View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Fordham University School of Law

Fordham International Law Journal

Volume 18, *Issue* 2 | 1994 | *Article* 5

Competition and State Aid Policy in the European Community

Frédéric Yves Jenny*

*

Copyright ©1994 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/ilj

Competition and State Aid Policy in the European Community

Frédéric Yves Jenny

Abstract

This article discusses the effect of European Community state aid policy on competition. First, the article defines and discusses the types of state aid under the Treaty Establishing the European Community. Second, the article analyzes the distortion of competition and effect on trade that state aids have. Third, the article discusses whether state aid qualifies for an exemption because it fulfills some other goal of the Treaty.

COMPETITION AND STATE AID POLICY IN THE EUROPEAN COMMUNITY

*Frédéric Yves Jenny**

CONTENTS

Introduction 525
I. State Aids 532
II. Distortion of Competition and Effect on Trade 534
III. Exemptions 537
Conclusion 552

INTRODUCTION

When one considers competition law in the European Community ("Community" or "EC"), it is useful to keep in mind the wording of Articles 2 and 3 of the Treaty Establishing the European Community ("EC Treaty" or "Treaty").[1] Article 2 states:

> The Community shall have as its task, by establishing a common market . . . and by implementing the common policies or activities referred to in Article[ ] 3 . . . to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member-States.[2]

Article 3 states that "[f]or the purpose set out in Article 2, the activities of the Community shall include . . . a system ensur-

* Professor of Economics, Ecole Supérieure des Sciences Economiques et Commerciales ("ESSEC"); Vice-Chairman, Conseil de la Concurrence. A version of this Article will be published in 1994 FORDHAM CORP. L. INST. (Barry E. Hawk ed., 1995). Copyright © Transnational Publications, Inc., 1995.

1. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/01 (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], *as 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).

2. EC Treaty, *supra* note 1, art. 2.

ing that competition in the internal market is not distorted."[3] The first Chapter of Title V of the Treaty establishes "rules on competition" applying to undertakings[4] and to "aids granted by States."[5] The provisions on competition of the Treaty should also be read in the context of its preamble, in which the founding fathers recognized that "the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition."[6]

As Helmuth R.B. Schröter stated a few years ago:

> [T]he much broader scope of and plurality of aims pursued by EC competition policy result in making antitrust analysis under Community law a more complicated process than under the antitrust law of the United States which considers 'allocative efficiency/consumer welfare' as the sole valid standard.[7]

These considerations have three consequences that are of particular importance in understanding the way the EC competition law is designed or enforced, and in understanding in particular the enforcement of the provisions on state aids. The first element to bear in mind has to do with the concept of competition, which underlies the EC Treaty. Among other things, competition must be fair. As early as the 1960's, the Court of Justice stated that "the elimination of barriers" and "fair competition" were both necessary to bring about a single market.[8]

As Schröter noted:

> According to the Commission, 'the principle of fairness in the market' place not only requires that equality of opportunity must be preserved for all commercial operators in the Common Market. It also highlights the need to take into account the great variety of situations in which firms carry on business and to pay special regard to small and medium firms. Finally, it demands that competition policy take account of the legitimate interests of workers, users and consumers.[9]

---

3. *Id.* art. 3.
4. *Id.* arts. 85-86.
5. *Id.* art. 92.
6. *Id.* pmbl.
7. Helmuth R.B. Schröter, *Antitrust Analysis Under Article 85(1) and (3), in* 1987 FORDHAM CORP. L. INST. 645, 661 (Barry E. Hawk ed., 1988).
8. Italy v. Council, Case 32/65, [1966] E.C.R. 389, 404, [1969] C.M.L.R. 39, 60-61.
9. Schröter, *supra* note 7, at 660.

In that sense the EC competition law not only protects the process of competition, but also the competitors. In the area of restrictive agreements, the issue of fairness does not come up very often, but one example quoted by Waelbroeck[10] is the first *SABA* decision, in which the Commission stated:

> The supply of goods by SABA wholesalers to private customers in Germany would . . . be inappropriate in a multi-level system such as that operated by SABA, with its clear definition of function between wholesalers and retailers. SABA wholesalers would furthermore have an unfair competitive advantage over SABA retailers. This type of unfair competitive advantage would not be protected by Article 85.[11]

Similarly, among the abuses prohibited by Article 86 are "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions"[12] and "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."[13] Commenting on the case law, Thomas E. Kauper states:

> The treatment under Article 86 of refusals to deal by dominant firms . . . has until recently had little to do with economic efficiency in the price-output, consumer welfare sense. The Commission and Court of Justice cases concluding that refusals to deal were abusive, like the examples set forth in Article 86 itself, have been based on a concern for fair treatment of distributors (where competitive effects, if any, are to be found at the secondary level), or, in some cases, upon the threatened exclusion of direct rivals (where at least colorable arguments can be advanced to suggest that the refusals increase market power and could therefore impair consumer welfare). In sum, these cases reflect a mix of concerns more common to American antitrust of two decades past, and give Article 86, because it is multi-valued, a highly regulatory quality Section 2 now lacks.[14]

The second element to bear in mind is that the primary

---

10. M. Waelbroeck, *Antitrust Analysis Under Article 85(1) and Article 85(3)*, *in* 1987 FORDHAM CORP. L. INST. 693, 702 (Barry E. Hawk ed., 1988).

11. Commission Decision No. 79/159/EEC, O.J. L 28/19, at 26, ¶ 34 (1976) [hereinafter SABA].

12. EC Treaty, *supra* note 1, art. 86.

13. *Id.*

14. Thomas E. Kauper, *Whither Article 86? Observations on Excessive Prices and Refusals to Deal*, *in* 1989 FORDHAM CORP. L. INST. 651, 668 (Barry E. Hawk ed., 1990).

goal of the EC competition policy is to unify the common market and to prevent private or public market intervention that is or could be incompatible with such a common market. For example, in the *Metro* case,[15] the Court of Justice emphasized that the objective of the Treaty regarding competition policy was to ensure "the creation of a single market achieving conditions similar to those of a domestic market."[16] Schröter goes even further when he states that "in the EC competition policy in general and antitrust policy in particular is primarily 'integration policy' aimed at bringing about a maximum of economic inter-penetration and thus merging the separate national markets into a single market of the Community."[17]

This means that interventions in the market mechanism, whether private or public, that establish directly a separation between national markets, such as an export cartel or a price discrimination across national borders, are prohibited. This also means that interventions, which establish differences in the economic circumstances faced by potential competitors, are viewed with extreme suspicion to the extent that the competitors affected are located in different countries or that the intervention could apply to competitors located in different Member States because they could directly or indirectly limit the extent of economic inter-penetration between national markets.

