State Aids and European Community Law

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STATE AIDS AND EUROPEAN COMMUNITY LAW

Dr. Hans-Jorg Niemeyer*

INTRODUCTION ............................................................................................................ 190

I. STATE AIDS IN THE EUROPEAN COMMUNITY .............................................. 191
   A. Background .......................................................................................................... 191
   B. The Concept of Aid within Article 92(1) of the EEC Treaty .......................... 192
      1. The Broad Concept of Aid ............................................................................. 192
      2. The Market Economy Investor Principle ..................................................... 193
      3. Sources of Aid ................................................................................................. 194
      4. State Aid Favoring Certain Undertakings ..................................................... 195
      5. The Effect on Competition and on Trade Between Member States .......... 195
   C. Treaty-Based Exceptions to the Prohibition on State Aids ......................... 196
      1. Aids for Very Depressed Regions ................................................................. 197
      2. Aids to Promote an Important European Project ......................................... 198
      3. Sectoral and Regional Aids ........................................................................... 198
      4. Implications ..................................................................................................... 199

II. PROCEDURAL ASPECTS ....................................................................................... 199
   A. Review of Existing Aid Systems (art. 93(1)) .................................................. 200
   B. Notification of New Aids (art. 93(3)) ............................................................... 200
   C. Procedure When the Commission is Notified ............................................... 201
   D. Procedure When the Commission is Not Notified .......................................... 202
   E. The Contentious Procedure ............................................................................ 203

III. REPAYMENT OF ILLLEGALLY GRANTED STATE AIDS .............................. 204
   A. The Commission’s Power to Order Repayment .............................................. 204
   B. Compliance with the Order of Repayment .................................................... 205
   C. Application of National Law ............................................................................ 206
   D. Legitimate Expectation of the Beneficiary ..................................................... 207

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* Partner, Gleiss, Lutz, Hootz, Hirsch and Partners, Brussels/Stuttgart. This is the extended and updated version of a speech given at the seminar “Overseas Investment” organized by the International Law Section of the State Bar of Michigan in Dearborn, Michigan on October 13, 1992.
The existence of State aids can considerably influence the decision of an investor regarding the region or sector in which to invest. State aids can reduce substantially investors' starting and capital costs, thereby enhancing the desirability of investing in a particular location. Therefore, a legal adviser should be aware of the available State aid programs if a client is seeking a location for production facilities. In the European Community (EC), a system has been set in place which substantially restricts the right of EC Member States to grant aids or subsidies to investors. The consequences of disregarding the EC provisions can be severe. If the EC Commission finds that the aid was illegally granted, it can order the investor to repay the entire amount of the aid.

A case which demonstrates the consequences of disregarding the EC laws arose out of the Toyota Motor Corporation investment in Great Britain. In 1989, Toyota decided to build a new plant to produce passenger cars in England. Toyota's decision to invest in England was influenced by the fact that the local county, which owned the building site, offered Toyota the real estate for an inexpensive price. The EC Commission became aware of this investment and concluded that the difference between the market value of the building site and the price paid by Toyota constituted illegal State aid. The consequence was that Toyota had to pay this difference to the county.

In light of the risks involved, investors and legal advisers must fully understand the EC State aid laws before embarking in any investment in the EC. This article provides an overview of EC State aid rules, focusing on recent Commission policy and recent judgments of the Court of Justice on State aids. In Part I, some general points, such as what may

2. See, e.g., Claude Blumann, Régime des aides d'Etat: Jurisprudence récente de la Cour
constitute a State aid, are considered. In Part II, the procedural aspects are dealt with in more detail, with emphasis on the notification process, and the procedure for reviewing State aids. Part III examines the recovery of illegally granted aids, and the defenses a beneficiary may assert. Next, Part IV sets out the remedies available for breach of the State aid rules, including the right to contest the Commission's decisions. The article concludes by pointing out the shortcomings of the present procedures and suggesting changes that could improve the procedures, especially from the perspective of outside investors unfamiliar with the EC rules.

I. STATE AIDS IN THE EUROPEAN COMMUNITY

A. Background

The control of State aids is part of the general competition policy in the Community and is codified in the EEC Treaty. In order to foster competition, the Treaty prohibits restrictions on competition by private individuals. Further, it prohibits Member States from granting aid to national industries that distorts, or threatens to distort, competition and trade between Member States.

Addressing the problem of State aids has become an increasingly important part of the Commission's competition policy in recent years. This new focus results from the dramatic increase in aid proposals submitted to the EC Commission — from 296 in 1989, to 429 in 1990.3 By the end of the 1980s, the total amount of subsidies granted by the twelve Member States reached ninety billion ECU per year4 (1 ECU = 1.13 US$).

The Commission's actions in regulation of State aid have always been controversial. Especially in times of recession, there is pressure on national governments to provide help to economically disadvantaged regions and industries in order to curb unemployment. Therefore, opponents of a vigorous State aid policy advocate the idea that the application of the State aid rules should be relaxed in times of recession in order to help those countries which are most in need.

\[\text{de Justice, 361 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 721 (1992); Siegfried Magiera, Rücksforderung gemeinschaftsrechtswidriger staatlicher Beihilfen, in EUROPARECHT ENERGIERECHT WIRTSCHAFTSRECHT FESTSCHRIFT FÜR BÖRNER 213 (1992).}

3. COMMISSION OF THE EUROPEAN COMMUNITIES, TWENTIETH REPORT ON COMPETITION POLICY 135 (1990) [hereinafter TWENTIETH REPORT].

