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State Aid to Airlines

by

Astridur Scheving Thorsteinsson

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of the degree Master of Laws (LL.M)

Institute of Air and Space Law
Faculty of Law, McGill University
Montreal, Quebec, Canada
March 2000

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Abstract

In the last decade, the European air transport industry has undergone a process in several stages of transition towards a single market. Liberalization has been closely linked to the effective application of the state aid rules of the EC Treaty.

In principle, direct aid to undertakings within the common market is not prohibited by the state aid rules in the Treaty. However, aid granted by Member States that distorts or threatens to distort competition by giving one airline an unfair advantage over its competitors, and in so far as it affects trade between Member States, is incompatible with the Treaty. Certain mandatory or discretionary exemptions may apply to aid to airlines providing that the measure fulfills the conditions and requirements as stated by the Treaty. The European Commission and the EFTA Surveillance Authority have a wide discretion in deciding whether or not certain aid measures fall within the stated exemptions. Where the market forces alone are not able to achieve the desired results or if they are only able to do so in a limited capacity, such exemptions may be warranted to the extent not contrary to the common interest.

A special mechanism is in place to ensure that state aid is properly scrutinized in the light of the demands of the Treaty and the EEA Agreement. The EC Commission or the EFTA Surveillance Authority must be notified of all aid measures in order to assess their compatibility with state aid rules.
Propos Préliminaire

Lors de la dernière décennie, l'industrie du transport aérien européen a fait l'objet d'une transition en plusieurs étapes vers un marché unique. Cette libéralisation s'est accompagnée d'une mise en œuvre des règles relatives aux aides étatiques du Traité de la Communauté Européenne.

En principe, ces dernières n'interdisent pas une mise en place d'aides directes. Toutefois, celles qui entraîneraient ou seraient susceptibles d'entraîner la concurrence en donnant à une compagnie aérienne un avantage déloyal par rapport à ses concurrents, et en affectant les échanges entre les États Membres, seraient incompatibles avec le Traité.

Certaines exemptions automatiques ou discrétionnaires peuvent s'appliquer aux aides octroyées aux compagnies aériennes à condition qu'elles remplissent les exigences imposées par le Traité. La Commission Européenne et l'Autorité de Surveillance EFTA ont un large pouvoir discrétionnaire pour apprécier si ces mesures d'aides correspondent aux dites exemptions.

Lorsque le marché, à lui seul, n'est pas capable d'atteindre le résultat voulu ou s'il n'est capable de l'atteindre que dans une mesure limitée, de telles exemptions peuvent être justifiées si elles ne sont pas contraires à l'intérêt commun.

Un mécanisme spécifique existe afin d'assurer que cette aide étatique soit correctement appréciée eut égard aux exigences du Traité et de l'Accord EEA. Aussi, toute aide doit être notifiée à l'Commission et à l'Autorité de Surveillance EFTA afin que ces dernières apprécient sa compatibilité avec les règles relatives aux aides étatiques.
Acknowledgements

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Furthermore, I owe special thanks to the staff of the Nahum Gelber law library at McGill and the Harvard Law School Library for their assistance in obtaining many of the books and documents referred to. Finally, I would like to thank my colleague Anais Berthou for translating the abstract into French.
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<tr>
<td>C.M.L.R.</td>
<td>Common Market Law Reports</td>
</tr>
<tr>
<td>CML Rev.</td>
<td>Common Market Law Review</td>
</tr>
<tr>
<td>E.C.L.R.</td>
<td>European Competition Law Review</td>
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<tr>
<td>EC</td>
<td>European Community</td>
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<tr>
<td>EC Treaty</td>
<td>Treaty Establishing the European Communities of 25 March 1957 (formerly known as the EEC Treaty) with amendments</td>
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<tr>
<td>ECJ</td>
<td>Court of Justice of the European Communities</td>
</tr>
<tr>
<td>ECR</td>
<td>European Court Reports (official reports of the judgments of the European Court, English version)</td>
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<td>ECAA</td>
<td>European Common Aviation Area</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<tr>
<td>EEA Agreement</td>
<td>Agreement of the European Economic Area signed in Oporto 2 May 1992</td>
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<td>EEC Treaty</td>
<td>European Economic Community Treaty (Treaty of Rome) signed on 25 March 1957</td>
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<td>EEC</td>
<td>European Economic Community</td>
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<tr>
<td>EFTA</td>
<td>European Free Trade Association</td>
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<tr>
<td>ESA/EFTA Agreement</td>
<td>Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, signed in Oporto on 2 May of 1992, as adjusted by the Protocol signed in Brussels on 17 March 1993</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>Eur.L.Rev.</td>
<td>European Law Review</td>
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<tr>
<td>Eur.Transp.L.</td>
<td>European Transport Law</td>
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<tr>
<td>Fordham Int’l L.J.</td>
<td>Fordham International Law Journal</td>
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<td>Fordham L.Rev.</td>
<td>Fordham Law Review</td>
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<tr>
<td>GATT</td>
<td>General Agreement on Trade and Tariffs</td>
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<tr>
<td>I.C.L.Q.</td>
<td>International and Comparative Law Quarterly</td>
</tr>
<tr>
<td>IP</td>
<td>International Press</td>
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<tr>
<td>OJ</td>
<td>Official Journal of the European Communities</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on European Union signed in Maastricht, 7 February 1992</td>
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<tr>
<td>Y.B.Eur.L.</td>
<td>Yearbook on European Law</td>
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Chapter 1. Introduction

"The monitoring of aid is an essential instrument in achieving a genuine single market. Particularly in a period of economic recession, subsidies can have a major protectionist effect underpinning national firms. The disadvantages for the Union as a whole are obvious. Firstly, aid can prop up unprofitable firms at the expense of efficient and innovative firms, holding back the necessary structural changes. Even if the firm is profitable any subsidies granted give it an unjustified advantage over its competitors. Furthermore, subsidies can undermine the Union's objective of social and economic cohesion, since they are often granted by the richest Member States. Lastly, failure to control aid would result in needless subsidy races that would be costly to the Member States as a whole."

European Commission.1

In the light of the traditionally high state involvement in the air transport sector, the state aid rules of the European Community Treaty2 are of particular relevance. Effective application of the competition rules is important to prevent significant distortion in the Community aviation market. One of the ways that competition can be distorted is by grants, or threats of grants, of subsidies or aids by Member States to particular industries or undertakings, such as airlines.

The state rules were in the beginning applied rather sparingly in the air transport sector. It is only in the past 8-10 years that the Commission has progressively become active in applying the state aid rules to airlines. By nature, the liberalization process and the competition rules are closely connected. The premature application of the strict state aid rules would have been ineffective until measures of liberalization were introduced in that area.

---

1.1. Liberalization

Inspired by the 1978 deregulation of the air transport market in the United States, the European aviation industry has undergone a process in several stages towards a single market during the last decade. Consequently, the discretionary powers of national authorities were reduced and possibilities extended for air carriers to decide, based on economical and financial considerations, fares, new routes and capacities to be offered on the market.

The main liberalizing legislation was set forth in three ‘packages’ constituting the Common Air Transport Policy. In 1987 the first package of liberalization within the Community was adopted and came into force on 1 January 1988. A second package of measures from the Commission was submitted to the Council in July 1989, and some of the proposed measures were adopted in June 1990. The third package of measures was adopted in 1992 and came into effect in January 1993. Other measures affecting air transport were also adopted outside the package program. The liberalization measures created a single air transport market within the Community in 1993, with a few restrictions for cabotage that

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3 ‘Liberalization’ in this context meaning; relaxation of controls over market entry and over tariffs while still ensuring safety.


disappeared in 1997, by harmonizing and opening up the air transport markets of eighteen states to competition. The Community objectives have mainly been achieved by legislative measures on air transport policy under Article 80(2) of the Treaty and application and enforcement of the competition rules in Articles 81-89. A number of important areas of air transport policy remain outstanding though such as application of the competition rules to air transport between the Community and third countries.

1.2. Application of State Aid Rules in the Community

The Treaty provides for general principles of competition and a system ensuring that competition in the common market is not distorted. The state aid control in the Community has been established progressively from scratch where international and national practice on the subject was non-existing. The state aid rules are quite unique as they are addressed to states and not to enterprises. The rules have limited the power of governments to grant financial advantages to certain sectors of their economy, thereby interfering with national sovereignty.

The European Union has expanded its state aid rules and control mechanism successively through the European Economic Area and the so-called Europe Agreements with Central and Eastern European Countries.

The state aid rules of the Treaty and the EEA Agreement apply within the European Economic Area. State aid granted by third countries to non-Community airlines falls outside the scope of the rules, although such aid may affect the competitive position of Community carriers.

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9 The Agreement on the European Economic Area coming into force 1 January 1994 (hereafter the EEA Agreement), has added three EFTA States to the 15 Member States of the European Union to the European Economic Area. Those States are Norway, Iceland and Liechtenstein. The EEA Agreement integrates those three States into the Community, subjecting them to Community law in relevant areas: free movement of goods, services, persons and capital and the rules of competition, including state aid. See further section 5.10.1.

10 Ex Article 84 of the Treaty.

11 Supra 5-7.

12 The Central and Eastern European Countries (CEEC) will respect substantive state aid rules that correspond in principle to those applicable within the EC in similar situations. They will not set up among themselves a surveillance authority like the EFTA States, but set up a national mechanism to ensure their international obligations towards the European Union.
1.3. Leveling the Playing Field

In a report of March 1992\textsuperscript{13} the Commission indicated that several airlines were benefiting from public funding that often took the form of direct operating aid. At the time, that finding was perhaps not surprising as a large part of community airlines were state owned undertakings known to benefit from privileged financial relations with public entities. In the 1994 guidelines the Commission sought to level the playing field for competition. It accepted that while some airlines carrying the financial burden of the past must have opportunities for a 'fresh start' with restructuring, provided, that such measures would not affect trading conditions to an extent contrary to the common interest.

European airlines, like their global counterparts, suffered the worst financial crisis in history in 1991 to 1994 and experienced heavy losses. Collectively, the world's airlines lost approximately USD 15 billions in four years.\textsuperscript{14} The causes were mainly over-capacity, lack of productivity, high costs and under-capitalization, made worse by the downturn in demand. As most European airlines were at the time, state owned, they sought rescue to the state as their principal owner and savior.

Before and during the liberalization several European governments undertook the task of privatizing or semi-privatizing their national carriers. Many airlines today are still partially or totally still under control of public institutions.\textsuperscript{15} In Member States where this is the case, governments have all indicated that they wish to move towards partial or total private ownership. They have also publicly recognized the need for their airlines to preserve their competitive position by developing strategic alliances with other airlines worldwide.

In the view of the precarious financial situation of many state-owned European airlines it is perhaps inevitable that some Member States will seek to

\textsuperscript{13} European Commission, Report by the Commission to the Council and the European Parliament on the evaluation of aid schemes established in favour of Community air carriers, SEC (92) 431 final.


clean up their loss-making airlines and/or re-capitalize them and restructure as a prelude to privatization.

The traditional and entrenched readiness of governments to support their main industries of national interests is widely recognized. But are those actions valid and if so, at what costs and under what conditions?

This thesis seeks to analyze, explain and comment upon the European Community rules that apply to transactions of aid and their underlying principles.
Chapter 2. The Concept of ‘State Aid’

2.1. The Community and the EEA Regime of State Aid

The Community rules on state aid are found in Articles 87-89 of the Treaty\(^{16}\) and in Articles 61-64 of the EEA Agreement (hereinafter the Agreement).\(^{17}\) The state aid rules within the Community are of a constitutional nature both with respect to substance and procedure. The Agreement reproduces the substantial rules of the Treaty to a large extent but with some minor revisions due to the institutional structure of the arrangement.

The compatibility of state aid is examined on the basis of the substantive rules of Article 87 of the Treaty and Article 61 of the Agreement, the procedural provisions of Article 88 of the Treaty and Articles 62-64 of the Agreement as well a number of Commission regulations, notifications, frameworks and communications.

State aid control within the Community is entrusted to the Commission alone according to Article 88 of the Treaty and to the EFTA Surveillance Authority for the EFTA States parties to the European Economic Area\(^{18}\) according to the Agreement.

The basic principle of state aid is in Article 87(1) of the Treaty:\(^{19}\)

"Save as otherwise provided in this Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the

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\(^{16}\) Previously Articles 92-94 of the EC Treaty. New numbering is due to the inclusion of the Amsterdam Treaty.

\(^{17}\) The prohibition of Article 87(1) is extended substantially to the three EFTA States (Iceland, Liechtenstein and Norway) by Article 62(1) of the EEA Agreement as well as to aid granted by Member States affecting trade with or between these EFTA States. It should be noted that Articles 87(2) and (3) are also substantially reproduced in the Agreement by virtue of Article 61(2) and (3).

\(^{18}\) Under the EEA Agreement and the Agreement of the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, the EFTA States have entrusted the EFTA Surveillance Authority to ensure the fulfilment of their obligations under Article 61 of the EEA Agreement in a similar manner as the Commission acts on behalf of the Community.

\(^{19}\) Article 87(1) of the Treaty is virtually identical to Article 61(1) of the Agreement; "Save as otherwise provided in this Agreement, any aid granted by EC Member States, EFTA States or through State resources in any form whatsoever which distorts competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Contracting Parties, be incompatible with the functioning of this Agreement".
production of certain goods shall, in so far as it affects trade between member states, be incompatible with the common market”.

The prohibition of state aid is neither absolute nor unconditional. Only aid that distorts trade between Member States and EFTA States is subject to Article 87(1) of the Treaty and Article 61(1) of the Agreement. While Article 87(1) of the Treaty prohibits state aid, Articles 87(2) and (3),\(^{20}\) allow the Community to approve particular types of aid that are generally beneficial. Certain categories of aid under Article 87(2) are automatically considered compatible with the common market whereas Article 87(3) provides for possible exemptions subject to the Commission’s discretion.

In determining whether a measure is compatible with the common market within the meaning of Article 87(1) and Article 61(1) of the Agreement, initial analysis up of the following elements must be made.

(i) whether the measure constitutes ‘aid’;
(ii) whether the aid is granted by a Member State or through State resources;
(iii) whether the aid distorts or threatens to distort competition;
(iv) whether the aid favors certain undertakings or the production of certain goods;
(v) whether the aid affects trade between Member States; and
(vi) whether the aid is specifically permitted by another Treaty provision.

The scope of Article 87(1) is quite broad with few exceptions. The \textit{lex specialis} principle is embodied in the saving clause at the beginning of Article 87. It recognizes that special rules may apply to aid in certain sectors, such as agriculture by virtue of Article 36 and in the transport sector by virtue of Article 76 of the Treaty. Article 87 is also considered to apply only to coal and steel activities not covered already by the ECSC Treaty.\(^{21}\)

The provision of Article 87 only covers state aid directly or indirectly granted by Member States; it does not cover Community aid granted by the European Union itself. The latter includes, for example, aid granted by the European

\(^{20}\) Article 87(2) and (3) are virtually identical to Article 62(2) and (3) of the Agreement.

Social Fund (Article 123 of the Treaty), the European Investment Bank (Article 198 (e) of the Treaty) and the High Authority (Articles 54 and 56 of the ECSC Treaty). Although the Community is not covered by Article 87 of the Treaty, learned authors seem to agree that the basic prohibition of Article 87(1) of the Treaty should also apply to Community aid.\(^{22}\)

The state aid rules of the Treaty and the Agreement apply to state aid granted to airlines within the European Economic Area. State aid granted to non-Community airlines by third countries do not fall within the scope of the state aid rules, although such aid may affect the competitive position of Community airlines.\(^{23}\)

Whereas aid is compatible with the common market under Article 88(2) or (3), Article 87(1) is inapplicable. This means that the prohibition of aid is tempered by the Commission’s powers to take economic, social and political considerations into account under Article 87(2) and (3) of the Treaty and also by the powers of the Council under Article 88(2) of the Treaty.

### 2.2. What Constitutes ‘State Aid’?

The Treaty and the Agreement do not contain a precise definition of ‘aid’. The ECSC Treaty which sets out a strict ban on state aid, in Article 4(c), contains no definition of ‘aid’ either. The concept of state aid has been defined by case law of the European Court of Justice and Commission policy. The definition is very wide. The Court of Justice held in *Steenkolenmijnen*, a case under the ECSC Treaty, that the concept of aid is wider than that of a subsidy.\(^ {24}\)

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\(^{24}\) Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1. The Court of Justice ruled: “A subsidy is normally defined as a payment in cash or in kind made in support of an undertaking other than the payment by the purchaser or consumer for the goods or services which it produces. An aid is a very similar concept, which, however, places emphasis on its purpose and seems especially devised for a particular objective which cannot be normally achieved without outside help. The concept of an aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without, therefore, being subsidies in the strict
A main element that makes up state aid is an advantage. A general measure of economic policy, for example, that applies to all undertakings within a Member State without any distinction being made between them would fall outside the scope of Article 87 of the Treaty. In determining whether aid has been granted, the pre-existing competitive position must be considered. In the application of Article 87(1), the point of departure must necessarily be the competitive position existing within the common market, before the adoption of the measure in issue. A measure is still capable of being an aid although the recipient undertaking has to do something in return, for example if an undertaking receives money on condition that it rationalizes or expands its production capacity. The crucial point is whether the recipient obtains benefit that, he would not have received in the normal course, not whether the recipient obtains something for nothing.

Article 87(1) only refers to 'goods' but various trade in services has been held to be included in the wording. Assistance to non-profit-making activities such as of a charitable, social or cultural nature is not covered. The concept of 'state' has been held to include all levels and emanations of public authority.

2.2.1. The Market Investor Principle

In order to decide whether transfer of public funds or assistance constitutes aid, one must examine whether the terms on which the funds are provided go beyond those that a private investor, operating under normal market economy conditions, would find acceptable when providing funds to a comparable private undertaking. This rule is known as the market economy investor principle. Application of the principle requires an examination of whether there will be an acceptable return on the provision of funds within a reasonable period of time. The test for a state aid might be whether, in comparable circumstances, a private businessman acting on the basis of relevant economic considerations would not support the undertaking in such a manner. A private shareholder may reasonably subscribe the capital necessary to secure the survival of an

meaning of the word, are similar in character and have the same effect”. See also case 61/79 Denkoi t Italiana [1980] ECR 1205.

undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after reorganization and restructuring. Similarly, a state shareholder may inject the necessary capital. However, where, at the time when the capital was subscribed, the undertaking in question had for several years been making substantial losses and its survival had already necessitated the reconstruction of its capital on several occasions and its products or services were being sold on a market on which there was excess capacity, any state injection of further capital would constitute aid. If a capital injection is a part of a restructuring and modernization plan, it constitutes aid if it fails to fulfill the market economy investor principle.

The profitability perspective is normally viewed by the Commission as the strategic prospects of a company in the long term rather than in short term.27

The market economy investor principle has been heavily criticized.28 The most veteran critics frequently argue that there is a variable to what a ‘good investment’ constitutes as there is no established norm on how or in which way such an investment should be calculated. The foundation on which calculations are made are not always the same. Another basic flaw of the market economy investor principle is that no one can tell what a ‘typical investor’ would do if considering a capital injection into an ailing airline. There is no such thing as a ‘typical investor’ nor any uniform pattern of conduct that investors follow. If there were, every investor would take the same decision at the same time and there would be no weighing of risks against benefits by investors, and no competition among investors. Yet in the market there is rarely a single ‘correct’ investment decision; for example, private investors can often make radically different competing bids for a public company.

There have been a few cases so far where the Commission applying the market investor principle has found that state funding of an airline does not constitute aid but a normal commercial investment.

27 Supra 21, at p. 2.
The Commission's reasoning and evaluation in the above mentioned cases is not always as transparent and clear as one would hope for. Especially in the light of the interests at hand, the competitors and market conditions.

The Air France decisions, the decisions concerning Lufthansa, Air Outre Mer, and Sabena do not give rise to much comparison or debate, as the Commission did not publish them. In the coverage, concerning both Air France decisions, the Commission's reasoning and analysis is quite meager; "In November of 1991 the financial ratios of the Air France group had worsened in the recent past due to the Gulf crisis".\textsuperscript{36} The Commission took account of the past achievements of Air France and general prospects for the aviation market. In July 1992, not even a year later, the airline was still in the red after losses of several years and the airline's net results were worse than anticipated in earlier forecasts. The airline's outlook was considered good in the general climate prevailing in civil aviation industry. Special mention was made of the good

<table>
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<tr>
<th>Airline</th>
<th>Year</th>
<th>Amount</th>
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<tr>
<td>Air France\textsuperscript{29}</td>
<td>1991</td>
<td>FRF 2 billions</td>
</tr>
<tr>
<td>Air France\textsuperscript{30}</td>
<td>1992</td>
<td>FRF 3.84 billions</td>
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<tr>
<td>Lufthansa\textsuperscript{31}</td>
<td>1995</td>
<td>DEM 1.55 billions</td>
</tr>
<tr>
<td>Sabena\textsuperscript{32}</td>
<td>1995</td>
<td>ECU 245 million</td>
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<tr>
<td>Aer Outre Mer\textsuperscript{33}</td>
<td>1995</td>
<td>FRF 300 millions</td>
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<tr>
<td>Iberia\textsuperscript{34}</td>
<td>1996</td>
<td>ESP 87 billions</td>
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<tr>
<td>Iberia\textsuperscript{35}</td>
<td>1999</td>
<td>ESP 20 billions</td>
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\textsuperscript{29} IP/91/1024, 9.20.1991.
\textsuperscript{30} IP/92/587, 7.15.1992.
\textsuperscript{31} IP/95/456, 5.10.1995.
\textsuperscript{32} In 1991 Swissair acquired a 49.5\% stake in Sabena, viewed by the Commission as a normal commercial transaction. Swissair later wrote off the investment in its entirety. See Jones, L. "Can Sabena bite the bullet?", (1997) Airline Business, May, 48.
\textsuperscript{33} IP/95/799, 7.19.1995.
public image of the airline and a high level of efficiency and substantial development prospects for Charles de Gaulle airport. In all likelihood the Commission’s decision could have been very much to the contrary without changing much of the vague reasoning.

