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State interference in the market
-State aid, EC and the WTO an explorative study

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Summary

This essay explores the possible influence from WTO law into Community law in the area of State aid. In order to do so one needs to examine questions relating to material law as well as EC enforcement and procedure. Special attention is paid to State aid as regulated in Article 87.1 ECT.

When an EC Member State thinks that another Member State is violating Article 87 ECT by administering illegal aid it may, under Article 88.2, bring the matter before the Commission and ultimately before the ECJ. Individuals have no equivalent possibility to initiate proceedings before the ECJ. An undertaking can thus not do the same if it sees that a competitor is receiving aid. An individual may however report the aid to the commission. The Commission may review the question under Article 230.2 ECT. The Commission may thereafter choose to take action or not. If the individual is not happy with the action taken by the Commission another complaint can be made to the CFI that then reviews the Commission's decision. The CFI's review includes the conduct of the Commission and what considerations must be taken into account by the Commission.

Under Community law the WTO Agreement is considered a mixed agreement. Some parts of it thus fall under the treaty making power of the Community; others parts fall under the treaty making power of the Member States. The ECJ has determined that there has to be uniform application in of the International Agreements to which the Community is a party. State aid is concerned one of the areas that fall under the Community's competence.

In ECJ case law it has been found that international agreements can be used to review Community acts and secondary legislation. However, the Court has so far denied GATT direct effect. Earlier ECJ case law concerned the old GATT from 1947 which since has been replaced by GATT from 1994. The new GATT is far more legal and less political than its predecessor when it comes to questions of conflict resolution. The ECJ's reason for denying direct effect has since changed from that the spirit, general scheme and terms of GATT along with its great flexibility and emphasis on negotiation was intended to get political solutions rather than to be applied within a legal system as the one of the Community to that the WTO Agreement itself does not indicate that it is meant to be directly enforced nor can it be established that that was the intention of the Community institution when concluding the Agreement.

Indirect effect of international agreements has not been ruled out, not even when it comes to GATT. The agreement in question has to be implemented into Community law by an implementing regulation. Not only does there has to be a regulation there must also be some indication of what parts of the international agreement are meant to be implemented and in what way.

What was intended in the implementing regulation is what determines the indirect effect not the international agreement

The core of the EC State aid regime is found in Article 87 ECT in WTO law rules on relating to those matters are found in the SCM Agreement, which is an Agreement under GATT, as well as in GATT Article VI and XVI. The anti State aid and anti subsidy regimes found in Article 87 ECT and the SCM Agreement are similar in that they target positive as well as negative measures. That is positive in the sense that a recipient is given something, and negative in that no additional burden is placed upon the recipient. Another similarity is that they both cover such measures if they are granted in law or in fact. What the SCM Agreement does not and Article 87 does is include measures to favour production of services as well as goods which they both include under their scope.

The material considerations in Article 87.1 and the SCM Agreement are of a similar nature. Basic concepts used in both WTO law to determine subsidies and EC law to determine State aid are that the measure is granted by the government, is a form of benefit, is specific to one or certain industries. In EC law there is the additional criteria of distortion of intra Community trade. WTO law uses the criterion of injury to another WTO Member.

The ECJ has in its case law found it necessary that a measure is not only granted by government but also that there is a burden on State funds as a result of it. Even if there is less to go on when looking at WTO law there is nothing to indicate a similar criterion. WTO law looks to whether a benefit is conferred to determine measure is a subsidy. The ECJ has established the market investor principle; a government can grant loans and public undertakings can use preferential tariffs for certain business partners but only when it can be economically motivated in a way a private investor would. In WTO law a benefit is to be understood as an advantage in relation to others acting on the same market.

Specificity as a concept is used by WTO as well as EC law. In WTO law certain subsidies are automatically considered specific; those are the ones promoting use of domestic goods over imported and subsidies to increase export. In WTO Law a subsidy can also be specific if it is limited in law or fact to certain enterprises and not granted following objective criteria and in a non discretionary manor. Specificity in EC law is when an aid is only available to certain industries of branch of industry. If the aid is available to other industries and would in fact be granted to those industries the aid is non specific. Access cannot be limited by that the provision is written in such a way that just one or a few industries are possible recipients.

In EC law a distortion of trade between the Member States can be assumed unless there is reason to think otherwise. The WTO law demands that an evaluation of another Members injury is based upon positive evidence.

The conclusion of this presentation is, that after examining the possible ways of influence from WTO law into EC law, that effects should only be possible where that was intended by a political Community institution when concluding or incorporating an international agreement such as GATT. Some of the considerations in WTO subsidy law and EC State aid law are materially similar which may open up for some fruitful exchange of thought, an influence by the power of the argumentation used in relation to Community law.

Preface

Jag vill tacka min familj för deras stöd under hela min utbildning, inte minst under den tid jag arbetat med den här uppsatsen.

Tobias Kämpe för hans hjälp och mina vänner, för er uppmuntran, förtjänar även ni ett stort tack.

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Abbreviations

A-G	Advocate General
CFI	European Court of First Instance
Dir.	Directive
DSU	Dispute Settlement Understanding
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECSCT	Treaty establishing the European Coal and Steel Community
ECT	Treaty establishing the European Economic Community
Ed.	Editor
Eds.	Editors
EEA	Agreement on the European Economic Area
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
p.	page
para.	Paragraph
paras.	Paragraphs
Reg.	Regulation
SCM	Subsidies and Countervailing Measures Agreement
TRIPS	Trade Related Intellectual Property Rights Treaty
vs.	versus
WTO	World Trade Organisation

1 Introduction

1.1 Where do we start off from?

State aid is a “big thing” for States and it is important for the companies that receive it. It most certainly is important to other companies not receiving it if others unjustly do receive it. In fact, it is so important to States that many States were reluctant to include it under the scope of the General Agreement on Tariffs and Trade in 1994 (GATT).¹

Recently one of the larger Swedish newspapers published an article on the agenda proclaimed by the future EU trade Commissioner Peter Mandelson. Mandelson emphasized the need to deal with matters of State aid and said that it illustrates why the Commission has to be strong, tough and independent.²

State aid to undertakings is, as we will see, as general rule incompatible with the market under Article 87 of the Treaty establishing the European Community (ECT). In the same Article we find a listing of possible exemptions allowing such aid for certain purposes. In Article 88 we find rules for the application of Article 87. Article 88 also empowers the Council to issue further rules as to the application of Article 87 and the commission to issue. Parts of what is regulated in Article 87-89 is regulated by the Subsidy and Countervailing Measures Agreement in the WTO system.³

1.2 Question

As the title says this is an explorative study. It starts out with a question and tries to examine some of the possible answers. The presentation is therefore just as much a look at judicial enforcement as it is a look at anti-State aid law.

The idea is that it may be possible to make a claim based on WTO law which gains effect through EC law as in direct effect or indirect effect.

There are two main questions I seek to answer:

- firstly, what is the standing of the WTO Agreements regulating this area in the EC?
- Secondly, which are the possible ways of influence? Is there direct, indirect or any other kind of influence that we have to consider?

¹ Didier, Pierre, WTO Trade Instruments in EU Law, 1999, p. 209.

² Göteborgs Posten, 11 november, 2004, p.55, Hårda tag mot industri stöd i EU, Anders Johansson.

³ Steiner & Woods, Text book on EC Law, 2003, p. 281.

Some other questions have to be answered along the way, those are:

- must the attitude towards WTO law be the same throughout the Community or if there is room for individuality in the application in the EC Member States? One needs to know if there is only one unified approach to the standing of the WTO Agreement within the EC or if there are no less than twenty-six views on the matter, one for each Member State and the one of the EC.
- In which areas is there a difference between the WTO anti-subsidy regime and EC State aid rules? If there are none it would not be useful to argue one's point on the basis of WTO law before a Community Court.

1.3 Limitations

It is not possible on this extensive question to examine all the intricacies of WTO Agreements and their status in the Community. The ECT speaks of State aid; the GATT and the SCM Agreements speak of subsidies for the production of goods. There is the first limitation; this presentation compares only the parts of EC State aid law that concerns goods to their WTO equivalent. To compare EC law in the area to all relevant WTO law would mean that one would need to take the GATS Agreement into consideration as well. State aid for production of services is regulated in the same Article as State aid for the production of goods in the ECT.

The comparative part of this presentation is limited to the concepts of State aid and subsidies. The provisions in question, mainly GATT the SCM Agreement and Article 87 ECT, regulates State aid and subsidies but in all cases there are exemptions. The comparison only extends as far as the main rules that determine whether something is caught under the scope of State aid rules or not.

Matters relating to EC procedure and the respective competence of the Community and each of the Member States will be examined with State aid in mind. Much of what does not directly relate to this general theme will be given less attention.

1.4 Method

The method of this essay is aimed at; firstly, finding out the current situation as it has been set in official community acts and documents along with relevant ECJ rulings. Secondly though principles established in those documents etc. examine what might be the most imminent legal developments.

It is not always easy to find out the more exact intentions behind community legal acts. It is the law making process with its complexity and many actors

that make it difficult.⁴ Interpretation of relevant treaty texts and accompanying case law will thus make for the bulk of the source material along with texts written by scholars working with those texts. Partly the source material, especially in the parts concerning the WTO, is scarce. That there is little available literature on the subject may be due to the fact that the WTO has only existed for ten years. The source material is in these parts therefore largely official texts such as the reports of the WTO Panels and Appellate body.

Part of the source material is made up of articles published on the subjects presented. Many articles are up to date in a way one would not expect most books to be and therefore have a lot to contribute. The argumentative style of the articles may be reflected in the language of this presentation. It is my intention to in spite of this stylistic feature produce a balanced view on each of the subjects presented.

1.5 Disposition

This presentation deals with matters of judicial review just as much as it deals with material law on subsidies. I suspect that some may find the order of the presentation peculiar at first. The orders of the individual chapters in this presentation indicate a line of thought that I hope will be the most useful one and that will make the matter as clear as possible. In this way it is also easier to place the subject in its context.

This essay is divided in five parts, not counting the introduction. They are: the ways of influence by WTO law into EC law through judicial enforcement, EC State aid law, WTO law on subsidies, a comparison between the two State aid and anti subsidy regimes and a concluding chapter. The closing chapter contains conclusions and a look at what adjoining questions that may be interesting.

Even if I have made an effort to explain the contents of the Treaty texts, they are not included in the presentation. The material will therefore probably be much more accessible if one has the ECT nearby when reading.

⁴ Öberg, Ulf in Juridisk Tidskrift vid Stockholms Universitet, 2000/2001, p. 495.

2 State aid judicial review

2.1 General about State aid and WTO law in Community and national Courts

The theme for this presentation is based on the questions of who is entitled to make a claim under Article 87 and where he can make his claim. The question of who is entitled to make a claim can include any number of persons, legal, physical as in individuals, Member States and Community institutions. This is another situation and different from reporting new and existing aids'; under Article 88 which Member States are required to do to the Commission. Here the question is more the one of: who can do anything about a measure that he thinks should have been reported as an aid. States can base claim against another Member State on Article 226 ECT if an aid has not been reported or if the Commissions decision on an aid is not followed in some way.⁵ The Commission can after a formal notice try to bring a Member State to stop an aid by filing a reasoned complaint before the ECJ under Article 88 ECT.

There is yet another question has to be dealt with in this chapter namely the WTO Agreement, GATT and other Agreements and their status in the Community legal order. After all, this presentation is supposed to say something about those Agreements possible influence in the Community legal order.

On the way to understanding the position of the WTO Agreement in the EC it is necessary to look at what standing it has in the EC. The WTO Agreement is what is usually called a mixed agreement. The EC holds exclusive competence to enact agreements with third countries within certain areas where it is empowered to do so by its Member States. The competence of the EC and its Member States can be said to be exclusive for either the Member States or the EU in different situations. A mixed agreement is an agreement that holds matters both under Member State and EC competence. This is not to say that what competences that have been transferred to the EC always are easily determined. In some cases there may even be overlapping competences.⁶ State aid is however solely within the competence of the EC; the Member States have no saying when it comes to regulating State aid.⁷

The WTO Agreement is a new construction and different from GATT 1947. GATT is now one of the WTO Agreements alongside GATS and TRIPS. Under GATT there are the so called multilateral Agreements such as the SCM Agreement. Any country wishing to enter the WTO must accept the

⁵ Quigley & Collins, EC State aid law and policy, 2003, p. 312.

⁶ Leal-Arcas in European Foreign Affairs Review, 2001, p. 486.

⁷ Article 87.1, ECT.

whole package or not become a WTO Member at all. There are some exemptions such as the plurilateral Agreements on Civil Aircraft and Public Procurement etc.⁸ The EC Member States are all parties to GATT 1994.⁹

As a part of the EC cooperation there is a joint commercial policy in relation to the rest of the world's countries. Trade policy of all the Member States is thus carried out through the EC.¹⁰ The Member States each have their own view of their relation to the EC as such. The two positions that can be taken are the so called monist and the dualist ones, and of course a great variety of positions between the two. That could be the situation with the Member States view on the WTO Agreement, but is there really room for so many possible views where there is a joint commercial policy? A large portion of the answer to this question can be found in Article 133 ECT. There we can find certain provisions regarding the external powers of the EC concerning trade in goods. The EC can under this provision enter into bilateral and multilateral trade agreements. Where so has been done with support of the ECT the EC holds exclusive competence in that field. No room is after that left for the Member States to issue legislation, and where there already are agreements between Member States and States outside of the EC such agreements are still valid as long as no Community act has been issued.¹¹

The EC legal order holds many similarities with a domestic legal system. The Community creates its own laws but just as in international law sovereign states are the legal actors. International law and EC law overlap at some points, where that happens the ECJ must find appropriate solutions. The Court has to determine whether international agreements are sources of community law and can be used for judicial review. It also has to determine whether it has jurisdiction to do so.¹²

2.2 EC judicial enforcement

2.2.1 Treaty infringement proceedings before the ECJ

A Member State or the Commission may want to use the WTO and SCM Agreements in a treaty infringement proceeding before the ECJ. Treaty infringement proceedings can be brought against an EC Member State for introducing a new or maintaining an unlawful aid. Aids are considered unlawful in either case as all aids have to be reported and approved by the Commission before entering into force. A reported aid that has not, or yet not, been approved is when the State decides to go ahead and commence the aid perhaps the more obvious target for judicial review, but proceedings

⁸ Pischel, Gerhard in *European Affairs Review*, 2001, p. 125.

⁹ The WTO internet website, www.wto.org, list of Members, last viewed December 19, 2004.

¹⁰ Article 133, ECT.

¹¹ Quigley & Collins, 2003, p. 157.

¹² Cheyne, Ilona, *International instruments as a Source of Community law* in Dashwood & Hillion 2000, p. 254.

may take their start even if an aid has not been reported at all. The rules concerned are found in Articles 226, 227 and 88.2 ECT. Under Article 226 proceedings can be brought before the ECJ when a Member State as failed to fulfil its obligations under the ECT.¹³

The Commission must continually examine aid administered by the Member States and it must recommend alterations if the aid in its current form is not longer compatible with the market. A suggestion from the Commission is binding for the one it is directed to after that State has accepted the suggestion for alteration. For the case when the Member State chooses not to accept the Commissions suggestion, the Commission can demand, after a formal examination under Article 88.2, that it does so. In practice this means that the Commission only retroactively controls aid that does not have to be reported.¹⁴ If the Member State still does not follow the Commissions decision it must be given chance to deliver its opinion to the Commission. After so has happened and if the Member States does not comply with the Commissions decision the matter may proceed to the ECJ.¹⁵

In a similar way actions may be brought before the ECJ against a Member State for infringing the Treaty by another Member State under Article 227. The State does not have to deliver a reasoned opinion as the Commission has to do. A reasoned opinion is normally required under Article 227, but that obligation is suspended by Article 88.2 in these cases. The Member States then takes its claim to the Commission which can submit it directly to the ECJ. Member States are under an obligation to comply with ECJ decisions and if so does not happen the State can be brought before the ECJ again and may then face a penalty. The penalty can come in to question independent of whether the proceedings started on the initiative of the Commission or another Member State.¹⁶

The rules the Commission has to follow when examining whether an aid is administered can be found in Article 88.2. Not only the Member State involved but also the sectors of industry involved have to be given notice. This is to ensure that they can make their view known to the Commission and so that the Commission is fully informed when it is making its decision. At this stage the Member State may apply to the Council which may, unanimously, decide that the aid in question will be considered compatible with the market. After the Commission has begun examinations of an aid and ordered it to be suspended meanwhile it may also happen that a Member State does not follow the Commissions order; also in those cases the matter may be brought before the ECJ. Under Article 88.2, in these cases no reasoned opinion has to be submitted by the Commission nor has the States to be given time to comply with the Commissions decision.¹⁷

¹³ Quigley & Collins, 2003, p. 357.

¹⁴ Pöntynen, Inga, in *Tidskrift Utgiven av Juridiska Föreningen i Finland*, 2002, p. 308.

¹⁵ Quigley & Collins, 2003, p. 357.

¹⁶ Quigley & Collins, 2003, p. 356 and 357.

¹⁷ Quigley & Collins, 2003, p. 359.

Other than under Article 88.2 infringement proceedings may be brought under Article 226. This is done when an aid has been introduced without reporting it to the Commission for approval. States are under an obligation to report aids' to the Commission under Article 88.3. The Commission can always take this kind of action as Article 226 as infringement of the Treaty proceedings are a question independent compatibility with the market. When a measure granting an aid is prohibited as it is contrary to EC law, the breach is dealt with using infringement proceedings under Article 226. Such matters must not concern State aid it may also, for example, be a question of discriminatory taxation under Article 90 ECT. When Article 226 proceedings are initiated the Article 88 procedure for evaluating an aid's compatibility with the market Article 88 as Article 88 does not effect the States obligation to respect the rules of the market.¹⁸

It is under the Commissions discrepancy to bring proceedings under Article 88.2 in cases when it has stopped an aid, ordered a reported aid to be stopped, altered or recovered, partly or wholly. Even if the Commissions action in those cases has its basis in Article 226 it has to follow Article 88.2 in its handling of the case. Also the Member States have the possibility to refer a matter directly to the ECJ when the Commissions decision on an aid is not followed under Article 88.2.¹⁹

Another possibility, open to Member States, is to begin proceedings against another Member State under Article 227 if that State is thought to be failing to fulfil its obligations under the Treaty. Any State that wishes to do so must first bring the matter before the Commission. It is not possible to go directly to the ECJ. The Commission must first deliver a reasoned opinion but only after each of the Member States involved have submitted and been given the chance to present its case orally. When the Commission does not deliver an opinion within three months from the date when the case was first brought before it the matter goes on to the ECJ.²⁰

Competitors to the recipient of an aid, or any other party then the ones mentioned above, have no possibility to begin infringement proceedings against the granting Member State. This goes both for cases when a Member State may be failing to fulfil its duties under the Treaty and when a Member State does not comply with Commission decisions.²¹

It is possible for a claimant to request that the Commission takes action and brings a Member State before the ECJ. When the Commission refuses to do so no proceedings can be brought against the Commission under Article 230 ECT.²² To take action is a matter of discretion left to the Commission and if

¹⁸ Quigley & Collins, 2003, p. 360.

¹⁹ Quigley & Collins, 2003, p. 359.

²⁰ Article 227, ECT.

²¹ Quigley & Collins, 2003, p. 360.

²² Case T-277/94, AITEC vs. Commission, para. 56.

it chooses not to do so the applicant does not have standing under Article 232 ECT against the Commission for failure to act.²³

2.2.2 Proceedings in national Courts

The State aid control regime has evolved quite a bit from the outline drawn up in the ECT. ECJ rulings and subsequent secondary legislation has put a heavy burden on national Courts when faced with State aid cases. Those Courts are frequently asked to rule in State aid cases. The Courts and national authorities must apply the procedures prescribed by Articles 87 to 89 ECT. It is however not up to them but to the Commission to make the material evaluation of State aid is compatibility with the market.

The first step that any national Court is faced with in these cases are whether a measure amounts to State aid in the meaning of Article 87. This really is the paramount question as it triggers the remainder of the supervisory process imposed by the Treaty i.e. examination by the Commission etc.²⁴ The next step concerns that the EC just as its Member States is a WTO Member. The WTO also has a State aid regime which should have some effect on the rulings of Community and national Courts through Community law.

A matter concerning State aid may appear before a national Court in several different contexts. As we have seen above there is no possibility for a competitor to bring a case directly before the ECJ, although a complaint can be brought before the CFI under Article 230 challenging the Commission's decisions, but more about that later. Articles 87 and 89 are dependant on a decision by a Community institution as they do not have direct effect and as long as there has not been any such decision national Courts have no power to determine the compatibility of an aid with the market.

Article 88.3, however, is directly effective putting procedural obligations on national Courts. Any individual with locus standi under national law may therefore challenge aid granted by national authorities when thought to be in breach of Article 88.3.²⁵

As a starting point the following situations are some of the possible ones when any one would want to bring a matter concerning State aid before a national Court: one may be dissatisfied that a Competitor has been granted an aid and want the State to stop administering the aid, the fact that someone else has been granted an aid may be used to argue that oneself should receive the same benefits. It is also possible that a competitor seeks a decision that an aid should not be granted by national authorities due to the Commission's decision being invalid; or a recipient may seek a declaration

²³ Case C-135/93, Spain vs. Commission, para. 17. See also Quigley & Collins, 2003, p. 360.

²⁴ Ross, Malcolm, in *Common Market Law Review*, 2000, p. 402.