On the other side, supporters of an unyielding State aid policy point out that the Europeans are still completing the internal market in the EC. One prerequisite for its completion is the elimination of policies which distort competition between Member States. If Member States are allowed to use State aid to defend their national companies or industries from the pressure of increased competition, these new barriers could jeopardize the efficient allocation of resources within the single market.\(^5\) One State’s aid can lead to another state’s unemployment. Thus, the supporters of the EC State aid policy argue that during a recession, a rigorous State aid policy takes on even greater importance.

While the debate rages on, no relaxation of the policy has actually occurred. Thus, anyone contemplating an investment in the EC would be unwise to proceed without first consulting the applicable laws.

B. *The Concept of Aid within Article 92(1) of the EEC Treaty*

1. The Broad Concept of Aid

The first thing an investor must determine when considering a Member State’s offer of aid is whether that offer constitutes “State aid” as defined by the EEC Treaty. Article 92(1) of the EEC Treaty defines State aid as “any aid granted by a Member State or through State resources in any form whatsoever.”\(^6\) This broad definition encompasses a wide variety of possible aids. It is generally agreed that it includes all forms of positive benefit to a recipient, including actual cash subsidies, as well as any measure that relieves an undertaking of costs it would otherwise have to bear.\(^7\)

Where a company receives a benefit from the State, and the State receives no consideration in return, it is clear that a State aid has been granted. In addition, given that the concept of State aid has been interpreted broadly, a State aid exists when the value of the services or goods provided by the investor is less than the consideration given for them by the State, or, conversely, when the State demands less payment than the value of the goods or services that the State provides to a

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5. TWENTIETH REPORT, supra note 3, at 125.

6. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 92(1). Treaty articles without references in the remaining text of this article refer to the EEC Treaty.

company.  

When considering sales agreements, particularly with regard to the sale of building sites by the State to an investor, State aid has been granted if the terms and conditions of the sale depart from normal commercial practice. Examples of State aids are non-repayable subsidies; loans from State-owned financial institutions at reduced rates; reductions in income or corporation tax; capital injection by a public authority; payment of below-market prices for energy; or the sale of real estate at a price below the market value.

Despite the broad concept of aid, not all State measures that benefit a company or groups of companies can be considered State aid within the meaning of article 92(1). Rather, the purpose of the State measure must aim at conferring a financial advantage on the undertakings concerned, which would result in the State assuming an additional burden. Therefore, a State measure whose purpose is not to confer a cost advantage to certain undertakings, but merely has consequential financial effects, is not considered State aid.

2. The Market Economy Investor Principle

In recent years, it has become common for Member States to assist companies, especially those involved in public undertakings, through capital injections. In these cases, the Commission applies the so-called “market economy investor principle.” In order to determine whether any aid is involved, the Commission examines whether a private investor, considering the expected return — but ignoring all social, regional, policy, and sectoral considerations — would have been willing to

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11. See id. German law provides the possibility for German shipping lines to employ nationals of third countries under less advantageous working and social conditions than seamen protected by German labor law. Although this German legislation gives German employers a cost advantage which results in lower social security contributions and lower taxes for the State, these consequential financial effects are not a State aid within the meaning of article 92(1).

make those contributions in a similar situation. If a private investor would not have been able to expect an acceptable rate of profitability on the capital invested, the capital injection is considered an aid. The Court of Justice accepted this principle as an appropriate method for determining whether a capital injection is considered an aid.\(^3\)

In *Italy v. Commission*,\(^4\) the Court refined the "market economy investor principle" by making a distinction between private investors investing capital in the short term, and private holding groups which have a longer-term perspective. In 1986, the Italian State-holding company Finmeccanica, which owned Alfa Romeo, carried out two capital infusions into Alfa Romeo amounting to ECU 429 million. The Commission decided that a private investor never would have made a similar investment, because Alfa Romeo had continuous losses between 1974 and 1986, and because the capital was not provided on the condition that Alfa Romeo rationalize its production. The Court held that where a private holding group, even considering decisions at the level of the whole group in a wider economic context, is not able to expect an acceptable rate of profitability (even in the long term) on the capital invested, the capital injection is an aid.\(^5\)

### 3. Sources of Aid

To be considered State aid, the aid must be granted by a Member State or through State resources. The term "through State resources" includes not only public bodies, but also private companies that are under the control of the State and established or appointed to administer the aid.\(^6\)

Nevertheless, aid granted by a Member State, but financed from EC funds, falls outside the scope of article 92 since the aid must come from the financial resources of a Member State.\(^7\) It should be noted that in

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recent years, the Commission has become one of the largest financial backers in Europe. Almost 64 billion ECU are available in the budget of the EC for Community subsidies.

4. State Aid Favoring Certain Undertakings

Only those State aids that are granted to certain undertakings or to all undertakings within a particular industry fall within article 92. Thus, public funds paid out to all undertakings in a Member State are not considered to be State aids. While this distinction is simple enough, the favoring of certain undertakings or sectors is not always obvious. For example, an Italian measure reduced the health insurance costs of all female workers. Upon closer examination, the Commission determined that this measure constituted State aid since it disproportionately benefited textile companies, which employed an above average number of women.  

