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**Recovery of Illegal State Aid from a Beneficiary's View**

*- The exception of legitimate expectations, the  
(mal)functioning air bag of the State aid policy?*

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## **Summary**

The member states of the European Union grant subsidies for various reasons. The purpose of such State aid can be economic and social as well as political and strategic. It can correct market failures by, for example, supporting research and development as well as investment in environmental technology. At the same time however, EC law has indeed a strict view on the granting of subsidies, since it may affect the competition through out the union in a negative way and thus distort the common market. Member states are therefore obliged to notify the Commission and await its examination of the proposed aid measure before putting it into action. And before approving a measure, the Commission thoroughly examines its compatibility with the Common market. However, while the tasks of examining State aid measures and deciding whether they are to be approved or not, or recovered or not, are placed upon the Commission, the recovery of unlawful and illegal State aids is to be carried out by the national courts, in accordance with national procedures. And as a consequence to the frequent slowness and sometimes lack of such procedures, the recovery of illegal State aids and the enforcement of State aid rules, have repeatedly been on the Commission's agenda. In addition, changes have been made within the procedure of the Commission's examination of potential State aid measures, where additional exemptions to the obligation to notify under Article 88(3) EC Treaty have been approved. By this, the examination in these exempted areas has been replaced by conditions in secondary EC law and the Commission's soft law. And as a consequence, the position of the beneficiary seems to have been weakened.

The purpose of this thesis is, in general, to provide a picture of the situation of the beneficiaries during the examination and recovery procedure under EC law, and in particular, to examine on what grounds a recipient undertaking of unlawful or illegal State aid, believed to be lawful and legal, can be protected from recovery by the principle of the protection of legitimate expectations. It provides, in other words, an examination and analysis of the different sources that may create legitimate expectations. And since such expectations merely can be entertained when contrary to a general principle of community law or when exceptional circumstances prevail, this thesis also provides a picture of in which context such claims can be successfully invoked. Last but not least, the above mentioned changes of the State aid field possess indeed a potential of affecting the position of the beneficiary and thus the notion of legitimate expectations. Therefore, this report also examines in what way and to what extent that may be the case.

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## 1. Introduction

In a pure and flawless market economy, this essay would not have been written. In such an economy, state subsidies do not exist. This is however not the reality, neither in the European Union (hereinafter referred to as EU) nor rest of the world. Something we indeed have been reminded of during recent time; where the reliance on state resources for companies to survive has been widely common not only through out the EU.

The granting of State aid has however also a natural place in the economies of the Community. The concept is broad and common and governments grant subsidies for various reasons. Thus, the purpose of State aid can be economic and social as well as political and strategic. It can furthermore act as a corrector of market failures. According to this line of reasoning, phenomena as asymmetric information, externalities and economies of scale can make it necessary for governments to grant subsidies. And target for such aid can be activities such as training or research and investment in environmental protection as well as so called Services of General Economic Interest (hereinafter referred to as SGEI).<sup>1</sup> In such areas, social and political objectives, such as equity, participation, cohesion and solidarity may be reasons to grant subsidies.<sup>2</sup> Aid may, in the context of SGEI, for example be necessary to guarantee the same access to telecommunications and postal services for all citizens of a member state.

However, State aid runs a great risk of affecting the competition, and thus weakening the common market and the economy as a whole. The main purpose of State aid control is therefore to maintain a level playing field and to protect the common market. For that reason, State aid policy has been an integral part of the competition policy since the signing of the Treaty of Rome in 1957, and since then the Commission has monitored that State aid not unduly distorts the competition in the Community.

In order to make State aid rules efficient, enforcement is central. It is thus highly important that there exist effective sanctions for breaching State aid rules, and that exceptions are carefully applied. However, the enforcement of the State aid rules has due to high numbers of un-repaid illegal State aid been target of much attention. For example, the State aid action

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<sup>1</sup> Hancher (2006) p. 18.

<sup>2</sup> Services of General Economic Interest Opinion Prepared by the State aid Group of EAGCP June 29 2006 p. 2.

plan (hereinafter referred to as the SAAP)<sup>3</sup> provides that “*the Commission will pursue a more effective policy and will seek to achieve the immediate execution of all recovery decisions*”. The SAAP further proposes the creation of State aid authorities through out the Community, as a way of enhancing the compliance with the State aid rules. Improvements of the rights of third parties as well as an upgrade of national rules concerning recovery have furthermore been topics of discussion. The Commissioner Neely Kroes gave her opinion on how to increase the efficiency of recovery of illegal State aid in a speech during the implementation of the SAAP: “*I would hope that competitors could become our best allies.*”<sup>4</sup>

While much work is done to improve the efficiency of recovery, the Commission’s scope of review has also been target for modification. Through recent case law and the newly adopted General Block Exemption Regulation, the possibilities to be exempted from the notification and standstill obligations according to Article 88(3) EC Treaty (hereinafter referred to as EC) and thus the examination of the Commission has further expanded. The real effect of this has probably not yet been shown. In addition, as a consequence of the financial crisis, the granting of subsidies has over recent time reached vast proportions. And for each one of these disbursements, there exists a recipient undertaking: a beneficiary.

What concerns the beneficiaries’ position, it remains however somewhat weak, not only during the notification process but also concerning the recovery of illegal State aids. Since, whereas it is highly important that such aids are recovered and that negative effects on the competition and the common market are corrected, the requirements of legal certainty call for some kind of possibility to be excepted from recovery, i.e. for a recipient undertaking to be exempted from the obligation to repay the State aid. This is particularly since State aid rules indeed are complicated and because recovery may lead to severe consequences for companies forced to repay unlawful or illegal aid, believed to be lawful and legal. Here the possibility to rely on the principle of the protection of legitimate expectations prevails, since the Community judicatures shall refrain from ordering recovery when it would be contrary to a

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<sup>3</sup> State aid action plan – Less and better targeted State aid: a roadmap for State aid reform 2005-2009 (Consultation document) SEC(2005) 795.

<sup>4</sup> Speech by European Commissioner for Competition Policy Neelie Kroes: "Reforming Europe's State aid Regime: An Action Plan for Change" - 14.06.2005: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/347&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited 09/09/28)  
The Commissioner has also expressed, in a most recent speech at a conference concerning Private Enforcement of State Aid rules (Brussels, 19th October 2009) that “*...if there was some systemic problem in some national judicial system, we would ourselves have to consider intervening to make sure that competitors get the necessary legal protection.*”

general principle of community law. And whereas the Community courts have been reluctant to allow such claims, the Commission has been somewhat more willing to accept exceptions, and thus generated a broader notion of what could constitute legitimate expectations as an exemption from the requirement to repay unlawful or illegal State aid.

## **1.1 Purpose, Delimitations and Research Questions**

The purpose of this thesis is, in general, to provide a picture of the situation of the beneficiaries when under the examination and recovery procedure under EC law, and in particular, to examine on what grounds a recipient undertaking of unlawful or illegal State aid, believed to be lawful and legal, can be exempted from recovery by claiming the principle of the protection of legitimate expectations. However, in order to present an image of the beneficiaries' situation, this report will not only contain an examination and analysis of the case law concerning different sources that may create legitimate expectations. It will also provide an analysis of potential problems that a beneficiary of illegal or unlawful State aid may face. An important part of the purpose is therefore to tie the various sources of legitimate expectations and the procedural rules governing that area to the developments in the field of enforcement of EC State aid rules.

Similar, for a successful report on the principle of the protection of legitimate expectations, as an exception to recovery of unlawful and illegal State aid, it is necessary to put it in its context. This follows since the possibility to entertain such expectations is not merely dependent on the subjective situation of the beneficiary, but also on objective circumstances. An additional purpose of this thesis is therefore to provide a detailed backdrop on the relevant rules within the State aid area as well as the principle of the protection of legitimate expectations.

Concerning the delimitations for this thesis, the following should be mentioned. While the Procedural Regulation<sup>5</sup> provides that the Commission shall not require recovery of the aid if that would be contrary to a general principle of community law, I have, despite the existence of additional principles, restricted my examination to merely contain the principle of the protection of legitimate expectations. This is because the principle of legitimate expectations as an exception to recovery is the exemption far most claimed by beneficiaries and dealt with

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<sup>5</sup> Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty, Official Journal L 83/1, 27.03.1999, p. 1-9.

by the Community judicatures. It provides, furthermore, a useful knowledge to what kind of expectations a beneficiary of State aid may have both when applying for such aid and when in a situation where the aid turns out to be unlawful or illegal. Moreover, as claims on legitimate expectations indeed are common, I have primarily focused my analysis on cases where such claims have been successful, save for typical patterns of unsuccessful cases, where examples will be provided. What concerns the developments in the State aid area, I have chosen to focus on them affecting the notification and standstill obligations under Article 88(3) EC since a common motivation, by the Community judicatures to reject a legitimate expectation claim, is that the notification and standstill obligations have not been followed. In addition, the notification requirement enables the Commission's examination, which also possesses an important role when discussing legitimate expectations. However, since private parties have claimed that soft law, such as the Commission's guidelines, has created legitimate expectations, and since the State aid area continues to rely on and create additional such law, their role will also be examined.

The expressed purpose and the delimitations lead to the following research questions:

- (1) On what grounds can a beneficiary of unlawful or illegal State aid rely on the protection of the principle of legitimate expectations as an exception to recovery, i.e. on what grounds can a beneficiary legitimately expect that what turns out to be unlawful or illegal State aid in fact was lawful and legal?
- (2) Are the Commission's reliance on soft law and the changes concerning the notification and standstill obligations and thus the Commission's possibility to perform its examination under article 88 EC capable of affecting the beneficiary's position and the potential sources of legitimate expectations?

## **1.2 Material and Method**

As provided, the purpose of this thesis is to examine and analyse the protection of the principle of legitimate expectations within the State aid field, but at the same time to present an outlook on the notion of recovery from a beneficiary's view. As a result, while the chosen method in the most straightforward way can be described as traditional legal dogmatic method, it also composes an additional approach; it aims at providing a picture of the beneficiaries' situation within the notion of recovery. It is however important to note that,

while the examination aims at systemizing possible exceptions to recovery provided by the principle of legitimate expectations and to present potential problems for beneficiaries due to the developments within the State aid field, it does not aim at being exhaustive. The examples provided are furthermore a result of an examination of relevant materials, and thus, the result an outcome of my interpretation.

As mentioned, the main part of this report is going to be a result of an examination of the exception to recovery provided by the principle of legitimate expectations. And since this exemption can be relied upon before the Commission in accordance with Article 14 of the Procedural Regulation as well as before national and Community courts in line with case law and the so called SFEI-doctrine, both these sources will be examined. However, since the legal standard to be applied within these two procedures is similar, the potential sources of legitimate expectations will be presented together. A discussion on the similarities and differences provided by these procedures will however be supplied. Furthermore, to be able to provide an image of the beneficiaries' situation within the notion of recovery, this thesis will contain an additional approach, with the main purpose of distinguishing potential problems for such recipient undertakings. This approach is rather valuable, since, as mentioned above, an important feature for a report on the scope of legitimate expectations, as an exemption to recovery, will be to examine and explain in which context such circumstances can exist and which procedural features that may generate them. Therefore, by adding this second approach, this report will stand a better chance of fulfilling its purpose, and thus not only provide guidance for beneficiaries facing a recovery order, but also give examples of certain parts of the State aid area with the potential of generating such situations.

As what concerns the material, the main part of the information for this thesis will be provided by an examination and analysis of the relevant EC case law. However, as a consequence to the purpose of providing a picture of the beneficiaries' situation within the notion of recovery, additional sources will also be examined. This includes relevant textbooks, articles, EC law and the Commission's materials such as guidelines, notions, frameworks and so on. Furthermore, I have also contacted the Commission, to hear their view on relevant topics. Thus, regarding the first part of this thesis, the backdrop on State aid rules, textbooks, articles and the Commission's information documents will constitute the main foundation. However, regarding the developments with potential of affecting the beneficiaries' situation, a more detailed analysis of the relevant regulations and EC case law



will be necessary. Moreover, while most of the examination has been focused on case law within the State aid field, where the principle of the protection of legitimate expectations has been claimed, I have also, in order to acquire a better understanding of the principle, chosen to study the notion of legitimate expectations in a more general context. Also this second part of the thesis will be a result of an examination of textbooks, articles and EC case law. What concerns the third part however, the examination of the different sources of legitimate expectations as exceptions to recovery, the Commission's decisions on State aid will be of great interest. This follows since most of the case law concerning such expectations has been created under the Commission's procedure. This third part will naturally also include an examination of legitimate expectations in the Community court's case law, as well as in textbooks and articles.

## 2. The State aid area - a backdrop

The purpose of this section is to provide a useful background of the State aid rules and thus the context in which a claim for legitimate expectations can arise. The first part examines Article 87 EC and under which circumstances an aid measure can be classified as State aid. After that, a closer look on the procedural rules of the State aid area will be provided. This includes the notification and standstill obligations under Article 88(3) as well as the Commission's formal investigation procedure, differences between existing and new aid measures and the rules governing recovery. Last but not least, the exemptions to the obligation to notify provided by regulations and case law will be thoroughly examined.

### 2.1 State aid according to Article 87 EC

When dealing with State aid and EC Law, the main rules can be found in article 87 EC. This article lays down the test for State aids, and covers aid given to private companies as well as public undertakings within the meaning of Article 86 EC.<sup>6</sup> Article 87 EC is divided into three parts and comprises both single aid measures and aid schemes.<sup>7</sup> The first part sets up four conditions which must all be met before a measure can be classified as State aid. It also establishes the main rule: State aids are incompatible with the common market. There exist however exceptions, where the second part of Article 87 provides examples of certain exceptions of aid that *will be* deemed compatible with the common market and the third and last part gives examples of cases where aid *may* be compatible with the common market. Concerning the State aid conditions, the first part of Article 87 EC reads as follows:

*“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 favouring certain undertakings or the production of certain goods shall, insofar as it effects trade between member states, be incompatible with the common market.”*

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<sup>6</sup> Compare Craig & de Búrca (2008) s. 1086, Case C-387/92 Banco de Credito Industrial SA [1994] ECR I-877 and Case T-106/95 Fédération Française des Sociétés d'Assurances (FFSA) [ECR] II-229.