²⁵ Steiner & Woods, 2003, p. 295 and 297.

that a measure is not an aid and does not have to be reported to the Commission.²⁶

An illustrative example of the role of national Courts under Articles 88.3 and 87 can be found in the case *Syndicat Français de l'Express International vs. La Post*. A competitor to La Post had brought a claim for compensation for losses suffered due to an alleged subsidisation of La Post. There had not been any notification of a State aid to the Commission as required by Article 88.3. The Competitor made a complaint to the Commission that after two years had not taken any action. It was after that the competitor made his claim before a national French Court. The national Court made a reference to the ECJ seeking clarification on certain issues. The questions put to the ECJ were, whether the recovery of State aid was the only way of guaranteeing the effectiveness of Article 88.3 or whether parties could make a claim compensation before a national Court, whether an ongoing examination by the Commission puts the matter outside of the jurisdiction on national Courts, if a national Court begins proceedings in such a case must put the proceedings on hold awaiting the Commissions decision. The answer of the ECJ was that national Courts have an obligation to safeguard the rights of individuals whenever there is a breach of Article 88.3 That the matter is being processed by the Commission does not relive national Courts of that obligation. In these cases national Courts are required to interpret Article 87 in order to determine whether the claim concerns a measure that has to be notified under Article 88.3.²⁷

In a later case, *Ferring vs. ACOSS* the ECJ found that a national Court could decide upon the whether a measure that meant that pharmaceutical wholesalers were relived from a tax that pharmaceutical laboratories had to pay. The national Court was found competent to decide on whether a measure was an aid which should have been reported.²⁸ National Courts may, as already mentioned, seek help from the ECJ and the Commission when determining the existence of an aid. The Courts may thus consult the Commission on its practice in the application on 87.1. The Commission has also called upon national courts to request its assistance when faced with these questions even if the Commission will not in its answer go into detail on whether the measure in question is an aid or on the individual case. The Commissions answer to the given question will not be binding to the national Court. There is yet another possibility available to national Courts and that is to request a preliminary ruling from the ECJ under Article 234 ECT and the definitive interpretation of Article 87.1.²⁹

On the connected matter of aid that is considered to be compatible with the Market under Article 87.2 Advocate General Roemer wrote, in his opinion in the *Capolonga vs. Maya* case, that to allow aid gives rise to too much

²⁶ Quigley & Collins, 2003, p. 367.

²⁷ Case C39/94, *Syndicat Français de l'Express International vs. La Post*.

²⁸ Case C-53/00, *Ferring SA vs. Agence centrale des organismes de sécurité sociale (ACOSS)*.

²⁹ Quigley & Collins, 2003, p. 368.

discretion and should not be left under the discrepancy of the Member States.³⁰ We already know that all aid has to be reported; there should, however, in practice be some room for discrepancy when deciding if one is dealing with an aid or not.

Advocate General Tizzano addressed a similar issue in his opinion in the *Ferring vs. ACOSS* case as he stated that: Article 86.2 should be directly effective in such a way that national Courts may determine whether a payment constitutes payment for services of general interest or not. This may be merely refining the scope of national jurisdiction to entail to determine just that and not a way to transfer State aid when the procedure is non transparent. In any case it does not alter that it should be left to the Commission to determine the existence of an aid or exercise its margin of discretion in those cases. It is worth to remember that Article 86.2 only gives this possibility when the development of trade between the Member States is not affected. Such matters should therefore, when there is any possibility of that, be left to the ECJ.³¹

Even if it is easy to think that the story often ends with the Commissions decision on an aid, national decisions based upon Commission decisions may be challenged before a national Court. That can be, for example, when there is reason to doubt the validity of a Commissions decision authorising an aid. The national Court may then make reference to the ECJ under Article 234.

The party to which the Commissions decision was directed, or anyone else to whom the matter is of direct and individual concern, may seek a decision for annulment of the Commissions decision from the CFI under Article 230. When one fails to file a complaint to the CFI under Article 230 the ECJ will not consider the illegality of the Commissions decision if it is challenged before it. This can be illustrated by the case *TWD vs. Germany* where the German Government had been ordered to recover an aid it had granted to the company TWD. The German government sought action to do so before a national Court. TWD argued that the Commissions decision was invalid and the national Court referred the matter to the ECJ pursuant to Article 234. The ECJ held that TWD was direct and individually concerned by the Commissions decision as it was the recipient of the aid. However no annulment proceedings for the Commissions decision had been brought before the CFI under Article 230 and the option to plead illegality was therefore no longer open to TWD.³²

A competitor or any other interested party may also have an interest to may also have been directly and individually concerned by the Commissions decision but it is unclear if they forfeit the possibility of a reference to the ECJ in the same way when not taking the Commissions decision directly to

³⁰ Opinion of A-G Roemer in Case 77/72, *Capolonga vs. Maya*, para. 9.

³¹ Quigley & Collins, 2003, p. 370.

³² Case C-188/92, *TWD vs. Germany*, para 15.

the CFI.³³ But even if the matter has been tried by the ECJ it remains unclear when one has standing in such cases.³⁴

Article 87.1 provisions do not, as mentioned, have direct effect but they are intended to have effects in the national legal systems. That is then only after they have been put in a more concrete form in an act issued under Article 89 or when a decision is made in a specific case under 88.2. National Courts must therefore accept the Commissions or the Councils decision that an aid is compatible with the market. Such decision can be taken under Council regulation 659/1999. However, the influence of Article 87.1 into national legal systems is restricted and it does not have direct effect when situations where a national Court is asked to review the legality of an aid already allowed by the Commission. The Commission, in cooperation with the Member States, is under an obligation to keep existing aid systems under review under Article 88.1. Should the Commission fail to do so or to take action when so happens does that not give basis for a claim that the State concerned or the Commission have failed to fulfil their obligations.³⁵

In the case *Pigs and Bacon Commission vs. Mc Carren* an argument was put forward to the meaning that national Courts had to, as a matter of Community law, consider whether a national measure had to be put aside as incompatible with the market. The claim was based on Article 10 ECT and thus that all Member States and their institutions, and thus Courts, have to work to fulfil the objectives of the Treaty. If the Article was applicable in these cases national Courts would have to refrain from enforcing a national law if found to be incompatible with the market. The Court would then have to request the Commissions opinion before it could move on. This question was left unexamined by the ECJ but Advocate General Warner did in his opinion to the case dismiss the argument. He stated that a decision by the Commission to allow an aid means that the aid remains lawful until the time limit for the Commissions decision expires or the Commission decides to alter it.³⁶ In the same way the Court should have no reason to refer a question concerning an aid, on which the Commission already made its decision and there had been no alterations of the national laws in question, to the ECJ pursuant to Article 234 ECT.³⁷

Aid that has not been decided upon by the Commission give raise to a different situation than the on described above as there is a prohibition to implement a new aid with out obtaining the Commissions decision under Article 88.3 ECT. That provision is sufficiently clear, precise and does not require further implementation; it therefore holds direct effect and establishes a procedural criterion that national Courts have to follow. The prohibition can be invoked before national Courts by individuals that have

³³ Case C-241/95, R vs. IBAP, ex parte Accrington Beef, paras. 15-16.

³⁴ Quigley & Collins, 2003, p. 371.

³⁵ Quigley & Collins, 2003, p. 372.

³⁶ Opinion of A-G Warner on Case 177/78, *Pigs and Bacon Commission vs. Mc Carren & Company*, para. 13.

³⁷ Quigley & Collins, 2003, p. 373.

individual subjective rights that the Courts in these cases are set to safeguard. An unreported aid can therefore be stopped by a national Court.³⁸

Article 87.1 has been given concrete form in certain secondary legislation. Commission decisions, Negative and decisions allowing an aid, must therefore be enforced by national Courts under Council Regulation 659/1999 Articles 7.4 and 7.5.³⁹

The situation facing a national Court when trying a case under Article 88.3 is another than the one the Commission may face. Even if an aid has not been notified that is not reason for the Commission to declare it illegal. There still has to be an investigation on whether the aid is compatible with the market. The role played by national Courts complement the role of the Commission.⁴⁰ The Commission examines the compatibility of aid with the market even when an aid is granted before its decision whereas national Courts preserve the right of individuals not to be subjected to unapproved measures. A positive decision by the Commission does not validate aid paid before as the prohibition Article 88.3 ECT to put an aid into effect in before that point otherwise would be without effect.⁴¹

2.2.3 Review of Commission decisions on State aid

Once the Commission has issued a decision the recipient or possible recipient of an aid can challenge that decision before the ECJ under Article 230.⁴² Anyone who is not a recipient nor a possible recipient does not have the same possibilities but can complain to the Commission and has thereafter the possibility to challenge the Commissions action or, if so is the case, refusal to act.⁴³

2.3 WTO law in Community and national Courts

2.3.1 What is the status of WTO law in the Community?

If the above has been a more general overview of the relevant EC judicial procedures in these cases the following will discourse the possibilities for WTO influence into those procedures. That the ECT has legal effects within the Community seems obvious, but what is the status of WTO law? The EC is a party to the WTO Agreement and the possible effects of WTO law in EC law therefore deserves some consideration. The EC Member States are,

³⁸ Case 77/72, Capolonga vs. Maya, para.6.

³⁹ Quigley & Collins, 2003, p. 373.

⁴⁰ Case C-301/87, France vs. Commission, para. 22.

⁴¹ Quigley & Collins, 2003, p. 374.

⁴² When the measure concerns a whole industry the individual recipients or potential recipients have no standing, but an organisation formed by the same individuals for the sake of representing them before the Court has. See Cases 67, 69 and 70/85 Kwerkerij Gebruders van der Kooy.

⁴³ Case 166/86, Irish Cement Ltd. vs. Commission, paras. 29 and 30.

just as the EC itself, parties to the WTO Agreement; this leads to other questions than the comparative of EC and WTO law. Thus, does WTO law have direct effect or other kinds of effects in the Community and in what situations does WTO law have to be considered by Community institutions or national Courts when dealing with matters of Community law?

The Community has a separate legal personality from the ones of its Member States. That it is so is necessary so that the Community can carry out policies towards third countries.⁴⁴ The Commission is empowered to negotiate agreements with third countries and the Council that is empowered to conclude those agreements.⁴⁵ Under Article 133 ECT the Commission can, under the Councils supervision, undertake negotiation and make agreements to implement the common commercial policy. The ECJ has provided some answers on the situation of the Community and the Member States as Members of the WTO in its opinion 1/94. There are, however, matters that remain unexplained. The Court considered that not all matters regulated under the WTO should fall under the Community's competence and that the Member States must fulfil their obligations as Members of the WTO Agreement.⁴⁶

In addition to the above, it seems to be of the essence to know whether there are one or twenty-six positions on the status of the WTO Agreement to take into account when dealing with a certain matter. As all of the Member States are Members of the WTO and their individual legal systems surely have their own position on the status of international agreements this question then becomes the one of how far they the competence they have turned over to the EC extends.⁴⁷ Some matters will fall under the Community's competence others under the Member States. The subject has been debated in numerous articles and would on by itself fill a presentation of this size. When trying to get some insight into the practical workings of State aid and subsidy rules in the EC and the WTO it cannot be left out. It is the frame in which the material rules operate. The mere existence of material rules says little about the actual implementation and the effectiveness thereof. The ways of influence, or direct and indirect effect of international agreements is an interesting field and a little bit different from direct and indirect effect of directives and has to be discussed further.

As we know all aids' have to be reported to the Commission and all decisions on that an aid may or may not be compatible with the market must come from the Commission or the Council a national Court has to decide on whether a measure is in fact an aid, and should have been reported; it is called upon to do its evaluation in accordance with 87.1. One of the questions facing the national Court in these cases is: does one have to take WTO Agreements into consideration? The *Hauptzollamt Mainz vs. Kupferberg* case concerned the 1972 free trade agreement with Portugal

⁴⁴ Article 281, ECT.

⁴⁵ Article 300, ECT.

⁴⁶ Steiner & Woods, 2003, p. 44.

⁴⁷ Eeckhout in *Common Market Law Review* 1997, p. 13.

which was not a mixed agreement but it gave the ECJ reason to examine the relation of Member State and Community obligations under an international agreement. The ECJ found that measures taken by the Member States to implement an agreement did not only fulfil an obligation towards non EC Member States concerned by the agreement but to the Community. The Member States were found to fulfil an obligation towards the EC which had assumed responsibility for the performance of the agreement.⁴⁸ In that same case the ECJ went on stating:

*“[i]t follows from the Community nature of such provisions that their effect may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States, in the latter case, according to the effects in the internal legal order of each Member State which assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions or agreements, to ensure their uniform application throughout the Community”.*⁴⁹

In the above case the ECJ still never confirmed that any provisions of a mixed agreement come within national competence and thus outside of its jurisdiction.⁵⁰

Is it so that the Council only did adopt the WTO Agreement to an extent reaching no further than the Community's exclusive competence the matter would be, in at least some aspects, settled. EC competence would then extend just that far. The ECJ did in opinion 1/94 find that the Community only had exclusive competence where there existed Community legislation. There extent of EC competence is then determined by where such can be determined according to the theory of implied powers. If this is the case Community external competence exists where there already is internal legislation. Following this approach Community competence becomes expanding and a dynamic effect of adopted directives and regulations.

In the preamble of the Councils decision to ratify the WTO Agreement it stated that the Agreement is by its nature not susceptible to be directly invoked before Community and national courts. The Council did not specify further if this concerned only matters within the Community's exclusive competence.⁵¹ The Councils position is clear as far as exclusive competence is concerned but beyond that matters may, as we have seen above, for the Member States to decide.

The Council did in the act ratifying the WTO Agreement make clear that it did not intend the Agreement could be directly invoked and for it to be authoritative when interpreting Community law. In the so called banana case, *Commission vs. Germany*, the ECJ concluded that:

⁴⁸ Eeckhout, 1997, p. 15 on case 104/81 *Hauptzollamt Mainz vs. Kupferberg*, para. 13.

⁴⁹ Case 104/81, *Hauptzollamt Mainz vs. Kupferberg*, para. 14.

⁵⁰ Eeckhout in *Common Market Law Review*, 1997, p. 17.

⁵¹ Eeckhout in *Common Market Law Review*, 1997, p. 20.

“[t]hose features of GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 (now Article 230) of the Treaty” (parenthesis added).⁵²

2.3.2 Do WTO Agreements have direct effect or not?

The nature of direct effect of international agreements is another matter from the direct effect of directives. The ECJ has in its case law clearly determined that international agreements are binding for the Community, and shall prevail over other Community legislation as well as over national legislation when the matter falls under the Community’s competence.⁵³

One of the more significant developments in this area is the ECJ’s judgement in the *Portugal vs. Council* in which the Court recognizes that GATT 1994 is fundamentally different from GATT 1947 while still denying GATT direct effect. In the same case the ECJ found that in most cases WTO law can not be used for reviewing the legality of Community legal acts. That WTO law can, in principle, be used to challenge Community law had at this point already been established by the Court.⁵⁴ What the Court did was to refine its earlier position.

In *Portugal vs. Council* the ECJ goes more into detail than before on some heavily debated issues.⁵⁵ The ECJ starts off by stating that an Agreement may itself hold information on whether it has legal effects in the domestic law of the parties and when that is not so the ECJ ultimately decides on its effects. In its judgement the ECJ examines whether the WTO Agreement itself, in any way answers whether it should have direct effect or not. It finds that it does not and that no direct effect can be derived from the WTO’s Dispute Settlement Understanding; for what reasons will be explained below.⁵⁶

To shine some light on the significance of *Portugal vs. Council* lets have a look at the case law developments up until then. In *Demirel*, which concerned the old GATT from 1947, the Court stated that:

“[a] provision in an agreement concluded by the Community with non-Member countries must be regarded as directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself,

⁵² Case C-280/93, *Germany vs. Council*, para. 109.

⁵³ Cases 21-24/72, *International Fruit Company NV and others vs. Produktschap voor Groenten en Fruit*, para. 14.

⁵⁴ Desmedt, Axel in *Journal of International Economic Law*, 2000, p.191.

⁵⁵ Case C-149/96, *Portugal vs. Council*.

⁵⁶ Eeckhout in *Journal of International Economic Law*, 2002, p. 92.

the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure”⁵⁷

In *International Fruit Company vs. Produktschap voor Groenten en Fruit* from 1972, a judgement concerning the old GATT from 1947, the ECJ stated that GATT was binding for the Community but went on to further examine the parts of GATT dealing with dispute settlement. The ECJ’s conclusion was that GATT was not unconditional; the Agreement was based on the principle of negotiation and that especially when there was a conflict between the parties the Agreement was characterized by great flexibility of the provisions.⁵⁸ As the ECJ concluded that the rules contained in GATT were not unconditional and the Agreement contained no obligation for the parties the WTO Members had no obligation to make it a part of their respective national legislation.⁵⁹ In the “banana” ruling from 1993, the ECJ followed its own case law from twenty-one years earlier and merely stated that:

*“the GATT rules are not unconditional and that an obligation to recognize them and rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or general terms of the GATT”.*⁶⁰

Again this is a judgment based upon the old GATT which was more of a diplomatic arrangement between States than the present GATT. Arrangements that could be renegotiated or in some circumstances unilaterally suspended. In addition the dispute settlement mechanism of the time was ultimately consensus based.⁶¹

The old GATT from 1947 was far less legal and more political in its conflict resolution procedure. The present WTO Agreement is as we have seen above quite different from the old GATT. Looking on subsidies, which is the subject I am trying to examine here, the provisions enshrined in GATT and the SCM Agreement which, form parts under the WTO Agreement, hold much greater detail than the ECT does when examined on its own. Alongside GATT there are also GATS and TRIPS which regulate trade in services and intellectual property. Under GATT there are numerous Agreements each covering a certain field such as the SCM Agreement does.

Dispute settlement mechanisms under GATT and adjoining Agreements are clearly much improved and strengthened. And maybe has there even been so many and far-reaching changes that the reasoning of the ECJ in the banana judgement is no longer valid. When the Court found existing GATT rules

⁵⁷ Case 12/86, *Demirel vs. Stadt Schwäbisch Gemünd*, para. 14.

⁵⁸ Cases 21-24/72, *International Fruit Company NV and others vs. Produktschap voor Groenten en Fruit*, para. 21.

⁵⁹ Cases 21-24/72, *International Fruit Company NV and others vs. Produktschap voor Groenten en Fruit*, para. 110.

⁶⁰ Case C-280/93, *Germany vs. Council*, para. 109.

⁶¹ *Eeckhout in Common Market Law Review*, 1997, p. 30.

were not unconditional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties could not be based upon the spirit, general scheme or terms of GATT.⁶²

Dispute settlement in the WTO is in itself an extensively regulated area, much more so now than before. Much of the earlier flexibility is thereby lost. Telling from the ECJ case law this does not seem to be enough to grant it direct effect even if some of the reasons for not doing so by the ECJ should be obsolete by now.⁶³ The reason for not granting direct effect seems to have turned more towards the fact that the rules as such were never meant to be implemented directly. As we saw earlier the Council made it clear that no direct effect was intended. The ECJ has not seen it fit to override the room the Council left for the Community's political institutions in implementing the WTO Agreement further by granting direct effect. Some writers have considered this an expression of the need of reciprocity in acceptance of international trade rules so that one does not leave one's domestic market wide open for outside competitors.⁶⁴

To return to the ECJ's ruling in *Portugal vs. Council* that was only just mentioned earlier.⁶⁵ Portugal had requested a decision from the Council declaring Agreements on certain market access for textile products entered into with India and Pakistan null and void. The argument put forward by Portugal was that the Agreements were incompatible with the WTO Agreement on Textiles and Clothing. After that the matter was brought before the ECJ under an Article 230 ECT procedure. The claim was dismissed the ECJ which concluded that the Agreement could not be used to review the legality of Community acts but the reasoning adds relevant discussion. The ECJ examined the new GATT 1994 in relation to GATT 1947 and found the new to be significantly different and especially so on matters of conflict resolution. The ECJ did, however, still find the system to be reliant on negotiation between the parties.⁶⁶

The ECJ also examined the WTO Dispute Settlement Understanding (DSU) and whether that could give grounds for testing the legality of Community acts. The DSU provides, for the case when a Member has not brought his measures into compliance with WTO law and obligates the parties to negotiate.⁶⁷ The conclusion of the Court was that if it as a judicial body took it upon itself to review the legality of Community acts in these cases it would trespass on the room for negotiation left for and intended for the Community's legislative and executive bodies.⁶⁸ After that the Court went on to see if there were any reasons to, on the basis of the internal EC legal

⁶² Griller in *Journal of International Economic Law*, 2000, p. 443.

⁶³ See for example Griller, Stefan in *Journal of International Economic Law*, 2000.

⁶⁴ Eeckhout in *Common Market Law Review*, 1997, p. 30.

⁶⁵ Case C-149/96, *Portugal vs. Council*.

⁶⁶ Case C-149/96, *Portugal vs. Council*, para. 36.

⁶⁷ Article 22.2, DSU.

⁶⁸ Case C-149/96, *Portugal vs. Council*, para. 41.

order, to ensure the fulfilment of the Community's obligations under the WTO Agreement. Again the Court found that if that was the case that would deprive the legislative and executive bodies of their room for manoeuvre that is enjoyed by their counterparts in third countries, i.e. outside the EU. The Court found reason for this conclusion, as it had done in the cases referred to above, due to the fact that there was nothing to be found in the preamble to the WTO Agreement or its annexes indicating that a different way of conflict resolution than negotiation as under GATT 1947 was intended in this new Agreement.⁶⁹ The Court found that the basis for conflict resolution still should be through entering into reciprocal and mutually advantageous arrangements.⁷⁰

The above presented case law does put a perspective on the relation between Community acts when challenged before Community Courts using WTO law; the reasoning should be equally applicable for direct effect of WTO Agreements in national Courts when playing a role in the EC legal order.⁷¹

2.3.3 Indirect effect and other possibilities

If the WTO Agreement cannot be granted direct effect, can it then have indirect effect? Should one interpret Community law so that it is consistent with international agreements such as GATT? One thing that speaks in favour of that one can apply the rule of consistent interpretation in these cases is that it has in the past been considered applicable when Community Regulations were in conflict with Article VI of GATT.⁷² The rule of consistent interpretation has been formulated by the ECJ as:

*“the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as possible, be interpreted in a manner consistent with those agreements”.*⁷³

The majority of ECJ judgments are available for analysis concern GATT 1947. GATT 1947 has since been replaced with the WTO Agreement and GATT 1994 and GATT has thereby if anything become more judicial in its structure. There does not seem to be any obvious reason why this earlier case law concerning GATT 1947 should not be extended to the WTO.⁷⁴

The scope of consistent interpretation is rather limited. According to the rule of consistent interpretation Community Secondary law shall be interpreted in the light of the Agreement it is meant to implement.⁷⁵ In fact the ECJ has in its ruling in the banana case, *Germany vs. Council*, stated that:

⁶⁹ Griller in *Journal of International Economic Law*, p. 448.

