Application of EC state aid law by the Member State courts

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У статті основну увагу було звернено на те, що курс на європейську інтеграцію ставить перед нашою державою комплексне завдання здійснення глибоких економічних реформ, створення реально діючої ринкової економіки. Значне місце у реалізації цих завдань посідає проблема регулювання державної допомоги. Для кращого проведення апроксимації українського антимонопольного законодавства у сфері надання державної допомоги до відповідних норм права Євросоюзу, практично необхідним є запозичення досвіду застосування національними судами держав-членів Євросоюзу положень конкурентного права Євросоюзу.

В статье основное внимание было обращение на то, что курс на европейскую интеграцию ставит перед нашим государством комплексное задание осуществления глубоких экономических реформ, создания реально действующей рыночной экономики. Значительное место в реализации этих заданий занимает проблема регулирования государственной помощи. Для лучшего проведения аппроксимации украинского антимонопольного законодательства в сфере предоставления государственной помощи к соответствующим нормам права Евросоюза, практически необходимым является заимствование опыта применения национальными судами государств-членов Евросоюза положений конкурентного права Евросоюза.

In this article, basic attention was dedicated to the state aid by the European Union competition law. The Commission and the national courts have complementary and separate roles in the application of the state aid rules. For better approximation of Ukrainian antitrust legislation in part of the state aid to the appropriate norms of the European Union competition rules, it is practically necessary to analyse the experience of application by national courts of member-states of the European Union provisions of the European Union competition law.

Ключові слова: *конкурентне право Євросоюзу, державна допомога, антимонопольне право, національні суди держав-членів Євросоюзу.*

A company which receives government support obtains an advantage over its competitors. Therefore, the EC Treaty generally prohibits State aid unless it is justified by reasons of general economic development. To ensure that this prohibition is respected and exemptions are applied equally across the European Union. The European Commission is in charge of watching over the compliance of State aid with EU rules. As a first step, it has to determine whether a company has received State aid, which is the case if the support meets the following criteria:

- there has been an intervention by the State or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or the provision of goods and services on preferential terms, etc.);
- the intervention confers an advantage to the recipient on a selective basis, for example to specific companies or sectors of the industry, or to companies located in specific regions;

• competition has been or may be distorted;
• the intervention is likely to affect trade between Member States.

By contrast, general measures are not regarded as State aid because they are not selective and apply to all companies regardless of their size, location or sector. Examples include general taxation measures or employment legislation.

State aid is traditionally considered as an area where there is not much room for action at national level, given the Commission's almost exclusive competence. This is true as far as the assessment of the compatibility of an aid with the common market is concerned. However, as set out in the Commission's notice on cooperation between national courts and the Commission in the State aid field national courts may also be called to take part in State aid control in many different situations.

First of all, national courts have an important role to play in the protection of enterprises against unlawful aid to their competitors. As a consequence of the direct effect of Art. 107(3) of, if aid is granted without prior authorisation by the Commission, a competitor can address himself directly to a national court. As the Court of Justice has established, the national judge is obliged to take all necessary measures against this infringement, even to the extent of ordering reimbursement of the aid.

Secondly, the implementation of Commission decisions, especially recovery decisions, often gives rise to procedures before national courts. National judges have to ensure the «*effet utile*» of the Commission decision. In doing so, they make an essential contribution to an efficient system of State aid control.

Despite these far-reaching powers and tasks of national courts, the present article shows that these are unfortunately largely underused. The number of cases in most Member States is very low, especially if compared with the number of examples of unlawful aid, and national proceedings have rarely allowed competitors to achieve the desired outcome. This is perhaps the most surprising conclusion to draw from the study: since the instruments exist at national level, why they are not used more often. Would it not follow the spirit of subsidiarity for enterprises and judges to take action against unlawful aid at national level?

I believe that part of the explanation for the current situation is probably the lack of knowledge of the State aid rules by the people concerned (administrations, enterprises, lawyers, etc.). The adoption of a procedural regulation and the ongoing efforts of the Commission to make State aid policy more transparent will lead to improvements in this regard. This article will certainly also bring a contribution by showing possible ways of action and offering inspiration for future developments.

