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Contents

SUMMARY	1
ABBREVIATIONS	2
1 INTRODUCTION	3
1.1 Purpose	3
1.2 Method and Material	3
1.3 Delimitation	4
1.4 Disposition	4
2 THE CONTEXT OF R&R	6
2.1 Policy context	6
2.1.1 <i>The rationale of state aid</i>	6
2.1.2 <i>The rationale of rescue and restructuring aid</i>	7
2.2 Legal context of R&R	8
2.3 The concept of state aid	9
2.3.1 <i>The definition of state aid</i>	9
2.3.2 <i>The cumulative conditions of article 87(1)</i>	11
2.3.2.1 Imputable to the state	11
2.3.2.2 Conferral of an economic advantage	12
2.3.2.3 Selectivity	14
2.3.2.4 Effect on competition and trade	15
2.4 Enforcement of the Commission's decisions	16
2.4.1 <i>Direct effect, recovery of state aid and litigation in front of national courts</i>	16
2.5 Judicial review	18
2.5.1 <i>Action for failure to act</i>	18
2.5.2 <i>Direct action</i>	19
2.5.2.1 Challengeable act	19
2.5.2.2 Locus standi	19
2.5.2.3 Direct concern	20
2.5.2.4 Individual concern in regard to decision resulting from the formal investigation	20
2.5.2.5 Individual concern in regard to a decision resulting from the preliminary investigation	20
2.5.3 <i>The extent of the judicial review</i>	21
2.5.3.1 Judicial review of facts and of rules of procedure	21
2.5.3.2 Judicial review of economic and social appraisals	23

3	LEGAL FRAMEWORK FOR R&R	27
3.1	The Treaty Provisions and Case law	27
3.1.1	<i>General procedural aspects</i>	27
3.1.1.1	Procedure regarding notified aid	28
3.1.1.2	Procedure regarding unlawful aid	30
3.1.1.3	Procedure regarding existing aid the and misuse of aid	30
3.1.2	<i>Which exemption may apply to aid from rescue and restructuring</i>	31
3.1.3	<i>Article 87(3)(c)</i>	32
3.1.3.1	Facilitate the development	33
3.1.3.2	Economic activites	34
3.1.3.3	Contrary to the common interest	34
3.2	The Guidelines	35
3.2.1	<i>Legal basis and legal status</i>	35
3.2.2	<i>The Guidelines on rescue and restructuring aid</i>	36
3.2.2.1	The scope of the Guidelines	36
3.2.2.2	General conditions	36
3.2.2.3	Rescue aid	37
3.2.2.4	Restructuring aid	37
4	COMMISSION DECISIONS	40
4.1	Commission decisions partially approving restructuring aid	40
4.1.1	<i>Air France</i>	40
4.1.2	<i>Head Tyrolia Mares</i>	43
4.1.3	<i>Alstom</i>	45
4.1.4	<i>Bull</i>	46
4.1.5	<i>British Energy</i>	48
4.1.6	<i>Bankgesellschaft Berlin AG</i>	52
4.1.7	<i>Crédit Lyonnais</i>	54
4.1.8	<i>GAN</i>	57
4.1.9	<i>Philipp Holzmann</i>	59
4.2	Negative Commission decisions	61
4.2.1	<i>France Telecom</i>	61
4.2.2	<i>Compagnie Marseillaise de Reperations</i>	62
4.2.3	<i>Soreni</i>	64
5	THE CFI'S CASE-LAW	66
5.1.1	<i>British Airways and others v Commission</i>	66
5.1.2	<i>Salomon SA v Commission</i>	69
5.1.3	<i>Kneissl Dachstein Sportartikel v Commission</i>	70

6 CONCLUSION	71
BIBLIOGRAPHY	77
TABLE OF CASES	79

Summary

The purpose of this thesis was to examine the EC Commission's role and policy in the EC control of state aid to companies that risk going out of business. The thesis explores the Commission's role in relation to the Member States as well as to the Community courts. It also examines the Commission's policy towards such aid in order to establish whether the Commission is coherent in its application and assessment of relevant EC Treaty provision, case-law and its own Guidelines on aid for the rescue and restructuring of firms in difficulty. In order to explore the Commission's role, the thesis examines the consequences of its decisions -on the one hand, the implications on the Member States and, on the other hand, how the Community courts exercises their judicial control over these decisions. The coherence of the Commission's assessments is examined through a study of eleven of the Commission's decisions.

The Commission, because of the direct effect of the standstill-provision and its wide discretion in social and economic appraisals, holds the most important role in the EC control of state aid for rescue and restructuring. This conclusion is supported by the Community courts sparse judicial review of the Commission's decisions in this area. It appears that, as long as the Commission does not directly contradict their case law and addresses the key-issues, they are most unwilling to interfere in the Commission's decision-making. It would seem like the Community courts case law merely places certain requirements as for the approach of the Commission in its assessment rather than substantial rules.

The Commission's decision-making is marked by inconsistencies. It has adopted a set of Guidelines to provide indications of how it will assess state aid for rescue and restructuring. A closer examination of the Commission's decisions reveals that these Guidelines do not necessarily provide any definite rules or indications but rather provide a basic approach to assessment. The Commission not only bends the more vague requirements of its Guidelines to achieve the result which is sought but also disregards straightforward requirements as the "one time, last time" principle. The Commission has also showed a notable confidence in its ability to know what is best for the development of an activity. Unfortunately, as in the Air France-decision, it is often the case that the Commission simply states that a restructuring would facilitate the development of a certain activity without providing any detailed reasoning to support its statement. Such bold assessments in combination with shortcomings in its reasoning strengthen, rightly or not, the impression of inconsistencies in its decision-making. In the conclusions, I argue that in certain cases, in particular the British Energy-decision, the Commission has gone very far in its approval of non-time-limited state interventions that permanently replace the mechanisms of the open market economy.

Abbreviations

AG	Advocate General
The Community Courts	European Court of Justice and the Court of First Instance
CFI	Court of First Instance
EC	European Community
ECLR	European Competition Law Review
ECJ	European Court of Justice
ECR	European Court Reports
EC Treaty	Treaty establishing the European Community as amended in accordance with the Treaty of Nice
EStAL	European State Aid Law Quarterly
The Guidelines	Community guidelines on State aid for rescuing and restructuring firms in difficulty
OJ	Official Journal of the European Union
R&R	Rescue and Restructuring

1 Introduction

1.1 Purpose

This thesis aims at examining the importance of the Commission's role in the EC control of state aid to firms that risk going out of business because of financial difficulties. The Commission labels such state aid as *state aid for the rescue and restructuring of firms in difficulty*. The main purpose of the thesis is to examine whether the Commission is consistent in its application of the Treaty provisions, the Court of Justice case law and in particular its own Guidelines on rescue and restructuring aid to companies in difficulty.

1.2 Method and Material

In order to examine whether the Commission's decision-making concerning aid for rescue and restructuring, I will present the legal framework of state aid for rescue and restructuring and then analyse the Commission's decisions.

To analyse the Commission's decisions I will compare the Commission's reasoning and the operational part of its final decision with the Commission's reasoning in its decision to open a formal investigation, and with the wording of the Guidelines and with the Commission's reasoning in similar decisions. Third parties opinion can often be helpful in identifying questions that are subject to controversy. The attention directed here at third parties opinion is due to the fact that little has been written on Commission decisions of this type.

To illustrate the important role of the Commission's decision-making in state aid control, I will describe the case law of the Community courts, the Guidelines, the rules on the admissibility of direct action under article 230 EC Treaty and the rules on the recovery of state aid found to be incompatible with the treaty.

To present the Community system of state aid control I have relied on the EC Treaty provisions, the case law of the Community courts, literature on state aid and on articles dealing with aid for rescue and restructuring. In the analysis of the Commission's decisions on aid for rescue and restructuring and its application of the Guidelines, the focus is on the Guidelines, the Commission's decision and the case law of the Court of First Instance.

1.3 Delimitation

The thesis examines the Commission's policy in granting state aid for the rescue and restructuring of companies in difficulty. The Commission considers in its Guidelines that, since the very existence of a firm in difficulty is in question, aid to a company in difficulty can only be deemed compatible on the basis of the exemptions described in Article 87(3)(c).¹ The focus is accordingly on the Commission's decision-making policy in its application of article 87(3)(c) to firms in difficulty.

The exemption contained in Article 87(3)(c) is only one part in the process of analysing state measures to companies in difficulty. The exemption in Article 87(3)(c) will be placed in its legal context. However, it is outside the scope of the thesis to examine the Commission's application of the market investor principle. This principle defines what constitutes state aid. It is also outside the scope of the thesis to analysis the Commission's application of rules on the recovery of illegal state aid.

There is a risk of the Commission being inconsistent in ruling on whether a state measure constitutes state aid. Similarly, there is a risk that the Commission will be inconsistent in its follow-up of such a finding. The Commission may, by lenient and inconsistent application of the market investor principle, avoid even having to assess whether a controversial state measure/state aid is compatible with the treaty according to in Article 87(3)(c).²

Accordingly, I will not try to conclude to what extent the Commission is consistent in its over all application of the general prohibition of state aid as laid down in Article 87, but will only consider the Commission's application of the exemptions in Article 87(3)(C).

According to the Guidelines, the Commission must be more flexible in its assessment of whether state aid is compatible with the Treaty if it is given to an assisted area and/or to a small or medium-sized firm (hereafter SME). However, it is not the intention of the thesis to try to define how important these matters are when the Commission approves grants of state aid for rescue and restructuring.

1.4 Disposition

The focus of the first part of the thesis is on describing the legal context and the legal framework of state aid for rescue and restructuring. In the second chapter, I analysis the rationale of aid for rescue and restructuring and

¹ Community guidelines on State aid for rescuing and restructuring firms in difficulty, §19

² For example, the Commission's recent decision concerning the restructuring of the Italian air-company Alitalia.

describe the notion of state aid and of the Community state aid control. The third chapter contains an account of the legal provisions that apply directly to aid for rescue and restructuring. The fourth chapter is an analysis of the Commission's decisions and its application of its Guidelines. In the fourth chapter, I present and comment on eleven decisions by the Commission. The Community court's comments on these Commission decisions are presented and commented on in the fifth chapter. Finally, in the sixth chapter I present my conclusions regarding the Commission's decision making policy towards aid for rescue and restructuring and which aspects that seem to be of particular importance in its control of such aid.

2 The context of R&R

2.1 Policy context

2.1.1 The rationale of state aid

State aid policy is the part of competition policy that concerns the control of state aid measures. As Groteke and Heine explains, the economic logic behind state aid policy *“is two-fold: first of all, international economics tells us that the establishment of free trade will lead via gains from trade to an increase of welfare. Secondly, unhampered competition on product markets will pressure companies to reduce their costs, to innovate and to set prices near the marginal cost”*.³

The embrace of this economic ideology as the basis of the European Community is expressed in Article 2 of the EC Treaty which declares that the Community will follow an economic policy in accordance with the principle of an open market economy with free competition. The EC competition policy rests upon the idea that a market-based economy provides the best guarantee for raising living conditions in Europe for the benefit of its citizens. Furthermore, competition is considered essential for increasing the competitiveness of the European economy since this is considered to create an environment in which efficient and innovative companies are rewarded properly.

In the absence of a control of state aid at the Community level, it could be argued that every Member State would grant aid to national enterprises without taking account the effects of this aid on the economy of other Member States.⁴ This could lead to a state-aid race between the Member States that would place the beneficial effects of free competition and free trade at risk.

Accordingly, the purpose of state aid control is to force enterprises to compete by their own means and not with the help of subsidies given by the Member States that could distort or threaten to distort the process of free competition. The bottom line is that state aid control should ensure a level playing field for enterprises within the Community. In order to achieve this, the state aid control must prevent state interventions from hampering the process of competition aimed at rewarding efficient and innovative firms.

However, state aid policy does allow the granting of state aid when it fulfils clearly defined objectives of common interest and does not distort intra-community competition and trade to an extent contrary to the common interest. State aid can correct market failures and thus enhance the

³ Groteke and Heine, p. 322

⁴ Nicolaidis, p. 265

competitiveness of the European market. There are also additional considerations since Article 2 of the EC Treaty states that economic and social cohesion within the European Community are aims of the Community. Accordingly, state aid for social and regional cohesion may be allowed as long as it does not have an adverse effect on intra-community competition. In brief, state aid policy is about striking the balance between the potentially negative impact of state aid measures on competition and its positive effects on the common interest.

2.1.2 The rationale of rescue and restructuring aid

State aid for rescue and restructuring is “typically granted in a situation of acute financial distress where state funding is often the last resort to keep the beneficiary from going into administration”.⁵ It is a situation in which, in an unrestrained market economy, the company in distress would go out of business.

The supporters of the market economy would argue that the bankruptcy of a non-viable company is the normal, and to society healthy, result of the process of free competition.⁶ It would simply be the result of the process of competition rewarding companies that are more efficient. The difficulty of this dilemma is amplified by the fact that aid for rescue and restructuring is not simply the preserve of traditional heavy manufacturing but is present in all part of economy.⁷

Aid for rescue and restructuring to companies in difficulty transfers the costs of structural adjustment to a more efficient company since it prevents competitors of the recipient of state aid from strengthening their position on the market concerned through taking the recipient’s markets shares. It prevents efficient companies from being properly rewarded by the process of competition. State aid could even, in a market characterised by over-capacity and stiff competition, reduce the business of more efficient companies sufficiently to force them to go out of business.

Furthermore, in order to keep a company afloat, state aid must in some cases be given to cover the company’s ongoing costs (operational aid). This would not only compensate the company for past mistakes but would also affect competition on an ongoing basis. A state aid recipient may, in a worst case scenario, use the state aid to subsidize an aggressive pricing strategy. This could lead it to strengthen its position on the market concerned and subsequently increase the effect of the aid on the competition. Consequently, rescue and restructuring aid is widely regarded as being the most distorting type of state aid.

⁵ Hansen, Van Ysendyck and Zuhlke, p. 210

⁶ Wish, p. 4

⁷ Hansen, Van Ysendyck and Zuhlke , p. 215

The Commission adheres to this reasoning. It states in the introduction to the Guidelines “The exit of inefficient firms is a normal part of the operation of the market. It cannot be the norm that a company which gets into difficulties is rescued by the State”...”the general rule of prohibition of state aid as laid down in the Treaty should remain and derogation from that rule should be limited”.⁸

The Commission finds, however, that rescue and restructuring of firms in difficulty may be justified by social or regional considerations and by the need to take into account the beneficial role of small and medium sized enterprises. Also, similar to the Commission’s market structure control in merger-cases, the desirability of maintaining a competitive market structure can be a reason to keep a company in business. This would be the case where the disappearance of the firm concerned could lead to a monopoly or to a tight oligopolistic situation.

Consequently, when analysing whether a rescue and restructuring effort is justified, it is necessary to take into account the principle of free competition as well as such social considerations as social protection and social cohesion together with broader economic considerations. The question is whether the positive effects of restructuring a company that would otherwise go out of business, with regard to social protection, social cohesion, market structure and the beneficial role of SMEs, outweigh the negative impact of preventing the due course of competition in rewarding efficient and innovative companies. As regard the beneficial effect on the community interests of regional and social cohesion, one can ask whether the negative effects on competition balanced out through the positive effects that state aid has on social and regional cohesion.

2.2 Legal context of R&R

Article 4 of the EC treaty states that the activities of the Member States and the Community shall include an economic policy conducted in accordance with the principle of an open market economy with free competition. The principle of free competition and Article 3(1)(g), that requires for the Community to have “*a system ensuring that competition in the internal market is not distorted*”, is pursued by the rules on competition in Title VI, Common rules on competition, taxation and approximation of law, Chapter 1 of the EC Treaty. These rules contain the safeguards of free competition in that they prohibit actions that have the effect or objective of distorting the competition within the common market.

The rules concerning undertaking, including different types of companies, and the Member States, are distinct from one another. Articles 81 and 82 apply to undertakings while Articles 87 and 88 apply to the Member States. Whereas it is impossible to separate which aspects of a measure should be

⁸ Community guidelines on State aid for rescuing and restructuring firms in difficulty, §4

assessed according to rules applicable to undertakings and which aspects fall under rules applicable to state aid, they are assessed solely under article 87.⁹ Article 81 prohibits all agreements or decisions by associations of undertakings and concerted practices between undertakings that have the effect or objective of distorting competition within the common market. Article 82 prohibits any abuse, by one or more companies, of a dominant position within the common market insofar as it may affect trade between the Member States. Article 87(1) declares that, in principle, any aid granted by a Member State or through state resources that threatens to distort competition is incompatible with the common market. (see below)

Articles 81(2) and 87(2) define certain situations in which aid per se is compatible with the common market, whereas articles 81(3) and 87(3) describe the conditions under which there may be an exemption from the prohibition. Article 82 is unconditional.

It should be noted that, even if the rules on state aid are placed under Title VI, Common rules on competition, taxation and approximation of law, Chapter 1 of the EC Treaty, the EC Treaty provisions on state aid differ from these in that they have a less definite wording. Articles 81 and 82 explicitly prohibit all decisions between undertakings that have the effect or intention of distorting competition as well as every abuse of a dominant position. Article 87 declares that state aid is incompatible with the common market. It does not explicitly prohibit state aid but instead Article 88 requires the Commission to decide that a Member State shall abolish or alter the aid within a time-period set down by the Commission itself.

According to Article 88, the Commission is authorised to control whether aid-measures granted by the Member States are compatible with the common market. The Commission's interpretation of these treaty provisions is, according to Article 220, subject to the supervision of the Community courts. Accordingly, it is through the Commission's decisions and the Community courts' judicial review of these decisions that the law of state aid has developed.

2.3 The concept of state aid

2.3.1 The definition of state aid

Article 87(1) of the EC Treaty defines state aid as every measure granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and that affects trade between Member States.

⁹ Case C-225/91, *Matra SA v Commission* [1993] ECR I-3203, § 4; Cases T-197/97 & T-198/97, *Weyl Beef Products BV v Commission* [2001] ECR II-303, §77, §78

There is no legal definition of the notion of aid as referred to in Article 87(1). In *Steenkolenmijnen v High Authority*, ECJ explained that the notion of aid and of subsidy are very similar but that “*The concept of aid is nevertheless wider than that of a subsidy because it embraces not only the positive benefits such as subsidies themselves but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and, which without therefore being subsidies in the strict sense of the word, are similar in character and have the same effect*”.¹⁰

Thus, it would seem as though the conferring of an advantage is crucial to identifying a state measure as representing state aid.

The opinion of Advocate General Jacobs in the case *Ministre de l'économie, des finances et de l'industrie, GEMO SA* provides a illustrative example of the ECJ approach to the notion of aid. Advocate General Jacobs argued, as was upheld by the ECJ, that “*Since the financial cost incurred in the disposal of animal carcasses and slaughterhouse waste must be considered to be an inherent cost of the economic activities of farmers and slaughterhouses, intervention by the public authorities intended to relieve them of that financial burden appears to be an economic advantage liable to distort competition within the meaning of article 92(1) of the treaty*”.¹¹

Furthermore, the ECJ has, by focusing on the effects of a state measure, rather than its causes or aims, given the notion of aid a wide scope. In *Italy v Commission* the Court found that Article 87 “*does not distinguish between the measures of state intervention concerned by reference to their causes or aims but defines them in relation to their effect*”.¹² However, ECJ has occasionally considered the aim in distinguishing between measures of state intervention.¹³ As Plender argued, it would “*carry semantic purity to the point of unreality if we were to deny that a Court may take any account of the purpose for which a national measure was adopted*”.¹⁴ Plender argues that the objectives pursued may, in particular, be taken into account in the assessment of whether an advantage has been conferred, where the Member State aims at rectifying an imbalance between two classes of undertakings which would otherwise exist in consequence of national legislation.

¹⁰ Case 30/59, *Steenkolenmijnen v High Authority* [1961] ECR 1, §19

¹¹ Opinion of Mr Advocate General Jacobs delivered on 30 April 2002, in Case C-126/01, *Ministre de l'économie, des finances et de l'industrie v GEMO SA* ECR. I-13769, §73; Case C-126/01, *Ministre de l'économie, des finances et de l'industrie v GEMO SA* ECR I-13769, §§30-33

¹² Case 173/73, *Italy v Commission* [1974] ECR 709, §13

¹³ Case C-6/97, *Italy v Commission* [1999] ECR I-2981; Cases C-72/91 and C-73/91, *Sloman neptun Schiffahrts AF v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1993] ECR I-887 and Case C-181/91, *Kirshamer-Hack v Sidal* [1993] ECR I-6185

¹⁴ Biondi, Piet and Flynn, p. 7

2.3.2 The cumulative conditions of article 87(1)

Four cumulative conditions must be met in order to apply Article 87(1). The aid must (i) be imputable to the state, (ii) conferring an advantage, (iii) be of a selective character and (iv) have an effect on competition and trade between Member States.

2.3.2.1 Imputable to the state

According to article 87 (1), aid must be “*granted by a Member State or through state resources in any form whatsoever*”. In *Sloman Neptun*, ECJ found that state measures that do not transfer funds attributable to the Member State fall outside the scope of this provision. ECJ explained that the wording of Article 87(1) aims “*to bring within the definition of aid not only aid granted directly by the state, but also aid granted by public or private bodies designated or established by the state*”.¹⁵

Thus, according to ECJ in *Sloman Neptune*; it would appear that there must be a transfer of resources attributable to the Member State but that it does not have to be granted by a public authority. It suffices for it to be granted by an entity that is controlled by the Member State.