<sup>7</sup> An aid scheme is an aid system under which several aids, to different beneficiaries, can be given. A good example can be seen in a tax reduction granted to companies under given circumstances.

As provided by this article, to be able to determine whether a measure falls under the provision and thus constitutes State aid a measure has to (1) contain some kind of intervention from a member state or through state resources (2) confer a benefit or an advantage (3) distort or threaten to distort competition and (4) have an effect on inter-state trade.<sup>8</sup>

*(1) Granted by a Member State or through state resources*

The first condition provides that the measure should be granted by a member state or through state resources. This means that the benefit or advantage must be brought on by the state. According to the European Court of Justice's (hereinafter referred to as the Court) case law this has to be done either directly or indirectly through state resources, but can include central, regional or local government bodies as well as private bodies established or appointed by the state to direct certain resources, even if they derive from private sources.<sup>9</sup> Furthermore, resources at the disposal of companies owned or controlled by the state are also met by this condition.<sup>10</sup>

*(2) A benefit or an advantage conferred on the recipient*

When acknowledged that a measure emanates from state resources one has to consider whether the measure confers a benefit or an advantage on the recipient. However, the Courts' case law does not have its focus on the purpose of a measure; the focus is rather on the effects caused by a measure, and whether it confers an advantage or not.<sup>11</sup> Thus, the list of instruments utilised for conferring an advantage, or in other words, the list of types of aids, is a wide one. Examples of these include direct subsidies, tax exemptions and exemptions from parafiscal charges, preferential interest rates, favourable loan guarantees and provisions of land or buildings on special terms, indemnities against losses, preferential terms for public ordering or the deferment of the collection of fiscal or social contributions.<sup>12</sup> By that, it is also clear that not just objective advantages, but also any form of state action that mitigates the charges which are normally included in the budget of an undertaking and which, without

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<sup>8</sup> Craig & de Búrca (2008) p. 1086 ff. Case C-280/00 Altmark Trans [2003] ECR I-7747.

<sup>9</sup> Hancher (2006) p. 38 f. Case 76/76 Steinike and Weinlig [1977] ECR 595 and C-345/02 Pearle [2004] ECR I-7139.

<sup>10</sup> Art. 2, Commission Directive 2006/111/EC of 16 November 2006 Transparency of financial relations between member states and public undertakings as well as on financial transparency within certain undertakings, Official Journal L 318, 17.11.2006, pages 17 – 25. Hereinafter referred to as the Transparency Directive.

<sup>11</sup> See for examples Case 173/73, Italy v Commission [1974] ECR Page 00709, Case C-241/94 France v Commission [1996] ECR I-04551 para. 20. Case C-382/99 the Netherlands v Commission [2002] ECR I-05163 para. 61.

<sup>12</sup> Craig & de Búrca (2008) p. 1087.

therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered as State aid.<sup>13</sup>

As provided, the scope of instruments that can confer an advantage is a wide one. It is, however, also useful to consider its outer boundaries: a granted economic benefit only constitutes State aid if it displays a degree of selectivity. Hence, a measure, which without distinction, benefits all companies in a national territory can therefore not constitute State aid.<sup>14</sup> Furthermore, as the Court held in the Altmark case, since it is central to the idea of State aid that it confers an advantage, assistance given to offset public service obligations incumbent on the beneficiary of the aid will not meet all the conditions in Article 87 EC, however, provided that the conditions expressed in the Altmark case are fulfilled.<sup>15</sup>

### *(3) Distorts or threatens to distort the competition*

Moreover, to constitute State aid, a measure has to distort or threaten to distort the competition by favouring certain undertakings or the production of certain goods. Under this condition, the Community courts will regard the company's position before and after an aid, and assess whether its situation has improved.<sup>16</sup> The question whether the measure distorts or threatens to distort the competition is furthermore linked to the condition whether the measure has an effect on trade between member states. Therefore, when the inter-state trade is affected, the competition is often distorted.<sup>17</sup>

### *(4) Has an effect on Inter-state trade*

The last condition under article 87(1) EC, whether the measure affects trade between member states, is met if the aid strengthens the financial position of a company, compared to other enterprises within the Community. It is however sufficient for the Commission to show that the trade *might* be affected and not that it actually *is* affected. Furthermore, according to case law, the fact that the aid or the recipient undertaking is relatively small does not exclude the

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<sup>13</sup> Case Case C-387/92 Banco de Credito Industrial SA, para. 13-14 and Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg [1961] ECR I-1 para. 19.

<sup>14</sup> Case C-143/99, Adria-Wien Pipeline [2001] ECR I-8365, para. 34 f.

<sup>15</sup> Case C-280/00 Altmark Trans, for the conditions see section 2.2.5.2 "Services of General Economic Interest".

<sup>16</sup> Case 173/73 Italy v Commission.

<sup>17</sup> Hettne & Fritz (2008) p. 9, see also Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97-T-607/97, T-1/98, T-3/98-T-6/98 och T-23/98, Alzetta Mauro and others v Commission [2000] ERC II-02319, para 81.

possibility of an effect on trade between member states.<sup>18</sup> In addition, the fact that a beneficiary provided *local* transport services did not stop the Court from stating that the aid could have an effect on Inter-state trade, since such a financial support can make it more difficult for transport companies from other member states to penetrate the market.<sup>19</sup> According to the Court, this is because several member states since 1995 have started to open certain transport markets to competition from companies established in other member states, “so that a number of undertakings are already offering their urban, suburban or regional transport services in member states other than their State of origin.”<sup>20</sup>

## 2.2 Procedural rules

### 2.2.1 The concept of Article 88(3) EC – Notification and Standstill

The procedural rules of the State aid area are found in Article 88 EC, the Procedural Regulation and in the Community courts’ case law. Article 88(3) EC states:<sup>21</sup>

*“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.”*

The obligation to notify encompasses, according to Article 1(a) of the Procedural Regulation any measure fulfilling the criteria laid down in Article 87(1) EC, which means that the scope of the notification requirement in Article 88(3) EC is identical to that of Article 87(1) EC. As a consequence, the first part of this article lays down a duty to notify any plans of State aid before implementing or altering them.

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<sup>18</sup> Case C-142/87, *Belgium v Commission* [1990] ECR I-959, para. 43, joined cases C-278/92, C-279/92, C-280/92, *Spain v Commission* [1994] ECR I-4103, para. 40-42 and case C-280/00 *Altmark* trans, para. 77-82. It exists however so called *de minimis* aids, which are aid measures exempted from notification when under a certain ceiling: see section 2.2.5 “Exemptions to the Obligations of Notification and Standstill”.

<sup>19</sup> Case C-280/00 *Altmark* trans, para. 77-82.

<sup>20</sup> *Ibid.* para. 79.

<sup>21</sup> The requirement of notification under article 88(3) is reiterated in article 2(1) of the Procedural Regulation.

The obligation to notify creates a possibility for the Commission to exercise a preliminary investigation to whether a planned aid or an aid scheme is compatible with the common market and can be implemented or whether it should be target for a formal investigation. What concerns aid schemes; it is enough for the Commission to examine the scheme, and not each particular individual case in which it applies.<sup>22</sup> Furthermore, it is for the Commission alone to assess the compatibility with the common market. A Commission decision may however be subject of review by the Community courts. It is conversely not possible, according to the Community courts' jurisprudence, for a national court to declare a State aid measure compatible with article 87(2-3) EC.<sup>23</sup>

In addition to notification, member states are under the obligation to stand still. This means, as expressed in the last sentence of article 88(3) EC, that a member state shall not put its proposed aid measures into effect until the Commission has given a final decision. Moreover, the Procedural Regulation states that the aid is not to be implemented before the Commission has taken such a decision or is deemed to have taken such a decision. This means that aid which is exempted from notification, for example through a block exemption, may be put into effect. Such aid is then viewed upon as existing State aid.<sup>24</sup>

After receiving a notification, the Commission shall communicate this to the state in question and thereafter within two months execute a preliminary investigation of the proposed aid measure and take a decision. Should the Commission fail to take such a decision, the standstill obligation will expire and the member state may then put the aid into effect, given that the Commission once again has been notified and not taken a decision within a period of 15 working days.<sup>25</sup> Also such aid is viewed upon as existing State aid.

As expressed in the Procedural Regulation the Commission can conclude the preliminary examination in three different ways. Firstly, the Commission can come to the conclusion that the measure does not constitute State aid.<sup>26</sup> It follows from such a decision that no obligations or conditions can be imposed, thus, it is for the member state and the beneficiary a favourable

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<sup>22</sup> Sinnave (2007) p. 3 and Case C-66/02, Italy v Commission [2005] ECR I-10901, para 91.

<sup>23</sup> Ibid. and Case C-199/06 Centre d'exportation du livre français (CELF) [2008] ECR I-00469, para. 38, Case C-17/91, Lornoy and Others [1992] ECR I-6523, para. 30 and Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires (FNCE) [1991] ECR I-5505, para. 14.

<sup>24</sup> Hancher (2006) p. 641.

<sup>25</sup> Hettne & Fritz (2008) p. 17 and the Procedural Regulation, Article 4(5-6).

<sup>26</sup> The Procedural Regulation, Article 4(2).

decision. Secondly, the preliminary procedure can be completed by a positive decision, which means that the Commission has found that the measure constitutes State aid but is compatible with the common market.<sup>27</sup> The measure can in other words be exempted under one of the exceptions given by the Treaty.<sup>28</sup> Thirdly, the Commission can conclude the preliminary procedure by initiating the formal investigation procedure under Article 88(2) EC. Such a decision will be taken where the Commission finds that doubts are raised as to the compatibility with the common market of a notified measure.<sup>29</sup>

### **2.2.2 The Formal Investigation Procedure**

The formal investigation procedure is expressed in Article 88(2) EC and in Article 6(1) of the Procedural Regulation, and is a more in-depth examination where member states and other interested parties are given the opportunity to submit their comments. In addition, the Commission organises, in general, meetings with the national authorities. The formal investigation procedure is moreover terminated in a similar way as the preliminary investigation; the Commission can conclude that the notified measure does not constitute State aid, that the measure constitutes State aid but one of the exemptions is applicable or that the aid is incompatible with the common market and should be recovered.<sup>30</sup> In addition to this, the Commission often finds aid measures partly incompatible with the common market. This means, in other words, that only a part of the proposed aid is compatible and thus approved.<sup>31</sup>

Concerning the beneficiaries' role during the formal investigation procedure, the following can be mentioned. When performing its review the Commission is bound to conduct a diligent and impartial examination, which follows from the interest of sound administration and the fundamental rules of the Treaty. Concerning the beneficiaries' right to be heard during this review; it is answered diversely dependent on whether the review is initiated against the beneficiary or not. This is since it follows from the *Fleuren* case that when the review concerns a potential aid measure and the recipient enterprise therefore merely is a potential beneficiary and not de facto a beneficiary, the recipient undertaking does not play a special

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<sup>27</sup> *Ibid*, Article 4(3).

<sup>28</sup> See article 87 EC Treaty.

<sup>29</sup> The Procedural Regulation, Article 4(4).

<sup>30</sup> The Procedural Regulation, Article 7.

<sup>31</sup> Hancher (2006) p. 637 ff.

role pursuant to any provision governing that procedure and can therefore not lay any claims to an exchange of arguments with the Commission. The applicant in the Fleuren case was thus unsuccessful when claiming that the Commission, before taking an unfavourable decision concerning a proposed aid measure, should be obligated to seek information not only through the member state but also from potential beneficiaries.<sup>32</sup> Hence, the outcome of this case means, for the potential beneficiary, that it possesses a rather weak position, and is dependant on the willingness of its member state to involve it. At the same time however, the Court of First Instance (hereinafter referred to as the CFI) also made it clear that if the review on the other hand concerns an aid measure initiated against a beneficiary, such a company can rely on rights as extensive as the rights of the defence as such and thereby a right to be heard.<sup>33</sup> According to the Court, this follows since the Commission, under its formal investigation procedure, is obligated to give notice to the interested parties to submit their comments.<sup>34</sup> An enterprise in such a situation can therefore exchange arguments with the Commission, and if necessary claim legitimate expectations.

### **2.2.3 Differences between Existing and New State Aids**

Concerning the distinction between existing and new aid measures it can firstly be said that it is not a clear cut, and has therefore been a source of dispute; while member states often take the position that the aid measure is covered by an earlier decision and therefore constitutes an existing aid and not a new one, the Commission frequently has the opposite view.<sup>35</sup> The reason why this is important is not the question whether the measure can be challenged by the Commission or not, since both new and existing aid can be target for a Commission investigation. The distinction is however essential because the qualification of an aid measure as falling under an existing aid scheme provides the beneficiary with great protection. This follows since such aid is exempted from the obligation to notify and thus also the risk of recovery. For a new aid on the contrary, both the notification and the standstill obligations have to be followed, or the beneficiary runs a great risk of having to repay the granted aid.

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<sup>32</sup> Case T-109/01 Fleuren Compost BV [2004] ECR II-00127 paras. 38 and 40-44.

<sup>33</sup> Ibid. paras. 40-44.

<sup>34</sup> Joined cases C-74/00 P and C-75/00 P. Falck SpA and Acciaierie di Bolzano SpA v Commission [2002] ECR I-07869, para. 79-83.

<sup>35</sup> Hancher (2006) p. 628.



