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**RECENT DEVELOPMENTS IN EC
STATE AID LAW**

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Recent Developments in EC State Aid Law

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RECENT DEVELOPMENTS IN EC STATE AID LAW

Piet Jan Slot¹

1.Introduction

State aid in the EC is a very hot topic these days. There is plenty of action in Brussels, the Member States and in the literature.² In June 2005 the EC Commission published a consultation document: "State Aid Action Plan. Less and better targeted aid: road map for state reform 2005-2009."³ On 21st November 2008, the Commission organized a seminar to present the results of the plan so far. The seminar also provided an opportunity to discuss the developments. Some 400 persons from all walks of Community legal life attended the seminar and others were on the waiting list. The aim of the State Aid Action Plan (SAAP) is to provide support for the renewed Lisbon strategy and to create better governance and transparency. The SAAP has the following objectives:

- Less and better targeted aid,
- A refined economic approach,
- More efficient procedures, better enforcement, higher predictability and enhanced transparency,
- Shared responsibility between the Commission and the Member States.

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² Recent books are: W.Mederer, N. Pesaresi and M.van Hoof eds.: "EU Competition Law, Vol IV, book 1 and 2, Claey's & Casteels, September 2008. A 1596 page compendium written by 40 officials of the Commission. See also P.Vesterdorf and M.Uhd Nielsen, *State Aid of the European Union*, London, Thompson 2008. *EC State Aid Law/Le droit des aides d'Etat dans la CE*, Liber Amicorum Francisco Santaolalla Gadea, Wolters Kluwer 2008. A useful guide to the case law of the Community Courts broken down by subject matter, is: R. Barents, *Directory of EC Case Law on State Aids*, Wolters Kluwer, 2008, the book covers the case law until March 2008 to the extent that judgments have been translated into English.

³ COM(2005) 107 final, Brussels, 7.6.2005; SEC(2005) 795.

So far, 12 new instruments have been adopted pursuant to the plan.⁴ The Annex to this publication lists all applicable state aid rules. The centerpiece of these instruments is the new General Block Exemption Regulation (GBER). As a result of the new block exemptions, some 65% of the state aid measures is now block-exempted. This figure will even be higher after the raising of the threshold for exemptible aid under the revised *de minimis* rule in December 2008 from 200.000 to 500.000 Euros.⁵ It should, of course, be observed that this figure of 65% is somewhat optimistic in the sense that the remaining 35% are the difficult cases with often a high political profile. The latter is demonstrated by the state aid measures for the financial sector discussed under point 4 below.

The case law of the Community courts in state aid cases continues to expand. In the last three years i.e. from 2005-2008 there have been 50 ECJ and 47 CFI judgments.⁶ It is, of course, impossible to provide a full discussion of this case law: that would require another, thorough and lengthy, study. Instead some leading judgments will be discussed and put in the context of the development of EC state law. The cases deal largely with procedural matters such as the enforcement of the state aid rules by national courts and the position of the complainant. The CELF judgment C-199/06 held that recovery of unlawful aid by a national court is no longer required by community law. The Luchini judgment C-119/05 concerned

⁴ Community Framework for State aid for Research and Development and Innovation OJ 2006 C 323/1; Decision on the application of Article 86(2) to State Aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ 2005, L312/67; Community Framework for state aid in the form of public service compensation, OJ 2005, C 207/4; Directive 2005/81, amending dir.80/723 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings; Communication on Short Term Credit Insurance ,OJ 2005, C 325/22; Guidelines on Regional Aid OJ 2006, C 54/13; Guidelines on Risk Capital, OJ 2006, C 194/2; Framework on Research, Development & Innovation, OJ 2006, C 323/1; Block Exemption on Regional Aid, OJ 2006, L 302/29; Block Exemption De Minimis, OJ 2006, L 379/5; Guidelines on Environmental Protection, OJ 2008, C 82/1; Communication on Reference and Discount Rates, OJ 2008, C 14/6; Communication on Guarantees, OJ 2008, C 155/10; General Block Exemption Regulation(GBER), OJ 2008, L 214/3.

⁵ Communication from the Commission; "Temporary framework for State aid measures to support access to finance in the current financial and economic crisis." IP/08/1993 of 17 December 2008.

⁶ See the website of the Court under: Digest of the case law under B.09.

recovery ordered by the Commission after it has decided that an unlawful aid is not compatible with the Treaty. The Chronopost judgment concluded a lengthy string of a Commission decision, a CFI judgment, an ECJ judgment, another CFI judgment and a final ECJ judgment. Shedding important light on how to calculate the compensation for services of general economic interest, the CFI BUPA judgment provides a very interesting illustration of the application of the Altmark criteria. The judgment in case C-521/06 concerned the notion of what constitutes an appealable decision.

Due to the ample discretion of the Commission in applying the state aid, there is generally less intervention by the community courts in substantive matters. The Altmark strand of case law is an exception to this rule.

In the fourth section I will discuss the financial crisis that has led to some important changes in the Commission's state aid policy. In order to cope with current crisis, the Commission adopted two Communications. On the 13th October 2008 the Commission adopted a Communication on: "The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis"⁷ ("the Banking Communication"). On 5th December it adopted a fresh communication: "The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition."⁸ The Commission's approach follows the well-known principles of the guidelines for rescue and restructuring.⁹ The Communication is in line with the recommendations of the ECB.

In section 5, I will discuss the notice on the enforcement of state aid law by national courts.

⁷ OJ 2008, C 270/8.

⁸ C(2008) 8259 final.

⁹ OJ 2004, C 244/2.

In view of the importance of the notion services of general economic interest and the question of the compatibility of their financial compensation with the state aid rules, it seems appropriate to start with the Altmark case law and its subsequent legislation first.

2. The Altmark case law

The notion of public services, or services of general economic interest, has become a key concept in Community law and politics.¹⁰ It is a notion that is particularly important in those sectors that have been the target of liberalization: transport, energy, telecommunications, postal services; it is also relevant in other sectors such as broadcasting. The Treaty of Amsterdam in 1997 added a new Article 16 EC, according to which “the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfill their missions”.¹¹ Article 36 of the EU Charter of Fundamental Rights recognizes and respects services of general economic interest. The European Council of 20-21 June 2007 adopted a Protocol on services of general economic interest, which is now part of the Lisbon treaty.¹²

¹⁰ Its political importance was highlighted during the French campaign for the referendum on the Constitutional Treaty in the spring of 2005. One of the arguments of the “No” camp was that the Community was gradually undermining the public services. Note also that the concepts of public service obligations and services of general economic interest are of significance in the field of EC free movement law as well as under the competition rules: see e.g. the discussion of the free movement of goods in the *Energy cases* (note 559, *infra*) and of the free movement of capital in the various *Golden shares* cases (note 184, below). See e.g.: Tony Prosser, “Competition Law and Public Services: From Single Market to Citizenship rights?” 2005 EPL p. 543 and Giulio Napolitano, “Towards a European Legal Order for Services of General Economic Interest,” (2005) EPL 565.

¹¹ See Ross, “Article 16 EC and Services of General Interest: From Derogation to Obligation” (2000) 25 EL Rev. 22.

¹² Protocol No. 9 on Services of General Interest: “The High Contracting Parties, Wishing to emphasise the importance of services of general interest Have agreed upon the following interpretative provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Unfortunately, the terminology is not always entirely clear: for the Commission uses the term "services of general interest" to include both services of general interest and services of general economic interest.¹³ The protocol also refers to both terms. It would be helpful to make a clear distinction between the two concepts and use the term services of general economic interest only for market activities i.e. activities performed by undertakings, and services of general interest for non-market activities i.e. performed by entities that are not undertakings.¹⁴

There has been a lively discussion on the proper function of public services and the extent to which such services are exempt from the competition rules and the state aid rules; the latter question is largely dealt with by reference to Article 86(2) EC.¹⁵ A new element has been added by the Court's judgment in the *Altmark* case,¹⁶ which provided important guidelines on the compatibility of financial compensation for such services

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 16 EC Treaty include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organizing services of general economic interest as closely as possible to the needs of the users;
- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights;

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest."

¹³ See the Communication from the Commission on this subject (COM(2000)580 final, of 20 Sept. 2000), as well as its "Non-Paper" on "Services of General Economic Interest and State Aid" (COMP-2002-01759) of 12 Nov. 2002. On 12 May 2003, the Commission published a Green Paper on services of general economic interest (COM(2003)270 final). In this publication, the Commission examines a variety of public service obligations and the Community instruments in force in the field of services of general interest. The Commission issued a White Paper on the same topic in 2004 (COM(2004)374 final).

¹⁴ That would make it clear that services of general interest do not come within the scope of the Treaty provisions. It would also make Art. 2 of the Protocol redundant.

¹⁵ Art. 86(2) EC deals specifically with undertakings entrusted with the operation of services in the general interest. See further Chapt. IX *supra*.

