

Northwestern Journal of International Law & Business

Volume 24

Issue 3 *Spring*

Spring 2004

E.U. State Aid Developments in 2003: More Complexity, Less Certainty Symposium on European Competition Law

Dennis Oswell

Esfandiar Vahida

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [Antitrust and Trade Regulation Commons](#), and the [International Law Commons](#)

Recommended Citation

Dennis Oswell, Esfandiar Vahida, E.U. State Aid Developments in 2003: More Complexity, Less Certainty Symposium on European Competition Law, 24 Nw. J. Int'l L. & Bus. 755 (2003-2004)

This Symposium is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

E.U. State Aid Developments in 2003: More Complexity, Less Certainty

*Dennis Oswell and Esfandiar Vahida**

I. INTRODUCTION

There was a time when observers had the impression that European companies could think of no better gift from the government than a subsidy of some sort. Scrutiny of such governmental largess at the E.U. level was perceived as lax and any consequences for violating the E.U. competition rules against such handouts were seen as remote and timid.¹ Times have changed. As the European Commission (the “Commission”) stiffens its resolve to police and punish unlawful State intervention in the marketplace, governmental subsidies to favored undertakings, broadly referred to in the European Union as “State aid,” are fast becoming gifts that companies sometimes wish they had not received.²

* European Union Competition Law Attorneys, Weil, Gotshal & Manges LLP, Brussels, Belgium.

¹ For a more detailed analysis, see Kelyn Bacon, *The Concept of State Aid: The Developing Jurisprudence in the European and UK Courts*, 24 EUR. COMPETITION L. REV. 54 (2003).

² The term “State aid” is actually broader than the concept of a government subsidy, going well beyond simple cash transfers from a government to a favored company to cover “any aid” that comes from “state resources in any form whatsoever.” CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, art. 87, O.J. (C 325) 67 (2002) [hereinafter EC Treaty]. The European Court of Justice elaborated on this difference by saying that:

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 meaning of the word, are similar in character and have the same effect.

Under E.U. competition rules,³ any *advantage* granted by the State to a company that *distorts* (or threatens to distort) *competition* in the European Union and which is capable of *affecting trade* between E.U. Member States constitutes unlawful aid unless it meets certain conditions which have become more detailed and more systematically enforced in recent years.⁴

The characterization of State aid granted in a straightforward manner as unlawful, e.g., through the grant of a loan at an artificially low rate, is relatively unproblematic, but the Commission is more and more often scrutinizing suspected State aid in unobvious and novel situations. In doing so, the Commission has been using the tests applied in straightforward cases and has adapted them to the situations under review (to use a French expression—*c'est dans les vieilles marmites qu'on fait la meilleure soupe*).⁵

The sophistication of the criteria used to characterize governmental assistance as unlawful State aid has made it risky for aid givers and recipients to predict whether an advantage granted by the State can safely pass the review of the Commission. Moreover, once a measure has been cleared (or blocked) by the Commission, as shown in the judgments reviewed below, a real risk exists that the European Courts⁶ will find the Commission's decision defective. This uncertainty, combined with the threat of recovery and reimbursement obligations, and the heavy political context surrounding State aid cases and Commission inquiries,⁷ make it hazardous to be a grantor, a beneficiary or a regulator in the State aid business.

One of the principal instruments used to characterize aid is the market economy investor principle ("MEIP"), and 2003 was a year of "tweaking" the MEIP for application in new contexts.

II. APPLICATION OF THE MARKET ECONOMY INVESTOR PRINCIPLE IN THREE NOVEL FACTUAL SITUATIONS

The MEIP is used to characterize the existence of State aid within the meaning of Article 87 of the European Community Treaty ("EC") and, at the same time, aims at ensuring equality of treatment between State-owned or controlled companies and private sector competitors pursuant to Article 295 EC.⁸ In other words, the MEIP test is designed to address situations

³ Articles 87-88 of the EC Treaty provide the legal basis of the E.U. competence in this field. EC TREATY, *supra* note 2, arts. 87-88.

⁴ For a more detailed analysis, see Bacon, *supra* note 1, at 54-61.

⁵ Translation: "It is in old pots that one makes the best soup."

⁶ The Court of First Instance ("CFI") and the European Court of Justice ("ECJ").

⁷ See e.g., Case C-110/02, Commission v. Council, (Dec. 11, 2003), at http://europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79968788C19020110%26model%3Ddoc_curia.

⁸ A standard expression of this test in the "straightforward" context of capital injection by

where a public authority acts (or claims to act) as a market participant, engaging in commercial activities in the same manner as a private undertaking.