As what concerns the distinction between new and existing aid, the former also comprises alterations of existing aid schemes. However, the CFI has expressed that an alteration only generates a new scheme, and thus requires notification, where the changes affects the actual substance of the original scheme. This means that neither technical alterations, which cannot affect the Commissions assessment, nor an increase in the original budget of 20 percent,<sup>36</sup> call for a new notification.<sup>37</sup> Hence, the CFI did not classify two amendments to an aid scheme in Gibraltar as alterations since they merely extended the category of exempted operations and did therefore not alter the character of the existing aid. Thus, the alterations did not constitute a new State aid.<sup>38</sup>

## 2.2.4 Recovery of Illegal and Unlawful State Aid

State aid implemented before notification and in breach of the standstill obligation is unlawful but not necessarily illegal. This is because, also unlawful State aids are to be examined by the Commission and assessed upon whether they are compatible with the common market or not.<sup>39</sup> And as expressed in the CELF-case, should the Commission find the unlawful aid measure to be compatible with the common market, the community law does not impose an obligation of full recovery. The recipient of such aid is however obliged to pay interest on the amount in question, and the national court *may*, within the framework of its own domestic law, also recover the unlawful aid.<sup>40</sup> Should the Commission however come to the conclusion that no exception under Article 87 EC is applicable; the State aid is illegal and must be recovered. And when the Commission takes such a recovery decision, it is up to the concerned member state to take all necessary measures to recover the aid from the recipient.<sup>41</sup> The decision shall then be executed immediately, but according to the procedure given by the national law. It is furthermore possible for the Commission to take a preliminary decision that a member state immediately has to cancel the disbursements and recover a non-notified aid.<sup>42</sup>

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<sup>36</sup> Commission Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Art. 93 of the EC Treaty, O.J. 2004, L 140/1, Article 4(1): such small budget increases are unlikely to affect the Commissions assessment.

<sup>37</sup> Sinnaeve (2007) p. 4 f.

<sup>38</sup> Joined cases T-195/01 and T-207/01 Gibraltar v Commission [2002] ECR II-02309, paras. 112-116.

<sup>39</sup> Commission notice on State aid enforcement by national courts p. 7: Case C-301/87, France v Commission (Boussac) [1990] I-307, paras. 17-23, Case C-142/87, Belgium v Commission (Tubemeuse) [1990] ECR I-959, paras. 15-19, Case C-354/90 FNCE, para. 14 and Case C-199/06, CELF, para. 38.

<sup>40</sup> Case C-199/06 CELF, paras. 46, 51 & 53.

<sup>41</sup> Procedural Regulation, Article 14.

<sup>42</sup> Case C-301/87 Boussac, para 19.

However, the presence of an illegal aid measure does not always lead to recovery. Because, recovery is merely possible when the aid has been disbursed, the limitation period for recovery has not expired<sup>43</sup> and the recovery of the aid is not contrary to any general principle of community law, for example the proportionality principle or the principle of legitimate expectations,<sup>44</sup> where the latter will be thoroughly examined further on. The Commission is furthermore, according to the Procedural Regulation, required to *ex officio* examine whether any such general principle could hinder a recovery, and should the Commission fail to do so, the Commission decision can be challenged before the Community courts.<sup>45</sup>

Should the Commission however order the recovery of an illegal or unlawful State aid, such an order is applied most strictly. For example, the fact that a member state comes upon unexpected administrative difficulties when executing a recovery decision is not reason enough to omit the decision. Such a conduct is merely possible when the member state can show that an execution of the recovery decision has been impossible. The fact that a recovery would lead to the recipient company being wound up is, however, not a legitimate reason for claiming impossibility to the execution of the decision.<sup>46</sup>

The purpose of recovery is to reinstate the situation which preceded the disbursement of the illegal State aid. The recipient of such State aid is therefore not only obliged to repay the aid in question, but is also required to pay interest. By this, the recipient will concede the advantage created by the illegal aid measure and the preceded situation will be reinstated.<sup>47</sup> Or as expressed by the Court, “*re-establishment of the previously existing situation is obtained once the unlawful and incompatible aid is repaid by the recipient who thereby forfeits the advantage which they enjoyed over their competitors in the market, and the situation as it existed prior to the granting of the aid is restored*”.<sup>48</sup>

### **2.2.5 Exemptions to the Obligations of Notification and Standstill**

As provided, the notification and standstill obligations make the Commission’s examination possible. What concerns certain aid measures however, the Commission has already made up

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<sup>43</sup> The limitation period is, according to the Procedural Regulation Article 15, 10 years.

<sup>44</sup> Edström (2007) p. 66 and the Procedural Regulation, Article 14(1).

<sup>45</sup> Hancer (2006) p. 680 and the Procedural Regulation, Article 14(1).

<sup>46</sup> Edström (2007) p. 68 and Case C- 261/99 Commission v France [2001] ECR I-02537.

<sup>47</sup> Case C-350/93, Commission v Italy [1995] ECR I-699, paras. 21-22 and Case C-110/02, Commission v Council [2004] ECR I-06333, para. 42.

<sup>48</sup> Case C-348/93, Commission v Italy [1995] ECR I-673, para. 27.

its mind. These exempted aid measures can thus be implemented without prior notification and examination by the Commission. While this is a change in line with the ongoing simplification process that aims at reducing the Commission's work load, it may also create complicated situations for beneficiaries. Thus, on the one hand, the exemptions to notification have been carefully prepared and may lead to benefits within the State aid area, since, as expressed in the General Block Exemption Regulation (hereinafter referred to as the GBER), *"The Commission has applied Articles 87 and 88 of the Treaty in numerous decisions and gained sufficient experience to define general compatibility criteria..."*<sup>49</sup> Furthermore, the GBER as well as the Decision on SGEI<sup>50</sup> also set certain thresholds that must be respected, and aid that exceeds such thresholds is not exempted from the notification and standstill obligations and must therefore be notified and individually examined by the Commission. In addition, exempted aid measures have to meet precise conditions to escape notification, and only the aid measures with the least risk of distortion is exempted. However, on the other hand, a great number of aid measures are implemented in line with these exemptions. For example, in 2007, the member states introduced more than 1100 block exempted measures.<sup>51</sup> Moreover, this procedure also means that more responsibility is moved from EU level to the member states and thus also the beneficiaries, since they have to control whether the proposed measure is in line with an exemption. And as will be shown by a closer look at the different exemptions, an increasing number of unnotified aid measures may affect the future expectations of such beneficiaries.

### **2.2.5.1 Block Exemptions**

In 1998, the Council regulation on the application of Articles 92 and 93 EC (now Articles 87 and 88 EC) to certain categories of horizontal State aid was adopted.<sup>52</sup> It constitutes the act enabling the Commission to adopt so called Block exemption regulations, but has also

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<sup>49</sup> 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) Official Journal L 214, 9.8.2008, p. 3–47, 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, Official Journal L 379 of 28.12.2006.

<sup>50</sup> Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest Official Journal L 312, 29.11.2005, p. 67-73.

<sup>51</sup> Report from the Commission, State aid Scoreboard spring 2008 update, COM/2008/0304/final. Compared to 410 block exempted measures under 2006, this is a significant increase.

<sup>52</sup> Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 (now 87 and 88 respectively) of the Treaty establishing the European community to certain categories of horizontal State aid, Official Journal L 142, 14.05.1998, pages 1-4.

allowed the Commission to create an exemption concerning so called de minimis aid, which is aid of smaller amounts deemed not to meet all the criteria set out in Article 87(1) EC. Block exemption regulations declare specific categories of State aid compatible with the Treaty and enable member states to grant aid that meets the conditions laid down in the regulations without the formal notification procedure. Member states are only required to submit information sheets on the implemented aid, which then is viewed upon as existing aid. At the same time however, an exemption means that such subsidies will not come under an individual examination of the Commission. And should the aid turn out not to qualify under an exemption, the aid will, what concerns recovery, be treated as new unlawfully granted State aid.

The first Block exemption regulation merely included aid to SME and training aid.<sup>53</sup> The categories have however grown over the years, and in 2008, the Commission issued the GBER.<sup>54</sup> This is one of the most important novelties in the State aid governance, and means that all of the block exemptions now are provided by the same regulation. The GBER has however also introduced new exemptions, and in some extent modified the existing ones.<sup>55</sup> Consequently, while the first exemptions were introduced as early as 2001, it is during the last years the granting of exempted aid measures has reached rather high numbers.<sup>56</sup>

The exemptions pose, furthermore, many similarities to aid schemes. This follows since also an aid scheme creates a situation where aid awards are not subject to any individual evaluation by the Commission. Since, by authorizing an aid scheme, the Commission exempts subsidies given under that scheme from the notification and standstill obligations under

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<sup>53</sup> Commission Regulation (EC) No. 70/2001 of 12 Jan. 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium sized enterprises, O.J. 2001, L10/33 and Commission Regulation (EC) No. 68/2001 of 12 Jan. 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid, O.J. 2001, L10/20. Training aid can for example concern aid with the purpose of educating the employees of a company.

<sup>54</sup> The General block exemption regulation includes aid to small and medium-sized enterprises (SMEs), aid in favor of research and development, aid in favor of environmental protection, employment and training aid and aid that complies with the map approved by the Commission for each member state for the grant of regional aid.

<sup>55</sup> Examples of new exemptions can be seen in certain types of environmental aid, regional aid and aid in the form of risk capital. A common change concerning the existing exemptions has been an increased notification ceiling.

<sup>56</sup> According to the Commission, the member states had in 2006 totally, since 2001, granted 1300 exempted aid measures, while only in 2006 and 2007, 410 and 1100 exempted aids were introduced. In Euros, this means € 3.2 billion in 2006 and € 6.2 billion in 2007. (Report from the Commission, State Aid Scoreboard, Autumn 2008 Update, COM(2008) 751 final, Brussels, 17.11.2008 and Report from the Commission to the Council and the European Parliament, Evaluation report On the application of the Council Regulation (EC) No 994/98 of 7 May 1998 regarding the application of Articles 87 (ex-Article 92) and 88 (ex-Article 93) of the EC Treaty to certain categories of horizontal State aid, pursuant to Article 5 of this Regulation, COM(2006) 831 final, Brussels, 21.12.2006).

Article 88(3) EC. This means that, problems of evaluating in advance potential consequences of an abstract aid scheme and subsequently leaving the application to member states, as provided by the GBER, had already been reality before its introduction.<sup>57</sup> Despite the similarities between aid schemes and the GBER it is however important to note that, when aid schemes are notified, they are generally target for modifications during the preliminary examination phase, where the Commission tries to secure that the proposed aid scheme complies with the State aid rules, by for example requesting additional information.<sup>58</sup> This inter-action between member states and the Commission makes it possible to alter the notification, add necessary clauses in a draft law and may thus correct flaws before the scheme is laid down in national legislation. As provided by the notion of block exemptions, this cannot take place when subsidies are granted under such a regulation. As a consequence, the responsibility to verify that an aid measure complies with the conditions laid down in an exemption is transferred from EU level to national level, something that creates difficult questions of legal certainty. Since, while a measure under an aid scheme, that has been notified and authorized, is legal as long as it complies with the terms of the scheme, there is no guarantee that a block exempted aid measure at the start actually fulfilled all the conditions set out in the regulation. This affects national authorities as well as competitors and beneficiaries.<sup>59</sup>

What concerns beneficiaries, it can first be held that block exemptions improve their position in many ways. For example, such exemptions seem to offer a quicker procedure and increased transparency, as they make information more attainable. Regarding legal certainty however, the exemptions possess some inconvenience. For instance, if a potential beneficiary has any doubts concerning the application of a condition under an exemption, the company would be in a difficult position. This is especially so since, as mentioned above, the procedure of making an aid measure comply with certain conditions is not always an easy task. And as the potential beneficiary is not legally involved in this procedure and thus lacks the possibility to be a proper part of the pre-granting process,<sup>60</sup> should such a situation occur, he could merely try to seek clarification through the member state or simply refuse the aid. The company is in other words not in a position to demand an active role what concerns the procedure, and it has therefore been argued that this weak position reduces the incentive they could have to control

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<sup>57</sup> Sinnaeve (2001) p. 3 f.

<sup>58</sup> In accordance with Article 5 the Procedural Regulation.

<sup>59</sup> Sinnaeve (2001) p. 9.

<sup>60</sup> See section 2.3.1 "The Formal Investigation Procedure".

whether the aid measure or aid scheme is in accordance with the relevant exemption.<sup>61</sup> An assumption, which in practice could cause considerable problems concerning what a beneficiary of such aid legitimately can expect. This regards not only the conditions provided in the GBER but also more generally the notification and standstill obligations under Article 88(3) EC.

### ***2.2.5.2 Services of General Economic Interest***

Apart from Block exemptions, another scope of measures which are exempted from the requirement of notification and standstill, are those which includes SGEI. Whereas the aid measures excepted through block exemptions must fulfill certain conditions under the GBER, the possibility to be exempted through the notion of SGEI requires either that particular conditions set out in the Altmark case<sup>62</sup> are met or that the requirements in the Decision on SGEI are fulfilled. There is however one important difference, while meeting the conditions in the Altmark case means that the measure does not constitute State aid, the exemption under the Decision on SGEI is merely a way of exempting State aid from notification, similar to a block exemption.<sup>63</sup>

The financial support to public or private entrusted companies as compensation for the performance of services imposed upon them in the general economic interest has been vividly discussed over many years. While earlier case law has been somewhat ambiguous towards the question whether State funding to companies executing obligations in the general economic interest could be viewed as a mere compensation, and not an advantage within the meaning of Article 87(1) EC,<sup>64</sup> later case law has provided further clarity to the question. This is foremost through the above mentioned Altmark case, which states that compensation for performance of a public service obligation is merely viewed upon as compensation and escapes thus the classification of State aid under article 87(1) EC, given that four cumulative conditions are fulfilled.<sup>65</sup> As a consequence, such a measure does not require notification under article 88(3)

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<sup>61</sup> Sinnaeve (2001) p. 15.

<sup>62</sup> Case C-280/00 Altmark trans.

<sup>63</sup> Report from the Commission, State Aid Scoreboard, Autumn 2008 Update, COM (2008) 751 final, Brussels, 17.11.2008.

<sup>64</sup> Hancher (2006) p. 206.