¹⁶ Case C-280/00, *Altmark Trans and Regierungspräsidium Magdeburg*.

with the state aid rules. It is worth quoting this important judgment extensively. The Court ruled that:

“Public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision [Art. 87(1) EC] where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

- first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

- second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

- third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

- fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations”.¹⁷

¹⁷ Ibid., para. 95.

The *Altmark* judgment has led to further questions about the interpretation of the four conditions that it laid down, as well as about the relationship between those conditions and Article 86(2) EC. The Commission adopted Decision 2005/842, based on Article 86(3) EC, to deal with cases where the *Altmark* conditions are not met.¹⁸ This Decision exempts Member States from the notification duty where compensation for a public service obligation is less than 30 million euro per annum and is granted to undertakings with an annual turnover of less than 100 million euro. According to Article 1 of the Decision, such compensation is to be regarded as compatible with the common market. The Decision also excludes compensation granted to hospitals and for social housing. In addition, the Commission has adopted a Community Framework for state aid given in the form of public service compensation.¹⁹ The Framework addresses situations that do not fall within the scope of application of the above-mentioned Decision and specific projects that Member States have decided to notify.²⁰ The Commission has also enacted a Directive amending the Financial Transparency Directive.²¹ The Commission published further documents in November 2007.²² The Commission's view on the appropriate scope of *Altmark* is also explained in several state aid decisions.²³ It can implicitly be gleaned from these cases, as well as from the Commission's decisions based on

¹⁸ Commission Decision 2005/842/EC on the application of Art. 86(2) EC to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, O.J. 2005, L 312/67. Art. 2 also exempts public service compensation to maritime and air transport links to islands which do not exceed 300 000 passengers, as well as compensation for airports with less than 1000 000 passengers and ports with less than 300 000 passengers.

¹⁹ Community Framework for state aid in the form of public service compensation, O.J. 2005, C 297/4.

²⁰ Para 21 of the preamble of the decision.

²¹ Commission Dir. 2005/81/EC of 28 Nov. 2005 amending Dir. 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, O.J. 2005, L 312/47.

²² COM(2007) 725 final. "Services of general interest, including social services of general interest: a New European commitment." SEC(2007) 1516. "Accompanying document to Communication COM(2007) 725.

²³ See e.g. para. 6.4 of the Commission Dec. of 15 Oct. 2003 on the measures implemented by Italy for RAI SpA, O.J. 2004, L 119/1; Commission Dec. of 20 Oct. 2004, concerning the aid scheme by Spain for the airline Intermediación Area, O.J. 2005, L 110/52; Commission Dec. 2004/838/EC of 10 Dec. 2003 on State aid implemented by France for France 2 and France 3, O.J. 2004, L 361/21.

Article 86(3) EC, that the Commission considers that in those instances where the *Altmark* conditions are *not* fulfilled, that an exemption from the effects of Article 87(1) EC (which prohibits most state aid) may be possible. This exemption is based on Article 86(2) EC, provided that the compensation is commensurate with the extra cost of providing the public service. Regulation 1370/2007 provides for the follow up of the *Altmark* case law in the inland-transport sector.²⁴

In the *BUPA* judgment of 12 February 2008, the CFI applied the *Altmark* criteria in a way as to leave Member States an important discretionary margin.²⁵ The first *Altmark* condition, of the existence of a clearly defined public service obligation, was rather easily satisfied. Thus it was no longer necessary that the service ought to have been offered free of charge.²⁶ Nor was it necessary that all potential users should be able to afford all services concerned.²⁷ In discussing the second criterion the CFI left it to the Member State to determine the compensation for costs. The third *Altmark* criterion requires just as Article 86(2) does, necessity and proportionality. Referring to the ECJ judgment *Commission v. Netherlands*, where the ECJ held that the operator must be able to provide the service under economically acceptable conditions,²⁸ the CFI found that the absence of a direct link between amounts actually paid and compensation under the risk equalization scheme, was not sufficient to conclude that the third condition was not met.²⁹ Finally the CFI found that the fourth criterion could not be applied in the Irish equalisation scheme that was the subject matter in the judgment.

²⁴ O.J. 2007, L 315/1 the regulation is discussed below in paragraph 3.6.

²⁵ Case T-289/03, *British United Provident Association v. Commission* [2008].

²⁶ Paragraph 203.

²⁷ Paragraph 201.

²⁸ Paragraph 222. Case C-157/94, *Commission v. Netherlands* [1997] ECR I-5699 paragraph 53.

²⁹ Paragraph 242.

The above discussion presupposes that the relevant public service obligations have been established in accordance with the requirements of Community law. The question of the determination of public service obligations was the subject of the *Analir* and *Coname* cases. In the *Analir* judgment,³⁰ the Court of Justice granted the Member States a fairly wide discretion in establishing public service obligations, but it imposed clear conditions upon the exercise of that discretion: “*They must be based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned, in such a way as to circumscribe the exercise of the national authorities’ discretion.*”³¹ Although *Analir* involved the interpretation of specific provisions in the Regulation on cabotage in maritime transport,³² the conditions formulated in *Analir* can be taken to be of more general significance for the whole transport sector and, indeed, other sectors where such public service obligations arise.³³

In the *Coname* judgment, the ECJ provided further guidance in this matter for cases where no compensation is involved.³⁴ The direct award of a concession must, on the basis of Articles 43 and 49 EC, comply with transparency requirements such as to enable an undertaking from another Member State to have access to appropriate information so that it would be in a position to apply for the concession. The Court stressed that the transparency requirements do not necessarily imply an

³⁰ Case C-205/99, *Analir*. See the annotation by Slot in (2003) 40 CML Rev., 159-168. The so-called “golden shares” cases – Case C-367/98, *Commission v. Portugal*; Case C-483/99, *Commission v. France*; C-503/99 *Commission v. Belgium* – provide, particularly in the last of these cases, a further clarification of the demands that must be met by any such approval process.

³¹ Case C-205/99, *Analir*, at para 38.

³² Reg. 3577/92 on maritime cabotage, O.J. 1992, L 364/7.

³³ According to the Commission, the frequent use of public service obligations by the Member States has led to the maintenance of a wide variety of procedures and conditions in these areas. On this basis, the Commission has proposed a new regulation to harmonize the creation of such public service obligations (O.J. 2002, C 151E/146). This new regulation would replace Reg. 1191/69/EC, O.J. 1969, L 156/1. The updated proposal COM(2005)319 does not apply to inland waterway transport, therefore Regs. 1169/69 and 1107/70 will continue to apply for this sector.

³⁴ Case C-231/03, *Coname*.

obligation to hold a tender.³⁵ It should be observed that the fourth condition of the *Altmark* judgment requires transparency and suggests a preference for a tender procedure when the authorities provide for compensation for the services. The case law is not entirely conclusive on this requirement. The *Coname* and the *Altmark* judgments do not require a tender, but another recent judgment (*Brixen*) seems to impose such a requirement.³⁶ Both Commission Decision 2005/842, based on Article 86(3), and the Framework mentioned above are silent on this question. The Commission decisions in individual cases suggest a strong preference for tendering, even to the extent that the presence of a tender establishes a rebuttable presumption that the transparency conditions are satisfied.³⁷

3. The State aid Action Plan³⁸

a. The economic approach

As in antitrust law, there is trend to apply economic reasoning to state aid rules. During a seminar given by the Commission on 20th November 2008 in Brussels, the Chief Economist of DG Competition, Damien Neven, provided a useful summary of the Commission's approach.³⁹ Neven and Verouden explained the Commission's approach.⁴⁰ The economic rationale for state aid control is based on the following five arguments:

- Member states aim to foster their own economic development by attracting investment;

³⁵ The concession in the *Coname* case was rather small and this may have led the ECJ not to require a tender.

³⁶ Case C-458/03, *Parking Brixen*. *Brixen* provides a useful clarification of the question when the award of public service concessions can be regarded as a transaction to which the public procurement rules of the Community apply and when this is not the case. In this context it should be noted that *Coname* was a judgment of the Grand Chamber of the ECJ, and *Brixen* was a judgment of a chamber of 5 judges.

³⁷ And, by analogous reasoning, that the absence of a tender creates a rebuttable presumption that the transparency requirements have *not* been satisfied.

³⁸ See Thibaut Kleiner in: W. Mederer, et al. eds.: "EU Competition Law, Vol IV, Part 1, Chapter 3, p. 65-98.

³⁹ The following paragraph is a summary taken from his presentation.

⁴⁰ See D. Neven and V. Verouden in: W. Mederer et al. eds.: "EU Competition law, Volume IV, Part 1, chapter 4, p.99-121.

- Member states may also affect the competitive position of domestic firms in international markets;
- Member states do not consider spill-over effects on other Member States. This may shift employment, rents and reduce investment abroad;
- Uncoordinated actions may degenerate in excessive support;
- But state aid can still contribute to sound public policy objectives and should not be banned per se.