In assessing alleged State aid measures under the MEIP, the Commission and the Community Courts assess whether, from the standpoint of the alleged State aid grantor, a private investor in similar circumstances would have provided the assistance in question;⁹ or whether, from the standpoint of the alleged State aid recipient, the recipient received a benefit it would not have obtained under normal market conditions.¹⁰ Where the State is determined to have acted in a manner similar to that of a “market economy investor,” i.e., providing the aid is seen as a sensible business decision that would likely have been made by a private investor on similar terms and conditions (i.e., a private party motivated by profit and unconcerned by broader governmental social objectives such as artificially bolstering employment or favoring a national champion), the MEIP is satisfied and the assistance in question will be characterized as a rational commercial investment rather than as unlawful State aid.¹¹

Judgments issued in 2003 by the European Court of Justice (“ECJ”) have applied the MEIP in several situations where it had not, or not as clearly, been applied before: (a) when the grantor of alleged State aid operates in a reserved market, (b) where the aid recipient provides a public service, and (c) from the point of view of an indirect beneficiary of the aid.

the State is as follows: “in order to determine whether . . . measures are in the nature of State aid, it is necessary to consider whether in similar circumstances a private investor of a size comparable to that of the bodies administering the public sector might have provided capital of such an amount.” Case C-305/89, *Italian Republic v. Commission*, 1991 E.C.R. I-01603, at para. 19.

⁹ Case 234/84, *Belgium v. Commission*, 1986 E.C.R. 2263; Case C-303/88, *Italy v. Commission*, 1991 ECR I-4437; Joined Cases C-278/92, C-279/92 and C-280/92, *Spain v. Commission*, 1994 E.C.R. I-4103.

¹⁰ Case C-39/94, *SFEI v. La Poste*, 1996 E.C.R. I-3547, at para. 60.

¹¹ See e.g., Case T-98/00, *Linde AG v. Commission*, 2002 E.C.R. II-3961.

A. Application of the MEIP when the Grantor of Alleged Aid Operates in a Reserved Market: *Chronopost and others v UFEX and others*¹²

In *Chronopost*, the ECJ clarified the conditions of the application of the MEIP when the grantor of an advantage operates in a “reserved market,” (i.e., one which lacks a private sector analogue).

In the case, La Poste (the French post office) provided logistical and commercial assistance to Chronopost, a subsidiary operating in the private sector. The French postal service is an entity governed by public law and had no equivalent in the private sector because it possessed a comprehensive, nation-wide postal delivery network that “would never have been created by a private undertaking.”¹³ This made it impossible to directly compare La Poste with a private investor, thereby hindering the application of the MEIP. The question on the minds of governments, companies and practitioners alike was whether the Court would attempt to apply some sort of MEIP test to analyze the alleged aid given by La Poste to Chronopost given the absence of a private sector comparator.

The ECJ judged that: “in the absence of any possibility of comparing the situation of La Poste with that of a private group of undertakings not operating in a reserved sector, ‘normal market conditions,’ which are necessarily hypothetical, must be assessed by reference to the objective and verifiable elements which are available.”¹⁴

The “objective and verifiable elements” to be used when characterizing aid as unlawful or not were: (1) whether it is established that the price charged properly covers all the additional, variable costs incurred by La Poste in providing the logistical and commercial assistance to Chronopost,

¹² Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost SA, La Poste and French Republic v. Union Française de l'Express (UFEX), DHL Int'l, Federal Express Int'l (France) and CRIE*, at paras. 38-41 (Jul. 3, 2003), at http://europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969296C19010094%26model%3Ddoc_curia; Case C-355/00, *Freskot/Elliniko Dimosio* (May 22, 2003), at http://europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969477C19000355%26model%3Ddoc_curia. *Freskot*, judged on May 22, 2003, before *Chronopost*, is consistent with *Chronopost*, although in a less clear way. In *Freskot*, the grantor of the alleged State aid was the ELGA, the Greek organization for agricultural insurance, a private entity wholly owned by the State and financed by a special insurance contribution levied by the tax authority. There was no equivalent for the ELGA in the private sector, at least regarding risks for which coverage would not be profitable. The alleged aid concerned whether a compulsory insurance scheme operated by the ELGA constituted State aid to Greek farmers. The ECJ indicated that the existence of aid must be assessed by reference to the “actual economic cost of the benefits provided by the ELGA under the compulsory [*i.e.*, not provided on the free market] insurance scheme, if indeed such a cost can be calculated.”

¹³ Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, *Chronopost*, at para. 36 (May 22, 2003), at http://europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969296C19010094%26model%3Ddoc_curia.

¹⁴ *Id.* at para. 38.

an appropriate contribution to the fixed costs arising from use of the postal network and an adequate return on the capital investment in so far as it is used for Chronopost's competitive activity; and (2) whether those elements have been underestimated or fixed in an arbitrary fashion.¹⁵ In other words, the ECJ did not even look for a "second best" market economy investor equivalent of the French postal service and instead went directly to a review of whether a certain contractual relationship made economic sense. The ECJ's analysis mainly focused on "objective elements" of assessment of the economic rationality of the measure at issue in order to determine whether the measure satisfied the MEIP. This approach had been applied before,¹⁶ but not as clearly as it was in *Chronopost*.