<sup>65</sup> (1) the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined, (2) the parameters on the basis of which the compensation will be calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings, (3) the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking

EC. Conversely, should one of the conditions not be met, while the measure satisfies the criteria under article 87(1), it constitutes State aid and shall be notified to the Commission according to article 88(3).<sup>66</sup>

The question has furthermore been clarified by the Commission, where it, for example, has issued a Communication and a Decision, where, as mentioned above, the Decision on SGEI functions similar to a block exemption. What concerns the Altmark doctrine however, and thus the possibility to escape the classification of State aid, difficulties still exist. Since, while the Commission's documents give guidance on how to apply it, the conditions provided by the Altmark case have in practice, due to the uncertainty of their exact meaning, proved to be rather complicated to apply.<sup>67</sup> There are, for example, difficulties linked to the defining of a SGEI, since, whereas the scope of what can constitute an SGEI indeed is a wide one,<sup>68</sup> it is not possible to deem every service as a SGEI. This is because, as stated in the Altmark case, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. And even though much discretion is placed upon the member states, the Commission ensures, what regards the definition, that this margin of discretion is applied without manifest errors.<sup>69</sup>

As provided, the notion of SGEI does not only exempt aid measures from the notification and standstill obligations, it also possesses difficulties what concerns the exact boundaries of its scope. It can therefore be held the same about SGEI as what concerns block exemptions; the procedure of making an aid measure comply with certain conditions is not always an easy task, a situation which in practice could cause considerable problems concerning what a beneficiary of such aid legitimately can expect. What concerns the Altmark doctrine however, it is of interest to note that the legal uncertainty and the risk of recovery felt by potential

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into account the relevant receipts and a reasonable profit for discharging those obligations, (4) where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the Community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations. (Case C-280/00 Altmark trans, para. 87-93).

<sup>66</sup> Hancher (2006) p. 208.

<sup>67</sup> Renzulli (2008) p. 32.

<sup>68</sup> According to the Communication (Communication on Services of general interest, including social services of general interest: a new European commitment COM(2007) 725 final) services of general interest cover a broad range of activities, from the large network industries such as energy, telecommunications, transport, audiovisual broadcasting and postal services, to education, water supply, waste management, health and social services.

<sup>69</sup> Community framework for State aid in the form of public service compensation, OJ C 297, 29.11.2005, p. 4-7.

beneficiaries has led to very few implementations of such measures, and thus, at least not yet, caused any real problems.<sup>70</sup>

### ***2.2.5.3 The CELF case – an Exception to Notification?***

The exemption to notification provided by the recent CELF-case<sup>71</sup> is not in theory a valid exception, but may in practice reduce the incentives to notify aid measures before implementing them. What concerns the outcome of the case, it has been argued that it constitutes an exception to the recovery of unlawful State aid, and that it may harm the effect of the notification and standstill obligations and thus the Commission's possibility of conducting its review.<sup>72</sup> It can however also be argued that it establishes an additional exception to the notification and standstill obligation under Article 88(3) EC. This follows since it seems like a proper sanction for the granting of unlawful, but not illegal State aid, no longer exists, something that may reduce granting authorities' tendency to notify and standstill when implementing State aids that they deem to be legal.

The CELF-case concerned the French Centre d'exportation du livre français (CELF) which received State aid on an annual basis between 1980 and 2002. The disbursements relevant in this context are the subsidies granted before the first Commission decision, thus in breach of the notification and standstill obligations under Article 88(3) EC, but which after they had come to the Commission's attention and examination was found to be compatible with the common market within the meaning of article 87(1) EC. The question therefore concerned whether the national court was bound to recover aid paid in breach of the notification and standstill obligations under article 88(3) EC, when the Commission subsequently found the aid measure compatible with the common market, i.e. unlawful but not illegal State aid.<sup>73</sup>

While earlier case law on this matter mainly is based on the purpose of the effectiveness of the standstill obligation and thus the scope of the Commission's control function,<sup>74</sup> the CELF-case is primarily based on the purpose of only implementing compatible aid measures.

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<sup>70</sup> Renzulli (2008) p. 33.

<sup>71</sup> Case C-199/06 CELF.

<sup>72</sup> Cheynel & Giraud (2008) p 5 f.

<sup>73</sup> C-199/06 Centre d'exportation du livre français (CELF) [2008] ECR I-00469, para. 32.

<sup>74</sup> Case C-368/04 Transalpine Ölleitung [2006] E.C.R. I-09957 para. 42.



Conversely to what the Court had stated in previous cases,<sup>75</sup> it therefore held that even in the absence of exceptional circumstances, community law does not impose an obligation of full recovery of such unlawful aid.<sup>76</sup>

It is however not entirely that simple, since the Court agreed to that the aid recipient is given advantages, firstly, due to the non-payment of interest it would have had to pay if it had borrowed the same amount on the market while awaiting the Commission's decision, and, secondly, due to the improvement of its competitive position, as against other operators in the market while the unlawfulness lasts. Consequently, the Court stated that, the national court *must order* the aid recipient to pay interest in respect of the period of unlawfulness, and that, the national court *may if it is appropriate*, in accordance with national law, also order the recovery of the unlawful aid and uphold claims for compensation for damage caused by reason of the aid.<sup>77</sup>

Accordingly, on the one hand, the exception to notification of State aids which are deemed to be compatible with the common market can be seen as a non-exhaustive exception, and thus rather a way of mitigating the consequences of an unlawfully granted aid. On the other hand however, the national court is not obligated to recover such aid granted in breach of Article 88(3) EC. Hence, it can be argued that a situation as this is exempted from the main principle of notification.

### **3. The Principle of the Protection of Legitimate Expectations – a Part of the Community Legal Order**

Before we have a look at the principle of the protection of legitimate expectations as an exception to recovery of State aid, it is of value to analyse its more general scope, as one of

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<sup>75</sup> Provided by for example the Case C-368/04 Transalpine Ölleitung, para. 41: “A Commission decision finding aid that was not notified compatible with the common market does not have the effect of regularising *ex post facto* implementing measures which were invalid because they were taken in disregard of the prohibition laid down by the last sentence of Article 88(3) EC, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the member state concerned and would deprive it of its effectiveness...” and in p. 42: *whether compatible with the common market or not, failure to comply with Article 88(3) EC carried no greater risk or penalty than compliance, the incentive for member states to notify and await a decision on compatibility would be greatly diminished – as would, consequently, the scope of the Commission’s control.*”

<sup>76</sup> Case C-199/06 CELF, para. 46.

<sup>77</sup> *Ibid.* para. 50-53.

the fundamental principles of EC law. This makes it possible to observe and understand its judicial requirements as well as its legal effects.

### 3.1 Background

As mentioned, the principle of the protection of legitimate expectations is one of the fundamental principles of community law.<sup>78</sup> It is closely linked to the principle of legal certainty, and has been derived from the rule of law concept; it appears to be an expression in the form of a subjective right of legal certainty. While the two principles are closely linked, the Court has however not provided a clear answer to their correlation.<sup>79</sup> Furthermore, in the national law of the member states, the principle of legitimate expectations merely protects against individual measures, while in community law, it has also been found to encompass protection against legislative measures.<sup>80</sup> An important feature of the principle of legitimate expectations is thus that the law should not differ from what can reasonably be expected.

The principle of legitimate expectations originally developed in German law, but began to gain acceptance in European law during the 1970s and 1980s. Briefly explained, it means that any individual, who, because of governmental conduct holds certain expectations relating to future governmental activity, can require those expectations to be fulfilled unless there exist compelling public interest for not doing so. It protects, in other words, participants on the market against unreasonable and unforeseeable effects, as results of judicatures' discretionary right to adopt new rules or decisions.<sup>81</sup> This is for example articulated by the Court in the Mavrides case, where it held that the protection of legitimate expectations extends to any individual who is in a situation in which it appears that the administration's conduct has led him to entertain reasonable expectations.<sup>82</sup> And, since the principle of legitimate expectations is a part of the general principles of community law it is granted priority status over other community instruments, regardless of whether the latter are rules of community law or administrative decisions.<sup>83</sup> As expressed in the Töpfer Case, the principle of the protection of

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<sup>78</sup> Moldén (1997) p. 3 and Case 112/80 Firma Anton Dürbeck [1981] ECR 01095 para 48.

<sup>79</sup> Barde Priya & Calińska Paulina (2006) p. 3

<sup>80</sup> Schermers (2000) p. 79.

<sup>81</sup> Giraud (2008) p. 4.

<sup>82</sup> Schönberg (2000) p. 118 and Case 289/81 Vassilis Mavridis [1983] ECR 01731, para. 21.

<sup>83</sup> Moldén (1997) p. 3 and Schermers (2000) p. 79.

legitimate expectations forms part of the community legal order with the result that any failure to comply with it is an infringement of the Treaty.<sup>84</sup>

## **3.2 Requirements for relying on the Principle of Legitimate Expectations**

### **3.2.1 Derived from a Community Institution's Conduct**

The notion of the principle of legitimate expectations requires certain conditions to be fulfilled if a company or an individual should be able to rely on it. Hence, for expectations to be legitimate, they have to be derived from a Community institution's conduct. This suffices some kind of identifiable positive behaviour on the part of the Community institutions, and can, for instance, be in form of a favourable administrative measure or a precise and specific assurance that may cause a person to entertain justifiable hopes.<sup>85</sup> Justified expectations may, furthermore, be created by consistent administrative practice or concern the continuation of a legal position. Inaction on the part of the Commission during the passage of time may also constitute assistance to a claim of legitimate expectations.<sup>86</sup> It is not, however, sufficient with a general expectation that the Commission will take full account of differences in market conditions.<sup>87</sup>

Furthermore, the positive behaviour from a Community institution shall be in the form of a clear and precise commitment from the Communities.<sup>88</sup> Thus, a person may not plead an infringement unless he has been given a precise assurance by the authority.<sup>89</sup> This can for example be in form of a so-called comfort letter in which the Commission in a given competition case states that no action will be taken. It can furthermore contain measures such as supplying information through faxes, agreements, circulars, reports, communications and code of conducts or through statements made by EP ministers. Concerning other soft law measures however, such as interpretative Council declarations and recommendations, the status is less clear.<sup>90</sup> And concerning oral measures, they may create legitimate expectations,

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<sup>84</sup> Case 112/77 August Töpfer [1978] ECR 01019, para. 19.

<sup>85</sup> Craig & de Búrca (2008), p. 554 ff.

<sup>86</sup> Case 223/85 Rijn-Schelde Verolme (RSV) [1987] ECR 4617.

<sup>87</sup> Moldén (1997) p. 41.

<sup>88</sup> Case 289/81 Mavridis para. 21.

<sup>89</sup> Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 v Commission [2006] ECR I-5479, para. 147 and Case C-506/03 Germany v Commission [2005] ECR I-0000, para. 58.

<sup>90</sup> Schönberg (2000) p. 120 f.

if they constitute very precise assurances.<sup>91</sup> Such measures are however often difficult to prove and carry thus generally less weight than written statements.<sup>92</sup>

Legitimate expectations can furthermore be derived from general conduct within a Community institution, which means that an institution can bind itself to its customs. This does however not apply to situations where the institution has bound itself to unreasonable or illegal manners.<sup>93</sup> In addition, the fact that a situation has existed for years does not automatically result in any right to an indefinite maintenance of the situation.<sup>94</sup> There are however examples where this has been the case, see for example the Rijn-Schelde Verolme case, which is a case within the State aid area.<sup>95</sup>

### **3.2.2 The need of an Objective and a Subjective Dimension**

It has at several occasions been shown by the Community courts that a company or an individual can, under the right conditions, entertain legitimate expectations. To give the circumstances under which such expectations is possible, is however far from easy. What can be mentioned though, besides the fact that legitimate expectations have to be derived from a Community institution's conduct, is that the circumstances can be divided into objective and subjective ones.<sup>96</sup>

What concerns the objective conditions; these are not dependent on the person seeking the protection of the principle of legitimate expectations. Instead, it has to, as mentioned above, exist an action on the part of a Community institution which can create a situation that justifies a reliance on the principle. Such an action may be produced by a lawful or unlawful administrative measure, which confers some kind of benefit. It can also concern the continuation of a legal situation.<sup>97</sup>

Legitimate expectations requires, furthermore, from a subjective kind of view that the company must have acted on the expectation or refrained from taking action which it would

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<sup>91</sup> See for example Case T-66/96 and 221/97 John Mellett [1998] ECR-SC II-1305.

<sup>92</sup> Schönberg (2000) p. 121.

<sup>93</sup> Schermers (2000) p. 80.

<sup>94</sup> Joined cases 161/80 and 162/80 Maria Grazia Carbognani and Marisa Coda Zabetta [1981] ECR 543.

<sup>95</sup> Case 223/85 Rijn-Schelde Verolme (RSV), para. 16, which will be further discussed below. See section 4.3.2.

<sup>96</sup> Barde Priya & Calińska Paulina (2006) p. 6.

<sup>97</sup> Ibid.

otherwise have taken.<sup>98</sup> Moreover, the affected undertaking must not have acted in such a way as to preclude its reliance on the expectation.<sup>99</sup> A beneficiary cannot for example entertain legitimate expectations, when it has provided the Commission with false or incomplete information.<sup>100</sup> The change must furthermore not have been foreseeable for the enterprise, thus, the reliance on legitimate expectations is not possible if a company, for example, has been aware of the unlawful nature of the measure, the conditions for the promised adoption of an administrative measure has not been fulfilled or the change in a legal position by a retroactive regulation has been of a foreseeable nature.<sup>101</sup>

What concerns administrative measures, a legitimate expectations must be an individual and concrete expectation of the company affected. An undertaking should therefore carefully examine the relevant community law and not rely exclusively on information provided by its national authority. This follows since a company cannot hold legitimate expectations when community law is infringed by such authorities.<sup>102</sup>

Regarding reliance on a legal situation created by a normative act and expectations that this situation will continue to apply, for expectations to be legitimate, they must be held by a prudent trader acting in accordance with the law. This means that, if such a trader could have foreseen the adoption of a community measure likely to affect his interest, he cannot entertain any legitimate expectations if the measure is adopted.<sup>103</sup> Hence, the applicant, in the Christmas butter case, could not entertain legitimate expectations as to the non-implementation of additional Christmas butter schemes (a scheme making it possible to sell butter in storage at a reduced price, as a way of enhancing the rotation and renewal of butter stocks) since the possibility of that ought to, due to the Commission's statements concerning the future possibility of such schemes, have been considered by a prudent and discriminating trader. In other words, such traders must keep themselves informed and updated, and an imported part of that is to read the Official Journal of the European Communities.