The Commission and the national courts have complementary and separate roles in the application of the State aid rules. While the Commission has the exclusive power to decide whether aid is compatible with the common market, national courts are responsible for the protection of rights and the enforcement of duties, usually at the behest of private parties. In its notice on cooperation in State aid matters between national courts and the Commission, the Commission points out that, while it is not always in a position to act promptly to safeguard the interests of third parties in State aid matters, national courts may be better placed to ensure that breaches of the last sentence of Art. 107 (3) are dealt with and remedied. [1]

This article analyses the cases on EC State aid law which have been decided by Member State courts to date. The following actions can be brought before national courts:

1) actions by the Member State to obtain recovery from the beneficiary (or actions by the beneficiary against recovery by the Member State);

2) actions by a company against the Member State for the annulment of a discriminatory imposition of a financial burden (e.g. tax) from which another company is exempted;

3) disputes between different branches of the administration as to the permissibility of State aid measures (institutional disputes);

4) actions by a competitor against the Member State for damages, recovery and/or injunctive measures;

5) actions by a competitor against the beneficiary for damages, recovery and/or injunctive measures.

Enforcement by the European Commission. Article 107(1) and (3) of the Treaty provide for a specific procedure under which the European Commission monitors new aid and keeps existing aid under constant review. A Member State must notify the Commission of any plans to grant or alter aid before they are put into effect.

Following notification, the Commission conducts an initial review of the planned aid, during which the aid may not be put into effect.

The Commission has a period of two months to submit comments. If the Commission does not take action within this two-month period, the Member State may proceed to implement its plans and the aid shall become existing aid, subject to the supervision rules of Article 107(1). If at the end of that review the Commission deems that there are questions on the compatibility of the aid with the Common Market, it must without delay initiate the consultative examination procedure under Article 107(2). In this case the prohibition continues until the Commission reaches a decision on the compatibility of the planned aid with the Common Market.

The Article 107(2) procedure is concluded by issuing either a negative decision prohibiting the aid, a conditional decision allowing the aid subject to certain conditions or a positive decision. Non-notification does not automatically make such aid incompatible with the Common Market. The Commission is not relieved of the duty to examine the aid and test its compatibility with Article 106. If the Commission finds aid incompatible and the aid has already been paid, it will ask the Member State to recover the aid from the recipient with interest as from the day on which the recipient had the aid at its disposal. [2] A Member State is obliged to recover the aid and may not allow a rule in its domestic law to prevent recovery. [3]

So, the Court of Justice has stated that a Member State may not plead provisions, practices or circumstances in its own legal system as a reason for not complying with EC law, while recipients of illegal aid cannot, save in exceptional circumstances, invoke the principle of legitimate expectations. The Court of First Instance has upheld the Commission's decision to make its authorization of a new aid package subject to a suspension of the payment of that aid, until a prior aid to the same undertaking, which has been declared incompatible, has been recovered [4].

Furthermore, in order to emphasize the importance of notification, the Commission has issued a communication on recovery of illegal aid, stipulating that it may make an interim decision requiring the beneficiary immediately to reimburse the no notified and illegal aid to the Member State with interest, pending the Commission's decision on its compatibility. [5] The Commission has also issued a notice on cooperation on State aid between national courts and the Commission. [6] The Commission pointed out that national courts must until the final decision of the Commission preserve the rights of individuals confronted with the potential breach by State Authorities of the prohibition in Article 107(3). National courts are encouraged to use all national remedies to freeze payment or order the return of sums illegally paid.

The first issue facing national courts and potential claimants when applying Articles 107 and 108 of the Treaty is whether the measure concerned actually constitutes State aid within the meaning of the Treaty.

Article 107(1) of the Treaty covers *'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States'*.

The ECJ has explicitly stated that, as is the case for the Commission, national courts have powers to interpret the notion of State aid. [7] The notion of State aid is not limited to subsidies. [8] It also comprises, *inter alia*, tax concessions and investments from public funds made in circumstances where a private investor would have withheld his support. [9] Whether the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid is immaterial in this respect [10]. However, for public support to be considered State aid, the aid needs to favour certain undertakings or the production of certain goods ('selectivity'), as opposed to general measures to which Article 107(1) of the Treaty does not apply [11]. In addition, the aid must distort or threaten to distort competition and must have an effect on trade between Member States [12].