18

5. The Effect on Competition and on Trade Between Member States

Finally, for a State aid to fall within article 92, it must distort or threaten to distort competition by favoring certain undertakings and must affect trade between Member States. In order to determine whether competition and trade between Member States is affected, the Commission has to examine the relevant market, the position of the recipient of the aid, the volume of inter-State trade, and the exports of the company concerned. 19 The standard of evidence for distortion is quite low. The Court of Justice has adopted a broad approach in determining whether State aid distorts or threatens to distort competition. 20 The Court argues that where competition between companies in various Member States exists, any financial aid is capable of distorting competition. The aid artificially strengthens the position of the recipient company, and this hinders the ability of other producers to increase their market shares and exports. This principle applies even if the recipient of the State aid is not engaged in exports. It is sufficient that the aid enables undertakings to maintain or increase their production, thereby reducing the opportunities of competitors from other Member States to export their goods

into the recipient's country.\textsuperscript{21} Even a relatively small amount of State aid may affect trade between the Member States if there is vigorous competition in that sector, or if the profit margins are small, such as in the textile industry.\textsuperscript{22}

Additionally, unlike other competition cases, no de minimis threshold applies in State aid cases. Consequently, the relatively small size of the recipient of a State aid does not exclude \textit{a priori} the effect on inter-State trade.\textsuperscript{23} As a consequence, the Commission does not have to provide evidence that trade between Member States is actually affected. It is sufficient that the aid \textit{may} affect inter-State trade.

Nevertheless, it is also clear that not all aids have a perceptible impact on trade and competition between Member States. This is true especially of aid provided in very small amounts, mainly though not exclusively, to small and medium-sized companies, and often under schemes run by local or regional authorities. Based on past experience, the Commission has set a de minimis figure at payments of ECU 50,000 to one undertaking for a particular type of expenditure — such as investment or training — over a three-year period. This rule applies to all companies, notwithstanding their size. State aids below this de minimis figure do not fall under article 92(1).\textsuperscript{24}

\textbf{C. Treaty-Based Exceptions to the Prohibition on State Aids}

Article 92(2) provides that certain social aids, subsidies to remove damages caused by natural disasters, and aids to compensate for economic disadvantages caused by the division of Germany, are per se allowable. There is no need to notify the Commission before implementing such aids.

Much more important in practice are the exemptions under article 92(3). Under article 92(3) the Commission has the discretion to exempt aids falling into the three main categories: (1) aid for very depressed regions; (2) aid to promote the execution of an important project of common interest or to remedy a serious disturbance in a Member State's economy; and (3) regional and sectoral aid.

\begin{itemize}
  \item \textsuperscript{23} Case C-142/87, Belgium v. Commission, 1990 E.C.R. I-959, I-1015.
  \item \textsuperscript{24} Commission Community Guidelines on State Aid for Small and Medium-Sized Enterprises, 1992 O.J. (C 213) 2, 5.
\end{itemize}
The Commission has broad discretion to authorize a State aid under these three categories. The Court of Justice has been quite reserved in examining the Commission’s discretion as long as the Commission’s decision was reasonably substantiated.25

1. Aids for Very Depressed Regions

The Commission has set out principles for approving national regional aid under article 92(3)(a).26 It is sufficient to say that regional aids are only justified for areas which have severe regional problems in relation to the Community as a whole (and not just in relation to the Member State).27 The socioeconomic situation of article 92(3)(a) regions is assessed primarily by reference to the purchasing power standards (PPS) based on the Gross National Product.28 The article 92(3)(a) regions are Greece, Ireland, and Portugal (all of the States), parts of Italy and Spain, and Northern Ireland.29 The Commission allows aid of up to seventy-five percent of the total investment, depending on the intensity or urgency of the regional problems. With respect to the type of aid, it allows regional aid linked to initial investment or job creation, as well as, under certain circumstances, operating aid designed to overcome particular or permanent disadvantage.30 As an example, the Commission did not object to State aids granted by the Portuguese government to the automotive components manufacturer Delco Remy,31 or to a Portuguese aid granted to the Ford/Volkswagen joint venture32 to build a minivan. In both cases, the subsidies amounted to more than thirty percent of the investment costs.

26. Commission Communication on the Method for the Application of Article 92(3)(a) and (c) to Regional Aid, 1988 O.J. (C 212) 2 [hereinafter 1988 Communication Concerning Regional Aid]; Commission Communication on the Method for the Application of Article 92(3)(a) and (c) to Regional Aid, 1990 O.J. (C 163) 6 [hereinafter 1990 Communication Concerning Regional Aid].
29. See id. at 6-7 (listing art. 93(3)(a) areas).
30. Id. at 3.
31. TWENTIETH REPORT, supra note 3, at 161.
Due to the restrictive application by the Commission, the significance of article 92(3)(a) is low, and most of the national regional aids are examined as regional or sectoral aids under article 92(3)(c), which is discussed below in Part I.C.3.  

2. Aids to Promote an Important European Project

Projects that fall into this category are European transnational programs supported jointly by various governments, or concerted action taken by the various Member States to combat a common problem such as the pollution of the environment. Furthermore, any aid granted to companies for their participation in research and development projects of common European interest may also qualify under article 92(3)(b).

3. Sectoral and Regional Aids

Under article 92(3)(c), the Commission may authorize two different types of State aids: sectoral aids promoting certain industrial sectors, and regional aids promoting a certain area within the EC. Thus, regional aids may be authorized under subsection (a) as well as (c). Under subsection (c), aid measures can be justified for regions that are disadvantaged in relation to other parts of the same Member State as a result of factors such as lower income or higher unemployment than the Member State average.

The Commission has set up several notices and Community frameworks on sectoral aid schemes for industries such as textile, shipbuilding, or motor vehicles. Such frameworks have also been set up for regional aid schemes. These notices provide guidelines for the assessment of such aids.