The approach consists of striking a balance between the benefits of state aid and its costs. According to Neven and Verouden this balancing test asks:

“(i) Whether the state aid addresses a market failure or another objective of common interest;

(ii) Whether there is an incentive effect (i.e. whether the aid affects the behaviour of the recipient in a way which meets the objective)

(iii) Whether the aid leads to distortions of competition and trade

(iv) Whether given the magnitude of the positive and negative effects, the overall balance is positive.”⁴¹

The benefits to be taken into account for the balancing test are efficiency rationales and equity rationales. The former consist of a correction of market failures. The latter consist of redistribution and cohesion objectives. The question is are the distortions of competition and the effects on trade limited, so that the overall balance is positive? Therefore the aid should be aimed at well-defined objectives of common interests. It should also

⁴¹ Op cit. p. 100.

be well designed to deliver the objective of common interest. The market failures lead firms to make incorrect decisions from a public policy perspective. They do not take account of positive externalities. Imperfect and asymmetric information also lead to market failure. As far as cohesion objectives are concerned, it is important that positive effects are felt in less developed regions and that socially disadvantaged groups benefit.”

Neven explained that these principles have been incorporated in the Guidelines for risk capital, R&D&I, Regional aid and in the General Block Exemption Regulation and the Guidelines on Environmental Protection.

b. The new system of state aid assessment

The General Block Exemption Regulation constitutes the centerpiece of the new system. Its enactment crowns a decade-long development of block exemption regulations beginning with the enabling Council Regulation 994/98.⁴² At the same time, the Commission has continued to adopt guidelines, communications and notices. As a result a substantial body of substantive rules has been developed. It may therefore be useful to present these rules in schematic form the Annex to this Article. It should be noted that this scheme only lists the rules based on article 87 EC. The procedural are also listed in the Annex. The Annex does not include the special rules for agriculture⁴³ nor does it include the special state aid rules for the transport sector.⁴⁴

⁴² OJ 1998, L 142/1.

⁴³ For these measures see A. Foszczynski and. A. Stobiecka-Kuik, in: W. Mederer et al. eds.: “EU Competition law, Volume IV, Part 4, chapter 15, p. 1511-1558.

⁴⁴ An overview of these can found in P.J. Slot: Kapteyn VerLoren van Themaat, The Law of the European Union and the European Communities, Kluwer 2008, p. 1191 et seq.as well as in A. Collucci in: W. Mederer et al. eds.: “EU Competition law, Volume IV, Part 4, chapter 14, p. 1459-1511.

The way in which Member State measures under the new state aid rules will be analysed, is as follows. First, it should be verified whether or not the aid is exempted by the *de minimis* rules.⁴⁵ If it is not, what type of aid is involved should be ascertained. Next it should be checked whether the measure is exempted under the GBER. If not, it should be assessed whether the measure is exempted by any other block exemption. If not, then it should be analysed under the relevant guideline or communication. Finally, if there are no guidelines or communications or relevant individual Commission decisions an individual assessment should be made.

c. The General Block Exemption Regulation (GBER)

(1) Introduction

The Regulation is designed to consolidate and simplify the hitherto existing block exemption regulations into one single instrument.⁴⁶ A look at the GBER shows that this first objective has certainly been met. It is doubtful however, to say the least, whether the second objective, to simplify, has been achieved. The Regulation is a very complex piece of legislation and certainly not an easy read. Not only are the rules complex, there are also many exceptions. One also wonders whether this Regulation will be helpful for national courts applying the state aid rules. The Commission may well end up having to issue guidelines to facilitate its application, as it has done in the area of antitrust e.g. for the block exemption for vertical agreements.

⁴⁵ It should be remembered that the *de minimis* block exemption regulation was temporarily amended in December 2008 so that the minimum was raised to 500.000Euro.

⁴⁶ See A.Fort and H.Nyssens in: W. Mederer et al. eds.: "EU Competition law, Volume IV, Part 4, chapter 1 p. 762-797.

The GBER comprises three chapters, chapter I Common provisions, chapter II Specific provisions for the different categories of aid, chapter III Final provisions.

(2) Chapter I Common provisions

The scope rules of Article 1 look more like a legal labyrinth than the acclaimed simplified system of application. On a horizontal level it may be noted that the GBER is applicable to all sectors of the economy even though this simple starting point is then considerably weakened with exceptions, followed by exceptions to those exceptions. Such is the case for the following sectors: agriculture,⁴⁷ fishery and aquaculture,⁴⁸ coal,⁴⁹ regional aid in the steel sector, shipbuilding and synthetic fibres,⁵⁰ road and air freight transport.⁵¹ Furthermore, the GBER shall not apply to regional aid schemes targeted at specific sectors of the economy.⁵²

On a vertical level the GBER does not apply to ad-hoc aid granted large enterprises⁵³ or to undertakings in difficulty.⁵⁴

According to Article 3, aid schemes and individual aid fulfilling all the conditions of the Regulation shall be compatible with the common market. There are quite a number of conditions in order for the GBER to apply. In other words the exemption comes with strings attached. It is therefore important to identify aid that is below the *de minimis* threshold because such

⁴⁷ Art. 1(3)(b).

⁴⁸ Art. 1(3)(a).

⁴⁹ Art. 1(3)(d) this exception does not apply to training aid, R&D&I aid and environmental aid.

⁵⁰ Art. 1(3)(e)(f) and (g) respectively.

⁵¹ See paragraph 35 of the preamble.

⁵² Art.1(4) schemes aimed at tourism activities are not considered targeted at specific sectors.

⁵³ Art. 1(5) with again an exception as provided for in art. 13(1).

⁵⁴ Art. 1(6)(c).

aids come with no, or few, strings attached.⁵⁵ Furthermore, as has been outlined above in section 2, it is important to identify financial compensation measures that under the *Altmark* rules are not state aid.

Article 4 provides rules for calculating the aid intensity and the eligible costs.

According to Article 5 of the GBER, the Regulation only applies to aid that is transparent.⁵⁶ The second sentence of Article 5(1) states that: "In particular, the following categories of aid shall be considered to be transparent." This would appear to allow aid to be considered transparent even though it is not listed in the Regulation. Aid is transparent if it is possible *ex ante* to calculate, precisely, the gross grant equivalent. The transparency condition is fulfilled when the methodology for calculating it has been approved by the Commission following notification. This system is applicable to aid below the maximum amount of aid exempted under the Regulation. Larger amounts of aid should be notified individually. The maximum amounts should be expressed in terms of aid intensities in relation to eligible costs. For aid to large undertakings that are within the scope of the GBER, Member States have to ensure that the beneficiary has analysed, in an internal document, the viability of the project for which aid is foreseen. Article 9 requires Member States to forward to the Commission a summary of the exempted aid measure. The summaries shall be published in the Official Journal. According to Article 10(1) the Commission shall regularly monitor the aid measures it has been informed of. Article 10(2) requires that Member States maintain detailed records of exempted aid for a period of 10 years. Article 10(3) provides that the Commission

⁵⁵ Regulation 1998/2006. The *de minimis* block exemption excludes export aid, agriculture and fisheries as well as the transport sector. It also excludes aid that cannot be calculated precisely in advance, art. 2(4) and paragraph 7 of the preamble of the regulation.

⁵⁶ A similar transparency requirement was laid down in the previous block exemption regulations.

may request information for the monitoring of the Regulation. The Article provides for sanctions when the Member State concerned does not provide the information. It further allows the Commission to require the Member State that has failed its duties under Article 10(2) and (3), to notify all future aid to which the GBER applies. In other words it may withdraw the benefit of the block exemption for the Member State concerned. It should be noted that this is a different type of withdrawal than the withdrawal, which is common for antitrust block-exemptions where the withdrawal has effect *erga omnes*.

Fort and Nyssens write that the Commission may open the procedure of Article 88(2) EC if a Member State fails its duties.⁵⁷ It is doubtful whether this is correct. The Commission can only withdraw the benefit of the GBER when this is clearly stipulated in the Regulation. Now that it has adopted the Regulation the Commission is no longer free to follow the procedure of Article 88(2) EC whenever it feels like it. The Commission cannot have its cake and eat it. This seems to be contrary to the principle of legitimate expectations. It should also be noted that this provision does not address the situation where the Commission does receive the necessary information, but considers the measure to be incompatible. If the Commission considers that such aid measure does not satisfy the conditions of the GBER, it may avail itself of the Article 88(2) because the Regulation does not apply. On the other hand, the Commission cannot use that procedure in the situation that the conditions of the GBER are satisfied. However, such situations will be rare.

Article 6 lays down the maximum amount of aid that is block exempted. There are 14 different maximum amounts varying from 2 million euro for training aid, to 20 million euro for aid for fundamental research.

⁵⁷ OP. cit. 785.