The case law of the Community courts [13] and decisions taken by the Commission have frequently addressed the question of whether certain measures qualify as State aid. In addition, the Commission has issued detailed guidance on a series of complex issues, such as the application of the private investor principle [14] and of the private creditor test [15], the circumstances under which State guarantees must be regarded as State aid [16], the treatment of public land sales [17], privatisation and assimilated State ac-

tions [18], aid below the *de minimis* thresholds [19], export credit insurance [20], direct business taxation [21], risk capital investments [22], and State aid for research, development and innovation [23]. Case law, Commission guidance and decision making practice can provide valuable assistance to national courts and potential claimants concerning State aid.

Where doubts exist as to the qualification of State aid, national courts may ask for a Commission opinion under section 3 of this Notice. This is without prejudice to the possibility or the obligation for a national court to refer the matter to the ECJ for a preliminary ruling under Article 309 of the Treaty.

The standstill obligation. According to Article 108(3) of the Treaty, Member States may not implement State aid measures without the prior approval of the Commission ('standstill obligation'): *'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 107, 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'* [24].

However, there are a number of circumstances in which State aid can be lawfully implemented without Commission approval: (a) Where the measure is covered by a Block Exemption Regulation issued under the framework of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [25] ('the Enabling Regulation'). Where a measure meets all the requirements of a Block Exemption Regulation, the Member State is relieved of its obligation to notify the planned aid measure and the standstill obligation does not apply. Based on the Enabling Regulation, the Commission originally adopted several Block Exemption Regulations [26], some of which have in the meantime been replaced by Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) [27]. (b) Similarly, existing aid [28] is not subject to the standstill obligation. This includes, amongst others, aid granted under a scheme which existed before a Member State's accession to the European Union or under a scheme previously approved by the Commission [29].

National court proceedings in State aid matters may sometimes concern the applicability of a Block Exemption Regulation or an existing or approved aid scheme, or both. Where the applicability of such a Regulation or scheme is at stake, the national court can only assess whether all the conditions of the Regulation or scheme are met. It cannot assess the compatibility of an aid measure where this is not the case, since that assessment is the exclusive responsibility of the Commission.

If the national court needs to determine whether the measure falls under an approved aid scheme, it can only verify whether all conditions of the approval decision are met. Where the issues raised at national level concern the validity of a Commission decision, the national court has no jurisdiction to declare acts of Community institutions invalid [29]. Where the issue of validity arises, the national court may, or in some cases must, refer the matter to the ECJ for a preliminary ruling [30]. Based on the principle of legal certainty as interpreted by the ECJ, even the possibility of questioning the validity of the underlying Commission decision by way of a preliminary ruling is no longer available where the claimant could undoubtedly have challenged the Commission decision before the Community courts under Article 263 of the Treaty, but failed to do so [31].

Respective roles of the Commission and national courts. The ECJ has repeatedly confirmed that both national courts and the Commission play essential, but distinct roles in the context of State aid enforcement [32]. The Commission's main role is to examine the compatibility of proposed aid measures with the common market, based on the criteria laid down in Article 107(2) and (3) of the Treaty. This compatibility assessment is the exclusive responsibility of the Commission, subject to review by the Community courts. According to settled ECJ jurisprudence, national courts do not have the power to declare a State aid measure compatible with Article 107(2) or (3) of the Treaty [33].

The role of the national court depends on the aid measure at issue and whether that measure has been duly notified and approved by the

Commission: (a) National courts are often asked to intervene in cases where a Member State authority [34] has granted aid without respecting the standstill obligation. This situation arises either because the aid was not notified at all, or because the authority implemented it before getting the Commission's approval. The role of national courts in such cases is to protect the rights of individuals affected by the unlawful implementation of the aid [35]. (b) National courts also play an important role in the enforcement of recovery decisions adopted under Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [36] ('the Procedural Regulation'), where the Commission's assessment concludes that aid granted unlawfully is incompatible with the common market and enjoins the Member State concerned to recover the incompatible aid from the beneficiary. The involvement of national courts in such cases usually arises from actions brought by beneficiaries for review of the legality of the repayment request issued by national authorities. However, depending on national procedural law, other types of legal action may be possible (such as actions by Member State authorities against the beneficiary aimed at the full implementation of a Commission recovery decision).

When preserving the interests of individuals, national courts must take full account of the effectiveness and direct effect [37] of Article 108(3) of the Treaty and the interests of the Community [38].

Like Articles 101 and 102 EC, the standstill obligation laid down in Article 108(3) of the Treaty gives rise to directly effective individual rights of affected parties (such as the competitors of the beneficiary). These affected parties can enforce their rights by bringing legal action before competent national courts against the granting Member State. Dealing with such legal actions and thus protecting competitor's rights under Article 108(3) of the Treaty is one of the most important roles of national courts in the State aid field.