A state commitment leading to the potential, but not immediate or even definite, transfer of resources does not rule out the possibility that the advantage may have been granted through state resources. Even an advantage through a potential additional burden may be sufficient to consider it to be imputable to the state.¹⁶

In *France v Commission*, ECJ found that the mere fact that a measure derives from a public undertaking is not sufficient for the measure to be imputable to the state. A public undertaking may act with a degree of independence that depend upon the degree of autonomy left to it by the State. Accordingly, the ECJ found it “*necessary to examine whether the public authorities must have been regarded as having been involved, in one way or another, in the adoption of the measures*”.¹⁷

ECJ also found that “*it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities incited the public undertaking to take the aid measure in question*”. The imputability of a public undertakings action to the state can be inferred from a set of indicators: whether the public undertaking can take the decision without considering the requirements of the public authorities; if the public undertaking has to take account of the directives issued by public authorities; the degree of supervision exercised by the public authorities; the

¹⁵ Cases C-72 and C-73/91, *Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesmer der Sloman Neptune Schiffahrts AG* [1993] ECR I-887, §§19-21

¹⁶ Case C-200/97, *Ecotrade* [1998] ECR I-7907, §43

¹⁷ Case C-482/99, *France v Commission* [2002] ECR I-4397, §52

nature of the undertaking's activities and whether the undertaking carried out its activities as private operator.¹⁸

2.3.2.2 Conferral of an economic advantage

An economic advantage considered to constitute aid can be subdivided into two elements. The State resources must bring about the favouring of the undertaking concerned and the undertaking must not have to provide an equal service in return.¹⁹ When deciding upon whether an undertaking has been favoured, the point of departure is the position of the undertaking in relation to its competitors within the common market before adoption of the measure in question.²⁰ Advocate General Jacobs considered that the crucial point is whether the undertaking obtains a benefit that it would not have received in the normal course of events on the private market.²¹

It may be is easy, where for example a Member State gives a financial grant and/or relieves an undertaking of a tax liability, to establish that the an undertaking has enjoyed a benefit and that the pre-existing competitive position has been altered. The Community courts have developed the private investor test for situations in which it is difficult to establish whether the state resources awarded are matched by a corresponding service. This test endeavours to establish whether the undertaking could have received the contribution in question, under similar conditions, if the State had been a private investor operating under market conditions.²² A state measure that does not comply with this test is regarded as conferring an advantage. The aid can be the full value of the contribution or, where a private investor could have made the decision to contribute but under different conditions, a part of it.²³ In assessing whether the State has acted as a private investor, it is necessary to consider the circumstances at the time of the state measure in question.²⁴

The private investor principle, which applies to all types of state measures, is one of the most important parts in distinguishing state measures. As Hansen pointed out "*without this test, the stand-still obligation of article 88(3) would apply to all commercial activities of the state*" ... "*this could partially paralyse the Member States economies*". Obviously, a situation in which the Commission would be obliged to assess every commercial activity of the Member States' would paralyse the Commission as well. To submit all the Member States commercial activity to the approval of the Commission would probably also be contrary to Article 295, which states that public and private sectors are to be treated equally.

¹⁸ Case C-482/99, *France v Commission* [2002] ECR I-4397, §55, §56

¹⁹ Arhold, p. 22

²⁰ Case 173/73, *Italy v Commission* [1974] ECR 709, §17

²¹ Opinion of AG Jacobs in Case C-256/97, [1991] ECR I-03913, §31

²² Case C-305/89, *Italy v Commission* [1991] ECR I-01603, §18

²³ Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, §51

²⁴ Case C-482/99 *France v Commission* [2002] ECR I-4397, §70, §71

A difficulty in connection with this test is to identify a suitable benchmark. As the CFI recognized in *WestLB et al. v Commission*, a public investor is not in the same position as a private investor. The public authorities as a public investor differ because of their access to resources flowing from their exercise of public power, in particular from taxation. Subsequently, as CFI found in *Neue Maxhütte Stahlwerk GmbH v Commission* “it is clear that although the conduct of a private investor with which that of a public investor pursuing an economic policy aims must be compared need not to be the conduct of an ordinary investor laying out capital with view to realising profit in the relatively short term”.²⁵

CFI found that the comparison “must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy -whether general or sectoral - and guided by prospects of profitability in the longer term”.²⁶ Furthermore, the comparison between the conduct of public and of private investors must be carried out with reference to the attitude the private investor would have had at the time of the contribution, with regard to the information present at that time.²⁷

In comparing the conditions of a contribution of a public investor with those that a hypothetical private investor could have made, every aspect of the investor’s position in relation to the receiving undertaking must be taken into account. Thus, a shareholder that already possesses a substantial investment in an undertaking may act differently from a minority investor or a new investor.²⁸ Such a shareholder may have a special interest in keeping control of the company and if it is in financial difficulty, it could be more liable to recapitalize the undertaking in order to protect its investments or to avoid other kinds of liabilities from pre-existing exposure from being asserted.

In *Spain v Commission*, a Spanish firm in difficulties was allowed to reschedule its social security payment, repaying its following debt with 9% interest. The Commission found the interest rate to be too low, constituting an advantage, but ECJ rejected this since the Social Security Fund was not acting as a loan provider but rather renegotiated the terms of existing loan with the aim of recovering as large part of the outstanding loans as possible.²⁹ It appears accurate to suggest, when assessing whether a state measure toward an undertaking in difficulty respects the private investor principle, that the State is not subordinated a general principle according to

²⁵ Cases T-129/95 and T-97/96, *Neue Maxhütte Stahlwerke GmbH v Commission* [1999] ECR II-17, § 109

²⁶ Cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen. v Commission* [2003] ECR-II 435, §272

²⁷ Cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen. v Commission* [2003] ECR-II 435, §246

²⁸ Hansen, p. 65

²⁹ Case C-342/96, *Spain v Commission* [1999] I-2459, §46

which it is prohibited from finding it economically preferable to avoid the liquidation of an undertaking in difficulties.

Finally, it should be born in mind that the business judgments that are the core of the private investor test do not represent an exact science. They are the result of an analysis of whether a certain business will flourish or decline and whether a business model is apt to compete on the future market. Accordingly, it could be argued that the test is essentially about examining whether the State is primarily motivated by commercial considerations and attached no weight to any economy or social objectives.³⁰

2.3.2.3 Selectivity

For a state measure to fall within the scope of article 87(1) it must be specific, this means that it must favour certain undertaking or the production of certain goods.

The problems of this criterion have arisen, in particular, when distinguishing an act of general policy from a measure characterised by selectivity. It is sufficient for a measure to have a selective effect, even if it is formally available to all companies, in order to characterise it as state aid. In *Commission v Italy*, the Commission rejected a state measure that would cut the employers contribution to a social security scheme by 4% for male employees and by 10% for female employees. The Commission considered that such a state measure would favour certain industrial undertakings that employed large numbers of female employees.³¹

Furthermore, a company that receives a state measure from a public authority that grants financial facilities of an apparently general nature but enjoys a discretion as to who is to benefit and the terms accorded will be considered to have been placed in a more favourable situation than other companies. The measure can thus not be considered to be of a general nature.³² Also rules that appear to be universal could be considered selective where there is discretion in their application. However, a general measure does not become selective because it is leaving for the undertakings in question to decide whether to take advantage of it. A Belgian measure providing for reductions in employers' social security contributions for firms that introduced shorter working hours was deemed to be of a general nature.³³

Whether derogations from general measures, particular in the area of taxation, should be regarded as falling within the scope of the specificity-criterion depends on whether the derogation is justified by reasons relating

³⁰ Arhold, p. 28. Hansen, p. 65

³¹ Case C-203/82, *Commission v Italy* [1983] ECR 2525, §4

³² Opinion of AG Jacobs in Case C-256/97, [1999] ECR I-03913, §36

³³ Thirty-First Report on Competition Policy, §369

to the logic of the system.³⁴ For example, the Commission accepted that wind and hydro plants were exempt from tax based on the emission by power plants of CO².

2.3.2.4 Effect on competition and trade

To fall within the scope of article 87(1), the aid must distort or threaten to distort competition and affect trade between the Member States. The requirement of distortion of competition has been given a broad interpretation. Competition is regarded as being distorted if the aid artificially changes the process of competition and strengthens the position of an undertaking against that of other undertakings competing with it in the common market.³⁵ It is not necessary that the aid actually affect the competition. It is sufficient that it threatens to distort the competition.³⁶ The limited value of a benefit does not take away the distorting effect. The CFI found in *Vlaamse Gewest* that “where a public authority favours an undertaking in a sector which is characterised by intense competition by granting it a benefit, there is a distortion of competition or risk of such a distortion. Where the benefit is limited, competition is distorted to a lesser extent, but it is still distorted”.³⁷

Even relatively modest aid may distort the competition when the structure of the market is characterized by a large amount of small- and medium-sized undertakings.³⁸ Neither is it necessary for the undertaking to be engaged in exporting but it may also be operating at only a local level.³⁹ In view of this interpretation, the requirement of distortion of competition would, in most cases appear to be inherent in the conferral of an advantage.⁴⁰

CFI has made a broad interpretation cases in which state measures affect the trade between Member States. If a state measure strengthen the position of an undertaking compared with other undertakings competing in intra-community trade, the latter must be regarded as affected by that aid.⁴¹ Subsequently, it is sufficient to define the relevant product market and to examine whether there are other undertakings within the Community on that product market. CFI held in *Altmark*, which concerned aid to an undertaking providing regional transport services, that the relatively small amount of aid or the small size of an undertaking that receives a grant of aid does not

³⁴ Case C-53/00, *Ferring SA v ACOSS* [2001] ECR I-9067, §17; see also Case T-471/93, *Tiercé Ladbroke SA v Commission* [1995] ECR II-02537, §62

³⁵ Case 730/79, *Philip Morris BV v Commission* [1980] ECR 2671 (hereinafter Philip Morris), §21

³⁶ Case T-288/97, *Regione Autonoma Friuli Venezia Giulia v Commission* [2001] ECR II-1169, §49, §50

³⁷ Case T-214/95, *Het Vlaamse Gewest v Commission* [1998] ECR II-717, §46

³⁸ Case T-288/97, *Regione Autonoma Friuli Venezia Giulia v Commission* [2001] ECR II-1169, §46

³⁹ Case C-75/97, *Belgium v Commission* [1999] ECR I-03671, §49

⁴⁰ Keppenne, p. 120, CMLR 37, Ross, p. 415

⁴¹ Philip Morris, §21

exclude the possibility that trade between Member States could be affected. CFI held “*that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned*”.⁴²

Furthermore, if a company does not export its products aid may still affect the competition between Member States. The aid could maintain or increase the company’s domestic production thus decreasing the chances for companies established in other Member States to export their product to this market.⁴³ Likewise, aid for export to non-Member States might also affect the competition.⁴⁴ If it is foreseeable that in the near future, that export will be directed towards other Member States, it may affect the trade between Member States even if no such trade exists at the time of the granting of the aid.⁴⁵ To conclude, as Advocate General Jacobs has stated, “*it is clear from the Court’s case-law that the requirement of an effect on trade between Member States is easily satisfied*”.⁴⁶

Since state aid to firms in difficulty is widely regarded as one of the most distorting types of state aid, it should be easy to argue that such a state measure indeed distorts the competition and affects inter-Member State trade.

2.4 Enforcement of the Commission’s decisions

The weight and the strictness of the sanction of state aid control are of strong importance since they illustrate how important the Commission’s decisions are to the system of state aid control. If the sanctions are strict, the incentive to adhere to the decisions by the Commission will be strong, whereas if the opposite is true the substance of the Commission’s decision will become of less importance.

2.4.1 Direct effect, recovery of state aid and litigation in front of national courts

In *Gebrüder Lorenz GmbH v Germany*, ECJ found that the prohibition of implementation referred to in the last sentence of article 88(3) has direct effect and gives rise to rights in favour of individuals that national courts are

⁴² Case C-280/00, *Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747 (Hereinafter Altmark), §81, §82

⁴³ Case 102/87, *France v Commission* [1988] ECR 4067, §19

⁴⁴ Case 142/87, *Belgium v Commission* [1990] ECR I-959, §35

⁴⁵ Cases T-447-449/93, *AITEC v Commission* [1995] ECR II-1971, §139, §140

⁴⁶ Opinion of AG Jacobs in C-278/92, C-279-92;C-280/92, *Spain v Commission* [1994] I-4103, §33

bound to safeguard. ECJ has also found that the direct effect of the prohibition extends to all types of aid-measures that have been implemented without notification of this having been made and, in the event of notification, operates before the Commission has, in its final decision, found the aid to be compatible with the common market.⁴⁷

The national courts must accordingly apply this prohibition without any possibility of circumventing it by rules of national law. The national courts must draw all necessary inferences in accordance with national law. This applies to the validity of the measure giving effect to the aid, the recovery of financial support granted in disregard of this prohibition, and possible interim measures.⁴⁸ The Commission cannot, however, even when the Member State has acted in breach of the prohibition of giving effect to aid, automatically declare the aid incompatible but has to actually investigate whether the aid in question is incompatible.

Nevertheless, a Commission decision approving a state aid measure does not have retroactive effect and cannot, therefore, regularise the aid granted before the Commission's decision approving the aid measure.⁴⁹ Aid granted before the approval of the Commission remains illegal and the national courts must draw all the necessary consequences of this (see above).⁵⁰ Otherwise, as AG Jacobs held in the *FNCPA v France* "*Member States would have an incentive not to await the outcome of the Commission's investigation, since in that way aid could be introduced more quickly. Such an outcome would considerably weaken the procedure for enforcing the Treaty rules on aid and would confer an unfair advantage on undertakings which benefited from the aid*".⁵¹

Advocate General Jacobs also explained that, in view of the difficulties in letting rescue aid await approval, that "*If it is necessary to allow an undertaking to retain any aid paid prematurely, such aid being set off against aid payable subsequently under a plan found compatible with the common market, then an adjustment may have to be made to offset any competitive advantage that would otherwise accrue to the undertaking concerned by reason of the early payment.*"⁵¹

ECJ recognised in *Francovich v Italy* that the principle whereby a State is liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible to be inherent in

⁴⁷ Case 120/73, *Gebrüder Lorenz GmbH v Germany*, Reference for a preliminary ruling: *Verwaltungsgericht Frankfurt am Main –Germany* [1973] ECR 1471, §8

⁴⁸ Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic* [1991] ECR I-5505 (hereinafter *Fédération Nationale*), §12

⁴⁹ Case C-301/87 *France v Commission* [1990] ECR I-351, §4, §24

⁵⁰ *Fédération Nationale*, §14

⁵¹ Opinion of AG Jacobs in *Fédération Nationale*, §28

the system of the EC Treaty.⁵² In *Brasserie du Pêcheur SA v Germany* the ECJ stated three conditions for when Community law confers a right to reparation: that the rule of law infringed must be intended to confer rights on individuals, that the breach must be sufficiently serious and that there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.⁵³ There is no prerequisite that the fault must be intentional.

The last sentence of Article 88(3) has direct effect and is meant to confer a right on the individual. When the Member State has little or no discretion, the mere infringement of a rule may be sufficiently serious. The obligation in Article 88(3) to not put into effect an aid measure before it has been approved by the Commission leaves no discretion to the Member State and, accordingly, a mere infringement of this rule should satisfy this condition.⁵⁴ It is less evident, however, whether there is a causal link between the infringement of Article 88(3) and a damage to a competitor of the recipient of a grant of aid. According to Advocate General Tesouro it is in particular difficult to show such a causal link in a market which is not oligopolistic.⁵⁵

2.5 Judicial review

The Commission's decisions, as well as all acts taken by Community institutions, are presumed to be valid.⁵⁶ Therefore the access to the Community judiciary as well as the extent of its judicial review are important for understanding the delimitations of the Commission's discretion. Obviously, the areas in which the Community courts make an extensive judicial review the importance of the Commission's decision-making is more limited, whereas in areas in which the Commission has very large discretion its decision-making becomes of a very great significance.

2.5.1 Action for failure to act

The possibilities of complainants to use the action for failure to act are very limited. According to case law, action of this sort refers to failure to act in the sense of failure to define a position, and not the adoption of a measure different from that desired or considered by the persons concerned.⁵⁷

⁵² Cases C-6 & 9/90, *Francovich v Italy* [1991] ECR I-5357, §35

⁵³ Cases C-466 & 48/93, *Brasserie du Pêcheur SA v Germany* [1996] ECR I-1029, §51

⁵⁴ Case C-5/94, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Limited* [1996] ECR I-2553, §28

⁵⁵ Opinion of AG Tesouro in Case 142/87, *Belgium v Commission* [1990] ECR I-959, §8

⁵⁶ Case 15/85, *Consorzio Cooperativo d'Abruzzo v Commission* [1987] ECR 1005, §10

⁵⁷ Case 220/86, *Irish Cement v. Commission* [1988] ECR 6473, §22

2.5.2 Direct action

All acts taken by the Commission and other Community institutions, except recommendations and opinions, may according to article 230 be annulled by the Community courts on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any other rule of law relating to its application or to misuse of powers.

To be admissible under Article 230, the subject of the action must (i) be a challengeable act, (ii) the applicant must have the requisite standing to challenge that measure and (iii) the action must have been initiated within the two-month limit.

2.5.2.1 Challengeable act

Only measures that produce legal effects are challengeable acts under Article 230. ECJ found such legal effects when an act is a binding measure that it is capable of affecting the interests of the applicant by bringing about a distinctive change in her legal position.⁵⁸ Preparatory steps that lead up to a decision or that confirm an earlier decision are not challengeable.⁵⁹

However, the Community courts appear to have made a lenient interpretation of the notion of legal effect. The Community courts have accepted, as challengeable acts, a decision to define a state aid measure as new state aid rather than as existing aid and a decision to define a state aid measure as existing aid rather than as new aid.⁶⁰

To sum up, every decision in the administrative procedure may be subject to challenge except (i) an injunction against a Member State to provide more information during an investigation into illegal aid, (ii) a decision by the Commission to propose or to not propose appropriate measure in relation to illegal/existing aid and (iii) a decision to not pronounce in a case following a complaint.⁶¹

2.5.2.2 Locus standi

To bring a challenge of a challengeable act in front of the Community courts the applicant must have the requisite standing (locus standi). According to Article 230(1) of the EC Treaty the Member State, as the addressee, has such standing. Private parties also possess, according to Article 230(4), standing in relation to a decision addressed to another person if they are of direct and individual concern to them. The case law on individual concern differs in regard to decisions that are the result of the preliminary

⁵⁸ Case 60/81, *IBM v Commission* [1981] ECR 2639, §9

⁵⁹ Case T-154/94, *Comité des salines de France v Commission* [1996] ECR II-1377, §48; Case 60/81, *IBM v Commission* [1981] ECR 2639, §9

⁶⁰ Case C-47/91, *Italy v Commission* [1992] ECR I-4145, §30; Case C-313/90, *CIRFS v Commission* [1993] I-1125, §27

⁶¹ Flynn, p. 290

investigation and decisions that are the result of the formal investigation. The burden of proof is on the private party arguing locus standi.

2.5.2.3 Direct concern

For a private party to be directly concerned, a decision must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone, without the application of other intermediate rules. A negative decision requires the Member State to not grant the state aid in question as well as to recover already granted aid. Accordingly, both the beneficiary of a granted state aid and the competitors of the beneficiary easily satisfy this criterion.⁶² A positive decision lends a certain discretion to the Member State as regards its implementation but, according to standing case law, this is not sufficient to affect its character of direct effect.

2.5.2.4 Individual concern in regard to decision resulting from the formal investigation

To satisfy the criterion of individual concern, the applicant must demonstrate that, as laid down by ECJ in *Plaumann v Commission*, the decision affect it “*by reasons of certain attributes which are peculiar to them or by reasons of circumstances in which they are differentiated from all other persons and if by virtue of those factors it distinguish them individually*”.⁶³

In regard to decisions authorising state aid, the persons, undertakings or associations whose interest could be affected by the grant of aid, in particular competing undertakings and trade associations, are to be regarded as individually and directly concerned.⁶⁴ Needless to say that following a negative decision, the beneficiary is individually and directly concerned.

2.5.2.5 Individual concern in regard to a decision resulting from the preliminary investigation

The Community Courts use a different approach to assess whether a person is *individually concerned* by the decisions made during or at the end of the preliminary investigation.⁶⁵

⁶² Quigley, p. 327; Cases C-15/98 & C-105/99, *Italy v Commission* [2000] ECR I-8855, §36

⁶³ C 25/62, *Plaumann v Commission* [1963] ECR 95 §107; Case C-50/00P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, §§36-44

⁶⁴ T-394/94, *British Airways and Others v Commission* (1998) ECR II-2405 (hereinafter *British Airways and others*), § 91; Case C-198/91, *William Cook v Commission* [1993] ECR I-2487 (hereinafter *William Cook*), §§24-26

⁶⁵ For the difference between the preliminary and the formal investigation procedure, see 3.1.1. General procedural aspects

In *Cook v Commission*, ECJ notes that it is only in connection with a formal investigation that the Commission is obliged to give third parties the possibility of submitting observations. This obligation confers on third parties the right to be heard in a situation in which there are serious difficulties concerning the compatibility of the aid measure in question. Thus, ECJ concluded that “*where, without initiating the procedure under article 88(2), the Commission finds, on the basis of article 88(3), that an aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision by the Commission before the Court*”.⁶⁶

As for the parties concerned, CFI referred to ECJ’s judgment in *Inter Mills v Commission*, where it identified the concerned third parties as undertakings or associations whose interest could be affected by the grant of aid and in particular competing undertakings and trade associations.⁶⁷

However, the Community courts will only try whether the Commission erred in not opening the formal investigation procedure; they cannot conduct full a investigation into the substance of the Commission’s decision.

2.5.3 The extent of the judicial review

State aid decisions can be annulled pursuant to Article 230 of the EC Treaty on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty or of any rule of law relating to its application, or misuse of powers.