The GBER specifies when aids may be cumulated thus addressing the situation that arose in the Dutch petrol stations case.⁵⁸ Genuine individual investments below the threshold come within the scope of the GBER while a series of investments by one and the same undertaking will not. The main rule is found in Article 7(2) of the Regulation, which states that aid may be cumulated with any other type of exempted aid under the GBER, as long as those aid measures concern different identifiable eligible costs. According to Article 7(3), aid exempted by the GBER shall not be cumulated with any other aid exempted by it, or by the *de minimis* Regulation in relation to the same eligible costs when such cumulation would result in exceeding the highest aid intensity. According to paragraph 27 of the preamble, it may be necessary to have a look at the relevant guidelines in case of cumulation of aid that is not covered by the GBER.

According to Article 8, only aid that has an incentive effect shall be exempt. Aid shall only be considered to have an incentive effect if the beneficiary has submitted an application before actually starting work on the project. For large enterprises there are several additional requirements. These rules are an incorporation of the compensatory justification principle of the *Philip Morris* judgment.⁵⁹ This principle was formulated by the ECJ following its general case law according to which, exceptions to a basic prohibition have to be necessary. It also follows from the wording of Article 87(3) that aid “*may be considered to be compatible with the common market.*” In the context of the state aid exemptions, this means that the aid will not be considered necessary if the undertaking itself would have made the investment. The requirement of the incentive is

⁵⁸ Case C-382/99 *Netherlands v. Commission*, [2002] ECR I-5163. Art. 7.

⁵⁹ Paragraph 28 of the preamble.

also a reflection of the economic approach. Without such an incentive effect there will be market distortions.⁶⁰

The GBER also incorporates the *Deggendorf* principle that no fresh aid may be granted before previously granted aid, that is subject to a recovery order, is repaid.⁶¹

The GBER includes an anti-circumvention rule in that it specifies that aid may not be artificially divided into subprojects so as to escape the notification threshold.⁶²

(3) Chapter II

The GBER consolidates previous block exemption regulations and provides for new block exemptions for environmental aid, aid for SME's, by women or in assisted regions, innovation aid and aid the form of risk capital.

Articles 13 and 14 lay down rules for the exemption of regional aid. Article 13 replaces the block exemption regulation for regional investment aid.⁶³ The GBER refers to regional investment and employment aid. The exemption applies to aid schemes. Article 13(1) second paragraph also provides a block exemption for ad hoc aid that does not exceed 50% of the total aid. The most important difference between the GBER and the previous regulation is found in the transparency requirements. Article 14 provides for an exemption for a new type of aid: aid for newly created small enterprises. Article 15 provides an exemption for SME investment and employment aid. The rules are very similar to the SME Block Exemption Regulation.⁶⁴

⁶⁰ A. Fort and H. Nyssens in: W. Mederer et al. eds.: "EU Competition law, Volume IV, Part 4, chapter 1 p. 779.

⁶¹ Art. 1(6)(a) Case C-355/95P, *TWD Deggendorf v. Commission*, [1997] ECR I-2549.

⁶² Paragraph 41 of the preamble. Similar rules apply in the public procurement regulations.

⁶³ OJ 2006, L 302/29.

⁶⁴ Reg. 70/2001, OJ 2001, L 10/33 amended by reg. 364/2004 OJ 2004, L 63/22.

Article 16, providing an exemption for aid to small enterprises newly created by female entrepreneurs, is new. The provision is designed to tackle the specific market failures women encounter with respect to access to finance. Women also face particular difficulties linked to bearing caring costs for family members.⁶⁵

Articles 17-25 deal with exemptions for environmental aid. This section is new. It has to be read together with the revised 2008 environmental guidelines.⁶⁶ The calculation method for eligible costs has been substantially simplified when compared to the method embodied in the guidelines. The basic principle is that the aid may only be designed to meet the extra costs an undertaking incurs which are necessary to meet an environmental objective. The extra benefits an undertaking enjoys because of such extra investment, may be disregarded. The provisions include exemptions for investment in energy saving, high-efficiency cogeneration and renewables. The provisions on environmental aid in the form of tax reductions include only a part of the guidelines.

Article 29 provides for an exemption for aid in the form of risk capital. This is a new form of aid block exempted under the Regulation. The rules are similar to those in laid down in the in the risk capital guidelines.⁶⁷ Only public equity participations in investment funds are block exempted.

Articles 30 – 37 provide rules for the exemption of aid for research, development and innovation. They incorporate the rules of the 2004 block exemption regulation.⁶⁸ The GBER also covers R&D project aid and aid for technical feasibility studies

⁶⁵ Paragraph 44 of the preamble.

⁶⁶ OJ 2008, C 82/1.

⁶⁷ Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises, section 4, OJ 2006, C 194/2.

⁶⁸ Reg. 364/2004, OJ 2004, L 63/22.

for large enterprises. This was not the case under the 2004 rules was restricted the exemption to SME's.

Article 38 and 39 block exempt training aid. The rules largely correspond to the rules of the 2001 block exemption regulation.⁶⁹ The notification ceiling has been raised from 1 to 2 million euro. Ad hoc training aid for large undertakings is not covered whilst under the previous rules it was. On the other hand, the eligible costs basis for the providing the aid has been extended.

Articles 40 – 42 provide a block exemption for disadvantaged and disabled persons. There are some minor differences between the Regulation and the corresponding rules in the 2002 employment regulation.⁷⁰ The definition of disadvantaged worker has been simplified and a new category of severely disadvantaged worker has been introduced. The provision on aid for the recruitment of disabled and disadvantaged persons has been clarified.

(4) Chapter III Transitional provisions

Article 44(1) provides that the GBER shall apply to individual aid granted before its entry into force if it fulfills all the conditions of this Regulation. Exemptions under the previous block exemption regulations continue to apply. The enactment of the GBER does not create an obligation for Member States to amend existing aid schemes not covered by the previous block exemption regulations.⁷¹

⁶⁹ Reg. 68/2001, OJ 2001, L 10/20.

⁷⁰ Reg. 2204/2002, OJ 2002, L 349/129.

⁷¹ Fort and Nyssens op. cit.p 796, they refer to the judgment in case C-110/03, *Belgium v. Commission* [2005] ECR I-2801.

(5) Comment

The General Block exemption is a rather complex piece of legislation. The rules are differentiated according different criteria and there are several exceptions to the main rule. This will not make it straightforward for national courts to apply.

4. Case Law

a. CELF

(1) Introduction

An important judgment in this period is the *CELF* judgment⁷² which dealt with the question of the duties of national courts in enforcing the prohibition of Article 88(3) EC and Article 3 of the Procedural Regulation 659/1999 (the standstill obligation).

The procedural rules for state aid are laid down in article 88 of the Treaty, Regulation 659/99⁷³ and the case law of the Community courts. These rules prescribe that state aid has to be notified to, and approved by, the Commission before it can be implemented. The two important notions are unlawful aid and incompatible aid. Aid that is implemented without observing the obligations of article 88(3) EC, *i.e.* the duty to notify and the duty to delay implementation of the aid until the Commission has approved it, is unlawful according to article 1, f, of Regulation 659/99. Aid that is not approved by the Commission is incompatible with the Treaty. Unlawful aid is not automatically incompatible. Until the early 1990s, the Commission held the view that unlawful aid was automatically incompatible with the Treaty. The ECJ rejected this view in the

⁷² Case C-199/06, *Centre d'exportation du livre Français (CELF) v. Société internationale de diffusion et d'édition (SIDE)*, [2008] ECR I-469. It is in the confines of this article not possible to do justice to the many interesting questions raised by this judgment. For a fuller treatment see annotation in 46 CMLRev. 2009, p.

⁷³ Council regulation 659/99 laying down detailed rules for the application of Article 93 of the EC Treaty, O.J. L 83/1 of 27 March 1999.

Boussac judgment.⁷⁴ Consequently, the Commission is under an obligation to investigate and authorize such unlawful aid, if it fulfills the criteria of article 87 EC. A positive Commission decision has an effect *ex nunc*. It does not legalise the unlawful status of the aid prior to such a decision. It only has future effects. On the other hand a Commission decision finding that there is no aid means that the financial compensation does not constitute unlawful aid and consequently there is no ground for repayment.⁷⁵

Even though Commission decisions produce legal effects, they can, of course, be challenged. The Commission decision may be appealed to the CFI and the CFI judgment can, in turn, be appealed to the ECJ. Annulment by the Community courts takes effect *ab initio*. Thus when the Community courts annul a positive Commission decision, the aid becomes unlawful again. The status of the aid remains uncertain as long as there is no final positive Commission decision.

The national court cannot decide on the compatibility of the aid. The role of the national courts based on the direct effect of Art. 88(3)EC and Article 3 of Regulation 659/99 is different. In the *FNCE* judgment⁷⁶ the ECJ ruled that the national courts have to preserve the rights of individuals until the Commission has taken a final decision. This includes recovery of unlawful aid as well as interim measures. Thus far it had been assumed that national courts were under an obligation to order recovery of state aid not yet declared compatible with the Treaty. Furthermore, it was always clear that national courts should order the payment of interest over the period that aid was

⁷⁴ Case C-301/87, *France v. Commission*, ECR 1990, I-307.

