction clearly).

great importance.<sup>104</sup>

If the measures concerned are state aid and the Commission has not yet adopted a final decision concerning them, the state aids may not be implemented and certain important consequences would follow. Implementation would be illegal. Only the Commission can decide that state aid is "incompatible with the common market,"<sup>105</sup> i.e., not authorized and therefore prohibited. The Court of Justice has set out a clear distinction between the role of the Commission and that of the national courts.<sup>106</sup>

As with Article 85(1) and (2), Article 86, and block exemption regulations, national courts may refer preliminary questions to the Court of Justice pursuant to Article 177 of the EC Treaty, and indeed must do so in certain circumstances.<sup>107</sup> They may also request assistance from the Commission by asking it for

104. See Opinion of Advocate General Lenz, *Namur - Les Assurances du Crédit v. Office National du Ducroire and Belgium*, Case C-44/93 (Eur. Ct. J. Aug. 9, 1994) (Court decision not yet reported) (stating clearly that notification requirement extends to all state aid measures).

105. EC Treaty, *supra* note 2, arts. 92-93.

106. *Fédération Nationale du Commerce Extérieur des Produits Alimentaires v. France*, Case C-354/90, [1991] E.C.R. I-5505, I-5527, ¶¶ 9-11. In *Fédération Nationale*, the Court held:

As far as the role of the Commission is concerned, the Court pointed out in its judgment in Case 78/96, *Steinike und Weinlig v. Germany*, [1977] ECR 595, at paragraph 9, that the intention of the Treaty, in providing through Article 93 for aid to be kept under constant review and supervised by the Commission, is that the finding that aid may be incompatible with the common market is to be arrived at, subject to review by the Court, by means of an appropriate procedure which it is the Commission's responsibility to set in motion.

As far as the role of national courts is concerned, the Court held in the same judgment that proceedings may be commenced before national courts requiring those to courts to interpret and apply the concept of aid contained in Article 92 in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to this procedure.

The involvement of national courts is the result of the direct effect which the last sentence of Article 93(3) of the Treaty has been held to have. In this respect, the Court stated in its judgment in Case 120/73, *Lorenz v. Germany*, [1973] ECR 1471, that the immediate enforceability of the prohibition on implementation referred to in that article extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period, and if the Commission sets in motion the contentious procedure, until the final decision.

*Id.*

107. EC Treaty, *supra* note 2, art. 177 (jurisdiction of Court of Justice in preliminary rulings).

“legal or economic information” by analogy to the Court’s *Delimitis*<sup>108</sup> judgment on Article 85.

The national judge’s duty is to ensure that no effect is given to the proposed aid measure until the Commission has reached a final decision on its compatibility with the common market. The judge must, at the request of a party or *ex officio*, use all appropriate devices and remedies and apply all relevant provisions of national law to implement the direct effect of this obligation placed by the Treaty on Member States.<sup>109</sup> Any deficiency of these national rules, which denies the full effectiveness of Article 93(3), must be set aside as a matter of Community law. The judge should, as appropriate, grant interim relief, order the freezing or return of monies illegally paid, and award damages to parties whose interests are harmed. The order should be made against the Member State, or whatever public authority was responsible for the measure concerned.

The Community law rules in *Francovich*<sup>110</sup> and *Factortame*<sup>111</sup> should be applied in state aid cases before national courts. Individuals and undertakings must have access to all procedural rules and remedies provided for by national law on the same conditions as would apply if a comparable breach of national law (for illegal payment/receipt of public funds) were involved. This equality of treatment concerns not only the definitive finding of a breach of directly effective Community law, but also ex-

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108. *Delimitis v. Henninger Bräu A.G.*, Case C-234/89, [1991] E.C.R. I-935, [1992] 5 C.M.L.R. 210; see Commission Notice, O.J. C 39/6 (1993) (cooperation between national courts and Commission in applying Articles 85 and 86 of EEC Treaty). The Commission is preparing a notice on cooperation between itself and national courts in the state aid field. Advocate General Lenz has drawn a parallel between the *Delimitis* case and the state aid field in his Opinion in *Namur*, ¶ 106.

109. *Federation Nationale*, [1991] E.C.R. at 5528, ¶ 12. The Court in *Federation Nationale* held that:

[T]he validity of measures giving effect to aid is affected if national authorities act in breach of the last sentence of Article 93(3) of the Treaty. National courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.

*Id.*

110. *Francovich v. Italy*, Joined Cases C-6, 9/90, [1991] E.C.R. I-5357, [1993] 2 C.M.L.R. 66.

111. *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd.*, Case C-213/89, [1990] E.C.R. I-2433, [1990] 3 C.M.L.R. 1, [1990] 2 CEC (CCH) 189.

tends to all legal means capable of contributing to effective legal protection. Consequently, national courts must be able to take provisional steps to suspend measures contrary to Community law and to award compensation for the damage suffered as a result of such measures. If adequate remedies are not available in national law and the effectiveness of Community rules is impaired, national courts must set aside impediments in national law and apply general principles of Community law.

In this way, national courts ensure that the competition rules are respected for the benefit of individuals. This is particularly important for the period of time between the grant of aid and the Commission's final decision. Although no new aid measure may be put into effect before the Commission has reached a final decision, the Commission, unlike a national court, cannot oblige a Member State to pay damages for any loss caused by an aid measure.

#### *CONCLUSION*

The founding generation of the European Community has achieved a great deal in creating a comprehensive system of state aid control from nothing. The challenges now are the interface between private and public sectors in the single market, the globalization of the economy, and the transformation of an administrative procedure between civil servants into a system of economic law enforcement.