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<sup>98</sup> Case 5/75 *Deuka v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1975] ECR 759 and Case 74/74 *CNTA v Commission* [1975] ECR 533, para. 42.

<sup>99</sup> *Moldén* (1997) p. 42 and Case 14/81 *Alpha Steel* [1982] ECR 792 para. 11.

<sup>100</sup> *Schönberg* (2000) p. 126 and Joined cases 42 & 49/59 *SNUPAT v High Authority* [1961] ECR 53 p. 87.

<sup>101</sup> *Moldén* (1997) p. 42: Case 14/61 *Hoogovens v High Authority* [1962] ECR 253, p. 273. and Case 228/84 *Pauvert v Court of Auditors* [1985] ECR 1973.

<sup>102</sup> *Moldén* (1997) p. 43 and Joined cases C-31-44/91 *Lageder E.A* [1993] ECR I-1761.

<sup>103</sup> *Schönberg* (2000) p. 127 and Case 265/85 *Van den Bergh en Jurgens BV and Van Dijk Food products BV* (the Christmas butter case)[1987] ECR 1155, para. 44.

Furthermore, in the *Amylum*<sup>104</sup> case the Advocate General Reischl held that a legitimate expectation is only worth protection if the applicant in question assumed its position on all the essential factors known at that time. An example of this can be seen in the CNTA case where the Court stated that the consequences could not have been foreseen by a prudent trader.<sup>105</sup>

Moreover, since the case law expresses a rather heavy administrative burden on the companies to be sufficiently informed, it may in practice discriminate against the smaller trader, who will have fewer resources to devote to such activity. The concept of a prudent trader can furthermore vary in different economic sectors. It is thus harder to entertain legitimate expectations in sectors generally recognized as being liable to frequent and sudden changes.<sup>106</sup>

### **3.2.3 Reasonable Expectations**

Legitimate expectations must, furthermore, be reasonable expectations. When deciding whether such expectations exist, regard must be taken to the conduct of a reasonable experienced actor on the specific market and whether he would have relied on such expectations.<sup>107</sup> An example of reasonable expectations is expressed in the CNTA case, where the Court held that an undertaking can have legitimate expectations to the fact that the Commission does not abolish rules, causing the undertaking unforeseeable losses, without adopting transitional measures which can make it possible to avoid such losses. A company can furthermore have legitimately expectations to not be induced by a community measure to take a decision which can result in negative consequences for it.<sup>108</sup> In addition, the beneficiaries of a favourable administrative measure, from a Community institution, can have legitimate expectations that the decision is not retroactively revoked. This follows since, legitimate expectations as to the legality of a favorable administrative act, once acquired, may not subsequently be undermined, as long as there is no public-policy interest which overrides the beneficiary's interest in the maintenance of a situation which he was entitled to regard as stable.<sup>109</sup>

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<sup>104</sup> Case 108/81 *Amylum v Council* [1982] ECR 3107, para 12-17.

<sup>105</sup> Case 74/74 CNTA, para. 41.

<sup>106</sup> *Moldén* (1997) p. 43 f.

<sup>107</sup> Case 108/81 *Amylum*, para 13.

<sup>108</sup> Case 120/86 *Mulder*, para. 24.

<sup>109</sup> Case C-90/95 *P Henri de Compte* [1997] ECR I-1999, para. 35.

### 3.2.4 The Balancing of Interests

As provided, the individual interest must prevail over the public interest. This includes a balancing of interests between the company affected, in having its legitimate expectations protected, and the public interest.<sup>110</sup> This test is however not applied concerning revocation of lawful administrative instruments conferring benefits, since the expectations of the individual normally prevail over the public interest in such situations. As what concerns unlawful administrative measures however, the Court has held that there should be a balancing of interests between the public interest and those who had relied on the unlawful measure and who had arranged their affairs in consequence.<sup>111</sup> The applicant must establish an important individual interest and thus show some reliance and detriment in order to override the public interest. Since, without such individual interest it is likely that the public interest justifies, for example, retroactive acts.<sup>112</sup>

### 3.3 Legal Effects

Giving a company the possibility to rely on legitimate expectations, several forms of legal effects may be the reality. Firstly, such a possibility often renders the community measure invalid or partly invalid. An example of this can be seen in the Töpfer case, where the Court held that any failure to comply with the principle of legitimate expectations is an infringement of the Treaty. Secondly, according to the Mavrides case, not every infringement of the principle of legitimate expectations leads to invalidity of the community act. It does however, under certain circumstances and under the condition that the applicant has suffered injury, justify an award of damages.<sup>113</sup> Thirdly and lastly, the retroactive effect of a judicial decision may be restricted when, as seen in the Defrenne case,<sup>114</sup> economic reasons for legal certainty are to prevail over the public interest in lawfulness. As will be shown below, an outcome that most often is the legal effect of an approved legitimate expectations claim within the State aid field.

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<sup>110</sup> Schønberg (2000) p. 128 f.

<sup>111</sup> Moldén (1997) p. 44.

<sup>112</sup> Schønberg (2000) p. 128 f.

<sup>113</sup> Moldén (1997) p. 46 and Case 289/81 Mavrides, para. 25.

<sup>114</sup> Case 43/75 Defrenne (No 2) [1976] ECR 455.

## **4. The Principle of the Protection of Legitimate Expectations within the State Aid Field – an Exception to Recovery**

The purpose of this part of the thesis is to examine how the protection of the principle of legitimate expectation is applied within the field of State aid. And as mentioned above, when the right circumstances prevail, such expectations may act as an exception to repay unlawful or illegal State aid. Before we examine the potential grounds for such expectations though, it is indeed of interest to have a closer look at the judicial context in which the principle may be invoked.

### **4.1 The judicial Context in which the Principle of Legitimate Expectations can be claimed**

The Treaty offers mainly two different processes of judicial review; the direct action under Article 230 EC and the reference for a preliminary ruling under Article 234 EC. And whether a State aid process will take either way is dependent on the relevant aid measure and the preceding circumstances. The State aid area offers furthermore a third possibility, since the procedure under Article 230 EC is preceded by a Commission investigation and a Commission decision.

#### **4.1.1 The Procedure before a National Court - a Preliminary Ruling**

The procedure under Article 234 may be applied when the legality of a State aid measure is challenged before a national court, for example by a competitor to the beneficiary, or, since it is up to the member state to carry out recovery orders from the Commission, when a beneficiary has brought an action for annulment of a national authority's recovery order to a national court. Here, according to the Court, it is for the national court alone to assess the circumstances of the individual case. It may however be necessary to seek guidance through a preliminary ruling.<sup>115</sup>

The national courts' jurisdiction stems from the direct effect of the procedural rules under Article 88 EC and the so called SFEI-doctrine,<sup>116</sup> and the courts are therefore, for example,

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<sup>115</sup> See for example Cases C-5/89 Commission v Germany [1990] ECR I-3437, T-67/94 Ladbroke Racing [1998] ECR II-I and T-459/93 Siemens [1995] ECR II 1675.

<sup>116</sup> Case 120/73 Gebrüder Lorenz GmbH [1973] ECR 01471 para. 8 and Case C-39/94 Syndicat Français de l'Express International (SFEI) [1996] ECR I-3547.



obliged to protect the rights of individuals affected by violations of the notification and standstill obligations.<sup>117</sup> This task contains both the rights of competitors and beneficiaries, and thus means that national courts can refrain from ordering recovery when it is appropriate.<sup>118</sup> However, as provided by the SFEI-doctrine, this is merely possible when exceptional circumstances prevail. And since the legal standard to be applied, should be similar to the one of the Commission under Article 14 of the Procedural Regulation,<sup>119</sup> national courts may only refrain from ordering recovery when it would be contrary to a general principle of community law, such as the principle of legitimate expectations.<sup>120</sup>

#### **4.1.2 The Procedure before the Commission - an Action for Annulment**

If an undertaking on the other hand has had direct contact with the Commission, for example through the formal investigation procedure, and this has resulted in a negative decision which the company wishes to bring an action against, such an action will be brought directly to the Community courts by way of Article 230 EC. The same goes for companies that, without being the direct addressee of a decision, are individually and directly concerned by it.<sup>121</sup> In the State aid field, this situation most often occurs when enterprises have benefited from an aid scheme, and not an individual aid measure.

Furthermore, it is not merely possible to claim legitimate expectations before the Community courts, since a Commission decision naturally precedes an action for annulment under Article 230 EC. Thus, the first possibility to make such claims is before the Commission, under the procedure of a formal investigation. This follows since, according to the Procedural Regulation Article 6, should the Commission launch such a procedure, interested parties are to be called upon to submit comments. And as mentioned above, when applied to an aid measure initiated against a beneficiary, it can rely on rights as extensive as the rights of the defence and thereby a right to be heard. Further, as also mentioned above, should the Commission come to a negative decision; it shall nevertheless not require recovery of the aid if that would be contrary to a general principle of community law.<sup>122</sup>

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<sup>117</sup> Case C-354/90 FNCE, para. 12, Case C-39/94 SFEI para. 40 and Opinion of Advocate General Jacobs in Case 39/94 SFEI, para. 44.

<sup>118</sup> Giraud (2008) p. 24 f.

<sup>119</sup> Commission notice on State aid enforcement by national courts p. 10 and Opinion of Advocate General Jacobs in Case C-39/94, SFEI, para 75.

<sup>120</sup> The Procedural Regulation, Article 14.

<sup>121</sup> See Article 230(4) EC.

<sup>122</sup> The Procedural Regulation, Article 14(1).

### 4.1.3 Action for Annulment and Preliminary Ruling: Equal Possibilities for Success?

The reason to why this question is relevant is easiest expressed by the following set of facts. To my knowledge, there exist four successful claims of legitimate expectations before the Community courts, where all have been the result of an action for annulment. In addition, while no claim for legitimate expectations has been approved under a preliminary ruling, this procedure has generated much of the significant case law within the field.<sup>123</sup> Whereas it thus seems impossible to be successful with a legitimate expectations claim under a preliminary ruling, there exist however, to some extent explanations, some due to the general features of the Community courts' procedures and some because of the special State aid procedures.

A part of the explanation can be as simple as the fact that the national courts only in rare cases deal with these kind of questions, whereas the Commission indeed more frequently has to take such considerations. Thus, more of these cases appear before the Community courts under the procedure of an action for annulment than under a preliminary ruling.<sup>124</sup> In addition, under an action for annulment, the Community courts provide a judgment in the specific case, while under a preliminary ruling, an interpretation of the relevant EC law, for the national court to apply when deciding the outcome of its case, is supplied. This difference is further supported by the fact that the national court, under the procedure for a preliminary ruling, is to assess the circumstances of the individual case, and whether any exceptional circumstances prevail.<sup>125</sup> A scenario that was expressed by the answer to the second question in the above mentioned CELF-case, where the Court held that the unlawfulness of the aid is to be remedied, save for exceptional circumstances.<sup>126</sup> And as a consequence, the Court did not have to rule on the existence of such expectations, since the answer means that it left it to the national court to assess whether any legitimate expectations may hinder a recovery.

The presented explanation may however, to some extent be dependant on the referred question, and it is therefore possible that the Court, in a future preliminary ruling, may express that a beneficiary can entertain legitimate expectations.<sup>127</sup> For example, in the Alcan

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<sup>123</sup> See for example Case C-354/90 FNCE, Case C-39/94 SFEI, Case C-345/02 Pearle, Case C-368/04 Transalpine Ölleitung and Case C-199/06 CELF.

<sup>124</sup> Provided by Christof Lessenich at DG Competition, in Unit H4 Enforcement and Procedural Reform. 090929.

<sup>125</sup> See for example Case C-5/89 Commission v Germany, para. 16 and Case C-199/06 CELF para. 43.

<sup>126</sup> Case C-199/06 CELF para. 69 and Case C-39/95 SFEI para. 71: *“The answer to the second question must therefore be that a national court requested to order the repayment of aid must grant that application if it finds that the aid was not notified to the Commission, unless by reason of exceptional circumstances repayment is inappropriate.”*

<sup>127</sup> For more information, see the epilogue, where the continuation of the CELF-case is discussed.

case,<sup>128</sup> the existence of a legitimate expectation was, after a referred question on the protection of the recipient's expectations, thoroughly examined, and if the claim would have been approved, the Court would probably have expressed that an applicant in such a situation can rely on legitimate expectations.

Furthermore, what concerns the requirement of a precise assurance from a Community institution for legitimate expectations to be entertained, such an assurance is indeed more often produced under the procedure of an action for annulment. This follows since, as the procedure of a preliminary ruling has its starting point at the national court, and often where a competitor has brought complaints to an aid measure, such an aid measure has rarely been notified and thus not been target of a Commission examination or decision. An action for annulment under Article 230 EC has on the other hand been preceded by a notification as well as a Commission examination and decision. And since it is precisely in such dealings with the Commission that a precise assurance may prevail, it is not surprising that claims on the principle of legitimate expectations are more successful under the procedure of an action for annulment under Article 230 EC.<sup>129</sup>

There might however be cases where notified and examined aid measures can come before a national court, and where the validity of a Commission decision can be questioned through a preliminary ruling.<sup>130</sup> However, since a company that has had the possibility to challenge a decision under Article 230 EC, but did not, not subsequently may challenge it under Article 234 EC, this procedure is only for beneficiaries without the possibility to bring proceedings under Article 230 EC.<sup>131</sup> In other words, companies neither the addressee of a Commission decision on an individual aid measure nor directly and individually concerned by a decision concerning an aid scheme. Therefore, while the enterprise may have benefited from a notified and examined aid measure and appears to be in the above mentioned situation, it has most likely not been involved in such dealings with the Commission that may create a precise assurance, and has consequently less chance to be successful with a legitimate expectation claim.