As Barry Hawk noted:

> The EC market integration goal results in both stricter rules and a different method of substantive analysis than under US law. . . . [T]he market integration goal is not necessarily consistent with other competition policy objectives, notably promotion of efficiency. At the minimum there is tension (and possible trade-offs) between strict legal rules based on market integration goal and efficiencies, at least in the short term.[18]

In this case, the integration goal supersedes the efficiency goal as is suggested by the 1991 report of the Commission on competition policy, which states:

---

15. Metro-SB-Grossmarkte GmbH & Co. KG v. Commission, Case 26/76, [1977] E.C.R. 1875, [1978] 2 C.M.L.R. 1.

16. *Id.* at 1904, ¶ 20, [1978] 2 C.M.L.R. at 33.

17. Schröter, *supra* note 7, at 657.

18. Barry Hawk, *Un Tour d'Horizon du Droit et de la Politique de Concurrence*, SEMAINE JURIDIQUE, Oct. 15, 1992, at 1.

> [C]ompetition policy has been an important Community instrument used both to promote economic integration and to ensure an efficient allocation of resources. Effective competition is the main stimulus to innovation and higher productivity which underpins policies designed to increase economic growth and welfare. Not only does competition lead to higher output but it also enables consumers to obtain a fair share of this growth. Living standards therefore depend on the maintenance of effective competition.[19]

The third important feature of the EC competition law lies in the fact that if the goal of EC competition law is to facilitate the emergence of the common market, then the common market is not an end in itself. Rather, according to Article 2, the common market is a means

> to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.[20]

To achieve these broad goals, Article 3 of the Treaty states, among other things, that the activities of the Community shall include a common policy in the sphere of agriculture and fisheries, in the sphere of transport, in the sphere of the environment, in the strengthening of economic and social cohesion, in the strengthening of the competitiveness of Community industry, and in the promotion of research and technological development.[21]

Two types of trade-offs may thus surface in the application of EC competition law. First, a trade-off between competition in the static sense and dynamic competition, and second, a trade-off between competition and some of the other objectives of the Treaty. Two principles laid out in the provisions of the Treaty related to competition among undertakings allow partial considerations of these trade-offs. First, there is an exemption mechanism that gives a certain amount of flexibility in the enforcement

---

19. COMMISSION OF THE EUROPEAN COMMUNITIES, XXTH REPORT ON COMPETITION POLICY 11, 13 (1991).

20. EC Treaty, *supra* note 1, art. 2.

21. *Id.* art. 3.

of competition law by allowing some anti-competitive practices that have redeeming values either from the point of view of competition in the long run or from the point of view of the other objectives of the Treaty. Second, such exemptions can only be granted in cases where competition is not eliminated for a substantial part of the products in question.

There is no exemption in the case of Article 86, because, by definition, the anti-competitive abuse by a firm holding a dominant position within the common market restricts competition in a substantial part of the European market. However, practices of undertakings which fall under Article 85(1) may be exempted through Article 85(3) if they "contribute[ ] to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;"[22] if they do not impose on the undertakings restrictions that are not indispensable; and if they do not "afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."[23]

Typical examples of such exemptions would include specialization agreements, research cooperation, or joint ventures through which two or more undertakings combine their capacities and knowledge, when the aim of such arrangements is to improve the efficiency of the firms involved. Additionally, agreements that ensure the existence of a new product or service would be exempt. Discussing the question of the relationship between competition law and industrial policy in the European Community, Manfred Caspari concluded:

> [W]hile the competition rules laid down in the EEC Treaty are applied within the framework of an overall and active competition policy, considerations which in a broad sense may be described as industrial policy considerations enter into a number of decisions. The aim is to create efficient undertakings on markets that fulfill this function, undertakings which are willing and able to engage in fair and active competition.[24]

While the three specific features of European competition

22. *Id.* art. 85(3).
23. *Id.*
24. Manfred Caspari, *1992-EEC Competition Law and Industrial Policy, in* 1989 FORDHAM CORP. L. INST. 163, 179 (Barry E. Hawk ed., 1990).

law outlined above are well known and have been discussed frequently in the analysis of Article 85 and Article 86 decisions, they are also useful for understanding both the provisions of Article 92, which establish the substantive rules for aids granted by Member States, and the case law.

In the Chapter devoted to Rules on Competition, the first paragraph of Section 3 of Article 92, entitled "Aids Granted by States," provides:

> 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.[25]

The second and third paragraphs of Article 92 detail the exemptions to this rule. Some state aids, including those having a social character, those that compensate for damages caused by natural disasters, and those granted to the economy of certain areas of the Federal Republic of Germany, shall be compatible with the common market. Others may be considered compatible with the common market. Of particular interest is paragraph 3 of Article 92, which states:

> The following may be considered to be compatible with the common market:
>
> (a) aid to promote the economic development of areas 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. . . . ;
>
> (d) 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; [and]

25. EC Treaty, *supra* note 1, art. 92.

(e) 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.[26]

I. *STATE AIDS*

Although Article 92 does not define state aids, the definition of such aids is clear, if wide-ranging. The Court of Justice has stated:

> The concept of aid is . . . wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict meaning of the word, are similar in character and have the same effect.[27]

Thus, within the scope of Article 92, state aid can take a variety of forms: subsidies; preferential rates on loans; cash injections to public enterprises; deferrals of tax, social security or other payments; sale or rental of land or property at discounted rates; preferential electricity or natural gas rates; infra-structural projects benefiting identifiable end users; and others.[28] In effect, any intervention by a Member State, i.e., by a state body or through the direction of the state, which intervention benefits a firm or a group of firms by increasing the resources they would normally obtain or by decreasing the costs, including taxes, they would otherwise incur, qualifies as a state aid irrespective of whether the benefit is conferred in money or in kind.

The fact that the aid must favor certain undertakings means that Member State interventions that apply uniformly across the economy cannot be considered state aids. This does not mean that general economic measures, such as rules of depreciation applied to capital equipment or charges on employers and employees to finance social benefits, cannot distort competition, but rather, are covered by other provisions in the Treaty.[29]

---

26. *Id.*

27. De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority of the European Coal and Steel Community, Case 30/59, [1961] E.C.R. 1, 1.