⁷⁵ I will omit a discussion of the question what happens if such decision is annulled by the Community courts.

⁷⁶ Paragraph 14 case C-354/90, *Fédération Nationale*, ECR I-1991, I-5523. In paragraph 47 of its judgment in case C-368/04 *Transalpine Ölleitung*, the Court reiterated this duty and held: "that national courts *must offer* to individuals entitled to rely on disregard of the obligation of notification the certain prospect that all appropriate conclusions will be drawn, in accordance with national law, with regard to both the validity of the acts giving effect to the aid and *the recovery of financial* support granted in disregard of that provision or possible interim measures...". (My italics).

unlawful. In the *CELF* judgment a grand chamber of the ECJ ruled that Community law, “*even in the absence of exceptional circumstances, does not impose an obligation of full recovery of the unlawful aid.*”⁷⁷ Until this judgment it was assumed on the basis of the ECJ’s judgment in *Transalpine Ölleitung* that such recovery was required.⁷⁸

The *CELF* judgment is puzzling because it is based on an equivocal concept of a final decision. In the key paragraphs of the judgment, the Court bases its reasoning on the fact that there is a final decision. But in the case at hand there was no such a final decision. There is only a final positive decision when the Commission decision can no longer be challenged or Court of First Instance gives judgment confirming the status of the Commission decision that it can no longer be appealed or the ECJ has confirmed the positive Commission decision.

(2) The facts which gave rise to the dispute, and the proceedings⁷⁹

CELF processes orders from abroad and from the French overseas territories and departments for books, brochures and any communication media, and promotes French culture throughout the world. CELF satisfies orders from all operators, without having regard to the size of the orders or their unprofitability. CELF’s obligations were reaffirmed in agreements concluded with the French Ministry of Culture and Communication.

From 1980 to 2002, CELF received operating subsidies from the French State to offset the extra costs of handling small orders placed by booksellers established abroad.

⁷⁷ Paragraph 46.

⁷⁸ Case C-368/04, *Transalpine Ölleitung*, [2006] ECR I-9957.

⁷⁹ Based on the summary in the judgment of the ECJ.

(3) The community proceedings

In 1992, SIDE, a competitor of CELF, asked the Commission whether or not it had been informed, under Article 88(3) EC, of the aid granted to CELF. The Commission requested, and obtained, information from the French Government about the measures in favour of CELF. The Commission confirmed the aid's existence to SIDE and informed it that the measures in question had not been notified.

By a Decision of 18 May 1993⁸⁰ the Commission concluded that, given the special nature of competition in the book trade, and the cultural purpose of the aid schemes in question, the derogation provided for in Article 87(3)(d) EC applied to them.

SIDE brought an action for annulment of that Decision before the CFI. The CFI annulled the Decision in so far as it concerned the subsidy granted exclusively to CELF to offset the extra costs involved in handling small orders for French-language books placed by booksellers established abroad.⁸¹ It decided that the Commission should have undertaken a detailed investigation of the conditions of competition in the sector concerned prior to ruling on the measures' compatibility with the common market. The Commission should therefore have initiated the adversarial procedure under Article 88(2) EC.

On 30 July 1996, the Commission decided to open a formal investigation procedure in respect of the aid in question. Following its investigation, it adopted a second Decision⁸² in which, first, it found that the aid was unlawful, on the ground that it had not been notified, and, second, declared the aid compatible with the common market on the ground that it satisfied the conditions for derogation under Article 87(3)(d) EC.

⁸⁰ NN 127/92, OJ 1993 C 174, p. 6.

⁸¹ Case T-49/93 SIDE v Commission [1995] ECR II-2501.

⁸² OJ 1999 L 44, p. 37.

Two actions were brought for annulment of that Decision. The first, brought before the ECJ by France arguing that the Commission had failed to apply Article 86(2) EC, was dismissed by judgment of 22 June 2000.⁸³ The second, brought before the CFI by SIDE, was upheld by judgment of 28 February 2002,⁸⁴ which, finding a manifest error of assessment in the definition of the relevant market, annulled the Commission's Decision in so far as it declared the aid compatible with the common market. Following that annulment, the Commission again declared the aid compatible with the common market (third Decision).⁸⁵ SIDE brought an action for annulment of that decision before the CFI. The CFI annulled that Decision.⁸⁶ It held that the Commission erred in law by applying the exemption of article 87(3)(d) EC to the part of the aid paid before 1 November 1993, the date that the cultural exemption entered into force. As to the aid paid after that date the CFI concluded that the Commission had committed a manifest error in assessing the extra costs involved in processing the small orders.

(4) The national proceedings and the questions referred

Simultaneously to the Community proceedings, proceedings were brought before the national authorities and courts. Following the Court of First Instance's judgment of 18 September 1995 in *SIDE v Commission*, cited above, SIDE requested the Minister for Culture and Communication that payment of the aid granted to CELF be stopped and that the be repaid. That request was rejected by decision of 9 October 1996. SIDE brought an action for annulment of that decision before the Tribunal administratif de Paris (Administrative Court,

⁸³ Case C-332/98 France v Commission [2000] ECR I-4833.

⁸⁴ Case T-155/98 SIDE v Commission [2002] ECR II-1179.

⁸⁵ OJ 2005 L 85, p. 27.

⁸⁶ Case T-348/04 SIDE v. Commission, 15 April 2008, n.y.r.

Paris). By judgment of 26 April 2001, that court annulled the contested decision. The Minister for Culture and Communication and CELF appealed against that judgment to the Cour administrative d'appel de Paris (Paris Administrative Court of Appeal). By judgment of 5 October 2004, the Cour administrative d'appel de Paris upheld the judgment appealed against and ordered the French State to recover, within three months of the date of notification of the judgment, the sums paid to CELF for handling small orders for books placed by booksellers established abroad and, in default, to pay a penalty of EUR 1 000 per day for delay. CELF and the Minister for Culture and Communication appealed to the Conseil d'État (Council of State) to set aside that judgment and the judgment of the Tribunal administratif de Paris. In those appeals, the appellants argued, among other things, that the Cour administrative d'appel had made an error of law and an error of legal characterisation by not holding, in the present case, that the fact that the Commission had recognised the aid's compatibility with the common market precluded the obligation to repay the aid which follows, as a rule, from unlawfulness in the implementation of measures of State aid, contrary to Article 88(3) EC, by the Member State. Since it took the view that the resolution of the dispute depended on the interpretation of Community law, the Conseil d'État decided to stay proceedings and to refer the following questions to the Court:

1. Is it permissible under Article 88 [EC] for a State which has granted to an undertaking aid which is unlawful, and which the courts of that State have found to be unlawful on the ground that it had not previously been notified to the ...Commission as required under Article 88(3) EC, not to recover that aid from the economic operator which received it on the ground that, after receiving a complaint from a third party, the Commission declared that aid to be compatible with the

rules of the common market, thus effectively exercising its exclusive right to determine such compatibility?

2. If that obligation to repay the aid is confirmed, must the periods during which the aid in question was declared by the ... Commission to be compatible with the rules of the common market, before those decisions were annulled by the Court of First Instance of the European Communities, be taken into account for the purpose of calculating the sums to be repaid?’

The Court answered the first question as follows:

“The reply to the first question referred must therefore be that the last sentence of Article 88(3) EC is to be interpreted as meaning that the national court is not bound to order the recovery of aid implemented contrary to that provision, where the Commission has adopted a final decision declaring that aid to be compatible with the common market, within the meaning of Article 87 EC. Applying Community law, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness. Within the framework of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State’s right to re-implement it, subsequently. It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid.”⁸⁷

The answer to the second question was:

“The reply to the second question referred must therefore be that in a procedural situation such as that in the main proceedings, the obligation, arising from the last sentence of Article 88(3) EC, to remedy the

⁸⁷ Paragraph 55.

consequences of the aid's unlawfulness extends also, for the purposes of calculating the sums to be paid by the recipient, and save for exceptional circumstances, to the period between a Commission decision declaring the aid to be compatible with the common market and the annulment of that decision by the Community court."⁸⁸

b. The Luchini case⁸⁹

This judgment concerns the duty of national courts to assist the recovery of unlawfully granted aid. The Italian government decided to pay aid to Luchini on condition that the aid would be approved by the Commission. In 1990 the Commission adopted a Decision finding the aid incompatible. Neither Luchini nor the Italian government appealed that Decision. The Italian court held in 1991 that the aid had to be repaid. This was confirmed upon appeal which judgment became final since no appeal was lodged to the Court of Cassation. Upon request of the Commission the Italian government adopted a decree withdrawing the aid and ordering repayment. Luchini brought an appeal against that decree. The administrative court ruled that the aid had to be granted because the previous decision of the Court of Appeal ordering payment had become final. An appeal was lodged against this judgment to Consiglio di Stato which asked for a preliminary ruling. In a judgment of the grand chamber of the Court of Justice ruled that the application of Article 2909 of the Italian civil code had to be set aside since it made it impossible to recover aid. The ECJ referred to its well-established case law:

⁸⁸ Paragraph 69.