⁷⁰ Case C-149/96, *Portugal vs. Council*, para. 43.

⁷¹ Desmedt, Axel in *Journal of International Economic Law*, 2000, p.192.

⁷² Cases T-163/94, *NTN Corporation and T-165/94, Koyo Seiko vs. Council*, para. 65.

⁷³ Case C-61/94, *Commission vs. Germany*, para. 52.

⁷⁴ Eeckhout in *Common Market Law Review* 1997, p. 41.

⁷⁵ Eeckhout in *Common Market Law Review* 1997, p. 40.

“it is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of GATT rules”.⁷⁶

There have been cases where Community Anti-dumping legislation was tried against and did not measure up to some aspects of the GATT Anti-dumping code. In those cases claims were made to get an individual Anti-dumping measure annulled on the basis that the regulation which they were issued under did not comply with GATT. The ECJ has stated on several occasions that not the Anti-dumping code nor GATT does confer rights on individuals but as the applicant did not pursue a question relating to direct effect but one relating to the applicability of a regulation. In a judgement subsequent to *Nakajima vs. Council* the ECJ stated that:

“[a]s regards the alleged infringement of the GATT anti-dumping code, it should be noted that it follows from the judgment in the Nakajima v Council... that such an infringement may be pleaded for the purposes of review of the legality of the basic Regulation”.⁷⁷

The ECJ has already earlier given preliminary on GATT 1947 to ensure uniform application though out the Community and not to let distortions within the Community to have an effect on the application of agreements binding on the Community. More importantly the ECJ has considered GATT and related Agreements binding for the interpretation of secondary EC law governing the Community's international trade relations.⁷⁸

The solution chosen by the ECJ seems to be decidedly dualistic. Effect of WTO rules in the EC becomes dependant on Community implementation measures and those implementation measures can then be invalidated if their non-compliance with the WTO rules shown. Can there then be effect outside of the scope of the implementation measures implementation? It seems unlikely in practice; the one possibility left would be that the implementation measure excluded a portion of the scope of the WTO measure it was meant to be implementing. When an international Agreement has been incorporated into EC law it achieves a different status and it is the obligation of the Community to implement correctly. Before implementation too many factors may play a role, with an agreement is rather unclear that leaves room for renegotiation to mention one aspect.⁷⁹ If we recall the statement made by the Council in its act ratifying the WTO Agreement, it then said that the WTO Agreement was not to be invoked before Courts. That point must be long passed when there are implementing

⁷⁶ Case C-280/93, *Germany vs. Council*, para. 111.

⁷⁷ Case C-188/88, *NMB GmbH and others vs. Commission*, para. 23. The quoted passage concerns an argument that the basic Regulation on anti-dumping should be in applicable.

⁷⁸ Griller in *Journal of International Economic Law*, 2000, p. 466.

⁷⁹ Eeckhout in *Common Market Law Review* 1997, p. 47.

acts issued by Community institutions and the Agreement must hold some kind of authority in those specific areas.

That is the situation with the WTO Agreements, but what the standing of WTO Panel and Appellate Body reports in the Community. The ECJ had reason to comment on a similar matter of judicial bodies working under international agreements in its opinion 1/91 on the EEA Agreement. The question examined by the Court was whether the proposed EEA court system was compatible with Community law.⁸⁰ What could happen, for example, is that a WTO Panel may, after a complaint from another WTO Member decide that an aid administered a Community Member State or even the Community itself falls under Article VI GATT and is prohibited or actionable under the SCM Agreement. The ECJ has jurisdiction under Community law to interpret international agreements but saw itself and other Community institutions bound by decisions of Courts operating under an international agreement. In this rather long but in my opinion relevant quote the ECJ found that:

*“when an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and as a result interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice. Those decisions will also be binding in the event that the Court of Justice should be called upon to rule, by the way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order. An international agreement providing for such a system of courts is in principle compatible with Community law. The Community’s competences in the field of international relations entail the power to submit to decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions”.*⁸¹

Most eye-catching may be that the Court finds itself bound to follow such rulings in its own judgments. However, as one continues reading it becomes clear that it is only so when the agreement forms an integral part of the Community legal order.⁸²

When one follows the ECJ’s reasoning this would then mean that if there is no direct effect of the WTO Agreement and that the same would be the case with Panel and Appellate Body reports. The Courts position has so far been that such reports are binding on the Community, but do not have direct effect. This prevents the community Courts from drawing any legal consequences in cases where there is no direct effect.⁸³

⁸⁰ ECJ opinion 1/91 on the EEA, para. 30.

⁸¹ ECJ opinion 1/91 on the EEA, paras. 39-40.

⁸² Griller in Journal of International Economic Law, 2000, p. 467.

⁸³ Eeckhout in Common Market Law Review 1997, p. 53.

Can one then assume that the case is the same even after the WTO Dispute Settlement Body has adopted a Panel or Appellate Body report after the EC has violated WTO rules? In these cases there would be a decision confirming that certain Community rules do not conform to the WTO rules and requiring the Community to make corrections. Some writers have argued that it should be possible in these cases rule out some reasons for denying direct applicability; such as that the WTO legal order is characterized by flexibility and is not clear enough to confer rights upon individuals to be granted direct effect.⁸⁴ Other writers find it odd that the existence of a report would make effects within the Community possible in areas where there normally would not be any.⁸⁵

2.4 An on the way Conclusion

The ECJ can as we have seen above be involved when there is an action under Articles 226, 227 and 88.2. The Court has not granted the WTO Agreements direct effect; if this is the correct thing to do is a matter of discussion. Even if the Court has been consistent in its attitude towards GATT both the current version and its predecessor the Court has changed its argumentation. What has happened is that it pointed out a second feature of WTO law that makes it incapable of having direct effect; there is now a two step process to determine the possibility for direct effect.

The first step would be to examine if there has been an intention from the Community institution that concluded an international agreement to bind the Community in a way other than an obligation to enter into negotiation and work out a political solution. The second step is to examine the prerequisites for direct effect; i.e. if the agreement is clear enough, unconditional, the time for implementation has run out and it is capable of conferring rights upon individuals. The Courts later argumentation is in no way contradictory to the earlier. Indirect effect is a trickier issue. The ECJ has declared that international Agreements, such as GATT, are binding on the Community. The next step has proven harder, the Court has made it clear that there is to be uniform application within the Community but has made review of Community acts in relation to international agreements dependant on the existence of Community implementation.

As we have seen individual citizens have no possibility to initiate proceedings before the ECJ in these cases. The options left are to go to the Commission and hope that the Commission takes action. Should the Commission not take action or if one is not satisfied with the Commissions decision there is the possibility of judicial review. Under Article 230.2 ECT the CFI has jurisdiction to review the legality of Community acts such as acts by the Commission when evaluating an aid's compatibility with the market. The review focuses on the legality of those acts e.g. in relation to

⁸⁴ Eeckhout in *Common Market Law Review* 1997, p. 53.

⁸⁵ Cheyne, Ilona, *International instruments as a source of Community law* in Dashwood and Hillion, 2000, p. 268.

the competence of the EC, infringement of essential procedural requirements and infringement of the Treaty or any rule or law relating to its application. Proceedings can be initiated by any natural or legal person to which the decision is directed, or when the decision is directed to another person if it is of direct and individual concern to him or her.⁸⁶ The review only concerns procedural or formal requirements.

There is an obligation to the Commission to take WTO law into consideration when it has been incorporated into EC law through secondary legislation.⁸⁷ A possible conclusion from the *Nakajima* case is that: as the Community has an obligation to fulfil under international agreement it has concluded it must also have the obligation to see to it that they are correctly implemented. There may thus be room for a claim against an implementing regulation. This conclusion is controversial; the problem is whether an intention to implement should be enough to ensure applicability. The Court did however question, without answering, whether implementation measures could be questioned by individuals. It is therefore possible that this possibility is not open to individuals; it should however be so to Member States.⁸⁸ There is another reason to make a complaint under Article 230 against a Commission decision; if so is not done the matter will not be considered by the ECJ later on.⁸⁹

Do national Courts have to take WTO law into consideration when deciding on a matter of State aid if so is argued by a party? ECJ case law up to this point has not acknowledged direct effect of the WTO Agreement. From what we have seen above the main legal reasons for the ECJ to deny the WTO Agreement direct effect are mainly connected with conflict resolution. One might think that the ECJ had changed its position since there is a new GATT and a whole new organisation, the WTO, to supervise its application and the ECJ stand point therefore was largely in another legal context. Indirect effect is of course the next possibility. Indirect effect would open up for a more general obligation for the Member States to keep the application of their respective State aid within boundaries set by EC law, or perhaps their duty to cooperate with the EC and viewing legislation in the light of EC law. The influence, if there is any, from WTO law would then come from interpreting the ECT along with the Community's obligations under the WTO Agreement.

⁸⁶ Article 230.4 ECT.

⁸⁷ Ilona Cheyne, Haegeman, Demirel and their progeny in Dashwood and Hillion, 2000, p. 31.

⁸⁸ Ilona Cheyne, Haegeman, Demirel and their progeny in Dashwood and Hillion, 2000, p. 33.

⁸⁹ Quigley & Collins, 2003, p. 278.

3 EC State aid law

3.1 The notion of State aid

3.1.1 A note on texts and terminology

This and the following chapter deals with material law in the EC and the WTO. These two chapters present the material that is the basis for the comparison in chapter five and partly in chapter six. If one's interest is not in State aid or subsidy law it should be possible to still benefit from the discussion in chapters five and six on the possible influence from WTO law into EC law without spending too much time reading this and the following fourth chapter.

The EC has provisions on State aid; the WTO has GATT Articles VI, XVI and the Subsidies and Countervailing Measures (SCM) Agreement. What EC law calls State aid is partly covered by those Agreements. Of course the WTO also has other Agreements and other rules covering the other areas that fall under the EC State aid rules, but only the WTO concept of subsidies will be examined here. The comparison only covers rules concerning goods.

What is a subsidy or State aid might not be expressed in the same way in Community law and in WTO law. The structure of relevant texts is different so is terminology and the ways of interpretation of legal texts. This is a problem that there is no way around and both concepts of subsidies must be examined. The EC State aid law will be looked at as far as it deals with matters with under a similar scope as the WTO's SCM Agreement. The SCM Agreement does, as earlier mentioned, only deal with trade in goods and is therefore more limited in its scope than the relevant EC provisions.⁹⁰

3.1.2 What is aid?

In the Community State aid is one of the factors that may influence free movement of goods; as such it is controlled not so that it does not influence function of the internal market. There are numerous ways to provide aid to various enterprises; so is also done in varying extent by all EC Member States. It is generally considered beneficial for the economy as a whole when done to a limited extent. When aid is granted to an industry or other undertakings within one country's territory it will have a more competitive position in relation to others, also to undertakings within another country's territory. Even if aid can be beneficial to the society as a whole it may in some cases frustrate competition. This is due to the fact that those not receiving the aid then are competing against others who do. The integration in the common market may invoke States to provide aid to gain relative

⁹⁰ Slotboom in *Journal of World Trade*, 2002, p. 519.

advantages. This influences the allocation of resources and then also may lead to the exportation on unemployment etc.⁹¹

Article 87 ECT holds the core rules of the anti State aid regime, aid that would otherwise threaten the function of the common market and further market integration. Aid to undertakings has become more important for States aiming to favour their industry as other measures of economic policy formerly used have turned less effective or are totally prohibited due to other rules imposed by the EC.⁹²

There is more than one way for one country to counter such activities by another country; measures like quantitative restrictions on imports or customs would make it possible to counter unwanted effects but are, as we know, per se prohibited in the Community's internal market. To put a complete prohibition on State aid may then seem to solve the problem they are a potential threat to the market and to community interest. These measures are a vital instrument in the Member States economic and social policy and the Member States. They are needed for the economic health of sectors of economy or regions, especially so during high unemployment as in times of economic difficulty. And quite likely it would therefore be counterproductive and lead to unwanted effects to make such measures totally unavailable. This creates a tense and difficult situation. It is necessary to balance the Member States national interests and the Community interests. Rules in the ECT and secondary legislation have to be interpreted and given the intended effect while taking all this in to account. Not strangely the national interests can be opposite to community interest and the creation of a single market.⁹³ One must keep this in mind when looking at these matters.

The aims behind granting an aid are usually social or economic objectives pursued by a State. In its ruling on the *Amministrazione delle Finanze dello Stato vs. Denkavit Italiana* case the ECJ was quite clear on the point that such aims cannot exempt an aid from the prohibition in Article 87.⁹⁴ Consequently the ECJ has rejected such arguments in cases concerning measures in order to provide jobs within a certain industry and in a case where a measure formed part of a Member States economic policy, conjunctural policy or to achieve public health aims. Where a measure can be commercially justified it may not constitute an aid in spite of that it furthers social and economic policy objectives as well. The State can thus invest and dispose of assets in a way that a private undertaking would when faced with the same prerequisites.⁹⁵

The EC State aid regime found in Articles 87 to 89 ECT is separate from Article 28 and the prohibition of quantitative import restrictions. This is so

⁹¹ Eleventh Report on Competition Policy (1981), p. 179.

⁹² Quigley & Collins, 2003, p. 2.

⁹³ Steiner & Woods, 2003, p. 280

⁹⁴ Case 61/79 *Amministrazione delle Finanze dello Stato vs. Denkavit Italiana*. para. 31.

⁹⁵ Quigley & Collins, 2003, p. 6.

even if State aid can have largely the similar effects in hindering import. Any aid allowed under Article 87, which is the article holding the material rules on State aid, cannot fall under the scope of Article 28. Articles, 28 and 87 are mutually exclusive. State aid is as a general rule prohibited but may be allowed if any exemption in paragraphs 2 or 3 in Article 87 is applicable. Those exemptions come in two categories and under them aid is allowed or may be allowed. Even when a measure is an aid but falls under an exemption in Article 87.2 or 3 it is still possible that parts of the aid are incompatible with the market if those parts are not necessary to achieve the aim motivating the exemption. That a part of an aid is incompatible with the market does not invalidate the aid as a whole.⁹⁶ In the case *Du Pont de Nemours Italiana*, the ECJ considered Italian legislation that required public bodies to purchase at least 30 percent of their supplies from the Mezzogiorno region. The conclusion of the ECJ was that Article 30 (now 28) is a separate regime and that some measure may be a State aid does not put it outside the scope of Article 28. Article 28 does thus prohibit national laws regulation procurement so that the products have to be purchased from a specific region even if it may be considered a State aid.⁹⁷

There are some other cases when a State aid may fall under the scope of another ECT provisions. Some of the more significant are: Article 31 holds provisions in relation to State monopolies of a commercial character. Those provisions are of interest when looking at State aid law as they contain a basic non-discrimination rule obligating States to adjust such monopolies. A State aid linked to rules governing an activity making it a monopoly must comply with Article 31 as well as Article 87.⁹⁸ Under article 86 public undertakings and private undertakings may not be given special or exclusive rights, nor may such systems be maintained by the Member States. This is as long as those undertakings have not been entrusted to perform services of general economic interest or have the character of a revenue producing monopoly. Such undertakings can be given special or exclusive rights if their performance of services of general economic interest otherwise would be obstructed. It is possible that an undertaking entrusted such duties may then be exempted from State aid rules thus creating an additional exemption besides the ones in Article 87.2 & 3. Article 81 holds provisions in relation to competition; those provisions have to be taken into consideration when an evaluation of an aid is made under Article 88. The evaluation under Article 88 is always present as all aid has to be reported and granted by the Commission. In cases where an aid is allowed it is exempted from liability under the competition provisions of Article 81. Even if a positive decision under Article 87 and 88 surpasses other provisions such as Article 31 and 81 an evaluation has to be made separately for all such provisions.⁹⁹

⁹⁶ Steiner & Woods, 2003, p. 293.

⁹⁷ Case 21/88, *Du Pont de Nemours Italiana vs. Unita Sanitaria Locale No 2 di Carrara*, para. 19.

⁹⁸ Steiner & Woods, 2003, p. 294 on case 74/76 *Ianelli & Volpi SpA vs. Ditta Paulo Meroni*.

⁹⁹ Steiner & Woods, 2003, p. 294.

3.1.3 Who is entitled to make a claim?

Individuals may not invoke Article 87 before national Courts as it does not have direct effect; that is not to say that a case involving evaluation of State aid using Article 87 may never appear in national Courts. Under certain circumstances this may happen. That some considerations are left to those Courts has been considered appropriate by the ECJ.¹⁰⁰ The normal course of action is that all aid has to be reported to the Commission before it is administered. It is then the Commission's job to examine and to control aid. Article 88 leaves it to the Commission to review and supervise State aid. While doing so the Commission has room to exercise discretion and to allow aid. Even if Article 87 holds what is an effective prohibition on State aid and the exemptions to that prohibition cannot be used for a claim before a national Court Article 28, for example, on import restrictions or measures of equivalent effect is directly effective. It should therefore not be impossible to use Articles 87 and 88, just because they deal with State aid, to determine what parts of an aid scheme it is that is not necessary to fulfil the scheme's goal and what is a measure prohibited under Article 28.¹⁰¹ In those cases the Commission has established a procedure through which national courts can seek the Commission's assistance in determining the existence of an aid under Article 87.¹⁰²

3.2 Article 87 ECT

3.2.1 Aid granted by a Member State or through State resources

From the wording of Article 87.1 ECT we can tell that measures granted by a Member State or through State resources can be considered State aid. When it comes to aid granted in some way by a Member State; that can happen in two ways. It is possible that an aid scheme that is regulated in a legal act or a general aid scheme or an act can be applied in a way making it specific in its practice. Starting with aid schemes in law, any legal provisions fulfilling the criteria set up in Article 87.1 can if applied amount to a State aid. It may not be the most common practice to make a law in such a way that it explicitly grants prohibited aid but it may happen.¹⁰³

What we are looking at is State aid so let us start with who can grant an aid of the kind described in Article 87.1 ECT. It seems unlikely that it is intended that only aid granted by central government is covered; in that case the prohibition could be easily circumvented. In addition to aid granted directly by government a measure can be considered an aid when decided by public authority at national, regional or local level. The authorities do not

¹⁰⁰ von Quitzow, 2002, p. 139.

¹⁰¹ Case 74/76, Ianelli & Volpi SpA vs. Ditta Paola Meroni, para. 14.

¹⁰² Case 74/76, Ianelli & Volpi SpA vs. Ditta Paola Meroni, paras. 11 and 12.

¹⁰³ von Quitzow, Carl Michael, State measures distorting free competition in the EC, 2002, p. 139.

have to administer the aid themselves but there has to be a certain amount of State influence in granting an aid or in an aid scheme. It can for example be when the aid is granted by a privately owned company acting on behalf of or by order of such an authority. To this effect there is no possibility to circumvent Article 87 by forming a company administering aid but not formally being under the influence of public authorities but still having to follow their directions. The case is the same for public undertakings and private undertakings over which the State has a dominant influence. The Member States' own view on who is acting as a part of or under public authorities can not be used to circumvent the Community notion of who is exercising effective control and influence over those undertakings.¹⁰⁴

Under Article 87 it is necessary that an aid to be granted by a Member State, a criterion that has been interpreted to entail any level of government and public or publicly owned bodies. It can be granted in any of these ways or it can be granted through State resources. From the look of it this seems to be to alternative criteria that can be used independently. There is, however, some ECJ case law saying the opposite; that the two are to be used parallel so that both criteria have to be met.¹⁰⁵

The Article states incompatibility for many forms of State aid, from that rule there are many exemptions. The exemptions are listed in the two following paragraphs. That is, in paragraph two, aid that is compatible and, in paragraph three aid that may be compatible with the market.

In short one can say that the concept State aid, as it has been defined by the Commission and the European Courts enshrine most advantages granted directly or indirectly through State resources as long as it distorts or threatens to distort competition by favouring certain undertakings or production of certain goods and trade between the Member States there by is affected.¹⁰⁶ Aid as such is wide concept and the most direct form of aid that comes to mind is subsidies. When one speaks of a subsidy it is normal to think of payment in cash or kind as that is the most common meaning of the word. Except for those positive measures where payments are made to a recipient such as subsidies there are also negative measures entailed in the concept of aid. Those can be tax exemptions or reduction of social cost e.g. for employment, to mention some. The ECJ has in *Steenkolenmijnen vs. High authority* put focus on the effect of advantages granted by the States and not the aim the State claims it had for granting that advantage. Thereby the concept of an aid becomes far wider than the one of a subsidy as it then embraces any measure to achieve an objective which could not be reached without such help. The focus of Article 87 when prohibiting aid has been clarified by the ECJ as independent from the measures' alleged aim or cause and solely to be determined in relation to its effects. Any relief regarding expenses normally included in an undertaking's budget such as taxes are therefore aid. It is not strange so as it is similar in character and has the

¹⁰⁴ Quigley & Collins, 2003, p. 7.

¹⁰⁵ von Quitzow, 2002, p. 140.