28. *Id.*

29. EC Treaty, *supra* note 1, art. 101. Article 101 states:

> Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting

The only real difficulty concerns the case of capital injections into private or public firms. If the Member State invests in a manner similar to a private investor, expecting a normal return on its investment, then there is no state aid. If the Member State invests where a private investor would not have invested, then there is a state aid. Thus, when private and public investors inject capital simultaneously and in comparable amounts, it is presumed that there is no state aid. However, when only the Member State injects capital, the Commission evaluates whether a private investor would have been likely to invest given the financial and industrial circumstances of the firm. The hypothetical private investor is assumed to seek a normal rate of return given a reasonable delay.

For example, the Commission's evaluation of a Sicilian regional law concerning in particular the financing of Sitas, a firm engaged in the hotel business, noted that this firm

> is continuing to incur losses despite considerable investment by the region totalling some Lit 270 billion. . . . There are no prospects of a turnaround, as evidenced by the fact that the management of EMS is seeking to negotiate with the creditor banks and that liquidation proceedings were commenced but not completed, chiefly because of a lack of buyers.
>
> No investor operating in a market economy would inject capital under such circumstances or take on the losses of a company without a future.[30]

The Commission concluded that "the sums in question must be regarded as state aid within the meaning of Article 92(1) in so far as they allow a firm with no economic basis to remain artificially in operation."[31]

---

the conditions of competition in the common market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the Council shall, on a proposal from the Commission, acting unanimously during the first stage and by a qualified majority thereafter, issue the necessary directives. The Commission and the Council may take any other appropriate measures provided for in this Treaty.

Id.

30. Commission Decision No. 94/374/EC, O.J. L 170/36, 38-39 (1994) [hereinafter Sitas].

31. *Id.* at 39.

II. *DISTORTION OF COMPETITION AND EFFECT ON TRADE*

When comparing the first paragraph of Article 92 to the underlying concept of competition in the Treaty, it is clear that all state aids "distort or threaten to distort competition."[32] Indeed, a state aid gives certain firms an advantage not conferred to their competitors in their own Member State or in other Member States. In that sense, they are discriminatory and unfair.[33]

State aids place competitors of the aided undertakings at a disadvantage, thereby distorting competition. As the second report on state aids notes:

> Not only are enterprises in other Member states put at a competitive disadvantage by the aid because the aided enterprises are favoured in a way outside the normal fiscal or social security systems that contribute to the equilibrium between Member States, but also enterprises not receiving aid in the same Member State are disadvantaged and pay higher taxes directly or indirectly.[34]

Thus, state aids are treated as per se anti-competitive.[35] In line with this reasoning, the Commission's decision on the financing of Sitas states that "[t]he aid has the effect of distorting competition since it improves the economic position of the recipients in relation to their competitors who do not receive such assistance."[36]

The above decision also illustrates one of the disturbing features of the Commission's decisions on state aids. In the landmark *Philip Morris* case,[37] the Court of Justice ruled that the Commission did not have to determine the relevant market on which competition is supposed to be distorted before establishing that an aid distorted competition, as in Article 85 or Article 86 cases.[38]

An extreme case, which illustrates the dogmatic position of

---

32. EC Treaty, *supra* note 1, art. 92.

33. *Id.*

34. COMMISSION OF THE EUROPEAN COMMUNITIES, SECOND SURVEY ON STATE AIDS IN THE EUROPEAN COMMUNITY IN THE MANUFACTURING AND CERTAIN OTHER SECTORS 7 (1990).

35. *Id.*

36. Sitas, O.J. L 170/36, at 40 (1994).

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

38. *Id.* at 2676, [1981] 2 C.M.L.R. at 339.

the Commission on the relationship between state aid and competition, is the Commission decision on the proposal to award aid to SST-Garngesellschaft mbH, Thüringen.[39] According to the Commission, the object of this aid was to cover the cost of the installation of new facilities for the production of polyester staple fiber. The entire output of the new plant was to serve as supply for the company's spinning mill for the production of specialized polyester yarn, which is not produced elsewhere in the Community.[40] The Commission then went on to state:

> The aid in question undoubtedly constitutes aid within the meaning of Article 92(1) of the EC Treaty, as it would allow SST-Garngesellschaft mbH to carry out the planned investment without having to bear all of the cost. Furthermore, as there is intra-Community trade in polyester staple . . . , the proposed aid would be likely to distort competition and affect trade among the Member States.[41]

The decision leaves us in the dark as to how the aid would distort competition because the beneficiary of the state aid will be the sole producer in the Community of the specialized yarn it intends to manufacture. The only conceivable cases in which there could be a distortion of competition would be either if the polyester yarn, which the beneficiary planned to produce, was a substitute for some of the other polyester staple produced in the Community, or if there were imports of this yarn. Yet, the Commission indicated that the yarn is specialized, which seems to suggest that it does not have substitutes, and did not mention the existence of imports. Thus, it appears that even when there are no competitors, state aids can be considered to distort competition. In short, there is a clear possibility of conflicts between the interpretation of the concept of competition in Article 85 and Article 86 cases and in state aids cases.

Finally, a state aid within the meaning of Article 92(1) must "affect[ ] trade between the Member States."[42] One should note that the Commission and the Court of Justice have given a broad interpretation of the concept of effect on trade in decisions on state aids, in line with the interpretation of this concept in Arti-

---

39. Commission Decision No. 94/266/EC, O.J. L 114/21 (1994) [hereinafter SST-Garngesellschaft mbH, Thüringen].

40. *Id.* at 21.

41. *Id.* at 23.

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

cle 85 and Article 86 decisions. The Commission and the Court of Justice consider, for example, that even when state aids are not specifically designed to stimulate exports or restrain imports, they nevertheless affect trade if they reinforce the position of an undertaking *vis-à-vis* competitors in intra-Community trade.[43] When the beneficiary of the state aid exports part of its production, this condition is fulfilled, even if the exports represent a small part, less than 5%, of its total production,[44] or if its exports represent a tiny part, less than 0.03%, of intra-EC trade.[45]

In addition, to appraise the effect of Community trade the Commission not only takes into account the potential advantage that the beneficiary will enjoy on exports markets, it also considers the advantage it may derive from the state aid on its domestic market *vis-à-vis* foreign importers.

For example, in its decision concerning the financing of Sitas, the Commission stated:

> The measures to be regarded as constituting state aid constitute assistance to firms operating in Sicily. They benefit those firms inasmuch as the assistance is not provided outside the region. . . . The aid in question . . . affects trade between Member States. Although it is not possible to assess the full impact of the aid as not all the recipients are known, import and export statistics . . . reveal that a significant proportion of Sicilian products and services is exported to other Member States. In addition, trade between Member States is also affected in cases where the aid favours domestic output and services to the detriment of imports and the provision of services from other Member States.[46]

What is remarkable in this and other decisions is that the Commission relies only on the fact that there is intra-Community trade in the sector in which the beneficiaries of the aid operate to establish that the aid affects trade between Member States.

