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Abstract

This Article examines the main legal questions raised by the particulat form of State aid known as equity participation. While the focus is on the internal, or EEC, aspect of such aids, the Article also suggests a comparison to some of the most relevant external, or GATT, aspects of these questions.

GOVERNMENT EQUITY PARTICIPATION UNDER THE EEC RULES ON STATE AIDS: RECENT DEVELOPMENTS

*Aurelio Pappalardo**

INTRODUCTION

The Commission of the European Communities ("the Commission") has recently handed down a number of decisions concerning equity participation by EEC Member States in business enterprises facing financial difficulties. The Court of Justice of the European Communities ("the Court") has subsequently clarified some of the most controversial issues in appeals of some of these decisions.

State intervention in the economy is a characteristic feature of the economic policy of most European countries. To be sure, the creation of totally State-owned undertakings, as well as the association of State and private capital within the same business, often serve the purpose of supporting important but risky industrial initiatives, or of encouraging investments in less developed regions. Such intervention can, however, have other, less desirable effects as well. It may delay the elimination of noncompetitive structures and may strengthen existing rigidities. In recent years, under the pressure of economic recession, Member States have often intervened to support ailing companies. The Commission has thus been faced with the difficult task of deciding whether State measures that are, in principle, incompatible with the EEC provisions on State aids, should nevertheless be permitted because they constitute the best means of remedying serious underemployment, or because they enable a company to recover its competitiveness. Furthermore, similar problems have also arisen within the framework of the General Agreement on Tariffs and Trade ("GATT"), especially in the trade relations between the EEC and its major commercial partner, the United States.

This Article examines the main legal questions raised by

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the particular form of State aid known as equity participation. While the focus is on the internal, or EEC, aspect of such aids, the Article also suggests a comparison to some of the most relevant external, or GATT, aspects of these questions.

I. *STATE AIDS UNDER THE RULES OF THE EEC TREATY*

A. *General Principles*

The Treaty of Rome, which brought the European Economic Community into existence, subscribes to the principles of a market economy, in that it basically relies on the mechanism of a free market for the achievement of Community goals. Article 2 of the Treaty describes these goals and indicates that they should be pursued, first, "by establishing a common market," and second, by progressively approximating the economic policies of Member States.[1] The creation of a common market requires the removal of all economic barriers dividing Member States and the establishment of the fundamental "four freedoms": free movement of goods, persons, services, and capital.[2] The single-market goal, envisioned from the outset by the Treaty, has recently been confirmed and made the top priority of the Community.[3] The primacy of the common market is confirmed by a comparison of the provisions of the

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1. Article 2 of the EEC Treaty reads:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 2, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), at 3 (official English trans.), 298 U.N.T.S. 11, 15 (1958) (unofficial English trans.) [hereinafter EEC Treaty].

2. *See* EEC Treaty, *supra* note 1, arts. 30-37, 1973 Gr. Brit. T.S. No. 1, at 13-16, 298 U.N.T.S. at 26-30 (goods); arts. 52-58, 1973 Gr. Brit. T.S. No. 1, at 23-25, 298 U.N.T.S. at 37-40 (persons); arts. 59-66, 1973 Gr. Brit. T.S. No. 1, at 25-27, 298 U.N.T.S. at 40-42 (services); arts. 67-73, Gr. Brit. T.S. No. 1, at 27-29, 298 U.N.T.S. at 42-44 (capital).

3. *See Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85) 310 final (June 14, 1985). Following the approval by the European Council of the proposals contained in the White Paper, the Single European Act was signed by Member States on February 17 and February 28, 1986. *See* Single European Act, O.J. L 169/1, at 29 (1987).

Treaty that ensure its establishment[4] with those on which the approximation of economic policies is based.[5] In most cases the market-establishment provisions include deadlines by which they must be implemented and impose directly applicable obligations, which the nationals of Member States can invoke before their national judges, on Member States and their undertakings. By contrast, the economic-approximation provisions are less precise and detailed, and, in general, confer less extensive power on Community institutions.[6]

The abolition of economic barriers offers undertakings the possibility of operating in a larger market. This possibility both increases the degree of competition and enables more efficient undertakings to heighten their competitiveness. The most recent report of the Commission of the European Communities states:

> A barrier-free internal market is an essential basis for increased prosperity in the Community as a whole. Only when the various kinds of barriers which currently limit their operations are removed will firms be able to take full advantage of the Community's size and to deploy their human, material and financial resources more efficiently. The resulting improvement in industrial efficiency and competitiveness and in overall economic performance should also make it possible to develop new ways of tackling the problem of unemployment.[7]

The importance of the elimination of remaining barriers—and its corollary, an increased degree of undistorted competition—to the *internal* market, should not obscure the fact that

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4. EEC Treaty, *supra* note 1, arts. 12-17, 1973 Gr. Brit. T.S. No. 1, at 7-9, 298 U.N.T.S. at 19-22 (elimination of customs duties among Member States).

5. EEC Treaty, *supra* note 1, arts. 100-102, 1973 Gr. Brit. T.S. No. 1, at 37-38, 298 U.N.T.S. at 54-55 (approximation of laws); art. 105, 1973 Gr. Brit. T.S. No. 1, at 39, 298 U.N.T.S. at 55-56 (coordination of economic policies).

6. For example, the Treaty established a Monetary Committee, with advisory powers only, to promote coordination of the policies of Member States in the monetary field. EEC Treaty, *supra* note 1, art. 105, 1973 Gr. Brit. T.S. No. 1, at 39, 298 U.N.T.S. at 55-56. Provisions concerning the common policies—agriculture, transport, and foreign commerce—constitute an exception in this regard. *See* P.J.G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 46-65 (1973); Bleckmann, *Subventionsprobleme des GATT und der EG*, 48 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 419, 427 *et seq.* (1984).