The ECJ had, in a previous judgment involving La Poste, adopted a position quite different to that which it elaborated in *Chronopost*, ruling that there should be an analysis based upon the classic elaboration of the MEIP, namely—whether the *recipient* undertaking receives an economic advantage which it would not have obtained under normal market conditions.¹⁷ *Chronopost* says that even where a lack of a private sector comparator prevents this question from being answered, there nonetheless remains scope for applying the MEIP, as described above. Moreover, whereas in *Chronopost* and in other relatively rare cases where State aid was alleged in the price of the provision of goods or services provided by a State controlled entity, the MEIP has usually been applied from the point of view of the *grantor* of the goods or services in question.¹⁸ In so doing the ECJ is signaling that under certain circumstances it will respect an economic decision of a State controlled entity so as long as it makes economic sense *from the point of view of that State controlled entity*.¹⁹

¹⁵ *Id.* at para. 40.

¹⁶ Case C-56/93 *Belgium v. Commission*, 1996 E.C.R. I-723, at paras. 27-28, 30, 37 (the "objective element" used by the ECJ to characterize the absence of aid was the "conditions of competition," i.e., competition in the ammonia market presented by imports from non-member countries); Joined cases 67/85, 68/85 and 70/85, *Van der Kooy v. Commission*, 1988 E.C.R. 219, at para. 30 (the objective element used was "the need to resist competition on the same market from other sources of energy the price of which was competitive," and competition was assessed based on price levels and the cost of conversion of users to alternative sources of energy); Case T-98/00, *Linde*, 2002 E.C.R. II-3961 (the objective elements taken into account were the cost of the service provided by the other party to a contract and the fact that conditions were not less favorable than under a previous contract replaced by the new arrangements).

¹⁷ Case C-39/94 *Syndicat Français de l'Express Int'l (SFEL) v. La Poste*, 1996 E.C.R. I-03547, at paras. 58, 61-62; *see also* Case T-98/00, *Linde*, 2002 E.C.R. II-3961, at para. 39.

¹⁸ Case C-457/00, *Belgium v. Commission*, para 57 (July 3, 2002), at http://europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79979080C19000457%26model%3Ddoc_curia.

¹⁹ This approach is consistent with the ECJ's rulings on the financing of public services discussed below, where the satisfaction of the MEIP is verified from the point of view of the

The review of the existence of possible State aid from the point of view of the beneficiary would, in the case of *Chronopost*, have amounted to prohibiting a measure as illegal State aid simply because of the different cost structure of the State controlled entity vis-à-vis a private sector operator. Therefore, such a review would have discriminated against the State owned entity, contrary to Article 295 EC, by effectively preventing it from acting in a reasonable commercial manner. Had the recipient perspective of the MEIP been applied, the State controlled entity would have to imitate a private sector entity to satisfy the MEIP, even though no comparable private sector entity existed.

Putting this point aside, the judgment in *Chronopost* appears open ended in that the criterion of the absence of an equivalent market economy investor for the grantor, which triggered recourse to a cost analysis, is a problem also encountered in other situations. The outcome of a pending case involving the Agricultural Bank of Greece (“BAG”) is interesting because the opinion of Advocate General M.L.A. Geelhoed does not follow *Chronopost*.²⁰ The alleged unlawful State aid concerned the provision of loans to farmers by BAG, which is controlled by the Greek State and is an entity without an equivalent in the private sector.²¹ The Advocate General considers that since the loans were granted at conditions that private banks would not have found acceptable, they do not satisfy the MEIP, thus comparing a unique entity (BAG) with second best equivalents (commercial banks).²² It may be that the existence of a commoditized market for the provision of loans justifies different legal treatment compared to the provision of goods or services in the special context of the *Chronopost* case.²³

In addition to the application of the MEIP to aid provided from companies operating in a reserved sector in the form of provision of goods or services to a private sector entity, as indicated above, 2003 also saw the issue of the application of the MEIP arise in a symmetrical situation – State compensation to companies that provide goods or services to the State

provider of public services (whose costs are analyzed) and not from the point of view of the public entity paying for such services.

²⁰ Case C-278/00, *Greece v. Commission*, at para. 127 (Sept. 25, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969074C19000278%26model%3Ddoc_curia (Opinion of Advocate General M.L.A. Geelhoed).

²¹ *Id.* BAG is described by the Advocate General as the only bank operating exclusively in the agricultural sector. Moreover, where a commercial bank considering making a loan would limit its analysis to the commercial merits of said loan, the BAG has been described as entrusted with a “mission” based on the “greater interests of the agricultural sector.” *Id.* at paras. 122, 127.

²² *Id.* at para. 127.

²³ *Id.*

while discharging a public service obligation.

B. Application of the MEIP to the financing of public service obligations:
*Altmark*²⁴

The ECJ's *Altmark* judgment has enjoyed a dominant position in last year's E.U. State aid literature and commentaries. The case was about the grant of a license to operate a scheduled bus transport service in a German region to a company called Altmark. The provision of the transport service constituted the discharge of a public service obligation (in this case the provision of public bus transportation). The case was brought to the ECJ through a request for a preliminary ruling and the ECJ reviewed the issue of whether subsidies granted by public authorities to make up for the costs involved in executing a public service obligation constitute unlawful State aid.