Furthermore, even in cases in which the state aid is granted

---

43. *See, e.g.*, Commission Decision No. 84/496/EEC, O.J. L 276/34 (1984) [hereinafter Tournai] (whenever financial aid granted by Member State strengthens position of undertaking relative to other firms competing with it in intra-Community trade, latter must be considered affected by aid).

44. *Id.*

45. *See, e.g.*, Commission Decision No. 88/174/EEC, O.J. L 79/29 (1988) (concerning aid that Land of Baden-Württemberg of Federal Republic of Germany provided to BUG-Alutechnik GmbH, undertaking producing semi-finished aluminum products).

46. Sitas, O.J. L 170/37, at 40 (1994).

to a firm or a group of firms selling a product for which there is practically no intra-Community trade, the Commission may consider that trade is affected if this aid is likely to limit the development of a competing product for which there are significant exports and imports.[47]

Thus, state aid of any significance is automatically deemed to meet the other criteria of paragraph 1 of Article 92 and to be incompatible with the common market. The Commission does not have to elaborate at length over why in the particular case at hand the aid could distort competition, what the market and the affected products are, or whether these particular products as opposed to other products in the same sector are traded among Member States. The Commission, however, considers that Article 92(1) does not apply to state aids grants amounting to less than 50,000 ECU over a three-year period.[48]

III. *EXEMPTIONS*

The main question in state aids decisions, therefore, is whether the aid qualifies for an exemption or, in other words, whether the state aid fulfills some other goal of the Treaty. There are two types of automatic exemptions: Article 92(2) exemptions and various types of discretionary, Article 92(3) exemptions. The two types of automatic exemptions are: first, state aids that have a social character, are granted to individual consumers, and are granted without discrimination regarding the origin of the product;[49] and second, state aids that are due to exceptional circumstances requiring solidarity, i.e., aids to compensate for the damage caused by national disasters or exceptional occurrences.[50]

Other aids may be exempted. Among these are aids to promote the economic development of severely depressed areas, i.e., areas where the standard of living is abnormally low or

---

47. *See, e.g.*, Commission Regulation No. 1471/72, J.O. L 156/15 (1972).

48. *See, e.g.*, Community Guidelines on State Aid for Small and Medium-Sized Enterprises (SMEs), O.J. C 213/2, at 5 (1992) [hereinafter Guidelines for SMEs] (establishing de minimis figure while discussing Article 93(3) notification requirements).

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

50. *Id.* Until 1990, state aids granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany were also automatically exempted. HANCHER ET AL., EC STATE AIDS 55-57 (1993).

where there is serious unemployment.[51] Also included are aids to promote the execution of important projects of common European interest.[52]

Article 92(3)(a) is designed to exempt state aids that compensate for handicaps that would normally deter firms from investing in more backward regions, in which the per capita gross domestic product does not exceed seventy-five percent of the Community average in purchasing power parities.[53] As Manfred Caspari stated, "[s]uch aid is therefore an expression of efforts to create greater equality of opportunity between regions. It is in line with the cohesion requirement . . . incorporated into the EEC Treaty."[54] The granting of an exemption on the basis of Article 92(3)(a) is, however, subject to two conditions. First, the aid must concern one of the regions from a Commission list, which includes the whole of Greece, Ireland, Portugal, the Italian Mezzogiorno, Northern Ireland, various provinces of Spain, and the overseas departments of France.[55] Second, the aid must not lead to the creation of competition-distorting excess capacity in capital intensive industries.[56]

State aids to other regions may be exempted, however, under the provisions of Article 92(3)(c). As far as Article 92(3)(b) is concerned, there are very few cases of "important project[s] of common European interest" justifying an exemption.[57] Those projects are usually associated with programs such as ESPRIT,[58] RACE,[59] or BRITE[60] or with situations in which the Community is confronted by a general threat such as the destruction of the environment. The Commission stated in its 1991 annual report that Article 92(3)(b) could also apply to

51. EC Treaty, *supra* note 1, art. 92(3)(a).

52. *Id.* art. 92(3)(b).

53. *Id.* art. 92(3)(a).

54. Caspari, *supra* note 24, at 173.

55. Commission Communication, O.J. C 212/2, at 6-7 (1988) (on method for application of Article 92(3)(a) and (c) to regional aid).

56. *Id.*

57. Commission Decision No. 94/118/EC, O.J. L 54/30, at 37 (1994) [hereinafter Aer Lingus].

58. ESPRIT is an acronym for European Strategy Program for Research in Information Technologies.

59. RACE is an acronym for Research and Development in Advanced Communication Technologies for Europe.

60. BRITE is an acronym for Basic Research in Industrial Technologies for Europe.

projects that were important both quantitatively and qualitatively, transnational, and related to the definition of international standards, thus allowing European industry to benefit from the full advantages of a single market.[61] For example, the Commission considered that state aids granted by the governments of France, the Netherlands, and Italy designed to encourage research and development for the definition of a European standard for High Definition Television could be exempted.[62] If the aid examined relates to an important project of common European interest, the Commission also verifies that it does not exceed what is tolerable from a competition policy point of view.

One reason for the Commission's narrow interpretation of Articles 92(3)(a) and 92(3)(b) is that the these provisions do not explicitly condition the granting of the exemption on whether the aid will not significantly affect intra-European trade. In the vast majority of cases, the discussion about the possibility of an exemption is based upon Article 92(3)(c), which concerns aids that "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."[63]

It is not easy to summarize the principles underlying the Commission's reasoning when it applies Article 92(3)(c). Concurrently, one must consider: the wording of Article 92(3)(c); general principles imbedded in other articles of the Treaty; a variety of specific rules established by the Commission in guidelines or frameworks on state aids that are either horizontal, such as the guidelines dealing with regional aids, aids for research and development, aids for the restructuring of firms, aids for small and medium-sized enterprises, and aids for the environment, or sectoral, such as aids for textile and clothing, synthetic fibers, motor vehicles, shipbuilding, coal and steel, agriculture, and food processing; and the case law.