In the case of Iberia in 1996 a more substantial and factual reasoning was put forward in a published decision. The Commission engaged a world renowned consultant agency to analyze the various transactions concerning the company Andes Holding BV and the injection of capital by the holding company Teneo into Iberia. The appointment of an independent consultant is now a standard in most formal investigations (Article 88(2) procedures). The Commission raised no objections to the injection, but it seems that the decision to do so was tied to several conditions.

Neither Article 87 of the Treaty nor Article 61 of the Agreement state or imply any legal basis for the Commission or the EFTA Surveillance Authority to place conditions when adopting a decision, on the injection into an ailing airline that does not amount to state aid. The question then arises whether the Commission is entitled to impose conditions, i.e. or refuse to agree on an injection as a normal commercial investment, unless certain conditions are met. One might argue that conditions a normal market investor would set prior to investing, and the company would undertake to abide by, may be justified as they aim at making the company a more viable investment prospect. However, demands that go over and beyond such conditions are certainly more doubtful. The Court of Justice has not ruled on the compatibility of such conditions with the Treaty.

The Court of Justice has stated that the aim of Article 87 is to prevent trade between Member States from being affected by benefits granted by public authorities which, in various forms, distort or threaten to distort competition by...
favoring certain undertakings or the production of certain goods. Accordingly, Article 87 does not distinguish between the measure of state intervention concerned by reference to their causes or aims but defines them in relation to their effects.

The principle of neutrality with regard to the system of property ownership existing in the Member States and the principle of equality between public and private undertakings has been established in the Treaty and the EEA Agreement. As a consequence of these principles, the Commission's actions may not prejudice or advantage public entities when they inject capital into undertakings. The Commission must investigate financial injections into companies to prevent Member States from infringing the state aid rules of the Treaty. As a general rule, the Commission is of the opinion that in the case of a capital injection out of public funds no state aid is involved, if there are some private minority shareholders who participate in the transaction proportionately to their shareholdings. The private investor's shareholdings must, however, have genuine economic significance. As regards the market economy investor principle, the Court of Justice has stressed that the behavior of a private investor, with which the intervention of the public investor has to be compared, must at least be that of a private holding company or of a group which follows a structural, global or sectoral policy and which is guided by profitability prospects in the long term. In the case of loss-making companies, such a long term investor would base his decision on a coherent restructuring plan.

2.2.2. Forms of State Aid

Article 87(1) of the Treaty and Article 61 of the EEA Agreement provide that aid may be granted 'in any form whatsoever' thereby covering vast possibilities of measures. The airline industry, being no stranger to aid, has benefited from various categories of forms of aid. The Commission has concluded that aid may be considered to be granted to airlines not only in respect of their primary

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42 Article 295 (ex 222) of the EC Treaty and Article 125 of the EEA Agreement.
activities but also to airport facilities for infrastructure, duty free shops, flying schools and airport charges. All forms of aid are subject to state aid rules.

2.2.2.1. Direct Subsidies

Direct grants of aid are the most obvious form of state assistance. Such aid may be given for various causes, such as for the operation of, or the encouragement of the use of particular aircraft types; aid to facilitate operation of domestic or intra-Community routes to remote regions and aid to pay for interest charges on loans taken out by airlines.

2.2.2.2. Capital Injections

Capital injections for the restructuring of an airline or aid to recover from operating losses (equity capital contributions) constitute aid where they do not amount to normal financial transaction, as defined by the market economy investor principle. Generally, capital injections do not constitute state aid when the public holding in a company is to be increased, provided the capital injected is proportionate to the number of shares held by the authorities and private shareholders. However, the private investor's holdings must have real economic significance. The dividend payments or capital appreciation must also correspond to a normal return, by reference to a comparable private enterprise, to be expected within a reasonable period.

In relation to capital injections or grants for restructuring, airlines are at times granted relief from paying stamp and capital duty. Whereas such relief is not in

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44 Commission of the European Communities, Civil aviation: Memorandum No 2: Progress towards the development of a Community air transport policy. March 15, 1984 COM (84) 72 final. (Annex IV)
45 The GATT Subsidy Code and the GATT Agreement on Trade in Civil Aircraft, both signed on April 12, 1979 at Geneva may be of relevance for the determination of compatibility of aid with the Treaty and the EEA Agreement. The Commission and Member States can not overlook a provision such as Article 4.4. of the Agreement on Trade in Civil Aircraft which reads: "Signatories agree to avoid attaching inducements of any kind to the sale or purchase of civil aircraft from any particular source which would create discrimination against suppliers from any signatory." See further Winters, J.A., "EC Supervision of State Aids in the Air Transport Sector", EEC Air Transport Policy and Regulation and their Implications for North America, Proceedings of a Conference held at McGill University, Montreal Canada, September 1989, (Deventer: Kluwer Law, 1990) p. 81, at VII.
46 Supra 44.
line with normal business practices as defined by the market investor principle it could also constitute aid.

2.2.2.3. Reduced Returns to the State

The state's failure to maximize the return on its capital may constitute aid whereas a normal rate of return is defined with reference to the market economy investor principle. Such reduced returns to the state may be in the form of providing land free of charge at state-owned airports or rented at an abnormally low rate, abnormally low rent for airport infrastructure or provision of logistical and commercial assistance without 'the normal payment' being required. Furthermore, various state public contracts or commitments may constitute aid.

2.2.2.4. Guarantees

State assurance to lenders that the government or the state itself is behind an airline or shareholder in an airline may constitute aid within the meaning of Article 87(1). State guarantees on loans or other financial obligations by airlines are a less subtle government intervention than direct grants of aid. The guarantee by a state eliminates commercial risks, often resulting in a lower interest rates as the undertaking taking out the loan is classified as a lower risk with the state or a state body co-signing the loan or guaranteeing it. The status of the undertaking in question receiving the guarantee or comfort letter is of great importance. If a poorly ranked undertaking is enabled to obtain loans at market rates with the assistance of a state government or even at rates it would have been unable to obtain unassisted, there is a presumption that a state guarantee involves the grant of aid, especially if the guarantee is necessary for the survival of the undertaking concerned, the terms of the guarantee last for an exceptional length of time or if an appropriate return is impossible.\textsuperscript{48}

The amount of aid involved is usually calculated as the difference between the interest rate payable under normal commercial conditions without government backing and that actually obtained because of the guarantee. Other factors such as security in movable or immovable property or mortgage rights in

\textsuperscript{48} Supra 21 at p. 32.
fixed properties reasonably sufficient to cover the risks involved or other specific conditions attached to the guarantee may lead to the conclusion that the guarantee falls outside the scope of Article 87(1).\(^49\)

Guarantees have been prevalent in the air industry throughout the Community.\(^50\)

Two types of guarantees have mostly existed:

(a) Guarantees by the state of the airline borrowings normally for aircraft acquisition;

(b) A limited guarantee in favor of a shareholder in an airline of repayment of an amount equal to the reduction of its capital contribution in the airline below a certain amount caused by the airline's losses, subject always to a fixed annual ceiling.\(^51\)

In 1995, the Commission decided not to raise objections to plans by the German government to contribute to pension funds of Lufthansa employees as a part of the company's privatization program.\(^52\) In addition to the financial obligations undertaken by the German government to transfer DEM 1.55 billion to the pension funds, the German State guaranteed for 30 years all pension payments to retiring Lufthansa employees should Lufthansa go bankrupt or find itself unable to meet the payments for whatever reason. The Commission came to the conclusion that the state's financial contribution was compatible with the state aid rules of the Treaty.

### 2.2.2.5. Tax or Custom Duties Exemptions, Concessions and Deferred Payments

It has been common for airlines to benefit from tax concessions or exemptions. However, to counteract such measures the Commission has devised special

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\(^{49}\) Such conditions may include contracts attached to the guarantee allowing for a compulsory declaration of bankruptcy of the beneficiary and for the guarantee to be honored only after the guaranteed creditor has recovered what he can of the debt through realization of the assets of the debtor. In any receivership the guarantor must be treated as any other creditor.

\(^{50}\) Supra 44.

\(^{51}\) Supra 44.

\(^{52}\) IP/95/456, 10.05.1995.
guidelines on tax measures and state aid. The following types of aid are most widely recognized:

(a) Preferential tax systems for airlines, e.g. deferred payments of tax by placing an additional charge on the figure of depreciation of an aircraft resulting in increased net profits of an air carrier. In 1996, the Commission concluded that a special depreciation arrangement in the German tax code for aircraft registered in Germany constituted aid within the meaning of Article 87 of the Treaty. The Commission’s analysis led it to believe that the tax rule constituted operating aid in that it provided companies with a financial advantage, the burden of which was to be carried by the German State’s budget. The depreciation in the tax code allowed an airline to deduct from taxable profits a certain proportion of the purchase price of an aircraft, provided it was used in international transport. Germany was called upon to discontinue the aid measure as of 1995.

(b) Exemption from Value Added Tax on fuel and equipment for international flights is generally available. This exemption exists in all Member States and is based upon Article 24 of the Chicago Convention. Article 24 of the Chicago Convention obliges contracting states to exempt fuel on board aircraft of other contracting states from customs duties and other charges. Foreign companies may also benefit, provided that reciprocal treatment is afforded by their countries. Consequently, aviation fuel used in international flights tends to be exempt from tax. This exemption is confirmed in the Sixth Directive on Value Added Tax.

(c) Exemption from Value Added Tax of the domestic part of international air transport.

(d) Exemption from capital taxation of the capital of the state-owned airline.

54 European Commission, Report by the Commission to the Council and the European Parliament on the evaluation of aid schemes established in favour of Community air carriers, SEC (92) 431 final (2) at p. 14.
56 Convention on international civil aviation. Signed at Chicago, on 7 December 1944. ICAO Doc. 7300/6 (1980).
(e) Exemption from paying custom duties or landing charges. The Commission in 1998 came to the conclusion that an exemption, granted by the Flemish Region to the company Air Belgium and the tour operator Sunair, from paying landing and parking charges at Ostend Airport constituted state aid within the meaning of Article 87 of the Treaty. However, as the exemption was ultimately withdrawn and never took effect further procedure was terminated.\(^8\)

Even failure by public authorities to take proceedings to enforce tax debts may constitute aid.

(f) Exoneration of air traffic control or air navigational charges. Articles 15 and 24 of the Chicago Convention prohibit discriminatory treatment of airlines with regard to airport and air navigation charges. These obligations would be violated by relief measures for the benefit of national carriers to the exclusion of foreign airlines.

2.2.2.6. Loans.

Loans made to airlines on terms unavailable from a commercial bank or investors could constitute an aid as to the difference between the rate payable under normal market conditions and that actually paid. An entire loan could be considered aid where an unsecured loan is made to an airline which under normal circumstances would be unable to obtain financing. Various related measures such as paid interest rebates, interest subsidies, lower premiums charged than reflect the actual risk involved or inadequate or non-existent security may also constitute state aid within the meaning of Article 87(1).

In 1994 the Flemish Region granted the Belgian airline Vlaamse Luchttransportmaatschappij NV (VLM) a BEF 20 million loan, interest free for a period of six years. The Commission concluded that the interest free loan included an aid component within the meaning of Article 87(1) of the Treaty and requested the Belgian authorities to require that interest at 9.3% be payable on

\(^8\) Commission Decision of 21 January 1998, concerning aid granted by the Flemish Region to the company Air Belgium and the tour operator Sunair in connection with the use of Ostend Airport, OJ No L 148, 19.05.1998, p. 36.
the loan and VLM repay the accrued interest on the loan to the date of the Commission's decision.\textsuperscript{59}

2.3. Aid Granted by a Member State or Through State Resources

As discussed above, a condition for Article 87(1) of the Treaty is that aid must be "by a Member State or through state resources". The provision suggests that there must be a loss of some nature from the state, be it expenditure or forgone revenue. The loss must involve a reduction, actual or potential, in the revenue of the state. The aid, furthermore, must be instigated by the state and subject to its approval.

The notion of a 'state' has been widely construed and the Commission has taken the view that even mere state influence on an economic actor may lead to a finding of state aid.\textsuperscript{60} The primary analysis in considering state aid lies with its effect on the undertakings in question and competition generally. Aid may be granted by central government, local authorities, private organizations or companies, provided that state revenues are involved and control of the state is present in some form\textsuperscript{61} and no distinction needs to be made between which body grants the aid.\textsuperscript{62} The form of state control is established if funds are state provided, if the body in question is under the influence of the state,\textsuperscript{63} appointed by the state to administer it\textsuperscript{64} or the funds are derived from state legislation.\textsuperscript{65}

\textsuperscript{59} Commission Decision of 26 July 1995 concerning aid granted by the Flemish Region to the Belgian airline Vlaamse Luchttransportmaatschappij NV, 95/466/EC, OJ No L 267, 9.11.1995, p. 49. See also application for annulment of the Commission's decision; Case T-214/95, Het Vlaamse Gewest (Flemish Region) v Commission [1998] ECR II-717. The application for annulment was dismissed in its entirety.


\textsuperscript{61} Supra 54, at p. 13.


\textsuperscript{63} Case 78/76 Firma Steinike und Weinlig v Germany [1977] ECR 595.


In a Commission decision concerning the subscription by CDC Participations to bonds issued by Air France, the Commission imputed to the French government a subscription of two issues of bonds by Caisse des Dépôts et Consignations-Participations (hereinafter ‘CDC-P’). CDC-P is a subsidiary of Caisse de Dépôts et de Consignations, a French public entity which was created by French law and whose directors and managers are appointed by the French Government upon proposal from the Minister of Finance. The Commission acknowledged that CDC-P was not an autonomous entity from the Caisse and the deposits made with the Caisse pursuant to statutory and regulatory obligations must be regarded as compulsory contributions. Therefore the sums deposited with Caisse could not be regarded as private funds and the Commission consequently concluded that whatever the special features of the Caisse, it was a public body, covered by the provisions of the Treaty on state aid. The Court of First Instance confirmed the Commission’s decision stating *inter alia*: “The Court considers that the investment in question, financed by the balance available to the Caisse, is liable to distort competition within the meaning of Article 87(1) of the Treaty in the same way as if that investment had been financed by means of revenue from taxation or compulsory contribution”.

In the case of Iberia’s re-capitalization in 1996, the Commission took the view that a capital injection of ESP 87 billion by the holding company Teneo, a majority shareholder in Iberia, did not constitute state aid. Arguments put forward by the Spanish State led to the conclusion that Teneo was independent of the State budget and a private holding company.

A factor in state aid cases is the problem of lack of transparency in financial transactions when determining whether aid has been granted by a Member State or through state resources to an undertaking. The problem is especially acute...
when the undertaking is a public enterprise. Lack of notification by Member States of aid schemes and the availability of information poses the Commission with problems. In 1980 the Commission adopted a Directive in dealing with the transparency of financial relations between Member States and public undertakings that was later amended to apply to the transport sector. The Directive requires Member States to ensure that the flow of all public funds to public undertakings and the uses to which these funds are put are made transparent. Although the transparency in question applies to all public funds, the following are particularly mentioned as falling within its scope:

- the setting off of operational losses,
- the provision of capital,
- non-refundable grants or loans on privileged terms,
- the granting of financial advantages by foregoing profits or the recovery of sums due,
- the foregoing of a normal return on public funds used,
- compensation for financial burdens imposed by the public authorities.

According to Article 1 of the Directive, not only are the flows of funds directly from public authorities to public undertakings deemed to fall within the scope of the transparency directive, but also public funds made available by public authorities through the intermediary of public undertakings or financial institutions. Article 5 of the Directive enables the Commission to request information concerning financial relations between public authorities and public undertakings.

2.4. Aid Distorts or Threatens to Distort Competition

A further pre-condition for the application of Article 87(1) is that a state aid must "distort or threaten to distort competition". Giving or handing out aid is not an infringement per se of Article 87(1). However, if the effect of the aid is such, as to distort competition or threatens to distort competition between Member States, or favor certain undertakings rather than a more general class, then the aid may be considered incompatible to the Treaty. The Commission

may have regard not only to the direct and immediate effects of aid on the market position of the recipient but may also consider the effects for potential competitors of the recipient. In an industry such as air transport, which is now substantially liberalized, aid granted to one airline competing with others in the common air transport market and on a network of competitive routes, will most likely constitute a preferential measure not available to the competitors. This goes in line with the Commission’s conclusion that aid is presumed to distort competition, unless exceptional circumstances exist, such as the total absence in the common market of products or services which are identical to, or may be substituted for those made or offered by the aid recipient.\textsuperscript{71}

The Commission’s decisions do not contain such detailed analysis of likely distortion of competition as decisions under Articles 81 (ex 85) and 82 (ex 86) of the Treaty on anti-competitive behaviour. In the Sabena decision,\textsuperscript{72} it was simply mentioned that distortion of competition was highly possible if aid was granted. In a decision concerning TAP the Commission verified whether the aid would affect trading conditions contrary to the common interest along with the market status of TAP.\textsuperscript{73} In the case of Air France\textsuperscript{74} and Aer Lingus,\textsuperscript{75} the Commission formed the view that Community air transport is a highly competitive sector and on a number of routes the competition is particularly intense, and notably, therefore those markets would be adversely affected by any reason of certain preferential measures which are not generally available. The aid would therefore have direct effects on trade in the European Economic Area.

\textbf{2.4.1. The \textit{de minimis} Rule}

In a Commission notice on the \textit{de minimis} rule for state aid\textsuperscript{76} it is acknowledged that aid which does not amount to more than ECU 100,000 over three years is

\begin{itemize}
\item \textsuperscript{71} Case 730/79 \textit{Phillip Morris v Commission} [1980] ECR 2671.
\item \textsuperscript{73} Commission Decision of 6 July 1994, TAP; OJ No L 279, 28.10.1994, p. 29, part VIII paragraph 3.
\item \textsuperscript{74} Supra 66.
\item \textsuperscript{75} Commission communication pursuant to Article 93(2) of the EEC Treaty to other Member States and interested parties on equity injection by the Irish Government in favour of Aer Lingus, OJ No C 291, 28.10.1993, at p. 4.
\item \textsuperscript{76} European Commission, Commission notice on \textit{de minimis} rule for State aid, OJ No C 68, 06.03.1996, p. 9.
\end{itemize}
not caught by Article 87(1). Even above that threshold the fact that the effect on competition is appreciable has to be shown in every case. Aid to firms supplying goods or services in which there is no cross-border trade in the Community, i.e. which are intended for a local market only, likewise falls outside the scope of Article 87(1). Certain sectors are excluded from the de minimis arrangement, such as shipbuilding, transport and agriculture and fisheries. Therefore aid to airlines cannot fall under the de minimis rule, but must always be notified.

Thus there is no requirement to show an 'appreciable' effect on competition or that the aid affects competition in 'a substantial part of the common market' as in the case of Articles 81 and 82 of the Treaty.

2.5. The Selectivity Requirement

State aid within the prohibition of Article 87(1) must distort competition: "...by favoring certain undertakings, or the production of certain goods". This condition has been described as the condition of selectivity or favoritism. This requirement is treated by the Commission as meaning that if Article 87(1) is to be applied, there must be an element of selection or discrimination in the grant of aid. Therefore, it is necessary to distinguish between an advantage granted to undertakings generally and one that is granted only to certain undertakings. It is only the latter that falls under Article 87(1). However, what may seem to be an advantage granted to all undertakings in a special sector generally may not in fact be so, if only few of them are able to able to apply it to their business. For example, tax measures that are structured in such a way to apply to only a very small number of operations, if not just to a single one, are limited in time or even apply only to large companies can be contrary to Article 87(1). Determining whether the measure is general or discriminating relies on more than purely formal examination of the aid concerned. Hence, the effects of a 'general' measure may prove discriminatory under close scrutiny.

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78 Case 142/87 Belgium v Commission (Tubemeuse) [1990] ECR 1-959.
It is also necessary to distinguish between advantages designed to attain particular economic and social objectives of a Member State and advantages which are commercially justifiable in the sense that a private undertaking or investor in a similar position would grant an equivalent advantage. The latter are generally not state aid. A measure can be an aid even though the recipient undertaking has contributed wholly or partially to its financing as a result of a state levy.

2.6. Effects of Aid on Trade between Member States

Once it has been established that a measure confers an advantage, is state financed and is selective in character, it can be concluded that it constitutes state aid for purposes of Article 87. However, for Article 87(1) to apply, the aid must also distort competition and affect trade between Member States.\(^{79}\) Whether aid affects trade between Member States must be determined on an ad hoc basis. The requirement of an effect between Member States has been interpreted liberally similarly as for the requirement of effect on inter-state trade under Articles 81 and 82 of the Treaty.\(^{80}\) Consequently, aid schemes generally will be deemed to affect trade between Member States except for those small enough to qualify for exemption under the \textit{de minimis} rule discussed above in section 2.4. Aid to airlines does not however fall under the \textit{de minimis} arrangement.