1. *The three competing views*

There were three competing legal views involved in this debate.

First, there was Advocate General Léger's opinion.²⁵ In his conclusions in *Altmark*, Advocate General Léger considered that the fact that an advantage granted by public authorities comes in compensation for the discharge of a public service obligation by its beneficiary is *not* relevant to the *characterization* of that advantage as State aid. This fact, according to the Advocate General, is only relevant to the analysis of the *compatibility* of the aid with the common market. According to Advocate General Léger, a "gross" advantage can constitute State aid, even if the "net" amount (taking into account the cost of public service obligations to their provider) does not constitute an advantage (this approach is referred to as the "State aid approach").²⁶ This approach would have burdened E.U. Member States with the obligation to notify for approval to the Commission every measure that involved the financing of a public service.

Second, there was Advocate General Tizzano's opinion.²⁷ The ECJ's position before the *Altmark* judgment was reflected in the *Ferring* judgment

²⁴ Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht*, (Jul. 24, 2003), at http://europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969275C19000280%26model%3Ddoc_curia.

²⁵ *Greece*, (Sept. 25, 2003) at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969074C19000278%26model%3Ddoc_curia.

²⁶ *Id.* at para. 94.

²⁷ Case C-53/00, *Ferring SA and Agence centrale des organismes de sécurité sociale (ACOSS)*, 2001 E.C.R. I-9067.

and followed Advocate General Tizzano's position. In that judgment, the ECJ decided that an exemption of a tax (on direct sales of medicine) amounted to State aid only where this advantage *exceeds* the cost of providing certain public service obligations (*i.e.*, there is State aid when the "net" amount constitutes an advantage - this approach is referred to as the "compensation approach").²⁸ Advocate General Léger considered that this view amounted to transposing the MEIP to the financing of public services (although the *Ferring* decision and the conclusions of Advocate General Tizzano do not mention the MEIP expressly).

Third was Advocate General Jacob's opinion.²⁹ In his conclusions in *GEMO*, Advocate General Jacobs indicated that when there is a clear *quid pro quo* between general interest obligations and their financing measures, then the compensation approach should apply; and that when there is no such *quid pro quo*, the State aid approach should apply. Advocate General Jacobs expressly refers to the application of the MEIP (which he calls the "private investor test").

The winners appear to have been Advocates General Jacobs and Tizzano. In its *Altmark* judgment, the ECJ ruled that financial support, which merely represents compensation for carrying out public service obligations imposed by Member States, does *not* have the characteristics of State aid because such support does not constitute an "advantage."³⁰ While in *Ferring*, the absence of over-compensation (*i.e.*, paying the provider of the public service more than the actual cost incurred in executing the obligation) was sufficient for a finding of absence of State aid, in *Altmark*, the ECJ detailed this condition and set forth the following four sub-conditions that must be satisfied in order to escape characterization as unlawful State aid for compensation provided by a government in exchange for providing a public service:

1. The recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;
2. The parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;
3. The compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a

²⁸ *Altmark*, *supra* note 24, at para. 7 (Opinion of Advocate General Léger).

²⁹ Case C-126/01, *Ministre de l'Economie, des Finances et de l'Industrie v. GEMO SA*, (Apr. 30, 2002), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79979569C19010126%26model%3Ddoc_curia (Opinion of Advocate General Jacobs).

³⁰ *Altmark*, *supra* note 24, at para. 87.

reasonable profit for discharging those obligations, and

4. Where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure (*i.e.*, via a transparent open bidding process), the level of compensation needed has to have been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.³¹

Condition 1 above defines the scope of application of the *Altmark* ruling—analyzing aid provided in exchange for the discharge of a public service obligation. Conditions 2 to 4 apply the MEIP to these circumstances.

It is noteworthy that the ECJ appears not to have picked up Advocate General Leger's opinion that the MEIP is reserved exclusively for situations where the aid recipient carries on an "economic activity" and that the MEIP cannot apply where the government exercises its official or sovereign powers, such as where it provides public services.³² The judgment therefore may mean that certain instances of the exercise of official powers are subject to the application of the MEIP, or that the grant of a subsidy does not constitute the exercise of an official power. Sadly, the Court did not take the opportunity to define what official powers are or the scope of any "hardcore" official powers where the MEIP may not apply. A clearer definition of official powers would be welcome.

2. Follow-up Legislation on Services of General Economic Interest

E.U. legislation on services of general interest (*i.e.*, public services) had been suspended while the *Altmark* case was pending. As a result of the judgment, the Commission is currently contemplating the adoption of guidelines or legislation regarding compensation for the cost of services of general interest based on the four criteria set forth in the *Altmark* judgment.³³ The Commission is also contemplating the adoption of an

³¹ *Id.* at para. 95.

³² *Altmark*, (Jan. 14, 2003) (the Advocate General Léger mentions compulsory social security schemes or compulsory education as examples of Official or sovereign powers to which the MEIP cannot be applied), at http://europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969885C19000280%26model%3Ddoc_curia.