7. COMM'N, SIXTEENTH REPORT ON COMPETITION POLICY introduction (1987).

the Community is also committed to a system of *international* free trade, albeit to a lesser extent and under less stringent procedures. The preamble of the EEC Treaty, while recognizing "that the removal of existing obstacles calls for concerted action in order to guarantee . . . fair competition,"[8] also expresses the desire of the contracting parties to contribute "by means of a common commercial policy to the progressive abolition of restrictions on international trade."[9] This principle is confirmed by Article 110, according to which the establishment of a customs union among Member States aims to contribute, once again, to "the progressive abolition of restrictions on international trade."[10]

The economic and social benefits that can be expected at both the internal and international levels from a system of free trade are permanently at risk of being impaired by several obstacles, both political and commercial in nature. As experience shows, the challenge inherent in every liberalization of trade invariably stimulates latent protectionist forces. Well aware of this danger, the authors of the Treaty included provisions that the Commission, under the control of the Court, has authority to enforce.[11] These provisions not only expressly obligate Member States to remove existing barriers, but also prevent them from adopting new measures that would nullify the effect of such removal.[12] Particularly significant in this respect are the rules of competition, especially those concerning aids granted by Member States to undertakings,[13] on which this analysis will focus.

As the Commission recently stated:

> [c]ompetition policy has a key role to play in ensuring that

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8. EEC Treaty, *supra* note 1, preamble, 1973 Gr. Brit. T.S. No. 1, at 1, 298 U.N.T.S. at 14.

9. *Id.* preamble, 1973 Gr. Brit. T.S. No. 1, at 1, 298 U.N.T.S. at 14.

10. *Id.* art. 110, 1973 Gr. Brit. T.S. No. 1, at 41, 298 U.N.T.S. at 58; Bleckmann, *supra* note 6, at 423.

11. *See* EEC Treaty, *supra* note 1, arts. 30-37, 1973 Gr. Brit. T.S. No. 1, at 13-16, 298 U.N.T.S. at 26-30 (goods); *id.* arts. 52-58, 1973 Gr. Brit. T.S. No. 1, at 23-25, 298 U.N.T.S. at 37-40 (persons); *id.* arts. 59-66, 1973 Gr. Brit. T.S. No. 1, at 25-27, 298 U.N.T.S. at 40-42 (services); *id.* arts. 67-73, Gr. Brit. T.S. No. 1, at 27-29, 298 U.N.T.S. at 42-44 (capital).

12. *See id.* art. 31, para. 1, 1973 Gr. Brit. T.S. No. 1, at 13, 298 U.N.T.S. at 27; *id.* art. 53, 1973 Gr. Brit. T.S. No. 1, at 23, 298 U.N.T.S. at 38.

13. *Id.* arts. 92-94, 1973 Gr. Brit. T.S. No. 1, at 35-36, 298 U.N.T.S. at 51-52.

> the opening of the market yields all the benefits expected of it. It must ensure that these barriers are not replaced by divisions of markets resulting from restrictive business practices or protectionist measures taken by the Member States. The control of State aid is of particular importance in this context. Member States may use aid to give their industry an advantage over industry elsewhere in the Community. Public funds may also be used to prop up uncompetitive businesses and industries. This generally only renders ultimately more difficult the task of finding a genuine solution and in the meantime tends to cause difficulties for more competitive firms that are providing real jobs. Hence it is essential to ensure that government funds are not used to confer a competitive advantage on some firms at the expense of others.[14]

Article 92(l) declares incompatible with the common market "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 . . . in so far as it affects trade among Member States."[15] The EEC Treaty thus opposes in principle any form of State intervention that can distort competition and restrict trade among Member States. Even the limited *de minimis* rule, which is accepted in the field of restrictive practices of undertakings,[16] is excluded when the State is responsible.[17]

An absolute prohibition of State aids would, however, be inconceivable, especially in a system of mixed economy. State aid is, after all, widely accepted, albeit with varying degrees, in all EEC member countries, where the public and private sectors often jointly pursue the realization of major economic goals. The EEC Treaty, drafted in a period of expansion,

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14. COMM'N, SIXTEENTH REPORT ON COMPETITION POLICY 13-14 (1986).

15. EEC Treaty, *supra* note 1, art. 92(1), 1973 Gr. Brit. T.S. No. 1, at 35, 298 U.N.T.S. at 51.

16. "[O]n agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community," see Comm'n Notice, O.J. C 231/2 (Sept. 3, 1986), Common Mkt. Rep. (CCH) ¶ 2700.

17. Government of the French Republic v. Commission, Case 47/69, 1970 E.C.R. 487, 495, ¶¶ 16-17, Common Mkt. Rep. (CCH) ¶ 8104, at 7158. The Commission has, however, simplified the procedure of notification for aids projects below a certain threshold. *See* COMM'N, FOURTEENTH REPORT ON COMPETITION POLICY 199 (1984).

when State aids were definitely of lesser practical importance than they are today, nevertheless recognized the fact that such aids can serve a variety of purposes, and more specifically, the fact that certain socioeconomic objectives cannot be achieved by market forces alone.[18] According to an official view, State aids

> may act as a stimulus for investments in certain enterprises, industries or regions, or as an incentive for R&D projects, for energy-saving measures or for the reduction of environmental pollution. Or else the aim may be to support sectors or enterprises which would not be viable without financial assistance from the State. Social objectives may be directly striven after via aids for housing construction or for the training and employment of certain categories of people.[19]

Several exceptions have thus been expressly admitted by Article 92(3),[20] whose pragmatic application has enabled the Commission progressively to work out a set of rules, in particular for regional[21] and sectoral[22] aids. These rules have made it possible for the Commission to reconcile the pursuit, at a national level, of important social and economic objectives, with the maintenance, at the Community level, of the degree of competition necessary to make sure that the achievement of a unified market is not impeded.