In the \textit{Philip Morris} case the Court of Justice stated the basic criterion for determining whether a given aid scheme affects trade between Member States: "...when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid".\(^{81}\) In the KLM pilot school case,\(^{82}\) the Commission considered that: "The competitive position of other Community

\(^{79}\) Article 61(1) of the EEA Agreement refers to both EC Member States and EFTA States as Contracting Parties.


\(^{81}\) \textit{Supra} 71, at p. 2688.

\(^{82}\) European Commission, Commission communication pursuant to Article 93(2) of the EEC Treaty to the other Member States and other interested parties on aid measures involved in the acquisition by KLM of the pilot school RLS, OJ No C 293, 29.10.1993, p. 4.
carriers which run their own schools without receiving subsidies or have to bear the full cost of their pilots' training, will be harmed by the acquisition and the covering of the losses. In other Member States (for example Belgium, Germany and the United Kingdom) pilot schools, even those in which national airlines hold shares, are not subsidized. In the liberalized common market any aid to an air carrier operating Community routes has an effect on Community trade”.

The effect on competition must be appreciable. If aid ‘may’ have an effect or is reasonably foreseeable on trade between Member States, it falls within Article 87(1) as it is capable of affecting trade. Thus, if trade in a specified product or service is affected at a purely local or national level or outside the Community entirely, Article 87 of the Treaty will not apply. Aid which applies to airlines outside the Community will not be prohibited under the state aids rules unless there is a “spill over” effect on trade between Member States.

2.7. Aid Specifically Permitted by Another Treaty Provision

Article 87(1) of the Treaty declares aid distorting competition and affecting trade between Member States incompatible with the common market subject to the exceptions provided in the Treaty. The specific exemptions to Article 87(1) in Articles 87(2) and 87(3) of the Treaty will be discussed in Chapters 3 and 4.

Article 87(3)(e) of the Treaty permits the Council acting by a qualified majority on a proposal from the Commission to specify other categories of aid that may be considered compatible with the common market.

Article 88(2), third sub-paragraph, of the Treaty allows the Council acting unanimously to declare state aid compatible “if such decision is justified by

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83 Supra 78. It was argued in the case that inter-state trade was not affected because Tubemeuse, the company receiving the aid in question exported 90% of its production outside the Community. The court rejected this argument and concluded that Tubemeuse had announced its intention to withdraw from certain foreign markets, making it 'reasonably foreseeable that Tubemeuse would redirect its activities toward the internal Community market'.

84 Case 12/87 France v Commission [1988] ECR 907 [1988]1 C.M.L.R. 713. The Court of Justice ruled that an aid fell within Article 87 if it was capable of affecting trade between Member States.
exceptional circumstances". So far the exception has been very rarely used, and since 1960's never outside the agricultural sector. 53

Sometimes an Act of Accession will contain rules granting new Member State(s) a certain transition period, allowing for exemptions from the Treaty due to special objectives or circumstances. 86 Furthermore, aid may be permissible on the basis of various safeguard clauses in the Treaty, for example Article 109 87 and 111 88 regarding protective measures. 89 Specific Treaty exemptions to the ban of state aid include Article 36 90 exemption for aid to agriculture, Article 86(2) 91 aid to public undertakings and Article 296(1)(b) 92 national defense.

2.7.1. Public Service Obligations

With regard to transportation in general the Treaty provides for specific exemptions.

Article 73 of the Treaty 93 states that aid shall be compatible with the Treaty if it meets the needs of coordination of transport or if it represents reimbursement for the discharge of certain obligations inherent in the concept of a public service. 94 Article 76(1) of the Treaty 95 states that the imposition by a Member State, in respect of transport operations carried out within the Community, of rates and conditions involving any element of support or protection in the interest of one or more particular undertakings or industries shall be prohibited as from the beginning of the second stage, unless authorized by the Commission. Article 76(2) furthermore lists a number of principles that the Commission is to take into account in examining the permissibility of aid. The provisions of Article 76 thus contain exceptions both to the general substantive rules on aid

53 Claus-Dieter Ehlermann, "State aids under European Community competition law" (1994) 18 Fordham Int'l L. J. 410., at p. 6. See further discussion on Article 88(2) of the Treaty in section 5.6. Council's Power to Declare Certain Aids Compatible

87 Ex Article 108 of the Treaty.
88 Ex Article 109 of the Treaty.
89 Supra 86.
90 Ex Article 42 of the Treaty.
91 Ex Article 90 of the Treaty.
92 Ex Article 223 of the Treaty.
93 Ex Article 77 of the Treaty.
94 Article 49 of the EEA Agreement serves the same purpose.
95 Ex Article 80 of the Treaty.
contained in Article 87 and to the procedural provision contained in Article 88 and 89. However, Article 80(2) of the Treaty\(^{96}\) excludes the automatic application of Articles 73 and 76 to air transport. Air transport is therefore subject to the general rules of the Treaty, including those on competition and state aid. Similarly, Article 49 of the EEA Agreement (the equivalence of Article 73 of the Treaty) does not apply to air transport as its application is excluded by Article 47 of the Agreement.

Reimbursement of airlines' losses for fulfilling public service obligation requirements must be assessed on the basis of general rules of the Treaty. Council Regulation (EEC) No 2408/92 on access for air carriers to intra-Community routes\(^{97}\) sets out the rules for imposing public service obligations on airlines.

Public service obligation is defined as any obligation imposed upon an air carrier to take, in respect of any route which is licensed to operate by a Member State, all necessary measures to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing which standards the air carrier would not assume if it were solely considering its economic interest.\(^ {98}\) A reimbursement must be calculated on the basis of the operational deficit incurred on the route and can not involve any over-compensation of the air carrier. The system so set up by the regulation excludes the reimbursement for public service obligations to include any aid elements. The consideration received for the public service obligation is a neutral commercial operation between the relevant State and the selected airline. Should the reimbursement over-compensate the airline for its public service obligation for the deficit as laid down in the bid or bring about some special benefits for the airline that were not foreseen in the tender, the Commission may take the matter under consideration.\(^ {99}\) Article 4(1)(i) of the Regulation obliges the Member States to take the measures

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\(^{96}\) Ex Article 84 of the Treaty.


\(^{98}\) Article 2(o) of Regulation (EEC) No 2408/92.

\(^{99}\) See Article 4 and Article 9 of Council Regulation 2408/92.
necessary to ensure that any decision can be reviewed effectively and speedily for an infringement of Community law or national implementing rules.

Compensation to carriers that incur losses on routes subject to public service obligation but were not selected through the tender will be assessed under the general state aid rules. All such compensation must be notified in order to allow the Commission to examine whether they include state aid elements or not.
Chapter 3. Mandatory Exemptions

The rules on competition and state aid of the Treaty may be tempered by the need to attain other Community objectives. Thus, state aid that restricts competition within the meaning of Article 87(1) may be exempted under Article 87(2) and (3) provided that the aid in question might help to achieve Community wide goals such as the reducing disparities among regions, and promoting social and economic cohesion.\(^{100}\) In doing so, the Treaty reflects the idea that secure objectives compatible with the Union concerns may be permitted. In this regard, the Court of First Instance has stated that in its application the Commission must have regard to ‘considerations of Community policy’,\(^{101}\) but national interests by themselves do not justify authorization of aid.

Article 87(2) of the Treaty and Article 61(2) of the Agreement lists the type of exemptions that are automatically deemed to be compatible with the common market. Exemptions under Article 87(2) of the Treaty and Article 61(2) of the Agreement are mandatory. If the characteristics of an aid measure satisfies the stated requirements, the exemption must be granted automatically. However, the aid measure is always subject to examination by the Commission in order to confirm its compatibility.\(^{102}\) The Commission's decisions are subject to judicial review by the Court of Justice.\(^{103}\)

Article 87(2) of the Treaty and Article 61(2) of the Agreement contain the following provisions:

“The following shall be compatible with the common market:

a. aid having social character, granted to individual consumers provided that such aid is granted without discrimination related to the origin of the products concerned;

b. aid to make good the damage caused by natural disasters or exceptional occurrences;

c. aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is


\(^{102}\) Same applies to EFTA states submitting its applications to the EFTA Surveillance Authority.

\(^{103}\) See further section 5.8.3.
required in order to compensate for the economic disadvantage caused by that division”.

3.1. Consumer Aid

Under normal circumstances in air transport the Article 87(2)(a) exemption or derogation is not widely used, as most aid that can be justified under paragraph (a) can also be justified on other grounds.

Article 87(2)(a) provides derogation for “aid having social character, granted to individual consumers, provided that such aid is granted without discrimination relating to the origin of the products concerned”. It does not authorize direct or indirect aid for the benefit of domestic producers.

Public and social welfare is the primary purpose of this paragraph. Aid may be granted to defined categories of consumers and should cover only specific categories of passengers travelling on a given route, such as children, the handicapped or low-income people. In some instances, it may be permissible to grant aid to all consumers in a particular area. When an air route concerns an underprivileged region, such as an island, aid to transport facilities available to the whole population of the region may fall under Article 87(2)(a).

Aid under Article 87(2)(a) is granted to individual consumers and not to undertakings such as air carriers, but may be of particular relevance in the case of direct operational subsidization of air routes provided the aid is effectively for the benefit of the final consumer. For example, an aid scheme operated by the Spanish Government for the provision of services by the airline Iberia between the mainland and Canary, Melilla and Balearic Islands, entitles Community residents in the islands to a 33% reduction in air fares. The Commission noted that this ‘consumer oriented’ aid was based upon public service and regional policy considerations and, since all Community residents on the islands were treated equally, the Commission was satisfied that there was no discrimination.

105 In a Commission Decision of 22 June 1987 concerning reductions in air and sea transport fares available only to Spanish national resident in the Canary Islands and the Balearic Islands.
The Commission has recently approved similar aid, in its decisions regarding social aid to residents of the Canary and Balearic Islands for intra-archipelago flights,\textsuperscript{106} and for residents in Madeira,\textsuperscript{107} for flights between the island and the rest of Portugal.\textsuperscript{108}

Aid to make up losses incurred by an airline in meeting its obligations to operate unprofitable routes may not be covered under Article 87(2)(a).\textsuperscript{109}

3.2. Disaster Aid

Article 87(2)(b) of the Treaty and Article 61(2)(b) of the Agreement allow for "aid to make good the damage caused by natural disasters or exceptional occurrences". The aid should not pose problems to competition as its purpose is to compensate for the worsening of competitive position caused by disasters. As long as the aid does no more than to repair the damage caused and is not applied any further, it is permitted. "Natural disasters" and "similar occurrences" would seem to include floods, earthquakes, war and internal political disturbances. Events, which are to be considered "normal commercial risks" and would normally be covered by insurance, do not justify aid. Assistance granted is limited to the repairs of harm done. Preventive measures aimed at structural improvements would normally be governed by Article 87(3)(a) or (c), if they fall under Article 87(1) at all.

This exemption has not been used in air transport and is highly unlikely as a basis for an exemption for aid to airlines, unless, for example, its fleet or infrastructure was disabled by a natural disaster. In a press release in 1991, the

87/359/EEC, the Commission declared the provisions of the Spanish Decree-Law incompatible with the provisions of Article 90(1), in conjunction with Article 7 of the EEC Treaty, as it discriminated against Community residents on the basis of nationality. Later the Spanish Decree-Law was amended and now provides for the discounted fares for all Community residents in the islands.

\textsuperscript{106} Commission Decision 29 July 1998, regarding aid to residents of the Canary and Balearic Islands, not yet published.

\textsuperscript{107} Commission Decision 27 August 1998, regarding aid to residents of Madeira, not yet published.

\textsuperscript{108} European Commission, XXVIIIth Report on Competition Policy, (Luxembourg: Office for Official Publication of the European Communities, 1999), at p. 78.

\textsuperscript{109} Commission Decision of 6 July 1994 concerning compensation in respect of the deficit incurred by TAP on the routes to the Autonomous Regions of the Azores and Madeira, 94/1666/EC, OJ No L 260, 8.10.1994, p. 27.
Commission stated its sympathetic consideration towards state aid aimed at cost increases directly linked to the effect of the hostilities in the Gulf on European airlines. The Commission however, did not refer specifically to Article 87(2)(b).  

3.3. Aid to Certain Areas of the Federal Republic of Germany

Under Article 87(2)(c) of the Treaty and Article 61(2)(c) of the Agreement aid granted “to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany” is permitted. This provision is now only of historical importance since the unification of East and West Germany in 1990. Of course, aid measures might still be proposed in order to remedy the present day effects of the division of Germany in the past. However, the Commission in its Report on Competition Policy has stated that following German reunification the grant of aid to those “areas of the Federal Republic of Germany affected by the division of Germany” will no longer be evaluated under the mandatory exemption of Article 87(2)(c) as the Commission no longer sees any economic justification for continuing to subsidize those areas of Germany. Any measures proposed to remedy the present day effects of the division of Germany in the past will be assessed under Article 87(3) of the Treaty.  

110 IP(91)10.  
Chapter 4. Discretionary Exemptions

Article 87(3) of the Treaty and Article 61(3) of the Agreement\(^{113}\) provide for discretionary exemptions subject to the advance formal approval of the Commission or the EFTA Surveillance Authority prior to implementation of the aid.

Article 87(3) of the Treaty:

"The following may be considered to be compatible with the common market:

a. aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

b. aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

c. aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. However, the aid granted to shipbuilding as of 1 January 1957 shall, in so far as they serve only to compensate for the absence of customs protection, be progressively reduced under the same conditions as apply to the elimination of customs duties, subject to the provisions of this Treaty concerning common commercial policy towards third countries;

d. aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;

e. such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission".

Sub paragraphs (d) and (e) have so far not been applied to air transport. Aid for economic activities or areas under (c) have been the most common ground for justifying aid to airlines and aerospace companies. However, (a) and (b) have had some relevance in a number of cases.

4.1. Commission’s Discretion

In exercising its discretion the Commission applies a general rule that the exemptions are to be construed narrowly since the norm is to prohibit the grant

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\(^{113}\) Article 87(3) of the EC Treaty and Article 61(3) of the Agreement are not entirely identical. The Agreement does not contain sub-paragraph (d) of the Treaty; aid to promote culture and
of state aid which distorts competition. The derogation can only be applied in cases where it can be shown that the aid would contribute to the attainment of one of the objectives in Article 87(3) and having regard to the principles set out in Article 3(g) of the Treaty. The scope of the exemptions can not be broadened by analogy or some other form of reasoning in order to apply to aid measures for which they do not expressly provide. The compatibility with the Treaty must be determined in the context of the Community as a whole and not in the context of a single Member State. Therefore, Member States on their own are not competent to apply directly the provisions of the Treaty relating to state aid.

In order to ensure that public authorities and businesses are clear about their legal positions the Commission has sought to make its approach public in applying the discretionary exemptions. The Commission has set out different criteria for each type of aid envisaged. Schemes of general, regional, industrial nature are subject to various regulations, directives, notices, communications, guidelines, frameworks, codes and letters to the Member States.

It should be noted here that regulations in Community law are binding in their entirety according to Article 249 of the Treaty, whereas directives are binding as to the result to be achieved. However, notices, guidelines, letters and so on are acts sui generis and are not provided for in Article 249 and in principle have no binding force. It is accepted that these acts sui generis may have a binding force if they are the subject of a formal agreement between the Commission and all Member States. No such agreements exist in the field of heritage conservation. Whereas reference is made to the Council in sub-paragraph (e) the Agreement in sub-paragraph (d) refers to the EEA Joint Committee.

116 Ex Article 189 of the Treaty.
117 Article 249 Treaty: "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have a general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force".
These acts are intended to indicate the criteria the Commission will apply when deciding whether or not to authorize aid of the kind described in the act. They do not in any way exempt the Member States from notifying the aid. The Commission in its Memorandum No 2\textsuperscript{119} made clear its policy that it would follow the exemptions in Article 87 in the same way as it is applied, \textit{mutatis mutandis}, in other economic sectors.\textsuperscript{120} Subsequently, the Commission has stated that it will take into account a number of factors when reviewing proposed aid plans. It should take into account not only the necessity of the aid as a means of achieving economic goals but also social objectives.\textsuperscript{121}

In the \textit{Phillip Morris} case\textsuperscript{122} the Court of Justice set out guiding criteria on which the Commission must base its decision. As stated in the Commission’s XIIth Report on Competition Policy\textsuperscript{123} the criteria are as follows:

i) that the aid should promote a development which is in the interest of the Community as a whole — national interest alone is not enough to justify aid;

ii) the aid must be necessary for the achievement of this result, and the objective could not be obtained in its absence;

iii) the modalities of the aid; duration, the intensity and scope of the aid must be proportionate to the importance of the intended results.\textsuperscript{124}

Specifically, the Commission referred to its doctrine of compensatory justification. Under the doctrine, aid will be justifiable on one of the grounds set out in Article 87(3) where there is “contribution by the beneficiary over and above the normal play of market forces for the achievement of a Community objective”. The validity of the doctrine was reviewed by the Court in the \textit{Philip Morris} case\textsuperscript{125} and approved, the Court finding that as the beneficiary undertaking was in a position to make the necessary investment itself for the...
attainment of one of the objectives in Article 87(3) the aid was not indispensable. Philip Morris had argued that the Treaty should be interpreted as requiring approval of state aid that fell within the categories outlined in Article 87(3) without any regard to the ability of the market to achieve the desired goal. The Court rejected the view.

The Court of Justice has consistently upheld the Commission’s discretion with respect to whether aid qualifies for one of the exceptions listed in Article 87(3).126

4.2. Article 87(3)(a) of the Treaty and Article 61(3)(a) of the Agreement
Under Article 87(3)(a) of the Treaty and Article 61(3)(a) of the Agreement the Commission, or in the case of the Agreement, the EFTA Surveillance Authority, may declare aid which is designed to assist regions which suffer under abnormally low standards of living or serious unemployment compatible with the common market. State aid to other regions may be exempted under the provisions of Article 87(3)(c).

Article 87(3)(c) overlaps to a certain degree with Article 87(3)(a) whereas it relates to aid designed to facilitate the development of certain economic activities or certain economic areas. In the case of Germany v Commission127 the Court of Justice sought to explain the difference. It held that paragraph (a) the parameters of ‘abnormally’ and ‘serious’ applied to an economic situation which was “extremely unfavorable in relation to the Community as a whole”. Paragraph (c) was wider in scope so that it permitted aid for the development of certain areas without being restricted by the parameters in paragraph (a), except that the aid must not affect trading conditions to an extent contrary to the common interest. It empowered the Commission to authorize aid intended to further the economic development of areas of a Member State which were disadvantaged in relation to the national average.

Regional aid, such as aid under Article 87(3)(a) and (c), has the specific aim to develop those regions that are disadvantaged, by supporting investment and job creation in a sustainable context. Expansion of economic activities, modernization and diversification are essential to encourage new firms to settle and to assist those activities already present to continue to stay in business.

Taking into account that the liberalization measures that entered into force on 1 January 1993 (introduction of consecutive cabotage) creating an integrated single market in air transport and the authorization of unrestricted cabotage from 1 April 1997, the Commission has stated that direct aid for the operation of regional air services can not in principle be exempted on the basis of Article 87(3)(a) of the Treaty. Operating aid has a direct effect on production costs and on the selling price of services and products. It may artificially maintain excess capacity and discourage firms in difficulties from undertaking the necessary adjustments in order to solve their operational problems. The same views have been expressed in reference to general investment aid and other types of operational aid, as such aid generally lacks any regional or sectoral impact.

According to the Commission, operating aid will be considered in two cases only: (1) if aid is of social character, granted to individual consumers, provided that it is granted without discrimination related to the origin of the services, and (2) if it serves to reimburse a carrier selected by public tender for performing the required public service.

Regions as specified under Article 87(3)(a) are particular regions within Member States. Member States must notify to the Commission of the methodology and the quantitative indicators which they wish to use to determine the eligible regions within their state and supply the Commission with a list. The Commission in its guidelines on national regional aid sets out conditions

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129 Ibid at p. 18.
130 See section 3.1.
131 The notion of a public service obligation is defined in Council Regulation (EEC) No 2408/92 on access for air carriers to intra-Community routes. See section 2.7.1.
that the regions listed must satisfy. In the case of transfer of the RLS pilot school to KLM at bargain prices, the Commission was not satisfied that Schiphol and Eelde, where the school was located, were regions which suffered from abnormally low standards of living and serious unemployment since the zones were not located within regions eligible for regional aid. In the case of aid granted to carriers operating on specified routes to Sardinia the Commission was willing to accept that the entire Sardinian region was covered by Article 87(3)(a), and air services provided an important means for linking the region with the rest of the Community and consequently promoting the economic development of the island.