³³ *Altmark*, at para. 95 (July 24, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969275C19000280%26model%3Ddoc_curia.

instrument clarifying the conditions that need to be satisfied for State aid to be compatible with the EC Treaty that would, *inter alia*, define over-compensation for the provision of public services. Finally, the Commission is working on a possible block exemption regulation for aid to services of general interest.³⁴

C. Existence of Aid to an Indirect Beneficiary

In *SIM 2 Multimedia SpA*,³⁵ the ECJ reviewed the existence of aid to an indirect beneficiary. In the facts of the case, a parent company that allegedly received unlawful State aid hived off its most profitable business activities into a subsidiary ("SIM Multimedia") after the Commission launched a formal State aid investigation. The shares of SIM Multimedia, were subsequently sold by the parent under investigation to a third party.³⁶

The Commission found that illegal aid was indeed granted to the parent corporation and ordered that the aid be partly recovered from SIM Multimedia even though it was purchased by third parties and no longer belonged to its original parent.³⁷ The ECJ annulled the Commission decision in this case because the Commission had not adequately considered whether the initial beneficiary of the unlawful State aid (*i.e.*, SIM Multimedia's parent) had *retained* the benefit of aid. Specifically, the Court stated that the fact that the shares in the subsidiary were apparently sold at market price indicates that the seller, SIM Multimedia's original parent, "retained the benefit of the aid received from the sale of SIM Multimedia at market price."³⁸ The purchase price presumably would have reflected the value of any advantage retained by SIM Multimedia, and if this was the case then it would be inappropriate to attempt recovery from the indirect beneficiary.

The assessment of whether the sale of SIM Multimedia was at a market price constitutes an application of the MEIP to the sale of shares from a direct beneficiary of unlawful State aid to a third party. Since the

³⁴ Mario Monti, Speech to the British Chamber of Commerce on New Developments in State Aid, Brussels (Dec. 1, 2003) (transcript available at http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/03/604|0|RAPID&lg=EN&display=).

³⁵ Joined Cases C-328/99 and C-399/00, Italian Republic and SIM 2 Multimedia SpA v. Commission, at paras. 75, 95 (May 8, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969491C19990328%26model%3Ddoc_curia.

³⁶ Although the judgment expressly states, "the question arises whether [the subsidiary] should also be considered as having been a beneficiary of the aid", the rest of the judgment is not clear, and the indirect beneficiary of aid can alternatively be presented as a mere party from whom aid is recovered. *Id.* at para. 75.

³⁷ *Id.* at para. 18.

³⁸ *Id.* at para. 8.

ECJ mentions that SIM Multimedia, as a subsidiary of a recipient of unlawful State aid, could itself be characterized as a beneficiary of unlawful State aid, the review of whether its shares were sold at a market price could lead to a novel conclusion. The buyer of the shares has itself become the beneficiary of the unlawful State aid. This is unusual since normally the MEIP is applied to the relationship between the State, or a State-controlled entity, and the *direct* beneficiary of aid.

It is true that a few decisions had in the past disregarded or appeared to disregard a direct receiver of aid and focused on an indirect beneficiary. However, they concerned direct beneficiaries who had no economic activity, and were therefore not “undertakings” for purposes of E.U. State aid law, whereas the indirect beneficiaries did carry out an economic activity.³⁹ The new element found in the *SIM Multimedia* case is that the direct and indirect beneficiaries of aid are both undertakings for purposes of E.U. State aid law and that the MEIP is able to be applied further “downstream” than previously declared.

The above case must be distinguished from *Verlipak*, where the ECJ ruled that the Commission was correct to take into account the effect of a clause by which the borrower of funds from the State passed the funds to a third party who was subsequently found to be the beneficiary of aid.⁴⁰ Whereas in *SIM 2 Multimedia SpA*, the MEIP appears to have been applied both between the State and the direct beneficiary and between the direct and the indirect beneficiary, in *Verlipak*, the MEIP is applied once, between the State and the ultimate beneficiary.

In order to prevent the risk present in *SIM 2 Multimedia SpA* of finding aid at every level where the benefits of the aid trickle, the ECJ could have simply ruled that the “downstream” parties taking advantage of aid were to be considered as parties from whom aid can be recovered rather than beneficiaries of aid. The difference would have been that the burdensome MEIP would not apply in commercial relations between unsuspecting private entities. This alternative view can apply only if the rules on recovery from “downstream” parties are clarified, which, as explained below, is not yet the case.

III. RECOVERY AND REIMBURSEMENT OF UNLAWFUL AID

E.U. Member States have an obligation to recover unlawful aid in accordance with their national laws.⁴¹ The Commission has recently set up

³⁹ Case C-156/98, *Federal Republic of Germany v. Commission*, 2000 E.C.R. I-06857, at paras. 27-28.

⁴⁰ *Belgium*, at paras. 57-61 (July 3, 2002), at http://europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79979080C19000457%26model%3Ddoc_curia.