The Commission has enjoyed considerable discretion in interpreting Article 92(3)(c). This situation, however, may change

61. COMMISSION OF THE EUROPEAN COMMUNITIES, XXVTH GENERAL REPORT OF THE ACTIVITIES OF THE EUROPEAN COMMUNITIES (1991).

62. Commission Regulation No. 3029/93, O.J. L 271/1 (1993).

63. EC Treaty, *supra* note 1, art. 92(3)(c).

in the future. Leigh Hancher, Tom Ottervanger, and Piet Jan Slot stated that:

> Up until now the Court has generally been prepared to endorse the Commission's discretionary powers to assess the compatibility of individual measures with Article 92(1) as being wide in nature. In only two cases to date has the Court annulled a Commission Decision on grounds of a manifest error of fact. Our survey of the Commission's decision making practice suggests that, in certain cases, the factual evidence presented in support of a decision to allow a national aid to be granted could well bear closer scrutiny. Once again parallels may be drawn from the experience gained in the application of Articles 85 and 86. One of the reasons for transferring jurisdiction in appeals against Commission decisions concerning these Articles to the Court of First Instance was to improve the administration of justice in the Community by engaging in more detailed investigation of factual matters. That Court has now developed a particular expertise in dealing with the economic effects of complex factual issues. . . . . The transfer of jurisdiction [to the Tribunal, effective August 1993] to review individual challenges to state aid decisions may be one means of stimulating a more critical appraisal of Commission state aid policy.[64]

A necessary, but not sufficient, condition for a state aid to be granted an exemption under Article 92(3)(c) is that it be in the common interest of the Community. This concept is not defined in Article 92. Furthermore, the goals of the Community listed in Article 2 of the Treaty are couched in terms so general that the Commission has a sufficient flexibility to decide what interferences in market mechanisms should be legitimized through state aids and to set Community industrial policy agenda.

Before analyzing the criteria used by the Commission to determine what is in the common interest, it should be stressed that the compatibility with the Treaty must be determined in the context of the Community as a whole and not in the context of a single Member State. This has several implications. The first one is to legitimize the fact that Member States are not competent to apply directly the provisions of the Treaty relating to state aids. Second, it means that Member States cannot justify the

64. HANCHER ET AL., *supra* note 50, at 15.

granting of state aids solely on the basis of the benefits they expect from such aids. For example, a state aid designed to foster economic development in a depressed region in one Member State may not be in the interest of the Community if the region cannot be considered to be economically depressed when compared to all regions in the Community. Thus, in its Tenth Report on Competition Policy, the Commission stated:

> State aids are in principle incompatible with the common market. The discretionary powers of the Commission should only be exercised when the aids proposed by Member States contribute to the achievement of the Community objectives and interest set out in Article 92(3). The national interest of a Member State or the benefits obtained by the recipient of the aid in contributing to the national interest do not by themselves justify the positive exercise of the Commission's discretionary powers.[65]

Third, it also means that the Commission has reservations about state aids granted to multinational firms. Indeed, because multinational firms often operate on a global level, state aids designed to help them restructure are not necessarily consistent with what would be in the interest of the Community.

At the most general level, one can say that the Commission views four types of aids favorably: aids for small and medium-sized enterprises, aids for regional development, aids for research and development, and aids for the environment.

Regarding aids for small and medium-sized enterprises, the Community Guidelines on State Aid for Small and Medium-Sized Enterprises states that: "there can be no doubt that state aids for [small and medium-sized enterprises] 'facilitate the development of certain economic activities or of certain economic areas.' "[66] At the same time, the Commission considers that aids to small and medium-sized enterprises are less disruptive of competition than aids to larger firms.

State aids for research and development may also be viewed positively to the extent that they relate to the aim stated in Article 130f(1) of the Treaty, which strengthens "the scientific and technological bases of Community industry and [which encour-

65. COMMISSION OF THE EUROPEAN COMMUNITIES, TENTH REPORT ON COMPETITION POLICY 160 (1983).

66. Guidelines for SMEs, *supra* note 48, O.J. C 213/2, at 5 (1992).

ages] it to become more competitive at international level."[67] As the guidelines on research and development make clear, the Commission views favorably state aids for basic industrial research, but limits the state aid to fifty percent of the gross cost of the project or program. The Commission feels, however, that if the research and development is more thoroughly applied so that its output more easily and rapidly influences a product market, then there is a greater risk that the state aid will distort competition. Therefore, the ceiling on the admissible state aid decreases as the research is increasingly applied. The Commission also considers that simple improvement of existing facilities does not qualify for an exemption under Article 92(3)(c).[68] To qualify for an exemption under Article 92(3)(c), the investment benefiting from the state aid must lead to the development of new products or the adoption of new processes.

State aids for regional development, when applied to regions that suffer from serious socio-economic disparities with the rest of the Community, are viewed favorably and monitored by the Commission to achieve the goals of promoting a "harmonious and balanced development of economic activities"[69] and "convergence of economic performance"[70] as set out in Article 2 of the Treaty. Thus, for example, state aids to investments in central, industrialized regions, cannot exceed 20% of the total investment, whereas in peripheral, lowly industrialized regions, they can represent a larger proportion of the investment.

Finally, environmental aids, which also relate to the goal of achieving "growth respecting the environment," set out in Article 2 of the Treaty, are viewed favorably if they are necessary to help undertakings adapt to laws or regulations, which impose major new burdens relating to environmental protection. In this instance, an undertaking can get an Article 92(3)(b) exemption. If the aid is intended to promote additional efforts going beyond national standards, then the undertaking may qualify for an Article 92(3)(c) exemption.

In sectors facing serious economic difficulties due to international competition, such as motor vehicles, textiles, shipbuild-

---

67. EC Treaty, *supra* note 1, art. 130f(1).

68. *See, e.g.*, Commission Decision No. 87/16/EEC, O.J. L 12/27 (1987) (denying Italian government's proposal to improve chemical industry facilities).

69. EC Treaty, *supra* note 1, art. 2.

70. *Id.*

ing, coal and steel, and where Member States may have a natural and growing inclination to grant state aids, the Commission has been concerned with limiting such aids. The aid is limited to projects that improve the efficiency of the industry, allow the conversion of firms to activities outside the industry, or allow existing firms to diversify their production towards products that will place them in a better position on the international markets. Such aids are allowed, however, only to the extent that they will not worsen the difficulties of similar industries in other European countries.

In other sectors, state aids may be allowed if they appear necessary to the development or maintenance of existing strategic industries. Thus, for example, the Commission allowed a state aid by the United Kingdom for the restructuring of the last tin mine in Europe. It also allowed a state aid by the United Kingdom for the purchase of industrial equipment for off-shore exploration when this sector was in an early stage of development in Europe. In 1979, however, the Commission withheld approval of the state aid because by then the sector had developed, and the promotion of this sector no longer had strategic importance. Similarly, the Commission may allow state aids to shipyards for the construction of ships so that they can successfully compete against non-European shipyards. However, in such cases the state aid must not exceed the amount necessary to prevent the order from going to a non-European shipyard.