There are a number of basic criteria for determining the propriety of the aid. The aid scheme must be clear enough so that the Commission can be able to determine the type of aid. Also, the purpose of the aid

35. TWENTIETH REPORT, supra note 3, at 140–43.
36. Moreover, this provision applies to other general State aid schemes and so-called horizontal aids. See COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTEENTH REPORT ON COMPETITION POLICY 138 (1987) [hereinafter SIXTEENTH REPORT].
37. TWENTY-FIRST REPORT, supra note 32, at 288–301, 305–306.
38. See, e.g., 1988 Communication Concerning Regional Aid, supra note 26; 1990 Communication Concerning Regional Aid, supra note 26.
must comply with the objectives of the Community. In the case of industry sectors in crisis, subsidies are inappropriate where their sole effect would be to maintain the status quo. They have to be linked to restructuring plans by which the company is enabled to become viable. Where overcapacity exists, aid for investment must not result in capacity increases. The aids must be degressive, well-adapted to the restructuring of the specific sector, and the intensity of the aid must be proportional to the aid's objective.

The Commission has generally shown a positive attitude towards regional aids, especially if the aid is granted for the implementation of new production plants in disadvantaged parts of the Community. Here the ceiling for aids is between twenty to thirty percent of the investment costs. In contrast, the Commission does not authorize operating aids, such as monetary infusions which are not linked to restructuring plans, even in disadvantaged regions.

4. Implications

Considering all the different guidelines and frameworks, there are many possibilities for the Commission to authorize State aids under article 92(3). Thus, it appears that the Commission's State aid control is actually quite lenient. This view is confirmed by the fact that from 429 notifications in 1990, the Commission decided that only twelve State aids were illegal.

II. PROCEDURAL ASPECTS

Article 93 gives the Commission a general right of supervision over State aids. It provides for a procedure that permits the Commission to force Member States to abolish or to suspend State aids which are incompatible with article 92. Article 93 distinguishes between existing aids and new aids, which have different procedural treatments.

39. See Commission Notice Pursuant to Article 93(2) of the EEC Treaty to Other Member States and other Parties Concerned Regarding Aid which France Has Decided to Grant Compagnie des Machines Bull, 1992 O.J. (C 244) 2, 7.

40. NINETEENTH REPORT, supra note 16, at 163–64 (authorizing capital injection covering more than 30% of the restructuring costs); COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTEENTH REPORT ON COMPETITION POLICY 175–76 (1989) (approving a subsidy intensity of 25%).

41. COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTH REPORT ON COMPETITION POLICY 124 (1979).

42. TWENTY-FIRST REPORT, supra note 32, at 152.

43. 1988 Communication Concerning Regional Aid, supra note 26, at 5.

44. TWENTIETH REPORT, supra note 3, at 135.
A. Review of Existing Aid Systems (art. 93(1))

An existing aid is one which was either in operation at the time the EEC Treaty came into force, or which was in operation at the time a new Member State joined the EC (like Spain and Portugal in 1986). Aids that were properly implemented after that time with the consent of the Commission are also treated as existing aids. Such existing aids are legal and can remain in force until the Commission requires their abolition or alteration.

Article 93(1) provides that the Commission must constantly review the propriety of existing aids. For example, a regional aid may have been authorized by the Commission, but due to the improvement of the economic situation in that region, the aid is no longer justified. In such a case, the Commission shall rule that the State concerned must alter or abolish the State aid after having carried out the contentious procedure set out in article 93(2). Such a decision does not have a retroactive effect. Recovery of the aid may only be ordered with respect to those aids granted by a Member State after the Commission decided on the abolition of the aid.

B. Notification of New Aids (art. 93(3))

The most important procedural rule is the notification procedure for new aids set forth in article 93(3). Member States are obliged to notify the Commission of any plans to grant new aids or to alter existing aids. There is, however, no such obligation to notify other parties, such as the recipient of the aid. The Commission has set a new threshold of ECU 50,000 below which an individual aid is no longer subject to prior notification to the Commission. This amount does not, however, apply for certain sensitive sectors subject to special rules such as the shipbuilding or the motor vehicle industry.

The last sentence of article 93(3) provides that the Member States are prevented from putting an aid scheme into effect, and especially from paying out the subsidy, until the Commission has declared the State aid compatible with the Common Market. This prohibition, known
as the stand-still clause, is directly actionable. It provides rights attaching to individuals which must be protected by national courts. If the aid was implemented without observance of the prior review procedure under article 93(2) and (3), i.e., without notification or between a notification and the Commission's decision, national courts have the power to safeguard the rights of individuals against this disregard by the Member State's authorities.

C. Procedure When the Commission is Notified

Once the notification of State aid by the Member State was properly made, the Commission must follow procedure in ruling on the propriety of the aid. The Commission must form its initial opinion on the notification within a two-month preliminary period of investigation. By the end of this two month period, the Commission must render its preliminary assessment of whether the aid falls within the scope of article 92(1) and whether it may be exempted under article 92(3). If the Commission has failed to rule on the notification during this preliminary period, the Member State may implement the plan, but must give prior notice of this implementation to the Commission.

The Commission's failure to make a preliminary assessment does not, however, prevent the Commission from continuing its procedure. The aid granted in the interim period merely becomes an existing aid and is subject to review under article 93(1) and (2). As in the case of an existing aid, a decision to abolish a new aid can have prospective effect only, and therefore the Commission may not require aid granted in the interim period to be repaid.