On the other hand, where State aids clash with fundamental objectives of the Community, such as the single-market goal, the Commission has steadfastly refused to grant an exemption.[23] This refusal to exempt applies in particular to aids that support exports to other countries. Another criterion on

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18. *See infra* notes 19-22 and accompanying text.

19. M. Caspari, The Aid Rules of the EEC Treaty and Their Application, Colloquium on Discretionary Powers of the Member States in the Field of Economic Policies and Their Limits Under the EEC Treaty 1 (May 14-15, 1987) (mimeogr. text).

20. These include, in particular, "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." EEC Treaty, *supra* note 1, art. 92(3)(c), 1973 Gr. Brit. T.S. No. 1, at 35, 298 U.N.T.S. at 51.

21. *See* Communication of the Commission on Regional Aid Systems, O.J. C 31/9 (1979).

22. *See Communication to the Council of Ministers of the EC on Commission Policy on Sectoral Aid Schemes*, COM(78) 221 final (May 1978), *reprinted in* COMM'N, COMPETITION RULES IN THE EEC AND THE ECSC APPLICABLE TO STATE AIDS 37 *et seq.* (1987).

23. *See* COMM'N, FOURTEENTH REPORT ON COMPETITION POLICY ¶¶ 166-167 (1985); *see also* Comm'n Decision of June 27, 1984, O.J. L 230/25 (1984).

which the Commission relies when deciding whether the State aids are compatible with the common market is whether they contribute to the economic *development* of the region or sector in question.[24] This condition is met, and the aid is permitted if, for example, the supporting measures serve to spur the realization of a new project that is capable of generating new jobs, or else where a viable undertaking facing transitional difficulties is able to restructure and recover its competitiveness by means of the aid. However, aids of a *conservatory* nature, that is, those that facilitate only the functioning of undertakings, or that contribute to maintaining inefficient undertakings, are basically prohibited.[25] The application of this principle has led the Commission to prohibit a number of state measures granted to ailing firms that would have been obligated to cease their activities but for that support.[26] One such form of aid is the infusion of fresh funds into the company through Government acquisition of equity. Government equity participation has recently been the object of several decisions of the Commission,[27] as well as of rulings of the Court.[28]

B. *The GATT Subsidies Code*

While the evaluation of such interventions as aids in the sense of Article 92 has given rise to a controversial debate from the viewpoint of the *internal* market, a similar problem has appeared on the *external* front, that is, in the commercial rela-

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24. *See* Comm'n Decisions O.J. L 59/21, 22 (1984); O.J. L 276/34, 35 (1984); O.J. L 62/18, 20 (1983); O.J. L 91/32, 33 (1983); O.J. L 280/30, 31 (1982) (*Intermills*); O.J. L 277/15, 16 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18, 19 (1982).

25. *See* O.J. L 59/21, 22 (1984); O.J. L 276/34, 35 (1984); O.J. L 62/18, 20 (1983); O.J. L 91/32, 33 (1983); O.J. L 280/30, 31 (1982) (*Intermills*); O.J. L 277/15, 16 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18, 19 (1982).

26. *See* O.J. L 59/21, 22 (1984); O.J. L 276/34, 35 (1984); O.J. L 62/18, 20 (1983); O.J. L 91/32, 33 (1983); O.J. L 280/30, 31 (1982) (*Intermills*); O.J. L 277/15, 16 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18, 19 (1982).

27. *See* O.J. L 59/21 (1984); O.J. L 276/34 (1984); O.J. L 62/18 (1983); O.J. L 91/32 (1983); O.J. L 280/30 (1982) (*Intermills*); O.J. L 277/15 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18 (1982).

28. *See* Belgium v. Commission, Case 40/85, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,375; Belgium v. Commission, Case 234/84, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,374; Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek BV v. Commission, Joined Cases 296 and 318/82, 1985 E.C.R. 809, Common Mkt. Rep. (CCH) ¶ 14,170; Intermills v. Commission, Case 323/82, 1984 E.C.R. 3809, Common Mkt. Rep. (CCH) ¶ 14,154.

tions between the Community and the United States, in the framework of the GATT. The original text of the GATT contained provisions on export subsidies.[29] However, the signatories, in particular the United States and most EC Member States, also considered it necessary to achieve some control over other forms of subsidies that, although not directly related to exports, could have damaging effects on international trade (the so-called "domestic subsidies"). After long and difficult negotiation, the signatories adopted the so-called Subsidies Code,[30] the essential points of which can be summarized as follows. First, the Code accepts the general principle that, although subsidies promote important social and economic policy objectives, they may cause "adverse effects to the interests of other signatories."[31] Signatories shall therefore "seek to avoid causing, through the use of *any* subsidy," injury or prejudice to the interests of other signatories.[32] Second, the Code distinguishes between export subsidies, which "[s]ignatories shall not grant,"[33] and "domestic subsidies," for which a complex rule has been adopted. This rule has given rise to serious difficulties in the interpretation and in the application of the Code.[34] Third, the Code sets forth two proce-

29. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XVI, 61 Stat. (pt. 5) A3, A51-A52, T.I.A.S. No. 1700, at 47-48, 55 U.N.T.S. 188, 250.

30. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade [hereinafter Subsidies Code], BASIC INSTRUMENTS AND SELECTED DOCUMENTS 56-83 (26th Supp. 1980) [hereinafter BISD]. For a description of the negotiations that led to the adoption of the Code, see J. BARTON & B. FISHER, INTERNATIONAL TRADE AND INVESTMENT 351 (1986). Some passages of the present article concerning the Subsidies Code are based on a contribution to volume 7 of the *Italian Yearbook of International Law* (1986) (forthcoming), where I have examined the subject in greater detail.

31. Subsidies Code, *supra* note 30, art. 8(1), BISD, *supra* note 30, at 67.

32. *Id.* art. 8(3), BISD, *supra* note 30, at 67 (emphasis added).

33. *Id.* art. 9(1), BISD, *supra* note 30, at 68.