Initially, it is important to distinguish between factual issues, procedural issues and those related to social and economic appraisals. The Court has consistently held that it confines its judicial review of social and economic appraisals to whether there has been a manifest error of assessment.⁶⁸ On the other hand, the Community courts carry out a full review into whether the facts on which a contested decision was based have been accurately stated and whether the Commission has complied with the rules of procedure and, in particular, whether the Commission’s statement of reason was sufficient. The Community courts may also, in their judgment, themselves raise the question of shortcomings in statement of reasons.⁶⁹

2.5.3.1 Judicial review of facts and of rules of procedure

ECJ has ruled that the Commission’s discretion brings with it a duty to examine carefully and impartially all relevant aspects of an individual

⁶⁶ William Cook, §23

⁶⁷ William Cook, §24; See also Case 323/82, *Inter Mills v Commission* [1984] ECR 3809, §16

⁶⁸ Case C-56/93, *Belgium v Commission* [1996] ECR I-723, §11

⁶⁹ Case 61/89, *Dansk Pelsdyravlerforening v Commission* [1992] ECR II-1931, §129

case.⁷⁰ In order for the statement of reasons to be sufficient, it must disclose in a clear and unequivocal fashion the reasoning followed by the Commission in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and for the Community courts to exercise their supervision.⁷¹ CFI has also pointed out that the requirement of providing reasons for a decision, taken in regard to state aid, cannot be determined solely in consideration of the interests that the Member State, to which the decision is addressed, might have. The reasoning must also take into account the interests of concerned parties.⁷² Concerned parties are those parties that are directly and individually concerned. In the *British Airways and Others v Commission*, CFI considered that it was indeed the interest of the concerned parties that were important since the Member State most probably had received sufficient information during the formal investigation.

CFI has also held that when the Commission applies an exemption to Article 87(1), the statement of reasons must indicate that the Commission has considered all the essential elements of facts or law that justified the approval or the refusal to approve the exemption in question.⁷³ Any information unveiled after the time of the decision cannot affect the legality of the Commission's decision. The legality of the Commission's decision is assessed on the elements of fact and law existing at the time when the decision was adopted.⁷⁴

The Commission is not obliged, however, to adopt a position on all the arguments relied on by the parties concerned and it is sufficient that it sets out the facts and the legal considerations having decisive importance in the context of the decision.⁷⁵ Accordingly, the Commission's statement of reasons cannot be limited to a finding that the measure constitutes aid but must instead refer to the specific facts qualifying a state measure as state aid within the definition of article 87(1).⁷⁶

In *British Airways and Others v Commission*, the applicants argued that a part of the restructuring aid constituted operating aid, which according to the Community court's case-law and the Commission's policy should be carried by the beneficiary. The Commission's lack of reasoning in regard to this led CFI to annul the decision.

Similarly, if the Commission, following a complaint, finds that a state measure does not constitute state aid, it must at least provide the

⁷⁰ Case C-269/90, *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469, §14

⁷¹ Case C-350/88, *Delacre and Others v Commission* [1990] ECR I-395, §15

⁷² *British Airways and Others*, §92

⁷³ Cases 296 & 318/82, *Netherlands v Commission* [1985] ECR 809, §25

⁷⁴ Cases 15/76 and 16/76, *France v Commission* [1979] ECR 321, §7

⁷⁵ Case T-459/93, *Siemens v Commission* [1995] ECR II-1675, §31

⁷⁶ Case T-323/99, *INMA v Commission* [2002] ECR II-00545, §51

complainant an adequate explanation of the reasons for which the facts and points of law put forward in the complaint have failed to demonstrate the existence of state aid. The Commission is not required, however, to define its position on matters which are manifestly irrelevant or insignificant or plainly of secondary importance.⁷⁷

The factual components of state aid decisions are of an objective character and it follows that, as the procedural requirements, they are subject to strict control.⁷⁸ The definition of a *fact* is broad. For example, the Court found that the notion of serious difficulties, the key-element in the Commission's assessment into whether to open a formal investigation, is a matter of fact (see 3.1.1, General procedural aspects)

CFI held "*Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted objectively*" ... "*comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aids with the common market*".⁷⁹ It follows that judicial review by the Court of First Instance of the existence of serious difficulties will, by nature, go beyond simple consideration of whether or not there has been a manifest error of assessment" (see below for manifest error of assessment).⁸⁰

It should be noted, however, that facts that would not have changed the outcome of a decision can under no circumstances lead to the annulment of the decision.⁸¹ In *France v Commission*, ECJ found that the Commission had failed to submit interested third parties' opinions to France. Also after having recognised that it is an important procedural requirement in order to ensure that the Member State gets the opportunity to respond to their opinion, the Court found that it did not affect the legality of the decision since the failure did not affect the outcome of the procedure.⁸²

2.5.3.2 Judicial review of economic and social appraisals

The judicial review of the substance of a decision is limited. The Court has held that Commission enjoys a broad discretion in the application of Article 87(3)(c).⁸³ This discretion derives from the text of Article 87(3) that, unlike Article 87(2), gives the Commission a discretion in that it states that aid "may" be considered compatible with the common market.

⁷⁷ Case C-367/95P, *Commission v Sytraval* [1998] ECR I-01719, §64

⁷⁸ Flynn, p. 297

⁷⁹ Case T-49/93, *SIDE v Commission* [1995] ECR II-2501, §51

⁸⁰ Case T-73/98, *Société Chimique Prayon-Rubel SA v Commission* [2001] ECR II-867, §47

⁸¹ Case 40/85, *Belgium v Commission (BOCH II)* [1986] ECR 2321, §30, §31

⁸² Case C-301/87, *France v Commission* [1990] ECR 0307, §31

⁸³ *British Airways and Others*, §79, Case 310/85 *Deufil v Commission* [1987] ECR 901 (hereinafter *Deufil*), §18

In social and economic appraisals that must be carried out within a Community context, the Court confines itself to determining whether there has been any manifest error of assessment or a misuse of powers.⁸⁴ The point of departure is that the Community courts do not allow themselves to substitute its appraisal for that of the Commission. According to the ECJ in *Germany v Commission*, the term “manifest” presupposes that the failure to observe legal provisions is such that, with regard to the provisions of the EC Treaty and of the situation in which the decision was taken, it appears to derive from an obvious error in the evaluation.⁸⁵

It must again be born in mind that this discretion only arises in regard to issues that involves economic and social assessments. The Commission does not enjoy any discretion in its assessment of whether a state measure falls within the notion of state aid.⁸⁶ Similarly, the Commission does not enjoy any discretion in deciding whether there are serious difficulties in assessing whether a state measure falls within the notion of state aid.

The assessment of whether state aid could be exempted through Article 87(3) involves assessments of an economic and social nature that must be made within a Community context. The very idea of approving aid for rescue and restructuring is based on the presumption that the social and economic benefits of saving a firm in difficulty can outweigh the costs represented by the distortion of competition. Whether the benefits outweigh the cost in a particular case is a question of the assessment of the economic and social issues involved. Obviously, since aid for rescue and restructuring is likely to distort the intra-community trade⁸⁷, the assessment of whether the benefits outweigh the costs can only be accurate if it is made in a Community context.

The assessment of whether aid for rescue or restructuring would distort competition in a manner contrary to the common market is therefore covered by the Commission’s discretion.⁸⁸

In *Regio autonoma della Sardegna v Commission*, CFI confirmed that it controls that the Commission has observed the Guidelines. CFI has also stated, however, that because of the Commission’s wide discretion in social and economic appraisals made in a Community context, it only exercises a limited control.⁸⁹ It confines its review to the question of whether the rules governing procedure and statement of reasoning have been respected,

⁸⁴ Case C-56/93, *Belgium v Commission* [1996] ECR I-723, §11; Case 730/79, *Philip Morris* [1980] ECR 2671, §24

⁸⁵ Case C-399/95R, *Germany v Commission* [1996] ECR I-2441, §62

⁸⁶ Case C-83/98P, *France v Ladbroke Racing Ltd and the Commission* [2000] ECR I-3271

⁸⁷ see above, 2.3.2.4 Effect on competition and trade

⁸⁸ Case T-35/99, *Keller SpA v Commission* [2002] ECR II-0261, §71

⁸⁹ Case T-171/02, *Regione autonoma della Sardegna v Commission* [2005] ECR II-0213, §97

whether the facts have been accurately stated and whether there has been any manifest error of assessment.

In *Matra SA v Commission*, the Commission's decision not to open the formal investigation procedure was challenged. ECJ reiterated that in regard to the application of the exemption of Article 87(3), it would only carry out a judicial review into whether the Commission had exceeded the scope of its discretion by a distortion or a manifest error of assessment of the facts.⁹⁰ Finally, the Court rejected the challenge since the Commission had indeed carried out a sufficiently detailed examination of whether the state measures would adversely affect trade.

In *Sida v Commission*, the CFI annulled the Commission's decision to conditionally approve aid to a French company that exported French language books. CFI found that the Commission had committed a manifest error in assessment since it had selected the export market for French language books in general rather than the market for small orders of French language books.⁹¹ This meant that the Commission had made an erroneous assessment of the beneficiary's market share and that this constituted a manifest error in assessment.

In *Graphischer Maschinenbau GMBH v Commission*, CFI annulled a Commission decision to approve aid for restructuring since the restructuring contained an obvious error. The restructuring plan was supposed to benefit the beneficiary by bringing it paid work but this was found upon closer scrutiny to not be the case.⁹² CFI also found that the Commission's failure to consider that a local variation in the price for a plot of land to constitute a manifest error of assessment.⁹³

To conclude, obvious mistakes, such as an erroneous delimitation of the relevant market, a failure to consider geographical price variation represents manifest errors of assessment. It would appear to be necessary to find an erroneous factual point that is fundamental to the Commission's conclusion in order to argue that the Commission has made a manifest error in assessment.

The social and economic appraisals involved in the assessment of whether state aid facilitates an economic activity without adversely distorting the competition to an extent contrary to the common interest is highly complex. If, for a manifest error, the Commission must have committed an obvious error in assessing the situation, it seems obvious that it will enjoy almost unlimited discretion as long as it does not directly contradict the Community

⁹⁰ Case C-225/91, *Matra SA v Commission* [1993] ECR I-3203, §25

⁹¹ Case T-155/98, *SIDA v Commission* [2002] ECR II-1179, §71

⁹² Case T-126/99, *Graphischer Maschinenbau v Commission* [2002] ECR-II 2427

⁹³ Cases T-127/99, T-129/99 and T-148/99, *Territorio Histórico de Álva, Comunidad Autónoma and Deawo v Commission* [2002] ECR II-1275, §§90-92

courts case law or its own policy.⁹⁴ From the abovemention case law it would seem like it is necessary to find an erroneous factual point in the Commission's assesment in order to launch a succesful challenge. The Commission benefit from the broad discretion in its analysis of whether a state measure respects the private investor as well as when it determines whether a state aid measure should be permitted under the derogation of Article 87(3).

⁹⁴ Case 301/87 *France v Commission* [1990] ECR I-307, §49

3 Legal framework for R&R

3.1 The Treaty Provisions and Case law

3.1.1 General procedural aspects

The Commission, in accordance with the case law of the Court, has developed and established a consistent practice for the application of article 88. This practice was codified by the Council Regulation No 659/1999.⁹⁵ The procedure here distinguishes between the control of existing aid, new aid, unlawful aid and misuse of aid.

This Council Regulation is characterised by its two-step control procedure. The Commission initially conducts a preliminary investigation aimed to allowing it to form a prima facie opinion on the partial or complete conformity of the aid measure in question to the common market. If the Commission, after having concluded this preliminary examination, finds that doubts remain as to the compatibility of an aid measure to the common market, it must initiate the formal investigation procedure. This allows the Commission to make a full analysis of the compatibility of the aid measure with the common market.

Existing aid is (i) all aid that exists at the time of the entry into force by the EC Treaty in the Member State concerned, (ii) aid schemes and individual aid which have been authorised by the Commission, (iii) aid which is deemed to be compatible because the Commission did not make a decision concerning the notified aid within the 2 month time-limit set down in article 4(5) of the Council Regulation, (iv) aid which falls outside the limitation of ten years within which the Commission is competent to demand the recovery of a grant of aid or, (v) aid which was not aid at the time when it was granted but subsequently became aid because of the evolution of the common market and without the alteration of the common market.⁹⁶

New aid means aid measures that do not qualify as existing aid. This means (i) a new aid scheme, (ii) a new individual aid that is not granted on the basis of an existing aid scheme, (iii) new aid under an existing aid scheme but regarding which the Commission must be notified before it is put into effect, and (iv) any alteration to an existing individual aid or aid scheme.⁹⁷

Unlawful aid means a new aid measure put into effect in contravention of the article 88(3). This includes all aid that is not covered by an explicit or

⁹⁵ Council Regulation (EC) No 659/1999 of March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1-9 (hereinafter Council Regulation No 659/1999)

⁹⁶ Council Regulation No 659/1999, Article 1(b)

⁹⁷ Council Regulation No 659/1999, Article 1(c)

implicit authorization by the Commission. This means non-notified aid, notified-aid but put into effect prior to the Commission's authorisation or granted in contravention of the conditions of approval.⁹⁸ Misuse of aid is defined as aid used by the beneficiary in contravention of a decision authorising aid.⁹⁹

3.1.1.1 Procedure regarding notified aid

The Council Regulation No 659/1999 which is a codification of the case-law on Article 88, sets up a system for the control of state aid based on the obligation to notify the Commission of all plans to grant or to alter existing aid. Prior to the authorisation of the notified aid, the Member State is prohibited to put the state aid measure into effect (the standstill-provision). Obviously, the scope of the obligation includes only measures that qualify as state aid according to Article 87(1).

The Member State must notify the Commission of the aid measure in sufficient time. This notification must provide all the information that is necessary for the Commission to take a decision on the compatibility or incompatibility of the proposed aid with the common market.¹⁰⁰ If the Commission finds that the Member State, after a reminder, has failed to provide complete information, it can issue an information injunction.¹⁰¹ The notification is considered as complete on the day after its arrival to the Commission. If the notification did not provide complete information, it is regarded as having arrived two months after the Commission received the last requested for information.¹⁰²

According to Article 4 of the Council Regulation No659/1999, the Commission is to initiate the preliminary examination procedure as soon as the complete notification has arrived. This preliminary examination allows for the Commission to form a prima facie opinion on whether the measure notified constitutes state aid and, if it constitutes aid, whether no doubts are raised as to its compatibility with the common market. In conducting this preliminary investigation, the Commission must address all facts and points brought to its attention by persons whose interest might be affected by the aid.¹⁰³

The Commission must conclude the preliminary investigation within two months after initiation of the preliminary investigation. The preliminary investigation initiates directly upon complete notification.¹⁰⁴ If the Commission has not taken a decision within this time limit, the aid shall

⁹⁸ Council Regulation No 659/1999, Article 1(f)

⁹⁹ Council Regulation No 659/1999, Article 1(g)

¹⁰⁰ Council Regulation No 659/1999, Article 2

¹⁰¹ Council Regulation No 659/1999, Article 5

¹⁰² Council Regulation No 659/1999, Article 4(5)

¹⁰³ Case C-367/95P, *Commission v Sytraval* [1998] ECR I-1719, §51

¹⁰⁴ Council Regulation No 659/1999, Article 4(5)

upon a request by the Member State, be deemed compatible with the common market.¹⁰⁵

It is for the Commission, subject to the review of the Community courts, to determine whether the difficulties involved in assessing the compatibility of the aid warrant the initiation of the formal investigation. Thus, in conducting the preliminary investigation, the Commission is not under any obligation to enter into communication with third parties or to assess ex officio objections that would have been raised by third parties if they had been given all the information obtained by the Commission.¹⁰⁶

The Commission must initiate the formal investigation procedure if (i) the preliminary investigation procedure has not enabled it to overcome all the difficulties involved in determining whether the notified aid or unlawful aid measure is compatible with the common market,¹⁰⁷ (ii) the commission considers that existing aid is incompatible with the common market and that the Member State does not accept the appropriate measure proposed by the Commission,¹⁰⁸ (iv) the Commission revokes a decision according to which it found a given measure not to constitute state aid or to be compatible with the common market¹⁰⁹ or (iv) if the Commission suspects the misuse of aid.¹¹⁰

The Commission must in its decision to initiate the formal investigation summarise the relevant issues of fact and law, make a preliminary assessment for the Commission of the aid character of the proposed measure and set out its doubts as to its compatibility with the common market. The decision also calls upon the Member State concerned and on interested third parties to submit comments on the state measures concerned.¹¹¹ The purpose of the participation of interested third parties is to provide the Commission with information.¹¹²

The CFI found that “*It follows that, far from enjoying the same right to a fair hearing as those which individual against whom a procedure has been instituted are recognised as having, the parties concerned have only the right to be involved in the administrative procedure to the extent appropriate in the light of the case*”.¹¹³

¹⁰⁵ Council Regulation No 659/1999, Article 4(6)

¹⁰⁶ Case 84/82, *Germany v Commission* [1984] ECR 1451, §13; Case-367/95P, *Commission v Sytraval* [1998] ECR I-1719, §58

¹⁰⁷ Council Regulation No 659/1999, article 4(4); Case C-367/95P, *Commission v Sytraval* [1998] ECR I-1719, §39

¹⁰⁸ Council Regulation No 659/1999, Article 17(2)

¹⁰⁹ Council Regulation No 659/1999, Article 9

¹¹⁰ Council Regulation No 659/1999, Article 16

¹¹¹ Council Regulation No 659/1999, Article 6

¹¹² Case 70/72, *Commission v Germany* [1973] ECR 813, §19

¹¹³ *British Airways and Others v Commission*, §59, §60

The formal investigation shall dispense any doubts as to the state measure's compatibility with the Common market. The Commission must decide upon the matter as soon as the doubts have been dispensed and it shall try to take a decision within 18 months. Once this time limit has expired, the Member State concerned can require the Commission to make a decision within an additional two months.¹¹⁴

If the notification is not withdrawn, the Commission is to close the formal investigation procedure by means of a decision. Depending on the outcome of its analysis, the Commission may decide that the state measure does not constitute aid or that after appropriate modification by the Member State concerned, the state measure constitutes aid but is compatible with the common market (a positive decision). The Commission may, to such a decision, attach conditions subject to which the aid measure is regarded as compatible with the common market (a conditional decision). If the Commission finds that the aid is incompatible with the common market, or where the Member State has not provided the necessary information, it is to take a negative decision.¹¹⁵

3.1.1.2 Procedure regarding unlawful aid

The procedure for the examination of aid when the Member State has infringed upon the requirement of prior notification or the standstill-provision is, with certain modifications, the same as for notified aid. The Commission begins itself the procedure and it is obliged, when it has such information, to without delay examine the alleged unlawful aid. However, the Commission is not bound by the time limit to make a decision that applies to the notified aid. The Commission must nevertheless set a reasonable time limit due to the principle of good administration.¹¹⁶

The Commission may order the suspension of any unlawful aid until it has decided upon its compatibility with the common market. The Commission may also, since this suspension injunction does not have any effect on aid already granted, issue a provisional recovery injunction of already granted unlawful aid.¹¹⁷ The recovery injunction is subject to two conditions, it must be clear that the measure amounts to state aid and there must be an urgency to act. Clearly, these conditions limit the usefulness of this possibility since it is often a judgement-call whether a state measure constitutes state aid.

3.1.1.3 Procedure regarding existing aid and misuse of aid

The control of existing aid differs between existing individual aid and existing aid schemes. An approved individual aid measure cannot be placed

¹¹⁴ Council Regulation No 659/1999, Article 7(6) and 7(7)

¹¹⁵ Council Regulation No 659/1999, Article 7

¹¹⁶ Slot and Sinnaeve, CMLR, 1999, p.1176

¹¹⁷ Guidelines, article 11(2),(3)

into question unless the determining information upon which it was based was incorrect.¹¹⁸ Existing aid schemes are subject to continued control by the Commission.¹¹⁹ The Member States must provide all the necessary information to allow the Commission to pursue this control. If the Commission considers that an existing aid scheme no longer is compatible with the common market, it must inform the Member State and give it the opportunity to submit its comments. Upon this, the Commission is to suggest appropriate measures to alleviate the incompatibility or an abolition of the aid scheme. This recommendation may be the proposal of a substantive amendment to the aid or the introduction of procedural requirements.¹²⁰

If the Member State accepts the appropriate measure proposed, the Commission is to confirm this, whereupon it is bound to implement these measures. If the Member State does not accept the proposed measures, the Commission is to initiate the formal investigation procedure. However, existing aid may never be subject to a suspension or recovery injunction.¹²¹

The procedure for the control of misuse of aid is the same as the procedure for unlawful aid with the exception that the Commission cannot decide upon the question without opening a formal investigation. Furthermore, the recovery injunction does not apply to the misuse of aid.¹²²

3.1.2 Which exemption may apply to aid from rescue and restructuring

A state measure established as state aid according to Article 87(2) or (3) can be considered compatible with the common market and thus be exempted from the general prohibition of state aid. According to the Commission, it is the nature of the aid that determines according to which exemption the compatibility of an aid measure will be evaluated.¹²³ According to Article 87(2), aid can be compatible with the common market if it is of a social character, granted to individual consumers or accorded to make good the damage caused by a natural disaster. The first two exemptions are obviously never applicable to aid for rescue and restructuring, but the last alternative could be applicable in some rare cases.