On the basis of the preliminary examination, the Commission can make two "decisions." If the Commission raises no objections, it can authorize the aid. The Commission informs the Member State of the authorization in an informal letter. In addition, the authorization can be published in the Official Journal of the European Communities. If, however, the Commission has serious doubts at the end of the two month period, it must open the so-called contentious procedure under article 93(2).


D. Procedure When the Commission is Not Notified

If a Member State implements a new aid without notifying the Commission, but the aid nevertheless comes to the Commission's notice, the Commission evaluates the aid in the following manner.52

The Commission first asks the Member State for all information necessary for the Commission to determine whether the aid is compatible with the Common Market. If the Member State does not reply, or if the reply is incomplete, the Commission may take a provisional step by requiring the Member State to suspend the operation of the aid scheme and to inform the Commission of the manner of its compliance with the decision within 15 days.53

If the Member State complies with this provisional decision, the Commission is obliged to examine the aid pursuant to article 93(2) and (3). If the Member State fails to comply with the provisional decision, the Commission can proceed to a final decision on the legality of the aid. The Commission may prohibit the aid in a final decision under article 93(2) on the basis of the information in its possession since the Member State opted not to offer any additional information. In this (final) decision, the Commission can, if necessary, seek repayment of the amount of the aid already granted. If the Member State fails to comply with either a provisional decision or a negative final decision, the Commission may refer the matter directly to the Court of Justice pursuant to article 93(2), subparagraph 2, and apply for interim measures if necessary.

It should be noted that the failure to notify the Commission of a new aid does not render the aid automatically unlawful. Thus, the Commission cannot declare aid illegal solely because the Member State has failed to meet its obligation to notify. As stated above, the Commission is obliged to examine the aid pursuant to article 93(3) and has to open the contentious procedure under article 93(2) if it intends to prohibit the aid. If the parties do not submit additional information or comments, however, the Commission may make a final decision on the basis of the information in its possession.54


53. See, e.g., Twenty-First Report, supra note 32, at 166–67 (discussing the case of Pari Mutuel Urbain).

E. The Contentious Procedure

The Commission must open the contentious procedure if it has serious difficulties in assessing whether or not the State aid is compatible with the Common Market. In particular, this occurs when only a complex analysis of the market, and further investigations of the undertakings in the affected market, can resolve such serious difficulties.\(^5\) The significance of an investment or an aid per se, however, cannot constitute such serious difficulties. Otherwise, the Commission would have to open the contentious procedure in all cases where the investment or the aid exceeds certain thresholds.\(^6\)

The contentious procedure starts with the Commission announcing the initiation of the procedure in the Official Journal. It invites the interested parties — the Member States, the recipient, and the competitors in all Member States — to submit their comments. The recipient of the aid does not have to be informed individually.\(^7\) The Commission then examines the views of all the interested parties. The Member State concerned is also given the opportunity to comment on any submissions made by third parties if the Commission intends to base its decision on such submissions.\(^8\)

If the Commission finds that the aid is not compatible with article 92, the Member State must abolish the aid. In addition, the Commission may require the repayment of the aid if it was unlawfully paid to the recipient. If the Commission raises no objections, it then authorizes the aid, sometimes subject to certain alterations. All decisions, whether for or against the aid, must be published in the Official Journal.

There is no time limit within which the Commission must reach a decision under article 93(2). However, in a case where the procedure lasted twenty-six months, and the Commission offered no justification for the delay, the Court of Justice considered the procedure unreasonably long and annulled the Commission's subsequent decision.\(^9\)

Finally, it should be noted that the Court requires the Commission to observe the article 93 procedure strictly. For example, in *British Aerospace and Rover v. Commission*, the Court annulled the Commis-

sion decision on purely procedural grounds. In that case, the British government had granted certain benefits to British Aerospace in connection with its acquisition of the Rover group. The EC Commission authorized that State aid, subject to certain conditions. Later, information was revealed indicating that the Government had granted further financial concessions of approximately forty-four million British pounds. The Commission, concluding that these concessions were illegal aid, issued a decision requiring Great Britain to recover the extra concessions from the recipient.

The Court reviewed the Commission’s decision and held that the Commission did not comply with the procedural rules provided in article 93. The Court determined that when the Commission found the further aid illegal, it should have done two things. Since the extra aid constituted a breach of the conditions and terms of the earlier decisions, the Commission should have referred the matter directly to the Court of Justice pursuant to article 93(2), subparagraph 2. Also, since there was a new aid which had not been examined previously through the proper procedure, the Commission should have opened a contentious procedure (art. 93 (2)), which includes a hearing of the interested parties. Since the Commission’s decision merely required the recipient to repay the money, without giving the parties concerned an opportunity to be heard, the Court annulled the decision.

III. REPAYMENT OF ILLEGALLY GRANTED STATE AIDS

A. The Commission’s Power to Order Repayment

A Commission decision to abolish illegal State aid would be without practical effect if the Commission could not require the Member State concerned to recover this illegal aid from the recipient. It is thus well established in Community law that the Commission has the power to require such recovery, including the interest accrued on the granted aid. The aid is not always repaid to the Member State, but rather to the institution granting the aid, and never to the Commission.