34. Article 11(1) of the Subsidies Code first recognizes that domestic subsidies "are widely used as important instruments for the promotion of social and economic policy objectives" and that "the right of signatories to use such subsidies to achieve these and other important policy objectives" is not restricted. It then enumerates examples of such objectives, among which "to facilitate the restructuring, under socially acceptable conditions, of certain sectors." BISD, *supra* note 19, at 69-70. Article 11(3) indicates several examples of domestic subsidies, which include "government subscription to, or provision of, equity capital." *Id.* at 70. On the other hand, Article 11(2) warns that domestic subsidies "may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory . . . , in particular where such subsidies would adversely affect the condi-

dures whereby a signatory can adopt defensive measures. First, the Code foresees the adoption of countervailing duties *by a signatory's competent national authority* following an investigation by that authority to determine the existence of a subsidy, of an injury, and of a causal link between them.[35] This procedure is the so-called "Track I." Another, less stringent procedure, "Track II," is foreseen in the second part of the Code: if the signatories involved have not arrived at a mutually acceptable solution after consultation, any of the signatories involved may refer the matter to *a Committee for conciliation* established within the GATT, which may authorize "such countermeasures as may be appropriate."[36]

The Code contains several ambiguities, which have caused serious tensions, especially in the trade relations between the United States and the EEC.[37] First, it is not clear whether the emphasis is on the positive or the negative effects of domestic subsidies.[38] The ambiguity is even greater in the field of remedies: does the acknowledgement by Article 11(1) of the signatories' "right" to use domestic subsidies restrict the scope of the Track I remedy, the unilateral imposition of countervailing duties by the authority of the importing signatory? The affirmative answer would mean that Track II remedies would be available. The applicability, according to Article 11(2), of the

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tions of normal competition." *Id.* at 70. As under Article 8(3), signatories are requested to "seek to avoid" causing such harmful effects and, "when drawing up their policies and practices in this field," also to weigh "as far as practicable, . . . possible adverse effects on trade." *Id.* at 70.

35. *See* Subsidies Code, *supra* note 30, art. 2(1), BISD, *supra* note 30, at 57-58.

36. *See id.* art. 13(4), BISD, *supra* note 19, at 72.

37. Benyon & Bourgeois, *The European Community-United States Steel Arrangement*, 21 COMMON MKT. L. REV. 305 (1984); Dominick, *Countervailing State Aids to Steel: A Case for International Consensus*, 21 COMMON MKT. L. REV. 355 (1984).

38. As several authors have pointed out, the Code does not say how the balance should be struck. *See, e.g.*, Benyon & Bourgeois, *supra* note 37, at 324. As another author has noted,

> It is not surprising that no agreement has been reached on how to deal with domestic subsidies. For, as Article II of the Subsidies Code recognizes, domestic subsidies are an integral part of each country's social and economic fabric. International agreement on their use and application, therefore, would require a degree of consensus on an array of economic and social issues that is presently unattainable and which may not be attainable in the near future.

Marcuss, *Understanding Direct and Indirect Subsidies: Are The Problems Negotiable or Incurable?*, in INTERNATIONAL LAW INST., INTERFACE THREE: LEGAL TREATMENT OF DOMESTIC SUBSIDIES 51, 54 (1984).

"injury" test[39] seems, however, to suggest that domestic subsidies are countervailable. This argument is the view accepted by the United States, which expressly included domestic aids in its Trade Agreements Act, enacted in 1979 to implement the Code.[40]

A comparison of the EEC and the GATT sets of rules reveals a number of important differences. On the one hand, it follows from the single-market goal—a central feature of the EEC—that State aids that distort competition and trade among Member States are incompatible with the Common Market and, with certain exceptions, prohibited. On the other hand, the less stringent rules in the Subsidies Code correspond to the intergovernmental, cooperative nature of the GATT. The sanctions also differ: if a State does not comply with a Commission decision ordering the abolition or modification of an aid, the only possible sanction is an appeal by the Commission to the Court.[41] Unilateral measures by other Member States (such as granting other aids to compensate for those that have been prohibited, or imposing countervailing duties on products originating from the subventioning State) are, as a rule, inconceivable.[42] By contrast, measures of this type, whether unilaterally or multilaterally decided, are precisely the means to which a signatory can resort within GATT.[43]

Still, these differences must not conceal the existence of some important analogies. The basic objective of both systems is to prevent a State from adopting certain measures, however important from the national viewpoint, without taking into account their possible negative effects on other States.

The EEC and the United States, its major commercial

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39. *See supra* note 34.

40. *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144, 150-89 (1979) (codified as amended at 19 U.S.C.A. §§ 1671-1677g (West 1980 & Supp. 1987)). The Act contains an illustrative list of domestic subsidies that can be countervailed if they are found to affect U.S. industry. Among others, the Act mentions "[t]he provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations," 19 U.S.C. § 1677(5)(B)(i)(1982), and "[t]he grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry," *id.* § 1677(5)(B)(iii) (1982).

41. *See* EEC Treaty, *supra* note 1, art. 169, 1973 Gr. Brit. T.S. No. 1, at 56-57, 298 U.N.T.S. at 75.

42. *But see id.* art. 46, 1973 Gr. Brit. T.S. No. 1, at 21, 298 U.N.T.S. at 75 (special provisions for agriculture).

43. *See supra* notes 35-36 and accompanying text (Tracks I and II procedures).

partner, thus arrive at a similar result: both in intra-Community trade and in their commercial relations with the GATT, any aid or subsidy that has a restrictive or distorting effect on normal commercial relations is prohibited, or at least subject to some control. Although both systems of law take a more stringent position vis-a-vis express export aid, they share a serious concern that other types of aids can produce damaging effects.