In applying Article 87(3)a) of the Treaty and Article 61(3)(a) of the Agreement the situation is viewed precisely and formally. The Commission assesses the relative level of development of different zones compared with the Community average. For the purpose of those provisions, the economic situation is assessed by reference to per capita GDP (gross domestic product) / PPS (purchasing power standard) using the Community index, NUTS level, for the region. In a second stage, the relative level of regional development is compared with the Community average of the last three years for which statistics are available. These amounts are calculated based on data furnished by the Statistical Office for the European Communities. Therefore, regions to be classified as falling within the scope of Article 87(3)(a) are regions, NUTS level II, which have a GDP/PPS threshold of 75% or lower, thus indicating an abnormally low standard of living and serious underemployment. The Court of Justice has held that “the use of the words “abnormally” and “serious” in the exemption contained in Article 87(3)(a) shows that it concerns only areas where

132 European Commission, Guidelines on national regional aid, OJ No C 74, 10.3.1998, p. 9. See also; European Commission, National ceilings for regional aid coverage under the derogations provided for in Article 92(3)(a) and (c) of the Treaty for the period 2000-2006, OJ No C 165, 21.1.1999, at p. 5.


the economic situation is extremely unfavorable in relation to the Community as a whole". The granting of aid is furthermore conditional to the maintenance of the investment and the jobs created during a minimum period in the region (i.e. aid only of temporary duration) and the amount of aid being degressive. Only in exceptional cases, where such aid is not enough to commence the process of regional development, the regional aid may be supplemented by operating aid.

An individual ad hoc payment made to a single firm or aid confined to one specific area of activity may have a major impact on competition in the relevant market and its effects on regional development are likely to be very limited. Therefore the Commission has stated that Article 87(3)(a) of the Treaty and Article 61(3)(a) of the Agreement exemption is only applicable to the air transport sector if the proposed aid is made available to all air carriers operating into, and not just based in, the Member State concerned. On the basis of non-discrimination, if such aid were granted, all other carriers that operate services to that Member State would also have to receive aid.

The Commission has in its decisions firmly stated it will not allow carriers to rely on Article 87(3)(a) in support of attempts to grant state aid to a single air carrier established within that Member State's territory. In the case of proposed equity injection into Aer Lingus by the Irish Government the Commission came to the conclusion in its communication to Member States, that: "The Commission does not share the Irish authorities' opinion on the applicability of Article 92(3)(a) [now Article 87] to the aid to Aer Lingus. Even though Ireland is a region within the scope of Article 92(3)(a), the aid under scrutiny is not a general scheme from which all the airlines based in Ireland linking it with the rest of the world may benefit. The aid is an ad hoc measure which helps the state-owned carrier to overcome its financial crisis and maintains Aer Lingus on the market. Therefore, Article 92(3)(a) cannot be applied in the present case."
In other state aid cases, such as concerning the Government of Greece and Portugal, the Commission has upheld the same view as stated here above.  

An exceptional case is aid to TAP in 1994 for the reimbursement for public service to the Portuguese islands, an underprivileged region, which at the time was not covered by the third package. Since none of the Portuguese regions had GDP/PPS of more than 75%, the Commission concluded that the aid could be characterized as regional aid under Article 87(3)(a) of the Treaty and added: "The compensation of TAP’s deficit is an operating aid of regional character, being designed to overcome a permanent and structural disadvantage caused by the remote location of the Autonomous Regions. In view of the situation it appears that, as long as the access to such routes is not entirely liberalized, the only way for the Portuguese Government to deal with the serious economic and social problems linked to the remoteness of the Autonomous Regions is to impose a public service obligation in respect of them, and compensate the deficit incurred by TAP on these routes". In another case the Commission took a favorable view towards direct operational aid granted by German regional authorities to support certain domestic routes.

Other measures where Article 87(3)(a) has been the legal basis was in 1990 when regional development aid was to Lufthansa for the purposes of extending its pilot training school at Bremen airport and aid to two regional UK airlines operating out of Carlisle airport in 1987.

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142 Ibid at p. 34.

143 Goh, J., European Air Transport Law and Competition, (Chichester: John Wiley & Sons, 1997) at p. 223.

144 ECU 15.5 million was granted to Lufthansa, IP/90/762.

4.3. Article 87(3)(b) of the Treaty and Article 61(3)(b) of the Agreement

Article 88(2)(b) of the Treaty and Article 61(2)(b) of the Agreement call for derogation, subject to the Commission's discretion, to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.

4.3.1. Project of common European interest

The phrase "project of common European interest" has not been specifically defined. The Commission has wide discretion in its assessment as to what it constitutes. According to the Commission, the 'project' must meet the following criteria:

- the aid must promote a project, 'promote' being taken to mean action which contributes to implementation of the project,
- it must be a specific, precise and clearly defined project,
- the project must be important both quantitatively and qualitatively, especially qualitatively,
- the project must be of 'common European interest' and as such benefit the whole of the Community.

'European interests' may be taken as to constitute interest not only of the EEA states, but also of other non-EEA states. 'Interests', as stated, may refer to the objectives set out in the Treaty or may be implied in order to realize the integration objectives in Article 2 of the Treaty. The crucial point is whether projects are of common interest and may benefit other Member States, or if the project is only beneficial to one Member State. Participation of all Member States is not required for the aid to fall within the exception of Article 87(3)(b) of the Treaty or Article 61(3)(b) of the Agreement. A project of two or more

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Member States may thus constitute “project of common European interest”\textsuperscript{148}
Unilateral action of a single state is not considered adequate.\textsuperscript{149}

In a Commission decision, concerning fiscal aid given to German airlines in
the form of depreciation facilities,\textsuperscript{150} the German Authorities argued that the aid
in question constituted investment aid to encourage, among other things, the
purchase of new less polluting aircraft. However, the aid in question was not
allocated to a specific project or program, any more than it was expressly
reserved for the purchase of aircraft of a particular type or with specific
environmental characteristics. Furthermore, the German initiative was made
unilaterally by the German State outside any framework for Community action
and could therefore hardly constitute a project “of common European interest” as
such nor benefit the whole of the Community.

In its Memorandum No 2,\textsuperscript{151} the Commission noted that the provision of aid
to ensure that an airline operates a specific type of aircraft had been justified to
the Commission by one Member State on the ground of execution of an
important project of common European interest.\textsuperscript{152} The Airbus Project of 1974
is an example of authorization of aid under Article 87(3)(b) of the Treaty. Aid
was granted by the German, French, United Kingdom and Spanish governments
to the Airbus consortium comprising Aérospartiale of France, Daimler-Benz of
Germany, British Aerospace of United Kingdom and Casa of Spain for the
manufacture of aircraft and aircraft parts.\textsuperscript{153}

Aid may also be authorized where it is provided, not necessarily to a joint
project as such, but to certain participants in the project. For example, the
Commission authorized German aid to space projects, mostly carried out through
international and European co-operation. There are very few cases of “important


\textsuperscript{149} Supra 146, at p. 53.

\textsuperscript{150} Ibid.

\textsuperscript{151} Supra 119.

\textsuperscript{152} Supra 119, Annex IV.7 (vi).

\textsuperscript{153} Adkins, B., European Competition Law Monographs: Air Transport and EC Competition
Law, (London: Sweet & Maxwell, 1994) at p. 160. See also European Commission, II Report
on Competition Policy (Luxembourg, Office for Official Publications of the European
Communities, 1973) at point 102.
projects of common European interest” justifying an exemption.\textsuperscript{154} The Commission has stated in its 1991 report\textsuperscript{155} that Article 87(3)(b) “can be applied to projects which are quantitatively and qualitatively important, are transnational in character and are related to the definition of international standards that can allow Community industry to benefit from all the advantages of the single market”.\textsuperscript{156}

To be authorized, aid must promote the project in the sense that without the aid the project would not go ahead, or only in such a manner that it would no longer be considered an important project of common European interest. The aid must show benefit to a project of common interest to the Community or correct an aberration to the economy. The Commission maintains that aid under this derogation will only be granted in exceptional circumstances.\textsuperscript{157}

4.3.2. Remedy of a Serious Disturbance

Aid to remedy a serious disturbance in the economy of a Member State may be authorized under Article 87(3)(b) of the Treaty and Article 61(3)(b) of the Agreement. The ‘disturbance’ must have a national significance and be of a serious nature by Community standards.\textsuperscript{158} It is not sufficient that the aid is to remedy a serious disturbance in the economy when the Commission reviews the application for the granting of aid, but possible effects of aid on competition within the Community must also be reviewed.\textsuperscript{159} The aid must not result in recipients being left in a stronger position than was necessary to ensure their viability or in a stronger position vis-à-vis industries in other Member States than they would be in had the disturbance not risen in the first place. The aid must not promote expansion of production capacity nor must it merely shift the

\textsuperscript{154} Supra 139. Projects exempted have usually been associated with programs such as the European Strategy Program for Research in Information Technologies (ESPRIT), Research and Development in Advanced Communication Technologies for Europe (RACE) and Basic Research in Industrial Technologies for Europe (BRUTE).


\textsuperscript{156} The Commission considered that state aid granted to encourage research and development for the definition of a European standard for High Definition Television could be exempted, Commission Regulation No 3029, OJ L No 271, 1993.

\textsuperscript{157} European Commission, Second Report on Competition Policy, (Luxembourg: Office for Official Publications of the EEC, 1973), pt. 120.

\textsuperscript{158} Supra 147, at p. 35.
problem without finding a general solution to the social and industrial problems facing the Union as a whole. In a Commission decision regarding Olympic Airways, the Greek government invoked Article 87(3)(b) of the Treaty in its notification to the Commission of a restructuring and reorganization plan for Olympic, claiming compatibility because the aid was intended to remedy a serious disturbance in the Greek economy. It argued that Greece was one of the poorest nations in the Union and account should be taken of the special and semi-insular geography of Greece. The Commission came to the conclusion that the aid in question was chiefly aimed at saving the airline from bankruptcy and it reasoned that the aid “relates only to one undertaking and could not possibly have either as its object or effect and remedying of serious disturbance in the Greek economy.” Therefore, Article 87(3)(b) of the Treaty and Article 61(3)(b) of the Agreement could not apply.

Different views have been argued on whether decision to grant aid based on Article 87(3)(b) may be addressed to affluent states as well as the economically challenged. It has been argued that aid may not be granted based on Article 87(3)(b) to relatively wealthy Member States should they suffer from economic crisis. Rather that the exemption in Article 87(3)(b) should apply only to states whose overall economic situation is weaker compared to the Community average. Despite the serious recession that has effected most of the Community in recent years, the Commission has been very reluctant to grant aid on the basis of sub-paragraph (b). Perhaps, as one might conclude, the Commission’s reluctance indicates the near impossibility of the Commission to permit Member States to invoke it now. A rare example of Commission approval of aid under sub-paragraph (b) was aid designed to assist companies experiencing difficulties

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159 Ibid at p. 36.
161 Supra 160, at p. 41.
162 Supra 158, at p. 36.
163 Supra 138, at p. 300.
in Greece due to nationwide economic crises\textsuperscript{164} and for protection of employment\textsuperscript{165}

4.4. Article 87(3)(c) of the Treaty and Article 61(3)(c) of the Agreement

4.4.1. Introduction
Article 87(3)(c) of the Treaty and Article 61(3)(c) of the Agreement provide for an exemption subject to the Commission’s or the EFTA Surveillance Authority’s discretion regarding aid for the development of certain economic activities or of certain economic areas, whereas such aid does not adversely affect trading conditions to an extent contrary to the common interest.

The scope of application of Article 87(3)(c) of the Treaty is considerably wider than the other exemption clauses. The provision concerns two kinds of aid: (1) sectoral aid, i.e. aid to certain economic sectors, industries as a whole or individual companies, and (2) regional aid, i.e. aid to certain regions of an economy\textsuperscript{166}. Sub-paragraph (c) has also been used to exempt horizontal aid\textsuperscript{167} which is granted irrespective of the beneficiaries’ industry or location. However, such aid is subject to more stringent requirements than sectoral or regional aid.

4.4.2. Sectoral Aid
The notion of sectoral aid to certain sectors and industries of the economy has been developed by the Commission. One may distinguish between two sectors: on the one hand where the Treaty provides for a legal basis for specific Community regulation on sectoral aid, such as coal and steel, agriculture and fisheries and transport\textsuperscript{168}, and on the other hand industries where no common


\textsuperscript{166} See section 4.4.3. on Article 87(3)(c) of the Treaty and Article 61(3)(c) of the Agreement.

\textsuperscript{167} In earlier Community decisions, reference was made to “general aid” but those two terms, horizontal and general aid, are now used synonymously. The most recent Competition Reports only refer to horizontal aid. See further section 4.4.4.

\textsuperscript{168} Transport via rail, road and inland waterway is subject to various regulations whereas aviation and maritime transport are subject to Commission guidelines. See European Commission,
organization is established; such as the motor vehicle industry, the textiles and the synthetic fibers industries.

The second sentence of Article 87(3)(c) contains a special rule for aid to shipbuilding that was in existence on January 1, 1957. Aid to shipbuilding is furthermore subject to various Council regulations.\(^{169}\)

The Commission has expressed its attitude towards sectoral aid as basically negative.\(^{170}\) Aid should be limited to cases where and to the extent it is justified by circumstances in the specific industry concerned. Where aid leads to restoration of the long-term viability of an industry, it may be exempted, but not when it preserves the status quo and merely postpones inevitable changes. Aid should therefore be linked to a restructuring of the sector concerned and normally be progressively reduced. Article 87(3)(c) of the Treaty has been given a restrictive interpretation so as to exclude aid which merely serves to benefit the activities of the recipient of the aid. The aid should, on the contrary, be capable of contributing to the sector as a whole.\(^{171}\)

In theory, the Article 87(3)(c) exemption is only available if the state aid results in a benefit to the industrial sector as a whole and not merely to the individual recipient company. In reality, the practice has not been based entirely on the reasoning of the aid’s greater good to industry but rather on the fact that it would be politically unacceptable to Member States if the Commission refused an exemption in the air transport sector on the grounds that it would be preferable that an airline went out of business.\(^{172}\)

The Commission maintains the view that air transport is subject to the state aid rules of the Treaty to the same extent as any other industrial sector.\(^{173}\) This statement has not been well received by all, and learned authors have argued that

\(^{169}\) See a complete list of applicable measures; http://europa.eu.int/comm/dg04/aid/aid.htm.


\(^{172}\) Soames, T., Ryan, A., "The practical application of the state aids rules to the air transport sector", (1994) 7 European Air Conference Papers (State Aid to Airlines - Seminar in Brussels, 3 June 1994) 33, at p.56.
the Commission has applied its discretion under Article 87(3) of the Treaty to create an industry specific policy for air transport.\textsuperscript{174} State aid to airlines is subject to the same principles of the Community guidelines on state aid for rescuing and restructuring firms in difficulty\textsuperscript{175} as other firms in other sectors and industries. The guidelines on aid in the aviation sector serve to clarify further the rescue and restructuring guidelines as they apply to airlines and other firms in the aviation sector.

Aid to certain industries as a whole, such as the air transport industry or individual companies, such as airlines, may fall within the exemption in Article 87(3)(c) of the Treaty if the conditions set out in Article 87(3)(c) are fulfilled. Namely that:
- Aid must facilitate the development of certain economic activities;
- Aid must not adversely affect trading conditions to an extent contrary to the common interest.

Furthermore as the Commission itself has ruled: "Since...it will then be a matter of granting aid to companies which, although basically viable, have run into difficulties threatening their survival, it follows that the operation must not result in their being left in a stronger competitive position vis-à-vis industries and other Member States than would otherwise occur had those difficulties not arisen in the first place. Accordingly the aid must not promote the expansion of production capacity nor must it merely shift the problem without finding a genuine solution to the social and industrial problems facing the Community as a whole or even aggravate the situation even further in the medium or long-term future."\textsuperscript{176} These conditions will be examined more closely in Section 4.4.2.2.

General Conditions of Compatibility

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\textsuperscript{173} European Commission, Civil Aviation Memorandum No 2: Progress towards the development of a Community air transport policy, 15.3.1984, COM (84) 72 final, at p. 37.

\textsuperscript{174} \textit{Supra} 138. See also Flynn, J., "Is Air Transport Special", 9 European Air Law Association Conference Papers (Seventh Annual Conference 3 June 1994 in Brussels) 75.

\textsuperscript{175} European Commission, Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty (Notice to Member States including proposals for appropriate measures), OJ No C 368, 23.12.1994, p. 12 and OJ No C 67, 10.3.1999 (extending the validity until 31 December 1999).

Article 87(3)(c) of the Treaty has been the basis for the Commission's authorization to grant state aid to all airlines that have benefited from aid since 1993 and even earlier. In the following sub-sections, efforts will be made to concentrate on the cases of the following airlines and the restrictions and conditions on which the aid measures granted were based.

<table>
<thead>
<tr>
<th>Airline</th>
<th>Year</th>
<th>Aid</th>
<th>No of installments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sabena</td>
<td>1991</td>
<td>BEF 65,2 billion</td>
<td>Two</td>
</tr>
<tr>
<td>Iberia</td>
<td>1992</td>
<td>ESP 120 billion</td>
<td>One</td>
</tr>
<tr>
<td>Aer Lingus</td>
<td>1993</td>
<td>IEP 175 million</td>
<td>Three</td>
</tr>
<tr>
<td>Air France</td>
<td>1994</td>
<td>FRF 20 billion</td>
<td>Three</td>
</tr>
<tr>
<td>Olympic Airways</td>
<td>1994</td>
<td>ECU 1.9 billion</td>
<td>Three</td>
</tr>
<tr>
<td>TAP</td>
<td>1994</td>
<td>ESC 180 billion</td>
<td>Four</td>
</tr>
<tr>
<td>KLM</td>
<td>1994</td>
<td>NLG 17 million</td>
<td>One</td>
</tr>
<tr>
<td>Alitalia</td>
<td>1997</td>
<td>ECU 1.419 billion</td>
<td>Three</td>
</tr>
</tbody>
</table>

4.4.2.1. Rescue and Restructuring Aid

The Commission's approach to rescue and restructuring aid to airlines was first outlined in the 1984 guidelines on state aid and further elaborated in 1994. The 'Committee of Wise Men' on civil aviation, better known as the Comité des.

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181 Supra 160.
186 Supra 128.
Sages, in its report to the Commission,\textsuperscript{187} in January 1994, urged the Commission to strictly enforce the Treaty provisions concerning state aid.\textsuperscript{188} However, for a brief period, the Comité recommended to approve state aid where the aid serves Community interest in a restructuring that leads to competitiveness. The transition of an airline to commercial viability may be in the Community’s interest if the position of its competitors is safeguarded. In line with the recommendations of the Comité des Sages, the Commission decided in its aid guidelines in the aviation sector to allow, in exceptional cases, state aid given in connection with a restructuring program.\textsuperscript{189} However, such aid would invariably be subject to a number of conditions.

Airlines in financial crises have on occasion needed urgent rescues just to withstand financial shortages or even bankruptcy. This has been especially relevant in the past few years during the transition to liberalization of air transport in the Community during recession and difficult economic times.

Rescue aid, by its very nature, tends to distort competition insofar as it affects trade between Member States. Under certain conditions, and allowed only as a short-term transitional device, rescue aid may be exempted preceding a restructuring operation. By nature, rescue aid is a temporary assistance. It should only make it possible to keep a firm in financial distress afloat for the time needed to work out the restructuring plan and only for the length of time that the Commission needs to be able to reach a decision on that plan. Rescue aid may be justified, for instance, by social or regional considerations, by the desirability of maintaining a competitive market structure when the disappearance of a firm could lead to a monopoly or a tight oligopoly situation.\textsuperscript{190}

The Commission regards a firm in difficulty where it is unable, either through its own resources or with the funds it is able to obtain from shareholders, owners


\textsuperscript{189} Supra 128.

\textsuperscript{190} Supra 175 at p. 1.
or creditors, to recover from its losses, and without the outside intervention from public authorities is almost certain to go out of business.\textsuperscript{191}

Restructuring aid is defined by the Commission as aid which is part of a feasible, coherent, and far-reaching plan to restore the long term viability of the recipient.\textsuperscript{192} It usually involves reorganization and rationalization of the firm’s activities on to a more efficient basis.

4.4.2.2. General Conditions of Compatibility

The Commission has stated that in line with the recommendations of the Comité des Sages it will continue with its policy to allow in exceptional cases state aid in connection with a restructuring program.\textsuperscript{193}

4.4.2.2.1. Comprehensive Restructuring Program

The Commission’s guidelines specifically describe a comprehensive restructuring program which should aim to restore the airline’s health so that it can, within a reasonable period, and on the basis of realistic assumptions as to its future operating conditions, be expected to operate viably and normally without further aid.

From the outset, it must be clear what the aid is all about quantitatively and qualitatively. The aid’s beneficiaries must be defined, as well as the mechanism, goal and the importance of the aid in absolute terms and in proportion to the total investment. The Member States are obligated to co-operate with the Commission and provide information concerning the aid measure and all circumstances relating to the aid required in order to assess the necessity and the proportionality of the aid.

The aid must be of limited duration and particular attention must be focused on the viability of the plan, and that no further aid should be envisaged or be likely to be required in the future, on the basis of the following factors:

- market analysis and projection for developments in the different market segments;
- planned cost reductions;

\textsuperscript{191} Ibid.
\textsuperscript{192} Supra 175, at p. 3.
- closing down of unprofitable routes;
- efficiency and productivity improvements;
- expected financial developments of the company;
- expected rates of return;
- profit, dividends and other factors that may be critical to the successful restructuring of the airline.