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<sup>128</sup> Case C-24/95 Alcan [1997] ECR I-1591.

<sup>129</sup> Provided by Christof Lessenich at DG Competition.

<sup>130</sup> See Article 234(b) EC.

<sup>131</sup> Case C-188/92 Textilwerke Deggendorf [1994] ECR I-00833, para. 26.

Even when taking into consideration that the possibility to be individually and directly concerned might be slim, this reasoning seems logic, even more since half of the approved cases before the Community courts have concerned such individually and directly concerned applicants.<sup>132</sup>

## **4.2 An Introduction to the Principle of the Protection of Legitimate Expectations in the State Aid Field**

As provided above, the principle of the protection of legitimate expectations is a general community principle, which aims at protecting participants on the market against unreasonable and unforeseeable effects, as results of legislators' discretionary right to adopt new decisions or regulations.<sup>133</sup> It fills, in other words, a similar purpose in the EC rules regime as the air bag does in an automobile. However, at the same time as the principle of legitimate expectations has been acknowledged by the Community institutions within the State aid field, and whereas it is frequently put forward by beneficiaries as a way of avoiding the recovery of State aid, such a claim most often turns out to be a grasp at straws. This follows since the Community courts have been considerably reluctant in accepting such pleas, and only acknowledged legitimate expectations in exceptionally rare cases.<sup>134</sup> Thus, it seems as the air bag of legitimate expectations in the State aid area is rather flat and consequently not much to rely on. While the Court therefore is sending the message that, when behind the wheels you better operate cautiously, the Commission has at the same time recognized the possibility to rely on the principle in additional cases, making the notion of legitimate expectations more comprehensive.

### **4.2.1 Procedural Requirements within the State aid Field**

What concerns the possibility to claim the protection of legitimate expectations; it is only the beneficiary of the aid and not the member state concerned that may entertain such expectations.<sup>135</sup> Legitimate expectations can furthermore, as mentioned above, only be

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<sup>132</sup> See Case C-348/03 Koninklijke Friesland Foods NV and joined Cases C-182/03 and C-217/03 Belgium and Forum 187 ASBL.

<sup>133</sup> Giraud (2008) p. 4.

<sup>134</sup> For example, see Case 223/85 Rijn-Schelde-Verolme (RSV).

<sup>135</sup> As provided by Case C-5/89 Commission v Germany, para. 17: *“a member state whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 92 and 93 (now 87 & 88) of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful*

successfully invoked if they are the result of a Community institution's conduct. This means, in other words, that a beneficiary can not, against the Commission or the Community courts, entertain legitimate expectations to any behaviour put on by the national authority.<sup>136</sup>

#### ***4.2.1.1 The Notification Requirement Revisited***

Before discussing the possible grounds for entertaining legitimate expectations we better, once again, have a look at the notification and standstill obligations under Article 88(3) EC. Because, it seems as the Community judicatures have given somewhat different answers to the same question. Thus, on the one hand, in case C-5/89 Commission v Germany, the Court held that, if the aid has not been granted in compliance with the procedure under Article 88 EC, a company may not, *in principle*, entertain a legitimate expectation. And a diligent businessman should normally be able to determine whether that procedure has been followed.<sup>137</sup> In the P & O Ferries case it was put as follows: “*It is true that a recipient of unlawfully granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund that aid.*”<sup>138</sup> As provided, a claim for legitimate expectations concerning an unlawful aid measure should not be possible under normal circumstances, under exceptional circumstances however, the beneficiary is not precluded from relying on such expectations.

On the other hand, there are also examples of an opposite conclusion, which, for example, is expressed in the Alcan case, where the Court stated that, “*undertakings receiving aid cannot have a legitimate expectation as to the lawfulness of the aid unless it has been granted in compliance with the procedure laid down in Article 93 of the Treaty.*”<sup>139</sup> Furthermore, it was also stated that even a beneficiary of unquestionable good faith can due to the non-notification of the member state be unsuccessful when claiming legitimate expectations: “*Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance*

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*conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness.*”

<sup>136</sup> Beneficiaries can however rely on exceptional circumstances on the basis of the relevant provisions of national law in the framework of the recovery procedure before the national courts. It is there for national courts alone to assess the circumstances of the case (Case T-109/01 Fleruren Compost, para. 137).

<sup>137</sup> Case C-5/89 Commission v Germany, para. 16.

<sup>138</sup> Joined Cases T-116/01 and 118/01 P & O Ferries [2003] ECR II-2957 para. 201.

<sup>139</sup> Case C-24/95 Alcan, para. 49. Emphasis added. Article 93 is now Article 88. This has also been the result in other cases, see Giraud p. 27 and for example joined Cases C-346/03 and 529/03, Giuseppe Atzeni et al. v Regione autonoma della Sardegna [2006] ECR I-1875, paras. 65-66 and Case 310/85, Deufil [1987] ECR 901 paras. 25-26.

*with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient... ”<sup>140</sup>*

It has however been argued that this latter approach is not sustainable since the fact that a strictly lawful aid measure cannot, in principle, be target for recovery, as the requirements of notification and standstill have been applied with. Thus, such an aid measure is either declared compatible and should not be recovered or is declared incompatible and does not become implemented, or is nevertheless granted, which rules out the possibility of legitimate expectations.<sup>141</sup> As provided by Giraud: *“Therefore, restricting the possibility of claiming the existence of legitimate expectations – which aims at preventing the recovery of an aid – to cases of lawful aids that can by definition not be recovered does not seem to make much sense.”<sup>142</sup>*

Furthermore, while earlier case law not directly has expressed that exceptional circumstances may be possible when the member state has failed to notify the aid measure, but merely referred to lawful and unlawful measures, the CFI stated the following in a most recent case: *“However, according to the case-law, a recipient of aid which is granted unlawfully, **because it was not notified**, as is the case of the aid schemes at issue, is not precluded from relying on exceptional circumstances on the basis of which it legitimately assumed the aid to be lawful, in order to oppose repayment of the aid.”<sup>143</sup>* This is a most reasonable statement, and even though it is not entirely sure that the Community courts will refrain from holding that exceptional circumstances are impossible when the aid measure has not been notified, the ruling of the CFI has made the situation clearer. In addition, as will also be shown below, the Commission has in several decisions approved claims on legitimate expectations despite that the aid measure had not been duly notified. Consequently, as the case law now stands, a failure of notification should not exclude the possibility to rely on legitimate expectations.

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<sup>140</sup> Case C-24/95 Alcan, para. 43.

<sup>141</sup> Giraud (2008) p. 28 f. See also below, section 4.3.1.

<sup>142</sup> Giraud (2008) p. 29.

<sup>143</sup> Judgment of the Court of First Instance - 9 September 2009, Territorio Histórico de Álava, joined Cases T-30/01, T-31/01, T-32/01, T-86/02, T-87/02, T-88/02 and Judgment of the Court of First Instance - 9 September 2009, Territorio Histórico de Álava joined Cases T-227/01, T-228/01, T-229/01, T-265/01, T-266/01, T-270/01 (emphasis added).

### **4.3 Sources with the Potential of Producing Legitimate Expectations**

As explained, when the right circumstances are present, a beneficiary of unlawful or illegal State aid, believed to be lawful and legal, may be exempted from recovery. However, this is merely possible when the recovery is contrary to a general principle of community law or when exceptional circumstances prevail. Hence, to specify in advance in which situations exceptions might be possible is far from easy. The case law of the Community judicatures may on the other hand provide a picture of such circumstances. Thus, the following section will provide examples of claims commonly put forward by beneficiaries, and whereas the main focus is to provide examples of successful pleas and thus potential sources of legitimate expectations, also common patterns of disapproved cases will be supplied.

#### **4.3.1 Legitimate Expectations when under the Impression that the Aid has been notified**

The source of legitimate expectations that can be drawn from believing an aid measure was rightfully implemented according to article 88 EC, when it in fact was not, is a somewhat common claim. It is however generally not a valid ground, because, the scope of this source normally brings us back to our diligent businessman, and the fact that he should be able to determine whether that procedure has been followed. A recipient undertaking can furthermore determine whether a specific aid measure has been notified by reading the Communication section of the Official Journal of the European Union, where the Commission's decisions is publicised,<sup>144</sup> or simply just pick up the phone and ask the Commission.<sup>145</sup> In that respect, the notion of this source is consequently not a broad one, if it is a source at all. It seems as the possibility to entertain legitimate expectations requires an additional cause. What concerns aid measures exempted from notification, such as block exemptions or SGEI, it becomes however more difficult for a diligent businessman to find out whether the aid measure is lawful or not. This question is however adjacent to the ground concerning difficulties of defining a State aid measure, which is discussed below.<sup>146</sup>

#### **4.3.2 Legitimate Expectations due to an Extraordinary Delay by the Commission**

An extraordinary delay by the Commission as a source of legitimate expectations was established by the Court in the Rijn-Schelde Verolme case, and is founded on the delay as a

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<sup>144</sup> Giraud (2008) p. 10.

<sup>145</sup> Revue des droits de la concurrence, Les aides d'État, Entretiens du Palais-Royal, Paris, 14 mars 2008 1 Concurrences N° 3-2008 p. 63.

<sup>146</sup> See section 4.3.3 "Legitimate Expectations due to a Positive Commission Decision".

sort of indirect assurance.<sup>147</sup> The applicant claimed that, by waiting 26 months before given the contested decision, the Commission disregarded the requirements of legal certainty and failed to apply with the rules of good administration. The delay therefore caused it to believe that the sums allocated by way of the aid in question belonged to the company. As an explanation, the Commission expressed that the complexity of the situation made it impossible to take a decision sooner. The Court however stated that the aid in question concerned only the supplementary costs of one operation, the cessation of the beneficiary's offshore engineering activities, which had already been the subject of aid authorized by the Commission, and that the aid therefore was known to the Commission.<sup>148</sup> The Court thus concluded that *"It follows that the Commission's delay in giving the contested decision could in the case in point establish a legitimate expectation on the applicant's part so as to prevent the Commission from requiring the Netherlands authorities to order the refund of the aid."*<sup>149</sup>

The source of legitimate expectations due to an extraordinary delay has been confirmed by the Community courts in additional cases, however without being put in to use.<sup>150</sup> The Court held, for example, in a more recent case concerning an aid scheme for Sardinian farmers that a total delay of four years and nine month, cannot lead to legitimate expectations, when it is not the Commission but the member state's authority that is to blame for the delay.<sup>151</sup> The Court did furthermore in Case C-298/00 repeat the conclusion in the Rijn-Schelde Verolme case,<sup>152</sup> but added that *"the facts of the case giving rise to that judgment were exceptional and bear no resemblance to those in the present case."*<sup>153</sup> It also stated that a delay in a case of State aid that has not been notified to the Commission may only be imputed from the time when it learned of the existence of the aid. The Court therefore concluded that the time between the date when the Commission learned about the aid measure and the date of adoption of the contested decision, namely less than two years, was reasonable. This followed since the aid

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<sup>147</sup> Case 223/85 Rijn-Schelde Verolme (RSV).

<sup>148</sup> Ibid. paras. 14-15.

<sup>149</sup> Ibid. para. 17.

<sup>150</sup> Joined cases T-195/01 and T-207/01 Government of Gibraltar v Commission [2002] ECR II-02309 para. 129, joined Cases C-346/03 and C-529/03 Giuseppe Atzeni and Case C-298/00 Italy v Commission [2004] ECR I-4087 para. 92.

<sup>151</sup> Flynn (2004) p. 683 and Joined cases C-346/03 and C-529/03 G. Atzeni.

<sup>152</sup> Case C-298/00 Italy v Commission, para. 90: *"a delay by the Commission in deciding that an aid is illegal and must be abolished and recovered by a member state could in certain circumstances establish a legitimate expectation on the part of the recipients of that aid so as to prevent the Commission from requiring that member state to order the refund of the aid."*

<sup>153</sup> Case C-298/00 Italy v Commission, para. 90.



had not been authorized by the Commission, neither was it aware of the complex situation in which the aid had been granted, thus, an investigation was necessary.<sup>154</sup>

#### **4.3.3 Legitimate Expectations due to a Positive Commission Decision**

Beneficiaries have furthermore argued that a positive Commission decision, approving the relevant measure, could generate legitimate expectations, and therefore preclude recovery even if the decision is annulled at a later stage.<sup>155</sup> This source of legitimate expectations has been discussed in earlier cases,<sup>156</sup> and the more recent CELF-case.<sup>157</sup> Here, the Court stated that a recipient of an unlawfully implemented aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful, it cannot however, entertain any legitimate expectations when a positive decision has been challenged in due time.<sup>158</sup> In other words, so long as the Commission has not taken a decision approving the aid, and as long as the period of bringing an action against such a decision has not expired, the recipient cannot be sure as to the lawfulness of the proposed aid, and therefore not entertain any legitimate expectations.<sup>159</sup> In addition, the Commission has in one of its decisions explained that the public interest in preventing market distortions requires the possibility for competitors to challenge a positive decision.<sup>160</sup> Thus, where community law now stands, this is most likely not a valid source of legitimate expectations.<sup>161</sup>

#### **4.3.4 Legitimate Expectations due to Difficulties of defining what constitutes a State Aid Measure**

As described above, for an aid measure to constitute State aid, four conditions must be met: a measure must (1) contain some kind of intervention from a member state or through state resources (2) confer a benefit or an advantage (3) distort or threaten to distort competition and (4) have an effect on Inter-state trade. And when these conditions are met, and no exemption is applicable, a notification to the Commission in accordance with Article 88(3) EC is required. What concerns these four conditions however, they have evolved mainly through

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<sup>154</sup> Ibid. para. 92.