¹⁰⁶ Steiner & Woods, 2003, p. 285.

same effect as a subsidy.¹⁰⁷ In fact as much as 25 percent of all aid is granted by exemptions from obligations to pay taxes and social security.¹⁰⁸

That the State has the possibility to exercise such influence is not in itself enough to assume that any decision by such a body may be State aid even if it is to someone's benefit. Whether or not a measure taken by an undertaking directing its resources shall be determined on the all circumstances of each case and the context in which the measure is taken. In *France vs. Commission* the ECJ listed the factors it saw as relevant indicators in determining whether an undertaking can be considered acting under State influence when using its resources in a way that may be an aid imputable to the State. Those indicators were: the integration of a public undertaking in State administration, the nature of the undertakings activities and how its activities are exercised in the market amongst private operators, undertakings legal status, the intensity of supervision of the undertakings management by public authorities and any other indicator showing involvement by public authorities on the undertakings adoption of the measures in question.¹⁰⁹

In the case *Van der Kooy vs. Commission* a company owned to fifty percent by the Netherlands State and 50 percent privately owned was deemed to be under such State influence that its measures could constitute aid. The measure in question then was the fixing of a preferential tariff for the company's product to be used in relation to some costumers. In another case the ECJ took another factor into consideration in order to determine what effective control is; the Netherlands Minister of economic affairs could reject any tariff adopted by the company that he did not see fit. The company was in practice under the influence of public authorities and could not act independently as any proposed tariff had to be approved.¹¹⁰

In *Namur-Les Assurances du Crédit SA vs. Office National du Ducroire (OND) & Belgian State* the board of directors of a public credit insurance company was required by law to follow the policy set out by the government. Advocate General Lenz held that: since the board was bound in its decisions in this way, the function of the policy set by the government was the same as an instruction and aid granted in this way could be attributed to the State. It was not necessary for the State involvement to go as far as a direct instruction as the board could not take any decision without considering the government policy.¹¹¹

The accumulation and use of funds may be for carrying out an instruction from the State even when done so by a private body. Those activities are then seen as the private body acting on delegated authority or carrying on an

¹⁰⁷ Quigley & Collins, 2003, p. 4 and 5.

¹⁰⁸ State aid scoreboard, spring 2002, p. 7.

¹⁰⁹ Case C-482/99, *France vs. Commission*, paras. 56 and 57.

¹¹⁰ Cases 67, 68 & 70/85, *Van der Kooy vs. Commission*. para. 36.

¹¹¹ Opinion of A-G Lenz in case C- 44/93, *Namur-Les Assurances du Crédit vs. Office National du Ducroire (OND) & Belgian State*, para. 45.

obligation imposed on it by the State. Under such circumstances it is thus not necessary for aid to be financed directly through State resources.¹¹² If there is a certain amount of State intervention the resources may be considered state resources for those purposes. To this effect the CFI has found that a fund based upon private and public compulsory deposits was a source of public finance. The deposits were repayable under certain circumstances and there was a balance in the fund between the continuous deposits and withdrawals.¹¹³

In the *Slooman Neptun* case the ECJ chose a restrictive interpretation of the phrase “by a Member State or granted through State resources” in Article 87.1. A German law allowed for seamen that were not Germans and did not live in Germany to be hired on ships registered in the German ships register with less social security benefits from their employer than German citizens. The question put to the ECJ by the national Court was if this reduction of costs to the employers was an aid. The Commission argued that the exemption constituted an aid even if the funding did not come out of State resources and was aimed at making the German shipping industry more competitive. The Commission supported its view on a literal interpretation of Article 87.1 ECT and that the measures funding came out of State resources as it decreased German tax revenue. The ECJ held that the entire phrase “by a Member State or through State resources” only referred to undertakings or bodies, both public and private, when administering State funds and found that the possible loss of revenue was not a burden on State resources.¹¹⁴ Advocate General Darmon argued that reduction of an employment related cost for seafarers from States that was not EC Member States was equivalent to a fund voluntarily established by the ship owners for the benefit of the seafarers.¹¹⁵

The Court has maintained this position in its ruling in the *Viscido and others vs. Ente Poste Italiane* cases 1998. In three joined cases Italian postal workers claimed that their employer was receiving a State aid as it was possible for the Post to deny them indefinite employment after they had been employed on short term contracts for a certain time. Other employers would have been forced by a legal obligation to give them such contracts, but the Post had been granted an exemption. Their argument made by the postal workers was that the relief from a burden which other undertakings had amounted to a State aid. The ECJ stuck to its earlier case law and rejected the argument. The Courts stated in its ruling that: even if there is a distinction in Article 87.1 between aid granted by a Member State and aid granted through State resources that did not mean that all benefits granted by a State constituted State aid. The Courts view was the same as in earlier

¹¹² Case 290/83, *Commission vs. France*, para. 14.

¹¹³ Case T-358/94, *Air France vs. Commission*, para. 62.

¹¹⁴ Cases C-72 & 73/91, *Slooman Neptun Schiffahrts AG vs. Seebetriebsrat Bodo Zieseimer der Slooman Neptun Schiffahrts AG*, paras. 19-22.

¹¹⁵ Quigley & Collins, 2003, p. 14.

rulings and as the measure it did not involve any transfer of State funds to it was not an aid.¹¹⁶

In his opinion in the *Viscido* case Advocate General Jacobs noted that the exemption provided for the Post was there to ease the transformation of the Post Administration into a public undertaking. He found that that the use of State funds, through loss of tax revenue or increased cost of unemployment benefits, in this case was inherent to the system and not means to grant a particular advantage and that any extra cost would be uncertain and unidentifiable.¹¹⁷ More notably Advocate General Jacobs made a further statement:

*“[i]t might be asked why, given their potential effect on competition, Article 87.1 does not cover all labour and other social measures which by virtue of being selective in their impact might distort competition and thereby have an equivalent effect to State aid. The answer is perhaps an essentially pragmatic one: to investigate all such regimes would entail an inquiry on the basis of the Treaty alone into the entire social and economic life of a Member State”.*¹¹⁸

The above quoted section is meant exemplify the Courts case law up until now and that it aim to extend the scope of Article 87 much further but also a reluctance to take complex and farfetched connections into consideration when determining whether there is a burden to State funds or not. Not that the latter has been ruled out but case law along with the quote above seems to support this conclusion.

The ECJ did, in the *Kirsammer-Hack vs. Sidal* case, answer the question if certain rules in German legislation who relived small undertakings from obligations normally providing protection to employees in the case of unfair dismissal. The costs the undertakings did not have to bear were for legal expenses and for compensating laid off workers. The ECJ also in this case came to the conclusion that even if this meant an advantage for those undertakings the funds for this did not come out of State resources and could thus not be State aid.¹¹⁹

The ECJ reached a similar conclusion in another case, *Ecotrade Srl vs. Altiforni e Ferriere di Servola SpA (AFS)*. The case concerned the application of some Italian insolvency rules. At the time the matter fell under the ECSC Treaty which has expired since after the ruling. The question then was whether Italian legislation designed to allow certain large industrial firms to keep trading despite being insolvent aided those undertakings in a way that was prohibited. The special regime for these undertakings was only available when certain criteria were met such as a

¹¹⁶ Cases C-52-54/97, *Viscido and others vs. Ente Poste Italiane*, para. 13.

¹¹⁷ Ross in *Common Market Law Review* 2000, p. 414.

¹¹⁸ Opinion of A-G Jacobs in cases C-52-54/97, *Viscido and others vs. Ente Poste Italiane*, para. 16.

¹¹⁹ Case C-189/91, *Kirsammer-Hack vs. Sidal*, para.17.

minimum number of workers, minimum level of debts and certain categories of creditors. The rules made it possible for the escape fines and they were exempted from penalties payable imposed for failure to pay compulsory social security contribution. Ecotrade was a company seeking to enforce a debt AFS had to it. AFS was put under the special regime provided for by the Italian rules. Ecotrade then sought action before a national Court claiming that the Italian law was incompatible with EC State aid rules. Advocate General Fennelly noted that Article 4(c) ECSC was applicable did not put up the same selectivity criteria as the ECT at least not expressly but considered that the notion of an aid should be the same for the two Treaties.¹²⁰ The way to apply the selectivity criterion suggested by, and which was accepted by the ECJ, was that the Italian rules had two features working in a selective manner. The criteria used to single out the undertakings eligible for the special regime was the first; the second was the discretionary manner in which the regime was granted to some undertakings.¹²¹

Telling from the above presented case law there seems to be a strong limitation on the scope of Article 87 in that that it is only applicable where a measure entails a burden on State funds. There has been debate in legal publications on the matter. Some writers think that this restricts the effective scope of Article 87 not to cover selective advantages.¹²² In ECJ case law it has been considered unimportant whether the measure grants a temporary advantage or a more permanent one, it is an aid just the same.¹²³

This necessity of a burden on State resources certainly limits the reach of Article 87. As we will see below a State guarantee can be State aid even if the States responsibility under that guarantee is never triggered and there is no burden on State resources. Such a guarantee is however determinable to its amount, that may be what it takes. This seems to be a pragmatic solution. Intervention reclaiming State aid may become very repressive if aid can be determined without that any amount can be set, this last conclusion is however mere speculation.

3.2.2 The recipients - selectivity

The next step on the way to determine a State aid is selective. Not all aid is prohibited. A general aid that does not only benefit a certain undertaking or production of certain goods is allowed. The general rule prohibiting State aid only applies if there is a benefit only to a certain undertakings or the production of certain goods. The Treaty does not define what an undertaking is but in ECJ case law this has been seen as any entity performing an economic activity. The economic activity does not have to be production of goods; it can just as well be production of services such as banking services

¹²⁰ Opinion of A-G Fennelly in case C 200/97, *Ecotrade vs. AFS*, para. 33.

¹²¹ Case C 200/97, *Ecotrade vs. AFS*, paras. 38 and 39.

¹²² Ross in *Common Market Law Review*, 2000, p. 414.

¹²³ Quigley & Collins, 2003, p. 5.

or travel. The meaning of goods is as that as well wider than the one in common speech; and production of electricity is an example of something that is goods production for the purpose of Article 87. It is relevant to establish that the aid has benefited the undertakings economic activity. The commission has, in one case, found that even if a receiving undertaking was involved in economic activity, the benefits it had received were for the restoration of buildings owned by the undertaking and that the buildings did not play a part in its economic activity.¹²⁴

Not only private undertakings can perform an economic activity so can public bodies in one form or the other. The recipient of an aid does not have to have a legal personality separate from the one who is administering the aid. This can be the case when a public undertaking receives an aid. From the point of view of the national authorities the giver and the recipient are parts of the same unit and no payment or other benefit has thus been referred. In this area the Commission has issued the so called Transparency Directive which covers a wide array of possible benefits that can be granted to public undertakings. Public bodies can be involved in production of goods or services; when performing such activities are they not exempted from the scope of Article 87. The organisation of State activities and State trading enterprises can take many shapes. It can for example be performed as a part of a public body's activities or in a separately organized enterprise. Organisation is just as important when determining who can be the recipient of a State aid as it is when determining if the body administering the aid is doing so as a part of, or acting on behalf of the State. A State owned monopoly, having a separate personality or not, is not exempted from the provisions of Article 31 and an aid granted in such cases has to be non discriminatory.¹²⁵

In the case *Italy vs. Commission*, which concerned the Italian tobacco monopoly, the ECJ held that the body did indeed carry out economic activities. Those activities were of an industrial or commercial nature and the fact that the body had no separate legal personality did not hinder that there could be economic relations between it and the State.¹²⁶

Now when we have had a look at the potential recipients let us examine how specific an aid has to be to be prohibited. The specificity criterion calls for that a recipient has to have been singled out in some way. When determining the degree of specificity a number of factors have to be considered. It is however not necessary for the recipient or beneficiary to be identified in advance in a way that distinguishes him specifically as eligible for the aid.¹²⁷ For example, general tax provisions are not affected by State aid rules since they are applicable to all undertakings throughout a Member State and not specific in any way.¹²⁸

¹²⁴ Quigley & Collins, 2003, p. 25 and 26.

¹²⁵ Steiner & Woods, 2003, p. 286.

¹²⁶ Case 118/85 *Commission vs. Italy*, para. 7 and 8.

¹²⁷ Quigley & Collins, 2003, p. 18.

¹²⁸ Quigley & Collins, 2003, p. 53.

Even if an aid has to be specific to an undertaking or production of certain goods that does not prevent seeing a group of companies as an undertaking for the purpose of receiving aid.¹²⁹ In the case Italy vs. Commission payment were made to a holding company which was owned by a group of companies. The ECJ accepted the Commissions view that as the payments through the holding company found its way to four other companies and was State aid. This conclusion was made due to the fact that the payments made other resources available for transfer to the subsidiaries to make up for losses they had made.¹³⁰ There is reason to assume that State aid rules apply in the same way to aid granted by a Member State to an undertaking in another Member State.¹³¹

A common defence used by many Member States is that a certain measure is not an aid as it is available to all undertakings, and the aid scheme applies automatically and equally to any potential beneficiary.¹³² Even if so may be the case; it is not necessary that a measure aimed at certain undertakings in law it may be granted through preferential treatment within an aid scheme so that it applies only to certain undertakings. The existence of an aid is then determined by comparing to the normal application of that scheme. It may be so that even if the relevant rules makes many undertakings eligible for the aid, the application of those rules may make the actual number of recipients very limited. Yet one possibility is that the rules are themselves general in their form and in their application but the actual number of possible recipients is limited. It may for example be so that only a few undertakings are active in a certain kind of production. If a measure is general in its nature and affects everyone it falls the State aid rules become non-applicable. Such measures are for example matters of general economic policy of the Member States. In the *Déménagements-Manutention Transport SA (DMT)* case the possible aid was in the practices of ONSS, a company entrusted by the Belgian national social security office to recover fees payable by employers. DMT was an undertaking undergoing insolvency proceedings at a Belgian Court; one of the questions put to the ECJ by the national Court was whether the practices had been such that it constituted an aid to DMT. ONSS was empowered to grant temporary relief to employers to pay their fee and to decide on the length of those periods. At one time ONSS was more lenient than ordinary granting an undertaking relief from those fees for eight years. The ECJ's opinion was that:

“where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature”.¹³³

¹²⁹ Quigley & Collins, 2003, p. 18.

¹³⁰ Cases C-303/88, Italy vs. Commission para.14 and C-305/89, Italy vs. Commission, para. 15.

¹³¹ Opinion of A-G Comas in case C-353/95, *Tiercé Ladbroke SA vs. Commission*, para. 25.

¹³² Ross in *Common Market Law Review*, 2002, p. 403.

¹³³ Case C-256/97 *Déménagements-Manutention Transport SA (DMT)*, para. 27.

In the case *Belgium vs. Commission* the Belgian government argued that measures in favour of certain categories of workers was not an aid as those measures were non-discriminatory, non-discretionary and objectively justified. The measures meant that employers were to pay reduced social security fees for manual workers. There were also special additional reductions for undertakings involved in certain sectors of industry. In addition there were yet further reductions in fees paid by industrial sectors where the government wanted to create jobs. Those were sectors mostly employing manual workers earning low wages due to their low level of education. The ECJ was not convinced that it was like the government had claimed. The Court made no objection to the claim that the measures were granted based on a non-discretionary way. It did not consider the use of manual workers to be specific enough for the application of Article 87 ECT even if it is more frequent in certain forms of production. The Court did however find that the impact of the relief was in fact confined to certain sectors as the Belgian aid schemes excluded some industrial activities. The Court took little notice of a Belgian claim that those exemptions to the policy only were motivated only by budgetary constraints and the scheme was more generally intended.¹³⁴ That the ECJ reached this conclusion is in line with its earlier position that aid is to be defined according to its effects and not in relation to intentions or aims.¹³⁵ For the case when this imbalance was only temporary the CFI did make it quite clear in *Ladbroke Racing Ltd vs. Commission* that a measure is only temporary or provisional is irrelevant and to be judged the same as permanent measures.¹³⁶

A case where the Court did not find that there was specificity in the sense of Article 87 was *Banks vs. Coal Authority*. In that case different regimes for royalties' payable by operators were dependant on technical, commercial and financial parameters. The rules made it possible to use two different formulas calculate those royalties. One formula was not more preferential than the other in it self but the result was dependant on the technical, commercial and financial characteristics specific to each undertaking. The possible advantage of using one or the other formula was available to all operators and stood in relation to their own forecasts being accurate.¹³⁷

In another case, that too between Belgium and the Commission, the ECJ made a relevant general observation as it stated:

*"[w]hen a practice is objectively justified on commercial grounds the fact that it also furthers a political aim does not mean that it constitutes aid ..."*¹³⁸

¹³⁴ Case C-75/97, *Belgium vs. Commission*, para. 7.

¹³⁵ Ross in *Common Market Law Review*, 2000, p. 404.

¹³⁶ Case T-67/94, *Ladbroke Racing Ltd vs. Commission*, para. 56.

¹³⁷ Case C-390/98, *HJ Banks & Co Ltd. vs. Coal Authority*, para. 48-50.

¹³⁸ Case C-56/93, *Belgium vs. Commission*, para. 79.

This can be demonstrated further by looking at the case *Van der Kooy vs. Commission*. In that case hothouse horticulture undertakings were offered a preferential tariff by Gasunie which was a State owned undertaking. The preferential tariff was motivated that they wanted to prevent clients switching to other sources of energy. If the tariff had not been used by Gasunie there future market had been jeopardized. The ECJ found that the tariff was motivated on objective commercial grounds.¹³⁹

When determining who is the recipient of an aid several situations are possible. It is not necessary that the one reviving the initial payment also is the one receiving the aid. Aid can be granted indirectly through a third party. This should also be the case, which has been suggested by the Commission, when tax incentive is granted to an undertaking to help it form a consortium and thereby saving undertakings in difficulty. The Commission has in another case found that benefits given to petrol stations in a certain area was in fact aid to the undertakings supplying the stations and those suppliers controlled the resale prices at some of the stations. Along that same line the ECJ has also considered tax relief granted to investors when investing in Berlin or the other new Bundesländer in Germany to be aid to the undertakings in which the investments were made. Normally a benefit granted to employees is not considered an aid to their employer; it then falls outside the scope of Article 87. Even though it is possible that such measures may be aimed at certain employees or groups thereof by granting them tax relief this would then possibly lower the employment cost and thus allow for lower wages and giving the employer an advantage. When the employer has to fulfil a legal obligation and the cost therefore is covered that equally constitutes aid. When, however, redundancy costs are paid to employees of an undertaking in bankruptcy that will not benefit the company and falls outside of Article 87's scope of application.¹⁴⁰

This will thus be the case for all lowered tax rates as long as they are effective within the whole territory under the administration of the deciding authority as long as they do not give a reduction for a whole economic sector. An autonomous regional authority that has the power to decide on tax can decide on general measures within its territory without it being State aid. The selectivity criterion will then apply in the same way in that territory. If an objective criterion is used to define which undertakings enjoy a certain level of taxation usually means that this is not a State aid. For the case when a regional authority has independent power to decide taxes within its territory any general measures will fall outside Article 87 even if it does not affect the Member State as a whole.¹⁴¹ An incidental decrease in the tax obligations of an undertaking will not be considered an aid if that decrease is due to the nature of the system. In the same way an incidental increase in taxation placed on one undertaking does not constitute aid to its

¹³⁹ Cases 67, 68 & 80/85, *Van der Kooy vs. Commission*, para. 30.

¹⁴⁰ Quigley & Collins, 2003, p. 54.

¹⁴¹ T-92/00 & T-103/00 *Territorio Historico de Álava and Disputation Foral de Álava vs. Commission*.

competitors.¹⁴² An aid program is considered an aid and specific enough to fall under Article 87 even if it benefits a whole sector of industry.¹⁴³

3.2.3 Aid – favour or advantage

One of the more obvious forms of aid is subsidies i.e. payments in cash or kind to favour the recipient. Another possibility is that aid is granted through reliefs from tax or social security costs or by public authorities paying more than market value for goods or services. In the same way it could also constitute aid when public bodies charge less than market prices for services they provide. In the terminology of EC law these negative benefits, or decreases the charges recipient normally would have to include in his budget, are the reason that we speak of aid and not just subsidies. The concept of aid is therefore wider than the one of subsidies in Community law.¹⁴⁴

Article 87.1 tells us that aid caught under its scope must favour certain undertakings or the production of certain goods. Does this indicate that there simply has to be a favouring, as in a benefit, to the recipient or does there have to be an advantage? There are two main questions that have to be answered to decide on whether there is a favour or not. First, one has to look at the actions or ways by which an aid is granted or how the State conferred the benefit and if it has done so in a situation where it cannot be commercially motivated. Secondly, there is the matter of whether if just any benefit is enough or does there have to be an advantage making the recipient more competitive in the market.¹⁴⁵ As will become clearer later on the first question is different from the latter in that it requires that a cost to the State occurs when an aid is granted. The second focuses on the relative benefit for the recipient in relation to his competitors. The questions are closely interconnected and cannot really be separated completely. It may however be good to examine them in turn to see some separate characteristics in case law as well as that the distinction may prove useful in the comparison later on.

In the above mentioned *Sloman Neptun* case the national Court referring the question to the ECJ wanted to know whether a decrease in cost for social benefits for workers was an aid. The ECJ found that this difference in social benefit costs did not constitute an aid as it did not give the undertakings in question any specified advantage.¹⁴⁶

There is a need to differentiate between entrepreneurial conduct of the State and State acting in authority. A State grant may have the function of an entrepreneurial investment and can therefore be a tricky indicator to use. A

¹⁴² Quigley & Collins, 2003, p. 54.

¹⁴³ Case 248/84, *Germany vs. Commission*, para 18.

¹⁴⁴ Ross in *Common Market Law Review*, 2000, p. 407.

¹⁴⁵ Quigley & Collins, 2003, p. 29.