To qualify for the exemptions of Article 92(3)(c), aids that fit the above mentioned general criteria must also meet at least six conditions: they must be transparent; they must be justified by a market failure or an externality; they must not provide continuous artificial support to non-viable undertakings; they must not create over-capacities; they must be proportionate to the goal they seek to achieve; and the restrictions to competition and trade that they entail must not outweigh the expected benefits at the Community level.

The transparency requirement is the easiest to understand. To grant an exemption, the Commission must be in a position to know precisely, both quantitatively and qualitatively, what the aid is all about. In particular, the Commission needs to know who the beneficiaries are, what the mechanism of the aid is, what the goal of the aid is, and what the importance of the aid is, both in absolute terms and in proportion to the total investment.

The second condition is more substantive. Exemptions may be invoked only when the Commission is satisfied that without the aid, market forces alone would be insufficient to guide the recipients towards the behavior that the state aid is supposed to encourage and that must be consistent with the other conditions. Thus, on the one hand, the Commission may grant an Article 92(3)(c) exemption for regional aids in certain lagging areas, such as those in which the GDP per inhabitant is in the long run at least fifteen percent lower than the national average, or where the unemployment rate is at least ten percent greater than the national unemployment rate. The Commission must be convinced that without such aids, these areas would not be able to attract sufficient private investment to reduce their deficit. Alternatively, the Commission will refuse to grant an exemption for a state aid to a firm if it is convinced that the proposed investment would be profitable without the aid. The Commission will deny the exemption even if the investment can be considered to have a Community interest, i.e., if it contributes to the development of the firm's region or sector.[71]

State aids designed simply to facilitate the modernization of existing capacities of an unprofitable firm in a sector characterized by existing or potential excess capacity will not be granted an exemption on the basis of Article 92(3)(c) for various reasons. First, the modernization of a firm is, in itself, considered by the Commission to be part of what profit maximizing private investors would normally do, and therefore unrelated to a market failure or an externality. Second, the expansion of capacities or the modernization of a firm in a structurally depressed sector is not likely to alleviate the disequilibrium between supply and demand at the Community level, as would a decrease in capacity or a restructuring of the firm allowing it to redirect some or all of its resources to another sector or to a different market. The profitability of the beneficiary would likely improve from such aids. The burden between supply and demand associated with the structural disequilibrium at the Community level, however, would shift to competing firms of other Member States. Thus, allowing a Member State to grant such aids would eventually give an incentive to other Member States to retaliate by granting aids

71. *See, e.g.*, Tournai, O.J. L 276/34 (1984).

for the modernization of their firms. Consequently, this succession of aid would not restore the profitability of the sector.

The third condition is that state aids must not provide artificial support to unprofitable undertakings. The Commission has repeatedly stated that state aids should not be used to prevent the disappearance of non-viable firms. For example, the Commission, in its decision concerning financing for Sitas, stated:

> With regard to the exceptions provided for in Article 92(3)(c) in respect of aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest, the aid is not tied to any restructuring plan ensuring restoration of the firm's viability. It is therefore an operating aid which preserves the status quo by preventing normal market forces from taking effect. The aid cannot, therefore, be considered compatible with the common market.[72]

Fourth, the Commission considers that state aids in sectors characterized by existing or potential excess capacities can be tolerated if, and only if, they contribute to a restructuring of the beneficiaries and a decrease of existing capacities, over and beyond the reductions that would be spontaneously forced on the beneficiaries by the normal working of the market. It must be clear that the restructuring will enable the firm to become profitable without further injection of state aid.

This principle is embedded in various sectoral guidelines or codes. For example, investment aids in the steel sector, characterized by severe excess capacity, cannot, in general, qualify for an exemption under Article 92(3)(c). There is a temporary exemption for Greece, Portugal, and the German landers located in the former German Democratic Republic. To qualify for this exemption, capacity reductions must accompany the aids. Similarly, in the synthetic fiber industry, aids for investments relating to the production and texturization of polyester, polyamide, acrylic, and polypropylene fibers can qualify for an exemption only if they are combined with a capacity reduction of the beneficiary. In the automobile sector state aids for unprofitable manufacturers of passenger vehicles must, among other requirements, include a restructuring plan and a reduction in capacity for the beneficiary. Beyond the requirements set in certain

72. Sitas, O.J. L 170/36, at 41 (1994).

sectoral regulations on state aids, other regulations on aids, for rescue aids, or for environmental investments, specify that such aids must be accompanied by reductions of capacity of the beneficiary.

The general concern of the Commission with overcapacity raises several questions. If interpreted strictly, it implies that a new entrant in the sectors or in the markets considered to be having overcapacity cannot benefit from a state aid, because by definition it cannot reduce its existing capacity, whereas established firms could benefit from such an aid in certain circumstances, i.e., if they met the other conditions set by the Commission.

The SST-Garngesellschaft mbH decision[73] illustrates this consideration. The object of this aid was to cover the cost of the installation of new facilities for the production of polyester staple fiber. The entire output of the new plant was to supply the company's spinning mill for the production of specialized polyester yarn that is not produced elsewhere in the Community. Having found that this aid violated Article 92(1), the Commission stated:

> Since 1977, aid to the synthetic fibre industry has been subject to constraints. The current version of the Code relates to the production and texturization of four fibers - polyester, polyamide, acrylic and polypropylene - irrespective of the end-use, and to their polymerization where integrated with fibre production in terms of the machinery involved. The Code states clearly that authorization of proposals to grant aid to synthetic fibre producers is conditional on a significant reduction in the production capacity of the prospective beneficiary. SST itself does not currently produce any synthetic fibers so that a capacity reduction is not possible. The aid does not meet the requirements of the Code.[74]

Perhaps because it sensed that this reasoning led to an economically questionable result in the case at hand, the Commission found a way to authorize it. Despite the fact that the region did not meet the code requirements, the Commission granted the aid because the region could be classified for regional aid by virtue of Article 92(3)(a), and because the investment consid-

73. SST-Garngesellschaft mbH, Thüringen, O.J. L 114/21 (1994).

74. *Id.* at 23.

ered was part of a broader plan to restructure the German Democratic Republic's synthetic fiber industry. The Commission stated that granting the aid would result in a reduction in capacity of twenty-five percent, similar to the reduction in capacity in the rest of the Community since 1978.