The Commission has discretion over whether or to what extent the aid must be reimbursed. This enables the Commission to take into

61. As of 1988, 22 Commission decisions ordered repayment of aids in the amount of approximately one billion ECU. COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTEENTH REPORT ON COMPETITION POLICY 139 (1988). Also see the list of decisions ordering recovery in Commission’s answer to the Written Question No. 2716/90, 1991 O.J. (C 177) 1.
consideration the particularity of each case. In exercising its discretion, the Commission has to respect the principle of proportionality and the principle of respect of legitimate expectation.62

B. Compliance with the Order of Repayment

If the Commission orders the recovery of aid payments, article 173 (subparts 2 and 3) allows the Member State, as the addressee of such order, to appeal the decision within a two-month period. When this time limit expires, the Commission's decision becomes final. The Member State must then carry out all appropriate measures to recover the aid payments from the recipient of the aid.63

There is an established principle that a Member State may not claim that provisions, practices, or circumstances existing in its legal system justify its failure to comply with obligations resulting from Community law.64 The Member State must use all the power at its disposal to secure repayment including, if necessary, exercising its rights as shareholder or creditor to wind up the company.65 The Member State may only plead that compliance with the order is absolutely impossible.66 Therefore, financial difficulties of the aided undertaking do not make compliance with the Commission's decision an "absolute impossibility."67 Since the purpose of ordering repayment is to remove the effects of an unlawful aid, where the recipient survived solely because of the aid, a necessary consequence of the order of repayment is to force the recipient into liquidation. Furthermore, a Commission decision ordering the suppression of the aid by means of repayment of the amount paid is not out of proportion with the illegal act but simply the logical consequence of the illegality of the aid.68

62. Case C-301/87, France v. Commission, 1990 E.C.R. I-307; Case 310/85, Deufil v. Commission, 1987 E.C.R. 901, 928. The principle of proportionality is that the individual should not have his freedom of action limited beyond the degree necessary for the public interest. The principle of respect of legitimate expectation is explained infra, part III.D.


Any difficulties in the implementation of the Commission’s decision have no influence on its legality. If, however, the aided undertaking were to go into liquidation whereby its property and assets were surrendered to its creditors and the Member State exercised all rights as creditor in the winding up procedure for the amount of aid paid, then the Member State would have adequately complied with its obligations under the Commission’s order.\(^6^9\)

If a Member State finds that there are difficulties in carrying out a Commission decision ordering recovery, then, rather than ignoring the decision, the Member State should submit proposals to the Commission, pursuant to article 5 of the EEC Treaty, for suitable amendments to the decision.\(^7^0\) However, it is not sufficient to merely inform the Commission of legal and practical difficulties with respect to the recovery, before actually trying to secure payment from the recipient and before submitting proposals for suitable amendments.\(^7^1\)

**C. Application of National Law**

European Community law does not provide rules for the actual recovery of unlawful State aids. In the absence of such provisions, the national authorities must proceed in accordance with the procedural and substantive rules of their own national law regarding the recovery of monies which were improperly paid.\(^7^2\) The application of national law is, however, subject to the limit imposed by Community law. Accordingly, national law must be applied in a manner that does not make the recovery virtually impossible.\(^7^3\) As an example, in *Commission v. Germany*,\(^7^4\) the German government argued that under German law, the State may require recovery of the aid only within a limited time period and that this period had already expired. The Court denied this argument and held that since Community law prevails over national law, the application of national law must not make the Community obligation of repayment impossible in practice.

Moreover, the application of national law must not affect the scope

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and effectiveness of Community law. The Community interest in recovery of unduly paid aid must be fully taken into consideration. Thus, the exercise of any discretion in determining whether or not it would be expedient to demand recovery of the aid is not permitted if Community law requires such recovery. The fact that national law does not provide rules and procedures for recovering unduly paid aid does not affect the Member States' obligation to recover such aid.

D. Legitimate Expectation of the Beneficiary

If the recipient relied on the legality of the aid, requiring repayment of the aid may conflict with the principle of protecting the legitimate expectations of the beneficiary of an aid. This principle is part of the legal order of the Community. Therefore, a recipient may attempt to argue that, based upon his good faith reliance on the Member State's compliance with the law of State aids, his acceptance of the aid is protected and, thus, he is not obliged to refund the aid granted him illegally. In certain circumstances, this argument may be persuasive.

A beneficiary is not justified in relying on the compliance of an aid with EC law when the Commission is reviewing the aid prior to reaching a final decision under article 93. Consequently, if an aid is granted during the pending Commission review, the recipient bears the risk that the aid be considered illegal by the Commission and must be repaid. An exception could be where the Commission unreasonably delayed the proceeding without justification for the delay. Here, the recipient may have been legitimately justified in expecting that the Commission would not object to the aid.

A recipient might try simply to argue that he relied on the Member State to observe the Community procedures. The notification of new aids under article 93(3) is, however, a fundamental obligation imposed on the Member States. Thus, a recipient who obtained an aid from a Member State must realize that this aid has to be notified to the Com-

80. See id. at I-3457.
81. Case 223/85, RSV v. Commission, 1987 E.C.R. 4617, 4659 (where the procedure lasted 26 months, and the Commission did not justify the delay, the Court of Justice annulled the Commission's decision requiring the repayment of the aid).
mission, and that in the case of failure of the Member State to do so, recovery of the aid may be required. Consequently, the recipient is not justified in simply trusting that the Member State has complied with its obligation under article 93. Rather, the recipient should verify personally whether the Commission has been notified. The Court of Justice termed this the concept of the "diligent recipient," whose task is to make sure that the procedure has been complied with. Thus, if a beneficiary failed to verify whether there had been a notification, it would be impossible, in principle, for him to rely on legitimate expectation.

In sum, recipients of State aid can only invoke the protection of the principle of legitimate expectation if the aid had been granted in accordance with the notification procedure laid down in article 93, and if the aid was not granted prior to a final Commission decision. Nevertheless, there may be exceptional cases where a recipient may establish legitimate expectation although the aid was granted without observing these procedural requirements. This might occur where an undertaking was granted an "atypical State aid," which the Commission considered State aid because of the concept's broad definition, and the undertaking is not familiar with the EC law.