According to Article 87(3) (a) and (b), aid can be considered compatible with the common market if it promotes the development of areas in which there is serious under-employment or if it promotes a project of common interest or remedied a serious disturbance in the economy of a Member

¹¹⁸ Council Regulation No 659/1999, Article 9

¹¹⁹ Council Regulation No 659/1999, Article 17

¹²⁰ Council Regulation No 659/1999, Article 17

¹²¹ Council Regulation No 659/1999, Article 17(2), last sentence

¹²² Council Regulation No 659/1999, Article 16 and Article 17(2), last sentence

¹²³ C34/2003, Opening of procedure, OJ C 188 8.8.03, p.5

State. The Commission has held that aid for rescue and restructuring cannot be regarded as remedying a serious disturbance in the economy since it seeks to remedy the difficulty experienced by a single company rather than all companies in a sector.¹²⁴ That aid for rescue and restructuring could be granted to promote culture and heritage is very unlikely. As a consequence of this exclusion, possible exemption aid for rescue and restructuring can only be considered compatible according to Article 87(3)(c). This exemption allows the Commission to approve aid, if such aid does not adversely affect the trading conditions to an extent contrary to the common interest, for the development of certain economic activity or of certain economic areas. Since aid for rescue and restructuring is not regional in purpose, it is only the promotion of an economic activity that can justify a state aid to a company in difficulties.¹²⁵

It should be borne in mind, however, that state aid may always be declared compatible by the Council on proposal by the Commission according to Article 87(3)(e). Even if this never has occurred, it constitutes nevertheless a last resort for the Commission and the Member States to pass state aid as compatible with the common market.

That the Commission has held that that companies in difficulty can only be awarded state aid insofar as the aid fulfils the requirement of exemption in Article 87(3)(c) is as also expressed in paragraph 20 of the Guidelines, *“Given that its very existence is in danger, a firm in difficulty cannot be considered an appropriate vehicle for promoting other policy objectives until such time as its viability is assured”*.¹²⁶

3.1.3 Article 87(3)(c)

Article 87(3)(c) declares that aid to facilitate the development of certain economic activities or of certain of economic areas, when it does not adversely affect trading conditions to an extent contrary to the common market, can be considered compatible with the common market. Note that this exemption, in comparison to article 87(3)(a), that permits aid to certain in a community context underdeveloped areas, is not restricted by economic conditions and that it provides for aid, not only to certain areas but also to certain activities.¹²⁷ To safeguard the proper functioning of the common market and in view of the principles set out in (g) of Article 3 EC Treaty, the exemption from 87(1) must be interpreted strictly.¹²⁸

¹²⁴ Commission Decision 98/204/EC of 30.7.1997, *“GAN”*, OJ L78 16.3.98, p.9

¹²⁵ Commission decision 2005/418/EC of 7.7.2004, *“Alstom”*, OJ L 150/24 10.6.2005, §147

¹²⁶ The Guidelines, §20

¹²⁷ Case 248/84, *Germany v Commission* [1987] ECR 4013, §19

¹²⁸ Arhold, EStAL, p. 176

3.1.3.1 Facilitate the development

Thus, the aid must *facilitate* the development of a certain activity or of a certain region. This condition is met if the development of the concerned economic activity in question would not be attained without the aid.¹²⁹ In *Philip Morris v Commission* the Court confirmed the Commission's decision to disallow aid on the basis that the market conditions in the cigarette manufacturing industry seemed, without state intervention, apt to ensure a normal development, and that the aid therefore could not be regarded as "facilitating".¹³⁰

Furthermore, operating aid is rarely regarded, under any circumstances, as satisfying the requirement of facilitating development.¹³¹ Operational aid is defined as aid intended to relieve an undertaking of expenses that it would, normally, have to bear itself in its day-to-day management or its usual activities. These activities should be financed by a company's own resources. Aid for such purposes does not aim at facilitate technical or structural change but simply enables the recipient firm to offer its clients artificially favourable terms and to improve its profits margins without justification.¹³² In *Exécutif Régional Wallon v Commission*, ECJ upheld the Commission's decision in which it had argued that state aid for investment that must be carried out periodically is operational aid. ECJ also accepted, as the Commission argued, that it is in interest of the producer to use the most modern and economic techniques. Accordingly, aid for renovating a plant facility pursuant of this should be considered as operational aid.¹³³

As regards aid for rescue and restructuring, and to facilitate the development, the aid must be part of a restructuring plan that restore the company's long-term viability and must contain compensatory justification. This justification must consist of a contribution by the beneficiary to the development of the sector as a whole.¹³⁴ An aid-measure that does not constitute part of such a restructuring program does not qualify as *facilitating* the development of an economic activity.¹³⁵ If a company, upon restructuring, is not competitive, it will not be able to add positively to the competitiveness of the sector of an economical activity. Instead, the aid will simply artificially prolong the activity of a company in a state of insolvency.¹³⁶

Oversimplified, it would appear that the Commission makes an assessment as to whether the sector concerned could ensure the development pursued without the aid measure in question.

¹²⁹ Philip Morris, §17

¹³⁰ Philip Morris, §26

¹³¹ Quigley, p. 105; Case T-459/93, *Siemens SA v Commission* [1995] ECR II-01675 §48

¹³² Case T-459/93, *Siemens SA v Commission* [1995] ECR II-01675, §57

¹³³ Cases 62 & 72/87, *Exécutif Régional Wallon v Commission* [1988] ECR 1573, §29

¹³⁴ Cases C-278-280/92, *Spain v Commission* [1994] ECR I-4103, §66

¹³⁵ Case C-42/93, *Spain v Commission* [1994] ECR I-4175, §§26-28

¹³⁶ Case 301/87, *France v Commission* [1990] ECR I-307, §54

3.1.3.2 Economic activities

Furthermore, Article 87(3)(c) permits aid for the development of certain economic activities or regions. This excludes aid measures having the effect of simply developing the activity of certain individual companies. Aid to an individual company must, in order to facilitate the development of an *economic activity*, have as its purpose to develop the overall sector.¹³⁷

In *Kneissl Dachstein Sportartikel AG v Commission*, the applicant argued that the approved aid did not promote an economic activity but only one single company. CFI found that, since the Commission was justified in finding that the beneficiary's survival would contribute to maintenance of a competitive market structure, the aid could not simply be regarded as favouring one single undertaking.¹³⁸

3.1.3.3 Contrary to the common interest

The Commission can only declare a state aid compatible with the common market to the extent that it does not adversely affect trading conditions contrary to the common interest. This "negative-criterion" requires that the Commission evaluate whether the positive effects of the aid measure in question outweigh its negative effects. In *France v Commission*, ECJ held that it is necessary to consider all the legal and factual circumstances surrounding that aid to assess whether there is an imbalance in relation to the benefits derived from the aid. It is necessary, in particular, to consider whether there is an imbalance between the charges imposed on the undertakings concerned and the benefits derived from the aid measure.

In *France v Commission*, ECJ upheld the Commission's broad approach to the assessment of distortion.¹³⁹ In this case, the Commission had demanded the abolition of a French support mechanism for the French textile industry. The state aid was financed by a charge levied on the sale of non-French textile-products in France. The more a foreign textile-company sold in France the more it contributed. The aid measure was intended for the support of research conducted by French textile companies. The Commission found that the aid in itself was not contrary to the common interest, but that the method of financing had a protective effect in that the more companies from other Member States succeeded in increasing their sales, the more they had to contribute to the system. Consequently, the Court found that the Commission was entitled to consider it contrary to the common interest.

¹³⁷ Quigley, p. 88

¹³⁸ Case T-110/97 *Kneissl Dachstein Sportartikel AG v Commission* [1999] ECR II-2881, §57

¹³⁹ Case 47/69, *France v Commission* [1970] ECR 487

The Court upheld, in *Philip Morris v Commission*, the Commission's finding that aid granted to a beneficiary in a sector in which there is an over-capacity would adversely affect trading conditions contrary to the common market.¹⁴⁰ In *France v Commission*, ECJ held that aid which might force the competitor of the beneficiary to withdraw from the relevant market, even though this competitor had been able to remain in business on its own merits, would adversely affect the trading conditions contrary to the common interest.¹⁴¹

3.2 The Guidelines

3.2.1 Legal basis and legal status

ECJ has confirmed that it is within the discretion conferred, through Articles 87 EC and 88 of the EC Treaty, on the Commission to adopt guidelines designed to indicate how it intends to exercise its discretion.¹⁴²

In *Netherlands v Commission*, ECJ again accepted that the Commission could adopt guidelines on how it would exercise its powers of assessment in the area of State aid.¹⁴³ In *CETM v Commission*, ECJ also held that the Commission is bound by the guidelines and notices that it issues in the area of state aid supervision as long as they do not depart from the provision of the EC Treaty and are accepted by the Member States.¹⁴⁴

ECJ has in *Italy v Commission* implicitly recognized the Guidelines concerning the rules on rescue aid.¹⁴⁵ The rules on restructuring aid were implicitly confirmed in *Ducros v. Commission*.¹⁴⁶ Finally it should be noted that no Member State has successfully challenged any guidelines on state aid adopted by the Commission. The Commission guidelines therefore appears to be a successful codification of how it will, without going beyond its discretion, assess whether state aid is compatible with the common market.¹⁴⁷

¹⁴⁰ *Philip Morris v Commission*, §26; Deufile, §16

¹⁴¹ Case C-301/87, *France v Commission* [1990] ECR I-307, §50

¹⁴² Case C-242/00, *Germany v Commission* [2002] ECR I-5603, §27

¹⁴³ Deufile, §22; Case C-313/90, *CIRFS and Others v Commission* [1993] ECR I-1125, §36

¹⁴⁴ Case C-351/98 *Spain v Commission* [] ECR, §52, §53

¹⁴⁵ Case 303/88, *Italy v. Commission* [1988] ECR I-1433, §37

¹⁴⁶ Case T-149/95, *Ducros v. Commission* [1995] ECR II-2031, §61

¹⁴⁷ Nicolaides, p. 250

3.2.2 The Guidelines on rescue and restructuring aid

3.2.2.1 The scope of the Guidelines

The rules on state aid for rescue and restructuring are set down in one instrument.¹⁴⁸ The Commission maintains that this was the logical solution since the public authorities in both cases are faced with a company in difficulty. Rescue and restructuring, even if they involve different processes, are also two parts of a single operation.

The Guidelines apply to all companies in all sectors with the exception of companies in the coal and steel sectors. There are also certain specific rules in the Guidelines concerning agriculture, fisheries and aquaculture.¹⁴⁹ The Guidelines have the aim of being the exclusive manner to grant a state aid for a company considered to be in financial difficulties. According to §19 of the Guidelines, a company in difficulty may only receive aid under the derogation of Article 87(3)(c). According to the same paragraph, the exemption of Article 87(3)(c) is only appropriate when the conditions set down in the Guidelines are met.¹⁵⁰

The Commission regards a firm to be in difficulties when it is unable to stem losses –using either its own resources or any funds it has been able to obtain from its owners, shareholders or creditors – which, without outside help, would almost certainly condemn it to go out of business in the short or medium term. In particular, this would be the case when more than half of its capital has disappeared and more than a quarter of its capital has been lost over the previous 12 months.

3.2.2.2 General conditions

An ailing company that represents part of a larger group is not normally eligible to receive aid for rescue and restructuring. To be eligible it must show that its difficulties are its own and not the result of an arbitrary allocation of costs within the group and that the difficulties are too serious to be met by the group itself. For the purpose of this condition, the State is not regarded as a group.¹⁵¹ The case law does not provide any further answers to what should be taken into account when assessing whether the difficulties are too serious to be dealt with by the group itself.

Furthermore, a company will in principle not be eligible for rescue and restructuring aid for the first three years following the start of its

¹⁴⁸ Community guidelines on state aid for rescue and restructuring firms in difficulty, OJ C244, 01.10.2004, p. 2-17 (hereinafter the Guidelines)

¹⁴⁹ The Guidelines, §18

¹⁵⁰ The Guidelines, §19, §20

¹⁵¹ NN 27/02 – Aide a la restructuration de la SNCM

operations.¹⁵² Any changes in ownership of the business do not affect the assessment.¹⁵³

If less than 10 years have elapsed since the company in question received rescue and/or restructuring aid, in order to ensure that the purposes of rescue and restructuring aid are respected, it is not eligible for further aid.¹⁵⁴ This rule will be exempted from in two situations. One is when restructuring aid follows the granting of rescue aid as part of a single operation. Secondly and more controversially, new rescue and restructuring aid may be granted if the company in question is in difficulties due to exceptional and unforeseeable circumstances for which the company is not responsible.

3.2.2.3 Rescue aid

The primary objective of rescue aid is to give a company in difficulties temporary support to keep it afloat during a short period of time. This time-period should allow the company to analyse the circumstances that gave rise to the difficulties and to develop an appropriate plan to remedy these difficulties or to create a liquidation plan.¹⁵⁵

According to the Guidelines, rescue aid must submit to the following conditions. The aid granted must (i) be justified on grounds of social difficulties (ii) be without any adverse spill over effects on other Member States and (iii) be restricted to the amounts necessary to keep the firm in business. The amount may only include aid for urgent structural measures.

The aid must consist of (iv) liquidity support in the form of refundable loan or of loan-guarantees and (v) be accompanied by a commitment by the Member State to, within 6 months, communicate to the Commission a restructuring plan or proof that the aid has been refunded. Loans are to be reimbursed over a period of no more than twelve months after disbursement of the last instalment to the company.¹⁵⁶

3.2.2.4 Restructuring aid

The objective of restructuring aid is to, by a feasible, coherent and far-reaching restructuring plan, restore the long-term viability of the company in question. Restructuring is a twofold process. Financial restructuring, such as capital increase and debt reduction, normally has to accompany the physical restructuring such as the consolidation of different businesses.¹⁵⁷

¹⁵² The Guidelines, §12

¹⁵³ The Guidelines, §19, §20, §22

¹⁵⁴ The Guidelines, §72, §73

¹⁵⁵ The Guidelines, §15

¹⁵⁶ The Guidelines, §25

¹⁵⁷ Anestis, Mavroghenis and Drakakakis, EStAL, p. 30

The Commission is to approve restructuring aid only if it is part of a restructuring plan that (i) will restore the long term viability of the firm in difficulty (ii) be limited to the minimum aid necessary and (iii) avoid undue distortions of competition.¹⁵⁸

The conditions of a return to long-term viability is to be understood as requiring a turnaround that will enable the company to, after completing its restructuring, to cover all of its costs, including depreciation and financial charges. The expected return on capital should be enough to enable the restructured company to compete in the marketplace on its own merits.¹⁵⁹

The restoration of the company's long-term viability must be realized through a restructuring plan, one that must be endorsed by the Commission. This restructuring plan must restore the company's long-term viability (a) within a reasonable time-scale and (b) on the basis of realistic assumption as to the future operating conditions. The improvement in viability must derive mainly from internal measures, only those external factors that are generally acknowledged may contribute to it.¹⁶⁰ Examples of internal physical restructuring-measures are reduction of the work force, reduction of regional divisions, cost-cutting, improved management and cost control, streamlining of the portfolio and reorientation of business.¹⁶¹ The restructuring plans usually emphasize the return to the beneficiary's core activity as the most important restructuring measure.

Obviously, the assessment of opportunities for return to viability requires a combination of complex economic and managerial expertise and judgment based on market and sector knowledge. In particular, the Commission favours privatisation of state-owned companies as part of the restructuring plan, since the Commission considers this to ensure that the market believes in the beneficiary's return to long-term viability.

The restructuring aid should be limited to the minimum, in terms of the costs that are necessary and in the light of its existing financial resources and those of its shareholders, that is needed to enable its successful restructuring. The aid beneficiaries must make a significant contribution to the restructuring from their own resources and private investors must chip in and take part in the cost of the restructuring. This contribution must be as high as possible, at least 25% in the case of small enterprises, 40% in the case of medium sized enterprises and 50% in the case of large firms. The Commission consider that the participation of private investors is a sign that the market believes in the restructuring plan. Furthermore, the amount of aid must be such as to avoid providing the firm with surplus cash that could be

¹⁵⁸ The Guidelines, §35, §38, §43

¹⁵⁹ The Guidelines, §37

¹⁶⁰ The Guidelines, §35

¹⁶¹ Anestis, Mavroghenis and Drakakakis, EStAL,31

used for aggressive marketing-distorting activities that are not linked to the restructuring process.¹⁶²

Compensatory measures must be taken in order to ensure that the negative effects on trading conditions are kept at a minimum and that the positive effects pursued outweigh the adverse ones. These measures may consist of the divestment of assets, reduction in capacity or in market presence and reduction of entry barriers on the market concerned.¹⁶³

The compensatory measures must be in proportion to the distorting effects of the aid and to the size and the relative importance of the company on its market. These measures should take place, in particular, in markets where the firm will have a significant market position after the restructuring.¹⁶⁴

The Guidelines state that these limitations usually take the form of limitations of the presence that the firm will have on its market following restructuring. However, the form of this limitation depends on the market structure. There will be less focus on limitation of the beneficiary's post-restructuring presence if the relevant market is not characterised by overproduction. This also applies when such a limitation could have the indirect effect of creating a monopoly and/or strengthening an oligopolistic situation.

For assessment of the adequacy of the compensatory measures, write off and closure of loss-making activities, which are necessary to restore viability, may not be considered as a reduction in capacity or in market presence.¹⁶⁵

According to paragraph 41 of the Guidelines, aid to SMSs does not normally distort the competition to an extent contrary to the common interest and accordingly does not have to be subject to compensatory measures.

¹⁶² The Guidelines, §44, §45

¹⁶³ The Guidelines, §38

¹⁶⁴ The Guidelines, §39

¹⁶⁵ The Guidelines, §40

4 Commission decisions

4.1 Commission decisions partially approving restructuring aid

4.1.1 Air France

March 18, 1994 France notified to the Commission a capital injection of FF 20 Billion for the restructuring of Air France. The Commission decided May 30, 1994 to open the formal investigation procedure.¹⁶⁶

The Air France group (hereafter Air France-group) was consisted of Air France , Air Inter, Air Charter and Sabena. It was one of the three largest European air carriers. The Air France-groups turnover was EUR 8606 Billion. Its biggest competitors British Airways and Lufthansa had a turnover of EUR 7300 Billion and EUR 8900 Billion. Needless to say that it was not only one of the largest air carriers but it was also, like national air carriers in general, a matter of national prestige. Air France had faced serious difficulties since 1991 and, after a bad result in 1993 that severely affected its own capital, it launched a restructuring plan to stay in business. According to the restructuring plan, Air France's financial situation was due to the recession that followed the Gulf-crisis, the liberalisation process within the Community and the increased competition in North America. Another major factor in Air France's difficulties was the heterogeneity of its fleet that led to increased operating costs as compared with other European air-carriers.

The restructuring plan applied only to Air France and not to the companies that it controlled. It focused on a decrease in investment, the Commission noted in particular that the number of new aircraft to be delivered during the restructuring period was to be reduced from 22 to 17. Furthermore, the restructuring plan was to reduce the operating costs through a cut of 5000 employees, a decrease in financial charges as a consequence of the capital injection and an effort to stop using certain aircraft in order to homogenise its fleet.

The Commission's main concern in deciding to open the formal investigation procedure was the question of whether the aid would adversely affect the trading conditions on the routes upon which Air France competed with other European airlines. The Commission also feared that the aid would lead to overcapitalisation, which could allow Air France to re-distribute the aid to its subsidiaries, and which could increase the negative effect of competition. In this context, the Commission also questioned why the restructuring package only aimed at Air France and not the entire group.

¹⁶⁶ Commission decision 94/653/EC of 17.7.1994, "*Air France*", OJ L 254, 30.9.1994

The Commission also doubted whether the French Government would refrain from interfering in the group's management for other than commercial reasons. The last concern could be seen as an expression of discomfort with the public ownership of Air France.

The Commission found in its final decision that the financial injection amounted to state aid.¹⁶⁷ However, it considered that the commitments made by France during the formal investigation were sufficient for it to be compatible with the common market. France had promised to ensure that Air France would not increase its fleet. Furthermore, Air France would, on routes that were subject to competition from other air-carriers, not be allowed to grow faster than the increase in traffic, and always under market growth. Air France would neither be allowed to act as a price-leader and nor to operate on more routes than it operated in 1993. In order to avoid cross-subsidisation, France would also put up a holding company for Air France and its subsidiaries to make sure that all transactions between them respected the "arm-length" principle. The Commission found that, since this would limit the growth of Air France, it would benefit its competitor and would thus avoid affecting the competition adversely. The Commission held that a successful restoration of Air France long-term viability would contribute to the development of the European air sector by improving its competitiveness.¹⁶⁸

The Commission found that Air France did not have any assets outside its core-activity. In this context, the Commission also noted that Air France had reduced its orders of new airplanes by 21%. The Commission appeared to consider this a step towards minimising the negative effect of the aid since larger investments in its fleet probably would affect its competitors negatively. The Commission held that a further reduction in airplane-orders would cause Air France's fleet to be too old to attract passengers and accordingly put its viability in danger. Consequently, the Commission concluded that Air France could not contribute any further to the restructuring. To ensure that the aid was limited to the minimum, the Commission held that the aid had to be granted in three different steps, all subject to its approval. If the Commission, during the restructuring process, should change its analysis as to the proper amount of state aid, it would subsequently demand a decrease in the amount of aid.

According to the Commission, the air-sector was no longer characterised by over-capacity and was moving toward economic recovery. Approval of aid for restructuring in such a situation is controversial. Air France had obviously not been able to carry out the structural adjustments by itself but made it through the crisis of the air-sector only at the cost of excessive losses. To support a company in this situation would take away the markets due reward to the other air-companies that had made it through the crisis

¹⁶⁷ Commission decision 94/653/EC of 17.7.1994, "*Air France*", OJ L 254, 30.9.1994

¹⁶⁸ Commission decision 94/653/EC of 17.7.1994, "*Air France*", OJ L 254, 30.9.1994, §218

through their own action. The French state's ownership of Air France represented for another disturbing point. It could be feared that Air France's failure to adapt to the crisis in the air-sector was due to its confidence in its owner, in the case of an acute financial crisis, to provide for its recapitalisation. It should also be borne in mind that the market for the air-transport of passenger was subject to stiff competition, leaving the companies under heavy pressure. From this point of view it appear difficult to accept that the restructuring of Air France was necessary because of the composition of the market.