The tougher standards used by the Commission to exempt a state aid when there is actual or potential "excess capacity" in the sector, together with the Commission's discretion as to the definition of the market or sector examined, can also lead to striking differences in the standards applied by the Commission in its decisions.[75]

In this respect, it is interesting to compare two decisions: the Commission decision on a state aid granted to Opel for an investment in one of the landers of the former German Democratic Republic,[76] and its decision on the state aid granted to Ford and Volkswagen by the Portuguese government for the creation of a new plant in the Setubal peninsula.[77] In both cases, the aid was for an investment in an automobile plant in an economically depressed area. In the first case, the Commission did not go into details about market segmentation and found that there was overcapacity in the automobile industry. Although it recognized that Opel/GM needed to increase its capacity because it fully utilized its existing capacity, the Commission concluded that the aided investment would increase overcapacity in the sector. In the second case, when it considered the aid granted for the creation by Ford and Volkswagen of a manufacturing plant of monospace cars in Portugal, the Commission considered that there was a separate market for monospace passengers cars. In a related Article 85 decision, the Commission acknowledged the fact that there was some degree of substitutability between monospace cars and other passenger cars, and that there was no overcapacity for this type of cars.[78]

In the first case, the Commission required that the aid be

75. *Id.* at 24.

76. Commission Notice No. 93/C 43/03, O.J. C 43/14 (1993) (regarding German Government proposal to award state aid to Opel Group in support of its investment plans in new Länder).

77. Commission Decision Summary No. 91/C 257/04, O.J. C 257/5 (1991) (raising no objections to aid that Portuguese Government planned to grant to joint-venture of Ford and Volkswagen to establish multi-purpose vehicle plant in Setubal peninsula).

78. Commission Decision No. 93/49/EEC, O.J. L 20/14 (1993) (Ford/Volkswagen).

limited to the amount or the intensity strictly necessary to compensate for the extra costs incurred by Opel/GM due to the location of its investment. This decision concluded that the aid would create overcapacity, which is far from obvious because Opel needed to increase its capacity, and therefore, would probably have gone ahead with the investment even if the Commission had decided to prohibit the aid, although possibly in a less economically depressed area. In the second case, the Commission used a somewhat arbitrary definition of the market to find that the aid would not create overcapacity. The Commission, adopting a more lenient approach, stated that the aid, which covered the extra cost faced by the investors due to the location of their investment and an additional financial incentive to attract investments in the region, could be exempted.

The concept of overcapacity, as used by the Commission, is not always economically relevant. For example, the Commission frequently refers to the need to increase the rate of utilization of existing capacities to make European industry more competitive and uses capacity utilization ratios to determine whether or not excess capacity has increased or decreased in a particular sector. Capacity utilization is calculated by the ratio of actual sales by the European manufacturers to their total capacity. Overcapacity is calculated by the ratio of total European demand for a product at a competitive price, whether this demand was met by domestic producers or importers, to total capacity by European manufacturers. Except under strong assumptions, for example, no imports and perfect competition among the European manufacturers, these two ratios are unrelated. Indeed the value of capacity utilization ratios, as opposed to excess capacity ratios, is heavily dependent on the market strategy of the manufacturers.

Reliance on the rate of capacity utilization, to assess the propriety of a state aid, can be extremely misleading from the point of view of what an outside observer could consider to be sound economic reasoning. If total capacity is equal to total demand, in which case there is no excess capacity, but forty percent of the demand is satisfied by more efficient non-European importers, who have developed a new technology not present in Europe, then capacity utilization in the industry will be only sixty percent. It is likely that price competition from the efficient non-European competitors will force the market price below the cost of

the non-efficient domestic producers, so that they will incur losses. The requirement that a state aid for an investment, such as one designed to introduce a technological innovation in the production process, to improve the efficiency of the sector, be accompanied by a reduction in the production capacity of the beneficiary clearly favors the importers because it reduces the scope of competition from the new efficient European manufacturer.

Even in cases where there are no significant non-European imports, the concern of the Commission with excess capacity can lead to questionable results from the point of view of competition. If, for example, the excess capacity, as measured by the Commission, is due to weak competition, the requirement that the state aid, designed to encourage the introduction of a technological innovation, be accompanied by a reduction in the capacity of the beneficiary may unnecessarily slow down the adjustment of the sector and stifle competition.

In the decisions of the Commission on state aids, competition in the relevant sector is always, implicitly, assumed to be working satisfactorily, or to be excessive, even though there is practically no analysis of the actual intensity of competition. Therefore, the creation of excess capacity through state aids to investments is never considered by the Commission to enhance competition; it is only considered to distort fair competition. However, there is a growing body of economic literature on the impact of excess capacity and the distribution of such excess capacity among firms, as well as competition in oligopolies. This literature suggests, among other things, that an asymmetrical distribution of excess capacity may, in certain cases, enhance competition. Thus, it is possible that some state aids to investment may have the dual effect of distorting fair competition and contributing to the creation of excess capacity, thereby increasing competition in the marketplace.

The final condition set by the Commission for granting an exemption to a state aid is that it must be proportionate to the problem that it is designed to resolve. This will keep distortion to competition at a minimum and will not affect trading to an extent contrary to the common market.

Whenever the Commission considers state aid for which one of the sectoral or horizontal Codes applies, it verifies that

the aid falls within the limit set in the relevant Code. For example, in the case of state aids for research and development, state aids cannot cover more than fifty percent of the gross cost of a project for basic industrial research or twenty-five percent of the cost of a project for applied research and development. Similarly, to benefit from an exemption under Article 92(3)(c), regional aids designed to facilitate the development of certain economic areas cannot amount to more than thirty percent of the investment. Under the Code for state aids to shipbuilding, operating aids for the production of large vessels must be below nine percent of the cost of the vessel, whereas for vessels costing less than ten million ECU, the maximum level of state aid is 4.5%. The maximum levels of state aids for small and medium-sized firms are usually larger than the maximum for larger firms.