Furthermore, the aid must be controllable and linked to a plan so that the ultimate effect of the aid is not simply to ensure the survival or continuity of the airline, but will in fact allow for the implementation of the objectives of the plan. The Commission will check on compliance with conditions and progress which is particularly of importance in cases where the aid is paid out in installments. Regular progress reports may be a condition to further installments being paid out and the assistance from external consultants may be required to report on the aid recipient’s progress.194

4.4.2.2.2. Justification of Aid

The aid must be justified by market failure or external factors. The Article 87(3)(c) exemption can only be invoked when the Commission is satisfied that the market forces alone would be insufficient to the recipients of the aid in the industry sector or region concerned. The Commission must be convinced that without aid areas or sectors would not be able to attract sufficient private investment to reduce their deficit. If the proposed investment would be profitable without the aid, the aid must not be granted.

In 1991 the Belgian Government notified the Commission of its intention to grant aid to Sabena. The measures included a transfer of BEF 16.2 billion into Sabena’s capital which had been granted by the Belgian State over the period 1949 to 1981; a capital increase of BEF 10 billion by subscription of shares and immediate payment; a capital reduction with cancellation of ordinary shares held by the Belgian State amounting to BEF 30.2 billion.195 An additional amount of BEF 9 billion was notified in the context of the second stage of the re-

193 Supra 175, at para 37.
194 Supra 128, at para. 1.3-5.
195 Supra 177, at p. 48.
capitalization. By clearing Sabena's past debts and using the increase in capital to wipe out loans and finance restructuring and staff reductions, the Belgian State hoped to reverse the situation. The Commission stated in its decision, as it granted the aid measure, that "in view of the accumulated debts and the costs of the restructuring programme, no investor apart from the State would at present be prepared to take part in the restructuring programme of Sabena".  

4.4.2.2.3. The Rule of Proportionality

In order to keep distortion to competition at a minimum and to not affect trade to an extent contrary to the common market,\(^\text{197}\) the Commission in granting an exemption to state aid makes certain that the aid in question is proportionate to the problem that it is designed to resolve.

The Italian Government proposed to inject capital totaling ITL 3.310 billion in July 1996 into Alitalia in order to restructure the company and create favourable conditions for privatization. Following the Commission's initiation of Article 87(3) procedure, four Member States and ten interested parties, including eight airlines, submitted comments, arguing e.g. that the aid notified was disproportionate in nature and would result in overcapitalization of the company, resulting in a very strong advantage granted to the recipient over its competitors. After extensive consultations with the Commission, the Italian Government in April of 1997 adjusted its proposed capital injection to ITL 2.800 billion. In the Commission's final decision of July 1997 the amount of the proposed capital increase was further reduced to ITL 2.750 billion and divided into three installments.\(^\text{198}\)

In 1993, the Irish Government proposed IEP 175 million equity injection into the Aer Lingus Group.\(^\text{199}\) In its assessment the Commission balanced the restructuring plan, the competitive environment in which Aer Lingus operated, and the effect of aid on the market, capacities and load factors when reaching its

\(^\text{196}\) *Supra*, 195 at part IV of the decision.


\(^\text{198}\) *Supra* 184, p. 44.

\(^\text{199}\) *Supra* 179.
decision that the aid was adequate and proportionate to the aim of financing the transition and restoring the airline’s commercial viability.

4.4.2.2.4. Aid Must Facilitate the Development of Certain Economic Activities

The notion “development” as stated in Article 87(3)(c) suggests any economic process of adaptation, such as rationalization, reorganization or restructuring.

The aid must not provide artificial support to unprofitable undertakings and the Commission has repeatedly stated that state aid should not be used to prevent non-viable firms from disappearing from the market. Aid that simply preserves the status quo and does not contribute to any changes in the situation of the undertaking is therefore not contributing to any development to the recipients of the aid. The ‘test’ of the aid therefore focuses on whether the aid would have the actual effect of facilitating the development and remedying the problems or if it was merely intended to do so. The airline in question must have the potential to become competitive; otherwise, the aid intended is merely operating aid to keep alive a failing company.

Restoration to financial viability requires critical measures to be taken and included in the reconstruction program. Restructuring usually involves one or more of the following elements (in no particular order):

- Reduction in costs and financial expenses, such as selling non-core assets and / or making a proportion of the workforce redundant through mandatory or voluntary measures, freezing wages, blocking promotions and proposing voluntary reduction in wages for free shares in the airline, for example;

- Application of a different concept of the products and better utilization of means with marketing initiatives, diversification to new viable activities, yield management to increase revenues and load-factors to increase profits;

- Adoption of measures to improve productivity, to reduce bureaucracy and improve the company’s capacity to react with better utilization of working time. Should restoration to financial viability require capacity reductions, adequate measures should be included in the program;

- Appropriate fleet reductions or fleet mix for optimal performance. Fleet renewal has so far been particularly sensitive to criticism. The acquisition of new aircraft, although part of an overall restructuring plan, has normally been considered an expense an airline has had to bear in its day-to-day management. In the Air France decision in 1994, as later challenged by seven rival airlines in the Court of First Instance, the failure of the Commission to adequately explain its reasons for allowing aid to be used by Air France to finance the acquisition of new aircraft, was inter alia grounds for annulment of the decision. As the Commission later re-argued its original decision it justified the investment on the grounds that it was subject to stringent conditions and moreover it enabled Air France to replace an old aircraft with a new, but not increasing seat capacity. The capacity matter, according to the Commission, was particularly relevant as the European aviation market was at the time not suffering from an over-capacity crisis. In the case of Iberia in 1987, one of the main reasons stated by the Commission for the granting of aid was fleet renewal, but the average age in 1990 of the aircraft in Iberia’s possession was 16.4 years. Furthermore, the fleet would then be compatible with Community rules on aircraft noise; 

- Enforcing changes in the route network, simplifying networks by abandoning marginal routes and focusing on routes that have prospective growth potential. In a decision concerning Aer Lingus, the Irish Government was obliged to discontinue its requirement concerning the obligatory Shannon stopover for Aer Lingus flights between Ireland and the USA as this was considered to be an obstacle to Aer Lingus’ return to profitability on the North Atlantic routes;

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201 Supra 180.
204 IP/92/606, 22.7.1996.
205 Supra 179.
- Securing that the recipient of the aid uses it wisely and effectively. On a number of occasions, the Commission has raised doubts as to the satisfactory implementation of the restructuring plan of the aid recipient;306

- Limiting the powers of the government providing the aid over management of the airline receiving the aid. For reasons other than those stemming from the government's ownership rights and commercial principles, the government should keep hands off the day-to-day management of the airline. Professor Doganis, a former CEO of Olympic Airways, has commented on this problem: "... that of ensuring that the government deals with the airline entirely at arms length as a normal shareholder, the Commission has had less success. This is partly because government pressures and involvement are not always transparent and partly because this requires a fundamental change of attitude and culture by politicians, civil servants, taxpayers and airline managers. In many countries this is difficult to achieve in a short period of time. Despite their comments to the Commission not to interfere, governments have in most cases found it difficult to avoid doing so. In Greece, successive transport ministers have continued to treat Olympic and its management as their predecessors had done before the restructuring, that is as an appendage of government".207

The items discussed here above have largely been standard conditions in decisions granting aid to airlines. In some cases, the conditions have been more implied than directly expressed or made a prerequisite during talks between the Commission and the Member State in question.

4.4.2.2.5. "Affect Trading Conditions Contrary to the Common Interest"

State aid must not adversely "affect trading conditions to an extent contrary to the common interest". The Commission must balance the beneficial effects of the aid in the development of certain economic activities or regions against its adverse effects on trading conditions and the maintenance of undistorted

206 Such as in the case of Olympic Airways; IP/96/362, 30.4.1996.
competition. The European Court of Justice has interpreted this condition as meaning that any state aid which, if granted, would adversely affect a competitor's market share, or would allow the recipient to increase its market share at the expense of its rivals, should not be exempted under Article 87(3)(c) of the Treaty.

The restructuring program can only be considered not contrary to the common interest if it is not expansive, expansion meaning: increase in capacity, increase beyond normal market growth in number of aircraft and capacity (seats) offered in the relevant market. The object of the aid must not be to increase the capacity of the airline at the cost of its direct European competitors. The geographical market is considered the European Economic Area as a whole, or specific regional markets particularly characterized by competition. If over-capacity exists in the air transport market the Commission will find it difficult to authorize the grant of aid unless sufficient capacity reductions are made. Under the rescue and restructuring guidelines and the 1994 aviation guidelines it is a condition for authorizing restructuring aid to firms operating within sectors suffering from structural over-capacity that the recipient firm reduces capacity in a genuine and irreversible way.

The Commission's approach to determining whether over-capacity in certain markets exists or not, has been subject to criticism. In some cases, such as concerning the Aer Lingus (1993), Air France (1994), and Olympic (1994) decisions, the Commission commented that there was no over-capacity in the European air transport market without going into much detail as to how it reached that conclusion.

A number of conditions are normally imposed by the Commission to place limits and restrictions on the recipient's commercial behaviour and to prevent the

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209 Supra 138 at p. 302.
210 Supra 128, at Chapter V, paragraph 38.4.
211 Ibid.
212 See Air Lingus decision, supra 179.
213 Supra 175.
214 Supra 128.
215 Supra 138, at p. 302.
aid measure having harmful effects on competition. Capacity restrictions or constraints or freezes on expansion have played a vital role. Aid should not provide the enterprise with cash which can be used for aggressive, market distorting activities or go to finance new investment (like acquisitions) not required by the restructuring. Constraints on expansion, route networks or fleet have been imposed in many cases; i.e. TAP, Alitalia, Aer Lingus, and Air France.

The Commission has so far avoided imposing capacity restrictions on extra-Community routes. In some cases, such as TAP, Iberia and Air France, the increase in capacity was not mentioned in the decisions granting aid, despite comments received from competitors.

A common condition to the approval of restructuring aid is the prohibition to acquire shareholdings in other airlines, such as in the Air France decision in 1994, Iberia in 1992 and in the 1995 Aer Lingus decision. However the wording of the condition “refrain from acquiring shareholding in any Community air carrier with the aid”, may be insufficient to prevent the airline from using other funds released by the availability of the state aid, for that purpose.

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216 Supra 182, see in particular Part VII, point 3 in the decision.
217 Supra 160, see condition (s) of the decision: “ensures that, throughout the entire duration of the plan, the number of seats offered by Olympic Airways on scheduled flights in the EEA, including additional and seasonal flights, but excluding services between continental Greece and the Greek islands, will not exceed that offered by Olympic Airways in the EEA market in 1993 (3,518,778 seats), taking account, however, of possible increase proportional to the growth of the market in question”.
218 Supra 184, see condition 5 of the decision: “until 31 December 2000 the available capacity of aircraft operated by Alitalia or by other carriers under agreements whereby Alitalia assumes the commercial risk for such capacity (wet-leasing, block-space, joint venture agreements, etc.) shall not exceed the following limits: (a) the number of seats available shall not exceed 28,985, of which 26,350 shall be for Alitalia’s own fleet; (b) the increase in the number of available seat-kilometers for each calendar year – within the European Economic Area excluding Italy, and – within Italy shall not exceed 2.7% on the understanding that no growth is to be authorized if the growth in the corresponding markets remains lower than 2.7%. However, if the growth rate in the corresponding markets exceeds 5%, supply may be increased above 2.7% by the margin of the increase beyond 5%”.
219 Supra 179, see condition (g) of the decision.
220 Supra 180, see condition (8) of the decision.
222 Supra 180.
223 Supra 178.
224 Supra 179.
225 Supra 174, at p. 305.
Other conditions invariably found in all decisions have included and been based on the 1994 aviation guidelines\textsuperscript{226}, such as:

- Prohibition to grant the airline any further aid during the restructuring period;
- Commitments to demonstrate the success of the restructuring program prior to any second and subsequent installments being paid out, and;
- Prohibition of price leadership on the European routes.

4.4.2.3. Approval of Restructuring Aid

In addition to the general conditions above, the Commission frequently sets out a number of specific conditions and requirements for the recipient to comply with in its decision to approve the aid.

4.4.2.3.1. One Time – Last Time

In the Report of the Comité des Sages a recommendation\textsuperscript{227} was made to the Commission that approvals made according to Article 87(3)(c) of the Treaty should include a clear genuine ‘one time – last time’ condition. The Commission’s aviation guidelines deviate on this point and provide for one state aid per restructuring plan, thereby leaving open the possibility for additional state aid to the same airline in the future. Articles 87 and 88 of the Treaty do not provide a solid legal basis for the recommendation of the Comité des Sages. It must be pointed out that the recommendations of the Comité are not legally binding in any way and the Commission must act in accordance with the Treaty rules as interpreted by the Court of Justice.

Nevertheless, the Commission has declared a strict approach in its guidelines in analysis of additional state aid to airlines having received aid in the past. The Commission normally requests written assurances from the government that the present aid will be the last. According to the aviation guidelines, restructuring aid should normally only be granted once. In evaluating a second application of aid the Commission states that it will “take into account all relevant elements, including the fact that the company has already received state aid. Therefore the

\textsuperscript{226} Supra 128.
\textsuperscript{227} Supra 187.
Commission will not allow further aid unless under exceptional circumstances, unforeseeable and external to the company".\textsuperscript{228}

Given this approach, further capital increase can only be approved (a) on the basis that the proposed transaction corresponds to the behaviour of a rational investor acting in the prevailing market, such as in the case of Iberia, or (b) where a special crisis situation arises. In 1992, Iberia received ESP 120 billion in aid from the Spanish government with the condition that there would be no further capital injections in the form of state aid.\textsuperscript{229} In 1996 further ESP 87 billion were approved by the Commission as a normal commercial investment\textsuperscript{230} and again in 1999, ESP 20 billion.\textsuperscript{231} Iberia has been scheduled for complete privatization in the year 2000.

In \textit{Italy v Commission} in 1991 (Alumina and Comsaf)\textsuperscript{232} the Court of Justice ruled that when the Commission considers the compatibility of state aid it must take all the relevant factors into account, including circumstances already considered in any prior decision and the obligations which that decision may have imposed on a Member State. The Commission can not therefore simply refuse further aid because of the condition in an earlier decision that no further aid be granted, if the carrier encounters further serious difficulties attributable to structural factors which were not present at the time of the previous decision and can demonstrate that the requirements of Article 87(3)(c) are otherwise satisfied. It has been suggested that the crisis encountered by the carrier must be in extremis; a drastic change in the competitive environment, war or some major changes of market structure.\textsuperscript{233}

\textsuperscript{228} \textit{Supra} 128, at V2, paragraph 2. See also; Ehlermann, C.D. "State aid control in the European Union: Success or Failure ?" (1995) 18 Fordham Int'l. L.J. 1212.
\textsuperscript{229} IP/92/606, 22.7.1992.
\textsuperscript{233} \textit{Supra} 172 at p. 67.
4.4.2.3.2. Privatization

Article 295\textsuperscript{234} of the Treaty\textsuperscript{235} acknowledges the existence of public ownership and enshrines the right of a Member State to invest or divest in company capital. The neutrality principle in Article 295 of the Treaty means that from a legal standpoint the Commission can not officially impose a condition to privatize on a government providing aid nor seek a commitment to do so.\textsuperscript{236} Nonetheless, the Commission’s approval of aid is often preceded by lengthy and intensive negotiations between the Member State granting the aid and the Commission. It is perhaps not uncommon during such negotiations for Commission officials to suggest that the Member State providing the aid formally propose the privatization of the recipient airline. A commitment from a Member State of privatizing the beneficiary of the aid is the best guarantee available to the Commission that the restructuring of the airline will enable it to return to full viability and that no additional aid will be necessary in the future. Moreover, the privatization may provide the recipient firm with the necessary funds to make the significant contribution to the restructuring plan normally required under the guidelines. The 1994 aviation guidelines themselves do not mention privatization as a condition for the approval of restructuring aid.

Several airlines which have received aid in the past years have taken measures towards full privatization or are in the process of doing so,\textsuperscript{237} such as Iberia, Alitalia, Finnair, TAP and Air France.\textsuperscript{238} So far, British Airways, Sabena,

\textsuperscript{234} Ex Article 222 of the Treaty.

\textsuperscript{235} Article 295 of the Treaty: “This Treaty shall in no way prejudice the rules in the Member States governing the system of property ownership”.

\textsuperscript{236} In the Air France decision in 1994, see supra 180, the Commission states on of the conditions to the grant of aid as follows: “(2) the process of privatizing Air France shall begin once the company’s economic and financial recovery has been achieved, in accordance with the Plan, having regard also to the situation on the financial markets”.

\textsuperscript{237} Iberia is 92% owned by the Spanish government and proposed to finish privatization in the year 2000, Air France is 91% owned by the French government and scheduled to begin privatization in 1999, Alitalia is 67% owned by the Italian government and privatization is proposed in the year 2000, TAP is 100% owned by the Portuguese government and privatization is planned in 1999.

Lufthansa, KLM and Air Outre Mer have completed privatization, although in some instances the State still retains some shares.\(^{239}\)

### 4.4.2.3.3. Other specific conditions

In certain cases, special conditions focusing on the recipient of the aid have been deemed necessary. In the case of Sabena, the status of the company statutes became an issue and the airline was required to base the new company statutes on private commercial law excluding the possibility of the Belgian State to intervene for other than commercial reasons. Furthermore, Sabena was required to transform privileged shares ‘actions privilégiées’ to normal risk shares ‘parts sociales’ within a specified timeframe.\(^{240}\) Similarly in the case of Olympic Airways, the Greek State committed itself to give Olympic the fiscal status of a public limited company comparable to that of Greek undertakings under ordinary law, except, however, for exonerating Olympic from any taxes likely to affect the re-capitalization operations envisaged in the undertaking’s re-capitalization and restructuring plan.\(^{241}\) In the case of TAP, it was a condition that the Portuguese Government abolish TAP’s tax exemption at the end of the restructuring period.\(^{242}\)

The Commission has on a number of occasions imposed specific conditions in decisions granting aid enforcing much more than simply the state aid rules. In some instances the conditions imposed have concentrated on bringing into effect elements of the third package or other regulatory measures the Commission has regarded as an obstacle to the liberalization process. In the case of Olympic Airways the Greek Government was required to repeal the monopoly position of Olympic on certain routes to the Greek islands, end the exemption given to Greek islands’ airports, and remove the condition to provide for guarantee for the repartition of passengers, to the exercise of traffic rights granted to Community airlines other than those licensed in Greece.\(^{243}\) In the case of TAP the Portuguese Government committed itself to impose public obligations where

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239 The Dutch State still holds 25% share in KLM and the Belgian government still holds 33.8% share in Sabena. *Ibid.*

240 *Supra* 177, p. 48 at V. Article 1.

241 *Supra* 160, p. 22 at VIII.

242 *Supra* 182, p. 29 at IX.
such routes had been subsidized. Furthermore, liberalization of charter services applied both in the cases of Olympic Airways and TAP.

The removal of specific treatment or exemptions has also been widespread; for example in the case of Sabena where the Belgian Government was required to abstain from granting any form of privileged treatment to Sabena in relation to other Belgian air carriers in the area of designation for traffic rights and in relation to all Community air carriers in the areas of slot scheduling, ground handling, catering and other airport-related activities. Similar commitments were drawn up in the case of Alitalia and Air France.

4.4.3. Regional Aid.

As mentioned in section 4.2., regional aid can be exempted under Article 87(3)(a) and (c) of the Treaty and Article 61(3)(a) and (c) of the Agreement. Regions eligible for aid under Article 87(3)(a) of the Treaty are regions that are suffering severe economic problems when compared to the rest of the Community, the relevant indicators standards of living and underemployment, whereas regions falling under Article 87(3)(c) are those with more general development problems in relation to national as well as the Community situation. Thus, the better the situation of a Member State is, compared with the Community average, the more important must be the disparity of a region within the national context in order to justify the award of aid.

Article 87(3)(c) of the Treaty and Article 61(3)(c) of the Agreement allow for greater latitude when it comes to defining the difficulties of a region that can be alleviated with the help of aid measures. The appropriate framework for evaluating the situation may be provided by the Community as a whole, but also by the relevant Member State. The regional aid covered by Article 87(3)(c) must form a part of coherent regional policy of the Member State and adhere to principles of geographical concentration set out in the Guidelines on national

243 Supra 160.
244 Supra 177.
245 Supra 184, p. 44 at IX.
246 Supra 180, p. 27.
regional aid. The determination of regions eligible in each Member State must fit into a framework guaranteeing the overall coherence of such determination at Community level. The Commission therefore fixes a ceiling on coverage of aid for each Country and eligible regions are selected.

The derogation provided for in Article 87(3)(c) can only be allowed to a very limited degree. Population coverage of regions falling under Article 87(3)(c) must not exceed 50% of the national population not covered by Article 87(3)(a). Therefore, only a small part of the national territory of a Member State may prima facie qualify for the aid. Furthermore, the aid will only be justified where it does not adversely affect trading to an extent contrary to the common interest.

In October 1990 the Commission approved, on the basis of Article 87(3)(c) of the EEC Treaty, a proposal from the German Federal Government to grant, in the context of a special Regional Development Program covering the Land Bremen, investment aid, aimed at increasing the capacity of a pilot school which Lufthansa operates at Bremen airport.

Following the Commission's approval in December 1986, pursuant to Article 87(3)(c), of a plan for British Airways to supply financial assistance to various independent airlines for 15 new routes, the Commission also raised no objections to the financing of a new independent airline which would also operate between the United Kingdom and the Continent. This latest authorization was granted within the framework of the above mentioned operation, the aim of which is to reorganize and increase the competitiveness of UK aviation as well as to develop services from regional airports.