⁴¹ *Altmark*, at para. 95 (Jul. 24, 2003), at <http://europa.eu.int/servlet/portail/>

a dedicated unit in charge of enforcing recovery decisions,⁴² but it is unclear who are the losers and winners of aid recovery. More specifically, there is uncertainty in the case law regarding who should reimburse unlawful aid, and the rights of parties contributing to a tax or charge levied specially to finance the underlying grant of aid, once that aid is declared unlawful.

A. Recovery from an Indirect Beneficiary of Aid—Cases of the Sale of Assets or Shares of the Direct Beneficiary of Aid

As indicated above, the ECJ has judged that unlawful State aid can be recovered from a company that purchased assets from another company that directly benefited from State aid, if the assets were sold at a non-market price or as a result of a procedure that was not open and transparent.⁴³ What the ECJ has not done is clearly define its position regarding whether, in the case of a sale of shares by a direct beneficiary of unlawful aid, the aid must be recovered from the seller of the shares, or from the company whose shares have been sold (or even from the buyer of shares, which the Court has yet to order).⁴⁴

In a June 2003 opinion,⁴⁵ Advocate General Tizzano argued that in the case of a share deal, aid should be recovered from the initial beneficiary of the aid because this is the only way of eliminating the distortion of competition created by the underlying grant of aid. This solution would apply regardless of whether the shares were sold at market price.

The uncertainty as to whether the seller of shares in a company that benefited from aid, or the company whose shares have been sold, or even the buyer of the shares, is ultimately liable for the repayment of State aid is harmful to the acquisition of companies. Clarification by the ECJ would therefore be welcome.

B. Can the Council 'Whitewash' Aid Found Unlawful by the Commission in Order to Avoid Repayment by its Beneficiary?

The fact that this question arose illustrates the heavy political context

CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969275C19000280%26model%3Ddoc_curia.

⁴² *Id.*

⁴³ *Italian Republic*, (May 8, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969491C19990328%26model%3Ddoc_curia.

⁴⁴ Opinion of Advocate General Antonio Tizzano, Case C-277/00, Germany v. Commission (Jun. 19, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DFR%26ident%3D79969380C19000277%26model%3Ddoc_curia (“[d]ans aucun précédent, la Cour n’a en revanche fait reposer l’obligation de restitution dans le chef de l’acquéreur, dont la responsabilité a été au contraire expressément exclue en cas de vente au prix du marché (arrêt Banks).”)

⁴⁵ *Id.*

surrounding State aid cases. The outcome of the case in question would determine whether a principle of “preemption” exists in E.U. institutional rules that would prevent inconsistency between Commission and Council decisions.

In *Commission v Council*,⁴⁶ the Commission ordered the repayment of unlawful aid granted by Portugal to pig farmers. A Council decision (taken pursuant to the third subparagraph of Article 88(2) EC, which empowers the Council, where justified by exceptional circumstances, to declare compatible with the common market an aid which a Member State is granting or intends to grant) authorized Portugal to make payments to a group of Portuguese pig farmers equivalent in amount to aid which those farmers had already received but had been required to repay following the Commission decision. The case is still pending before the ECJ, but Advocate General Jacob’s opinion in this case favors preventing the Council from frustrating a Commission decision in this manner.

According to Advocate General Jacobs: (a) the Council cannot, under the third subparagraph of Article 88(2) EC, adopt a decision in respect of aid which has previously been the subject of a negative Commission decision; (b) the Council cannot authorize aid which has as its object and effect to assist its recipients to repay aid previously the subject of a negative Commission decision, and (c) hardship to the beneficiaries of the original aid arising out of the obligation to repay that aid does not constitute in itself an exceptional circumstance within the meaning of the third subparagraph of Article 88(2). When ordered by the Commission, recovery must be pursued by the State in question even if it leads to the failure of the undertaking to which the aid was granted. The only defense available to the Member State is that it is absolutely impossible for it to recover the aid.⁴⁷

The judgment in this case will be crucial in either stopping or encouraging a recent tendency noticed by Advocate General Jacobs, namely to use Article 88(2) EC to authorize an aid which serves to reimburse its recipients for having to repay another aid previously subject to a negative Commission decision.

C. Interest Applicable to the Repayment of Unlawful Aid

The Commission has clarified in a Communication⁴⁸ that in any future decisions ordering recovery of unlawful State aid, it will apply the relevant

⁴⁶ Case C-110/02, *Commission v. Council*, (Dec. 11, 2003), at http://europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79968788C19020110%26model%3Ddoc_curia.

⁴⁷ *Id.* at para. 54.

⁴⁸ Commission communication on the interest rate to be applied when aid granted unlawfully is being recovered, 2003 O.J. (C 110) 08, 21, available at http://www.europa.eu.int/eur-lex/en/archive/2003/c_11020030508en.html.

interest rate⁴⁹ on a compound basis calculated annually. This communication is meant to put an end to a doubt that affected the execution of recovery decisions where it was discussed whether the interest rate should be applied on a simple basis or on a compound basis.