The Commission's reasoning concerning Air France's purchase of new airplanes demonstrates the Commission standpoint regarding a beneficiary's participation in its own restructuring. The Commission noted with satisfaction that Air France had reduced its orders of new airplanes, thus increasing its part in the restructuring. At the same time, it accepted the idea that a larger cut would put the company's viability in danger and thus was out of the question. The Commission's assessment was thus based on the presumption that the survival of Air France would have a positive effect on the market. This may or may not be a correct presumption but again, considering the composition of the market, it would have been of interest to know more in detail how the Commission came to this conclusion.

The Commission found, nevertheless, that the successful restructuring of Air France would contribute to the development of the air-sector by improving its competitiveness. The Commission's main concern was that Air France would adopt an aggressive pricing policy and through this grow faster than the market in general. It accordingly held that as long as the restructuring circumvented this risk, there would be no adverse distortion of the competition. That competitors would be sufficiently compensated by this approach appears controversial since it means that, instead of sharing Air France's market shares in the event of its bankruptcy, the competitors were only given the promise that Air France would not take any market shares from them. Although this might make sense within a larger assessment, of the benefits stemming from the restructuring, from the competitor's point of view it is not a very impressive line of reasoning.

In connection with this, it is also strange that the Commission in its decision did not mention any consideration as of the social impact of the approval or non-approval of the aid in question. If the Commission had showed or at least argued that the bankruptcy of Air France would have had a very negative social impact, for example because of a large loss of employment, it would have been easier to accept the idea that the benefits of the restructuring outweighed its costs.

The fact that compensatory measures only aimed at limiting the company's growth-rate to that of the market in general demonstrates the Commission's focus on the future. Perhaps it could be feared that this sends signals to large and prestigious companies that they do not have to adapt to the development of the market since they will be eligible for state aid in a situation of

financial distress. Another interesting detail worthy of a note is that the Commission accepted that the idea that restructuring involved only Air France and not the entire group. The guidelines state that a company that form part of a group can only receive aid if the group as a whole is incapable of dealing with the problems. In view of the scale of the problems encountered, this was certainly the case for Air France. However, it is still of interest that it is possible to detach Air France's subsidiaries from the restructuring effort. Does this mean that it also would be possible to detach certain parts of a single company when making assessments connected with restructuring aid?

4.1.2 Head Tyrolia Mares

During the summer of 1995 the Commission received several requests to investigate an alleged state aid-measure in favour of Head Tyrolia Marines (hereinafter HTM), an Austrian producer of articles for the ski-sport. HTM was owned by the public owned tobacco company Austria Tabakwerke (hereafter AT) and had incurred heavy losses in 1993 and 1994. In September 1995, AT decided to sell HTM to a group of international investors (hereinafter called Eliasch) as part of a restructuring plan to keep the company in business. December 20, 1995 the Commission decided to initiate the formal investigation procedure.¹⁶⁹

According to the restructuring plan, AT would sell HTM to Eliasch for EUR 0,7 Million. AT would give an additional capital grant to HTM of EUR 88 million while Eliasch undertook to inject EUR 20 million within the following three years. The physical restructuring of HTM focused on a return to core activities, re-dimensioning of production capacity and reduction of fixed costs.

In the final decision, the Commission concluded that the public ownership AT's participation in the restructuring amounted to state aid. It was uncontroversial that the restructuring would bring HTM into a long-term viability. The difficulty was to assess whether it avoided undue distortions of competition and whether the aid was in proportion to the restructuring's benefits.¹⁷⁰ The Commission noted that the sectors in which HTM was active had gone through difficult times because there had been a sharp decline in demand since the beginning of the 1980s. It also pointed out that these sectors were mature and suffered from overcapacity. The Commission argued that HTM's capacity reductions in these sectors, in the range of 9% to 59%, would benefit the sector as a whole.

The markets in question were also characterised by four large companies. The Commission argued that the disappearance of HTM would have had a negative effect on the market structure. The disappearance could create

¹⁶⁹ Commission decision 97/81/EC of 30.7.1996, "HTM", OJ C124, 27.5.1995, p. 5

¹⁷⁰ ¹⁷⁰ Commission decision 97/81/EC of 30.7.1996, "HTM", OJ C124, 27.5.1995, p. 5

tighter oligopolies or even duopolies. Therefore, the Commission found that this also meant that the restructuring benefited the sector as a whole. As for proportionality, the Commission considered Eliasch's contribution of EUR 20 million to be a significant contribution. Eliasch contribution together with HTM's own contribution, which amounted to a third of the restructuring cost, was considered sufficient to ensure that the total state aid of EUR 118 million was limited to the minimum. The Commission felt reassured that, since the aid was paid in several tranches and did not leave HTM with a comfortable equity share, it would not provide HTM with surplus capital.

This case illustrates the Commission's special competence to consider the market structure when assessing whether the advantages brought about by the restructuring outweigh the inherent distortion of such aid. It should be noted that it was crucial here that HTM undertook large capacity reductions. The decision is interesting since it dealt with a company that was active in an oligopolistic market characterised by overcapacity. On the one hand, the preservation of the market structure is, according to the Guidelines, one reason that can motivate aid for the restructuring of a company in difficulties. On the other hand, ECJ has found that aid to a company in a sector characterised by over-capacity is contrary to the common interest.¹⁷¹ The circumstances of HTM were not identical but it is nevertheless strange that the Commission did not offer further reasoning on this point. The Commission obviously considered itself in possession of considerable wisdom in the organising of the market, saving a company on the one hand but deciding on the other hand that it needs to reduce its activities to a certain extent. The sectors in which HTM were active had been in recession since the beginning of the 1980s when the demand for ski and sport articles dropped. The problems were thus not new and it appears even more relevant, therefore, to argue that going out business was the normal result of the process of competition. This criticism can be illustrated by the Commission's opinion on restructuring aid for air-companies in the aftermath of 9/11-01. The Commission had the pointed out that "*the events of 11 September 2001 must not undermine the Commission's policy on State aid to restructuring based in particular on the "one time, last time" principle. They must not be used as a pretext for bypassing the existing framework for aid to restructuring in order to remedy the serious problems which for months and sometimes years have dogged certain Community airlines attempting to restructure*".¹⁷²

Even though HTM and Eliasch contributed by one third of the restructuring cost, it remains of interest that the Commission considered Eliasch's part of the contribution to be significant. Eliasch contribution amounted to less than 20% of the amount of aid. This restructuring was assessed according to the

¹⁷¹ Philip Morris v Commission, §26

¹⁷² Communication from the Commission to the European Parliament and the Council, 'The repercussions of the terrorist attacks in the United States on the air transport industry', 10 October 2001, COM(2001) 574 Final, §29.

guidelines of 1994. These guidelines did not require the private contribution to amount to a certain percentage and accordingly the outcome might have been different if the aid had been assessed according to the present Guidelines.

4.1.3 Alstom

In a decision the September 17, 2003, the Commission decided to open the formal investigation procedure in respect to restructuring aid in favour of the Alstom-group. Alstom was at the time active in four sectors: the power sector, the transmission and distribution-sector, the transport-sector and the marine sector. It employed 110 000 persons, 62 000 of them in Europe. France also claimed that subcontractors carried out 75% of Alstom's activities and that a bankruptcy would lead directly to the loss of additional 113 000 jobs and indirectly to further a loss of 50 000 jobs. This would bring the total loss of employment up to a staggering 216 000.¹⁷³

Alstom's financial difficulties, according to the restructuring plan, were due to the general downturn in the economy following 9/11-01, and the liberalisation of the electricity market, as well as to unforeseen technical problems connected with its heavy-gas turbines (the core of its activity in the power-sector). Alstom's situation became urgent when it in 2003 acknowledged its having difficulties. This led to a crisis in confidence that increased its debts-related costs. The restructuring plan, after several modifications, focused on a large divestiture and an industrial reorganisation. Of particular interest is the financial restructuring consisting of state aid amounting to EUR 3,08 billion.¹⁷⁴ The contribution to the restructuring by Alstom and by private investors amounted to EUR 10 billion.

The Commission motivated the opening of the formal investigation procedure by the lack of sufficient information being provided by France. The Commission found the information submitted insufficient to evaluate whether the aid was limited to the minimum and which compensatory measures would be appropriate. In particular, the Commission noted that there was uncertainty of whether the aid would provide Alstom with a surplus that could be used for market-distorting activities.¹⁷⁵ Interested third parties put forward the argument that the markets on which Alstom was active were sufficiently competitive and that the disappearance of Alstom would not change this situation.

¹⁷³ Commission Decision 2005/418/EC of 7 July 2004, "*Alstom*", OJ L150/24, 10.6.2005, §85

¹⁷⁴ Commission Decision 2005/418/EC of 7 July 2004, "*Alstom*", OJ L150/24, 10.6.2005, §144, §216

¹⁷⁵ Aid C 58/03 (ex NN 70/03) –Aid granted by France to the Alstom group, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, §77

In its final decision, the Commission found that the private contribution was sufficiently large to ensure that the aid was limited to the minimum. In order to ensure that the aid did not provide Alstom with surplus cash that could be used for aggressive, market-distorting activities, the Commission made approval subject to control of Alstom's pricing and acquisitions policy for a period of four years. Approval was also subject to the condition of the divestiture of France's shareholding in Alstom.¹⁷⁶ The Commission held that the 20% reduction in turnover already carried out in 2003 and an additional 10% reduction were sufficient to avoid undue distortions of competition.

Since the Alstom decision is technical in nature, it is difficult to draw any conclusions of interest other than that even very large sums of state aid may be found compatible with the common market when they are accompanied by a very substantial private contribution. This would be the case, even when the financial difficulties, as in this case, were not due to any exceptional circumstances but rather to the lack of structural adaptation of its own.

Another interesting point in this decision is that the Commission does not comment on the French authorities' focus on the social impact. An interested third party (Siemens) had argued that the competition on the markets in question would not be negatively affected by the disappearance of Alstom. The Commission avoided commenting on this as well. In fact, it did not provide any reasoning concerning the claimed advantages of the restructuring. The Commission had obviously chosen to make a technical application of the conditions of the Guidelines without any attempt to explain its possibly greater benefits. It would appear that the Commission thought that the restructuring of the company was beneficial in itself or that the benefits of the restructuring were so obvious that it was not necessary to mention them. It would at any rate have been of interest to know how the Commission positioned itself in regard to the claim that the market would remain competitive even without Alstom. It would have been very interesting to know as well what importance the Commission placed on the social considerations put forward by France. The Final decision also leaves some uncertainty as to the compensatory measures. According to the final decision, 20% of the reduction in turnover took place in 2003. Since notification of restructuring aid took place in September, it thus raises the question of whether compensatory measures taken before the notification can be considered as being part of the restructuring.

4.1.4 Bull

Bull was a large company that operated mainly in the areas professional servers and specialised computer-engineering services. State aid in favour of

¹⁷⁶ Aid C 58/03 (ex NN 70/03) –Aid granted by France to the Alstom group, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, §216, § 220

Bull has been the subject of several Commission decisions. The rescue and restructuring aid during the period of 1992-1994 granted by France to Bull was found compatible with the common market. However, in 1999 Bull showed renewed losses. At the end of 2001 it was granted additional rescue aid by France, which was subsequently declared compatible by the Commission under the condition that it be repaid by June 2003. When it did not comply with this condition, the Commission brought an action before the Court of Justice. This forced France, in April 2004, to notify this aid as aid for restructuring.

The restructuring plan provided for large reductions in overheads and a significant cut in staff members (from 11 000 to 7800) as well as a refocusing on the company's core business. The financial part of the restructuring contained a 90% reduction in the EUR 204 million debt owed to convertible bond holders, a capital increase based on private investment and capital aid from France amounting to EUR 504 million.

The decision on the March 16, 2004 to open the formal investigation was motivated by doubt as to whether the restructuring plan would be able to restore Bull's long term viability, whether the aid was limited to the minimum and whether the "one time, last time principle" was respected.¹⁷⁷ The Commission noted that even if Bull itself and private investors contributed with EUR 298 million, it was still a relatively small private contribution compared with the state aid of EUR 504 million. This raised concerns regarding whether the quantity of the aid was appropriate and the need for compensatory measures to offset possible undue distortions of competition. The Commission also noted that France had not submitted any information on such exceptional circumstances as would motivate the violation of the "one time, last time" principle. According to the Guidelines, such a justification was necessary since less than ten years had elapsed since Bull had received restructuring aid¹⁷⁸ However, no competitor spoke of distortions to the competition during the formal procedure.

In its final decision, the Commission approved the state aid in favour of Bull subject to several conditions. The Commission motivated the approval by Bull's small market share on the relevant market as well as, in certain product-segments, it being the only competitor to IBM. The preservation of Bull would lead to more dynamic competition in certain niche-segments. In the wider segments, the competition was strong and Bull's market share small. In combination with the offsetting of substantial assets and a commitment to no external growth, the Commission found that the aid would affect the competition in an unduly negative way. As regards the concern that the aid was limited to the minimum, the Commission accepted that a smaller amount would have meant that private investors had participated in the restructuring. The Commission also concluded that the

¹⁷⁸ Commission decision 2005/941/EC of 1.10.2004, "*Bull*", OJ L342/81, 24.12.2005

aid did not provide Bull with surplus cash that could be used for aggressive, market-distorting activities.

Concerning the “one time, last time” principle, the Commission held that the 10-year period had nearly elapsed. Furthermore, the Commission held that it was sufficient that, even though the crisis in the technology-sector in 2000 was not exceptional or unforeseeable, its scale was exceptional and unforeseeable to justify the breach of the “one time, last time” principle. Therefore, it found that the philosophy behind this principle, namely the wish to prevent companies from being unfairly treated, to be respected.

The Commission’s reasoning certainly lack coherence on several points. The Commission seems to pick the arguments that fits the conclusion it wants to reach. It points out the beneficiary’s small market share in the market as a whole, but also considers that its strong presence in relation to the market leader IBM, in certain niche-segments means that the preservation of Bull facilitates the development of the sector. However, the absence of criticism from competitors as regard the negative effect on competition indicate that there was no major negative effect on the competition. The Commission also appeared to accept, as France argued, that the large aid was necessary in order to convince private investors to participate. It does seem strange, however, that the Commission did not explain why it was certain that the aid did not provide Bull with surplus cash. France’s argument that the aid was necessary to bring the private investors also appears up side down. The philosophy behind private participation is rather a confirmation of the markets’ belief in the restructuring then a reason to grant large amount of aid. Furthermore, the Commission accepted that, despite the fact that Bull was a large company, the private contributions amounted to less then half of the state aid. This clearly demonstrates that the condition of a significant private contribution set down in the Guidelines is not absolute. That the Commission found that Bulls difficulties were due to exceptional and unforeseeable circumstances does not seem credible. Its financial difficulties were not a result of the crisis in the technology sector in 2000 but had started already in 1999. The Commission’s overall approach to the “one time, last time principle” is curious. It asserted that the fact that the 10-year period had almost elapsed to be one of the reasons for accepting new aid to Bull. Does this mean that companies can expect aid to be approved as long as ten years, or perhaps a little less, has passed? Such reasoning certainly seems contrary to the policy of avoiding aid for problems of a recurring nature.

4.1.5 British Energy

In September 2004, the Commission approved rescue and restructuring aid in favour of British Energy (hereinafter BE).¹⁷⁹ It was the largest energy-

¹⁷⁹ Commission decision 2005/407/EC of 22.09.2004, “*British Energy*”, OJ L142/26, 6.6.2005 (hereinafter *British Energy*)”

producer in the UK and, since the spring of 2002, it had faced serious economic difficulties. It owned eight nuclear power plants and one coal-based power plant. It was the only private operator of nuclear power in the UK; it had been privatised in 1996. It supplied large and commercial enterprises on the UK-energy market. BE's economical situation continued to deteriorate during the summer of 2002. In September 2002, the British government put in place a rescue package for the BE which the Commission subsequently approved on November 27th. On March 7th the restructuring plan for BE was submitted to the Commission and on the 23rd of July the Commission decided to launch a formal investigation. The Commission final approval, on July 23rd 2004, was subject to a number of conditions.

The origin of BE's difficulties was the large price-drop in electricity prices in 2002. According to the restructuring plan, BE had been unable to adapt to the new price-situation for three reasons, firstly its unhedged position. Unlike other large generating companies BE did not own a customer retail business that could provide a natural hedge to price-variation. Secondly, the nuclear generation also has a high proportion of unavoidable costs in relation to the output, mainly due to nuclear decommission liabilities and fuel management costs. Finally, BE had been obliged, due to technical problems, to temporarily close down certain nuclear power-plants which further reduced its income.

The restructuring package that was put together by the UK-authorities and BE's major investors contained 7 measures:

The UK Government agreed to take over the funding of historic nuclear liabilities. This means that the UK Government would assume the liability for the decommissioning of BE's nuclear plant and of the nuclear fuel loaded prior to the restructuring plan.

The renegotiation of a fuel supply and spent fuel management contract with British Nuclear Fuel Limited (public company).

A standstill on BE's debt towards its major creditors and the possibility of these debts finally being waived.

Financial restructuring arrangements with major creditors.

Introduction of a new trading strategy for BE.

The disposal of assets in North America to generate cash.

The waiver of tax owed to local governments.

The Commission found that only measure (A) constituted state aid.¹⁸⁰ I shall examine the Commission assessment of this measure. The Commission's qualification of the other measures as being non-state aid is outside the delimitations of this thesis.

When BE was privatized, it kept the liability for decommissioning nuclear power plants. Measure A transferred the financing of these liabilities to a state instituted fund. This fund was to be capitalised by BE and the UK. BE was to contribute with a percentage of its cash flow (65 percent of the

¹⁸⁰ British Energy, §300, §254, §255

consolidated cash-flow after tax and financing costs). Subsequently, since its participation was based on a percentage of its own cash flow, there was no definite limit on value of this state aid. The fund was to cover liabilities connected to decommissioning up to the year 2086.

The Commission, in its decision to open the formal investigation, voiced concerns regarding the unlimited nature of the mechanism of financing decommissioning liabilities in which BE would participate through a percentage of its free cash flow. The Commission feared that the state aid, because of the considerable uncertainty regarding its amount, was not limited to the minimum. During the formal investigation, several interested third parties argued that this aid amounted to operating aid and such, in line with the Guidelines, could not be compatible with the common market.¹⁸¹ The Commission was also concerned at the lack of internal restructuring. Interested third parties also added that the costs related to nuclear liabilities were underestimated and that the British governance support contained an implicit promise to that it would always guarantee BE's financial situation.¹⁸²

In its final decision the Commission mentioned the unlimited nature of the measure (A) as a problem since it raised concerns as to whether BE could be considered able, on its own feet, to face competition within a reasonable period of time.

The Commission, however, found that the decommissioning cost related to the past. Furthermore, it held that, because the cause of the liabilities was defined, the aid measure was in itself defined. The Commission concluded that the absence of limits in time or in value could not be viewed as postponing the restoration of viability to the future.¹⁸³ According to the Guidelines, the restructuring must not only be based on external measures. The Commission found BE's disposal of its assets in North America and its new trading strategy to be sufficient to meet the requirement of internal restructuring.¹⁸⁴

As regards the aid being limited to the minimum, the Commission reiterated that it is indeed impossible to determine the costs of decommissioning. The Commission found that since any estimate would risk being an overestimation of the costs, it was more accurate to set up a mechanism that would ensure that future expenditures to be kept at a minimum.¹⁸⁵

The British government argued that the aid would have no effect on competition since the economic problems were due to the costs of investment in nuclear generation already made (un-avoidable cost). The

¹⁸¹ British Energy, §154, §180

¹⁸² British Energy, §162, §179

¹⁸³ British Energy, §315

¹⁸⁴ British Energy, §333

¹⁸⁵ British Energy, §358

British government argued that it would always be more cost-efficient to keep all of BE's nuclear power plants than to have one or several of them shut down, since they covered their running cost. They also pointed out that the nuclear power plants' avoidable costs were lower than other power plants in the UK that meant that, even if the competition increased it would still be rational to keep them operational.

The Commission agreed with the British government. It found that it was necessary to make a distinction between aid for avoidable costs and for unavoidable costs. The unavoidable costs are sunk. It is therefore rational for a company to operate as long as it could cover its avoidable cost in order to recover as much "sunk cost" as possible. The Commission explained that state aid gives advantages to the beneficiary since it changes its break-even point but that it would not affect the competition since the company would operate in any case as soon as it covers its avoidable cost. Accordingly, aid for unavoidable costs would not artificially pro-long the life of a company.¹⁸⁶ Aid for avoidable cost would only improve the company's long-term viability if was open-ended.

Although the Commission agreed with the British government regarding the analysis of the distortion of competition, it feared that aid to nuclear generation might be used for buying additional non-nuclear generation or to enhance BE's non-nuclear power plant and accordingly distort the competition. The Commission noted that there was no overcapacity on the British energy market. If there was no structural over-capacity on the market, compensatory measures could be taken in the other forms than capacity reductions.¹⁸⁷ In order to ensure that the state aid was only used for the decommissioning of used nuclear fuel and nuclear power plants, the Commission demanded that BE be split up into three different parts. The nuclear power production was to be separated from the coal-based energy production and from the sales and distribution unit. The Commission also demanded that BE put a limit on its production for a six years period, that it be obliged not to act price-leading and that it set a maximum quantity of aid above which the further payments had to be approved by the Commission. The Commission gave the UK authorities 120 days to complete the restructuring of the company.¹⁸⁸

From the Commission's decision, it is clear that the condition of limiting the aid to the minimum does not necessarily require that the aid to be quantity-defined. It is sufficient that the source of cost is clearly defined. The Commission also argued that the duration of aid could in principle be unlimited as long as it was aid for "sunk costs" thus changing the break-even point but not artificially prolonging the life of the company.