¹⁴⁶ Cases C-72 & 73/91, *Sloman Neptun, Schiffahrts AG*, para. 21.

private undertaking may have to take in consideration the for example the need to forgo profits on a short term perspective. State aid should therefore be determined on whether a private undertaking would act in the same manner faced with the same circumstances and acting on the basis of relevant economic considerations would support an undertaking in the same situation. The ECJ confirmed the use of this so called private investor test in the above mentioned case *Belgium vs. Commission*.¹⁴⁷

The ECJ's approach has been that independent of whether the State has acted as a hypothetical investor or creditor the test should be whether the State has acted in a way that an ordinary economic agent would not.¹⁴⁸ The ECJ addressed this matter in the *DMT* case as it stated that:

“it is for the national court to determine whether the payment facilities granted by the ONSS to DMT are manifestly more generous than those which a private creditor would have granted. To that end the ONSS must be compared with a hypothetical creditor which, so far as possible, is in the same position as vis-à-vis its debtor as the ONSS and is seeking to recover the sums owed to it”.¹⁴⁹

In the same case Advocate General Jacobs explained that a hypothetical creditor should have the same possibilities to give its debtor some advantages as a private creditor would looking after his long term interests. In this way it must, in a comparison, be assumed that creditors pursue commercial interests and that it therefore cannot be assumed that they always would act to prevent their debtor's liquidation as the most favourable option. Departure from normal market conditions is one of the more predominant considerations that would indicate aid. This means that the State is not getting due consideration for its contribution and there is a benefit for the recipient.¹⁵⁰ This is virtually the same position as the ECJ took in its *Spain vs. Commission*; aid is granted when the State make funds available in a way that a private investor would not. The state would not then be applying normally applicable commercial criteria and a private investor would disregard considerations of a social, political character.¹⁵¹ The test can be applied in many cases but there are problems in conceptualising and finding the proper comparators. The test was formulated to examine equity participation by the State in State trading enterprises constituted aid or not. Variations of this test have been applied by the ECJ to loans, interest thereon and State guarantees.¹⁵²

In the ECJ's ruling in the *Ferring SA vs. Agence centrale des organismes de sécurité sociale* case. A pharmaceutical laboratory had been taxed on its direct sales to pharmacies. Pharmaceutical wholesalers doing the same thing

¹⁴⁷ Case C- 40/85, *Belgium vs. Commission*, paras. 14-17.

¹⁴⁸ Case C-56/93, *Belgium vs. Commission*, para. 79.

¹⁴⁹ Case C-256/97, *DMT*, para. 25.

¹⁵⁰ Opinion of A-G Jacobs in case 256/97, *DMT*, para. 42.

¹⁵¹ Opinion of A-G Jacobs in cases C-278-280/92, *Spain vs. Commission*, p. 42.

¹⁵² Ross in *Common Market Law Review*, 2000, p. 408.

were not taxed at all. The wholesalers were under an obligation to maintain a certain stock to ensure the supply of pharmaceuticals. The laboratories had no such obligation. The ECJ ruled that this did not constitute State aid as long as the preferential tax treatment was in proportion to the additional cost sustained by the wholesalers. It seems that the ECJ here reached the conclusion that there was no advantage left in the end.¹⁵³

There has not to be an actual transfer of funds to the beneficiary. Aid may also be in the form of a future contingency such as a State guarantee. Guarantees entail a possible future burden on State. State guarantees may lead to the beneficiary getting a loan at lower interest rates or perhaps he may have to provide less security. The risk associated with the guarantee is then borne by the State. It is not necessary that any payments are made under the guarantee. ECJ case law tells us that: in cases where the debtor would be unable to get any loan the total secured amount must be seen as aid. Where the guarantee has led to the debtor getting a loan at a lower interest rate the difference is the amount of the aid.¹⁵⁴ In some circumstances the even a creditor may be seen as the recipient of aid. This can be the case when a guaranteed loan is used to payback a non-guaranteed loan. The one benefiting from the guarantee may actually be the creditor of the non-guaranteed loan as he is relieved of risk or cost that may occur in connection with that loan.¹⁵⁵

An aid may also start out as an ordinary commercial transaction or agreement with the State as one of the parties and a private undertaking as the other. Payments made by a public body in connection with such a civil law agreement are then quite normal and happens just as they would have if the State too was a private undertaking. It is not an aid as long as the payments the State has to make under that agreement are in proportion to the obligations the undertaking holds under it. The Commissions opinion on the matter has been that if an undertaking receives benefits without thereby gaining a gratuitous advantage and thus nothing more than due remuneration for its products that will not be considered an aid.¹⁵⁶ What also can happen is that the State grants an extension for repayment of a loan. This is in most cases quite normal and something many creditors would do. At some later point when the States leniency goes beyond what is normal that may become an aid.¹⁵⁷

Acquisition of capital in a company can be another way for State of providing aid. This can be the case even though Article 295 ECT states that the Treaty shall not influence the way in which States choose to organize there system of State and private ownership. A situation may on the surface seem to fall under this rule rather than the one in Article 87 but may

¹⁵³ Case C-53/00, Ferring SA vs. Agence centrale des organismes de sécurité sociale (ACOSS), para. 30.

¹⁵⁴ Quigley & Collins, 2003, p. 57.

¹⁵⁵ Quigley & Collins, 2003, p. 40.

¹⁵⁶ Twenty-eighth report on competition policy (1998) p. 255.

¹⁵⁷ Ross in Common Market Law Review, 2000, p. 409.

nevertheless entail State aid elements. The Commission published guidelines in 1984 identifying four situations in which public authorities could acquire a capital shareholding in a company. Those are: when setting up a company, transferring total or partial ownership to the public sector from the private, injection of capital into an existing public company, or participation in increasing the share capital in such a company. Acquisition of shares in an existing company with out an injection of capital or the contributing of fresh capital in a situation where a private investor would have done the same under normal market conditions constitutes a situation different from the ones above as they leave out the element of aid to the company in question.¹⁵⁸

In *Spain vs. Commission* the Spanish authorities argued that an injection of capital into textile and footwear industries was justified as the cost of keeping the companies in operation was lower than suffering the cost of liquidation coupled with thereupon following redundancy cost and paying out unemployment benefits to unemployed workers. The ECJ came to the conclusion that the State as holder of share capital was limitedly liable. As the State due to its share holding only s liable for the company's debts up to that limited amount and other cost that were due to other obligations of the State could not be taken into account when determining whether the capital injection was justified or not.¹⁵⁹

Sale of public assets at an undervalue is another and maybe one of the more obvious ways of providing aid. When publicly owned property is sold at a value under what its commercial value there is a transfer of value to whom ever buys it. In the same way privatisation of publicly owned assets or shares in publicly owned companies entail State aid. This is so even if the mere fact that the paid price is low is not in itself a reason to assume that aid has been granted. As long as the sales procedure has been an open procedure leading up to the best offer being accepted there is no reason to assume that.¹⁶⁰

Yet other measures that may be caught by Article 87 are those funded by parafiscal levies. If a measure adopted by public authorities is wholly or partly financed by a levy imposed on the undertakings concerned that does not mean that aid is out of the question. In *France vs. Commission* some traders in a specific sector benefited from a system of subsidies. The system in question was funded by parafiscal charges imposed on all operators within that sector. The ECJ found that the set up of this system did not free it of its State aid character and subsidies paid to those operators in this way were aid within the scope of Article 87.¹⁶¹

An actual advantage is present when there has been an improvement of the undertakings net financial position due to the measure or if there has been

¹⁵⁸ Quigley & Collins, 2003, p. 33.

¹⁵⁹ Cases C-278-280/92, *Spain vs. Commission*, para. 22.

¹⁶⁰ Quigley & Collins, 2003, p. 38.

¹⁶¹ Case 259/85, *France vs. Commission*, para. 23.

no improvement it is enough that the aid has prevented a company's financial position from deteriorating.¹⁶² It is easy to imagine that a direct payment to an undertaking provides a competitive edge in comparison to other undertakings engaged in intra-community trade no matter where those other undertakings have their base. The same goes for a tax-measure reducing tax pressure on a certain sector of industry. The position of that sector will then be more favourable than it was before in comparison to that in other Member States. In *Italy vs. Commission* reduction of social security charges payable by undertakings in the textile sector in Italy altered the competitive position of those undertakings in relation to other undertakings in other Member States. The reduction was considered an aid.¹⁶³ A further point is that no other undertaking in a similar situation receives the aid as the effect of an advantage is then lost and the measure is general.¹⁶⁴

There are a number of rulings where the ECJ has reached the conclusion that different measures did not constitute aid as they did not inflict any cost on public funds. This if it is a general rule would make the next requirement used to determine the existence of a State aid whether the funds involved comes out of State resources, i.e. it must burden public funds in some way. Even if most aid, allowed or not, is granted through transfers of funds it can also be given in the form of fiscal relief or similar measures. In the case *PreussenElectra AG vs. Schlesweg AG* the Commission argued that Article 87 ECT refers to aid in any form whatsoever, secondly that when read in conjunction with Article 3 Article 87 is intended to ensure equal terms for competition between traders and, thirdly that all State revenue derives from private resources and the nature and number of intermediaries did not change that. The Commission's argument was that another interpretation would open up for States to circumvent community rules on State aid. The ECJ rejected all these arguments, and maintained that for a measure to qualify as a State aid it must involve a direct or indirect transfer of State funds.¹⁶⁵ In practice this meant that the Commission did not classify a measure requiring electricity distributors to purchase a certain amount of electricity origination from renewable energy sources as State aid.¹⁶⁶

In two Commission decisions public authorities had restored polluted land owned by private undertakings. In the first case the owner of the land was not considered having received an advantage as he had not owned the land when the pollution occurred and was not responsible to restore it.¹⁶⁷ In the second case the owner of the land was held responsible for the pollution and the Commission found that if he was held to repay the cost already paid by public authority for the decontamination.¹⁶⁸ The conclusion of the Commission decisions seems to be that no matter who received the benefit

¹⁶² Quigley & Collins, 2003, p. 20.

¹⁶³ Case C-303/88, *Italy vs. Commission*, para. 16.

¹⁶⁴ Opinion of A-G Comas Case C-353/95 *Tierce Ladbrooke vs. Commission*.

¹⁶⁵ Case C-379/98, *PreussenElectra AG vs. Schlesweg AG*, paras. 59-61.

¹⁶⁶ Quigley & Collins, 2003, p. 14.

¹⁶⁷ Twenty-eighth report on competition policy (1998), p. 256.

¹⁶⁸ Commission Decision, 1999/272/EC.

of the land improvements the fact of whether they had a legal obligation to do so seems to be the relevant factor in determining the existence of an advantage and a State aid.

3.2.4 Distortion of competition impacting on inter-State trade

It is hard to imagine a situation where an undertaking has received an advantage relative to its competitors and where there are no possibilities what so ever that it may impact on trade between the Member States. In fact ECJ case law shows that it may not always be necessary to have an actual and proven distortion of competition and that a threat of a distortion can be enough. This means that the mere characteristics of an aid scheme could be enough to determine if it is likely to distort intra-community trade if it is set up in a way making it likely to distort trade.¹⁶⁹

It has been argued that the ECJ's stand point on advantages has made a separate assessment of distortion of trade virtually redundant. The way the Court has interpreted the notion of an advantage as an advantage in relation to others does certainly make it hard to imagine that there in those cases would be no impact on competition.¹⁷⁰ In any case the actual distortion required does not seem to be very extensive. In the case *Vlaams Gewest vs. Commission* the CFI considered an advantage described as a few francs per passenger to be enough. The CFI stated: "Where a public authority favours an undertaking operating in a sector which is characterized by intense competition by granting it a benefit, there is a distortion of competition or risk of such distortion. Where the benefit is limited, competition is distorted to a lesser extent, but it is still distorted. The prohibition in Article 87.1 applies to any aid which distorts or threatens to distort competition irrespective of the amount, in so far as it affects trade between Member States."¹⁷¹ It seems that the CFI left two doors open there still has to be at least the threat of a distortion to trade between the Member States and that the case might not have been the same in this case if an advantage of this size had been granted in a sector with less intense competition. There was, however, at the time of the CFI's ruling existing case law supporting not only this conclusion, but also that what may distort competition is to be widely interpreted so that anything strengthening the position competing with others in intra-State trade is automatically treated as if it distorts Community trade.¹⁷² It has therefore even been considered by the ECJ that the Commission could limit its examination to see if the amounts of aid, the nature of the investments involved or other terms may give an advantage to an undertaking in comparison with its competitors and that is likely to benefit the undertaking in trade between the Member States.¹⁷³ It has even

¹⁶⁹ Quigley & Collins, 2003, p. 61.

¹⁷⁰ Ross in Common Market Law Review, 2000, p. 416.

¹⁷¹ Case T-214/95, *Vlaams Gewest vs. Commission*, para. 46.

¹⁷² Case 730/79, *Philip Morris vs. Commission*, para. 11.

¹⁷³ Case 248/84, *Germany vs. Commission*, para. 18.

in the case *Belgium vs. Commission* been considered unnecessary to show that the one receiving the aid is engaged in imports or exports.¹⁷⁴ Not only measures with a close and direct connection to export are thus targeted. Even if only the national market is affected by an undertakings strengthened position that may mean that the prospects of exporting to that market become less favourable and thereby affecting Community trade. Export aid granted by a Member State favouring the export of national products in order to make them more helping them to compete in other Member States clearly qualifies as aid under Article 87.¹⁷⁵ Clearly this is a wide but not very surprising interpretation of Article 87.1 as the direct aim of such measures must more or less be to affect trade between the Member States.

Another factor was considered by the CFI in *Regione Autonoma Friuli Venezia Giulia vs. Commission* was that in a market characterized by a large number of small operators even a relatively small aid may strengthen the position of an undertaking so that it distorts competition.¹⁷⁶ This may in my opinion still indicate that the aid must be put in proportion to the market in question.

There is no mentioning of effects of aid on trade with third countries. The ECJ has considered aid to undertakings about to withdraw from third countries where profits were insufficient fell within the scope of Article 87 as the aim of the aid was to refocus efforts to the Common market.¹⁷⁷ The Commission has not taken action against aid to certain undertakings with the motivation that the impact on the Common market was marginal even if there was an overcapacity in the Community and that the production was intended for outside markets. In another case the Commission found that aid to a tin-mining company fell within the scope of Article 87 even if all of the company's export from the subsidized production went to countries outside the Community. The undertaking did, however export another product within the Community.¹⁷⁸

To conclude this subsection one can sum this criterion up in that that the wording of Article 87 demands that intra Community trade is affected. In practice this has proven to be of minor importance as the ECJ has found that it is enough that an aid may affect trade between the Member States and this also in cases where the aid only gives the undertaking a stronger position in its home country and even if the value of the aid is quite small.¹⁷⁹

Aid granted by a Member State to favour the export on national exports into other Member States is incompatible with the market under Article 87.1. The very nature of aid that is administered on such premises gives it an effect on trade between Member States. A general scheme subsidising goods

¹⁷⁴ Case C-75/97 *Commission vs. Belgium*, para. 34.

¹⁷⁵ Quigley & Collins, 2003, p. 61.

¹⁷⁶ Case T-288/97, *Regione Autonoma Friuli Venezia Giulia vs. Commission*, para. 46.

¹⁷⁷ Case C-142/87, *Belgium vs. Commission*, para.18.

¹⁷⁸ Quigley & Collins, 2003, p. 63.

¹⁷⁹ Pöntynen in *Tidskrift utgiven av Juridiska Föreningen i Finland*, 2002, p. 304.

export is not specific in the normal meaning of the word. It is clearly so that it does not aid certain industries or the production of certain goods. The ECJ has decided that a setup of this kind is aid within the meaning of Article 87.1. In that case, *Commission vs. France*, the court came to its conclusion despite the fact that the preferential treatment was available when exporting all nationally produced goods.¹⁸⁰ In his opinion Advocate General Roemer explained that even if the aid was only available when a good was exported, the production of that good had potential to compete with products intended for domestic consumption and may find its way in to the domestic market. In addition he found that the export of those goods may distort exports from other Member States that are not subsidized.¹⁸¹ The case is different when the aid is for export to third countries. The matter is debatable; aid meant for export to third countries has been considered compatible by the ECJ but only after the fact that ten percent of the subsidized export was exported to other Member States.¹⁸² The Commission's approach has been rather allowing and it has accepted aid that only had a marginal impact on trade between the Member States and the vast majority of the subsidized export went to countries outside of the Community.¹⁸³

¹⁸⁰ Cases 6 & 11/69, *Commission vs. France*, paras. 20-21.

¹⁸¹ Opinion of A-G Roemer, in cases 6 & 11/69, *Commission vs. France*, para. 55.

¹⁸² Case C-142/87, *Belgium vs. Commission*, para. 38.

¹⁸³ Quigley & Collins, 2003, p. 63.

4 Subsidies in WTO and GATT

4.1 Background

4.1.1 GATT and interconnecting Agreements

The Final Act Embodying the Results of the Uruguay Round was signed for what today is almost ten years ago. The WTO was formed and this new organisation was set to manage a number of international agreements. The most well known of those is probably GATT 1994 which succeeds GATT 1947. GATT was at this time, 1994, joined with further Agreements one on trade in services, GATS, and one on trade related aspects of intellectual property rights, TRIPS. Under GATT 1994 there are a number of Agreements governing different aspects of trade in goods. One of those Agreements is the SCM Agreement. These Agreements are all multilateral Agreements under the WTO and binding on all signatories, i.e. Members of the WTO. The SCM Agreement puts down rules disciplining the granting of subsidies and controls the adoption of countervailing measures. In addition to the already existent rules on subsidies that limit import into the subsidising countries markets, there are now rules governing action when subsidies are limiting export into a third-country's market through subsidized exports from the subsidising country.¹⁸⁴

The WTO is headed by the Ministerial Conference as its highest decision making body whereas a General Council supervises the operation of GATT and the decisions of the ministerial council on a day to day basis. This General Council acts as a Dispute Settlement Body and a Trade Policy Review Mechanism in the case there may be a breach of the GATT or an Agreement under it. Any WTO Member can take action in accordance with GATT and the SCM Agreement when it, after investigation, finds that a prohibited or actionable subsidy has been granted. The actions in the case of a prohibited subsidy start with that the complaining Member can request consultations with the Member granting the subsidy. If no mutual understanding can be reached the matter may be referred to the Dispute Settlement Body to be solved by a Panel and after that appealed to the Appellate Body. If the decisions reached are not followed the Dispute Settlement Body shall grant the complaining Member to take appropriate countermeasures.

GATT and the several connecting Agreements constitute a whole system and a part of the larger WTO system alongside GATS and TRIPS. It is therefore important not to simply compare the SCM with its more specific rules to its closest resembling EC counterpart. The SCM Agreement must be seen as the integrated part of GATT that it is. Other rules than the ones of the SCM Agreement must be taken in to account when reading the SCM

¹⁸⁴ Didier, 1999, p. 208.

Agreement. The first ones of those to come into mind are Articles VI and XVI. Article VI deals with Anti-dumping and Countervailing Duties which is a question connected to the one of subsidies. Subsidies are more specifically regulated in Article XVI. As we are dealing with the European Community here and the Community forms a free trade area in the view of the WTO that matter also deserves some attention. That particular question is regulated in Article XXIV on Customs Unions and Free-trade Areas.¹⁸⁵ There is a Council Regulation implementing the SCM Agreement ((EC) No 3284/94). The scope of that Regulation is protection from subsidized imports from non EC Member States and allows for a countervailing duty to be imposed offsetting those imports.

Article VI GATT enables States to impose countervailing duties on imports of products determined to have been subsidized into their territory, much as the SCM Agreement does. Article VI makes such actions possible when a product has been subsidized directly or indirectly, in manufacture or production, export or transportation and to import it causes injury to the importing country's domestic market. In the Brazil – Desiccated Coconut dispute, the Panel gave its view on this issue. The Panel was faced with making a distinction between the SCM Agreement and Article VI GATT and stated:

*“whether Article VI creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement, or whether Article VI of GATT 1994 and the SCM Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction”.*¹⁸⁶

The Panels conclusion, which was later confirmed by the Appellate Body, was that the SCM Agreement did not step in to the place of Article VI of GATT as the basis for regulating countervailing measures under the WTO Agreement. The Appellate Body did in the same case emphasize the integrated nature of the WTO Agreement and the annexed agreements and went on extending its reasoning further:

*“[t]he relationship between the GATT 1994 and the other goods agreements in is complex and must be examined on a case-by-case basis”.*¹⁸⁷

For example, with respect to subsidies on agricultural products Articles II, VI and XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members when it comes to subsidies. The Agreement on Agriculture and the SCM Agreement reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. Yet other goods Agreements under GATT such as the SCM Agreement represent a substantial elaboration of the provisions of the GATT 1994, and

¹⁸⁵ The WTO internet webpage's analytical index to GATT Article VI and to the SCM Agreement, www.wto.org.

¹⁸⁶ The Panel on Brazil – Desiccated Coconut, WT/DS22/R, para. 227.

¹⁸⁷ The Appellate Body on Brazil – Desiccated Coconut, WT/DS22/AB/R, para. 16.

to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements, such as the SCM Agreement, supersede the GATT 1994.¹⁸⁸

On another point the same Panel found that Article VI of GATT 1994 and the SCM Agreement represent package of rights and obligations that amongst WTO Members regarding the use of countervailing duties. Through Article VI and the SCM Agreement obligations on a potential user of countervailing duties are imposed. Conditions must be fulfilled for anyone to impose a duty. On this point the Appellate Body found, that in accordance with the ordinary meaning of the provisions taken in their context leads to the conclusion that the negotiators of the SCM Agreement had intended that, under the integrated WTO Agreement, countervailing duties may only be imposed in accordance with the provisions of the SCM Agreement and Article VI of the GATT 1994, taken together. If there would be a conflict between the provisions of the SCM Agreement and Article VI of the GATT 1994, the provisions of the SCM Agreement would prevail.¹⁸⁹

Article XVI has been left almost untouched from GATT 1947 and it is there we find rules within GATT itself relating to subsidies. The regulation in that Article only requires States to notify subsidies that directly or indirectly operate to increase exports out of or decrease imports in to their territory. No definition of subsidies can be found in the Article. It is therefore probable that its use is somewhat limited. Article XVI.4 regulates the granting of export subsidies, that is: subsidies that result in the sale of such a product at a lower price than the price charged for a like product in the domestic market. The provision entails no prohibition nor does it provide any means for action against domestic subsidies. The one effect to a subsidising country under Article XVI is an obligation to discuss the possibility of limiting the subsidisation.¹⁹⁰

The SCM Agreement and GATT Article XVI.4 are interconnected, exactly how that work is not easy to tell from the SCM Agreement. As the texts themselves do not say much the relationship between Articles 1.1(a) and 3.1(a) of the SCM Agreement and Article XVI.4 must be determined on the basis of the texts of the relevant provisions as a whole. First of all the SCM Agreement contains a definition of a subsidy, but some criteria to do so. Anything similar cannot be found in Article XVI.4. The SCM Agreement contains a broader regime than earlier, the new export subsidy disciplines go well beyond merely applying and interpreting the earlier mentioned Articles VI and XVI. To get the full grasp of the rules in those Articles one also needs to look at Article XXIII on measures by one country that lead to the nullification or impairment of the benefits another country would normally

¹⁸⁸ The Appellate Body on Brazil – Desiccated Coconut, WT/DS22/AB/R, para. 14.