In order to benefit from the exemption of Article 92(3)(c), however, the state aid must also be strictly necessary to correct the problem that justifies the exemption. An example is the Commission's decision concerning aid to be provided by the Irish government for the restructuring of the Aer Lingus group, which was facing a serious financial crisis.[79] The Commission first stated that "the genuine restructuring of Aer Lingus contributes to the development of the air transport sector from a Community standpoint."[80] It then asked itself whether the amount of the aid was "adequate and proportionate to the aim of financing the transition and restore the airline's commercial viability."[81] In assessing that the aid was indeed adequate and proportionate, the Commission took into account the fact that "the equity injected into Aer lingus will not [lead] to an overcapitalization of the airline but will simply bring its financial ratios into more prudent limits, and, therefore, restore the financial balance."[82] "The strategy pursued by Aer Lingus in its restructuring plan is not over-expansionist" because it will not expand its operating fleet or change the general pattern of its operations, and consequently, does not aim at increasing its market share.[83]

Finally, the state aid must not adversely "affect[ ] trading

79. Aer Lingus, O.J. L 54/30 (1994).
80. *Id.* at 38.
81. *Id.* at 39.
82. *Id.*
83. *Id.*

conditions to an extent contrary to the common interest."[84] The Commission does not always make its reasoning explicit, but rather uses its discretionary power to decide whether or not this condition is met or to impose constraints on the granting of the aid so that the condition is met. To establish the extent to which the state aid will affect trading conditions, the Commission takes into consideration a variety of factors, such as whether: the amount of the aid is small when compared to the size of the investment, the market shares of the firms involved are minimal or will decrease, the market is rapidly expanding, there is little intra-Community trade for the product involved, or that the investment will be devoted to the production of goods that will be sold outside the Community.

In its decision on the aid granted by the United Kingdom to SCA Aylesford,[85] a manufacturer of newsprint, the Commission concluded that the investment aid did not adversely affect "trading conditions . . . to an extent contrary to the common interest."[86] The Commission considered that the investment aid would result in an increase in the capacity of production of the firm and that part of the increased production, 100,000 tons or about a third of the increase in capacity, would be sold in other Member States. Nonetheless, the Commission determined that the aid was limited and that although the United Kingdom imported seventy-five percent of its consumption of newsprint, ninety percent of these imports came from non-Community countries.[87]

Similarly, in its decision on a state aid from the German government for the restructuring of Carl Zeiss Jena, Jenoptik, and Jenaer Glaswerk, manufacturers of optical instruments located in the former German Democratic Republic, the Commission considered that the very small scale of the activities of the three firms in the forthcoming years ensured that the aid would not adversely affect trading conditions to an extent contrary to the common interest.[88]

---

84. *Id.*

85. Commission Notice, O.J. C 46/5 (1993) (aid to SCA Aylesford, manufacturer of newsprint).

86. *Id.*, O.J. C 46/5, at 7 (1993).

87. *Id.*, O.J. C 46/5, at 6 (1993).

88. Commission Notice, O.J. C 97/7 (1993) (concerning aid awarded by German Government to Carl Zeiss Jena, Jenoptik, and Jenaer Glaswerk).

The Commission decisions, however, do not provide clear criteria to assess the extent beyond which the effect of trading conditions due to the state aid will be held to be contrary to the common interest.

CONCLUSION

Manfred Caspari, speaking at the 1989 Fordham Corporate Law Institute conference, remarked that usually lawyers do not take much interest in the subject of state aids. This, in his opinion, was wrong because "[s]tate subsidies can distort competition more, and can create more harm to competing companies which do not get such support than anti-competitive behavior caught by antitrust rules."[89]

The fact is that this apparent lack of interest for the European state aid policy is not unique to lawyers. Economists, even those specialized in market mechanisms and competition, have also been largely silent on the issue. This is all the more perplexing because there are hundreds of decisions by the Commission each year that concern state aids. However, this state of affairs could be explained on the ground that even if the provisions on state aids are part of the rules of competition in the Treaty and even if the Commission produces decisions on state aids as it does when it applies Articles 85 and 86, these two sets of decisions have little in common.

First, as any sizeable aid is considered to threaten or distort competition, market competition or fair competition, there is no real discussion in the decisions of the actual consequences of the aids on the relevant markets or detailed definition of the affected markets. The focus of the decisions on state aids is therefore very different from the focus of Article 85 or 86 decisions in which the reasoning used by the Commission to establish that a particular behavior has restrained competition or to assess the extent to which competition has been affected is explicit and can be challenged.

Second, the formal decisions on state aids mostly deal with the possibility of exemptions for the aids concerned or, in other words, with the potential contribution of these aids to the common interest, the development of certain areas or certain eco-

89. Caspari, *supra* note 24, at 172.

nomic activities, etc. The assessment of the contribution of state aids to the promotion of such general and sometimes contradictory goals is, to a large extent, dependent on the policy objectives of the Commission. The Commission has enjoyed broad discretion in making such assessments. In many cases, its decisions do not prove that an aid can or cannot be exempted, but merely state that they do or do not adversely affect trading conditions to an extent contrary to the common interest on the basis of criteria that are not explicit and the validity of which could not be challenged until recently.

Third, over time, the Commission has defined minimal rules in various sectoral or horizontal codes. This effort would certainly be welcome if it contributed to making the decision mechanism more transparent and more predictable. However, not only do the definitions of the rules seem somewhat arbitrary, they constitute a maze rather than an organized body of references. In many cases in which several sets of rules could be applied simultaneously to the same aid with different results, the Commission will choose the one that fits the conclusion it wants to reach.

Thus, one could argue that the relative lack of interest of both lawyers and economists for state aid decisions comes partly from the fact that they do not always appear to be grounded on a predictable economic analysis and that the scope for challenging them is at best limited. Two features that differentiate them from decisions based on Articles 85 and 86.

Echoing these concerns, the authors of the most comprehensive review of EC state aid decisions to date state that

> [n]o one could, for a moment, assume that in an area as highly charged by political and social considerations as state aids policy that one could expect the Commission to apply a rigid, formalistic or mechanistic approach to controlling national state aids. The Treaty itself confers considerable scope upon it to take into account a wide range of factors in reaching its final Decisions. It is, therefore, not so surprising that what appears to be an essentially similar set of facts is capable of yielding quite divergent Decisions in different cases. Yet one is surely entitled to expect some consistency of approach, and at the very least that similar emphasis is given to various factors. One might also expect that especially where guidelines exist these should be applied, and be seen to be applied,

> in a consistent manner. . . . On the basis of the analysis of Commission Decisions undertaken in the preparation of this study, it cannot be said with any certainty that expectations as to a consistent approach have been or are always likely to be met. The relative lack of institutional constraints on the Commission in this field gives the latter ample scope to draft Decisions in such a way that factual elements which might suggest inconsistency are simply ignored or are only referred to in summary fashion.[90]

It remains to be seen whether the transfer of jurisdiction in appeals against the Commission decisions on state aid to the Court of First Instance will help bring about a more transparent and more predictable decision-making process.

---

90. HANCHER ET AL., *supra* note 50, at 10-11.