D. Entitlement to the Repayment of Charges Levied by a Member State to Finance Unlawful State Aid

Until recently, there was uncertainty as to whether the levying of a charge dedicated to a particular purpose (*i.e.*, a “parafiscal charge”) constituted a component of an aid measure. The lawfulness of the method used to finance aid was thought to be a mere matter of national law drawing inferences from the prohibition of aid.⁵⁰ Several recent judgments have contradicted that view and stated that the *method* of financing aid can itself constitute aid.

In *Van Calster*,⁵¹ the Commission reviewed a notified aid scheme to finance an animal health and production fund and found it to be compatible with the common market. Some of the aid’s financing provisions were retroactive and intended to finance prior, unlawful aid. The aid was financed through levies on certain operators in the meat industry. In a decision that was probably flawed due to a lack of review of the compatibility of the method of the aid’s financing, the E.U. Commission declared the aid compatible with the common market. The ECJ ruled that if an aid measure, of which the method of financing is an integral part, has been implemented in breach of the obligation to notify, national courts must in principle order reimbursement of charges or contributions levied specifically for the purpose of financing that aid. This position has been confirmed in *Enirisorse*.⁵²

It had already been established that charges levied by a Member State

⁴⁹ The relevant interest rate for the recovery of unlawful aid is the reference rate used in the calculation of the net grant equivalent of regional aid measures. Letter from the Commission to the Member States (Feb. 22, 1995), *available at* http://www.europa.eu.int/comm/competition/state_aid/legislation/txint_en.html.

⁵⁰ Joined Cases C-34/01 & C-38/01, *Enirisorse SpA v. Ministero delle Finanze*, at paras. 171-174 (Nov. 7, 2002), *at* http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79978892C19010037%26model%3Ddoc_curia (Opinion of Advocate General Stix-Hackl).

⁵¹ Joined Cases C-261/01 & C-262/01, *Belgische Staat v Eugene Van Calster, Felix Cleeren (C-261/01) and Belgische Staat v Openbaar Slachthuis NV (C-262/01)*, 2003 O.J. (C 304) 5, at para. 54 (In order to avoid criticizing the Commission’s probably imperfect review, the ECJ had to interpret the Commission’s finding of compatibility as a decision that had not approved the aid’s provisions on retroactive financing).

⁵² Joined Cases C-34/01 and C-38/01, *Enirisorse SpA*, at paras. 11, 45, 46 (Nov. 7, 2002), *at* http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79978892C19010037%26model%3Ddoc_curia.

in breach of Community law must not be repaid if it is shown that the person required to pay such charges has actually passed them on to other persons.⁵³ This principle was refined in *Weber's Wine World* where, in connection with a duty on beverages that was found to constitute State aid, the ECJ judged that E.U. law precludes national rules which refuse repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the taxable person be established.⁵⁴ In other words, it is not possible to deny reimbursement of unlawful duties to beverage sellers by claiming that sellers have passed on the duty to buyers without first establishing the extent to which this has in fact happened, and that therefore reimbursement would cause unjust enrichment of the sellers.

In contradiction to the above line of cases, the CFI has recently ruled that a levy charged on cotton, and entirely dedicated to finance aid granted by an association of Greek cotton ginnerers, was merely a State aid financing method and not itself State aid, and could not be declared compatible or incompatible with the common market by the Commission.⁵⁵

All the above does not make life particularly easy for the grantor of aid or the beneficiary. It appears that the multiple tests and controls add complexity to economic decisions of the State or State controlled entities which do not burden decisions by private entities. Although the idea is systematically rejected by case law,⁵⁶ this difference of treatment probably constitutes a breach of Article 295 EC. By contrast to the above restrictions, some of the developments in State aid procedural rules in 2003, concerning the requirement for the Commission to state the reasons for its decisions, may provide limited comfort to the grantor or the beneficiary of challenged aid.

⁵³ Joined Cases C-192/95 and C-218/95, *Comateb and Others v. Directeur Général des Douanes et Droits Indirects*, 1997 E.C.R. I-165, at paras. 20-21.

⁵⁴ Case C-147/01, *Weber's Wine World and Others v. Abgabenberufungskommission Wien*, at para. 98 (Oct. 2, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79968997C19010147%26model%3Ddoc_curia.

⁵⁵ Case T-148/00, *Panhellenic Union of Cotton Ginnerers & Exp. v. Commission*, at paras. 11-12, 65 (Oct. 16, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79968983T19000148%26model%3Ddoc_curia.

⁵⁶ See, e.g., Joined Cases T-116/01 and 118/01, *P & O European Ferries (Vizcaya), SA v. Commission*, 2003 O.J. (C 251) 10, at paras. 151-52.

IV. COURT SANCTION OF THE COMMISSION'S LACK OF SUFFICIENT STATEMENT OF REASONS

The ECJ in 2003 annulled several Commission decisions finding unlawful State aid on grounds of insufficient reasoning.