⁸⁹ Case C-119/05, *Ministerio dell'Industria v. Luchini*, [2007] ECR I-6199. For a fuller discussion see the annotation by A. Biondi, 45 CMLRev.2008, 1459-1467.

“ It also follows from settled case-law that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation(references omitted).”⁹⁰

c. The Chronopost judgement⁹¹

This the long running saga of the of the logistical and commercial assistance to Chronopost. It started in 1990 with a complaint of its competitor Syndicat français de l’express international (SFEI). The company later changed its name to Union française de l’express(UFEX). After almost seven years the Commission adopted a Decision. Article 1 of the decision read:

“The logistical and commercial assistance provided by [La Poste] to its subsidiary SFMI-Chronopost, the other financial transactions between those two companies, the relationship between SFMI-Chronopost and Radio France, the customs arrangements applicable to [La Poste] and SFMI-Chronopost, the system of payroll tax and stamp duty applicable to [La Poste] and its ... investment in the dispatching platforms do not constitute State aid to SFMI-Chronopost”.⁹²

UFEX appealed to the CFI claiming that the Commission had misapplied the concept of aid. The CFI agreed with the applicants finding fault with the Commission’s view that the logistical and commercial assistance provided by La Poste to its subsidiary, does not constitute state aid. The CFI did not rule

⁹⁰ Paragraph 61.

⁹¹ Case C-341/06P and C-342/-6P, [2008].

⁹² Cited in paragraph 23 of the judgment.

on the other elements mentioned in Article 1 of the Commission Decision. Thus the Commission's finding that the customs arrangement, the system of payroll tax and stamp duty and its investment in the dispatching platforms do not constitute state aid, were left unchallenged. Upon appeal, the ECJ held that the CFI had given an incorrect interpretation of the concept of normal market conditions.⁹³ According to the ECJ the CFI wrongly held the test to be whether the payment received by La Poste was comparable to that demanded by a private holding company not operating in a reserved sector, pursuing a structural policy –whether general or structural – and guided by long term prospects. Consequently the ECJ referred the case back to the CFI. The CFI annulled the Commission's Decision on the ground that it was unable to review whether the method used and the stages of the analysis followed by the Commission were free from error and compatible with the principles laid down by the ECJ. The ECJ disagreed and set aside the CFI judgment because: *"In view of all the foregoing considerations, the judgment under appeal must be set aside in so far as it (i) annuls the contested decision inasmuch as that decision finds that neither the logistical and commercial assistance provided by La Poste to its subsidiary, namely SFMI-Chronopost, nor the transfer of Postadex constitute State aid to SFMI-Chronopost, and (ii) allocates the burden of costs accordingly."*⁹⁴ The other arguments of UFEX were rejected by the CFI and no challenges were brought against this part of the CFI judgment. It was therefore possible for the ECJ to rule on the merits of the judgment. Following its traditional approach when reviewing the Commission's assessment, the ECJ held that the Commission had not exercised its discretion in an erroneous manner.

The final result of this string of CFI and ECJ judgments is that the standard for assessing whether financial compensation for

⁹³ Joined cases C-83/01P, C-93/01P and C-94/01, *Chronopost and others v. UFEX* [2003] ECR I-6993.

⁹⁴ Paragraph 133.

companies involved in public services is state aid, is whether the payment received for such services is comparable to that of a company operating in a reserved sector. Furthermore, the ECJ confirmed the Commission's margin of discretion in making its assessment under Article 87(1).

d. The Athinaïki Techniki case⁹⁵

After a complaint by Athinaïki Techniki the Commission sent it a letter which states as follows: *"I refer to your telephone inquiry seeking to confirm whether the Commission is pursuing its investigation in the abovementioned case or whether there has been a decision to take no further action. By letter of 16 September 2003, the Commission informed you that, on the basis of the information in its possession, there are insufficient grounds for continuing to examine that case (in accordance with Article 20 of [Regulation No 659/1999]). In the absence of additional information to justify continuing the investigation, the Commission has, for the purposes of administrative action, closed the file on the case on 2 June 2004."* Athinaïki lodged an appeal with the CFI which held: *"It follows that the letter [in dispute] does not constitute a Decision within the meaning of Article 25 of Regulation No 659/1999 and that it has no legal effect. That letter is not therefore open to challenge under Article 230 EC."* Athinaïki lodged an appeal with the ECJ. The ECJ ruled that:

"In that regard, it is apparent from the progress of the administrative procedure, as noted inter alia in paragraph 6 of the order under appeal, that the Commission adopted its position on the ground that the State measure at issue did not constitute State aid. The contested act must therefore be classified as a decision

⁹⁵ C-521/06 P, *Athinaïki Techniki* [2008].

within the meaning of Article 4(2) of Regulation No 659/1999, read in conjunction with Articles 13(1) and the third sentence of Article 20(2) of that regulation. As that act prevented Athinaiki Techniki from submitting its comments, in the context of a formal investigation procedure referred to in Article 88(2) EC, it produced legal effects which were capable of affecting that company's interests. The contested act does, therefore, constitute an act open to challenge for the purposes of Article 230 EC.⁹⁶

The judgment is important because it strengthens the position of the complainant. The problem for the complainant has always been that according to the *Sytraval*⁹⁷ judgment, the Commission is not under a duty to adopt a Decision addressed to it. Complainants nevertheless have standing to challenge decisions addressed to Member States. The *Athinaiki* judgment provides complainants with an opportunity to challenge Commission Decisions not to pursue complaints.

5. The financial crisis

In the autumn of 2008, the Commission approved a large number of rescue operations for banks.⁹⁸ The Commission did so after an unusually short expedited examination period.⁹⁹

⁹⁶ Paragraph 60-62.

⁹⁷ Case C-367/95P *Commission v. Chambre Syndicale(Sytraval)* [1998] ECR I-1719.

⁹⁸ The Commission provided an overview in the IP of 4 Dec. 2008, "State aid: Overview of national rescue measures and guarantee schemes". Such overviews are published regularly on the website of DG Comp. See C. Arhold, *Globale Finanzkrise und europäisches Beihilfenrecht*, EuZW, 2008, 713-719, 12 December 2008.

⁹⁹ It should be recalled that the preliminary examination period for notified State aid according to Art. 4(5) of reg. 659/1999 is 2 months. The formal investigation period is another 18 months which may be extended by common agreement according to Art. 7(6) of Reg. 659/1999. Given their impact on competition and their complexity, the decisions in the financial sector would normally have been taken only after the opening of the formal procedure. By contrast, the decisions on the financial crisis were taken within 2 weeks: Decision K(2008) 6422, N 512/2008, Credit institutions in Germany; C(2008) NN 48/2008, Guarantee scheme for banks in Ireland; C(2008) 6616, N 524/2008, Guarantees for banks in the Netherlands. The decision in the case of C(2008) 6936, N 528/2008 Aid for the ING Bank was taken after 3 weeks, because additional information was needed. Other decisions were adopted within 2 days: e.g. C(2008), N 507/2008, Financial support measures to the Banking

Some Decisions were adopted in two days. The Commission's special task force for State aid in the financial sector worked flat out, including the weekends, during the autumn of 2008. On 13th October 2008, it adopted a 'Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis' ("the Banking Communication")¹⁰⁰. On 5th December 2008 it adopted a fresh Communication, "The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition"¹⁰¹. The Commission also adopted a Communication "on the Treatment of Impaired Assets in the Community Banking Sector."¹⁰² In addition the Commission published a Communication: "Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis."¹⁰³ Amendments to this temporary framework were published on the 25th of February 2009.¹⁰⁴

The Commission's approach for the banking sector of 5th December 2008 follows the well-known principles of the Guidelines for rescue and restructuring.¹⁰⁵ The Communication

industry in the UK; C(2008), N 533/2008, Support measures for the banking industry in Sweden; C(2008) 6989, N 567/2008, Guarantee scheme for banks in Finland. Some measures were not notified i.e. Denmark case NN 51/2008, OJ 2008, C 273/2, but approved after the Commission contacted the Danish Government. The Commission approved, originally not notified, State aid for Irish banks in decision C(2008) 6059, NN 48/08. After intensive contacts with the Commission, the Irish authorities submitted the finalized scheme on 12 Oct., addressing issues raised in the discussions (see MEMO/08/615). The Commission found the revised scheme to be compatible with EU State aid rules, because it was an appropriate means to remedy a serious disturbance in the Irish economy (Art. 87(3)(b) EC), while avoiding unnecessary distortions of competition. In particular, it now provides for non-discriminatory access to banks with systemic relevance for the Irish economy, regardless of their origin, fair remuneration of the guarantee, is limited in time and contains appropriate safeguards to avoid abuses. The Irish measures are therefore now in line with the guidance just issued by the Commission (see IP/08/1495).