¹⁸⁶ British Energy, §319, §320

¹⁸⁷ British Energy, §415

¹⁸⁸ European Commission Rapid Press release 22/09/2004, IP/04/1125.

It remains a fact that the aid to BE was not limited in quantity and that it would be an ongoing support for very long duration of time. BE was to contribute to the decommissioning only on the basis of its cash-flow (65 percent of the consolidated cash-flow after tax and financing costs). This financing mechanism completely relieved BE of certain costs associated with its activities. One of the third parties argued that this aid was operational aid. Operational aid is defined as aid intended to relieve an undertaking of expenses that it would itself normally have to bear in its day-to-day management or its usual activities. These activities should be financed by the companies own resources. Aid for such purposes does not aim at facilitating technical or structural changes but simply at enabling the recipient company to offer its clients artificially favourable terms and to ameliorate its profits margins without justification.¹⁸⁹ It seems reasonable to argue that a nuclear power plants should, on a day-to-day basis, should have to cover the expected costs of the decommission of the nuclear power plants.

To argue that aid would not affect the competition negatively because it was rational to keep a nuclear power plant in operation does not appear to be in line with the philosophy of the Guidelines. Such reasoning would mean that, in a market not characterised by over-capacity, any company could make an uncompetitive investment in new production facilities and, as long as the new facility was sufficiently efficient to make it rational to keep it in operation, expect the Commission to approve aid for restructuring. To not connect BE participation to decommissioning in relation to the actual costs of decommissioning, but simply to decide that it will participate on the basis of its cash-flow seems very distant from recreating a competitive situation.

The decision to approve aid to BE obviously deals with a very special situation. The large investments to nuclear generation and the liabilities already incurred, together with the low short-term costs (avoidable costs) for keeping the plants operational created difficulties in the assessment of the aid.

4.1.6 Bankgesellschaft Berlin AG

In January 2002, Germany notified the Commission that it intended to grant aid for restructuring in favour of Bankgesellschaft Berlin AG (hereinafter BGB). In February 2004, the Commission approved the restructuring aid. BGB was, at the time one, a publicly owned bank that ranked among ten largest banks in Germany. It had a particularly very strong presence in the Berlin-region. BGB operated primarily in private and corporate retail banking, real estate financing, real estate services and capital markets. BGB faced serious difficulties in the first half of 2001. The difficulty were described as being the result of high-risk real estate transactions, in particular imprudent rent and repurchase guarantees given to investors in

¹⁸⁹ Case T-459/93, *Siemens SA v Commissionen* [1995] ECR II-01675, §57

real estate funds in combination with the downturn of the real-estate market. In August 2001, Germany granted BGB rescue aid amounting to EUR 1755 million.

The restructuring aid consisted of a capital injection of EUR 1755 million and a commitment by the regional authority to cover risk rising arising from BGB's real estate business (hereinafter the risk shield). This risk-shield was of 30 years duration and was limited to a maximum EUR 35 billion. The high limit was fictitious since the cost resulting from the real estate business was in the best-case scenario EUR 3.7 billion and in the worst case EUR 6.1 billion.

The Commission decided to start the formal investigation procedure due to doubts as to whether the restructuring plan was sufficient to restore BGB's long-term viability. The Commission also had serious doubts as to the compensatory measures. It doubted, in view of the high amount of state aid, whether the reduction and abandonment of activities that would reduce BGB's balance sheet total by 26% (from EUR 190 billion to EUR 140 billion) was sufficient to mitigate the distortive effect of the state aid.¹⁹⁰

In its final decision the Commission examined the social and economic repercussions that would result from the bankruptcy of BGB.¹⁹¹ It then held that the restructuring plan would restore BGB's long-term viability. However, the Commission maintained that the recovery could be threatened if the real estate market should deteriorate further or if the gross domestic product should decline. The Commission also noted Germany's commitment to privatising BGB as being important in order to ensure its long-term viability. It argued that a private investor has a different demand of profitability than a public investor and that this would improve BGB's long-term viability. As regards the compensatory measures, the Commission noted that the market for financial services do not suffer from overcapacity within the sense of the Guidelines. The notion of overcapacity refers to production capacity rather than to service industries in which capacity can be adjusted much more easily. The Commission also concluded that it would be inappropriate to define the market as national in assessing the distortive effects. BGB had a pre-eminent position on the Berlin bank retail market and accordingly BGB was forced to offer considerably compensatory measures in this area.

Of interest in this case is how the Commission dealt with the condition of long-term viability. In its reasoning, the Commission acknowledges that further deterioration of the real estate market would endanger BGB's return to viability. According to the Guidelines, improvement in the viability can be based on external factors. If the external factor in question are based on

¹⁹⁰ Aid C 28/02 (ex NN 5/2002) - Restructuring aid for Bankgesellschaft Berlin AG, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, OJ C 141/2, 14.6.2002

¹⁹¹ Commission decision 2005/345/EC of 18.2.2004, "BGB", OJ L116/1, 4.5.2005

market assumptions then they should be generally acknowledged. The Commission admitted that BGB's return to long-term viability was dependent on the improvement in the markets. However, it did not provide any information on whether such improvement was expected generally. It is also of interest to note the Commission's focus on the social and economic impact of the aid or absence of aid for restructuring. The BGB and the Philipp Holzman decisions are the only decision examined in this thesis in which the Commission expressly took into account the social and economic impact in its compatibility assessment. This is also the most recent decision examined in the thesis but it is unlikely that it indicates a shift in the Commission's policy. It should instead be seen as an illustration of how the Commission can bring up different considerations in different decisions on aid for rescue and restructuring.

4.1.7 Crédit Lyonnais

In May 1998, the Commission approved of aid for restructuring of Crédit Lyonnais (hereinafter CL).¹⁹² CL was at the time of its financial difficulties a publicly owned group operating in the banking sector.¹⁹³ CL had from the late eighties up to 1992 expanded rapidly, mainly in Europe, and it had become the world's largest bank outside Japan. In 1992 and 1993, CL recorded very heavy losses in proportion to its own funds. The losses were caused by excessive and under-controlled exposure to real estate, an imprudent policy of expansion abroad and also an inefficient monitoring system on the part of the shareholder (France), which had been unable to in time, put an end to the high risk strategy adopted by CL's managers. The Commission argued that there were grounds for believing that if CL had not been given the total and permanent, implicit or explicit, promise to receive state aid in case of financial difficulties it would not have embarked on such a risky business strategy. It described the implicit promise of state backing as a "moral hazard".¹⁹⁴

The losses caused its solvency ratio, the proportion of own funds to risk-adjusted assets, to fall. If France had not intervened in 1994, the bank's solvency ratio would have fallen below the 8% legal minimum, forcing it into liquidation. To save the company, France granted rescue and restructuring aid consisting of a capital increase of FRF 4,9 Billion and the underwriting by the state of the risks attached to about FRF 42,7 billion of non-performing property assets. These assets transferred to a special hiving-off company. Simplified, CL put its loss making activities into a holding company. This holding company was to carry its losses through the guarantees given by the French authorities. The aid was thus an effort to reduce CL debt.

¹⁹² Commission decision 98/490/EC of 20 May 1998, "*Crédit Lyonnais*", OJ L 221/28, 8.8.98

¹⁹³ France was the majority shareholder holding 55% of the shares and 75% of the votes.

¹⁹⁴ OJ L 221/66, 8.8.98

The restructuring plan included CL contributing to the costs of this holding company through a preferential loan of FRF 145 billion to the holding company. The annual value of this preferential loan was calculated to FRF 2.8-3.3 billion. In 1995, the Commission approved the aid that had been granted by France to CL during 1994 and 1995.¹⁹⁵ The approval was conditional on a “better fortune clause”. According to this clause, France would receive a contribution of 34% of CL’s net consolidated result. As for compensatory measures, CL would make a 35% cut in its commercial presence outside France including a 50% cut in its commercial presence in Europe.

CL continued to suffer financial losses. In 1996, France put together a new rescue package amounting to nearly FRF 4 billion. The reason for the continued financial difficulties was described as the inadequacy of the restructuring plan of 1995. In particular, CL’s costs for the preferential loan to the holding company proved too large for allowing a return to viability. Furthermore, the costs of the claims against CL carried by the holding company soared thus increasing the amount of state aid compared to the amount calculated in the restructuring plan of 1995.

To restore CL’s long term viability, the restructuring plan of 1997 involved the following measures: (i) total neutralization of CL’s net costs of the preferential loan to the holding company, (ii) the sale of a substantial proportion of the banks retail operations in Europe, (iii) a redundancy program leading to the cut of 5000 in the number of employees and (iv) reinvestment in the cash flow of the proceeds from the asset sales. France also promised to privatise CL.

According to the French authorities, the restructuring plan included state aid that would probably amount to FRF 97-128 billion. The Commission estimated the amount of aid to be in between FRF 100 and 145 billion. As compensatory measures, France offered the sale of most of CL’s retail operations in Europe. France also made a commitment to privatize CL in 1999.

In its final decision, the Commission observed that the European banking sector was undergoing a process of adjustment characterised by severe competition.¹⁹⁶ The liberalization of capital and the launching of the single currency had further fuelled this process. The Commission noted that France had a quasi-systematic state support for nationalized institutions in difficulty. It argued that to approve aid that was of such a quasi-natural nature could create expectations of further state support in the future.

¹⁹⁵ Commission Decision 95/547/EC of 26 July 1995, OJ L 308, 21.12.5

¹⁹⁶ Commission decision 98/490/EC of 20 May 1998, “*Crédit Lyonnais*”, OJ L 221/28, 8.8.98

The Commission found that the restructuring plan of 1997 was realistic in terms of the assumptions made, which forecast reasonable growth and avoided excessively ambitious objectives that could lead to the adoption of an aggressive pricing policy. The Commission concluded that the restructuring plan would restore CL's long-term viability. That CL, as a result of the largest-ever state aid for restructuring of a company in difficulties, could become viable is neither surprising nor controversial. The Commission also noted that the privatisation of CL would help to solve the problem of "moral hazard". The main point of controversy was the cost-benefits-assessment and what compensatory measures that would be necessary to avoid an undue distortion of competition due to the aid in question.

Concerning the costs-benefits assessment, the Commission examined the proportionality between the additional aid and the objective of restructuring the company. Here it is important to note that the Commission acknowledged that the direct and indirect costs of letting CL go into liquidation would by far exceed the costs of its restructuring. This is not surprising considering that CL was one of the most important credit institutions (and consequently "too big to fail"). Since from 2000, CL was expected to be able to finance its own recovery and the Commission found that CL should carry the cost of the preferential loan to the holding company from thereon. This would limit the additional state aid to FRF 53 and FRF 98 billion.

As for the compensatory measures, the Commission pointed out that the cut in CL activities would ensure its contribution to its own restructuring as well as to allow its competitors to be compensated by setting free of parts of its market shares. The Commission maintained that CL had received state aid equal to at least twice and possibly even three times its own funds in 1997 (FRF 44 billion). Furthermore, the aid had not only enabled CL to avoid liquidation but had also allowed CL to maintain a level of activity that otherwise would have been impossible due to legal restraint that applied to the banking sector. The Commission retained that given the volume of aid, CL's European competitors had suffered an exceptional distortion of competition so that exceptional compensatory measures were necessary.

The Commission noted that CL's rapid expansion at the end of the 1980s and into the early 1990s was a result of it building up a banking-network in Europe. The compensatory measures should subsequently be aimed at its activities in Europe. The Commission found that all of CL's activities in Europe outside of France ought to be sold off.

The decision in 1997 failed to respect the "one time, last time" principle. CL's problems had evolved over time and they were not the result of any unforeseen events beyond its control. The Commission did not even attempt to present any unforeseen event that would have caused the deterioration of CL's financial situation that justified a second restructuring. Considering that CL was one of the most important banks in Europe, it is not surprising

that the Commission was compelled to approve aid. The bankruptcy of such a large banking company would undoubtedly have had very negative effect on the economy as a whole. It could indeed be argued that such a bank is too large to fail.

The focus of criticism is instead on the compensatory measures then on the restructuring itself. The Commission admitted itself that the amount of state aid involved created an exceptional distortion of competition. From this point of view, it is interesting that the compensatory measures connected with the new restructuring aid were not proportionally larger than those connected to the first restructuring. This is interesting since the second aid package was considerably larger. It is difficult to see the logic in demanding proportionally smaller compensatory measures in a situation in which a company already granted aid for restructuring need even more aid. This remark is strengthened by the fact that the European banking sector was characterised by competition and structural adjustment. Other credit institutions would have to adapt to the high level of competition and make the necessary structural adaptations without any state support. As had been argued by the Commission in the decision to open the formal investigation, recurrent aid might not only have a distorting impact in making up for past losses but it might also lead to expectations of new aid in the future. This argument is of lesser relevance, however, since the commitment to privatise CL appear to shift the focus from the state to private shareholders.

France's commitment to privatise CL could be regarded as a compliance with an additional, implicit, requirement to ensure that CL, in the future, would turn to its private shareholders rather than to France. That a Member State is the main shareholder does not affect the qualification of a state measure as state aid but it still appears to carry importance in the assessment of compatibility. If a Member State fails to act as a responsible owner, it may lead the Commission to the conclusion that privatisation is the only solution to ensure the beneficiary's return to long-term viability. Since the return to long-term viability is one of the Guideline's most central conditions, this means that privatisation could become an implicit condition for the approval of aid for restructuring.

4.1.8 GAN

The restructuring aid granted by France to the GAN group in 1997 is of particularly interesting since the Commission considered the public ownership to be the main reason for the company's difficulties.¹⁹⁷ GAN, a public owned financial group, was France's fifth largest company in insurance and banking. GAN had experienced major economic difficulties in respect both to its banking and to its insurance activities since 1993. It was in particular the poor quality of the approximately FRF 19 billion-worth of debts and assets linked to real estate-projects held by the GAN's

¹⁹⁷ Commission decision 98/204/EC of 30.7.1997, "GAN", OJ L78/1, 16.3.98

subsidiary banking group that led to the financial difficulties. The Commission found that it was the result of an excessive and uncontrolled exposure to the property sector, an imprudent policy of expansion in the non-life-insurance sector and an ineffective system of checks on the part of its shareholder (the French authorities). In other words, the Commission held that the cause of its financial difficulties was the inadequacy its corporate governance. In 1994, GAN was unable, following disappointing results on the insurance side, to offset the deficit in its property business. In 1995, GAN received rescue aid amounting to FRF 2.86 billion. In February 1997, French authorities informed the Commission that the approved aid was insufficient and notified of additional aid amounting to FRF 20 billion. This aid consisted of a FRF 11 billion capital increase and a commitment to cover GAN's losses of FRF 9 billion.

The Commission, accordingly, reopened the formal investigation procedure with respect of the rescue aid granted in 1995 and initiated the same procedure with respect to the restructuring aid announced in 1997.¹⁹⁸ In particular, the Commission had doubts as to whether the restructuring plan would restore GAN's long term viability. In the final decision, the Commission argued that it was clear that the colossal amount of aid provided, reflected the confidence that GAN's top management placed in the state as a shareholder. It recognised that the restructuring of GAN would be less costly for France in its capacity as authority responsible for monetary and financial stability. The Commission still held that the state by its passivity as a shareholder had created the need for state aid. The Commission argued that if GAN had not had the implicit or explicit support of the French authorities it would not have embarked upon such a hazardous policy. Thus, the Commission's reasoning is similar to that in the *Crédit Lyonnais*-decision. The Commission argued that privatization would be the best solution to reduce the "moral hazard" that had been the root of GAN's collapse. This would strengthen GAN's corporate governance by stepping up monitoring without distorting the market. The Commission held that the restructuring plan would restore GAN's long-term viability but again, only if it transferred its activities to partners having the necessary economic and human resources to complete the restructuring.

France undertook the sell of GAN to a private buyer. The Commission explained that GAN's planned reduction of market shares could not be regarded as a compensatory measure because it was simply the effect of voluntarily reduction of non-performing contracts aimed at reducing losses and increasing productivity. The Commission declared that the aid would be compatible only on the condition that GAN dispose of the international side of its insurance-business. GAN's banking did not have any activities outside of France. The Commission considered the compensatory measures undertaken in the first restructuring plan to be sufficient to offset the distortion of the competition in the banking sector, provided that GAN was

¹⁹⁸ Commission decision 98/204/EC of 30.7.1997, "*GAN*", OJ L78/1, 16.3.98

privatized. At any rate, further divestitures of its banking activity would put its return to long-term viability at risk.

The Commission's reasoning in this decision resembles its reasoning in the Credit Lyonnais decision. The Commission appeared to think that aid was motivated since it would be less costly for France than letting GAN go out of business. GAN's bankruptcy would have meant that France, in its capacity as authority responsible for monetary and financial stability, would have had to assume GAN's liabilities. The Commission repeated on several occasions that the reason for GAN's financial difficulties was the passivity of its owner, the French state. This gives the impression that France blackmailed the Commission, by providing *a fait accompli*, to approve restructuring aid. From this point of view, it is only logical that the Commission demands the privatisation of GAN. This could prevent the state as a shareholder making the same mistaken still another time.

4.1.9 Philipp Holzmann

In December 1999, Germany notified the Commission that it intended to grant restructuring aid in favour of Philip Holzman AG (hereinafter P-H). The Commission initiated the formal investigation January 18, 2000.¹⁹⁹ P-H was at the time one of Germany's largest construction companies. Until 1998 it was the second largest supplier of construction services and it was fully owned by private shareholders. In 1999, P-H had 28000 employees, 16000 in Germany and 12000 in other countries and an annual turnover of EUR 4.55 billion.

Demand in the German construction sector had been declining since 1995. The Commission characterised the sector as suffering from overcapacity. Between 1993 and 1998, P-H had suffered losses of EUR 3 billion and when it started its restructuring program in 1998 further losses amounting to 1.4 billion were discovered. At this point the three major creditor banks agreed on the principles for a restructuring plan. However, Deutsche bank was the only shareholder and the other two creditor banks refused to participate in the capital increase. Subsequently P-H filed for bankruptcy. The petition for bankruptcy was withdrawn when the German authorities decided to support the restructuring efforts.

The restructuring aid was part of a broader restructuring concept involving a EUR 76.7 million loan from a public bank and a state guarantee for a loan of EUR 64 million. The private investors were to contribute with EUR 3 billion. Apart from liquidity assistance, the restructuring plan involved a cut of 7000 jobs as well as the selling out and closure of subsidiaries. The

¹⁹⁹ Aid C 1/2000 (ex N 760/99) –Restructuring aid in favour of Philipp Holzmann AG, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, OJ C 110/2, 15.4.2000

divestments were to account for a volume of EUR 630 billion, half of which was in Germany.

In its decision to open the formal investigation, the Commission was concerned at the lack of information submitted. Foremost, it pointed out that due to the overcapacity in the construction sector it had serious doubts as to whether divestments and workforce cuts could be considered as an irreversible reduction in production and questioned the absence of compensatory measures connected with the restructuring plan. The Commission also wanted more information on why the aid was decisive for undertaking the restructuring plan.

During the formal investigation procedure, the German authorities submitted information on the adverse social effect that would be the result from a liquidation of P-H. Germany argued that the disappearance of P-H would lead to loss of 55 000-60000 jobs. The Commission found, on the basis of the information submitted, that the loss of 35 000 jobs were more realistic.

In its final decision, the Commission reiterated that in accordance with the Guidelines, any distortions of competition must be offset by the benefits flowing from the firm's survival.²⁰⁰ The Commission held for true that the liquidation of P-H would have meant a loss of 35 000 employments. It based this on the fear that if one major (P-H) company undergoes an insolvency-procedure, it could easily trigger a domino effect in the already crisis-struck sector. The restructuring, therefore, had economic and social advantages. The Commission concluded, supported by an independent consultancy firm, that the restructuring plan would restore P-H's long-term viability. The Commission pointed out that this was under the condition that P-H, to ensure its short-time survival, dealt rapidly with its divestitures.²⁰¹ The Commission also noted that P-H's liquidity would not be sufficient if the situation in the construction industry deteriorated. As for the lack of compensatory measures, the Commission reiterated the argument that supply exceeded demand on the German construction-market. However, it argued that the notion of overcapacity used in the Guidelines implicitly refers to manufacturing rather than services. Service capacity can adapt far more readily to market conditions since this capacity is based on employees rather than manufacturing equipment. Accordingly, the Commission found that the job cuts were appropriate measures for compensating competitors and it held that the job-cuts contained in the restructuring plan were sufficient.

It is interesting that the Commission explained that the notion of overcapacity in the Guidelines does not have the same implications in the service sector. It could also be questioned whether the construction sector is

²⁰⁰ Commission decision 2001/695/EC of 8.5.2001, "*Philipp Holzmann AG*", L 248/46, 18.9.2001

a service sector. As for the compensatory measures, the Commission only commented on where the job-cuts needed to be taken but not which sectors that should be involved. The Guidelines require capacity reductions, in order for measures to qualify as compensatory measures, areas that not characterised by financial problems. According to the Commission's reasoning in this decision, it would be sufficient to consider in which geographic areas the beneficiary had a strong position but it would not be necessary to take into account in which product-markets the beneficiary had a strong position or whether it was actually facing financial problems in these markets.