¹⁸⁹ The Appellate Body on Brazil – Desiccated Coconut, WT/DS22/AB/R, para. 17.

¹⁹⁰ Didier, 1999, p. 210.

enjoy under GATT, but there will be reason to get back to this matter when discussion the SCM Agreement.¹⁹¹

The SCM Agreement is different from GATT in that Article XVI:4 GATT only prohibits export subsidies when they result in the export sale of a product at a price lower than the comparable price charged for the like product to buyers in the domestic market. The SCM Agreement on the other hand holds a much broader prohibition against subsidies as it targets those who are “contingent upon export performance”. It is easy to imagine that the rule contained in Article 3.1(a) of the SCM Agreement that all subsidies which are “contingent upon export performance” are prohibited is significantly different from a rule that prohibits only those subsidies which result in a lower price for the exported product than the comparable price for that product when sold in the domestic market. Whether or not a measure is an export subsidy under Article XVI.4 GATT provides little help when determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the SCM Agreement.¹⁹²

4.1.2 The Agreement on subsidies and countervailing measures

The SCM Agreement does two things, it provides rules for the use of subsidies, and it also regulates the actions countries can take to counter the effects of subsidies i.e. countervailing measures. Where the countervailing measures are concerned a country can either try to make the subsidising country withdraw the subsidies through using the WTO’s dispute settlement procedure or, if that does not work, counter its effects by taking by imposing countervailing duties. A country also has a second possibility; it can do its own investigation to see if there are reasons under the Agreement charge extra (countervailing) duty if subsidized imports are found to be hurting the country’s domestic producers. Even if no in depth examination of countervailing measures will be attempted here they got be mentioned as they are important in understanding the structure of the SCM Agreement.¹⁹³

The SCM Agreement divides three categories of subsidies: those prohibited, actionable and non-actionable. The section on actionable subsidies holds rules on how to identify allowed State measures. In order to compare them to the EC rules looking at the characteristics of measures caught by the Agreement will probably be a functional method. The comparison will not lose its relevancy because of this; it is just a way that the material issues of both the EC system and the WTO in perspective.

¹⁹¹ The WTO’s internet webpage’s analytical index to Article 1.1, SCM Agreement on the relationship to other WTO Agreements (Last viewed 19 December 2004).

¹⁹² The WTO’s internet webpage’s analytical index to Article XVI, GATT (Last viewed 19 December 2004).

¹⁹³ Didier, 1999, p. 208.

Part I of the SCM Agreement establishes a definition of the term subsidy and an explanation of the concept of specificity. Specificity means that a subsidy is available only to an enterprise, industry, group of enterprises, or group of industries in the subsidising country. It does not matter at this point if they are domestic or export subsidies. Of the most interest here are two categories of subsidies: those prohibited and those actionable. Subsidies considered prohibited under the Agreement are: subsidies that require the undertakings receiving them to meet certain export targets, or to use domestic goods instead of imported goods. This is understandable since they are specifically designed to distort international trade. And as such are they very likely to hurt other countries' trade. Prohibited are subsidies that are contingent in law or in fact upon export performance or, upon the use of domestic over imported goods. It does not matter, in either of the two cases, if export performance or the use of domestic over imported goods is the sole or one of several other conditions. If a subsidy is considered prohibited in a dispute settlement procedure it must be withdrawn immediately. If that is not done, the complaining country can take measures to counter its effects. This means that if domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed. The second category is actionable subsidies: here the complaining country has to show that the subsidy has an adverse effect and thus causes injury to its domestic industry. The adverse effect, i.e. damage, is defined in three types. Firstly: subsidies in one country can hurt a domestic industry in an importing country. They may further hurt rival exporters from another country when the two compete in third markets. Thirdly: subsidies in one country can hurt exporters trying to compete in the subsidising country's domestic market. Originally there was a third category of so called non-actionable subsidies- They could be either non-specific subsidies, or specific subsidies involving assistance to industrial research and pre-competitive development activity, assistance to disadvantaged regions, or certain type of assistance for adapting existing facilities to new environmental requirements imposed by law and/or regulations.

4.2 The notion of a subsidy

4.2.1 Financial contribution and benefit or advantage?

The SCM Agreement uses a number of prerequisites to determine a subsidy (see Article 1.1 and 1.2). Two of those are that there is a contribution by a government to its domestic industry and that there is a benefit to an industry as a result of that contribution. Both these prerequisites will be discussed in the following; so will whether has to be an effect or the threat to the industry of another country as a result of the subsidy. Finally the contribution has to be specific in that it is not made to all of a government's domestic industry. Specificity can be assumed under certain circumstances in other cases it calls for a quite complicated evaluation.¹⁹⁴ Due to the more complex nature

¹⁹⁴ Didier, 1999, p. 208.

of the specificity criterion and that specificity also is important for what countervailing measures that can be applied it has seemed fit to discuss the matter and its relation to the different countervailing measures more thoroughly in a special subchapter (see subchapter 4.3).

In a society there are many financial transactions between public and private bodies but; for one to be a subsidy in the meaning of the SCM Agreement certain criteria must be fulfilled. The first two criteria are that the measure is granted by the government and that the recipient receives a benefit from the measure (see Article 1.1(b) SCM).

The way the term government is used in the SCM Agreement it extends further than what may be the everyday meaning of the word. The SCM Agreement applies not only to measures granted by national governments, but also to measures of regional and other sub-national governments and other public bodies within the territory of a Member.¹⁹⁵

The notion of a subsidy then comprises direct transfers of funds and other positive benefits such as grants, loans, but also potential direct transfers of funds such as granting of loan guarantees. It also covers negative benefits, i.e. when a government intervenes and reduces costs normally borne by companies. Sometimes a government can provide goods or services to undertakings and thereby subsidize their operation. The next criterion needed for a measure to fall under the scope of Article 1.1 is that a benefit is conferred to the recipient, but first things first.

Article 14 SCM lists the types of measures that can represent a financial contribution, for example, grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services or the purchase of goods.¹⁹⁶ Capital grants without security, investment grants are also considered subsidies. Loans granted by a public body to a private undertaking are as such not measures that benefit the debtor making them subsidies unless the granting authority charges less interest than a private operator would from the recipient. The benefit shall in these cases be calculated as the difference between those two interest rates.¹⁹⁷

One form of financial contributions is export subsidies. This form of positive measures has been analysed by the Panel in Brazil – Aircraft. The Panel found that a subsidy exists not only where there is a direct transfer of funds or but also where there is a potential direct transfer of funds. The government does not actually have to effectuate such a commitment. A subsidy exists as soon as such a practice is prescribed. A potential direct transfer of funds was thus found to be irrelevant for the existence of a subsidy. The Panel motivated its view with that:

¹⁹⁵ Didier, 1999, p. 220.

¹⁹⁶ Slotboom in Common Market Law Review, 2002, p. 534.

¹⁹⁷ The SCM Agreement Article 14 (b).

*“[i]f subsidies were deemed to exist only once a direct or potential direct transfer of funds had actually been effectuated, the Agreement would be rendered totally ineffective and even the typical WTO remedy (i.e. the cessation of the violation) would not be possible”.*¹⁹⁸

It seems that the Panel made its consideration based upon the availability of countervailing measures. Countervailing measures are taken to stop a violation of the Agreement. Prevention of potential violation would otherwise be impossible in many cases as the countervailing measures are available first after the fact, i.e. after the actual and perhaps only payment.

Revenue otherwise due or forgone can be a form of subsidisation. The government does not have to forgo revenue completely; still if some but less normally has been raised. That it has to be “forgone” has been considered by a WTO Panel include cases when the government gives up entitlement to collect revenue that it otherwise could have raised. Of course there has to be some tax provision saying that it normally would. It would, in theory, be possible for Governments to tax all revenue and a normative benchmark is therefore needed. The raised revenue is thus compared to the revenue that would have been raised in a normal situation. The Panel stated that WTO Members have sovereign authority to tax any particular categories of revenue they wish and are free not to tax any particular categories of revenues.¹⁹⁹ Either way the Member must respect its WTO obligations. The conclusion of the Appellate Body was that what is otherwise due therefore depends on the rules of taxation that each Member establishes on its own.

Ones financial contribution, or the non-collection of revenue otherwise due, has been established it is still not certain that one is dealing with a subsidy that is covered by the SCM Agreement. A benefit also has to be conferred to someone, usually the recipient. In any case it is the recipient of the benefit that is considered subsidized. A financial contribution in the form of a cash payment is usually easily determined so is the benefit to the recipient. In other cases the benefit and the value of the benefit will be more complex to determine. This is for example the case with, loans, equity infusion or when a government purchases goods.

In Canada – Aircraft the Panel had reason to comment the nature of the required benefit. It found that it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than he would have otherwise. A benefit, i.e. an advantage, can take many forms when provided in the form of a loan the benefit may consist in that it is provided on terms that are more advantageous than those available to the same recipient in the market. This reasoning by the Panel is not the same as saying that it is subsidisation when there is a relative cost to the government that a private undertaking would avoid. The Panel rejected the argument that a benefit could be assumed was net cost to the government to the contrary of focusing on the recipient of the subsidy. It was considered enough to

¹⁹⁸ The Panel on Brazil – Aircraft, WT/DS46/R, para. 7.70.

¹⁹⁹ The Panel on US – FSC, WT/DS108/AB/R, para. 90.

determine if a financial contribution by a government confers a benefit in the form of an advantage rather than cost to government.²⁰⁰

The term benefit is not meant for abstract interpretation. The concept as such insinuates that a benefit can be received and enjoyed by a beneficiary or recipient. A benefit can thus be said to arise if a person, natural or legal, or a group of persons, has in fact received something. In certain cases it may not be necessary for the benefit to have materialized but it must have that potential. The conclusion of the Appellate Body in the above case was therefore that a benefit implies that there must be a recipient or a potential recipient. The Panels view was later confirmed by the Appellate Body on the same case.²⁰¹

The method of calculating the amount of a subsidy in terms of the benefit to the recipient can be found in Article 14 SCM.

4.2.2 Specificity

Even if a measure is a subsidy within the meaning of the SCM Agreement it may still fall outside of the Agreements scope. Subsidies targeted by the Agreement are those specifically provided to an enterprise or industry or group of enterprises or industries and not those that are available to all. The SCM agreement aims to discipline subsidies that distort the allocation of resources within an economy. A general measure available to all is presumed not to distort the allocation of resources. Consequently only specific subsidies are subject to the SCM Agreement's countervailing measures.

Specificity within the meaning of Article 2 SCM comes in four variations. A government can subsidize production specifically for export or subsidize domestic production under the condition that it uses domestic goods over imported. In these two cases specificity is assumed and there has not to be an investigation of whether or not a benefit is conferred. The third kind is enterprise-specificity: meaning that a government targets a particular company or companies for subsidisation. This can also be when a government targets a particular sector or sectors for subsidisation. The final kind of specificity is regional specificity, i.e. when a government targets producers in specific parts of its territory for subsidisation.²⁰²

As already mentioned above, when legislation explicitly limits access to it to certain enterprises it is quite obvious that the measure is specific; but it can just as well be the way an otherwise general provision is applied by the government that makes it specific. When the legislation establishes objective criteria for eligibility for and the subsidy is granted strictly following those criteria the subsidy is non specific. Eligibility has to be

²⁰⁰ The Panel on Canada – Aircraft, WT/DS70/R, para. 9.119.

²⁰¹ The Appellate Body on Canada – Aircraft, WT/DS70/AB/R, para. 154.

²⁰² Slotboom, in *Common Market Law Review*, 2002, p. 539.

automatic and the criteria clearly spelled out in law. Even if legislation may appear general, i.e. non specific, it is still possible that it can be specific in practice. This can happen in a number of different ways, it may be that subsidies in practice only are granted certain enterprises, predominantly is used by certain enterprises, a disproportionate portion of the subsidies may benefit only certain enterprises or the authority administering the subsidy may exercise discretion in a way making the subsidies specific. When the granting authority or the legislation establishes objective criteria or conditions which are neutral and do not favour certain enterprises over others concerning eligibility or the amount granted, and which are economic in nature and horizontal in application, such as number of employees the subsidy is not specific.²⁰³

The span of activities which fall under the jurisdiction of the granting authority does matter, such tasks may be entrusted to regional or authorities responsible for certain matters. Is the subsidy limited to a specific region within the jurisdiction of the granting authority that subsidy is specific. The setting or altering of generally applicable tax rates by the government entitled to do so does not lead to the subsidy being of specific nature. Subsidies given on the basis of export performance or on the use of domestic goods over imported goods will be considered specific even if they are not for the benefit of a certain industry or certain goods.²⁰⁴

4.2.3 Effect on the industry of another Member and the causal link

The implementation of countervailing measures is closely connected to the injury they are meant to remedy; therefore both the existence and the amount have to be determined before any countervailing measures can come in question. Before investigations are launched the exporting country's authorities have to be invited by the importing country to consultations. The aim of the consultations is to clarify the existence of the subsidy, injury to domestic industry of the importer and the causal link between them. The meaning is to arrive at a mutual understanding solving the problem.

Under Article VI(6) GATT it is not allowed for a Member to impose the countervailing duty unless the effect of the subsidisation has been established as causing or threatening to cause material injury to domestic industry. It may also be that it retards the establishment of domestic industry.²⁰⁵ Determination of the material injury means material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry.²⁰⁶ Article 15 of the SCM Agreement defines the evaluation to be made when determining the injury to use as base for the countervailing measures under GATT

²⁰³ Didier, 1999, p. 235.

²⁰⁴ Didier, 1999, p. 235.

²⁰⁵ Didier, 1999, p. 270.

²⁰⁶ Original footnote 45 to the SCM Agreement.

Article VI. Determining is positive evidence and objective examination of both the volume of the subsidized imports and the effect of those imports on prices in the domestic market for like products and secondly, the consequent impact of these imports on the domestic producers of such products. The volume of the subsidized imports is evaluated after where there has been a significant increase in subsidized imports in absolute terms or relative to production or consumption by the importing Member. Regard is taken to the effect of the subsidized imports on prices and whether there has been a significant price undercutting by the subsidized imports compared with the price of a like domestic product. Effects of such imports to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, may also be play a role if it has done so to a significant degree. Other factors than the above mentioned can however be used to make the evaluation.²⁰⁷

Injury is calculated following the provisions of Article 15 SCM. Things taken into account are the volumes sold and the effect on prices of products that are alike, or if there are not any products similar in as many aspects as possible.²⁰⁸ The injury established in the form of a drop in price or the amount of goods sold then serves as basis for the countervailing measures.

To justify countervailing measures there must be shown a causal link between the import of subsidized goods and the injury. The examination of whether it is the alleged aid that is causing the injury must consider all other known factors that may influence the situation. Injury shall thereafter be determined on the basis of positive evidence indicating that the subsidisation is indeed causing the injury.²⁰⁹ The threat of material injury may be enough to entitle countervailing duties. In those situations special care must be taken when evaluating injury.²¹⁰

Much of what are the connections between subsidisation and effects and intended export effects, as in subsidies contingent on export performance or the use of domestic goods for production can be found in part V SCM. There is where we find substantive requirements that must be fulfilled in order to impose a countervailing measure. It also holds procedural requirements regarding the investigation preceding countervailing measures. Under Article 10 of the SCM Agreement and Article VI GATT countervailing measures may be imposed unilaterally on any subsidized product imported into the territory of a Member; that is if the product in question causes material injury to the Member in question. Countervailing measures can due to their nature only be imposed on products as they are imported and then on only on imported products from the subsidising Country.²¹¹

²⁰⁷ Didier, 1999, p. 271.

²⁰⁸ Original footnote 46 to the SCM Agreement.

²⁰⁹ Article 15, SCM Agreement.

²¹⁰ Article 15.8, SCM Agreement.

²¹¹ Didier, 1999, p. 267.

4.3 Prohibited and actionable subsidies

4.3.1 Prohibited subsidies

The SCM Agreement divides subsidies into three categories based upon the countervailing measures it provides against them. The categories are: prohibited, actionable and non-actionable subsidies. In this part the structure is clearly different from the Community rules. As there will be little attention paid to non-actionable subsidies here and the term is frequent in the SCM Agreement a word of explanation is needed. Non-actionable subsidies can be either be non-specific subsidies, or specific subsidies for industrial research and pre-competitive development activity and that does not bring products closer to the market. It also includes assistance to disadvantaged regions and certain types of assistance to adapt existing facilities to new environmental requirements imposed by law. Where a WTO Member believes a non-actionable subsidy is resulting in serious adverse effects to a domestic industry even if it is basically still a non-actionable subsidy, that Member may seek a determination and recommendation on the matter.²¹²

The story when looking at the scope of the SCM Agreement does not end, as it does with State aid in Article 87 ECT, with the criteria used to determine a subsidy. Some of the criteria used to define a subsidy are specific to the different categories of subsidies. Most of what falls under prohibited and actionable subsidies must fulfil the specificity criterion in Article 2 SCM. Subsidies prohibited in Article 3 are automatically considered specific. Prohibited subsidies under the SCM Agreement are divided into two groups. The first consist of subsidies contingent, in law or in fact, and wholly or as one of several conditions, on export performance. The second category consists of subsidies contingent, solely or as one of several other conditions, upon the use of domestic over imported goods. These two categories of subsidies are specifically designed so that they will directly affect trade and are thus very likely to have adverse effects on the interests of other Members.²¹³

Export subsidies have been the considered by the Appellate Body on Canada – Autos. A WTO Member gave exporters of motor vehicles an exemption from import duties. The exemption which would have lowered business costs was not available to those not exporting their products. The Appellate Body concluded that:

“as the import duty exemption is simply not available to a manufacturer unless it exports motor vehicles, the import duty exemption is clearly

²¹² The WTO internet webpage’s summary of the Final Act of the Uruguay Round (last viewed 19 December 2004).

²¹³ Slotboom, in *Common Market Law Review*, 2002, p. 519.

conditional or dependent upon, exportation and, therefore, is contrary to Article 3.1(a)".²¹⁴

Whether a subsidy is contingent in law on export performance was one of the questions left to the Panel on Canada – Autos. The Panel's conclusion was that a subsidy is contingent "in law" upon export performance when the existence of an export requirement can be demonstrated using the very words of the relevant legislation, regulation or other legal instrument proscribing the measure.²¹⁵ That is however not the only possibility a subsidy is also held to be contingent in law on export where the condition to export is stated clearly, though implicitly, in the instrument comprising the measure. For a subsidy to be export contingent, the underlying legal instrument does not always have to provide "expressis verbis" that the subsidy is available only under the condition of export performance. That so is required can also be derived by necessary implication from the words actually used in the measure.²¹⁶ These are still cases where the subsidy is tied to export by law. The contingency criterion is fulfilled if the facts demonstrate that the subsidy is "tied to actual or anticipated exportation or export earnings".²¹⁷

The other possibility for a subsidy to be caught under the scope of SCM Article 3 is that it is contingent "in fact" on export performance. The Appellate Body in Canada – Aircraft was faced with such a case. With respect to the meaning of a subsidy contingent in fact on export performance the Appellate Body's conclusion was that the term contingent held the legal standard for both "in law" or "in fact" contingency and stated that the meaning between these is the same for the two. The difference is in what evidence may be employed to prove that a subsidy is export contingent. Export contingency may be demonstrated on the basis of the words of the relevant legislation or other legal instrument. The Appellate Body found that in the absence of such evidence that,

*"the existence of the relationship of contingency, between the subsidy and export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case".*²¹⁸

If a subsidy is granted on the expectation that exports will increase that may put it under the scope of Article 3. The mere expectation is in itself not enough as the Appellate Body on Canada - Aircraft found:

"the closer a subsidy brings a product to sale on the export market, the greater the possibility that the facts may demonstrate that the subsidy would not have been granted but for anticipated exportation or export earnings".

²¹⁴ The Appellate Body Report on Canada – Autos, para. 92

²¹⁵ The Panel on Canada – Autos, WT/DS139/AB/R and WT/DS142/AB/R, para. 104.

²¹⁶ The Panel on Canada - Autos, WT/DS139/AB/R and WT/DS142/AB/R, para. 100.

²¹⁷ Original footnote 4 to the SCM Agreement.

²¹⁸ The Appellate body on Canada – Aircraft, WT/DS70/AB/R, paras. 166-167.

The Panel specified its earlier statement by adding that subsidies for pure research or for general purposes such as improving efficiency or adopting new technology would be less likely to give rise to de facto export contingency than subsidies that bring the product closer to the market. The Appellate Body who later handled the case merely added a word of caution in saying that all facts have to be taken in to account and subsidies for those purposes do not exclude the possibility that the effect can be bringing the product closer to the market and no presumption therefore should arise that any given factor in this way indicates that the subsidy is or is not contingent on export performance.²¹⁹

Even if the difference, or more rightly equal treatment, of measures contingent in law or fact is only mentioned in Article 3 text in respect of export subsidies the Appellate Body on Canada - Aircraft held that contingency under Article 3.1(b) on subsidies for the use of domestic goods over imported goods includes both contingency in law and in fact. The Appellate Body observed that whether a subsidy was contingent upon the use of domestic over imported goods left room for interpretation. It held that if contingency in fact was included under the scope circumvention of the Members obligations under the SCM was too easy.²²⁰

4.3.2 Actionable Subsidies

Rules concerning actionable subsidies can be found in Articles 5 to 7 SCM. A subsidy as defined in Article 1 and 2 is actionable if it creates adverse effects to other Members. This can be if the subsidy causes injury to the domestic industry, nullification or impairment of benefits affecting another Member directly or indirectly. It may also be that it causes serious prejudice to the interests of other Members. There are several alternate measures that may cause these effects; a few will be mentioned in the following.