¹⁰⁰ OJ 2008, C 270/8.

¹⁰¹ C(2008) 8259 final, Brussels 5.12.2008.

¹⁰² On the 25th of February published on the website of DG Comp.

¹⁰³ The Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis applies from 17 December 2008 until 31 December 2010. OJ C 16, 22.1.2009, p. 1.

¹⁰⁴ See the website of DG Comp.

¹⁰⁵ OJ 2004, C 244/2.

is in-line with the recommendations of the ECB. It is based on the principle that State support for banks should not provide the recipients of aid with an artificially advantageous competitive position over banks not receiving aid. The legal basis for the communication is Article 87(3)(b) EC, "aid to remedy a serious disturbance in the economy of a Member State". The approval is subject to the condition of review after six months. Member States have to submit a report for that purpose. The report should inter alia provide complete information on "the path towards exit from reliance on State capital." Competitor banks that have managed without state aid will have a chance to provide their comments and thus protect their interests.

The actions by Member States to rescue the banks have in several instances led to state ownership.¹⁰⁶ According to the case law of the ECJ, this means that the actions by these banks have to be regarded as state aid whenever they are not in conformity with the market economy investor principle.¹⁰⁷ This will provide private banks without or with a minor government shareholding some protection of their competitive position. It also implies that governments have to supervise these banks as to their conduct that may not satisfy the market economy investor test. For the moment such behaviour does not seem to be a serious concern because the banks have, of course, to restore their profitability.

6. The notice on co-operation with national courts

The role of national courts in the enforcement is based on the direct effect of Article 88(3) EC, and since the enactment of

¹⁰⁶ E.g. the UK government has acquired 57.9% of the share capital of the Royal Bank of Scotland; the Dutch government has acquired control over ABN-AMRO.

¹⁰⁷ Case 67/85, *Kwekerij Gebroeders van der Kooy BV and others v. Commission* [1988] ECR 219. As for the market economy investor principle see L. Hancher, T. Ottervanger and P.J. Slot, *EC State Aids*, Thomson Sweet & Maxwell, 3rd ed. London 2006, paragraph 3-065.

block-exemptions, also on the direct effect of those Regulations. As in the field of antitrust law, the application of the Articles 81 and 82 EC, the Commission has been promoting an active role for national courts and private actions.¹⁰⁸ It adopted a Notice on the Enforcement of State Aid Law by National Courts in 1995 following the *Federation Nationale du Commerce Exterieur*¹⁰⁹ judgment. The enforcement by national courts has not been, so far, an unequivocal success¹¹⁰ and is undoubtedly the reason why the Commission issued on 25th February 2009 a new Notice on the Enforcement of State Aid Law by National Courts.¹¹¹ This fresh Notice is an important element of the State Aid Action Plan. It replaces the 1995 notice on co-operation between national courts and the Commission. "The main purpose of the notice is to inform national courts and potential claimants about the remedies available in the event of a breach of the State aid rules."¹¹² The Notice outlines the relevant state aid rules for the national courts. It provides, in paragraph 15-18, the national courts with an update of the relevant rules of the block exemptions and in particular the General Block Exemption Regulation.¹¹³ The Commission does not provide substantial guidance. The General Block Exemption Regulation is a very complex legislative instrument, which may well be difficult to apply.

In next section of the Notice provides a summary of the respective roles of the Commission and national courts as well

¹⁰⁸ It should be clarified that administrative national courts can be called to enforce the state aid rules when they have to grant or sanction orders for recovery issued by Member States. National commercial courts may be called upon to enforce the prohibition of Art, 88(3).

¹⁰⁹ Case C-354/90, [1991] ECR I-5505.

¹¹⁰ See for Germany: A. Martin-Ehlers/S.Strohmayr, Private Rechtsdurchsetzung im EG-Beihilfenrecht-Konkurrentenklagen vor Deutschen Zivilgerichte, EuZW, 2008, p. 745-751. See also the editorial in the same issue by M.Heidenhain: Beihilferecht vor Deutschen Zivilgerichte, EuZW, 2008, Heft 24, V.

¹¹¹ See the website of DG Competition.

¹¹² Paragraph 6 of the Notice.

¹¹³ The 1995 Notice was issued well before the enactment of Council regulations 659/1999, the procedural regulation and the enabling regulation 994/98. The latter allowed the Commission to adopt block exemptions such as the General Block exemption regulation 808/2008 discussed above. These rules have potentially extended the role of national courts considerably.

as the rules for dealing with unlawful aid, including its recovery. The Notice also points out that national courts have to recover interest on unlawful aid. It also discusses damage claims usually directed against the Member State granting the aid. Such actions may, according to the Commission, also be brought against the beneficiary if there is a basis in national law.¹¹⁴ The next section outlines the rules for interim measures. Such measures have to be taken by national courts in order to safeguard the rights of individuals and to ensure the effectiveness of the standstill obligation of Article 88(3) EC. The following section discusses the role of national courts in cases where the Commission has ordered recovery of the unlawful and incompatible aid.

The third section of the Notice outlines the support that the Commission will give national courts this may take two different forms:

- The national court may ask the Commission to transmit to it relevant information in its possession (see section 3.1 of the Notice).
- The national court may ask the Commission for an opinion concerning the application of the State aid rules (see section 3.2 of the Notice).¹¹⁵ Possible subject matters for Commission opinions include, *inter alia*:

1) Whether a certain measure qualifies as State aid within the meaning of Article 87 EC and, if so, how the exact aid amount is to be calculated. Such opinions can relate to each of the criteria under Article 87 EC (i.e. existence of an advantage, granted by a Member State or through State resources, possible distortion of competition and effect on trade between Member States).

¹¹⁴ Paragraph 53-55 of the Notice.

¹¹⁵ Paragraph 89 – 96 of the Notice.

2) Whether a certain aid measure meets a certain requirement of a Block Exemption Regulation so that no individual notification is necessary and the standstill obligation under Article 88(3) EC does not apply.

3) Whether a certain aid measure falls under a specific aid scheme which has been notified and approved by the Commission or otherwise qualifies as existing aid. Also in such cases, the standstill obligation under Article 88(3) EC does not apply.

4) Whether exceptional circumstances (as referred to in the 'SFEI' judgment of the ECJ138) exist which would prevent the national court from ordering full recovery under Community law.

5) Where the national court is required to order the recovery of interest, it can ask the Commission for assistance as regards the interest calculation and the interest rate to be applied.

6) The legal prerequisites for damages claims under Community law and issues concerning the calculation of the damage incurred.¹¹⁶

The Notice does, of course, refer to the *CELF* judgment but it does, in my view, no justice to the complex issues, which are discussed in section 3 above.¹¹⁷ In particular, it does not address the question of when the national court should order recovery, the interpretation of the words "within the framework of its domestic law" in paragraph 53 of the judgment, or which criteria the national courts may or should apply. Paragraph 35 of the notice merely states: "*While after a positive Commission decision, the national court is no longer under a Community law*

¹¹⁶ Paragraph 91 of the Notice.

¹¹⁷ The *CELF* judgment is also discussed by J-P. Keppene and Kilian Gross, *Quelques considerations sur le role du juge national dans le controle des aides d'Etat*, in *Liber Amicorum Francisco Santaolla Gadea*, EC State Aid Law, Kluwer 2008, Chapter 18, 391-408, at p. 403-407.

obligation to order full recovery, the ECJ also explicitly recognizes that a recovery obligation may exist under national law." In paragraph 40 of the notice the Commission writes that the national court must normally order full recovery of unlawful aid. While the Commission formulates principles which apply in respect of the recovery of interest, any guidance about the recovery of the unlawful aid is conspicuously absent.

More importantly, the Commission fails to make a distinction between positive decisions that can still be challenged, and those that can no longer be challenged. The Commission should have made such a distinction. It should have also addressed the question of whether or not national courts are under an obligation to order recovery. Are national courts no longer under such an obligation (a) when there is a final positive Commission Decision; (b) when there is a positive Commission Decision that is not yet final or c) in both situations? The Commission language in paragraph 35 and 40 of the notice are ambiguous, even though the ECJ is clear that there is no obligation. Second, the Commission should have provided national courts with guidance as to when to order recovery and when not. It would seem that the paramount obligation in this respect, is the duty to protect the position of the competitor. It may well be that the payment of interest over the full period of unlawfulness may be enough. This seemed to be the case in the situation of CELF where the accumulation of interest would effectively take away CELF's benefit. On the other hand, there may be situations where depending on the specific facts of the case, additional and more stringent measures are required to protect the competitor from harm, in which case full or partial recovery may be necessary. In this respect the situation may be compared with damages for an infringement of article 81 or 82 EC.