<sup>155</sup> Hancher (2006) p. 683.

<sup>156</sup> See for example Cases T-116/01 and T-118/01 P & O Ferries.

<sup>157</sup> Case C-199/06 CELF.

<sup>158</sup> Case C-169/95 Spain v Commission [1997] ECR I-135, para. 53 and Case C-199/06 CELF, para. 65.

<sup>159</sup> Case C-91/01 Italy v Commission [2004] ECR I-4355, para. 66 and Case C-199/06 CELF, paras. 66-67.

<sup>160</sup> Hancher (2006) p. 683 and Commission Decision 2005/786 [2005] L296/19 para. 137.

<sup>161</sup> The French Conseil d'État has however, concerning the CELF-case, recently requested a preliminary ruling regarding non-final Commission decisions. This is further discussed in the epilogue, section 6 below.

case law, and there exists a noteworthy degree of uncertainty concerning their application.<sup>162</sup> In addition, as mentioned above, it can be rather complicated to define whether a measure is new or existing State aid.

Whereas the Community courts have not explicitly stated that this source is a possible one, the problem has been discussed by Advocate General Jacobs and has been accepted by the Commission. Advocate General Jacobs expressed it in the SFEI-case, when discussing recovery, as doubtful whether a diligent businessman ought to have realised that the measure constituted State aid, because the measure in question was not one which self-evidently constitute such aid.<sup>163</sup> This was since the definition was dependent on whether the beneficiary received adequate remuneration for its services or not; a matter that was difficult, if not impossible, to verify. Advocate General Jacobs further expressed that the Commission, after conducting its preliminary inquiry, decided not to proceed the matter and that the Commission, after re-opening its inquiry, failed to reach a decision for a period of more than three years. It was thus Advocate General Jacobs opinion that it might be inappropriate to order the repayment of the aid. The Court did not, however, elaborate on this question, but merely stated that the national court must order the recovery unless, by reason of exceptional circumstances, repayment is inappropriate.<sup>164</sup>

Regarding the Commission, it has in several decisions refrained from ordering recovery of unlawfully granted aids with regard to the uncertainty of whether the measure constitutes State aid.<sup>165</sup> One such decision concerned the Adria-Wien case,<sup>166</sup> in which the Court had stated that the Austrian measure in the main proceedings, which provided for a rebate on energy taxes on natural gas and electricity, did not constitute State aid where it applied to all undertakings in a national territory, regardless of their activity.<sup>167</sup> Subsequently however, the Commission found that the tax rebate in certain industry sectors, while in theory applicable to all, in practice benefited undertakings with high energy consumption. The measure was therefore selective and constituted State aid. It was however, according to the Commission inappropriate to recover the aid, since the wording in the Adria-Wien case “*may have led*

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<sup>162</sup> Giraud (2008) p. 11.

<sup>163</sup> Case 39/94 SFEI and Opinion of Advocate General Jacobs in Case C-39/94 SFEI, paras 73-77.

<sup>164</sup> Case C-39/94 SFEI, paras. 70-71.

<sup>165</sup> See for example Commission Decision 2005/565 [2005] O.J. L190/13 para. 100 and Commission Decision 2006/621/EC on the State aid implemented by France for France Telecom, O.J. 2006, L 257/11–67, para. 263-264.

<sup>166</sup> Case C-143/99 Adria-Wien.

<sup>167</sup> Ibid. p. 36.

*some beneficiaries to believe in good faith that the national measures at issue before the national court would cease to be selective, and therefore cease to constitute State aid, if their benefit were extended to sectors other than the manufacture of goods.*"<sup>168</sup> The Commission therefore concluded that a recovery would be contrary to the principle of the protection of legitimate expectations.

In another example, the Commission dealt with a shareholder loan, which under normal circumstances probably would not have constituted State aid, but due to certain declarations by the French Government was found to be such aid. This was the result since the declarations had the effect of restoring the confidence to the market as the enterprise in question was concerned; a fact that turned the shareholder loan proposal into a State aid measure. The Commission expressed that it had not previously examined whether this type of conduct constitutes State aid, and that, since the conduct preceded the notification of the shareholder loan proposal, "*a diligent operator could have had confidence in the lawfulness of the conduct of the member state concerned*".<sup>169</sup> The recipient undertaking could therefore legitimately have had confidence in France's conduct not constituting State aid.

What concerns the Orkney Islands Council track-record scheme, it could be considered as a case of legitimate expectations both due to difficulties of defining what constitutes State aid and because of a prior decision of a similar nature (where the latter will be further discussed below).<sup>170</sup> The Commission accepted the claim as to the private nature of a fund, since that would have excluded the measure from the State aid rules. This was partly because that the United Kingdom and the Commission consistently had acted as the fund was of a private nature and partly due to a prior decision concerning grants to fishermen on the Shetland Islands. It was therefore, according to the Commission, wrongly, but reasonably, for the fishermen on the Orkney Island to assume that only private funds had been involved. Hence, the fishermen could entertain legitimate expectations to the non-existence of a State aid measure. This decision is furthermore an example of a claim of legitimate expectations that has been successful despite the fact that no Community institution had given any specific

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<sup>168</sup> Commission Decision 2005/565 [2005] O.J. L190/13 para. 66.

<sup>169</sup> Commission Decision 2006/621 O.J. 2006, L 257/11–67, para. 263.

<sup>170</sup> 2003/611/EC: Commission Decision of 3 June 2003 on the Orkney Islands Council track-record scheme, Official Journal L 211 , 21/08/2003 P. 0049 – 0062.

assurance. Thus, the Commission approved the claim although there was no direct link between its conduct or the prior decision and the fund.<sup>171</sup>

#### **4.3.5 Legitimate Expectations due to a Prior Decision or Judgement of Similar Nature**

This source of exceptional circumstances is built upon expectations to the lawfulness of a State aid measure due to a prior decision or judgement by the Community judicatures, where a similar measure has been approved, and the judicature has concluded that the measure does not constitute State aid within the meaning of Article 87 EC. Whereas this conclusion can be found in several Commission decisions, it has not been directly applied by the Court.

A representative example can be found in a decision concerning a Spanish tax deduction scheme, which initially had been notified but later was target for a formal investigation procedure. The scheme concerned businesses engaged in export activities, and legitimate expectations prevailed due to similarities to a precedent Commission decision regarding a French tax scheme. The Commission consequently held that “*even the most cautious and well informed steel firms could not have foreseen the tax provisions under examination being classed as State aid.*” And ...”*they could rightly claim legitimate expectations.*”<sup>172</sup>

This case was followed by several decisions, in which the Commission came to similar conclusions. Nine of these were taken between 2002 and 2004,<sup>173</sup> and the Commission refrained from ordering recovery because of their similarities to a Belgian scheme, which according to a previous decision did not constitute State aid.<sup>174</sup> The first of the nine cases also concerned a Spanish aid scheme. The Commission expressed that, “*the Vizcaya coordination centers scheme bears close similarities to the scheme introduced in Belgium*”.<sup>175</sup> Consequently, “*both the Spanish authorities and the sole beneficiary of the scheme were*

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<sup>171</sup> Sinnaeve (2008) p. 40 f. and Case T-129/96, Preussag Stahl AG [1998] ECR II-609, paras. 77–78, case T-521/93 Atlanta and Others [1996] ECR II-1707, para. 57 and case T-113/96 Dubois et Fils [1998] ECR II-125, para. 68.

<sup>172</sup> 2001/168/EC: Commission Decision of 31 October 2000 on Spain's corporation tax laws, OJ L 60, 1.3.2001, paras. 25–28.

<sup>173</sup> Giraud (2008) p. 19: Decision 2003/81/EC, O.J. 2003, L 031/26–31; Decision 2003/438/EC, O.J. 2003, L 153/40–48; Decision 2003/501/EC, O.J. 2003, L 170/20 – 28; Decision 2003/512/EC, O.J. 2003, L 177/ 17–21; Decision 2003/515/EC, O.J. 2003, L 180/52–66; Decision 2003/601/EC, O.J. 2003, L 204/51–59; Decision 2003/883/EC, O.J. 2003, L 330/23–29; Decision 2004/76/EC, O.J. 2004, L 23/1–13; Decision 2004/77/EC, O.J. 2004, L 23/14–26.

<sup>174</sup> It can also be mentioned that none of these measures had been notified to the Commission, something that did not stop the Commission from refraining from a recovery order. See for example Decision 2003/81 paras. 4 & 47 and Decision 2003/438 para. 59.

<sup>175</sup> 2003/81/EC: Commission Decision of 22 August 2002 para. 43.

*entitled to entertain legitimate expectations that the scheme did not constitute State aid.*<sup>176</sup> This case is however also interesting since the Commission regarded the Belgian decision as made public, even though the decision not yet had been published. This was since the Commission's view, at the time, had been expressed in the Fourteenth Report on Competition Policy and in an answer to a Parliamentary question.<sup>177</sup>

While the Spanish case, and the eight cases that followed, compose the mere part of the source of legitimate expectations due to prior decisions by the Commission, they are not unique. This follows since the Commission, in additional cases, has found reasons to approve claims of legitimate expectations, as a result of its prior decisions.<sup>178</sup> The Commission has for instance, concerning a tax reduction scheme in Gibraltar,<sup>179</sup> stated that a beneficiary could entertain legitimate expectations due to similarities between the new scheme and an existing scheme. This is furthermore an example of a claim that has been approved despite that the measure had not been properly notified to the Commission; the circumstances were however rather unusual. This was because the aid scheme in question did not only have considerable similarities to an existing tax reduction scheme in Gibraltar, but was also, due to differences concerning the determination of the annual tax due, less favorable. The Commission repeated that *“where a diligent businessman could have foreseen the adoption of a community measure likely to affect his interests, he cannot rely on the principle of protection of legitimate expectations if the measure is adopted.”* Given the similarities between the measures however, the Commission continued, *“...it is hard to see how a diligent operator could have anticipated that the two regimes would be subject to different State aid procedures.”* It was therefore the Commission's opinion that it was *“reasonable to assume that a conscientious businessman, acting in good faith, could legitimately have believed that by opting for the less generous Qualifying Companies regime rather than the manifestly legal (in State aid terms, existing) Exempt Companies regime, he would also enter a regime whose legality was not in doubt.”* The conclusion was therefore, also in this case, that the recovery would be contrary to a general principle of community law.<sup>180</sup>

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<sup>176</sup> Ibid. para. 47.

<sup>177</sup> Sinnaeve (2008) p. 40.

<sup>178</sup> Giraud (2008) p. 19: See for example Commission Decision 2002/347/ECSC, O.J. 2002, L 126/27–30 and Commission Decision 2005/77 [2005] O.J. L29/24.

<sup>179</sup> Commission Decision 2005/77 [2005] O.J. L29/24.

<sup>180</sup> Ibid. paras. 99-100.

#### 4.3.6 Legitimate Expectations due to Reliance on Community Soft Law

As mentioned above, within the State aid area, the Commission has come to heavily rely on soft law instruments, such as guidelines, communications and frameworks, as a way of enforcing the State aid rules. It is furthermore evident that the Commission prefers to use guidelines in certain fields, such as environment and research and development, despite the fact that the Enabling Regulation provides it with a formal legal basis to adopt binding rules, which could be enforced by national courts.<sup>181</sup> What concerns claims on legitimate expectations, as an exemption to recovery due to soft law instruments; they are not merely rare but also rather unsuccessful. However, while the exemptions to notification have increased over the recent years, the importance of the information provided by soft law is growing. In addition, more and more information can be found in such law and it is thus of value to identify whether they can constitute a source of legitimate expectations.

It is therefore of interest to find out whether soft law, such as guidelines, may produce legal effects. This question was discussed by the Court in the recent *Dansk Rørindustri* case,<sup>182</sup> where it, concerning a guideline on the method of setting fines within the competition area, expressed that rules of conduct designed to produce external effects, as is the case of guidelines, cannot be precluded from creating legal effects. Thus, by creating a guideline, the institution imposes a limit on the exercise of its discretion and cannot, where appropriate, without breaching general principles of law, such as the protection of legitimate expectations, depart from the methods the institution through the guideline has bound itself to.<sup>183</sup> The CFI has furthermore stated that, “*The Commission is bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the member states. The parties concerned are therefore entitled to rely on those guidelines and the Court will ascertain whether the Commission complied with the rules it has itself laid down when it adopted the contested decision.*”<sup>184</sup> In addition, the CFI has expressed that guidelines bind the Commission, albeit that the Commission may amend any guidelines if the circumstances so require.<sup>185</sup>

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<sup>181</sup> Hancher (2006) p. 13.

<sup>182</sup> Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri* [2005] ECR I-05425.

<sup>183</sup> *Ibid.* paras. 210-213.

<sup>184</sup> Case T-176/01 *Ferriere Nord SpA* [2004] ECR II-03931 76/01 para. 134. See also Case T-35/99 *Keller and Keller Meccanica* [2002] ECR II-261, paras. 74 and 77 and Case T-380/94 *AIUFFASS and AKT* [1996] ECR II-2169, para. 57.

<sup>185</sup> Hancher (2006) p. 13.