4.4.4. Aid with Horizontal Objectives

Aid with horizontal objectives and dimensions can be authorized not only on the basis of Article 87(3)(c) of the Treaty but also based on Article 87(3)(b) of the Treaty. Horizontal aid can not be considered as promoting an important project of common European interest may still be compatible with the common market if it fulfills the requirements of Article 87(3)(c) which generally may allow the granting of larger amounts of aid and / or the granting of aid in less strictly...

249 Ibid. p. 9.
250 IP/90/762, 27.9.1990.
defined circumstances, but applies where the Commission finds that the aid
"does not adversely affect trading conditions to an extent contrary to the
common interest".

The Commission has implemented several frameworks and guidelines concerning horizontal aid, such as on:
- Research and development aid;
- Rescue and restructuring aid;
- Small and medium sized enterprises;
- Employment, training and undertakings in deprived urban areas.
- Environmental aid. For example in 1998 Martinair received aid from the Dutch State for the installation of new equipment designed to reduce pollutant emissions which was exempted.  

4.5. Article 87(3)(d) of the Treaty

Article 87(3)(d) of the Treaty, as added by the Treaty of the Union, provides for an exemption to grant aid to promote culture and heritage conservation where such aid does not affect trading conditions contrary to the common interest. As a recognized productive activity, cultural activities, are subject to the same rules as other economic activities. One might note that no such derogation has so far been added to Article 61 of the EEA Agreement. So far this derogation has not been applied to the air transport sector.

4.6. Article 87(3)(e) of the Treaty

Article 87(3)(e) of the Treaty authorizes the Council, acting by a qualified majority on a proposal from the Commission, to consider compatible with the

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255 Point (d) inserted by Article G (18) Treaty on the Union (TEU). It is ancillary to the new Article 128 in the Maastricht Treaty and aimed to promote the cultures of Member States. See further; Petersen, A. "State Aid and European Union: State Aid in the Light of Trade, Competition, Industrial and Cohesion Policies", State Aid: Community Law and Policy, (Köln: Bundesanzeiger, 1993), p. 20-22.
common market other such categories of aid than stipulated in sub paragraph 3 of Article 87(3). The Council can, on the basis of Article 87(3)(e), create new exemptions to Article 87 of the Treaty. The application of such new exemptions is, however, entrusted to the Commission. Similarly, Article 61(3)(d) of the EEA Agreement stipulates "such other categories of aid as may be specified by the EEA Joint Committee in accordance with Part VII". The Council itself is not competent to declare specific aid measures compatible with the common market on the basis of Article 87(3)(e) as it may in exceptional cases on the basis of Article 88(2) third sub-paragraph of the Treaty.

So far no exemptions for aid to the aviation sector have been enacted by the Council on the basis of Article 87(3)(e).
Chapter 5. Procedural rules

5.1. Introduction

Procedural rules regarding state aid are found in Article 88 and 89 of the Treaty and Article 62, 63 and 64 of the Agreement. Furthermore, Council Regulation (EC) 569/1999 (hereinafter the Regulation) lays down detailed rules for the application of Article 88 of the Treaty.

Article 88 of the Treaty:

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Article 226 and 227, refer the matter to the Court of Justice direct.

On application by a Member State, the Council, may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”

254 See further section 5.10.
5.2. Approval Prior to Implementation

The European Commission and the EFTA Surveillance Authority carry out the supervision of state aid and assess whether state aid is compatible with the common market. The procedural rules are based on a system of advance vetting. The principle of advance vetting, which is laid down in Article 88(3) of the Treaty and Article 2 of the Regulation, requires that the Commission be informed of planned aid measures or changes to existing ones before the plan is put into effect. “Putting into effect” means not only the action of granting the aid to the recipient, it is sufficient that the conferment of powers enabling the aid to be granted, without further formality, has taken place.

The obligations in Article 88(3) of the Treaty to notify and await authorization are of great importance, because they have direct effect. Certain provisions of Community law are directly effective in that they create ‘individual rights which national courts must protect’ without any need for implementing legislation in that Member State. Domestic court has to apply them, on application by an interested party or of its own motion, always provided that the case before it involves state aid caught by Article 87(1) of the Treaty. The Court of Justice has accepted that in order to apply the procedural rules, having direct effect in its domestic legal order, a national court has power to determine whether or not there is state aid. That is the measure itself. However, the national courts have no jurisdiction to determine whether or not the aid is compatible with the common market, that is a matter for the Commission or the EFTA Surveillance Authority alone. Once the Commission has ruled an aid measure is contrary to the Treaty, national courts can take whatever action appropriate under their domestic law to remedy the situation. In the event that a Member State should fail to comply with a decision adopted by the Commission on a planned aid measure, that decision may be

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invoked before national courts in the event that the Member State should fail to comply with it.\textsuperscript{259}

Insignificant aid, aid classified as \textit{de minimis}, is not subject to notification.\textsuperscript{260} Generally, it is therefore considered that the aid, as defined by the Commission, does not affect trade between Member States significantly and thus does not fall within Article 87(1) of the Treaty. The \textit{de minimis} rule, in this context, does not apply to air transport.\textsuperscript{261}

\section*{5.3. Review of Existing Aid}

Article 88(1) of the Treaty states that “The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States”.\textsuperscript{262} Thus, existing measures do not have to be notified and need not await authorization before being applied.\textsuperscript{263} The “system of aid existing in the Member States” refers to:

a. **All systems of aid which already existed when Member States joined the Community.** Aid measures introduced before the Treaty or the Agreement entered into force are either on-off measures, where the aid was granted before a certain date, or measures by which aid is now granted under a

\textsuperscript{259} See further section 5.7.
\textsuperscript{260} European Commission, Commission notice on \textit{de minimis} rule for State aid, OJ No C 68, 06.03.1996, p. 9.
\textsuperscript{261} See section 2.4.1.
\textsuperscript{262} In Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 of the Treaty, the term “existing aid” is so defined in Article 1(b): “(i) Without prejudice to Articles 201 (ex Article 144) and 229 (ex Article 172) of the Act of Accession of Austria, Finland and Sweden, all aid which existed prior to the entry into force of the Treaty in the respective Member State, that is to say, aid schemes and individual aid which were put into effect before and provided for payments after, the entry into force of the Treaty; (ii) authorized aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid; (iii) aid which is deemed to have been authorized pursuant to Article 4(6) of this Regulation or prior to this Regulation but in accordance with this procedure; (iv) aid which is deemed to be existing aid pursuant to Article 15; (v) aid which is deemed to be existing aid because it can be established that at the time it was put into effect it did not constitute aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalization of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalization”.

scheme which was already in existence at that time, provided the scheme has not been changed in the meantime.

b. Aid which has already been authorized by the Commission or by the Council. Where aid has already been approved by the Commission, whether explicitly or implicitly (i.e. by default, the time allowed having passed), there is no particular problem if the measure is a one-off measure rather than a measure granting aid under a scheme, provided of course that the measure implemented does not differ from the plan notified, and any conditions attached by the Commission to its approval are complied with. However, if aid is being granted under a scheme, the Member State and the recipient should check whether what is envisaged is in fact in accordance with the scheme and in accordance with any conditions imposed by the Commission in the decision authorizing the scheme, and that any notification requirements which the Commission imposed in its authorizing decision have been complied with. If there is such a notification requirement, the measure will be subject to the obligation to notify and the obligation to await authorization laid down in Article 88(3) even though it is not strictly speaking a new aid scheme.

c. Aid which has been lawfully granted by the Member States following a Commission decision in that regard, or the expiry of the two months available to the Commission to complete its initial examination of notified measures.

The constant review procedure suggests that the compatibility of an existing aid scheme is not permanent. A formerly compatible aid scheme can lose its status because of economic or social changes in Member State or the European Community or because conditions attached to it have not been complied with in full.

Member States are obliged to provide the Commission with all the information necessary for it to carry out its surveillance duties. Cooperation as stated in Article 88(1) of the Treaty between the Commission and the Member

\[^{264}\text{Article 88(2) third sub-paragraph of the Treaty.}\]

\[^{265}\text{Article 4(5) of the Regulation.}\]
States is not merely bilateral but all Member States are to be considered as interested parties in context to the Commission’s review. The duty to cooperate is reciprocal.

The Commission is entitled to propose to the Member States ‘any appropriate measures required by the progressive development or by the functioning of the common market’. For this purpose, the Commission makes use of a recommendation, which has no binding force. If the aid is incompatible with the common market, the Commission, by means of notification in the Official Journal, will have to initiate a review procedure in accordance with Article 88(2) of the Treaty. However, the procedure does not block the grant of already existing aid.

In some circumstances, however, the Commission may make the application of a scheme subject to the notification and authorization obligations even though the scheme itself has been properly approved, so that measures under the scheme are subject to the same procedure as planned new measures.

5.4. Review of new or altered aid

Article 88(3) of the Treaty puts Member States under an obligation to inform the Commission of the planned introduction of aid “in sufficient time”. Notification has to be made when the measures are at the planning stage, before they are put into effect, when they can still be changed to take account of any observations the Commission may put forward. To ensure that the vetting system is effective, the obligation to notify is backed up by a prohibition which prevents the Member State from putting the plan into effect before the

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266 Article 5 of the Regulation.
267 Recommendations according to Article 249(5) of the Treaty need not be limited to the issue of whether an aid system is compatible with the common market. The Commission may suggest modifications it considers appropriate. If the Commission then considers that a given aid measure is not amenable to adjustment but instead is incompatible with the common market, or if the Commission’s proposals as to the compatibility of the aid are not taken to heart by the Member State concerned, it is required to institute the formal procedure of Article 87(3) Treaty.
268 In a communication to Member States, the Commission stated that due time within the meaning of “sufficient time” would be at least two months, or as the case may be, 30 days before the projected entry into force of the aid measure. See further European Commission, The notification of State aids to the Commission pursuant to Article 93(3) of the EEC Treaty: The failure of Member States to respect their obligations, OJ No C 252, 30.9.1980, at p. 2.
Commission has authorized it, explicitly or implicitly. The prohibition has direct effect.  

Although Article 88(3) of the Treaty stipulates procedure for notified aid only, the Court of Justice has held that the Commission is empowered to apply the procedure of Article 88(2) to non-notified aids as well.

Any aid granted without first being notified to the Commission or without awaiting the Commission’s authorization is unlawful and may have to be repaid when the regular procedure is ultimately completed, if it should prove to be incompatible with the common market. Aid may be ‘unlawful’ or ‘illegal’ in this sense without actually being “incompatible with the common market”, which would mean that it did not in fact qualify for any of the possible exemptions from the ban on state aid.

5.4.1. Procedure

The Member State concerned must notify the planned aid measure. It will usually do so by using a form the Commission has drawn up for the purpose.

5.4.1.1. Preliminary Examination

From the receipt of the notification, the Commission has 15 working days to request any clarification or further information it may need which the Member State must supply within 20 days. In cases where the Commission receives incomplete information and no further information is given within the stipulated 20 days time limit, the notification will be considered withdrawn according to Article 5 of the Regulation. From the time the Commission has all the information it needs, it has two months to examine the planned aid. During that time and until the Commission has taken a decision, the ‘stand-still’ clause

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269 Article 3 of the Regulation.

270 Case 120/70 Lorenz v Germany, [1973] ECR 1471.


272 The fact that the aid is ‘unlawful’ does not mean that it is necessarily ‘incompatible’. Only when the aid is unlawful and incompatible can the Commission order that it be recovered. See Case C-354/90 cited supra 258.

applies. The prohibition to grant aid also applies in cases where the Commission has not opened a formal proceeding.

5.4.1.2. Forms of action

At the end of the two-month period, the Commission’s decision on the compatibility with the common market may take three forms.

a. Raise no objections to the plan notified. In such a case, a brief notice is published in the Official Journal C series. Parties dissatisfied with the Commission’s decision can bring an action for an annulment before the Court of First Instance, provided they can show that they are competing directly with the firm receiving the aid.

b. Take no action. In the case where the Commission is dead silent and takes no action the Member State is entitled to put its proposed measure into effect after two months from notification of the intent to implement aid. The Member State, must before doing so, give the Commission a prior notice thereof. From the wording of the Lorenz case it is not certain whether the Commission has any additional period to rectify the situation after the two month period and after the Member State gave its prior notice thereof, had it not acted earlier. In Article 5(6) of the Regulation the Commission is given 15 days from the prior notice of the Member State to implement the aid (in the absence of a specific Commission decision thereto), to react and give its decision. It has been argued by the Commission that the extra time gives

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274 A request for further information cancels the start of the period allowed for assessing the notification. The whole period only begins to run again from the date on which the requested information is received. See further Article 4(5) of the Regulation.


276 Provided, of course, that no extensions were given to the Member State nor any further information was requested.

277 The C Series contains non-binding decisions, resolutions, communications and information. The L Series consists of enacted legislation.

278 See further infra section 5.8.

279 Case 120/73 cited supra 270 and Case 84/82 Germany v Commission [1984] ECR 1451. See also Article 5(6) of the Regulation.

280 Ibid.
more legal certainty to the beneficiary than an implicit approval and bars serious distorting aid from inadvertently becoming authorized.\textsuperscript{281}

c. To initiate formal investigation procedures under Article 88(2) of the Treaty. If the Commission has the slightest doubt as to the compatibility of the aid with the common market, it must set in motion the procedure laid down in Article 88(2) of the Treaty.\textsuperscript{282} The purpose is to enable the Commission to obtain opinions and observations which may be relevant to the proper consideration of the case, and to enable parties who feel that they would be injured by the aid to defend their interests.\textsuperscript{283} The procedure is applicable in all types of cases, whether the aid measure is notified or not, or existing aid, although in the latter case it must be preceded by the proposal of 'appropriate measures'.\textsuperscript{284} The decision to open formal proceedings is without prejudice to the final decision, which may still be that the aid is compatible with the functioning of the Treaty.

A detailed description of the aid is published in the Official Journal C series and gives the Member State concerned notice to submit its observations.\textsuperscript{285} Observations are called for from other interested parties, such as other Member States, the recipient firm and its competitors and trade associations. The time-limit for observations is usually 30 days from the date of the notice published in the Official Journal.\textsuperscript{286} In duly justified cases the Commission may extend the prescribed time period to submit observations. If the Commission then decides to go ahead with Article 88(2) proceedings, which are at times referred to as 'full investigation' or 'administrative proceedings', all parties who can show a legitimate interest, can make their views known.

\textsuperscript{281} Sinnaeve, A. "Unanimous agreement in the Council on the procedural regulation", (1999) 1 EC Competition Policy Newsletter 45.
\textsuperscript{282} Cases 91 and 127/83 Heineken Brouwerijen v Inspecteurs der Vennootschapsbelasting[1984] ECR 3435.
\textsuperscript{283} Case 84/82 supra 279 and Case C 47/91 supra 262.
\textsuperscript{285} Publication of a notice in the Official Journal has been held to be an appropriate means of informing all the parties concerned that a procedure has been initiated. Case 323/82 Internills v Commission [1984] ECR 3809 [1986] 1 C.M.L.R. 614 and Joined Cases 91 & 127/83 supra 282.
\textsuperscript{286} Article 6 of the Regulation.
Although there is no time limit laid down for this inquiry the Commission attempts to complete it within six months of publications of the notice.

It is generally accepted that interested parties that submit their comments to the Commission and request to be heard have a right to a hearing. However, no procedural rules exist on granting such a hearing. According to the case law of the Court of Justice it is a fundamental principle of Community law, which must be guaranteed even in the absence of any rules governing the procedure, that a person must be afforded the opportunity during a procedure to make his views known on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission. However, the right to a hearing is not considered an essential formality, the disregard of which will ipso facto entail the ensuing decision to be void. In British Airways and Others v Commission the Court of First Instance ruled that interested parties, within the meaning of Article 88(2) of the Treaty, can not enjoy the same rights to a fair hearing as those individuals against whom proceedings have been instituted are recognized as having. Interested parties have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case and their participation and right to be informed may be limited. This is particularly so when such disclosure of information involves information of the kind covered by the obligation of professional secrecy, i.e. documents concerning business secrets.

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287 European Commission, Commission letter to Member States SG (87) D/5540 of 30.04.1987. In the Regulation a maximum duration for the formal examination procedure is not laid down. However, in Article 7(6) it is stated that the Commission shall endeavour to adopt a decision within a period of 18 months from the opening of the procedure and by common agreement between the Commission and the Member State concerned such time limit may be extended further.


289 Case 234/84 Belgium v Commission (Meura) [1986] ECR 2263. The Court of Justice concluded that the contested decision even without comments from third parties "could not have been substantially different" and therefore considered that the Commission's violation of the rights of the defense did not justify a declaration that its decision was void. See further Case C-301/87 France v Commission (Boussac) [1990] ECR I-30 and Case C-142/87 Belgium v. Commission (Tubemeuse) [1990] ECR I-959.


291 Ibid at para 60-64.
In *Cityflyer Express Ltd v Commission*\(^{292}\) the applicant requested certain correspondence between the Commission and Belgian authorities to be produced by the Commission in order to assist with the legal assessment of the facts of the case. The contested decision concerned an interest-free loan granted by the Flemish Region to a private Vlaamse Luchttransportmaatschappij NV (VLM) airline. The Court of First Instance ruled that the production of the documents was irrelevant to the legal assessment of the case, as the parties were not in dispute over the facts.\(^{293}\)

### 5.4.1.3. Accelerated Clearance Procedure

The Commission, in its Guidelines,\(^{294}\) in the interest of administrative simplification, has set up an accelerated clearance procedure for small aid schemes in the aviation sector. It will apply more rapid administrative clearance procedure to new or modified existing schemes if the notified aid does not exceed ECU 1 million over a three year period. Furthermore, the aid must be linked to a specific investment objective and must not constitute operating aid.

#### 5.4.2. Commission’s Decision

The Commission’s decision may be negative, positive, positive but subject to various stated conditions,\(^{295}\) or positive in respect of some aspects but negative in respect of others. A positive decision is a decision to grant authorization for the aid and a negative decision prohibits the aid.

If a decision states a time limit the Member State in question must comply with it. If a Member State fails to act within the allowed time limit the Commission may refer the matter to the Court of Justice directly according to Article 88(2) of the Treaty, seeking a finding that a Member State has failed to fulfil its obligations under the Treaty.\(^{296}\) A final decision of the Commission is directly binding upon Member States.

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\(^{292}\) Case T-16/96 *Cityflyer Express Ltd v Commission* [1998] ECR II-757.

\(^{293}\) *Ibid* at para 102-106.


\(^{295}\) Article 7(4) of the Regulation.

\(^{296}\) Articles 226 and 227 of the Treaty.
Should the Commission, after a decision has been taken, come to the conclusion that information which the decision was based upon was incorrect, it has an opportunity to revoke its decision in order to ensure that the state aid rules are applied correctly and effectively.\footnote{Article 9 of the Regulation.}

A delay in adopting a final decision, after the opening of a formal procedure by the Commission, may affect the validity of an order requiring the Member State to recover aid from its beneficiary.\footnote{Case 223/85 cited infra 354.}

The Commission’s decision according to Article 253\footnote{Ex Article 190 of the Treaty.} of the Treaty\footnote{Article 253 of the Treaty: “Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty”.} must contain sufficient reasons to justify its conclusion and specify any obligations imposed on the Member State concerned. The decision must set out the principal issues of law and fact upon which it is based and which are necessary in order that the reasoning which led the Commission to its decision may be understood.\footnote{Case 24/62 Germany v Commission [1963] ECR 63, at p. 69.} It is not necessary to discuss all issues of fact and law that have been raised during the administrative procedure.\footnote{Joined Cases 209/78 to 215/78 and 218/78 Heintz Van Landewyck and Others v Commission [1980] ECR 3125, at para 66.} The requirements to be satisfied must depend on the circumstances of each case, in particular the measure in question, the nature of the reasons given and the need for information of the undertakings to whom the measure is addressed.\footnote{Joined Cases 209/78 to 215/78 and 218/78 Heintz Van Landewyck and Others v Commission [1980] ECR 3125, at para 66.}

In stating the reasons for its decision the Commission must, for example in relation to trade distortion, at least give an outline of the present trade flow, indicate what part is attributable to the company involved and predict the extent to which the existing situation would be changed by the proposed aid. The Commission decision must contain a statement of reasons which allows the Court of Justice to review its legality and provide the Member State and the undertaking(s) concerned with the information necessary to enable it to ascertain whether or not the decision is well founded so that it/they may defend their
rights. Failure to explain, at least briefly, why all of the requirements of Article 87 of the Treaty are fulfilled is ground for the annulment of a decision finding incompatibility. If the Commission grants an exemption the decision shall specify which exception under the Treaty has been applied.

In a judgement of the Court of First Instance, *British Airways and Others v Commission*, the Court annulled the decision of the Commission to authorize the re-capitalization of Air France owing to insufficient reasoning on two points of the stated conditions for the authorization. One point related to the purchasing of new aircraft. Several airlines and Member States submitted comments and observations regarding the Commission’s decision to grant an exemption to Air France as they had serious doubts as to the legality of the aid in question. One of the major principal objections regarding the aid measure was the intended purchase of the 17 new aircraft Air France was planning to purchase at the cost of FRF 11.5 billion. The Court came to the conclusion that the Commission had failed to specify whether the modernization of the Air France fleet would be partially financed by aid earmarked for restructuring of the company and, if so, for what reasons. The Commission’s reasoning in the contested decision did therefore not satisfy the requirements of Article 253 of the Treaty.