In order to answer the question: what is an adverse effect, one has to look at the definition of subsidies found in Article 1. The actual calculation of injury to one country's domestic industry is found in Article 15 SCM.

Under Article 5 no Member should cause adverse effects to the interests of other Members. There is up until this point no case law where a WTO body has had to determine whether injury to the domestic industry of Member had been caused by another Member.²²¹ Also the criteria of nullification or impairment of the benefits of the Members concessions under GATT 1994 Article II remains untested. One can find some guidance from looking at the

²¹⁹ The Panel and Appellate body on Canada – Aircraft, WT/DS70/R, paras. 9.337-9.339, and WT/DS70/AB/R, para. 174.

²²⁰ The Panel and Appellate body on Canada – Aircraft, WT/DS70/R, para. 9.332. and WT/DS70/AB/R, para. 171.

²²¹ The WTO's internet webpage's analytical index to Article 5 SCM (Last viewed 19 December 2004).

formula used to determine injury caused by another Country's subsidisation of its industry found in Part V of the SCM Agreement.

In the case of serious prejudice to the interests of another Member the term is used in the same sense as it is used in Article XVI.1 GATT 1994 and thus also includes the threat of serious prejudice.²²² Under Article 6 SCM shall serious prejudice be deemed to exist in the case of a total "ad valorem" subsidisation of a product exceeding five percent. That is when the cost to the subsidising government for the subsidisation exceeds five percent of the enterprise in questions turnover from sales of the product from the year before. The total amount of granted aid, even if it comes from different authorities within that government's territory, shall be added up in the calculation.²²³ Subsidies administered over several years can be added up. When a 5 percent subsidy would when granted over 20 years for the benefit of one years production would then leave all regulation useless. Finally fifteen percent subsidisation is allowed for undertakings under a start up period of maximum 1 year. Contributions to cover operating losses sustained by an industry or enterprise may be allowed under WTO law as long as they are one-time measures which are non-recurrent. The measure cannot be repeated and can be given solely to provide time for the development of long-term solutions and to avoid acute social problems.²²⁴

Serious prejudice may arise in many cases, for example where the effect of the subsidy displacing or impeding the imports of a like product of another Member into the market of the subsidising Member.²²⁵

When determining if there is an "ad valorem" subsidisation of at least 5 percent it is important to remember that subsidy payments can take place over a period of time and the effects may occur much later than the actual payment. An argument that a WTO dispute settlement Panel was precluded from considering the later effects of a subsidy programme has been rejected by the Panel on Indonesia – Autos. The Panel view was that:

"[w]e must assess the 'effect of the subsidies' on the interests of another Member to determine whether serious prejudice exists, not the effect of 'subsidy programmes'. ... at any given moment in time some payments of subsidies have occurred in the past while others have yet to occur in the future. If we were to consider that past subsidies were not relevant to our serious prejudice analysis as they were 'expired measures' while future measures could not yet have caused actual serious prejudice, it is hard to imagine any situation where a Panel would be able to determine the existence of actual serious prejudice".²²⁶

²²² Original footnote 13 to the SCM Agreement.

²²³ Annex IV to the SCM Agreement, paras.1-6.

²²⁴ The Panel on Indonesia – Autos, WT/DS54/R, para. 14.155.

²²⁵ Article 6.2 of the SCM Agreement.

²²⁶ The Panel on Brazil – Aircraft, para. 7.13.

The same Panel also considered the United States claim that it has suffered serious prejudice as a result of displacement, impedance or of price undercutting of a product which did not originate in the United States but the producer of that product was a US company. The Panel drew a line of distinction between United States products and United States companies. It rejected the claim that the nationality of producers is relevant to establishing the existence of serious prejudice rather than within which country's territory production takes place.²²⁷

Displacement or impeding of exports includes any case in which it can be demonstrated that there has been a change in relative shares of the market to the disadvantage of the non-subsidized like product. A change in relative market shares market include where there is an increase in the market share of the subsidized product, the market share of the subsidized product remains constant in circumstances in which in the absence of the subsidy it would have declined, and where the market share of the subsidized product still declines even after the granting of the subsidy, but at a slower rate than would have otherwise.²²⁸

When looking at price undercutting as a criterion to determine an actionable subsidy one must first look the concept of like products. What is a "like product"? The Panel on Indonesia – Autos emphasized that the physical characteristics of the products should be compared and stated that:

*“‘characteristics closely resembling’ ... must include as an important element the physical characteristics of the cars in question. Thus, factors such as brand loyalty, brand image/reputation, status and resale value reflect, at least in part, an assessment by purchasers of the physical characteristics of the cars being purchased. Although it is possible that products that are physically very different can be put to the same uses, differences in uses generally arise out of, and assist in assessing the importance of, different physical characteristics of products”.*²²⁹

Like products may be products that are substitutable; or that have characteristics closely resembling each other. The characteristics in question can be physical characteristics but there is nothing to indicate that other criteria cannot be used. The term “in the SCM Agreement is, as we can see from the passage quoted above, not limited to physical characteristics.”²³⁰

Within the concept of “like products” there must be some room to generalize. Not all differing characteristics can be enough to make two products to “unlike”. The Panel on Indonesia – Autos rejected an argument wanting to differentiate between certain products. It motivated its decision with that the multitude of differing characteristics possible would inevitably result in arbitrary divisions and found that a number of different possibilities

²²⁷ The Panel on US – Lead and Bismuth II, WT/DS138/R, para. 6.74.

²²⁸ Article 6.4 of the SCM Agreement.

²²⁹ The Panel on US – Lead and Bismuth II, WT/DS138/R, para. 6.74.

²³⁰ Panel Report on Indonesia – Autos, WT/DS54/R, paras. 14.173-14.174.

were reasonable in this context; such as dividing cars into the different segments used by the auto industry. That a specific car holds a particularly low price can however normally not be such a dividing factor as it is the low price characterizes price undercutting.²³¹

Price undercutting includes any case, within a market, where price undercutting has been demonstrated through a comparison between prices on the subsidized product with prices of a non-subsidized like product supplied in the same market. The comparison shall be made at the same level of trade, it may be wholesale or retail for example, and at comparable times. Any other factor affecting price comparability must be taken into account in the evaluation.²³² The effect to prices has to be significant (see Article 6.3(c)); this is to ensure that margins of undercutting so small that they could not meaningfully affect suppliers of the imported product whose price is undercut are not considered to give rise to serious prejudice.²³³

²³¹ The Panel on Indonesia – Autos, WT/DS54/R, para. 14.176.

²³² Article 6.5 of the SCM Agreement.

²³³ The Panel on Indonesia – Autos WT/DS54/R, para. 14.201.

5 Comparison and discussion

5.1 A note on interpretation and terminology

One must be careful when comparing two systems that move in environments as disparate. Comparing the two criteria for criteria tells us something of what is caught under these provisions but it is easy to assume too much. Bearing this in mind it may be better to compare certain occurrences or rules on the same kind of questions. The comparison of the two is meant to lay as basis for a look in to what possibilities there may be to successfully argue on the basis of WTO law before a Court in the EC.

As shown seen in the above WTO Panels and Dispute Settlement Body have stressed that the wording of WTO statute should be guiding when interpreting the meaning of WTO Agreement. This is in line with Article 31 of the Vienna Convention on the law of treaties which they also referred to.²³⁴ The ECT is another kind of legal order and the ways of interpretation are not the same. The ECJ has on a number of occasions referred to the purpose behind the legislation or the overall Community interest when interpreting Treaty texts.²³⁵

The provisions in WTO certainly look very similar to the EC ones. The most obvious similarities may be in the listing of relevant factors when determining the existence of State aid or a subsidy and that the material provisions of Article 87 ECT just as relevant GATT Articles and the SCM Agreement Article 1.1 and 1.2 are not unconditional. It is quite likely that some of the similarities derive from the fact that Article 87 ECT was drafted upon Article XIV GATT 1947 why the rules should be similar.²³⁶

Before we start the comparison there is one more important thing to remember: Countries in the EC are referred to as Member States whereas WTO refers to its Members as Members. The differences in terminology do not end there: Community law speak of State aid to indicate that it targets both positive and negative measures. WTO law speak of subsidies which in WTO terminology indicates both negative and positive measures.

²³⁴ Slotboom in *Journal of World Trade*, 2002, p. 517.

²³⁵ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

²³⁶ Council Regulation 3284/94, Article 2.

5.2 Material law

5.2.1 Aid granted by whom and through State resources

In the following subchapters the structure follows the one in Article 87.1 ECT. Some of the different comparable elements of WTO law are EC law are discussed and put in relation.

Under Article 87 ECT it is necessary that an aid is granted by a Member State; that is by any level of government or by a public authority. The text of Article 87 ECT seem to indicate that there is an alternative criterion as the text mentions aid granted by government or administered through government resources. This may indicate that there are two separate possibilities to qualify a measure as aid. ECJ case law does, however, indicate that both criteria have to be met.²³⁷ The EC view on what measures have been granted by the State is largely dependant on whether the State exercises control over the measure. It does not matter if it is by an authority be it national, regional and at any level. When the measure has been granted through a private body the ECJ case law is a little bit more complex. The State may influence the decision through its ownership or through orders. When the State has direct or indirect ownership a controlling majority of the shares seems to be enough.

Aid can be granted in a general way, and then be allowed. This can be done through a private just as well as a public body important is whether the State has exercised influence, or had the possibility to do so. Here the effect of the States actions must be guiding. The construction used in the SCM Agreement uses the term government comprise not only to measures granted by national governments, but also to measures of regional and other public bodies within the territory of a Member much in the same way as Article 87 does.²³⁸

In EC law the act of granting an aid may be through a legal act or a government practice.²³⁹ WTO law does not deal with this matter at this point but uses a similar construction to determine if one is dealing with a subsidy prohibited or actionable under the SCM Agreement. Subsidies contingent “in law” or “in fact” on export performance or upon the use of domestic over imported goods for use in an undertaking’s own production are prohibited.²⁴⁰ These subsidies are, as the Agreement sees it specifically designed so that they will directly affect trade and are thus very likely to have adverse effects on the interests of other Members they are therefore also automatically considered specific, something that will be discussed later on.²⁴¹ Other subsidies, labelled actionable in the SCM Agreement, do

²³⁷ von Quitzow, 2002, p. 140.

²³⁸ Didier, 1999, p. 220.

²³⁹ von Quitzow, Carl Michael, State measures distorting free competition in the EC, 2002, p. 139.

²⁴⁰ The Appellate body on Canada – Aircraft, WT/DS70/AB/R, paras. 166-167.

²⁴¹ Slotboom, in Common Market Law Review, 2002, p. 519.

not require this exact kind of considerations. The SCM Agreement is more focused on the effect of subsidisation and whether a causal link to the conduct of another State can be established. In WTO law it becomes more a matter of the effect and if it can be traced to the subsidy. There is reason (see 4.3.2 above) to believe that it is the actual conduct of the subsidising State that has to be brought into evidence and that it is not a question so much of whether this can be established in law or fact. What the SCM Agreement does is that it uses different ways to establish that a measure is specific enough so that it may have effects upon other WTO Members. This will also be discussed further in the following.

Article 87 ECT uses “State aid” much in the same way as the SCM uses the term subsidy. In EC terminology subsidies are positive measures, payments. In WTO terminology subsidy may mean positive as well as negative measures. This can be confusing as the EC uses one term to indicate positive measures, only, that the WTO uses to indicate positive as well as negative measures.

When a government intervenes and reduces costs normally borne by companies that is subsidisation under the SCM Agreement. Potential direct transfer of funds is enough and a subsidy will exist when there is such a practice manifested in some way. Examples are financial contribution such as grants, loans, equity infusions, loan guarantees, fiscal incentives, the provision of goods or services or the purchase of goods.²⁴² As we saw in the case Canada – Aircraft above the WTO considers that a benefit is conferred and thus a subsidy when the recipient is placed in a more advantageous position. A benefit cannot be assumed where there is net cost to the government but the focus has to be on the recipient.²⁴³ The EC concept of aid can be described as to include all measures helping the recipient to achieve an objective which could not be reached without government interference. In *Steenkolenmijnen vs. High authority* the ECJ did in a similar way as the WTO Panels cited above, put focus on advantages granted by the States and not the aim the State claims it had for granting that advantage. Any relief regarding expenses normally included in an undertakings budget such as taxes thus falls under the concept of an Aid. These actions are similar in character and have the same effect as a payment.²⁴⁴

The EC concept State aid has been defined by the Commission and the European Courts enshrine most advantages granted directly or indirectly through State resources.²⁴⁵ In fact, the Court has taken the position in several rulings, e.g. *Viscido and others vs. Ente Poste Italiane* that a measure was not an aid if it did not involve any transfer of State funds.²⁴⁶ That there has to be a burden on State resources certainly limits the reach of Article 87. The SCM Agreement does not have criterion such as that there

²⁴² Slotboom in *Common Market Law Review*, 2002, p. 534.

²⁴³ The Panel on *Canada – Aircraft*, WT/DS70/R, para. 9.119.

²⁴⁴ Quigley & Collins, 2003, p. 4 and 5.

²⁴⁵ Steiner & Woods, 2003, p. 285.

²⁴⁶ Cases C-52-54/97, *Viscido and others vs. Ente Poste Italiane*, para. 13.

has to be a burden on State funds. In this part the WTO term subsidy is different from the concept used in EC law.

When the State forgoes revenue otherwise due that may be a subsidy in WTO law. In the EC tax reductions may be State aid. There is a similarity in that the norm that both legal systems use to determine what is otherwise due or should have been collected. The ECJ has in a number of cases reasoned in a way that can be seen as similar to the reasoning by WTO Panel on US – FSC. If there is not a legal provision obliging payment there is burden on state funds where a non-general exemption that is not commercially based is made.²⁴⁷ What is otherwise due depends on the legal situation in each State, in the EC as well as in the WTO. That a measure does not involve a charge on public funds that does not mean that it does not provide artificial advantages for the recipient. Some writers have argued that, that whether a measure means a charge on public funds should not be a part of the consideration under 87 ECT.²⁴⁸ The WTO rules demand no charge on public funds except for when that is the source of aid in the same way a payment is, a situation that is also covered by EC law as we have seen. It is possible that the ECJ's consideration is only a way to safeguard the Member States position a sovereign to determine their own taxes; and then also not to tax as they see fit.

In ECJ case law it has been considered unimportant whether the measure grants a temporary advantage or a more permanent one when determining an aid.²⁴⁹ In WTO law however subsidies to cover operating losses sustained by an industry or enterprise may be allowed. WTO law says the same on such measures as long as they are one time measures. They have to be given solely to provide time for the development of long-term solutions and to avoid acute social problems. In EC law there are exemptions for certain kinds of situations allowing certain aid but the measure is still an aid. Those exemptions are outside of the scope of this presentation.²⁵⁰

5.2.2 Specific measures and distortion of competition

In the ECT aid to an industry or the production of certain goods is considered “specific”. Aid is also considered specific when it targets a specific region within a Member State or a branch of industry. In the SCM Agreement Article 2.1, subsidies are specific when access to them is limited by the granting authority or by the legislation that is applied through that authority. So is not the case where there are objective criteria for the eligibility and amount of the subsidy spelled out in law, or similar, and those criteria applied automatically and followed strictly. Where there is reason to believe that a subsidy in spite of its legal appearance is in fact specific other factors can be used to determine its nature. One of those factors is: that it is

²⁴⁷ The Panel on US – FSC, WT/DS108/AB/R, para. 90.

²⁴⁸ Slotboom in *Journal of World Trade*, 2002, p. 522.

²⁴⁹ Quigley & Collins, 2003, p. 5.

²⁵⁰ See Article 87.2 & 3 ECT.

in fact only, or to a large degree granted certain enterprises. Other such factors are: that a disproportionate amount has come to favour certain enterprises or that discretion has been applied in some other way in granting the subsidy. In the WTO (see Articles 2.3 and 3 SCM) subsidies contingent on export performance and those who are contingent on the use of domestic goods over imported are automatically considered specific. That contingency may be in law or fact. Any general measure such as a general tax cut does not only benefit certain undertakings but all undertakings and is thus not specific. This also means that when a measure applies to the whole region under an authority's jurisdiction it is non-specific. If it does apply to only a part of such a region it is specific (see Article 2.2 SCM). Objective and neutral criteria that do not favour certain enterprises over others which are economic and horizontal in application, such as number of employees the subsidy does not make a subsidy specific.²⁵¹ In EC law the selectivity criterion calls for a recipient to have been singled out in some way. When determining the degree of selectivity a number of factors are considered.²⁵² Much the same as in WTO law general tax provisions do not fall under State aid rules as they are applicable to all undertakings throughout a Member State and not specific in any way.²⁵³ For a measure to be general in EC law it has to be applicable in the whole territory under the granting authority, but still not only benefit a whole sector of economy. It is thus possible for autonomous regional authorities their own general aid schemes as long as they apply equally in the whole region.²⁵⁴

The CFI has in *Ladbroke Racing Ltd vs. Commission* held that temporary measures are to be considered the same as permanent measures.²⁵⁵ In WTO law, however, contributions cover operating losses sustained by an industry or enterprise may be allowed if they are one-time measures and non-recurrent. I.e. measures of this kind cannot be repeated and can only be given so that long-term solutions may be developed and to avoid acute social problems.²⁵⁶

5.2.3 Favour or advantage

In the SCM Agreement the recipient must receive a benefit as a result of a government measure for it to be a subsidy (see Article 1.1(b) SCM). Not only has there have to be a financial contribution or the non-collection of revenue otherwise due, a benefit also has to be conferred. What is a conferred benefit has been tested in WTO case law. The Panel on *Canada – Aircraft* found that it is necessary to determine whether a measure places the recipient in a more advantageous position than he would have been in otherwise. An advantage can come many forms an example is when a loan

²⁵¹ Didier, 1999, p. 235.

²⁵² Quigley & Collins, 2003, p. 18.

²⁵³ Quigley & Collins, 2003, p. 53.

²⁵⁴ T-92/00 & T-103/00 *Territorio Historico de Álava and Disputation Foral de Álava vs. Commission*.

²⁵⁵ Case T-67/94, *Ladbroke Racing Ltd vs. Commission*, para. 56.

²⁵⁶ The Panel on *Indonesia – Autos*, WT/DS54/R, para. 14.155.

is provided on terms that are more advantageous than those available to the same recipient in the market. A benefit can not be automatically assumed where there is net cost to the government; the focus must be on the recipient and the relative advantage received.²⁵⁷ Article 87.1 ECT targets aid to favour certain undertakings or the production of certain goods. Does this then indicate that there simply has to be a favouring, as in a benefit, to the recipient or does there have to be an advantage? There is an actual advantage where there has been an improvement of the undertakings net financial position or if company's financial position has been prevented from deteriorating.²⁵⁸ A direct payment to an undertaking can give such an advantage. In the same way tax measures can reduce pressure on a certain undertaking or sector of industry. The position of that undertaking or sector will then be more favourable than it was. If another undertaking in a similar situation receives the aid as the effect of an advantage is then lost and the measure becomes general.²⁵⁹

A government may invest in the same way as do private undertakings. If the government is administering aid is therefore be determined by whether a hypothetical private undertaking would act in the same manner faced with the same circumstances and acting on the basis of relevant economic considerations in granting rules or when not enforcing debts. This is what is called the private investor rule in EC law.²⁶⁰ The State must disregard considerations of a social, political character that a government have to deal with in its non entrepreneurial role.²⁶¹ The State may pay or give an undertaking special treatment when that undertaking is under a legal obligation to provide services of public interest. The special treatment then outweighs the additional cost to the undertaking and there is no benefit left to consider.²⁶²

5.2.4 Trade between Member States and injury to industry

The SCM Agreement speaks of prohibited and actionable subsidies. Prohibited subsidies are those specifically designed to effect trade with other countries (see Article 3 SCM). Such subsidies are those contingent, in law or in fact, wholly or as one of several conditions, on export performance or upon the use of domestic over imported goods. These subsidies are as we have seen automatically considered specific and it is not required that an effect on trade actually does arise for these measures to be prohibited.²⁶³ As is the case with prohibited subsidies in WTO law in EC law aid granted by a Member State to favour the export on national exports to other Member States is incompatible with the market. The ECJ has decided that even if aid

²⁵⁷ The Panel on Canada – Aircraft, WT/DS70/R, para. 9.119.

²⁵⁸ Quigley & Collins, 2003, p. 20.

²⁵⁹ Opinion of A-G Comas Case C-353/95 Tierce Ladbroke vs. Commission.

²⁶⁰ Case C- 40/85, Belgium vs. Commission, paras. 14-17.

²⁶¹ Opinion of A-G Jacobs in cases C-278-280/92, Spain vs. Commission, p. 42.

²⁶² Case C-53/00, Ferring SA vs. Agence centrale des organismes de sécurité sociale (ACOSS), para. 30.