7. Annex List of State Aid rules in chronological order

Legislation		Guidelines, Notices and Communications	
Date	Act	Date	Act
2008	Commission Regulation (EC) No 1147/2008 of 31 October 2008 amending Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as regards Part III.10 of its Annex 1 OJ 2008 L 313/1	2008	Communication from the Commission - Temporary framework for State aid measures to support access to finance in the current financial and economic crisis - adopted on 17 December 2008
2008	Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) OJ 2008 L 214/3	2008	Commission Communication Recapitalisation of financial institutions in the current financial crisis: limitation of the aid to the minimum necessary and safeguards against undue distortions of competition. Adopted on 5 December 2008. C(2008) 8259 final
2008	Council Regulation (EC) No 744/2008 of 24 July 2008 instituting a temporary specific action aiming to promote the restructuring of the European Community	2008	Communication from the Commission to the European Council "A European Economic Recovery Plan" COM(2008) 800 final

	<p>fishing fleets affected by the economic crisis OJ 2008 L 202/1</p>		
2008	<p>Commission Regulation (EC) No 736/2008 of 22 July 2008 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of fisheries products OJ 2008 L 201/16</p>	2008	<p>Communication from the Commission - From financial crisis to recovery: A European framework for action COM(2008) 706 final</p>
2008	<p>Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ 2008 L 82/1</p>	2008	<p>Communication from the Commission — The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis OJ 2008 C 270/8</p>
2007	<p>Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to <i>de minimis</i> aid in the sector of agricultural production OJ 2008 L 337/35</p>	2008	<p>Communication from the Commission concerning the prolongation of the Framework on State aid to shipbuilding OJ 2008 C 173/3</p>
2007	<p>Commission Regulation (EC) No 875/2007 of 24 July 2007 on the application of Articles 87 and 88 of the EC Treaty</p>	2008	<p>Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the</p>

	to <i>de minimis</i> aid in the fisheries sector and amending Regulation (EC) No 1860/2004 OJ 2007 L 193/6		form of guarantees OJ 2008 C 155/10 Corrigendum OJ 2008 C 244/32
2007	Commission Decision of 20 December 2006 on the prolongation of certain State aid decisions OJ 2007 L 32/180	2008	Guidelines for the examination of State aid to fisheries and aquaculture OJ 2008 C 84/10
2006	Commission Regulation (EC) No 1935/2006 of 20 December 2006 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ 2006 L 407/1	2008	Community guidelines on state aid for environmental protection OJ 2008 C 82/1
2006	Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to <i>de minimis</i> aid OJ 2006 L 379/5	2008	Communication from the Commission on the revision of the method for setting the reference and discount rates OJ 2008 C 14/6
2006	Commission Regulation (EC) No 1976/2006 of 20 December 2006 amending Regulations (EC) No 2204/2002, (EC) No 70/2001 and (EC) No 68/2001 as regards the extension of the periods of application	2007	Notice from the Commission - Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid OJ 2007 C 272/4

	OJ 2006 L 368/85		
2006	Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 OJ 2006 L 358/3	2007	Commission communication concerning the prolongation of the application of the Communication on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (cinema communication) of 26 September 2001 OJ 2007 C 134/5
2006	Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (Codified version) OJ 2006 L 318/17	2006	Community framework for state aid for research and development and innovation OJ 2006 C 323/1
2006	Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (Block Exemption Regulation for regional aid) OJ 2006 L 302/29	2006	Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013 OJ 2006 C 319/1

2006	Commission Regulation (EC) No 1627/2006 of 24 October 2006 amending Regulation (EC) No 794/2004 as regards the standard forms for notification of aid OJ 2006 L 302/10	2006	Commission communication concerning the prolongation of the Framework on State aid to shipbuilding OJ 2006 C 260/7
2005	Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest OJ 2005 L 312/67	2006	Community guidelines on State aid to promote risk capital investments in small and medium-sized enterprises OJ 2006 C 194/2
2004	Commission Regulation (EC) No 1860/2004 of 6 October 2004 on the application of Articles 87 and 88 of the EC Treaty to <i>de minimis</i> aid in the agriculture and fisheries sectors OJ 2004 L 325/4	2006	Guidelines on national regional aid for 2007-2013 OJ 2006 C 54/13
2004	Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ 2004 L 140/1	2005	Communication of the Commission to Member States amending the communication pursuant to Article 93(1) of the EC Treaty applying Articles 92 and 93 of the Treaty to short-term export-credit

			insurance OJ 2005 C 325/22
2004	Commission Regulation (EC) No 364/2004 of 25 February 2004 amending Regulation (EC) No 70/2001 as regards the extension of its scope to include aid for research and development OJ 2004 L 63/22	2005	Communication from the Commission — Community guidelines on financing of airports and start-up aid to airlines departing from regional airports OJ 2005 C 312/1
2004	Commission Regulation (EC) No 363/2004 of 25 February 2004 amending Regulation (EC) No 68/2001 on the application of Articles 87 and 88 of the EC Treaty to training aid OJ 2004 L 63/20	2005	Community framework for State aid in the form of public service compensation OJ 2005 C 297/4
2003	Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) OJ 2003 L 124/36	2005	Details of arrangement for the electronic transmission of State aid notifications including addresses together with the arrangements for the protection of confidential information — Article 3(6) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ 2005 C 237/3

2002	Corrigendum to Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment OJ 2002 L 349/126	2004	Commission communication concerning the prolongation of the Communication of the Commission to the Member States pursuant to Article 93(1) of the EC Treaty applying Articles 92 and 93 of the Treaty to short-term export-credit insurance OJ 2004 C 307/12
2002	Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment OJ 2002 L 337/3	2004	Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty OJ 2004 C 244/2
2002	Council Regulation (EC) No 1407/2002 of 23 July 2002 on State aid to the coal industry OJ 2002 L 205/1	2004	Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema communication) of 26 September 2001 OJ 2004 C 123/1

2001	Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises OJ 2001 L 10/33	2004	Commission communication concerning the obsolescence of certain State aid policy documents OJ 2004 C 115/1
2001	Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid OJ 2001 L 10/20	2004	Commission communication C(2004) 43 – Community guidelines on State aid to maritime transport OJ 2004 C 13/3
1999	Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now art. 88) of the EC Treaty OJ 1999 L 83/1	2003	Framework on State aid to shipbuilding OJ 2003 C 317/11
1998	Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid OJ 1998 L 142/1	2003	Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions OJ 2003 C 297/6
		2003	Commission communication on the submission to individual notification of the application of all regional investment aid

			schemes to the shipbuilding sector and proposal of appropriate measures pursuant to Article 88 paragraph 1 of the EC Treaty OJ 2003 C 263/2
		2003	Commission communication — Model declaration on the information relating to the qualification of an enterprise as an SME OJ 2003 C 118/5 Corrigendum OJ 2003 C 156/14
		2002	Communication from the Commission concerning certain aspects of the treatment of competition cases resulting from the expiry of the ECSC Treaty OJ 2002 C 152/5
		2002	Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (notified under document number C(2002) 458) OJ 2002 C 119/22
		2002	Communication from the Commission — Rescue and restructuring aid and closure aid for the steel sector (notified under

			document No C(2002) 315) OJ 2002 C 70/21
		2002	Communication from the Commission — Multisectoral framework on regional aid for large investment projects (notified under document No C(2002) 315) OJ 2002 C 70/8
		2002	Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works OJ 2002 C 43/6
		2001	Communication from the Commission on the application of State aid rules to public service broadcasting OJ 2001 C 320/5
		2001	Community guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products OJ 2001 C 252/5
		2001	Commission communication relating to the methodology for

			<p>analysing State aid linked to stranded costs - Adopted by the Commission on 26 July 2001 Commission letter SG (2001) D/290869 of 6 August 2001</p>
		2001	<p>Communication of the Commission to Member States amending the communication pursuant to Article 93(1) of the EC Treaty applying Articles 92 and 93 of the Treaty to short-term export-credit insurance OJ 2001 C 217/2</p>
		1998	<p>Commission notice on the application of the State aid rules to measures relating to direct business taxation OJ 1998 C 384/3</p>
		1998	<p>Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services OJ 1998 C 39/2</p>
		1997	<p>Communication of the Commission to the Member States pursuant to Article 93 (1) of the EC Treaty applying Articles 92 and</p>

			93 of the Treaty to short-term export-credit insurance OJ 1997 C 281/4
		1997	Commission Communication on State aid elements in sales of land and buildings by public authorities OJ 1997 C 209/3
		1995	Notice on cooperation between national courts and the Commission in the State aid field OJ 1995 C 312/8
		1994	Commission communication on the application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA agreement to State aid in the aviation sector OJ 1994 C 350/5
		1993	Commission communication to the Member States - Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector OJ 1993 C 307/3
		1984	Communication to the Member States concerning public authorities' holdings in

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