IV. Remedies

A. Remedies Before the Court of Justice and the Court of First Instance of the European Communities

1. The Commission’s Enforcement Remedies

If the Member State does not comply with a decision prohibiting an aid, the Commission may enforce its decision by referring the matter directly to the Court of Justice, pursuant to article 93(2), subparagraph 2. In contrast to articles 169 and 170, no formal notice and no issuance of a reasoned opinion to the Member State is necessary. Together with its complaint under article 93(2), subparagraph 2, the Commission can apply for interim measures by the Court of Justice, pursuant to article 186, should the Member State fail to comply with the Commission’s

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84. Id.
85. See supra part I.B.1.
86. See Magiera, supra note 2, 228–29.
decision requiring it to abolish an aid.\textsuperscript{88}

The Commission has the same right of referral if a Member State fails to comply with a so-called "provisional" decision. Such a provisional decision requires the Member State to suspend the operation of an aid which has not been notified or which has been implemented before the Commission has ruled on the aid.\textsuperscript{89}

2. Other Parties' Remedies

Pursuant to article 173(1), a Member State may appeal a Commission decision requiring the Member State to abolish and to recover the aid granted.

In two recent cases,\textsuperscript{90} the Court of Justice held that a Member State may challenge a Commission decision to initiate the contentious procedure under article 93(2). The Court reasoned that such a Commission decision was not an interim measure since it had binding legal effects on the Member State. First, the decision prohibited the Member State from implementing the aid measure before the article 93(2) procedure was complete. Furthermore, the decision was more than a preparatory measure, the illegality of which could have been challenged in the final decision. Even if the Commission were to authorize the aid in its final decision this would not have the consequence of remedying \textit{a posteriori} the implementation of that aid.\textsuperscript{91}

In contrast, the Commission's decision to initiate a procedure in competition and anti-dumping proceedings, is only an intermediate measure whose purpose is to prepare for a final decision, and is therefore not reviewable by the Court of Justice.\textsuperscript{92}

In principle, a Member State can obtain interim relief against a Commission decision pursuant to article 186 provided that the Member State can prove that it will suffer serious and irreparable damage. Nevertheless, the Member State cannot obtain interim relief by arguing that its national industry or the recipient would suffer such grave and

\begin{footnotesize}
89. \textit{See supra} part II.D.
91. ECJ, C-312/90, Spain v. Commission, Judgement of 30 June 1992, points 20, 21 and 23.
\end{footnotesize}
irreparable harm. In that case, the recipient itself would have to apply for interim measures.\textsuperscript{93}

Whether the recipient of an aid is entitled directly to challenge a Commission decision prohibiting an aid is not entirely clear. Pursuant to article 173(2), any undertaking is entitled to institute proceedings against a decision addressed to another person, if this decision is of direct and individual concern to that undertaking. The Court of Justice has held that where the intended recipient was a single undertaking, or where the intended recipients of the proposed aid constituted a closed category of undertakings, the decision could be challenged by those undertakings. In contrast, if there is a large number of intended recipients who do not constitute a closed category of undertakings, the recipients may not directly challenge the decision. On the other hand, a body established under public law to represent those undertakings, or a trade association, can have sufficient standing under article 173(2) if it actively participated in the administrative proceedings before the Commission.\textsuperscript{94}

A more difficult question is whether competitors of the recipient of an aid may challenge the aid by claiming that they will be prejudiced by the aid measure. In order to answer this question, one must first distinguish between the challenge to a formal decision (subsequent to the contentious procedure), and the challenge to a Commission authorization on the basis of the preliminary assessment within the two-month period.

3. Types of Decisions Which May Be Challenged

a. Challenge to Formal Decisions

With respect to the formal decision, the Court of Justice has applied the same principle as it did in the context of competition and anti-dumping proceedings. In order to meet the article 173(2) requirement that the measure be of direct and individual concern, two conditions must be satisfied: (1) the undertaking must have participated in the Commission investigation into the proposed aid. Participation is likely to be found particularly where that undertaking made the complaint which led to the opening of the investigation procedure, or where it submitted its comments during the contentious procedure laid down in article 93(2); and (2) where the position of that undertaking on the market significantly is affected by the proposed aid.


If these requirements are met, the undertaking is entitled to initiate proceedings under article 173(2) to challenge a decision authorizing the aid.\(^{95}\) In *Cdf Chimie Azf v. Commission*, the Court of Justice, for the first time, annulled a Commission decision authorizing an aid upon substantive grounds where the action was brought by a third party.\(^{96}\)

b. Challenge to Preliminary Assessments

Until recently, the question of whether competing companies are entitled under article 173(2) to appeal a Commission authorization of an aid after the two-month investigation period has been the subject of controversy. Three recent decisions by the Court of Justice, however, have laid the controversy to rest by confirming the right to such an appeal.\(^{97}\) In its test of direct and individual concern in article 173(2), the Court did not require the plaintiff to have participated in the Commission’s preliminary two-month investigation, as it did with respect to formal opinions. This is not contradictory, since a notice of a State aid is not published in the Official Journal and, very often, competitors become aware of the preliminary investigation of an aid measure only by chance. Thus, it would be unfair to make the right to challenge the preliminary authorization dependent upon the competitor’s participation in the investigation.