The essential role played by national courts in this context also stems from the fact that the Commission's own powers to protect competitors and other third parties against unlawful aid are limited. Most importantly, as the ECJ held in its 'Boussac' [39] and 'Tubemeuse' [40] judgments, the Commission cannot adopt a final decision ordering recovery merely because the aid was not notified in accordance with Article 108(3) of the Treaty. The Commission must therefore conduct a full compatibility assessment, regardless of whether the standstill obligation has been respected or not [41]. This assessment can be time-consuming and the Commission's powers to issue preliminary recovery injunctions are subject to very strict legal requirements [42].

As a result, actions before national courts offer an important means of redress for competitors and other third parties affected by unlawful State aid. Remedies available before national courts include: (a) preventing the payment of unlawful aid; (b) recovery of unlawful aid (regardless of compatibility); (c) recovery of illegality interest; (d) damages for competitors and other third parties; and (e) interim measures against unlawful aid.

Preventing the payment of unlawful aid. National courts are obliged to protect the rights of individuals affected by violations of the standstill obligation. National courts must therefore draw all appropriate legal consequences, in accordance with national law, where an infringement of Article 108(3) of the Treaty has occurred [43]. However, the national courts′ obligations are not limited to unlawful aid already disbursed. They also extend to cases where an unlawful payment is about to be made. As part of their duties under Article 108(3) of the Treaty, national courts must safeguard the rights of individuals against possible disregard of those rights. Where unlawful aid is about to be disbursed, the national court is therefore obliged to prevent this payment from taking place.

The national courts′ obligation to prevent the payment of unlawful aid can arise in a variety of procedural settings, depending on different types of actions available under national law. Very often, the claimant will seek to challenge the validity of the national act granting the unlawful State aid. In such cases, preventing the unlawful payment will usually be the logical consequence of finding that the granting act is invalid as a result of the Member State's breach of Article 108(3) of the Treaty [44].

Recovery of unlawful aid. Where a national court is confronted with unlawfully granted aid, it must draw all legal consequences from this unlawfulness under national law. The national court must therefore in principle order the full

recovery of unlawful State aid from the beneficiary [45]. Ordering the full recovery of unlawful aid is part of the national court′s obligation to protect the individual rights of the claimant (such as the competitor) under Article 108(3) of the Treaty. The recovery obligation of the national court is thus not dependent on the compatibility of the aid measure with Article 107(2) or (3) of the Treaty.

Since national courts must order the full recovery of unlawful aid regardless of its compatibility, recovery can be swifter before a national court than through a complaint with the Commission. Indeed, unlike the Commission, the national court can and must limit itself to determining whether the measure constitutes State aid and whether the standstill obligation applies to it.

However, the national courts′ recovery obligation is not absolute. According to the 'SFEI' jurisprudence [46], there can be exceptional circumstances in which the recovery of unlawful State aid would not be appropriate. The legal standard to be applied in this context should be similar to the one applicable under Articles 14 and 15 of the Procedural Regulation [47]. In other words, circumstances which would not stand in the way of a recovery order by the Commission cannot justify a national court refraining from ordering full recovery under Article 108(3) of the Treaty. The standard which the Community courts apply in this respect is very strict. In particular, the ECJ has consistently held that, in principle, a beneficiary of unlawful aid cannot plead legitimate expectation against a Commission recovery order [48]. This is because a diligent businessman would have been able to verify whether the aid he received was notified or not [49].

To justify the national court not ordering recovery under Article 108(3) of the Treaty, a specific and concrete fact must therefore have generated legitimate expectation on the beneficiary's part [50]. This can be the case if the Commission itself has given precise assurances that the measure in question does not constitute State aid, or that it is not covered by the standstill obligation [51].

In its 'CELF' judgment [52], the ECJ clarified that the national court's obligation to order full recovery of unlawful State aid ceases if, by the time the national court renders its judgment, the Commission has already decided that the aid is compatible with the common market. Since the purpose of the standstill obligation is to ensure that only compatible aid can be implemented, this purpose can no longer be frustrated where the Commission has already confirmed compatibility [53]. Therefore, the national court's obligation to protect individual rights under Article 108(3) of the Treaty remains unaffected where the Commission has not yet taken a decision, regardless of whether a Commission procedure is pending or not [54].