In several important decisions, the Commission had avoided mentioning the matter of employment in the over-all assessment of a restructuring. It is therefore of interest to note that the Commission's dealt with the employment situation, as an important factor, in its assessment of the benefits flowing from restructuring. At least it confirms that employment, as stated in the Guidelines, can be important in assessing whether a state measure can be compatible with the common market.

4.2 Negative Commission decisions

4.2.1 France Telecom

In January 2003, the Commission decided to open the formal investigation into two separate state measures in favour of France Telecom.²⁰² The French authority's non-notified announcement to, if its financial situation should deteriorate, support France Telecom and a notified announcement of its intention to grant a shareholder loan as part of its re-capitalisation.

The account in 2001 had showed that even though France Telecom had improved its operating result and had a substantial cash-flow generation, the weight from the past wiped out the net result turning the over-all result into a EUR 8.3 billion loss. This led to a downgrading of France Telecom's rating for long-term debt that led to a rapid deteriorated of the company's financial situation. France Telecom's large debt originated mainly from massive acquisitions in 1999. From June 2002 on, France Telecom was a company with serious structural problems and an unbalanced balance sheet.

In this situation, the French Minister for Economic Affairs told the media that if France Telecom were to face any financing problems then the State would take whatever decision necessary to overcome them. The Government in a press release confirmed this announcement. As a result of this announcement, the Goldman Sachs kept France Telecom on the investment scale. In December 2002 Air France presented an action plan aimed at re-capitalising France Telecom. France announced its commitment

²⁰² Commission decision 2006/621/EC of 2 August 2004, "*France Télécom*", OJ L 257/11, 20.9.2006

to take part in the re-capitalisation effort in proportion to its share. This meant that France assured that, if necessary, it would participate with EUR 9 billion. France notified to the Commission its participation. The re-capitalisation that followed was a success and subsequently France never had to participate in it.

The Commission found in its final decision that both the first announcement to support France Telecom and the shareholder loan constituted state aid.²⁰³ It held that France Telecom fulfilled the criteria to qualify as a company in difficulties. Consequently, the aid was assessed according to the Guidelines. The Commission found that France had not submitted any information on whether the aid was limited to the minimum or any information to support that the distortion of competition being offset by benefits flowing from the restructuring. Accordingly, the Commission found the aid incompatible with the common market and held that France, in light of Article 14 of Regulation (EC) No. 659/1999, was under the obligation to recover the value of the state aid granted.

The Commission then held that the obligation to recover was conditioned on the fact that the amount of aid is precise. The Commission found that it had not been able to determine the value of the French authorities announced intention to support France Telecom. Consequently, the Commission found, as follow by the principle of legitimate expectation, that it was refrained from demanding the recovery.

In this decision, the Commission thus confirmed that it makes a strict interpretation of the concept of a company in difficulties. France Telecom showed a good and improving operating result and generated a large cash flow. This did not prevent the Commission from concluding that the company, because of its large debt and the markets lack of confidence, would go out of business without an outside intervention. The decision also illustrates the fact that the Commission, in a situation in which a Member State has not submitted information on the fulfilment of the conditions in the Guidelines, can declare the aid to be incompatible. It is notable that the Commission found that the value of France's announcement to participate, if it would have be necessary, in the re-capitalisation of France Telecom could not be defined sufficiently to demand the recovery. This could mean that the Guidelines in reality do not apply to promises by Member State's to support companies in difficulty.

4.2.2 Compagnie Marseillaise de Reperations

In November 2002, France notified the Commission of its intention to grant EUR 3.49 million restructuring aid to Compagnie Marseillaise de Reperations (hereinafter CMR). CMR was founded on June 2002 to take

²⁰³ Commission decision 2006/621/EC of 2 August 2004, "*France Télécom*", OJ L 257/11, 20.9.2006

over the assets of the bankrupt ship repair yard CMdR. CMR had bought CMdR's assets for the symbolic price of EUR 1001. CMR also took over the asbestos liabilities and liabilities related to social security. France argued that CMR took over the problems related to loss of customers that resulted from CMdR's policy of focusing on ship conversion to the detriment of ship repair. The restructuring plan focused on realigning its business policy toward ship repair. Private investors would contribute with EUR 2.44 million.

The Commission opened the formal investigation procedure because it had doubts as to whether the financial measures in question could be authorised as restructuring aid.²⁰⁴ According to the Guidelines newly created companies are not eligible for state aid. CMR appeared to be a newly created firm emerging from the liquidation of CMdR. France argued that although CMR was a new company, it was similar to an existing company experiencing difficulties since its difficulties were related to the physical and human resources that it had taken over from CMdR. However, CMR did not take over any financial liabilities from CMdR. France also argued that there would be no distortion of competition since the reduction in capacity was ensured by the closing of two other ship repair sites in Marseille.

The Commission held in its final decision that the reason for excluding new firms from restructuring aid is based on the assumption that the creation of a company should reflect the situation on the market in question.²⁰⁵ The Commission also explained the difficulties described in the Guidelines are difficulties generated in connection with the operation of the company. Accordingly, new companies could not encounter such difficulties. The Commission pointed out in particular that CMR had not taken over any of CMdR financial liabilities, except those relating to asbestos, and consequently was not a continuation of CMdR.

The Commission accepted the principle that the existence of one ship repair company was in line with the needs of the market but argued that support for such activities should be met by investment aid. The Commission also pointed out those capacity reductions taken by others than the beneficiary cannot be regarded as compensatory measures. The pre-restructuring cut of 200 employees could not be taken into account since this reduction in the workforce was taken prior to the restructuring effort and thus could not be seen as a measure to mitigate the distortion of competition.

It is interesting to note that the Commission defended the non-eligibility of new companies to receive state aid for rescue and restructuring. Since the Commission upheld this non-eligibility, despite its having accepted that the existence of a single ship-repair company would be in line with the needs of

²⁰⁴ Aid C 34/03 (ex N 728/02) – CMR, ship repair yard Marseille, Invitation to submit comments pursuant to Article 88(2), OJ C 188/2, 8.8.03

²⁰⁵ Commission Decision of 22 September 2004, “CMR”, OJ 100/26, 20.4.2005

the market, it is clear that this is a requirement that is not open to exceptions. That the beneficiary itself must take compensatory measures is probably self-evident but it remains an interesting point. Does this mean that a Member State's commitment within a restructuring plan, as the opening up of certain markets or the facilitation of intra-community trade, but without any direct connection with the beneficiary, may not be taken into account when assessing the benefits flowing from the restructuring? It is also noteworthy that Commission upheld the view that reductions in capacity, as set down in the Guidelines, must be taken within the restructuring plan in order to qualify as compensatory measures.

4.2.3 Soreni

In August 2002, the Commission decided to start the formal investigation procedure into a non-notified French support measure for the ship repair firm Société de Réparation Naval et Industrielle (hereinafter SORENI) in Le Havre.²⁰⁶ The beneficiary, founded in November 2000, had taken over the activities of three bankrupt companies in the ship-repair sector. After a short time it ran into serious difficulties and the French authorities decided to support the restructuring effort. The situation resembles that in the CMR-decision. SORENI had not taken over any liabilities from the three subsidiaries except for those liabilities related to asbestos claims, as well as social liabilities. The Commission found, as in the CMR-decision, that a new firm is not eligible for restructuring aid and ordered the recovery of the restructuring aid already granted by France. This decision remains interesting because the Commission explained that, if SORENI had taken over certain financial liabilities, it could have qualified for restructuring aid.²⁰⁷ That the extent of financial liabilities that needs to be taken over was left unspecified might also indicate a possibility for a more flexible approach in the future. Furthermore, the Commission pointed out that the aid measures could not have been compatible with the common market even if SORENI had been eligible for restructuring aid. The Commission regarded the intended purpose of the state aid, to cover the costs of the first three month of salaries as well as the costs related to compensating workers who had been exposed to asbestos, as operating aid.²⁰⁸

It is well-known that support to an ongoing business is regarded as operational aid, yet it seems controversial to qualify as such aid asbestos-related costs. It seems more reasonable to argue that asbestos liabilities are the result of its past activity rather than remaining a part of its daily activities. Since the Commission already had deemed that SORENI was not

²⁰⁶ Commission decision 2005/90/EC of 20 April 2004, "*SORENI*", OJ L 31/44, 4.2.2005

²⁰⁷ Commission decision 2005/90/EC of 20 April 2004, "*SORENI*", OJ L 31/44, 4.2.2005, §61

²⁰⁸ Commission decision 2005/90/EC of 20 April 2004, "*SORENI*", OJ L 31/44, 4.2.2005, §§70-73

eligible for restructuring aid, it remains odd that they would go the extra-mile to declare it to be operational aid only to reinforce its reasoning.

5 The CFI's case-law

The decisions to approve restructuring aid for HTM and Air France have both been subject to annulment proceedings. It could be argued that it is strange that only two out of the eleven Commission decisions commented on in this thesis, despite the alleged controversy, have been subject of a judicial review. As already noted, this is rather a mark of the Commission wide discretion than a confirmation of the flawlessness of its decision. As illustrated by the British airways and others-, Salomon- and Kneissl Dachstein Sportartikel-cases, (see below) the burden of proof and the level of proof to lead to an annulment must indeed act as a deterrent to appeal the Commission's decision.

5.1.1 British Airways and others v Commission

In November 2004, British Airways and six other large European airlines, supported by Sweden, Norway, Denmark and the UK, brought an action against the Commission's decision to approve the grant of restructuring aid for Air France.²⁰⁹ This case is of particular interest because it is one of few cases in which CFI found that the Commission's decision suffered from insufficient reasoning. It should be noted that, even though CFI annulled the decision, it rejected most of the applicant's pleas.

The CFI separated the applicants' pleas into two groups. First, the applicants claimed that the Commission had failed to observe its obligations during the formal investigation procedure by restricting interested third parties participation. They argued that the Commission had failed to ask the third parties for sufficient information. They also criticised the Commission for not having called on an independent expert to help with the assessment of the aid measures compatibility with the common market. Secondly, the applicants claimed that the Commission had committed a number of errors in the application of Article 87(3)(c).

Of particular interest are the allegations that the restructuring aid included operational aid, through the authorisation to buy new airplanes as part of the restructuring plan, and that the Commission had failed in its assessment of the distortion of competition. The applicants also argued that an alleged inefficiency of the system of implementation of the condition set down in the decision should lead to the annulment of the decision.

The applicants argued that the amount of restructuring aid approved by the Commission, if the aid was not meant to cover the costs of the purchase of the 17 new airplanes, would be excessive and disproportionate. The purchase of the airplanes formed part of the restructuring plan. The

²⁰⁹ British Airways and Others

Commission considered in the final decision that this purchase was necessary to ensure that Air France's fleet did not become unreasonably old. This was considered as important in order to lower Air France's operating costs as well as its being an important factor in attracting passengers.

Upon this argumentation, the applicants argued that the costs of periodically necessary renovation of the fleet in principle formed part of an airline's operating cost. They argued that the investment did not concern Air France's restructuring but that it was a normal modernisation designed to maintain the company's competitiveness. The applicants referred to the ECJ's reasoning in *Deufil*, according to which such activities should be carried out using the company's own resources and not through state aid.²¹⁰ The applicants also referred to *Exécutif Regional Wallon*. In that case, the ECJ had maintained that investments intended for technological renovation and modernisation of a product line, which had to be carried out periodically, could not be regarded as facilitating the development of an economic activity.

CFI found the Commission's reasoning to be insufficient because it did not make clear that it had actually considered whether the purchase of the airplanes could be financed by aid earmarked for restructuring.²¹¹ It should be noted that CFI avoided commenting on whether the Commission had indeed accepted a measure amounting to operational aid as a part of the restructuring plan.

In connection with this reasoning, CFI rejected the plea of the applicants that the aid for debt-reduction, which was the core of the financial restructuring of Air France, amounted to operational aid. The applicants had argued that the only real restructuring measure was the cut of 5000 employees. Consequently, they argued that restructuring aid could only be granted to cover the costs of that measure. According to the applicants, aid intended for debt reduction should be regarded as operational aid in the sense that its receipt would enable Air France to release other resources, which instead of being used for debt reduction, could serve to finance operational measures.²¹² CFI upheld the Commission's rejection of this line of argumentation. If such a reasoning would be accepted then no aid could ever be granted for rescue and restructuring efforts.

The applicants had also claimed that the Commission failed in its examination of the impact of the aid on competition. CFI did not find it necessary for the Commission to take the competitive situation on every route into account but accepted an over-all assessment.²¹³ CFI also confirmed that the Commission was not under any obligation to compare the restructuring measures envisaged by Air France with those taken by other

²¹⁰ *Deufil*, §§16-19

²¹¹ *British Airways and others*, §120

²¹² *British Airways and others*, §141

²¹³ *British Airways and others*, §287

air-line companies.²¹⁴ Such an assessment was made in relation to the circumstances of the individual case. CFI also found, that since the Commission had found that there was no over-capacity, that it was not under any obligation to consider cuts in reductions, but it was sufficient to consider limitations to its business strategy and expansion. The applicants also pointed out that the statement of the grounds involved, despite having noted a need for it in the decision to open the formal investigation, did not contain any indication as to Air France's competitive position outside of the EU. CFI found that non-European flights was of great importance for the European air-companies. Accordingly, it held that the Commission should have explained its reasoning on this in the final decision.²¹⁵

CFI rejected the claim that the envisaged control of the implementation of the decision could be a reason to annul the decision. It was for the Commission to act when there were doubts as to Air France compliance with the conditions of the decision.

CFI confirmed earlier case law by stating the limited right conferred on concerned parties to participate during the formal investigation is not a reflection of the Commission's obligation to provide sufficient reasoning.²¹⁶ The Commission must provide interested third parties with general information concerning the planned aid and it must receive and take account of their opinion, but a failure to do this would not lead to the annulment of the Commission's decision as long as the Commission provides adequate reasoning in the final decision. The same line of thought led CFI to conclude that the Commission is not under any obligation to call upon independent expertise. Consequently, that the Commission had not restricted the participation of interested third parties.

This case confirms the Community courts' reluctance to interfere in the Commission's control of state aid. CFI rejected most of the applicants' pleas but did point out that the Commission must at least provide reasons for the controversial issues in question. Even in this, it seems as if CFI is prepared to go great lengths to avoid stating that the Commission has made an error in its assessment. The Commission's support, in the final decision, for the purchase of new airplanes, as a part of the restructuring, was clear and was not put in question on any level whatsoever. CFI still avoided ruling that the Commission had made an error in assessment. Instead, CFI only ruled that it did not explain sufficiently how such aid could be motivated. It is completely uncontroversial to say the both the Community courts and the Commission had found aid for such purposes to be incompatible with the

²¹⁴ British Airways and others, §286

²¹⁵ British Airways and others, §280

²¹⁶ According to Case C-350/88, *Delacre and Others v Commission* [1990] ECR I-395, §15, the statement of reason must disclose in a clear and unequivocal fashion the reasoning followed by the Commission in such way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their right and the Community courts to exercise their supervisory jurisdiction.

common market. From this point of view it seems like hypocrisy to not state the obvious.

The CFI's rejection of the applicants' claim that aid for restructuring not earmarked for a particular physical restructuring-effort actually is a form of hidden operational aid is of particular interest. The applicants argued that such aid, for example aid for debt-reduction, would allow the beneficiary to set free resources otherwise meant for such debt-reduction and use it in the operational activities. CFI's rejection of this line of argument may be self-evident but it is still important since it confirms the Commission's policy of approving aid for restructuring. This rejection also acts as a delimitation of the general principle prohibiting operational aid. In order for aid to be regarded as operational, it must have the direct effect of supporting an activity that the beneficiary should cover. It is not possible to argue that aid may have the indirect effect of of-setting resources or the beneficiary's on-going operations.

5.1.2 Salomon SA v Commission

In April 1997, Salomon brought an action for annulment of the Commission's decision to approve the grant of aid to HTM.²¹⁷ The case is mainly interesting from a procedural point of view. CFI held that it is the time of publication in the Official Journal that is the starting point for the time limit prescribed for instituting proceedings, this remained true even if the Commission's decision in question had already come to the knowledge of the applicant. As for the substance of the case, it illustrates how careful the Community courts are in their judicial review of the Commission's decisions on restructuring aid for companies in difficulty. CFI reiterated that the Commission enjoys a broad discretion in the application of Article 87(3)(c) since it involves economic and social appraisals. It stated further that only the situation at the time of the decision is relevant to the judicial review. CFI's reasoning on capacity reductions as a measure to mitigate the distortion of competition is of particular interest. CFI found that the Commission, because it had found that the competition on the relevant market would benefit from the restructuring of HTM, was correct in limiting the capacity reduction to avoid jeopardising HTM's long-term viability. This illustrates how the Commission, when it has declared that the restructuring of a company would benefit the market as a whole, enjoys considerable freedom to decide on the extent of the capacity reduction that can be demanded without putting the beneficiary's long term viability at risk.

²¹⁷ Case T-123/97, *Salomon SA v Commission* [1999] ECR II-2925

5.1.3 Kneissl Dachstein Sportartikel v Commission

Like Salomon, Kneissl Dachstein Sportartikel (hereinafter KDS) brought an action for annulment of the Commission's decision to approve restructuring aid for HTM.²¹⁸ CFI's findings, just as in the Salomon-case, are mainly of interest from a procedural point of view. As for the substance, the Court held that the pleas must be examined in the light of the well-known principles for judicial review of Commission appraisal in economic and social matters. CFI reiterated its view that the Commission enjoys a broad discretion in matters of economic and social assessment, that legality can only be assessed in regard to the elements of fact and law at the time of the adoption of the decision and that the Commission's decisions are presumed to be valid until an applicant has proved the opposite. CFI found that the Commission's assumption that the disappearance of HTM would strengthen the oligopolistic structure was not manifestly erroneous since it would indeed be likely that a company already active in this market would have bought the HTM. That would have meant that the market structure would have deteriorated. CFI also found that since the Commission was correct, or at least not incorrect, in finding that the preservation of the company would benefit the structure of the market, the aid could not be regarded as favouring only one single undertaking.²¹⁹ CFI also dismissed that the idea that the duration of time that it took to present the restructuring plan, which went beyond the six month referred to in the Guidelines, should be sufficient to refuse the aid. CFI held that the Guidelines six-month time limit is not of a binding nature, that the time limit represented instead the period considered necessary to elaborate a restructuring plan. A longer duration of time was not considered as problematic as long as it was necessary because of the complexity of the case.²²⁰

²¹⁸ Case T-110/97, *Kneissl Dachstein Sportartikel AG v Commission* [1999] ECR II-2881

²¹⁹ Case T-110/97, *Kneissl Dachstein Sportartikel AG v Commission* [1999] ECR II-2881, §60

²²⁰ Case T-110/97, *Kneissl Dachstein Sportartikel AG v Commission* [1999] ECR II-2881, §11

6 Conclusion

The Commission has a strong position in Community state aid control. This is guaranteed by the direct effect of the standstill provision and its very large discretion when making social and economic appraisals in a community context. The direct effect of the standstill-provision ensures that the Member States cannot bypass Community state aid control by avoiding demanding the approval of the Commission. The only way to enforce the state aid control in the absence of direct effect would have been through the Community courts. They would surely have done their best but considering their present workload and the large number of situations that involve state aid, it seems likely that the absence of direct effect would have undermined Community state aid control. The Commission's position would have been even stronger if it had been clear that the Member States could be held liable for non-observance of Article 88. This does not change the fact that the Commission is in a position of strength in its state aid control.

The large discretion given to the Commission in social and economic appraisals is the result of the Community courts' choice to only conduct a very limited judicial review of these matters. The fact that the Commission's decisions on most levels in the process of state aid control are challengeable acts, that both beneficiaries and competitors have the requisite standing to challenge its act in before CFI, does not alter this conclusion. The Community courts have made it clear that they do not intend to substitute their appraisals for the economic and social appraisals of the Commission. The Community courts carry out a full investigation into the factual and procedural aspects of the Commission's decision. As for issues involving economic and social appraisals, only a manifest error of assessment is a cause for an annulment. A manifest error in assessment is to be understood as an obvious error in evaluation. Since the assessment of whether aid for rescue and restructuring is compatible with the common market involves very complex economic and social appraisals, the Commission has a very wide margin of discretion.

CFI's reasoning in its annulment of the Commission's decision to approve a grant of state aid for the restructuring of Air France illustrates this conclusion. CFI annulled the decision but accepted the new reasoning that the Commission provided during proceedings. Although this did not change the outcome of the case, it is the reasoning in the decision itself that is subject to judicial review, it is clear that CFI made an effort to send the signal that with another line of reasoning the Commission's decision had not been the subject of annulment. CFI appeared to want to give the impression that it only reluctantly carried out the judicial review of the Commission's approval of aid.

The Community courts can obviously not accept a decision by the Commission that directly contradicts its case law and there are a number of

points on which they have declared themselves regarding this. Aid for the on-going business operations of a company in difficulties cannot be compatible with the common market. The Community courts do not consider that this *facilitates* the development of an economic activity. Aid for restructuring must also be part of a complete plan for the return to long-term viability of the beneficiary. If a company, upon its restructuring, is not viable, then the Community courts do not consider it to be able to facilitate the economic development. In order to avoid undue distortion of competition, a restructuring plan must contain sufficient compensatory measures to offset any such adverse distortion of competition. The positive effects of aid must outweigh the negative. The aid must be granted for the facilitation of *an economic activity*. Thus, the Community courts have found that it must not only benefit the company that is the subject to restructuring, but that it must also bring about a positive effect to the sector as a whole.

These and other conditions laid down in the case law constitute limitations to the Commission's discretion, but less so than might at first appear. Since the Commission has been given such broad discretion in its appraisals, these limitations become requirements as to the form and outline of approval rather than substantial conditions to which the Commission must adhere. The Commission must in its decisions give reasons concerning controversial issues that are involved, for example if an aid qualifies as operating aid or not. The Community courts do not question this reasoning if it is not tainted by a manifest error of assessment.