A Commission decision under Article 88 of the Treaty does not have to demonstrate the actual effect of aid already implemented when finding incompatibility. Such a requirement, according to the Court of Justice, would be tantamount to putting Member States who disregard Article 88(3) in a favorable position.

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105 Article 7(3) of the Regulation.
106 Supra 289.
107 Commission Decision 96/653/EC concerning the notified capital increase of Air France, OJ No L 254, 27.7.1994, p. 73.
108 Supra 290 at para 114.
109 Case C-301/87 (Boussac) cited supra 289 and Case C-142/87 (Tubemeuse) cited supra 289.
In a negative decision on cases of unlawful aid the Commission, as a rule, orders the Member State to reclaim the aid from the recipient.\textsuperscript{310}

If a decision is negative or partly negative, or positive subject to conditions, the Member States concerned and the firm which is to receive the aid are entitled to bring a court action for annulment of the decision under Article 230\textsuperscript{311} of the Treaty. In principle, the action does not suspend the operation of the decision. In the same way other firms competing with the recipient, and in certain circumstances trade associations as well, are entitled to challenge a decision which is positive or partly positive, but they must have played an active part in the administrative proceedings.\textsuperscript{312}

In order to increase transparency and legal certainty the Commission has stated it will take increased actions to publish information on its preliminary decisions by producing public summaries of all decisions which might affect interested parties in the authentic language only.\textsuperscript{313} Article 26 of the Regulation stipulates further the method of publication of the Commission's decisions in the Official Journal.

\subsection*{5.5. Aid Schemes}

A 'scheme' is a measure taken by a Member State, usually in the form of legislation, which lays down conditions of eligibility for aid, the ceilings and intensity of the aid available, and the machinery for payment. A scheme differs from a 'one-off', 'ad hoc' or specific measure in that it is not aimed at a particular firm, but rather a class of firms whose identities and number are still undefined. The Commission keeps existing aid schemes under constant review. Member States are required to supply the Commission with annual reports for this purpose and regular multilateral meetings are held.\textsuperscript{314} Once the Commission

\textsuperscript{310} Case C-70/72 Commission v Germany [1973] ECR 813.
\textsuperscript{311} Ex Article 173 of the Treaty.
\textsuperscript{312} See further section 5.8.
\textsuperscript{313} IP/98/170, 7.16.1998. In order to reduce the time needed for translation summary of preliminary decisions is posted. However interested parties are given the option to request a copy in their own language. See also Article 23 and 25 of the Regulation.
\textsuperscript{314} Commission letter to Member States SG (94) D/2472-2494 of 22.02.1994 on notifications and standardized reports.
has studied the information from the Member States, the Commission may conclude that the measure is still fully justified and decide to take no further action; or it may propose changes, or, in the words of Article 88 of the Treaty, 'appropriate measures' which may involve anything up to and including the abolition of the scheme. If the Member State does not take the 'appropriate measures' proposed, the Commission initiates Article 88(2) proceedings of the kind already described.

In principle, the same rules regarding aid schemes apply to 'ad hoc' or other measures where aid is granted to entities in a few installments or trenches. The Commission may revoke a decision to grant aid if the Member State does not fulfil the conditions or criteria on which the decision to grant aid is based.

5.6. Council’s Power to Declare Certain Aids Compatible

A Member State granting aid may apply to the Council, on the basis of Article 88(2) third sub-paragraph, for a decision which determines such aid to be compatible with the common market, in derogation from the provision of Article 87 of the Treaty. As the text of the provision indicates, the Council is in effect given the power to exempt specific aid measures from the application of Article 87, thereby preempting any negative decisions that the Commission might have with regard to such measures. The Council, however, is not authorized to exempt general categories of aid from the application of Article 87, but rather to define additional categories of aid that the Commission may consider to be compatible with the common market.

The Council’s power to issue decisions granting exemptions is tied to a number of strict conditions. (1) Application for an exemption decision may only be submitted by the Member State to which the negative decision was addressed and not by the beneficiary of the aid or any other Member State. (2) The Council’s determination as regards compatibility must be made before the

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315 The EEA Agreement does not contain the equivalent of Article 88(2) of the Treaty.
316 Similarly the EFTA states may by a common accord decide to grant such exemption as the Council on basis of Article 1(3) of Protocol 3 to the EFTA Surveillance Authority and Court Agreements. The wording of the article in substance is identical to Article 88(2) third sub-paragraph of the Treaty.
Commission has taken a final decision on the aid in question. If the Commission has already reached a negative decision, the Council has no power to 'override' that determination.\(^{317}\) If the Commission has initiated, but not yet concluded, a formal procedure with respect to an aid measure, the Member State's application to the Council has the effect of suspending that procedure until the Council has made its attitude known. However, if the Council has made its attitude known within three months after the application has been made, the Commission must give its decision on the case. It is not clear whether the Commission may initiate a formal procedure after an application has been made to the Council and three months have elapsed. (3) An application for an exemption decision must be "justified by exceptional circumstances". It is not quite clear what this exactly entails. It has been argued that only circumstances which go beyond the grounds of justifications listed in Article 87(2) and 87(3) would qualify.\(^{318}\)

The discretionary nature of the Council's power suggests that the Court of Justice, if confronted with a challenge to the legality of an exemption decision, would not exercise a full _de novo_ review but rather limit itself to verifying whether the procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal and misuse of powers. The Court traditionally applies this standard in areas where a Community institution enjoys policy discretion.

5.7. **Unlawful Aid**

Illegality of state aid measures implemented by a Member State can derive from a violation of either formal or substantive state aid law. State aid declared incompatible with the common market under Article 87 of the Treaty is an example of the latter. Recovery has to be effected in every case where such a finding is made by the Commission.

\(^{317}\) _Supra_ 310.

\(^{318}\) In practice, the Council has made use of this exceptional exemption particularly in respect of agriculture. See Baudenbacher, C., _A Brief Guide to European State Aid Law_, (London: Kluwer Law, 1997), at p. 57.
A further distinction can be drawn between a formal illegality on account of non-compliance with Article 88(3) of the Treaty. On the one hand instances where, new aid is granted without notification to the Commission or if the Commission is notified but the aid is granted during the two-month preliminary investigation period or during the full investigation. On the other hand, where an illegality on account of incompatibility with a former Commission decision on the other hand, such as if aid is granted in violation of the Commission's decision to reject or modify the proposed aid.

5.7.1. Procedure

5.7.1.1. Violation of Formal Requirements

The rule of Article 88(3) of the Treaty, last sentence, the so called stand-still clause, prohibits Member States from putting the proposed aid into effect until the procedure has resulted in a final decision. The Court of Justice has stated that the Commission can not declare aid to be illegal solely because it has not been notified or because the Member State has disregarded the stand-still clause and implemented a measure without waiting for clearance, if the aid otherwise meets the criteria of Article 87 of the Treaty. Should the aid be found compatible with the common market, the Commission can not recover the previously disbursed aid. However, such decision will not always counteract infringements of Article 88(3) of the Treaty, particularly where all or part of the aid has been paid out. If the Commission finds the non-notified aid subsequently compatible with the common market it can never have the effect of retroactively approving such measures according to the Court of Justice. Obviously, any other interpretation would encourage non-observance by the Member States of the stand-still clause in Article 88(3) and deprive it of its useful effect.

319 If the Member State is prepared to cooperate fully with the Commission and provide it with all information necessary to assess the case, the Commission is obliged to examine the aid according to procedure in Articles 88(2) and (3). Case C-301/87 (Boussac) cited supra 289.

320 Priess, H. "Recovery of Illegal State aid: An Overview of Recent Developments in Case Law" (1996) 33 CML Rev. 69, at p. 73.

If a Member State fails to comply with its obligation to notify and its obligation to await authorization, the Commission may initiate proceedings either on its own initiative or, for example, in response to complaints from competitors.\footnote{Case C-301/87 \textit{(Boussac)} and Case C-142/87 \textit{(Tubemeuse)} cited supra 289.}

When a Member State has not respected the notification obligation or the stand-still clause and implemented the aid measure, the Commission is not bound by time limits. However, the Commission’s objective and task still remains to end all possible distortions of competition caused by unlawful aid as quickly as possible.

The Commission has been provided with injunctions of three kinds in order to rectify the procedural and material infringements of the Treaty. The procedural Regulation codifies these injunctions as:

(1) Information injunction;

(2) Suspension injunction;

(3) Provisional recovery injunction.

(1) Information injunction. It may be brought to the attention of the Commission that a certain Member State is providing unlawful aid to a recipient entity. Whoever or whatever the source may be, the Commission has the obligation to examine the information and, if necessary, require further information from the Member State concerned. Where the Member State concerned does not provide the information requested within the time period prescribed by the Commission, or the information provided is incomplete, the Commission can require the information to be provided by a decision, the so called information injunction. As mentioned in Article 10(3) of the Regulation, the decision shall specify what information is required and the period within which it is to be supplied.

(2) Suspension injunction. The Commission may adopt a decision requiring the Member State to suspend any unlawful aid after giving the Member State concerned the opportunity to submit its comments, until the Commission has taken a decision on the compatibility of the aid with the common market. The Commission is also empowered to suspend the granting of lawful aid,
found compatible with the common market, until earlier aid paid out to the
same entity, that was found illegal, is repaid.\footnote{Case C-355/95 P TWD Textilwerke Deggendorf v Commission [1997] ECR I-2549.} The suspension injunction
takes effect only for aid not yet granted. The potential distortion of
competition caused by the unlawful aid paid out remains unaffected.

(3) Recovery injunction. A Member State, having implemented aid to an entity
may be required to recover it until the Commission has taken a decision on
the compatibility of the aid with the common market, having given the
Member State concerned the opportunity to submit its comments to the
Commission. According to Article 11(2) of the Regulation, the Commission
may provisionally order a Member State to recover aid provided that (a)
there are no doubts that the measure in question constitutes state aid; (b)
there is an urgency to act and; (c) there is a serious risk of substantial and
irreparable damage to a competitor. If the recovery injunction has been
complied with, the regulation provides that the Commission shall take a
decision within the time limits for notified aid.

The injunction procedures are different from the procedure in section 6.3.1.
The stage before the opening of a detailed inquiry is shorter, and consideration is
given to the fact that the aid was granted prematurely in breach of the obligation
to await authorization. When the Commission finds that a Member State has
failed to comply with its obligations, it asks the state to comment within a fixed
period, usually fairly short one. If a Member State fails to submit the required
documents, the Commission may base its decision on such information as is
available to it and initiate the 88(2) proceedings, usually along with taking other
injunction actions. If the Member State does not supply all the information the
Commission needs in order to consider the measure properly, the Commission
requires it to do so within a final time-limit, usually 15 days, failing which the
Commission is entitled to take a final decision on the basis of whatever
information is in its possession.\footnote{Supra 289. In the Meura case, the Court established the power of the Commission to reach a
negative decision on a state aid on the basis of incomplete information whereas the state did not provide full information requested by the Commission.} In that event the Member State is barred from
producing fresh evidence at a later stage, for example in an action before the
Court of Justice, in addition to the information it submitted in the course of the administrative proceedings.

If the Member State does not comply with the injunction order issued by the Commission within the time-period fixed by the Commission, the Commission may bring the matter before the Court of Justice. Such a procedure is justified by the urgent nature of the matter, because the Member State concerned has been given the opportunity to present its observations. The action before the Court of Justice is based on the Member State's failure to fulfil its Treaty obligations (Article 226 of the Treaty).

5.7.1.2. Non Compliance with a Commission Decision

If the Commission has approved a decision for granting of state aid and set forth certain conditions in relation thereto, a formal illegality can arise in the case where the state does not comply with the conditions stated. If a suspicion arises as to the misuse of aid the Commission may open formal investigation procedure pursuant to Article 88(2) of the Treaty and seek recovery of the illegally granted aid. Further use of the injunctions mentioned above may be critical.

In 1996 the Commission reopened Article 88(2) proceedings in respect of restructuring aid to be paid out in installments to Olympic Airways. The aid was authorized in October 1994 under certain conditions. While Olympic Airways largely met the objectives of the restructuring program, the Commission became concerned that Greece was not fully complying with the conditions. In particular, Greece seemed to have granted further aid to Olympic (without proper notification), disregarded several conditions stipulated in the 1994 decision and interfered in the management to an extent beyond its role of a shareholder. The result of the Commission reopening the case was a two-year suspension of all further aid to Olympic until a final decision was reached in

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325 Article 16 of the Regulation.
326 European Commission, Commission Communication pursuant to Article 93(2) of the EC Treaty addressed to the other Member States and interested parties concerning aid granted to Olympic Airways, OJ No C 176, 19.6.1996, at p. 5.
1998. As the Commission found the Greek authorities in 1998 to be acting in accordance with the conditions a revised restructuring plan was extended until 2002 but with reduced capital injection and further conditions laid down.

In Ryanair v Commission329 the Court of First Instance the Court stated that once the Commission has adopted a decision approving aid subject to conditions at the end of a procedure under Article 88(2) it is not entitled to depart from the scope of its initial decision without re-opening the procedure. However, should the aid recipient not fully comply with one of the conditions of the decision to which the approval of an aid was subject to, the Commission may normally adopt a decision derogating from those conditions without re-opening the procedure under Article 88(2) of the Treaty, but only in the event of relatively minor deviations from the initial conditions, which leave it with no doubt as to whether the aid at issue is still compatible with the common market. Furthermore, the Court added that in respect of aid already approved in principle, paid in successive trenches over a relatively long period in association with a restructuring plan, the results of which will be achieved only after a number of years, the Commission must enjoy the power to manage and monitor the implementation of such aid in order to enable it to deal with developments which it could not have been foreseen when the initial decision was adopted.330

A general reporting system with regard to all existing aid schemes is introduced by the procedural Regulation between the Member States and the Commission in the form of annual reports.331 In order to verify whether its conditional decisions are being complied with the Commission, in cases where it has serious doubts, will have the possibility of making inspections on the spot.332 On-site monitoring visits are considered an appropriate instrument as far as conditional decisions are concerned. In other cases the Commission may request assistance from competent national independent supervisory bodies.333 This will allow the Commission to establish whether conditional decisions, negative decisions, suspension injunctions and recovery injunctions are being complied

329 Case T-140/95 Ryanair Ltd v Commission, unpublished, at para 87-89.
330 Ibid at para 89.
331 Article 19 of the Regulation.
332 Article 20 of the Regulation.
with in accordance with Article 5 of the Regulation and the subsidiarity principle in Article 5 of the Treaty.  

5.7.2. Recovery of Disbursed Aid

The purpose of the recovery of aid is to re-establish the previously existing situation on the market. According to Article 15 of the Regulation, the powers of the Commission to recover aid are subject to a limitation period of ten years. Any action taken by the Commission or by a Member State with regard to unlawful aid shall interrupt the limitation period. Each time an interruption takes place, the limitation period is renewed.

Once it has completed its examination of the measure, the Commission adopts a final decision. Where unlawful aid is incompatible with the common market, Article 14 of the Regulation introduces an obligation for the Commission to order recovery of all unlawful aid that is incompatible with the common market. Recovery is effected in accordance with national law of the Member State. In order to require Member States to effect the recovery of an illegal state aid the Commission issues a decision according to Article 249(4) of the Treaty. The decision is addressed to the Member State regardless of whether central authorities or sub-central regional or local authorities granted the aid. Member States are then obliged according to Article 10 of the Treaty, to ensure that recovery is effected by the granting entity. Should the Member State not comply with a conditional or a negative decision to recover unlawful aid, the Commission may refer the matter to the Court of Justice directly in accordance with Article 88(2) of the Treaty. Should a Member State not comply with a judgement of the Court of Justice to the same substance, the Commission may pursue the matter in accordance with Article 228 of the Treaty.

333 Article 21 of the Regulation. I.e. such independent national body as a Court of Auditors.
334 Ex Article 3(b) of the Treaty.
335 Article 15(2) of the Regulation.
336 Article 249(4) "A decision shall be binding in its entirety upon those to whom it is addressed".
337 Ex Article 5 of the Treaty.
338 Ex Article 171 of the Treaty.
339 Article 228 of the Treaty: "1. If the Court of Justice finds that a Member State has failed to fulfill an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgement of the Court of Justice. 2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the
This layered system of recovery poses some problems. Administrative law in the Member States differentiates; recovering aid in one Member State may be relatively easy whereas rules in another may render recovery impossible, thereby rendering the Community obligation ineffective. National procedural rules must be applied in such a way that recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration.\textsuperscript{340} The absence of specific Community rules must not prevent the aid from being properly recovered. The Member State is under a duty to use whatever means are available to it.

The Commission decision regarding the recovery of aid may be addressed to the entity which received the aid or the Member State which granted it. If the Member State is specified, it has to determine the debtor of the repayment obligation. Usually this will not present particular problems. In the instance where the entity has been transferred to another entity or sold, general rules of transfer of liabilities will apply.\textsuperscript{341}

In addition to repayment of all funds required, the Member State or recipient firm have to pay back interest, running from the date on which the aid was granted,\textsuperscript{342} the interest being a commercial rate rather than a legally defined one.

A Commission decision ordering recovery can be challenged by the Member State or the recipient in an action brought under Article 230 of the Treaty.\textsuperscript{343} In a Commission decision regarding bonds issued by Air France, the Commission found the subscription by CDC Participations to the ORA and TSIP-BSA to

\begin{itemize}
\item opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgement for the Court of Justice. If the Member State concerned fails to take the necessary measures to comply with the Court's judgement within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the Member State concerned has not complied with its judgement it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 227 [ex Article 170].
\end{itemize}

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\item Case C-142/87 (Tubemeuse) cited supra 289 and Case C-5/89 Commission v Germany [1990] I-3437.
\item Case T-459/93 Siemens v Commission [1995] ECR II-1675. Commission letter to Member States SG(95) D/1971 of 22.2.1995 on interest rates to be applied when aid granted unlawfully is being recovered. See also Article 14(2) of the procedural Regulation.
\item Ex Article 173 of the Treaty.
\end{itemize}
constitute unlawful aid. Both Air France and the Government of France appealed the decision on the basis of Article 230 of the Treaty, the French Government to the Court of Justice, and Air France to the Court of First Instance. The Commission Decision had ordered the reimbursement of the aid within two months from the publication of the decision. Following the Commission's decision, the French authorities explained to the Commission the difficulties of implementing the decision as the bonds were packaged in such a way as to make it difficult to liberate the funds they represented, and submitted an interim recovery scheme as a replacement. The Commission decided to amend its earlier decision by granting the changes the French Government requested so as the principle amount and the accrued interest would be deposited in a blocked account pending the outcome of the decisions of the European Court of Justice and the Court of First Instance. The Court of First Instance later dismissed the application of Air France in its entirety.

5.7.2.1. Special Measures for Enforcing Recovery

A number of special measures may be taken against a Member State that does not comply with a recovery decision to ensure recovery of illegal aid.

As mentioned earlier, the Commission is entitled to adopt decisions requiring Member States to suspend or provisionally recover unlawful aid.

The procedural regulation further introduces an obligation for the Commission to request recovery whenever it takes a negative decision on unlawful aid. Furthermore, Member States are obliged to take all necessary measures which are available within their respective legal systems, even provisional measures, in order to obtain immediate reimbursement.

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346 Case T-358/94 cited supra 304.
347 Case C-301-87 (Boussac) cited supra 289. The Boussac case confirmed the authority of the Commission to issue injunctions requiring Member State governments either to supply information required to evaluate a state aid or to suspend payment of an aid until the scrutiny process has been completed.
348 Article 14 of the Regulation, supra 255.
349 Article 14(3) of the Regulation, supra 255
It is also conceivable that a claim for the recovery of illegal aid can be set off against a claim for the payment of aid which is compatible with the Treaty or even with other claims that the Member State has against the recipient, e.g. tax claims. 350 As stated in Article 11(2), subparagraph 2, the Commission may authorize the Member State to couple the refunding of the aid with payment of rescue aid to the firm concerned. However, such set-off can only be declared by either the recipient or the entity granting the legal and illegal aid. In relation to both claims, the Commission itself is neither the debtor nor the creditor.

5.7.2.2. Limitations for Recovery Decisions

An argument frequently put forward by Member States and recipient firms to avoid recovery or repayment is the appeal to good faith and the principle of the protection of legitimate expectations. 351 The Commission, in order to overcome this argument, has published a communication in the Official Journal informing firms of the risk attaching to any aid granted without its authorization, and warning them to check whether any aid they are given is granted in accordance with Community law. 352 The same warning is given in published decisions initiating Article 88(2) proceedings. The Court of Justice has held that it is only in exceptional circumstances that the Member State concerned or the recipient firm can invoke the principle of the protection of legitimate expectations. 353 The only case where a recipient has succeeded in establishing a legitimate expectation was where the Commission had delayed the proceedings for 26 months without any justification and thereby established a legitimate expectation, as the recipient assumed that the Commission would not object to the aid. 354

Member States claiming absolutely impossible recovery must have used all powers at its disposal to secure the recovery of disbursed funds. The Member

350 Case C-354/90 cited supra 258, at p. I-5520.
351 It is only the recipient of the aid who can invoke the argument of legitimate expectations. See Case C-5/89 cited supra 353.
State must respect the underlying principle of Article 5, which imposes a duty of genuine cooperation on the Member State and Community institutions.355

5.8. Rights of Third Parties

5.8.1. The Recipient of Aid

The term ‘third parties’ here refers to the recipient of state aid. The recipient firm is not an immediate party to the proceedings between the Commission and the Member State concerned, and strictly speaking this makes it a third party. But its position is different from that of other third parties, and in terms of the judicial protection of its rights it is in fact in the same position as the Member State, except the court with jurisdiction is the Court of Justice in actions brought by the Member State and the Court of First Instance in actions brought by a recipient. The recipient is entitled to take part throughout the Article 88(2) proceedings.356

5.8.2. Other Interested Parties

Interested parties or ‘parties concerned’ have been defined by the Court of Justice in *Intermills*357 as including not only the recipient and the other Member States but also any person, firm of association which might be injured by the grant of aid, and especially the recipient’s competitors and the trade association concerned.358 In *Kahn*,359 the Court of Justice held that the expression ‘parties concerned’ does not include a company that objects to a decision approving a general aid scheme (which consisted of certain tax advantages), since such a decision can only have a potential and indirect effect on the company’s competitive position.