II. *GOVERNMENT EQUITY PARTICIPATION AND THE EEC TREATY: THE COMMISSION'S RESPONSE*

Government equity participation in commercial companies is a common form of State intervention in most Member States of the EEC. The association of public and private capital within the same undertaking may serve a variety of purposes. For one, the State may wish to obtain decisive influence over the conduct of an undertaking so as to orient its major decisions, especially those relating to investments, in a direction that conforms with the goals of the State's general economic policy. For another, the State, like a merchant bank, may wish to buy and then eventually to sell for profit the equity that it has bought in a promising company.

The acquisition by the Government of equity participation is as such not prohibited by the EEC Treaty; according to Article 222, the Treaty "shall in no way prejudice the rules in Member States governing the system of property ownership."[44] This provision, which the Commission has always interpreted very broadly, has formed, for example, the basis for reconciling with the Treaty certain nationalizations that have been effected in some Member States.[45] However, problems in interpreting Article 222 arise when public equity participation is used to support economically dubious or ailing initiatives. Here the state comes close to the borderline between what the Treaty allows under Article 222 and what it prohibits under Article 92.

At what point government equity injections infringe Arti-

44. *See* EEC Treaty, *supra* note 1, art. 222, 1973 Gr. Brit. T.S. No. 1, at 70, 298 U.N.T.S. at 88.

45. *See, e.g.*, Answers to Written Questions Concerning the Nationalizations Decided by the French Government in 1981, O.J. C 65/3-6 (Mar. 15, 1982).

cle 92 is the question that the Commission has had to resolve in a series of recent cases.[46] Since 1972 the Commission has set forth several criteria by which it can distinguish a government participation compatible with Treaty obligations from other forms of aid proscribed by Article 92.[47] The Commission's first opportunity to do so came when it examined an Italian law enacted to "encourage the restructuring and the conversion of certain industrial undertakings."[48] In addition to granting "classic" aids (for example, preferential credit terms), the law provided for the acquisition of temporary holdings through public financial institutions. In considering that the principle of neutrality set out by Article 222 prohibited Member States from implementing measures that, if other intervention techniques were used, would infringe Article 92, the Commission held that the equity participation element of the Italian law could not stand.[49] The decision required the Commission to draw the line between the use of equity participation schemes within Article 222 and those that are incompatible with the common market. In the Commission's opinion, there are certain forms of public investment schemes in which the State is acting as an investor of venture capital. These schemes include the setting up of new firms by the State as well as the purchase of holdings either in existing firms, or in those set up in association with private capital. Even where the objective of these investments went beyond that of making a profit, Article 222 could still apply. Article 222 was inapplicable, however, where the State, working through public investment organizations, purchased equity in a firm to see it through a period of economic difficulty.[50]

The Commission had to go further and develop criteria to allow it to identify *ex ante* a government equity participation as an aid falling under Article 92(1). In the Italian subsidies case the clues listed were: (i) that the equity participation is used as an alternative to or in conjunction with classic aids; (ii) that the

46. *See* O.J. L 59/21 (1984); O.J. L 276/34 (1984); O.J. L 62/18 (1983); O.J. L 91/32 (1983); O.J. L 280/30 (1982) (*Intermills*); O.J. L 277/15 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18 (1982).

47. *See infra* notes 48-51, 63-67 and accompanying text.

48. COMM'N, SECOND REPORT ON COMPETITION POLICY ¶122 (1973).

49. *Id.* ¶124.

50. *Id.*

firms in question would disappear from the market but for that intervention; or (iii) that the investment does not generate a normal return, or that the holding is eventually sold to the firm at a loss.[51]

The Commission's reference to the hypothetical behavior of private investors raises a number of new questions, however. How can one predict the choice that a private investor would make, there being no clear concept of how he would react to an investment opportunity? It is impossible to say for certain that a natural or legal person would *not* invest in a company that might, with the necessary capital, be turned around and brought back to profitability. Second, where the State has already invested considerable sums in a firm in difficulty, the State can possibly avoid further losses only by injecting fresh capital. Faced with this situation, would the private investor pull out and lose his investment, or would he agree to purchase further equity in the hope of recovering some of his capital?

The investigation of several cases of presumed infringement of Article 92, in particular during the period 1982 to 1984, gave the Commission the opportunity to work out more precise criteria for the evaluation of the aid effect of equity participations. The results of this participation are contained in several decisions,[52] as well as in a notice[53] that summarizes the Commission's main line of thought and that constitutes a sort of code of equity participations. On the other hand, following appeals of some of those decisions, the Court has had the opportunity to clarify several aspects of the dispute.[54]

The cases investigated by the Commission had two points in common. First, all the firms in which the Member States in

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51. *Id.*

52. *See* O.J. L 59/21 (1984); O.J. L 276/34 (1984); O.J. L 62/18 (1983); O.J. L 91/32 (1983); O.J. L 280/30 (1982) (*Intermills*); O.J. L 277/15 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18 (1982).

53. *Public Authorities' Holdings in Company Capital*, 1984 E.C. BULL. No. 9, at 93 (1984) [hereinafter *Public Authorities' Holdings*].

54. *See* Belgium v. Commission, Case 40/85, 1986 E.C.R. ____, Common Mkt. Rep. (CCH) ¶ 14,375; Belgium v. Commission, Case 234/84, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,374; Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek BV v Commission, Joined Cases 296 and 318/82, 1985 E.C.R. 809, Common Mkt. Rep. (CCH) ¶ 14,170; Intermills v. Commission, Case 323/82, 1984 E.C.R. 3809, Common Mkt. Rep. (CCH) ¶ 14,154.

question had invested were or had been in a difficult financial situation.[55] They had suffered continuous losses for several years, and some of them had gone into bankruptcy. Second, the industrial sectors in which they operated were suffering from overcapacity, rendering the State subsidies inopportune if not damaging to the whole sector.[56] The Commission therefore found that the equity participations were incompatible with the common market and should therefore be suppressed.[57] In certain cases, the Commission held that the participation was a rescuing aid,[58] while in others, it considered it unlikely that the undertaking would have been able to raise the funds needed for its survival on the private capital market.[59] The Commission thus again referred to the criterion of the presumed behavior of a private investor in similar circumstances. In the present cases, however, the Commission had at its disposal figures proving that the firms had almost invariably incurred serious losses.[60]