While after a positive Commission decision the national court is no longer under a *Community law* obligation to order full recovery, the ECJ also explicitly recognises that a recovery obligation may exist under *national law* [55]. However, where such a recovery obligation exists, this is without prejudice to the Member State's right to re-implement the aid subsequently.

Once the national court has decided that unlawful aid has been disbursed in violation of Article 108(3) of the Treaty, it must quantify the aid in order to determine the amount to be recovered. The case law of the Community courts on the application of Article 107(1) of the Treaty and the Commission's guidance and decision making practice should assist the court in this respect.

Recovery of interest. The economic advantage of unlawful aid is not limited to its nominal amount. In addition, the beneficiary obtains a financial advantage resulting from the premature implementation of the aid. This is due to the fact that, had the aid been notified to the Commission, payment would (if at all) have taken place later. This would have obliged the beneficiary to borrow the relevant funds on the capital markets, including interest at market rates.

This undue time advantage is the reason why, if recovery is ordered by the Commission, Article 14(2) of the Procedural Regulation requires not only recovery of the nominal aid amount, but also recovery of interest from the day the unlawful aid was put at the disposal of the beneficiary to the day when it is effectively recovered. The interest rate to be applied in this context is defined in Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 113 of the Treaty ('the Implementing Regulation') [56].

In its 'CELF' judgment, the ECJ clarified

that the need to recover the financial advantage resulting from premature implementation of the aid (hereinafter referred to as 'illegality interest') is part of the national courts' obligation under Article 108(3) of the Treaty. This is because the premature implementation of unlawful aid will at least cause competitors to suffer depending on the circumstances earlier than they would have to, in competition terms, from the effects of the aid. The beneficiary has therefore obtained an undue advantage [57].

The national court's obligation to order the recovery of illegality interest can arise in two different settings: (a) The national court must normally order full recovery of unlawful aid under Article 108(3) of the Treaty. Where this is the case, illegality interest needs to be added to the original aid amount when determining the total recovery amount. (b) However, the national court must also order the recovery of illegality interest in circumstances in which, exceptionally, there is no obligation to order full recovery. As confirmed in 'CELF', the national court's obligation to order recovery of illegality interest therefore remains in place even after a positive Commission decision [58]. This can be of central importance to potential claimants, since it also offers a successful remedy in cases where the Commission has already declared the aid compatible with the common market.

Conclusions

In order to comply with their recovery obligation as regards illegality interest, national courts need to determine the interest amount to be recovered. The following principles apply in this respect:

(a) The starting point is the nominal aid amount [59].

(b) When determining the applicable interest rate and calculation method, national courts should take account of the fact that recovery of illegality interest by a national court serves the same purpose as the Commission's interest recovery under Article 14 of the Procedural Regulation. In addition, claims for the recovery of illegality interest are Community law claims based directly on Article 108(3) of the Treaty.

(c) In order to ensure consistency with Article 14 of the Procedural Regulation and to comply with the effectiveness requirement, the Commission considers that the method of interest calculation used by the national court may not be less strict than that foreseen in the Implementing Regulation [60]. Consequently, illegality interest must be calculated on a compound basis and the applicable interest rate may not be lower than the reference rate.

(d) Moreover, in the Commission's view, it follows from the principle of equivalence that, where the interest rate calculation under national law is stricter than that laid down in the Implementing Regulation, the national court will have to apply the stricter national rules also to claims based on Article 108(3) of the Treaty.

(e) The start date for the interest calculation will always be the day on which the unlawful aid was put at the disposal of the beneficiary. The end date depends on the situation at the time of the national judgment. If, as was the case in 'CELF', the Commission has already approved the aid, the end date is the date of the Commission decision. Otherwise, illegality interest accumulates for the whole period of unlawfulness until the date of actual repayment of the aid by the beneficiary. As was confirmed in 'CELF', illegality interest also needs to be applied for the period between the adoption of a positive Commission decision and the subsequent annulment of this decision by the Community courts [61].

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2. State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM (2005) 107 final, paragraphs 55 and 56.

3. OJ C 312, 23.11.1995, p. 8.

4. A total increase from 116 cases to 357 cases.

5. 51 % of all judgments.

6. 12 % of all judgments.