The Commission thus has the central role in Community state aid control and its policy is essential. The second aim of this thesis was to examine whether the Commission is coherent in its assessment of whether to approve aid for rescue and restructuring. The eleven Commission decisions examined in the thesis highlighted questions concerning the extent to which the Commission's assessments are made on a case-to-case basis. This case-to-case approach was confirmed by CFI in the *British Airways and others v Commission*, where it held that the Commission was not obligated, in its reasoning, to compare certain restructuring-efforts to other similar restructuring efforts. This approach is obviously very convenient for the Commission since it means it does not have to justify why a certain consideration was relevant in one certain decision but irrelevant in another.

As for the Commission's assessments in relation to the case law of the Community courts, it appears to have shifted the emphasis from a straight-cut cost-benefit analysis such as proposed by the case law of the Community courts. According to the case law of the Community courts, the Commission can only declare a state aid to be compatible with the common market to the extent that it does not adversely affect trading conditions contrary to the common interest. This "*negative-criterion*" requires the Commission to evaluate whether the positive effects of the aid measure in question outweigh its negative effects. The focus, in the Commission's decisions commented on in the thesis, is instead on ensuring that the restructuring will bring the company in question back to viability.

According to the Community courts case-law, this is a pre-requisite for approval, but it is far from sufficient for the aid to be considered as compatible with the common market. The restructuring must not only benefit the beneficiary but must also bring an overall advantage to the concerned sector. The Commission, however, only seldom provides a complete reasoning regarding the benefits of rescuing and restructuring a company instead of letting it go out of business.

Instead the Commission deals with the *cost-benefit* analysis involved in the assessment of which compensatory measures are appropriate to mitigate the distortion of competition. This approach appears contradictory, since the Commission has repeatedly stated that the type and the size of the compensatory measure are limited to what the beneficiary can handle without risking its long-term viability. The extent of the compensatory measures is therefore not decided solely in regard to the distortion of the competition but is limited to what the company can sustain without risking its long term viability. Accordingly, it cannot replace an assessment of the over-all effect on the competition. That the Commission fails to provide such an assessment in its decisions is obviously not true in decision in which the Commission has actually found that the market structure would benefit from the restructure of the beneficiary, as in the Air France, HTM and Bull decisions, or where it found, as in the BE-decision, that the aid would not distort the competition. Even in these decision, in which the Commission declared that there were over-all benefits to be achieved by saving a failing company, it does not provide any detailed reasoning as to how it reached such an conclusion.

To examine the coherence of the Commission's decisions with regard to its own policy on state aid for rescue and restructuring, it seemed appropriate to examine to what extent the decisions respect the requirement of the Guidelines. It should be born in mind that the Guidelines were adopted by the Commission, they therefore could be presumed to represent its ambitions. The eleven Commission decision examined showed the Guidelines to not provide a clear road map regarding how the Commission would consider aid for rescue and restructuring. It would seem that the Guidelines offer a methodology for the assessment of aid for rescue and restructuring rather than putting down any definite conditions or even indication of how the Commission would assess such aid. I provide support to this conclusion through my analysis of the Commission decisions.

In the Air France-decision, the Commission approved aid because the successful restructuring of Air France would contribute to the development of the airline sector by improving its competitiveness. The improvement of the competitiveness of a sector, according to the Guidelines, is an explicit reason for approve aid for restructuring. The Commission, however, did not provide any further motivation for why the restructuring would improve the competitiveness of the airline sector. This becomes even more notable when

one consider that the Commission acknowledges the relevant market to be characterised by hard competition and structural adaptation.

In the BE-decision, the Commission held that the aid, as required by the Guidelines, was limited to the minimum. This did not hinder the aid from being potentially unlimited since it was impossible to calculate the cost of decommissioning (which were transferred from BE to the UK). In the BGB and Philipp Holzmann decisions, the Commission acknowledged that a further deterioration of the German economy would endanger the return to long-term viability of the beneficiaries. The Guidelines accept that the return to long-term viability can be the result of external circumstances but it requires them to be generally acknowledged. Despite this requirement, the Commission did not provide any reasoning regarding forecast concerning the German economy. Furthermore, it is hardly controversial to claim that the forecast for the German construction-sector was gloomy at the time of the Philipp-Holzmann's restructuring. In retrospect, it is also clear that the Commission failed in its assessment since Philipp-Holzmann, despite state aid, went out of business.

Even the straightforward conditions of the Guidelines are given much less straightforward interpretation by the Commission. The "one time, last time" principle means, according to the Guidelines, that a beneficiary of rescue and restructuring aid cannot receive such aid again until ten years has elapsed. In the Bull-decision, the Commission partly explained the exemption from this principle with the fact that "*almost*" ten years had passed. The other reason for exemption from this principle was that the crisis in the Telecom sector was of such a magnitude that it qualified as an unforeseeable event beyond the beneficiary's control. The Commission did not comment on the fact that Bull's difficulties had started two years before the burst of the telecom-bubble. In the Crédit Lyonnais decision and in the GAN decision, the Commission did not even endeavour to argue that the exemption from the "first time, last time" principle was due to any exceptional circumstances.

It is of interest to note that the Commission is strict in its application of the exclusion of new firms from eligibility to receive aid for rescue and restructuring. In the CMR and the Soreni decisions, the Commission held that two companies in the ship-repair sector were not eligible to receive aid for rescue and restructuring. Each of the two companies had recently taken over the activity of a liquidated company in the ship-repair sector. The Commission accepted there was a demand on the market in question for the activities of these two companies but still refused to approve aid since less than three years had elapsed since the creations of the companies.

The Commission's application of the requirement of compensatory measures also confirms the impression that it regards the Guidelines as providing an approach to the assessment of aid for rescue and restructuring rather than a set of substantial rules. The compensatory measures in the Alstom-decision, constituting a 30% reduction in turnover, were held to be

sufficient to offset any undue distortion of the competition. From the final decision it appears that 2/3 of the reduction in turnover had taken place even before the notification of the aid for restructuring. According to the Guidelines, compensatory measures must be an integrated part of the restructuring plan. The Commission did not care to explain whether compensatory measures taken before the notification could really be considered an integrated part of the restructuring plan. The Crédit-Lyonnais decisions also provide another example of how the Commission can differ in its approach toward compensatory measures. Crédit-Lyonnais received in 1995, for the second time within four years, aid for restructuring. The second aid-package was more than twice as large as the first aid-package, but the Commission did not demand additional compensatory measures in proportion to the additional aid.

It could also be argued that this illustrates the fact that the Commission has a strong confidence in its ability to decide what is best for the development of a certain activity. The HTM decision provides another illustrative example to support this conclusion. The Commission decided that the beneficiary had to cut its production-capacity with a certain percentage but ultimately held that its survival would benefit the development of the sector since certain of the markets in question were characterised by their being only a small number of competitors. The Commission's reasoning, upheld by CFI, appears correct. It is of interest to ask how the Commission, in balancing different factors that are, complicated and presumably difficult to predict, comes up with a solution.

From the Commission's decisions, it also appears as though the approval of aid for restructuring in favour of public companies may be subject to an additional condition, that of privatisation. The Guidelines call for problems related to corporate governance to be addressed in the restructuring plan. In the Crédit-Lyonnais and GAN decisions, the Commission found that the French State, in its role as majority-shareholder, was the main cause for the company's financial problems. The Commission argued that if France had not given an explicit or implicit guarantee to support the companies in case of financial difficulties, they would not have embarked on the risky business strategy that led to their financial difficulties. The Guidelines do not mention privatisation as a measure for resolving problems of corporate governance. However, the French commitment to privatise the two companies as part of the restructuring plan seems to be the result of such an implicit condition imposed by the Commission. It appears that this would be an additional criterion to take account of in assessing aid for the restructuring to publicly owned companies.

The Commission, as in the BE-decision, seems not only to be in contradiction in its approach with some of the express conditions of the Guidelines but also appears to be in contradiction with the philosophy of state aid control.

The philosophy behind the state aid control is the belief that the market economy with free competition is the best guarantee for raising living conditions in Europe. The rescue and restructuring of companies in difficulty illustrate the problem of balancing belief in the market economy against other policy objectives, such as social and regional cohesion, as well as the certainty that there are situations in which competition itself might benefit from a state intervention that keeps a company from going out of business. The EC Treaty, the case law of the Community courts and the Guidelines still emphasize the aim being not to replace the free market but to carry out an intervention. This intervention should be as small as possible for achieving the goal upon which the development in question is to be returned to the principle of the free market

The Commission accepted, in the BE-decision, that the UK would take over the entire financial risk related to the decommissioning of BE's nuclear power. BE was obliged to contribute to the future decommissioning through using a percentage of its free cash-flow for this. Thus, even though BE participated in the costs, its participation was disconnected from the actual costs. It appears to me that the Commission by eliminating all risk related to such a central condition for BE's activities failed to even make an effort to recreate the conditions that characterise the free market.

Briefly, it appears as if the Commission has the ambition of using the methodology of the Guidelines in its assessment of rescue and restructuring aid. However, when it is necessary, as in the *Crédit Lyonnais* and the *BE*-decisions, it disregards even straightforward requirements, as well as the philosophy behind state aid, in order to reach what appears to be the desired result. The Commission has also showed that it can add new conditions, such as the privatization of a public company, to the requirements already set down in the Guidelines.

Bibliography

EC Documents and Legislation

Council Regulation No 659/1999 of March 1999 laying down detailed rules for the application of Article 88 of the EC Treaty, OJ L 83/1, 27.3.1999

Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty, OJ C 288/29, 9.10.1999

Community Guidelines on State Aid for Rescuing and Restructuring of Firms in Difficulty, OJ C 244/2, 1-10.2004

XXXIst Report of Competition Policy, European Commission, Brussels/Luxembourg, 2001

Rapid Press release, European Commission, 22/09/2004, IP/04/1125

Literature

A. Evans, European Community Law of State Aid, Clarendon Press, Oxford, 1997

L. Hancher, T. Ottervanger, P-J. Slot, European practice library –EC State aids, Second edition, Sweet & Maxwell, 1999

M. Ross, Decentralization, Effectiveness and Modernization: Contradiction in Terms? In A. Biondi, P. Eeckhout and J. Flynn, Law of State Aid in the European Union, Oxford University Press, 2002

C. Quigley, A. M. Collins, EC State Aid Law and Policy, First Edition, Oxford-Portland Oregon, 2003

J-P. Keppenne, Guide des aides d'état en droit communautaire, Bruylant Brussels

Les aides d'état en droit communautaire et en droit national, Seminaire organise a lieège les 14 et 15 mai 1998, Collection Commission droit et vie des affaires, Faculte de droit de Liège

Articles

C. Arhold, "The Case-Law of the European Court of Justice and the Court of First instance on State Aids in 2003/2004", European State Aid Law Quarterly [2004] Vol. 3, Nr 2, pp. 167-203

- C. H. Bovis, "State Aid and European Union Transport: A Reflection on Law, Policy and Practise", *Journal of World Trade* [2005] Vol. 39(4), pp. 587-636
- H.A. Cosma and R. Whish, "Soft Law in the Field of EU Competition Policy" [2003] *EBLR*, pp. 26-56
- R. Delfino, "Credit Institutions and State Aid in EC Law" [2004] pp.775-810
- P. Frühling, "The Dissuasive "One Time, Last Time" Principle Applied to European Airlines State Aid Control", [2002] *Air & Space Law*, Vol. 27(2), pp.135-149
- P. Nicolaidis, "Control of State Aid in the European Union: Compliance, Sanctions and Rational Behaviour", [2002] *World Competition*, Vol. 25(3), pp. 249-262
- P. Nicolaidis, "Decentralised State Aid Control in an Enlarged Europe: Feasible, Necessary or both?", *World Competition* [2003] Vol. 26(2), pp. 263-276.
- M. Hansen, A. van Ysendyck, S. Zühlke, "The Coming of Age of EC State Aid Law: A Review of the Principle Developments in 2002 and 2003", *European Competition Law Review* [2004] Issue 4, pp.202-233
- A. Sinnaeve, P.J. Slot, "The New regulation on state aid procedures", *Common Market Law Review* [1999] Vol. 36, pp. 1153-1194.
- M. Struys, H. Abbot, "The Role of National Courts in State Aid Litigation", *European Law Review* [2003] Vol. 28, Nr. 2, pp. 172-189
- L. Parret, "Judicial Protection after Modernisation of Competition Law", *Legal Issues of Economic Integration* [2005] Vol. 32(4), pp.339-368
- M. Ross, "State Aid and National Courts: Definitions and other Problems – A Case of Premature Emancipation?", *Common Market Law Review* [2000] Vol. 37, pp. 401-423
- J. Winter; "The Right of Complainants in State Aid Cases: Judicial Review of Commission Decisions under Article 88 (EX 93) EC", *Common Market Law Review* [1999] Vol. 36, pp. 521-568
- J.Winter, "Re(de)fining the Notion of State Aid in Article 87(1) of the EC Treaty", *Common Market Law Review* [2004], Vol 41, pp. 475-504

Table of Cases

The European Court of Justice

- Case 30/59, *Steenkolenmijnen v High Authority* [1961] ECR 1
C 25/62, *Plaumann v Commission* [1963]
Case 47/69, *France v Commission* [1970] ECR 487
Case 120/73, *Gebrüder Lorenz GmbH v Germany*, Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main –Germany [1973] ECR 1471
Case 173/73, *Italy v Commission* [1974] ECR 709
Cases 15/76 and 16/76, *France v Commission* [1979] ECR 321
Case 730/79, *Philip Morris BV v Commission* [1980] ECR 2671
Case 60/81, *IBM v Commission* [1981] ECR 2639
Case C-203/82, *Commission v Italy* [1983] ECR 2525
Cases 296 & 318/82, *Netherlands v Commission* [1985] ECR 809
Case 248/84, *Germany v Commission* [1987] ECR 4013
Case 15/85, *Consortio Cooperativo d’Abruzzo v Commission* [1987] ECR 1005
Case 40/85, *Belgium v Commission (BOCH II)* [1986] ECR 2321
Case 310/85 *Deufil v Commission* [1987] ECR 901
Case 220/86, *Irish Cement v. Commission* [1988] ECR 6473
Cases 62 & 72/87, *Exécutif Régional Wallon v Commission* [1988] ECR 1573
Case 102/87, *France v Commission* [1988] ECR 4067
Case 142/87, *Belgium v Commission* [1990] ECR I-959
Case C-301/87, *France v Commission* [1990] ECR 0307
Case C-301/87, *France v Commission* [1990] ECR I-351
Case 303/88, *Italy v. Commission* [1988] ECR I-1433
Case C-350/88, *Delacre and Others v Commission* [1990] ECR I-395
Case 61/89, *Dansk Pelsdyravlerforening v Commission* [1992] ECR II-1931
Case C-305/89, *Italy v Commission* [1991] ECR I-01603
Cases C-6 & 9/90, *Francovich v Italy* [1991] ECR I-5357
Case C-269/90, *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469
Case C-313/90, *CIRFS v Commission* [1993] I-1125
Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic* [1991] ECR I-5505
Case C-47/91, *Italy v Commission* [1992] ECR I-4145
Cases C-72/91 and C-73/91, *Sloman neptun Schiffahrts AF v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* [1993] ECR I-887
Case C-181/91, *Kirshamer-Hack v Sidal* [1993] ECR I-6185
Case C-198/91, *William Cook v Commission* [1993] ECR I-2487
Case C-225/91, *Matra SA v Commission* [1993] ECR I-3203
Cases C-278-280/92, *Spain v Commission* [1994] ECR I-4103

Cases C-466 & 448/93, *Brasserie du Pêcheur SA v Germany* [1996] ECR I-1029
 Case T-459/93, *Siemens SA v Commission*, [1995] ECR II-01675
 Case C-5/94, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Limited* [1996] ECR I-2553
 Case T-149/95, *Ducros v. Commission* [1995] ECR II-2031
 Case C-367/95P, *Commission v Sytraval* [1998] ECR I-01719
 Case C-342/96, *Spain v Commission* [1999] I-2459
 Case C-6/97, *Italy v Commission* [1999] ECR I-2981
 Case C-75/97, *Belgium v Commission* [1999] ECR I-03671
 Case T-110/97 *Kneissl Dachstein Sportartikel AG v Commission* [1999] ECR II-2881
 Case T-123/97, *Salomon SA v Commission* [1999] ECR II-2925
 Case C-200/97, *Ecotrade* [1998] ECR I-7907
 Cases C-15/98 & C-105/99, *Italy v Commission* [2000] ECR I-8855
 Case C-351/98 *Spain v Commission*
 Case C-482/99, *France v Commission* [2002] ECR I-4397
 Case C-50/00P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677
 Case C-53/00, *Ferring SA v ACOSS* [2001] ECR I-9067
 Case C-242/00, *Germany v Commission* [2002] ECR I-5603
 Case C-280/00, *Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH*, [2003] ECR I-7747
 Case C-126/01, *Ministre de l'économie, des finances et de l'industrie v GEMO SA* ECR I-13769

The Court of First Instance

Case T-49/93, *SIDE v Commission* [1995] ECR II-2501
 Case T-459/93, *Siemens v Commission* [1995] ECR II-1675
 Cases T-447-449/93, *AITEC v Commission* [1995] ECR II-1971
 Case T-471/93, *Tiercé Ladbroke SA v Commission* [1995] ECR II-02537
 Case T-154/94, *Comité des salines de France v Commission* [1996] ECR II-1377
 T-394/94, *British Airways and Others v Commission* (1998) ECR II-2405
 Cases T-129/95 and T-97/96, *Neue Maxhütte Stahlwerke GmbH v Commission* [1999] ECR II-17
 Case T-214/95, *Vlaamse Gewestv Commission* [1998] ECR II-717
 Cases T-197/97 & T-198/97, *Weyl Beef Products BV v Commission* [2001] ECR II-303
 Case T-73/98, *Société Chimique Prayon-Rubel SA v Commission* [2001] ECR II-867
 Case T-288/97, *Regione Autonoma Friuli Venezia Giulia v Commission* [2001] ECR II-1169
 Case T-323/99, *INMA v Commission* [2002] ECR II-00545

Opinion of Advocate Generals

Case 142/87, *Belgium v Commission* [1990] ECR I-959, Opinion of Advocate General Tesauro, 19 September 1989

Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v France* [1991] ECR I-5505, Opinion of Advocate General Jacobs, 3 October 1991

C-278/92, C-279-92 and C-280/92, *Spain v Commission* [1994] I-4103, Opinion of Advocate General Jacobs, 23 March 1994

Case C-126/01, *Ministre de l'économie, des finances et de l'industrie v GEMO SA* ECR. I-13769, Opinion of Advocate General Jacobs, 30 April 2002

Case C-256/97, *Déménagements-Manutent Transports SA* [1999] ECR I-03913, Opinion of General Advocate Jacobs, 24 septembre 1998

The Commission of the European Communities

94/653/EC: Commission Decision of 27 July 1994, concerning the notified capital increase of Air France, OJ L 254/73, 30.9.1994

95/547/EC: Commission Decision of 26 July, giving conditional approval to the aid granted by France to the bank Crédit Lyonnais, OJ L308, 21.12.1995

97/81/EC: Commission Decision of 30 July 1996, concerning aid granted to Head Tyrolia Mares in the form of capital injections, OJ L 25/26, 28.1.1997

98/204/EC: Commission Decision of 30 July 1997, conditionally approving aid granted by France to the GAN group, OJ L 78/1, 16.3.98

98/490/EC: Commission Decision of 20 May 1998, concerning aid granted by France to the Crédit Lyonnais group, OJ L 221/28, 8.8.1998

2001/695/EC: Commission Decision of 8 May 2001, on state aid granted by the Federal Republic of Germany to Philipp Holzmann AG, OJ L 248/46, 18.9.2001

2005/90/EC: Commission Decision of 20 April, on the measures implemented by France for Société de Réparation Navale et Industrielle SA, OJ L 31/44, 4.2.2005

2005/314/EC: Commission Decision of 22 September 2004, on restructuring aid implemented by France to Compagnie Marseille Réparation (CMR), OJ L 100/26, 20.4.2005

2005/345/EC: Commission Decision of 18 February 2004, on restructuring aid implemented by Germany for Bankgesellschaft Berlin AG, OJ L 116/1, 4.5.2005

2005/407/EC: Commission Decision of 22 September 2004, on state aid which the United Kingdom is planning to implement for British Energy plc, OJ L 142/26, 6.6.2005

2005/418/EC: Commission Decision of 7 July 2004, on the aid measure implemented by France for Alstom, OJ L 150/24, 10.6.2005

2005/941/EC: Commission Decision of 1 October 2004, on state aid which France is planning to implement for Bull, OJ L 342/81, 24.12.2005

2006/621/EC: Commission Decision of 2 August 2004, on state aid implemented by France for France Télécom, OJ L 257/11, 20.9.2006

Aid C 1/2000 (ex N 760/99) –Restructuring aid in favour of Philipp Holzmann AG, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, OJ C 110/2, 15.4.2000

Aid C 28/02 (ex NN 5/2002) - Restructuring aid for Bankgesellschaft Berlin AG, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, OJ C 141/2, 14.6.2002

Aid C 34/03 (ex N 728/02) – CMR, ship repair yard Marseille, Invitation to submit comments pursuant to Article 88(2), OJ C 188/2, 8.8.03

Aid C 58/03 (ex NN 70/03) –Aid granted by France to the Alstom group, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, OJ 269/15, 8.11.03

Aid C 10/04 (ex 94/04) –Restructuring aid to BULL, Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, OJ C 102/12, 28.4.2004