The importance of the principles in question, as well as the fact that this form of state intervention has clearly taken on increased importance, have induced the Commission to analyze systematically its various aspects. The result is a document,[61] sent to all Member States, which expresses the Comission's views as to when a state equity acquisitition constitutes an aid, as opposed to a "normal" investment. The Commis-

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55. *See* O.J. L 59/21, at 22 (1984); O.J. L 276/34, at 35 (1984); O.J. L 62/18, at 19 (1983); O.J. L 91/32, at 33 (1983); O.J. L 280/30, at 30 (1982) (*Intermills*); O.J. L 277/15, at 15 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18, at 18 (1982).

56. *See* O.J. L 59/21, at 22 (1984); O.J. L 276/34, at 35 (1984); O.J. L 62/18, at 21 (1983); O.J. L 91/32, at 32 (1983); O.J. L 280/30, at 30 (1982) (*Intermills*); O.J. L 277/15, at 15 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18, at 19 (1982).

57. *See* O.J. L 59/21 at 22 (1984); O.J. L 276/34 at 35 (1984); O.J. L 62/18 at 20 (1983); O.J. L 91/32 at 33 (1983); O.J. L 280/30 at 31 (1982) (*Intermills*); O.J. L 277/15 at 16 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18 at 19 (1982).

58. *See* O.J. L 62/18 at 19 (1983); O.J. L 280/30 at 30 (1982) (*Intermills*); O.J. L 138/18 at 18 (1982).

59. This view is expressed in almost all the relevant Commission decisions. *See, e.g.*, O.J. L 276/34 at 35 ("the company's financial situation was a handicap which makes it very unlikely that it could have raised the finance it needed to survive on the private capital market"); *see also* O.J. L 277/15 at 15; O.J. L 280/30 at 30; O. J. L 91/32 at 32; O.J. L 59/ 21 at 22.

60. *See* O.J. L 59/21 at 22 (1984); O.J. L 276/34 at 35 (1984); O.J. L 62/18 at 19 (1983); O.J. L 91/32 at 33 (1983); O.J. L 280/30 at 30 (1982) (*Intermills*); O.J. L 277/15 at 15 (1982) (*Leeuwarder Papierwarenfabriek*); O.J. L 138/18 at 18 (1982).

61. *Public Authorities' Holdings*, *supra* note 53, at 93.

sion also restated the procedural rules that Member States must observe concerning notification of new aids.[62]

The basic idea in the document is that there is State aid "where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under normal market economy conditions."[63] The comparison with the presumed behavior of the private investor is thus once again a criterion. The Commission does not establish general conditions for the application of this principle; it indicates instead a number of practically relevant cases where it can be assumed to apply.[64] Two of these cases appear to be particularly important: (i) where the financial situation of the undertaking is such that it is impossible to predict whether or not the invested capital will produce a normal return within a reasonable period of time; and (ii) where, because of insufficient cash flow, the undertaking is unable to raise the funds it needs for its investment program on the capital market.[65] In these cases, Article 92(1) is, as a rule, deemed to be applicable. The Commission does admit that it is not always possible to be certain *a priori* as to its applicability, and that the only solution left is an *ex post* examination.[66] However, the document lists two situations where the character of aid may be presumed: (i) where the equity participation follows the granting of "classic" aids; and (ii) where the firm operates in a sector suffering from overcapacity.[67]

We can conclude that the principal common denominator in the Commission's various arguments is the finding that the undertaking is in a bad financial situation. This situation makes a private financing unlikely and confers on the government equity participation the character of an aid, as opposed to a provision of risk capital, according to normal market economy conditions.

III. *THE COURT OF JUSTICE RULINGS*

The first case concerning State aids appealed to the Court

62. *Id.* at 94, point 4.
63. *Id.* at 94, point 3.3.
64. *Id.* at 94, point 3.3, (i)-(vi).
65. *Id.* at 94, point 3.3, (i)-(ii).
66. *Id.* at 94, point 3.4.
67. *Id.* at 94, points 3.4., (i) and (iii).

dealt with aids granted by the Belgian government to the paper manufacturer Intermills.[68] The aid had two components: (i) a low-interest loan as well as two repayable advances; and (ii) the acquisition of a holding by the Walloon Regional Executive.[69] The government had allocated the loan and advances in 1980 to support a restructuring program that included closing three of five manufacturing plants and switching the remaining operation from bulk- to specialized-paper production. The Commission had concluded that this part of the aid satisfied Article 92(3)(c) and was therefore compatible with the common market.[70] However, the Commission found that the government's acquisition of equity bore no relation to the restructuring measures and that, in view of the firm's financial difficulties, it should be treated as a " 'rescue aid,' intended to allow the undertaking to meet its financial commitments."[71] This aid was declared incompatible with Article 92 and prohibited.[72]

On appeal, the Court annulled the decision for reasons not connected with the central question of the evaluation of the equity participation. For one, the Court held that the Commission had not clearly shown why the equity participation was unrelated to the restructuring plan.[73] For another, it found that the Commission had not sufficiently taken into account the effects of the reorientation of the firm's production: in this case, "the Commission has not shown why the applicant's activities on the market, following the conversion of its production with the assistance of the aid granted, were likely to have such an adverse effect on trading conditions that the undertaking's disappearance would have been preferable to its rescue."[74] The Court thus seemed to suggest that the existence of a restructuring plan that satisfies Article 92(3) can constitute a valid justification even though the undertaking would disappear from the market without that aid. But the Court

68. S.A. Intermills v. Commission, Case 323/82, 1984 E.C.R. 3809, Common Mkt. Rep. (CCH) ¶14,154.

69. *Id.* at 3813, Common Mkt. Rep. (CCH) ¶14,154, at 15,878.