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358 However, the Court of Justice and the Court of First Instance have not yet expressly taken a position on the question of the status of a party concerned such as taxpayers or consumers.
Interested parties within the Community, who believe that aid is being granted illegally, have no right to know if notification has taken place or not. Such parties can file a complaint with the Commission and submit information about the alleged aid and its impact on Community trade. The Commission will investigate the complaint, but need not keep the complainant informed of the progress of its preliminary investigation. In *Sytraval*\(^{360}\) the Court of Justice clarified that the Commission is obliged to conduct a diligent and impartial examination of the complaints it receives, which may make it necessary for it to examine matters not expressly raised by the complainant. The Commission is, however, not obliged to examine other objections which the complainant would have raised had it been aware of the information obtained by the Commission in the course of investigation.

However, if the Commission decides to initiate Article 88(2) proceedings and informs the public accordingly by means of a notice published in the Official Journal, C series, third parties are entitled to submit observations. The notice provides third parties with general information on the essentials of the planned aid.

5.8.3. **Challenging Aid under Article 230 of the Treaty**

The Commission’s decision under Article 88(2) procedure is clearly of interest to third parties. If the Commission’s decision authorizes the aid, even only conditionally or partially, the parties might seek to have it annulled by the courts. As stated in Article 230 of the Treaty,\(^{361}\) the proceedings must be instituted within two months of the publication of the Commission’s decision or notification to the plaintiff.

When the Commission takes a summary decision to grant aid without taking an Article 88(2) procedure third parties in the past have found themselves in a

\(^{360}\) Case C-367/95 P *Commission v Sytraval and Brink’s France* [1998] ECR I-1719.

\(^{361}\) Article 230 of the Treaty, paragraph 4 and 5 so provides: “Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be”.

tough spot. The decisions before the procedural regulation took effect were often neither published in full nor notified to the competitors. In such cases, third parties had to try 'within reasonable time' to obtain the wording of the decision, not to be time barred. In *Sytraval* the European Court of Justice ruled that where the Commission approves aid by way of summary proceedings, it may be obliged to hear competitors of the beneficiary, or at least, to take their views into consideration *ex officio*. Failure to do so may result in the Commission's approval decision being quashed.

Substantive grounds for review under Article 230 include (1) Notice and consultation procedures of Article 87 and 88 were not properly followed by the Commission. (2) The decision was inadequately reasoned. Three major areas in case law give rise to defective reasoning by the Commission: failure to identify the act or scheme as an aid, inadequate discussion of the test of affecting inter-state trade and of distorting competition, and defective explanation of the compatibility criteria. (3) The Commission's action infringed or ignored an overriding principle of Community law.

Principles of the Court of Justice recognized as capable of supporting actions for judicial review in state aid cases include: protection of legitimate expectation, proportionality and equality of treatment.

According to Council Decision 93/530 the Court of First Instance now has jurisdiction in all actions brought by natural or legal persons according to Article 230(4) of the Treaty, whereas the Court of Justice has jurisdiction for actions brought by Member States, EU Institutions or for reference proceedings under Article 234.

If the action is successful, and the aid is ruled incompatible with the common market, the Commission will have to issue a recovery decision in accordance with Article 233 of the Treaty.

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362 *Supra* 360.
364 Ex Article 177 of the Treaty.
365 Ex Article 176 of the Treaty.
5.8.3.1. The Status of Recipient of Aid

The recipient of aid may only challenge the Commission decision if the decision is of direct and individual concern to it. The Court of Justice has established that the recipient of an aid payment is generally concerned directly and individually by a recovery decision. As regards Commission decisions that are in essence restrictive or conditional to the granting of aid, the recipient may also have the right to challenge the decision.

5.8.3.2. The Status of Other Interested Parties

Article 230 of the Treaty provides third parties, "natural or legal persons", with a very restrictive scope for action to have a decision annulled. In order to bring such an action for annulment before the Court of First Instance, the plaintiff must be able to show that it is directly and individually concerned by the Commission’s decision. Case-law of the Court of Justice indicates that it is presumed that a third party is entitled to bring an action for the annulment of a decision authorizing a state aid measure if that third party can show that it took part in the proceedings before the Commission, for example, by lodging a complaint or submitting observations. In addition, the Court has held that the third party's position in the market must be substantially affected by the aid which is approved by the contested decision. Only then can, the subsequent Commission decision under Article 88(2) can be regarded as being of direct and individual concern to the competitor.

A trade association that considers itself damaged by a decision must in addition to defending its own interests, prove interests other than those of its members otherwise it can not claim to be individually concerned by a decision.

which affects the general interests of the group it represents as distinct from those of its members.\textsuperscript{369}

Seven rival airlines, in an action for annulment,\textsuperscript{370} challenged a Commission decision granting Air France FRF 20 billion in July of 1994.\textsuperscript{371} During the Commission's Article 88(2) procedure a total of 23 interested parties had submitted observations of the notified aid measure. As all applicants for the annulment had participated, no comments were made by the Court as to their standing.\textsuperscript{372}

5.8.4. Challenging Aid in National Courts - Article 234 of the Treaty

Article 234 of the Treaty enables national courts and tribunals to refer questions of Community law, in cases pending before them, to the Court of Justice for a ruling. The Court's ruling on the points of Community law is then utilized by the national court or tribunal in reaching its decision on the case pending. The Court of Justice, however, does not give the final decision in the case pending before the national court, but it can rule on the validity of acts of the Community institutions.

5.8.4.1. Recipient of Aid

The recipient of aid, which the Commission has declared unlawful, can not mount a direct challenge under Article 234 of the Treaty in a national court when called upon to repay the aid. Failure to challenge the validity of the Commission's decision under Article 230 of the Treaty does not provide for another remedy.\textsuperscript{373}


\textsuperscript{370} Joined Cases T-371/94 and T-394/94 cited supra 306.


\textsuperscript{372} Similarly in other cases whereas rival airlines have appealed a Commission Decision to the Court of First Instance they have all either complained to the Commission about the aid measure, submitted observation during Article 88(2) procedure or had direct and individual interests to defend. See in particular Case T-16/96 Cityflyer Express Ltd v Commission [1998] ECR II-757 and Case T-140/95 Ryanair v Commission [1998] unpublished.

\textsuperscript{373} Case C-188/92 TWD v Bundesrepublric Deutscherland [1994] ECR I-833.
5.8.4.2. Other Interested Parties

The possibilities open to other interested parties affected by the aid but who have not manifested themselves during the Commission's procedure under Article 88(2) seem remote. Some scholars have suggested the possibility of challenging the Commission's decision via Article 234 of the Treaty procedure. However, the matter remains to be resolved.

In *Salt Union v Commission* the Court of Justice stated that it is open to competitors to contest before national courts the decision of national authorities to grant state aid to an undertaking competing with them. However, the Court of Justice's ruling only indicated general aid schemes, not aid directed to one specific undertaking. The Court further stated that if this kind of action is brought before national court, the latter may refer a question to the Court of Justice for a preliminary ruling under Article 234 of the Treaty. Questions of validity of the aid must be referred to the Court of Justice.

5.8.5. Injunction by Third Parties Against the Aid Beneficiary

In most Member States it is not very clear whether a competitor or an interested party has direct action against the beneficiary of the unlawful, incompatible or non-notified aid before a national court. Any such injunction or other action must be based on the national law of the respective Member State rather than on EC law.

5.8.6. Action for Damages

Under Article 288 of the Treaty, third parties will be entitled to damages if they have suffered loss caused by the Commission or the Council on account of the latter's wrongful approval or wrongful failure to approve an aid scheme. The Commission enjoys a broad discretion in reviewing the compatibility of aid.

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377 Ex Article 215 of the Treaty.
measures within the common market. The requirement that the applicant prove a causal link between any Treaty violation and the damage suffered will undoubtedly limit chances of success.

5.9. Article 89 of the Treaty

Article 89 of the Treaty authorizes the Council to enact "any appropriate regulations for the application of Article 87 and 88". The Council has taken some measures, based on both Articles 75 and 73 and on Article 89, relating to state aid in the transportation field but only recently adopted a regulation laying down detailed rules for the application of Article 93 of the Treaty. The pressure on the Commission to present the Council with a proposed regulation surfaced in 1990. At that time the Commission concluded that the Court of Justice through its judgements had built up a considerable body of case law which is binding on both the Commission and the Member States. However, in 1996 the Commission launched an initiative for the re-orientation of state aid control through the implementation of a more transparent, coherent and efficient policy, by using of Article 89 of the Treaty. In February 1998 the Commission presented a proposal for a Council Regulation on state aid procedures. The regulation based on Article 89 codifies the various procedures in force, which are based on the practice of the Commission and the case law of the Court of Justice. The regulation will enable the Commission to strengthen its control of aid and instruments at its disposal against illegal aid and abuses are widened.

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The codification of the state aid procedural rules has been compared to regulation 17 for the application of Articles 81-82 (anti-competitive measures) for its impact and significance.\textsuperscript{383} For transparency, visibility and certainty the regulation is a step forward from the mixtures of case law and soft law that at the present has dominated the state aid field.

5.10. Procedure Under the EEA Agreement

5.10.1. The European Economic Area

The Agreement on the European Economic Area was concluded between the twelve Member States\textsuperscript{384} of the Community and five EFTA States in 1992\textsuperscript{385} and came into force on 1 January 1994. Three of the EFTA States\textsuperscript{386} have since joined the European Union.\textsuperscript{387}

The main part of the Agreement concerns Community legislation i.e. the four freedoms: the freedom of persons, goods, services and capital, and the competition and other common rules.\textsuperscript{388}

The successful operation of the Agreement depends upon uniform implementation and application of the common rules in all EEA States. To this end, a two-pillar system of supervision has been devised: The EU Member States are supervised by the Commission and the EFTA States party to the Agreement by the EFTA Surveillance Authority. The EFTA Surveillance Authority has been given powers corresponding to those of the Commission in the exercise of its surveillance role.\textsuperscript{389} The EFTA Surveillance Authority shall ensure that the EFTA States respect their obligations under the Agreement, and that enterprises

\textsuperscript{383} Sinnaeve, A., "Unanimous agreement in the Council on the procedural regulation" 1 EC Competition Policy Newsletter, 45 at p. 48.
\textsuperscript{384} Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.
\textsuperscript{385} Austria, Finland, Iceland, Norway and Sweden.
\textsuperscript{386} Namely, Austria, Sweden and Finland.
\textsuperscript{388} Agreement on the European Economic Area, signed in Oporto on 2 May 1992, as adjusted by the Protocol signed in Brussels on 17 March 1993.
\textsuperscript{389} See Article 1 of Protocol 3 to the ESA/EFTA Agreements. ESA/EFTA Agreements refers to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, signed in Oporto on 2 May of 1992, as adjusted by the Protocol signed in Brussels on 17 March 1993 (hereinafter the ESA/EFTA Agreement).
abide by the rules relating to effective competition. The Authority can investigate possible infringements either on its own initiative or on the basis of complaints.

A two-pillar structure has also been established in respect of judicial control; the EFTA Court operates in parallel to the Court of Justice of the European Communities. The EFTA Court has jurisdiction with regard to EFTA States which are parties to the Agreement (at present Iceland, Liechtenstein and Norway). The Court is mainly competent to deal with infringement actions brought by the the EFTA Surveillance Authority against an EFTA State with regard to the implementation, application or interpretation of the Agreement, for the settlement of disputes between two or more EFTA States, for appeals concerning decisions taken by the EFTA Surveillance Authority and for giving advisory opinions to courts in EFTA States on the interpretation of the Agreement. Thus, the jurisdiction of the EFTA Court mainly corresponds to the jurisdiction of the Court of Justice of the European Communities over its Member States.

5.10.2. Procedure Under the EEA Agreement
The EFTA Surveillance Authority is, according to Article 5(1)(a) of the Agreement and in accordance with Article 1 of Protocol 3 to the ESA/EFTA Agreement, entrusted to ensure the fulfillment of their obligations under Article 61 of the Agreement. Article 61 of the Agreement, which corresponds with Article 87 of the Treaty, declares aid incompatible with the functioning of the Agreement except in certain circumstances where an exemption is or may be granted according to paragraphs 2 and 3 of Article 61 and Article 49 of the Agreement.

The legal basis of the powers of the EFTA Surveillance Authority in the field of state aid is Article 24 of the ESA/EFTA Agreements. In essence, the

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390 Ibid.
391 Supra 387 at p. 273.
392 Article 49 of the Agreement does however not apply to air transport as stated in Article 47 of the Agreement. See further section 2.7.1.
393 Article 24 of the ESA/EFTA Agreement : "The EFTA Surveillance Authority shall, in accordance with Articles 49, 61 to 64 and 109 of, and Protocols 14, 26, 27 and Annex XIII, section I(iv), and XV to, the EEA Agreement, as well as subject to the provisions contained in
formal procedures contained in the Treaty and the secondary EC law are to a large extent reproduced in the Agreement.\textsuperscript{394}

Division of competence between the Commission and the EFTA Surveillance Authority in the field of state aid is subject to Article 62 of the Agreement.\textsuperscript{395} Review of compatibility of aid granted by EFTA States is in the hands of the EFTA Surveillance Authority, whereas aid granted by EU Member States lies within the Commission's competence. In the cases where one or more EFTA States or EU States are involved in the granting of aid to a common project, the EFTA Surveillance Authority will be competent to deal with the part of the aid granted by EFTA States, whereas the Commission will be competent for the part of the aid granted by EU Member States.

5.10.3. Cooperation Between the Commission and the EFTA Surveillance Authority

Due to the wide discretion given to the Commission and EFTA Surveillance Authority in regard to Article 87 of the Treaty and Article 61 of the Agreement, cooperation between the two bodies is of particular relevance. As Article 61 of the Agreement and Article 87 of the Treaty provide for a wide margin of discretion to be exercised by the EFTA Surveillance Authority and the Commission, it is critical that application of the state aid rules in the EEA and the EU be as closely tied as possible. The application of the nearly identical rules should not differentiate on any major points.

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\textsuperscript{395} Article 62 of the Agreement: "1. All existing systems of State aid in the territory of the Contracting Parties, as well as any plans to grant aid or alter State aid, shall be subject to constant review as to their compatibility with Article 61. This review shall be carried out: (a) as regards the EC Member States, by the EC Commission according to the rules laid down in Article 93 of the Treaty establishing the European Economic Community; (b) as regards the EFTA States, by the EFTA Surveillance Authority according to the rules set out in agreement between the EFTA States establishing the EFTA Surveillance Authority which is entrusted with the powers and functions laid down in Protocol 26. 2. With a view to ensuring a uniform surveillance in the field of State aid throughout the territory covered by this Agreement, the EC Commission and the EFTA Surveillance Authority shall cooperate in accordance with the provisions set out in Protocol 27."
Article 64 of the Agreement\textsuperscript{396} and Protocol 27 of the Agreement\textsuperscript{397} contain specific rules concerning cooperation. The EFTA Surveillance Authority and the Commission are periodically, or at the request of the other, to exchange information and views on general policy issues, such as the implementation, application and interpretation of the rules on state aid.

Furthermore, information regarding decisions the Commission and the Authority have taken should flow efficiently both ways.\textsuperscript{398}

\textsuperscript{396} Article 64 of the Agreement: "1. If one of the surveillance authorities considers that the implementation by the other surveillance authority of Articles 61 and 62 of this Agreement and Article 5 of Protocol 14 is not in conformity with the maintenance of equal conditions of competition within the territory covered by this Agreement, exchange of views shall be held within two weeks according to the procedure of Protocol 27, paragraph (f). If a commonly agreed solution has not been found by the end of this two-week period, the competent authority of the affected Contracting Party may immediately adopt appropriate interim measures in order to remedy the resulting distortion of competition. Consultations shall then be held in the EEA Joint Committee with a view to finding a commonly acceptable solution. If within three months the EEA Joint Committee has not been able to find such a solution, and if the practice in question causes, or threatens to cause, distortion of competition affecting trade between the Contracting Parties, the interim measures may be replaced by definitive measures, strictly necessary to offset the effect of such distortion. Priority shall be given to such measures that will least disturb the functioning of the EEA. 2. The provisions of this Article will also apply to State monopolies, which are established after the date of signature of the Agreement".

\textsuperscript{397} Protocol 27 on cooperation in the field of state aid. The protocol requires the parties to exchange information about the kind and extent of aid granted in Member States, about general surveillance policy and about the opening of aid review procedures and the decision reached in them.

\textsuperscript{398} Ibid.
Chapter 6. Conclusion

6.1. What is Lacking?
The application of state aid rules to the air transport sector is and has been controversial both politically and legally. As the rules governing state aid are an important part of European competition policy, they differ in two importantly related respects from the other competition law provisions of the Treaty. Firstly, a much higher degree of political intervention is involved and secondly, detailed competition analysis has often been lacking. The lack of codified legal framework is seen by some observers as lying at the root of the political intervention, along with lack of transparency in the decision-making process and the lack of checks and balances in the Commission’s work.

The Commission has a very wide margin in exercising its control, more than in other competition matters in general. The margins of political discretion of the Commission are not limitless and the Court of Justice provides for counterbalance. However, as the provisions of the Treaty play the Commission against national governments, politics will often play a greater part in the decision process than in any other area of competition law.

Calls for a more codified framework involving the Council of Ministers has already led to the procedural regulation. The traditional instruments such as frameworks, guidelines, notices and communications have considerable value for stating the Commission’s interpretation of substantive and procedural issues, but do not provide legal certainty. The traditional instruments have hardly led to more transparency although the Commission claims that the margins of discretion have been shrinking.

There is a growing demand by Member States for information and comprehensive reasoning of the Commission’s decision making practice. In many cases the published information has been detailed and available and in other cases not. The reasoning is frequently on an ad hoc basis, lacking competitive impact analysis, or not stating in general terms how the conditions

imposed would minimize the harm to competition. In many cases the decisions do not prove that aid can or can not be exempted. Instead, they merely pronounce that state aid does or does not adversely affect trading conditions to an extent contrary to the common interest on the basis of criteria that are inexplicit and the validity of which can not be challenged. The Commission still has work to do in providing for clear guidelines regarding the assessment of the competitive impact of state aid.

During the past two years, the Commission has diligently built up an extensive web-site to inform the general public of its role in the Union and provide for extensive information on its policies, legal acts, decisions and guidelines. Researching European Community law has taken a new turn and transparency and availability of information has indeed improved a great deal. It is my belief that the growing tendency for open communication, such as is available through the Internet, will increase transparency in state aid matters even more.

6.2. Other Challenges

In 1994 the Commission set out principles and criteria for the assessment of state aid to airlines. It sought to strike a balance between the need to protect the liberalized single market from the distortive effects of aid, on the one hand, and the useful role aid can play in restructuring the industry on the other hand. Five major airlines\(^{400}\) have been restructured during 1991-1999 and two\(^ {401}\) are near the finishing line.

The results, according to the Commission, are deemed satisfactory on the average.\(^ {402}\) Competitors tend to have more divergent views. Naturally some airlines have done better than others, and a few might be considered vulnerable.

\(^ {400}\) Sabena, Iberia, Aer lingus, TAP, Air France.
\(^ {401}\) Alitalia and Olympic Airways.
Operating ratios, with the exception of Olympic Airways, have improved positively as well as productivity.403

One might conclude from such a report that there will be no more state aid cases in the Community unless recession hits again or some unforeseen challenge to the air transport industry unfolds. On the European Community horizon is the establishment of the European Common Aviation Area, ECAA. Negotiations on a multilateral agreement have begun between the Commission and ten associated Central European States404 on market access in the air transport sector. In essence, the single aviation market of the European Community and the EFTA States is to be extended to the ten Central European States. Included in the community legislation to be enacted in these states are the Community rules on state aid.

It is interesting to contemplate the ECAA in the light of the demand of the Comité des Sages, of the ‘one time – last time’ condition. Recently the Commission has openly discussed the fact that the restructuring of the European airlines will soon be over, of course, pending the outcome of the most recent developments concerning Alitalia and Olympic Airways. However, if the European aviation market opens up, ‘new’ ailing airlines might very well appear. The ‘one time - last time’ condition will perhaps only apply to the airlines that already have received aid and not the new market entrants.

403 Ibid.
404 Bulgaria, the Czech Republic, the Republic of Estonia, the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland, Romania, the Slovak Republic and the Republic of Slovenia.
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