7. Case 78/76, Steinike & Weinlig, [1977] ECR 595, paragraph 14; Case C-39/94, SFEI and Others, [1996] ECR I-3547, paragraph 49; Case C-354/90 Fédération Nationale du Commerce Extérieur des

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9. Cf. Advocate General Jacobs′ Opinion in Joined Cases C-278/92, C-279/92 and C-280/92, Spain v Commission, [1994] ECR I-4103, paragraph 28: 'State aid is granted whenever a Member State makes available to an undertaking funds which in the normal course of events would not be provided by a private investor applying normal commercial criteria and disregarding other considerations of a social, political or philanthropic nature'.

10. Case 290/83, Commission v France, [1985] ECR 439, paragraph 14; and Case C-482/99, France v Commission, [2002] ECR I-4397, paragraphs 36 to 42.

11. A clear analysis of this distinction is to be found in Advocate General Darmon's Opinion in Joined Cases C-72/91 and C-73/91, Sloman Neptun v Bodo Ziesemer, [1993] ECR I-887.

12. See, inter alia, Joined Cases C-393/04 and C-41/05, Air Liquide Industries Belgium, [2006] ECR I-5293, paragraphs 33 to 36; Case C-222/04, Cassa di Risparmio de Firenze and Others, [2006] ECR I-289, paragraphs 139 to 141; and Case C-310/99, Italy v Commission, [2002] ECR I-2289, paragraphs 84 to 86.

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22. Community Guidelines on State aid to promote risk capital investments in small and medium-sized enterprises (OJ C 194, 18.8.2006, p. 2).

23. Community Framework for State aid for research and development and innovation (OJ C 323, 30.12.2006, p. 1).

24. The Standstill Obligation is reiterated in Article 3 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [93] of the EC Treaty (OJ L 83, 27.3.1999, p. 1) ('the Procedural Regulation'). As regards the exact time of the granting of an aid, see Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid (OJ L 379, 28.12.2006, p. 5) at recital 10.

25. OJ L 142, 14.5.1998, p. 1.

26. Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid (OJ L 10, 13.1.2001, p. 20); Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ L 10, 13.1.2001, p. 33); Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ L 337, 13.12.2002, p. 3) and Commission Regulation (EC) No 1628/2006 of 24 October 2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid (OJ L 302, 1.11.2006, p. 29). The SME, training and employment Block Exemption Regulation were prolonged until 30 June 2008 by Commission Regulation (EC) No 1976/2006 of 20 December 2006 amending Regulations (EC) No 2204/2002, (EC) No 70/2001 and (EC) No 68/2001 as regards the extension of the periods of application (OJ L 368, 23.12.2006, p. 85). Specific Block Exemption Regulations apply in the fisheries and agricultural sector. See Commission Regulation (EC) No 736/2008 of 22 July 2008 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of fisheries products (OJ L 201, 30.7.2008, p. 16); and Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ L 358, 16.12.2006, p. 3).

27. OJ L 214, 9.8.2008, p. 3. The General Block Exemption Regulation entered into force on 29 August 2008. The rules governing the transition to the new regime are contained in its Article 44.

28. See Article 1 (b) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

29. This does not apply where the scheme itself foresees an individual notification requirement for certain types of aid. On the notion of existing aid, see also Case C-44/93 Namur-Les assurances du crédit v Office national du ducroire and Belgian State [1994] ECR I-3829, paragraphs 28 to 34.

30. See Case C-119/05 Lucchini [2007] ECR I-6199, paragraph 53.

31. Case T-330/94, Salt Union v Commission, [1996] ECR II-1475, paragraph 39.

32. Case C-188/92, TWD Textilwerke Deggendorf v Germany, [1994] ECR I-833, paragraphs 17, 25 and 26; see also Joined Cases C-346/03 and C-529/03, Atzeni and Others, [2006] ECR I-1875, paragraph 31; and Case C-232/05, Commission v France, ('Scott'), [2006] ECR I-10071, paragraph 59.

33. Case C-368/04, Transalpine Ölleitung in Österreich, cited above footnote 8, paragraph 37; Joined Cases C-261/01 and C-262/01, Van Calster and Cleeren, [2003] ECR I-12249, paragraph 74; and Case C-39/94, SFEI and Others, paragraph 41.

34. Case C-199/06, CELF and Ministre de la Culture et de la Communication, [2008] ECR I-469, paragraph 38; Case C-17/91, Lornoy and Others v Belgian State, [1992] ECR I-6523, paragraph 30; and Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, paragraph 14.