70. *Id.*, Common Mkt. Rep. (CCH) ¶14,154, at 15,878-79.

71. *Id.* at 3824, Common Mkt. Rep. (CCH) ¶14,154, at 15,885.

72. *Id.*

73. *Id.* at 3831, ¶35, Common Mkt. Rep. (CCH) ¶14,154, at 15,889.

74. *Id.* at 3832, ¶39, Common Mkt. Rep. (CCH) ¶14,154, at 15,889.

hardly mentioned the question whether equity participation should be considered an aid. It merely confirmed that the Treaty considers that State aids can be granted "in any manner whatsoever"[75] and that equity participation can constitute an illicit aid.[76] It thus left open the question of the circumstances under which Article 92(l) would be applicable to such a participation.

The *Leeuwarder Papierwarenfabriek* case,[77] decided by the Court a few months after *Intermills*, is an important point in the development of the Court's doctrine. In *Leeuwarder*, the Commission had found that the equity holding of the Dutch government in a paperboard-processing firm was incompatible with the Treaty.[78] According to the Commission, "[t]he financial structure of the firm, which urgently needed to carry out replacement investments, and the overcapacity in the paperboard-processing industry, constituted handicaps indicating that the firm would probably have been unable to raise on the private capital markets the funds essential to its survival."[79] So far, *Leeuwarder* was similar to *Intermills*; its novelty, however, lay in the fact that the question of the evaluation of the equity participation from the viewpoint of Article 92 was raised before the Court. The applicants contested the applicability of the provision, arguing that the Commission had not shown that their undertaking was in difficulty. The *Leeuwarder* Court rejected this argument:

> In this case it was the absence of the possibility of raising finance on the private capital market which indicated that the contribution in question amounted to aid in the light of three factors, namely the financial structure of the undertaking, its urgent need for replacement investments and the over-capacity in the paperboard-processing sector. In the Commission's opinion those factors made it unlikely that

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75. EEC Treaty, *supra* note 1, art. 92(1), 1973 Gr. Brit. T.S. No. 1, at 35, 298 U.N.T.S. at 51.

76. *See Intermills*, 1984 E.C.R. at 3830, ¶¶ 30-32, Common Mkt. Rep. (CCH) ¶14,154, at 15,888.

77. Kingdom of the Netherlands and Leeuwarder Papierwarenfabriek BV v. Commission, Joined Cases 296 and 318/82, 1985 E.C.R. 809, Common Mkt. Rep. (CCH) ¶ 14,170.

78. Commission Decision, O.J. L 277/15, at 17 (1982).

79. *Id.* at 15.

> the undertaking would be able to raise on the private capital markets the funds essential to its survival . . . .
>
> That statement of reasons satisfies the requirements of Article 190 of the EEC Treaty since it is sufficient to permit a review by the Court and gives those concerned an appropriate opportunity to express their views on the accuracy and relevance of the alleged facts and circumstances.[80]

Although it does not answer the crucial question of the evaluation of the equity participation, the judgment is important because the Court considered the criteria utilized by the Commission to establish the character of an equity participation, and for the first time indicated its support for the Commission's comparison with the behavior of a private investor in normal market economy conditions.

This line of thought has been developed in two further judgments affirming Commission decisions qualifying substantial equity participation by the Belgian government in two firms as illicit aids.[81] Both firms had suffered serious financial losses for several years. Initially, the Government had resorted to using classic aids and had later supplemented these aids with a substantial equity participation. Despite restructuring measures, the firms eventually went bankrupt.[82]

The Belgian government argued both before the Commission and the Court that preventing a state from supporting domestic enterprises facing transitional difficulties effectively discriminated between public and private financial groups, particularly when, as in this case, the contribution to equity was part of a restructuring plan that foresaw reorientation of the firm's activity.[83] The central question was thus clearly put to the Court: can the *public* shareholder be prohibited from using his financial means for supporting an undertaking without in so doing discriminating against the *private* shareholders, who, in a

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80. *Leeuwarder*, 1985 E.C.R. at 824, ¶¶ 20-21, Common Mkt. Rep. (CCH) ¶ 14,170, at 16,041.

81. Belgium v. Commission, Case 234/84, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶14,374; Belgium v. Commission, Case 40/85, 1986 E.C.R. —, Common Mkt. Rep. (CCH) ¶ 14,375, at 17,487.

82. *See* Belgium v. Commission, Case 234/84, 1986 E.C.R. at —, Common Mkt. Rep. (CCH) ¶14,374, at 17,480.

83. *See* Belgium v. Commission, Case 234/84, 1986 E.C.R. —, Common Mkt. Rep (CCH) ¶ 14,374, at 17,480; Belgium v. Commission, Case 40/85, 1986 E.C.R. at —, Common Mkt. Rep (CCH) ¶ 14,375, at 17,486.

comparable situation, would carry out such an intervention? And if so, under what circumstances? Would such a prohibition offend the principle, accepted by the Treaty,[84] of non-discrimination between the private and public sector of an economy? The Belgian argument was strengthened by the reference to the restructuring program, which, as we have seen, had been taken into account by the Court in both *Intermills* and *Leeuwarder*. The Court's answer, almost identical in both opinions, expressly upheld the validity of the Commission's analysis.[85] To decide whether an equity participation constitutes a State aid, it is justified, the Court stated,

> to apply the criterion, which was mentioned in the Commission's decision and, moreover, was not contested by the Belgian Government, of determining to what extent the undertaking would be able to obtain the sums in question on the private capital markets. In the case of an undertaking whose capital is held by the public authorities, the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectoral considerations, would have subscribed the capital in question.[86]

The Court thus gives its support to the essence of the Commission's approach, which is the comparison of the public intervention in a given case and the presumed behavior of a private investor in a similar case.[87] In the two cases under examination the Court approved the conclusions the Commission drew from that comparison. The fact that the firms had incurred serious losses for several years, as well as the fact that they operated in markets suffering from over-capacity, made it unlikely that they would have been able to raise the funds needed for

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84. *See* EEC Treaty, *supra* note 1, art. 90, 1973 Gr. Brit. T.S. No. 1, at 34, 298 U.N.T.S. at 50.