²⁶³ Slotboom, in Common Market Law Review, 2002, p. 519.

of this kind is not necessarily specific so that it favours certain industries or the production of certain goods it is aid under Article 87.1. That aid is available to all when exporting all nationally produced goods still does not make the aid non-specific.²⁶⁴

WTO laws' actionable subsidies are those that create adverse effects to other WTO Members. Such subsidies are those causing injury to the domestic industry, nullification or impairment of benefits of the WTO Agreement to another Member in a direct or indirect way (see Article 5 SCM).²⁶⁵ Another reason that a subsidy may be considered actionable is that it causes serious prejudice to the interests of other Members (see Article 5(c) and 6 SCM). That can be where there is a total ad valorem subsidisation of an imported product exceeding five percent subsidies to cover operating losses other than certain one time measures, if a government held debt is forgiven or if there are grants to cover repayment of debt.²⁶⁶ Serious prejudice may also be when a subsidized product works to displace or impede of exports of a non-subsidized like product into the market of the subsidising Member or into a third country market.²⁶⁷ Yet one kind of serious prejudice is price undercutting which is when a subsidized product is offered at a lower price than a non-subsidized or if it causes price suppression or depression or sales loss of like products.²⁶⁸ Any measure to the effect that a product is brought closer to the market can give rise to export subsidies.²⁶⁹ A condition to use of domestic goods over imported goods in law and in fact can makes a subsidy prohibited.²⁷⁰

The ECJ has ruled on the need for an actual and proven distortion of competition several times. It has found that the characteristics of an aid scheme can be enough to determine if it is likely to distort intra-community trade or not.²⁷¹ The way the ECJ has come to interpret a benefit as an advantage in relation to other undertakings operation in the same market does certainly make it hard to imagine that there in those cases would be no impact on competition.²⁷² One could argue that any benefit is an advantage; but where there is a determined advantage it seems closer at hand that there is a likeliness of a distortion. The features relevant for examination determined by the ECJ are: the amounts of aid, the nature of the States contribution and whether other terms may give an advantage to an undertaking that is likely to benefit the undertaking in trade between the

²⁶⁴ Cases 6 & 11/69, Commission vs. France, paras. 20-21.

²⁶⁵ See part V SCM Agreement.

²⁶⁶ Annex IV to the SCM Agreement, paras.1-6.

²⁶⁷ Article 6.4 of the SCM Agreement.

²⁶⁸ Article 6.3 (a-c).

²⁶⁹ The Panel and Appellate body on Canada – Aircraft, WT/DS70/R, paras. 9.337-9.339, and WT/DS70/AB/R, para. 174.

²⁷⁰ The Panel and Appellate body on Canada – Aircraft, WT/DS70/R, para. 9.332. and WT/DS70/AB/R, para. 171.

²⁷¹ Quigley & Collins, 2003, p. 61.

²⁷² Ross in Common Market Law Review, 2000, p. 416.

Member States.²⁷³ Not only measures with a close and direct connection to export may distort trade between the Member States.²⁷⁴

In WTO dispute resolution a subsidy has been found to exist also when a transfer of funds has not been effectuated. Under Article 1.1(i) a subsidy exists if a government practice involves “a direct transfer of funds or a potential direct transfer of funds”. It is thus not necessary that a government actually effectuates and transfers directly but that engages in a potential transfer. Subsidies have been found to exist as soon as there is such a practice.²⁷⁵ However, a potential direct transfer of funds exists only where government measures give rise to a benefit. The two elements of financial contribution and benefit are both needed to determine the existence of a subsidy; a subsidy can be conferred even if any payment never occurs.²⁷⁶ It seems that there must be a practice that may potentially entail financial contributions; that a benefit is conferred is necessary. The WTO provisions are linked to evidence of injury rather than distortion of trade as the EC ones are. Indeed, with the exception of subsidies prohibited in the SCM which are deemed to distort trade by their very nature, countervailing measures can only be imposed when actionable subsidies have been found to have caused injury.

In the SCM Agreement implementation of countervailing measures are connected the injury they are meant to remedy. Such effects are material injury to domestic industry or that establishment of domestic industry is retarded.²⁷⁷ Damage has to be determined using positive evidence and objective examination of both the volume of the subsidized imports and the effect of those imports on prices in the domestic market for like products and the impact of those imports on the domestic industry. Countervailing measures are only allowed where a causal link between the import of subsidized goods and the injury has been established.²⁷⁸ The threat of material injury may in certain cases be enough to entitle countervailing duties.²⁷⁹

²⁷³ Case 248/84, Germany vs. Commission, para. 18.

²⁷⁴ Case C-75/97 Commission vs. Belgium, para. 34.

²⁷⁵ The Panel on Brazil – Aircraft, para. 7.13.

²⁷⁶ The Appellate Body on Brazil – Aircraft, para. 157.

²⁷⁷ Didier, 1999, p. 270 on Article VI (6) GATT.

²⁷⁸ Article 15, SCM Agreement.

²⁷⁹ Article 15.8, SCM Agreement.

6 Conclusion and final remarks

6.1 Conclusion

This part of the presentation is a discussion on argumentation from of WTO law in the light of EC law is applicable. This involves questions of influence over Community law, e.g. direct and indirect effect and a look at some of the argumentation that has formed WTO case law. There are, no doubt, many issues to discuss; therefore emphasis will be on some of the ones I experience as more central to the matter.

The EC legal order holds many similarities with a domestic legal system; it creates it own laws. Its actors are however just the same as in international law sovereign states. Community institutions have been given their powers and responsibilities in an international agreement, the ECT. An examination of the influence from another international agreement such as the WTO Agreement can not be done as one would with influence into a national legal system. It must be done carefully and remembering the limited objectives set up in the Treaty, the Community's evolving nature and that the justiciability policies of the ECJ derive from an international agreement and cannot be the same as the ones of a national court. The ECJ has had to find solutions determining the very nature of Community law, its own jurisdiction over international agreements and questions concerning the powers of the different Community institutions.²⁸⁰ In the *van Gend en Loos* case the Court found that the Community legal order was of its own kind and not the same as national nor international law. In the cases presented above the Court has given its view on certain matters concerning the WTO Agreement.

The ECJ has determined that international agreements could be used to review and may even prevail over Community acts and secondary legislation. There has been an ever growing amount of case law on the influence of such agreements over Community law. The Court has persistently denied GATT and other WTO Agreements direct effect. Since the first decisions by ECJ the old GATT 1947 has been replaced by GATT 1994 which is far more legal and institutionalized in its structure. With this change the ECJ has altered its reasons for denying direct effect; the altered argumentation used by it may give some insight in to the subject.

The ECJ's ruling in *International Fruit* established that the Court has jurisdiction under Article 234 (then 177) ECT to consider International law when reviewing Community legislation. In that case the Court made no assessment of whether GATT provisions could be applied in Community law but determined that GATT could not be invoked by individuals. It found

²⁸⁰ Cheyne, Ilona, *International instruments as a Source of Community law* in Dashwood & Hillion 2000, p. 254.

that the spirit, general scheme and terms of GATT along with its great flexibility and emphasis on negotiation was intended to get political solutions rather than to be applied within a legal system as the one of the Community. Later on in the Kupferberg the Court found that an agreement between Portugal and the EEC was capable of generating direct effect as it was unconditional enough. The Community was found to have assumed responsibility for the fulfilment of the agreement; the Member States as a part of the Community's legal system thus had a part in that responsibility motivating direct effect. That the Community is bound by an agreement is not enough that agreement must be able to confer rights upon individuals if there is to be direct effect. The Member States must help in fulfilling the Community's obligation they have however not yet been found to have any rights in relation to the Community. The ECJ has not made any mentioning of the Member States being able to force the community to comply with international agreements as they do.²⁸¹ In the Kupferberg case the Court also found that possibility for judicial review was decided by the Community institution negotiating and concluding an agreement. The earlier criteria of unconditionally and clarity could now only first be tested after the distribution of external powers and what had been intended when concluding the agreement had been examined.

When looking at the ECJ case law we see that the Court has rejected direct effect of WTO law and GATT based on the nature, general scheme and terms of the Agreement and that it in many cases proscribes conflict resolution through negotiation. Very seldom has the Court come as far as looking at the material rules of a case if one looks at the normal four conditions used to determine direct effect that the time limit for implementation has run out, that the provision is clear, not requiring further implementing measures and the provision has the ability to create rights for individuals. To look at direct effect criteria is the second step in a two step process established by the ECJ. The first step is to determine what was intended by the Community institution involved when becoming a party to an international agreement.

The ECJ has in the past found the WTO Agreement not unconditional enough to grant direct effect. It has done so as conflict resolution under it is dependant on political action. More lately the ECJ's argumentation against direct effect have switched towards that the WTO Agreement itself does not indicate that it is meant to be directly enforced, indicating that this matter needs to be examined first.

The ECJ has not ruled out indirect effect of international agreements when the agreement has been implemented into Community law. There has up until this point not been any cases where indirect effect of non implemented, but negotiated and concluded agreements has been determined. There are cases where the implementing regulation makes a genera reference to the agreement it is meant to implement; in those cases there is some possibility

²⁸¹ Illona Cheyne, Haegeman, Demirel and their progeny in Dashwood and Hillion, 2000, p. 26.

for indirect effect. A Community measure meant to implement an agreement may have done so in a way that is not conforming to that agreement. In those cases the ECJ has turned to what was meant to be implemented. That is, it has sought to find what parts of that agreement were meant to be implemented and in which way they were meant to be implemented. It is the intention behind the implementing measure that has been guiding and not the agreement behind the implementation.

An argument to deny direct effect is that it would undermine the EC negotiation position towards its trade partners. Some authors have tried to find an answer to this question in Article 133 ECT which is filled with shared and in some cases overlapping competences, clearly not the easiest starting point. What one at least to a large portion can find in there is the division of powers between the Community and the Member States. Supplemented by the ERTA doctrine one can find some clues to whether the Community has the power to bind the Member States. For this presentation, dealing with State aid, the competence is the Community's. The first conclusion from that is that there should be a unified Community approach to the Standing of the WTO Agreement in this area and no room for Member State treaty making power. This is then why one must follow a line of argumentation the ECJ may accept. Apart from the above mentioned question of the political nature of WTO conflict resolution. The WTO Agreement as an act accepted by the Community must hold some domestic legal value.

From the presentation above we have got some pointers as to how conflicts are solved when any provision of the WTO and more specifically GATT and the SCM Agreement. One must not forget that these are matters under international public law and not the same as national and European Community provisions, the conflict solving process must therefore be viewed in a different light. There is always the possibility for voluntary conflict resolution where the parties reconcile. Other factors to weigh in are that even a Panel report or an Appellate Body report can only be enforced by whom ever has been granted to take countervailing measures. Whether countervailing measures are taken is therefore, in some way, a question of politics.

Both the WTO and EC regimes target measures granted by governments. There are many ways in which a government can transfer funds to undertakings; some of them are discussed above. WTO looks to whether a benefit is conferred to determine if a government measure is a subsidy. The means of providing subsidies are all in some way measured by the benefit they confer. As we have seen with loans; it is not necessarily the whole loan that counts as a benefit even if there are such cases. Normally it is with loans as with other measures that it is the relative benefit that counts as compared with normal market conditions. The ECJ has established the market investor principle that is used much in the same way. The government is not prohibited to grant loans and public undertakings can use preferential tariffs for certain business partners but it must be done

following the same considerations a private investor would. Benefit in the SCM Agreement is to be understood as an advantage in relation to others on the market. The EC does not, it seems, use the same indicator. EC law allows for contributions outside an undertakings economic activity. Without going too much into detail is it always possible that any payment or contribution brings about a benefit but both EC and WTO law seems to provide room for measures that do not create a measurable advantage. Any contribution outside a business's financial activity can be hard to evaluate this does not necessarily mean that there is no advantage.

Both the WTO and the EC acknowledge that their Members are sovereign to tax as they think fit. A special problem arise from that it is difficult to determine negative benefits. The argument has been put fourth in both that a government in theory could tax all income or source and to any amount. Therefore is it in the EC as well as in the WTO the States own tax laws that set the standard for what is a tax reduction or otherwise due payments to the state. The ECJ has in a number of cases withheld its position that a measure must entail a burden on state funds to qualify as an aid. The WTO has no equivalent rule. There does not have to be a burden where there is a benefit.

The WTO does not have any rules requiring repayment of aid as does the EC rules and therefore not the same reasons for having to calculate the exact amount. Legal measures that are beneficial to certain undertakings but not to others can exist without creating a burden on state funds. When one seeks repayment it seems natural that it is the sum paid and received that is reclaimed. In the SCM no sums must be repaid; countervailing measures are the available remedies. They are calculated based on the injury suffered. ECJ case law has been reluctant to take complicated calculations into consideration especially this may be the reason for demanding a cost to the government. It should not be very difficult to see why the Courts reasoning has been debated. The text of Article 87 could be interpreted as that there has to be a contribution either through a government decision *or* through state funds. WTO law and EC law display many differences making it hard to exactly compare the two. It does however seem unnecessary to demand a burden on state funds as it makes circumvention of the ECT easier and also since it makes it possible for a measure to be allowed under EC law but even if it may make ground for countervailing measures under WTO law.

The ECJ has found that the Member States have to participate in fulfilling the responsibilities of the Community under international agreements. The conduct of one Member State may lead to countervailing measures against the Community and thus all Member States. It would therefore be motivated that Community law strived to fulfil the Community's obligations also in this aspect. However, as we have seen above, the ECJ has so far avoided the question of the Community's responsibility toward the Member States. It is however in my opinion a point that can be well argued.

Specificity as a concept is used by WTO as well as EC law. In the SCM Agreement prohibited subsidies are automatically considered specific. EC

law allows for action against measures that have yet not materialized, and the text of Article 87 ECT requires an effect on trade between Member States. To my knowledge there is no similar possibility to consider measures favouring export specific in this way in EC law. That is not to say that such measures are not targeted by other parts of the ECT, they are. But the measure should still be too general to fall under State aid rules. Looking at the ECJ ruling allowing aid to industries depending on a high level of manual labour as it was not specific enough. The ECJ ruling seems to leave room for such a measure to be specific in fact, depending on additional facts of the case.

Looking at the way the distortion of trade between the Member States has been shaped in ECJ case law it has become quite strict. The SCM Agreement demands that such an evaluation of injury is based upon positive evidence. ECJ case law displays a very different attitude. Even if legal certainty in the Commissions examinations should call for positive evidence in many cases it seems to be the explicit view of the Court that the how the evaluation should be made allows for some discrepancy.

The prohibited subsidies targeted by the SCM must be said to be close to unconditional. The discrepancy for Community and national institutions should be rather small; there should in these cases be very little flexibility. The Kupferberg case can be interpreted so that there are agreements in which negotiation is the way for problem solution and others where negotiation solutions are reserved for certain cases.²⁸² Even if the SCM agreement proscribes negotiation no such measures are to be neither initiated nor maintained; this could therefore be a case when Community institutions when negotiating the WTO Agreement may be said to have approved of direct effect. At least an argument can be made to this point.

The WTO Panels and Appellate Body seem, at least from looking on the cases presented above, to emphasize the wording of the provisions to a greater extent than the ECJ. In doing so they acted in accordance with Article 31.1 of the Vienna convention on the interpretation of treaties. Interpretation shall thus be done in accordance with the terms normal meaning.²⁸³ In the same way, from looking on the above cases the ECJ consider the overall objectives of the ECT as well as the purpose of the Treaty as a whole.²⁸⁴

On the matter of specificity, in the case *Belgium vs. Commission* the Commissions argument that industries using manual workers were to pay lowered social security costs was State aid.²⁸⁵ As nothing indicates otherwise an argument can be made that under WTO law this would be considered a benefit and specific enough. After all, manual workers are

²⁸² Ilona Cheyne, Haegeman, Demirel and their progeny in Dashwood and Hillion, 2000, p. 27.

²⁸³ Vienna Convention on the Law of Treaties, 22 of may 1969.

²⁸⁴ Slotboom in Journal of World Trade, 2002, p. 517.

²⁸⁵ Case C-75/97, *Belgium vs. Commission*.

employed more frequently in some sectors of industry. When interpreted in this way, there may be room for the conclusion that those industries or the production of be “in fact” targeted by a measure. There may be additional factors needed to make this line of argumentation work. It can be that the actual number of companies is limited by other factors or that there is a limit on the amount of manual workers the company employs or that the companies eligible for the aid is in fact located in certain areas.²⁸⁶ The SCM Agreement does, much as does the ECT, consider subsidies that are specific both in law and in fact. There is little WTO case law on this and a comparison has been difficult.

The notion of a subsidy in WTO law clearly is not too far from the concept of State aid in the ECT. Article 87 EC holds exemptions to the general rule that all subsidies are incompatible with the market. All State measures considered not to be subsidies are left outside of the scope and all subsidies within that are caught by the exemptions will still be considered subsidies even if allowed ones. The focus is slightly different as GATT and thus the SCM Agreement do not include provisions relating to services as that is included in the GATS. As we have seen the material considerations are largely the same. The SCM Agreement holds more specific rules than the ECT but the more extensive case law of the ECJ has led to the EC legal situation being more thoroughly examined. The GATT and the SCM Agreement also have a different structure as they hold different provisions depending on the characteristics of the subsidies in question which, of course also has to do with the different measures it provides for in different cases.

The WTO Agreement is in the view of Community law a mixed agreement. That means that some parts of its contents is within the Community’s exclusive treaty making power under Article 133 ECT remaining parts have been entered into under the competence of European Community Member States as they too are parties to the Agreement. To determine the status of the WTO Agreement within the European Community one has to solve the question on if there is one single approach to its effects or if that is totally up to each Member State to solve this within their national competence.²⁸⁷ From the presentation above it is clear that no Member State has any competence to enter into an international agreement as far as State aid is concerned. It should also be clear that these matters fall solely under the competence of the Community and that it is there one must look for relevant legislation. Comparing the anti-subsidy regimes of the WTO and the EC may not be as straight forward as it seems at first glance. The above presentations should prove that the material provisions seen one by one hold great similarities between the two systems. This says little about the available means for enforcement of those rules, which are very different both to their effect and in their practice. The mode of interpretation also leads to a difference in dynamic growth of case law; which will be discussed in the following subchapter. Another aspect is that: one factor can

²⁸⁶ Article 2.2, SCM Agreement.

²⁸⁷ Eeckhout in *Common Market Law Review*, 1997, p.13.

seemingly be left out in determining the existence of an aid, as has been done in GATT article XVI and the SCM Agreement, or a subsidy in one provision or be dealt with in a completely disparate manner.

The position taken by the ECJ in regard of the possible direct effect of the WTO Agreements is less than surprising. To allow for direct effect would for one thing leave the EC open to all WTO provisions in a way most countries would not. It would also clearly limit the future development of the EC itself as the aim is market integration rather than mere market liberation as is the goal of the WTO. Successful market integration depends on many more factors than trade does. As is provided for in the ECT several other factors have to be taken into account when integration is in aim. The social level and standards of Member State societies are not willing to trade for yet further liberation of trade, at least not so when priorities are left up to an organisation that has no such aims. Future developments would then not be controlled in the same way by EC institutions.

When one recalls the initial questions asked in the first chapter; I feel that that there has been some clarification on the standing of the WTO Agreements regulating this area in the EC law. The different ways of influence have also been examined, direct and indirect effect. As a result, when examining these question even it has not been discussed in the same way as the first two questions, has there been some examination of the way international agreements are implemented throughout the Community and the Member States. There is no direct an undisputable answer to these matters. The reasoning displayed in case law can as always be refined further. Future developments will no doubt bring about some of this.

6.2 Further questions

This presentation has hopefully fulfilled what it set out to do and answered the initial questions put in it. That is not to say that there are not any stones left to turn. One problem that occurs when one tries to examine something in detail is that many interesting questions have to be left unseen along the way. If there was a possibility to look more widely on the issues presented here which perspectives and matters would be interesting to examine?

The most obvious of the remaining questions may be what about the subsidized services. This would be of interest to examine; Article 87 ECT covers these cases and the SCM Agreement does not. This is not to say that there are no WTO provisions for these cases but they have been is outside of the scope here. As services can be offered across borders they are clearly not to be forgotten. The comparative element would in this respect benefit greatly as the study thereby would be more complete. If one just for the sake of argument would like to use an argument used before a WTO Panel or Appellate Body in a similar matter before a national Court it may turn out to be useful to know any differences in relation to services. In any case when

supporting a claim directly on WTO law the specific WTO provisions as well as there domestic standing in Community law.

This presentation has not dealt with the effects of aid on trade with third countries. The ECJ has considered aid to undertakings about to withdraw from third countries where profits were insufficient fell within the scope of Article 87 as the aim was to refocus efforts to the Common market.²⁸⁸ This would be interesting to examine further from an international law perspective as the question deals with rules that the EC uses in its trade with the rest of the world.

The SCM Agreement is incorporated into EC Law through Council Regulation 3284/94. The aim of that Regulation is protection from subsidized imports from countries that are not Members of the EC. A countervailing duty may be imposed thereby offsetting a granted direct or indirect subsidy for the manufacture, production, export or transport of any product that if released freely in the Community would cause injury.²⁸⁹ This presentation focuses on a different case than does the Regulation, the directly opposite case. To examine the EC reaction and rules for reacting on actions like these by third countries may that too prove interesting.

Another question in deserving more attention is as the scope of this presentation has been on the questions facing national Courts of what is State aid or not and the possibility to expand the concept on the basis of WTO law. Right here we have a number of possible questions arising under Article 87.2 and 3 that may be brought up before national Courts. These questions of exceptions are under the sole competence of the Commission and should not be a matter for the Courts.²⁹⁰

Yet one matter deserving attention is that the European Community administers aid too; this aid does not fall under the scope of Articles 87-89. There have been cases where the Community's aid has been found to distort competition. This poses a problem as the EC's own aid does not fall under the State aid rules as aid administered by the Member States does.²⁹¹ Most aid administered by the EC is done so to match aid already granted by a Member State by adding to the amount of aid handed out of the Community's pocket. This question does not involve international law but is never the less interesting.

²⁸⁸ Case C-142/87, Belgium vs. Commission, para.18.

²⁸⁹ Council Regulation 3284/94, Article 1.1.

²⁹⁰ Ross in Common Market Law Review, 2000, p. 418.

²⁹¹ Rähkä, Henrik in Tidskrift utgiven av Juridiska Föreningen i Finland, 2002, p. 329.

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