A. Lack of Sufficient Statement of Reasons Regarding the Application of the MEIP

In *WestLB*,⁵⁷ the CFI judged that without having an obligation to provide an exhaustive account of the mathematical reasoning followed, the Commission must do a better job explaining the essential considerations which lead to its choice of a certain rate of return used in order to determine whether the MEIP test was satisfied. The Commission, among other examples of imprecise wording, referred to certain sources of information in its decision without setting out their content and explaining their consequence on its decision, and had also referred to its "own experience" to justify the decision. In addition, the Commission argued that the beneficiary's participation in a procedure and its experience in a particular market allowed it to understand the Commission's decision. The Court rejected these arguments and annulled the Commission's sloppy decision.

In *SIM 2 Multimedia SpA*, as indicated above, the Commission considered it irrelevant that the shares of a company, that benefited from unlawful State aid, were apparently sold at market price by its shareholder to a third party.⁵⁸ The matter concerned the Commission's attempt at recovering aid from the beneficiary. The Commission's reasons were insufficient to establish that the seller of the shares had not retained the benefit of the aid received from the sale of its shares at market price. The ECJ annulled the Commission's decision on this point.

B. Statement of Reasons Regarding Exemption Decisions by the Commission

The ECJ considers that the Commission has wide discretion regarding exemption decisions.⁵⁹ Judicial review is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons are satisfied, to verify the accuracy of the facts relied on and that there has been

⁵⁷ Joined Cases T-228/99 and T-233/99, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v. Commission*, (Mar. 6, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969693T19990228%26model%3Ddoc_curia.

⁵⁸ *Italian Republic*, at paras. 83-85 (May 8, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969491C19990328%26model%3Ddoc_curia.

⁵⁹ See e.g., *Case C-225/91, Matra SA v. Commission*, 1993 E.C.R. I-3203, at paras. 24-25.

no error of law, manifest error of assessment of facts or misuse of powers.

In *Kingdom of Spain v Commission*, the Commission did not characterize aid as investment or operating aid, as requested by the Guidelines on environmental aid.⁶⁰ The ECJ found this to constitute a breach of the Commission's obligation to explain clearly and unambiguously the reasoning followed, to enable interested parties to take cognizance of the justifications for the measure for the purpose of defending their rights and to enable the courts to exercise their powers of review.⁶¹ The Court therefore annulled the Commission's decision.

V. OTHER PROCEDURAL DEVELOPMENTS

An entity granting or receiving aid may sometimes be in a dominant position. In such cases, there may be a hesitation as to the most appropriate "cause of action." In a recent judgment, the ECJ expressly stated that "the fact that allocation by the State to a public undertaking of a significant proportion of certain charges constitutes State aid does not preclude that allocation from also giving rise to abuse of a dominant position by that undertaking, contrary to Articles 86 and 90 of the Treaty."⁶²

The ECJ already clarified that the Commission cannot be required to take into account amendments made to aid during an administrative procedure (i.e., during a Commission investigation into the alleged aid).⁶³ The CFI has recently added that the Commission may take into account an alteration to an agreement effected during its inquiry, at least when the original agreement and its alteration constitute a single grant of aid.⁶⁴ The Commission can broaden its review, but cannot be forced to do so.

The Commission has published a draft regulation implementing Regulation 659/1999, the general State aid procedural regulation.⁶⁵ The draft Regulation includes a provision making the use of compulsory notification forms necessary for the validity of notifications, rules on the calculation of procedural time limits and a method for the fixing of interest

⁶⁰ Case C-409/00, *Kingdom of Spain v. Commission*, at paras. 93, 98-99 (Feb. 13, 2003), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79969786C19000409%26model%3Ddoc_curia.

⁶¹ *Id.*

⁶² *Enirisorse SpA*, at para. 50 (Nov. 7, 2002), at http://www.europa.eu.int/servlet/portail/CuriaServlet?curiaLink=%26lang%3DEN%26ident%3D79978892C19010037%26model%3Ddoc_curia.

⁶³ Joined Cases C-15/98 & C-105/99, *Italian Republic and Sardegna Lines - Servizi Marittimi della Sardegna SpA v. Commission*, 2000 O.J. (C 372) 1, at paras. 42-43.

⁶⁴ *P & O European Ferries*, 2003 O.J. (C 251) 10, at para. 58.

⁶⁵ See European Commission, Commission Regulation Implementing Council Regulation (EC) No 659/1999, at <http://www.europa.eu.int/comm/competition/stateaid/others/proceduralrules/implementingregulationen.pdf> (last visited Feb. 22, 2004).

rates and the calculation of interests due on the recovery of unlawful aid. The Commission is contemplating the adoption of the Regulation in early 2004.

VI. SUMMARY

Once considered the ugly duckling of E.U. competition law, State aid is rapidly becoming a growing and dynamic source of work for practitioners and regulators alike. As demonstrated above, the field is becoming increasingly complex and nuanced. This has resulted in a great deal of uncertainty among both aid givers and recipients alike as to the legality of actual and contemplated assistance. It is hoped that the Commission will enter into a dialogue with the Member States and the private sector in an effort to further codify and clarify the boundaries of permitted versus unlawful giving. Introducing a greater element of certainty and predictability to this field will reduce the Commission's (and the Courts') case load and allow it to focus its resources on those cases that pose the greatest risk to distorting competition in the European market.