85. Belgium v. Commission, Case 234/84, 1986 E.C.R. at —, Common Mkt. Rep (CCH) ¶ 14,374, at 17,480; Belgium v. Commission, Case 40/85, 1986 E.C.R. at —, Common Mkt. Rep (CCH) ¶ 14,375, at 17,486.

86. Belgium v. Commission, Case 234/84, 1986 E.C.R. at —, Common Mkt. Rep (CCH) ¶ 14,374, at 17,481; *see also* Belgium v. Commission, Case 40/85, 1986 E.C.R. at —, Common Mkt. Rep (CCH) ¶ 14,375, at 17,486.

87. The Court seems to restrict the validity of the comparison to the case where the capital of the company is owned by the public authorities. However, the reasoning should not be different if, as can occur in practice, the shareholders were private.

their survival on the private capital markets. The contribution to equity by public authorities could thus only be considered aids in the sense of Article 92.[88]

Within the U.S. Trade Agreements Act, equity infusions into a company constitute a countervailable subsidy if they are provided on terms "inconsistent with commercial considerations."[89] In interpreting this provision, the U.S. authorities, especially the Department of Commerce, have arrived at results that present several analogies to the conclusions of the Commission or the Court. It is accepted "that neither government equity ownership *per se*, nor any secondary benefit to the company reflecting the private market's reaction to government ownership, confers a subsidy."[90] As in the case of the EEC Treaty, one must identify the factors conferring on a measure that is in itself neutral the quality of a subsidy. Such an investigation does not yield results substantially different from those that have been accepted by the Commission and the Court. The Department states: "An equity subsidy potentially arises when the government makes equity infusions into a company which is sustaining deep or significant continuing losses and for which there does not appear to be any reasonable indication of a rapid recovery."[91] Thus, both the U.S. and the Commission employ an essentially similar approach. Both pose the same question: whether the undertaking that the government has invested in is creditworthy. And the criteria used for answering the question are also basically the same, including, first, the financial performance of the undertaking. The Department of Commerce states: "Before we consider government equity infusions as countervailable subsidies, we must find the company under investigation not to be equityworthy. Our equityworthy analysis involves assessing the company's

88. Belgium v. Commission, Case 234/84, 1986 E.C.R. at —, Comm. Mkt. Rep. (CCH) ¶ 14,374, at 17,481; Belgium v. Commission, Case 40/85, 1986 E.C.R. at —, Comm. Mkt. Rep (CCH) ¶14,375, at 17,487.

89. 19 U.S.C. § 1677(5)(B)(i) (1982).

90. Final Affirmative Countervailing Duty Determinations; Certain Steel Products from Belgium, 47 Fed. Reg. 39,304, 39,318-19 (Sept. 7, 1972). The evaluation of government equity acquisition as countervailable subsidy has been thoroughly analyzed by the Department of Commerce, which has published a Methodology, that is, a set of principles that it applies when dealing with the main forms of state assistance to firms. *Id.* at 39,316-23.

91. *Id.* at 39,319.

current and past financial health and gives great weight to a company's recent rate of return on equity."[92] The Department of Commerce also accepts the comparison with the foreseeable conduct of a private investor.[93]

CONCLUSION

Most European countries, especially those that are members of the EEC, frequently resort to various forms of direct intervention in their economies. Such intervention raises a difficult question, however. While many of these interventions are traditional instruments through which those countries effect their national economic policy, they can nevertheless conflict at both the EEC and GATT levels with the generally accepted principle of undistorted competition in international trade.

Recent developments within the EEC and in the trade relations between the EEC and the United States show that this dilemma arises, in particular, when a government acquires equity in a commercial company. To be sure, the fact that such an operation is effected by the public authorities neither alters its financial nature nor necessarily confers on it an anticompetitive character. Under certain circumstances, however, a different conclusion may be unescapable. The identification of these circumstances is a delicate task, because the infusion of fresh funds into a company by means of equity acquisition undoubtedly carries with it an element of "aid." Criteria distinguishing trade-distorting measures from mere financial investments are required both in the EEC, to delimitate the applicability of Article 92 to State aids, and in EEC-United States trade relations, so as to determine whether certain "domestic" subsidies are countervailable.

As the preceding analysis shows, both the EEC institutions

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92. Industrial Nitrocellulose from France, Final Results of Countervailing Duties, 52 Fed. Reg. 833, 840 (Jan. 9, 1987).

93. The Department stated:

> In making an equityworthy determination, we consider the company as a whole, not specific areas of the company. This is the approach a reasonable private investor would take. A reasonable investor would not invest in a company that has earned a profit in one comparatively small product line . . . if all other product lines lost money.

Id. at 840.

and the United States authorities have arrived at basically the same result after a distinct, complex process of litigation or negotiation. The decisive factor in distinguishing State investments is a consideration of the past and present financial and economic situation of the company in which the government has acquired equity. The healthier the company, the more likely it is that government intervention constitutes a mere investment, similar to what any private investor would make. However, as the company's losses get higher and as its period of financial difficulties gets longer, it is more unlikely that the company would have been able to obtain the funds it needed on the private capital market. The conclusion that the government acquired equity in the company to rescue it from more serious difficulties or even from bankruptcy follows naturally. To be sure, this criterion is only a general one; further analysis and refinements are needed to adapt it to a variety of situations that may arise in practice. But its importance should not be underestimated. If EEC countries apply the same discipline that the EEC Treaty imposes on them to their relations with the United States, further trade wars may be prevented.