B. Remedies Before National Courts

Article 93 provides that the Commission has the exclusive competence (subject to Council actions in exceptional circumstances) to review State aid systems. The Court of Justice concluded from this that article 92, which declares State aids incompatible with the common market subject to a few exceptions, does not have direct effect. Consequently, it cannot be invoked by individuals in proceedings before national courts.\(^{98}\) This is in contrast with article 85(2), which provides national courts with the power to declare anti-competitive arrangements void.

While national courts may not directly rule on the propriety of State aids, these courts may apply article 92 in certain circumstances. This may occur when a national court is presented with a challenge to a State aid.
aid under the stand-still clause, contained in the last sentence of article 93(3), which is the only part of articles 92 and 93 that has direct effect. The stand-still clause prohibits a state from (1) putting an aid into effect without first notifying the Commission, and (2) from putting a new aid system into effect after notification, but before the Commission has ruled on its legality. Since this clause has direct effect, a private party can seek a declaration from a national court that the implementation of an aid violates article 93(3). The national court then must decide whether the State measure concerned is an aid within the meaning of article 92 before it can determine whether the State breached the stand-still clause.

Until recently, it has been unclear what effect the breach of these provisions has on the aid measures themselves. With regard to the Commission procedure under article 93(2), the Court of Justice held that the Commission is not entitled to consider an aid illegal solely on the ground that the obligation to notify was disregarded. The Commission still must examine the aid under article 92.

With regard to proceedings before national courts, in a recent case, FNCEPA v. France, the Court of Justice took a different view. In 1982, the Commission initiated the article 93(2) procedure to determine the legality of a French State aid measure in the fishery sector. In April 1985, the French government implemented the aid. In October 1985, the Commission informed the French government by an informal letter that it had no objections to the State aid measure and intended to close the files. Then, an action was brought against France before a French court contesting the validity of the aid measure since it was introduced in derogation of the stand-still obligation under the last sentence of article 93(3). The French Conseil d'Etat requested the Court of Justice to give a preliminary ruling under article 177 on the decisive question: is an aid measure which was implemented in violation of the stand-still clause, remedied a posteriori if the Commission declares, in its final decision, the aid measure compatible with the Common Market?

The Court of Justice answered this question in the negative. The Court held that national courts must safeguard the rights of individuals against any disregard of the stand-still obligation by taking — in accordance with the national law — all appropriate measures, such as declar-

ing the implementation of the aid invalid, ordering the recovery of any aid already paid, and other interim measures. The Court went on to state that a subsequent final Commission decision does not legalize *a posteri-ori* the invalid implementation of the aid. A contrary result, the Court reasoned, would infringe upon the rights of individuals safeguarded by the above stated measures of national courts, and would encourage Member States to disregard the stand-still clause and deprive this provision of its effectiveness ("effet utile").

This judgment considerably strengthens the possibility for private parties to challenge a State aid measure implemented by the Member State in breach of the stand-still clause. National courts can now order recovery of the aid paid, and order other interim measures, even when the article 93(2) procedure is still pending before the Commission. Such orders taken by a national court are valid and cannot be revoked because the Commission, in a subsequent final decision, declares the aid measure compatible with the Common Market. Private parties, especially competitors, may now challenge aid measures before national courts with more efficiency and with less risk if they know that these aid measures were not notified to the Commission, or were implemented prior to a final Commission decision. For the beneficiary of an aid, it is now even more important to verify that the aid was notified by the Member State and that no procedure under article 93(2) was opened by the Commission.

**CONCLUSION**

In its latest decisions, the Court of Justice has continued developing State aid law and has provided clarification on some procedural aspects. In *Boussac*, the Court strengthened the Commission’s position with regard to State aids implemented by Member States in breach of the stand-still clause in the last sentence of article 93(3). In *FNCEPA v. Commission*, the Court increased the right of individuals to challenge aid measures before national courts which were implemented by Member States in disregard of this stand-still clause. The Court’s decision in *British Aerospace and Rover v. Commission* confirmed the Court’s requirement that the Commission strictly observe the procedural rules. Where the Commission has been given broad discretion, and where a

103. *Id.* at I-5529.
complex economic assessment is involved, as is the case with regard to State aid, competition, and antidumping cases, the Court of Justice is reluctant to disturb the Commission’s findings. Thus, it is all the more important that the procedural rights of the parties involved are strictly complied with.

In recent years, the Commission’s State aid policy has become more understandable to the general public. For example, the Commission now publishes a summary of all cases dealt with in the Bulletin of the European Communities, issues press releases in the more important cases, publishes all final decisions in the Official Journal, and gives notice in the Official Journal of all cases in which proceedings are initiated. Nevertheless, the procedural rights of recipients of an aid are insufficient. The recipients often do not know whether the government which has given them aid has given notice to the Commission, even though it is the recipients who will have to repay an illegally granted aid. Even if they ascertain that notification has been made, they will not know what objections the Commission has taken. They do not know how complete the notification has been and what arguments have been used to support it. Moreover, there is no obligation for the Commission during the two-month preliminary period to invite third parties, especially the recipients, to submit their comments. If the Commission decides to open the contentious procedure they will not be informed individually. There is no mandatory oral hearing during the contentious procedure, and the recipients do not have access to the Commission’s files. Thus, the system, as it presently stands, is unfair to the aided party, especially in cases where the Commission examines an aid measure to be granted to an individual undertaking.

In order to strengthen the procedural rights of recipients and third parties, a new regulation, based upon article 94, outlining the application of article 93(2) and (3), would be a solution. Regulations No. 17/62, 27/62 and 99/63, which govern the application of the competition rules, could provide the necessary guidance.