35. Case C-368/04, Transalpine Ölleitung in Österreich, paragraphs 38 and 44; Joined Cases C-261/01 and C-262/01, Van Calster and Cleeren, paragraph 75; and Case C-295/97, Piaggio, paragraph 31.

36. OJ L 83, 27.3.1999, p. 1.

37. Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, paragraphs 11 and 12; and Case C-39/94, SFEI and Others, paragraphs 39 and 40.

38. Case C-368/04, Transalpine Ölleitung in Österreich, paragraph 48.

39. Case C-301/87, France v Commission, ('Boussac'), [1990] ECR I-307.

40. Case C-142/87, Belgium v Commission, ('Tubemeuse'), [1990] ECR I-959.

41. Case C-301/87, France v Commission, ('Boussac'), paragraphs 17 to 23; Case C-142/87, Belgium v Commission, ('Tubemeuse'), paragraphs 15 to 19; Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, paragraph 14; and Case C-199/06, CELF and Ministre de la Culture et de la Communication, paragraph 38.

42. Cf. Article 11(2) of the Procedural Regulation, which requires that there are no doubts about the aid character of the measure concerned, that there is an urgency to act and that there is a serious risk of substantial and irreparable damage to a competitor.

43. Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, paragraph 12; Case C-39/94, SFEI and Others, paragraph 40; Case C-368/04, Transalpine Ölleitung in Österreich, paragraph 47; and Case C-199/06, CELF and Ministre de la Culture et de la Communication, paragraph 41.

44. On the invalidity of the granting act in cases where the Member State has violated Article 88(3) EC, see Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, cited above footnote 8, paragraph 12; see also, as an illustration, German Federal Court of Justice ('Bundesgerichtshof'), judgment of 4 April 2003, V ZR 314/02, VIZ 2003, 340, and judgment of 20 January 2004, XI ZR 53/03, NVwZ 2004, 636.

45. Case C-71/04, Xunta de Galicia, [2005] ECR I-7419, paragraph 49; Case C-39/94, SFEI and Others, paragraphs 40 and 68; and Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v France, paragraph 12.

46. Case C-39/94, SFEI and Others, paragraphs 70 and 71, referring to Advocate General Jacobs' Opinion in this case, paragraphs 73 to 75; see also Case 223/85, RSV v Commission, [1987] ECR 4617, paragraph 17; and Case C-5/89, Commission v Germany, [1990] ECR I-3437, paragraph 16.

47. On the standard applied in this respect, see Advocate General Jacobs' Opinion in Case C-39/94, SFEI and Others, paragraph 75.

48. Case C-5/89, Commission v Germany, paragraph 14; Case C-169/95, Spain v Commission, [1997] ECR I-135, paragraph 51; and Case C-148/04, Unicredito Italiano, [2005] ECR I-11137, paragraph 104.

49. Case C-5/89, Commission v Germany, paragraph 14; Case C-24/95, Alcan Deutschland, [1997] ECR I-1591, paragraph 25; and Joined Cases C-346/03 and C-529/03, Atzeni and Others, paragraph 64.

50. Cf. Advocate General Jacobs' Opinion in Case C-39/94, SFEI and Others, paragraph 73; and Case 223/85, RSV v Commission, cited above footnote 51, paragraph 17.

51. Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 v Commission [2006] ECR I-5479, paragraph 147.

52. Case C-199/06, CELF and Ministre de la Culture et de la Communication, paragraphs 45, 46 and 55; and Case C-384/07, Wienstrom, judgment of 11 December 2008, not yet published, paragraph 28.

53. Case C-199/06, CELF and Ministre de la Culture et de la Communication, paragraph 49.

54. The judgment explicitly confirms the recovery obligation imposed by the ECJ in its previous jurisprudence, cf. Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraph 41.

55. Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 53 and 55.

56. OJ L 140, 30.4.2004, p. 1. On the method for setting the reference and discount rates, see the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p. 6)

57. Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 50 to 52 and 55.

58. Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 36, paragraphs 52 and 55.

59. See paragraph 36. Taxes paid on the nominal aid amount can be deducted for the purposes of recovery, see Case T-459/93 Siemens v Commission [1995] ECR II-1675, paragraph 83.

60. Case C-199/06, CELF and Ministre de la Culture et de la Communication, paragraphs 52 and 55.

61. Case C-199/06, CELF and Ministre de la Culture et de la Communication, paragraph 69.