Consequently, it appears that soft law, such as guidelines, may produce legal effects, save for when they depart from the community rules and the judicatures' case law. This was expressed in the Deufil case,<sup>186</sup> where the Court concluded that the fact that a specific part of an industry was not included in the Commission's aid code could not give rise to any legitimate expectations, since the aid code only provided guidelines and could not constitute exemptions from the State aid rules. Hence, the recipient company could not rely on the guidelines as an exhaustive source of State aid measures, since, as expressed by the Court, "*The aid code constitutes guidelines setting out the course of conduct which the Commission intends to follow and with which it asks the member states to comply... ..it does not derogate from the provisions of Articles 92 and 93 of the Treaty, nor could it do so.*"<sup>187</sup> Moreover, in recent ASM Brescia SpA case,<sup>188</sup> a plea on legitimate expectations concerning the Communication on SGEI was dismissed.<sup>189</sup> The CFI held that the communication must not itself be regarded as a legislative provision but merely interpretative in nature, and that the criteria regarding SGEI are those which can be inferred from the Treaty and the case law.<sup>190</sup> Similar, in the CIRFS-case, the Court found that the Commission was bound by the terms of its policy framework, but also stated that the protection of legitimate expectations may not be relied upon in order to justify the repetition of an incorrect interpretation of a measure.<sup>191</sup>

Furthermore, as shown by Case C-91/01 Italy v Commission,<sup>192</sup> account must also be taken to the purpose behind a soft law. The applicants argued that they had legitimate expectations to the approval of their applications for increased aid, since the rules expressed in the SME Guideline and SME Recommendation incited them to put in place organisational and corporate structures which would make them comply with the rules. Whereas the applicants formally met the independence criterion under those rules, the Court held, as the Commission, that the purpose, which was clearly expressed by the recommendation and the guidelines, leads to the conclusion that the enterprises nevertheless did not meet the criterion. This was because the companies, while not owned to more than 25 % by a large enterprise and thus meeting the criterion expressed in the soft law, in reality belonged to a large group of undertakings, hence breaching the purpose of the rules. As an answer to the applicants claim

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<sup>186</sup> Case 310/85 Deufil.

<sup>187</sup> Ibid. para. 22. Articles 92 and 93 are now Articles 87 and 88 EC.

<sup>188</sup> Case T-189/03 ASM Brescia SpA, Judgment of the Court of First Instance of 11 June 2009.

<sup>189</sup> The Communication from the Commission concerning services of general interest in Europe (OJ 2001 C 17. p. 4)

<sup>190</sup> Case T-189/03 ASM Brescia SpA, para. 128.

<sup>191</sup> Case C-313/90 CIRFS, paras 34-36 and 45.

<sup>192</sup> Case C-91/01 Italy v Commission [2004] ECR I-04355.

on legitimate expectations, the Court therefore stated that the Commission merely applied the SME Recommendation and the SME Guideline correctly<sup>193</sup> and that “*the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption.*”<sup>194</sup>

In addition, what concerns guidelines and the relation between existing aid measures and the implementation of new guidelines, interesting notions can be provided by the Commission decision on the aid scheme implemented by Sweden for an exemption from the tax on energy.<sup>195</sup> Here, the applicants were granted the possibility to rely on the principle of legitimate expectations, since the Commission had not published the acceptance by each member state of the appropriate measures proposed by it for the implementation of the guidelines, as provided by Articles 18 and 26 of the Procedural Regulation and as necessary for the guidelines to produce legal effects. And according to the Commission, these circumstances may have led some beneficiaries to believe in good faith that the aid measure still was to be regarded as existing aid.<sup>196</sup> However, the Commission also concluded that it was merely possible for the beneficiaries to rely on the principle of legitimate expectations to the date of the publication of the Commission’s decision to open the Article 88(2) EC procedure, since it at that time must have been clear for the beneficiaries that the measure no longer constituted existing aid and that it could be incompatible with the guidelines.

#### **4.4 The Balancing of Interests within the State Aid Field**

As mentioned above, to be able to rely on the principle of the protection of legitimate expectations, the individual interest must prevail over the public interest. Hence, these interests must be balanced. In the field of State aid, this test is however hardly ever mentioned explicitly.<sup>197</sup> Yet, the CFI has in one of its rare such cases provided some guidance, since, in the P & O European Ferries case,<sup>198</sup> the CFI stated that whilst it is important to ensure compliance with requirements of legal certainty which protect the private interest, such requirements must be balanced against requirements which protect the public interests. The

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<sup>193</sup> Ibid. para. 65.

<sup>194</sup> Ibid. para. 49.

<sup>195</sup> 2005/468/EC: Commission Decision of 30 June 2004 on the aid scheme implemented by Sweden for an exemption from the tax on energy from 1 January 2002 to 30 June 2004 O.J. L 165 , 25/06/2005 paras. 0021 – 0030.

<sup>196</sup> Ibid, para. 61.

<sup>197</sup> Giraud p. 21.

<sup>198</sup> Joined Cases T-116/01 and T-118/01 P&O European Ferries.



CFI further held that *“In the field of State aid, there is an important public interest in preventing the operation of the market from being distorted by State aid injurious to competition, a fact which, in accordance with settled case-law, requires unlawful aid to be repaid in order to reestablish the previously existing situation...”*<sup>199</sup> And according to the CFI, such public interest also encompasses the protection of competitors who have an interest in being able to challenge Commission measures which adversely affect them. A different conclusion would render the review conducted by the Community judicatures ineffective.<sup>200</sup>

While the beneficiaries in the P & O European Ferries case were unsuccessful in their legitimate expectation claim, the case clearly shows what constitutes the public interest. And the public interest, in the field of State aid, is sincerely concerned about the possibility for competitors to challenge positive decisions, the review carried out by the Community judicatures and preventing distortion of the common market. As the Court held in the SFEI-case, *“Having regard to the importance for the proper functioning of the common market of compliance with the procedure for prior review of planned State aid, national courts must in principle allow an application for repayment of aid paid in breach of Article 93(3) (now Article 88(3)) of the Treaty.”*<sup>201</sup> And given the importance of the notification and standstill obligations under Article 88(3) EC the Court has constantly held that legitimate expectations only are possible when exceptional circumstances prevail.<sup>202</sup> It can therefore be argued that the reason to why the balancing test is so rare within the State aid field is because the protection of the principle of legitimate expectations merely is possible when such circumstances exist.<sup>203</sup> And when circumstances are exceptional, it is not surprising that they prevail over the public interest, and thus make the balancing test redundant.

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<sup>199</sup> Ibid. para. 208.

<sup>200</sup> Ibid. para. 208 f.

<sup>201</sup> Case C-39/94 SFEI, para. 70.

<sup>202</sup> Ibid.

<sup>203</sup> Giraud (2008) p. 21.

## 5. Conclusions

As provided, the beneficiaries play a rather obscure role in the State aid field, since, at the same time as they are often somewhat forgotten about they play one of the leading parts. Because, without beneficiaries no State aid would exist; with no recipient undertakings an important channel of State politics would disappear. This leads to my first conclusion: the position of beneficiaries would not be harmed by an increased focus. It can furthermore be concluded that the possibility for a beneficiary to rely on legitimate expectations as an exemption to recovery, indeed requires, as expressed in the case law, exceptional circumstances. However, when such circumstances prevail, at least the Commission is not unfamiliar to grant exceptions.

While the potential beneficiary obtains a rather weak position, this is not entirely the case for a beneficiary which the Commission has launched its formal investigation procedure against, since, under such circumstances the beneficiary will be able to exchange arguments with the Commission. The formal investigation procedure is also the first and foremost successful possibility for a beneficiary to claim the protection of the principle of legitimate expectations. However, as provided, the applicant can also claim such expectations before the CFI and the Court in an action for the annulment of a Commission decision and through a preliminary ruling when before a national court. Legitimate expectation pleas have however merely been successful before the Commission or the Community courts in an action for annulment. This implies that the first and perhaps foremost important circumstance a beneficiary has to show is that it is either the addressee of a decision or at least individually and directly concerned by it, so that it qualifies for an annulment action under Article 230 EC.

This may however not be the whole truth, since, under the procedure of a preliminary ruling, it is often the national court which examines whether any exceptional circumstances exist and whether the beneficiary can rely on legitimate expectations. And here, the national court can apply the whole range of such sources. In addition, at the same time as the close link between being an addressee or directly and individually concerned by a decision - and thus qualifying for an action of annulment under Article 230 EC - and the requirements of a specific assurance and the procedure under Article 88(3) EC, indeed is important, the notion of exceptional circumstances and hence legitimate expectations have very special characters. Thus, as mentioned, legitimate expectations have been approved both without a specific

assurance and when the obligation to standstill and notify under Article 88(3) EC has not been followed.

## **5.1 The Sources of Legitimate Expectations in the State Aid Field Concluded**

The main object of investigation for this thesis has been the possibility for a beneficiary of unlawful or illegal State aid, believed to be legal and lawful, to rely on the principle of the protection of legitimate expectations, and thus escape recovery. While this is a common claim for an enterprise under a recovery order, the success rate for such claims is rather peculiar to understand. If one should, for example, merely examine the Community courts' case law without going further, the success rate would be, to say the least, poor.<sup>204</sup> Through the Commission and its forms of examination and thus its decisions however, the source becomes more vivid and comprehensive, and thus the rate of success more positive.

Furthermore, as a consequence to the rather odd notion of legitimate expectations, a large amount of the Community judicatures' decisions contain remarkably diverse sources of exceptions. There exist however similarities and the most common and thus clear grounds are in my view the following: legitimate expectations due to an extraordinary delay by the Commission, due to difficulties of defining what constitutes a State aid measure and due to a prior decision of similar nature. What concerns legitimate expectations due to a positive Commission decision and when under the impression that the aid has been notified, both have been met with reluctance, something that, at least what concerns the latter is understandable, since it is indeed easy for a recipient undertaking to confirm whether the member state has notified the measure or not. What concerns the former, the case law is rather clear; it is not possible to entertain legitimate expectations until the period of appeal is over. This means that no member state may, risk free, put the proposed measure into effect until that period has expired. At the same time as this equals uncertainty and forces the granter and the beneficiary to wait, it is understandable because of the rights of third parties, and their possibilities to challenge a decision before the aid measure is put into effect.

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<sup>204</sup> Whereas the Community courts have heard plenty of claims of legitimate expectations, it has merely approved to the existence of such expectations in four cases: Case 223/85, Rijn-Schelde-Verolme (RSV), Joined Cases C-182/03 & C-217/03, Belgium and Forum 187 ASBL [2006] ECR I-5479, Case T-6/99, ESF Elbe-Stahlwerke Feralpi GmbH [2001] ECR II-1523 and Case T-348/03, Koninklijke Friesland Foods NV.

What concerns the most common and clear grounds, the following conclusions can be made. Regarding legitimate expectations due to an extraordinary delay by the Commission, this was one of the first grounds of legitimate expectations as an exception to recovery that the Court expressed. Since then however, the Community courts have shown quite reluctance, not towards the source as such, but what concerns the possibility to be exempted. Thus, while the courts have repeated the statements from the successful Rijn-Schelde Verolme case in other cases, it has not yet accepted an additional claim on that ground. The Community judicatures have however expressed that the circumstances in the Rijn-Schelde Verolme case were rather unusual; implying that relying on this source might be rather difficult.

The source of legitimate expectations due to difficulties of defining what constitutes a State aid measure is perhaps the most successful category. Whereas this source, in contrast to the others, is indeed a wide one, possible of containing rather different cases of legitimate expectations, all the provided cases share the same feature: difficulties of defining what constitutes a State aid measure. As shown, this is not always an easy task. And due to the increasing number of exceptions to notification, it is probably not going to be easier in the future. Because, as a consequence, the Commission's examinations of potential aid measures will decrease and the enforcement of State aid rules will be decentralized. Hence, the responsibility for granting authorities and beneficiaries to examine aid measures before they are put in to effect will increase. And while the granting authority may turn to the Commission for guidance, the beneficiary is notably dependent on its own national authority, without being able to entertain any legitimate expectations due to its behaviour. Thus, it seems as the position of the potential beneficiary has been even more weakened. It also seems as soft law may come to play a more important role for beneficiaries, both as a source of information and what regards legitimate expectations.

However, concerning legitimate expectations due to soft law as an exception to recovery, it has yet to be properly confirmed. As provided though, such soft law will, under the right circumstances produce legal effects and can therefore create legitimate expectations. Then again, since this must be under the conditions that the soft law does not depart from the Treaty, the Community judicatures' case law and the purpose of the relevant soft law measure, it is, on the one hand, rather safe to conclude that this will only be in, to say the least, exceptional circumstances. On the other hand however, exceptional circumstances is the

trademark of legitimate expectations, and considering the increasing number of soft law instruments, it would not be surprising if this source soon was properly confirmed.

Regarding legitimate expectations due to a prior decision or judgement of similar nature, this source has been the basis of numerous Commission decisions. It is thus, despite the fact that most of them have been generated by similarities to the same decision,<sup>205</sup> safe to conclude that prior decisions or judgements may generate legitimate expectations to the lawfulness of an unlawful or illegal aid measure.

## **5.2 The Notification Requirement Concluded**

The requirement of notification has indeed an effect on the scope of legitimate expectations. Its role has however been somewhat divided. The Community judicatures have for example used it as a way of dismissing claims for legitimate expectations, by stating that a beneficiary cannot claim legitimate expectations if the aid measure has not been granted in accordance with Article 88(3) EC. They have at the same time however also expressed that the unlawfulness of an aid does not preclude undertakings from entertaining legitimate expectations, and the Commission has at several occasions approved to legitimate expectations concerning unnotified aid measures, as provided by several of the above mentioned decisions. The CFI did also, most recently express that a legitimate expectation claim is not precluded because the aid measure was not notified.<sup>206</sup> This ruling contains, in contrast to earlier case law, a clearer statement, and must, in relation to the above mentioned facts be seen as the applicable practice. Consequently, it seems as a rather common ground for dismissal of legitimate expectation claims no longer exist.

Furthermore, this question may be of increased interest, since the exemptions to notification have grown over the recent years, leading to an increased number of unnotified, and thus not examined State aids. Most of these will naturally be granted in accordance with Block exemptions and the Commission's soft law, and the problem should not be exaggerated. However, since the area contains some difficulties of legal certainty at the same time as significant amounts of aid are granted under such exemptions, exceptions to recovery can come to be necessary, and thus generate additional sources of legitimate expectations.

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<sup>205</sup> As provided by Giraud (2008) p. 19: "The coordination centres saga".

<sup>206</sup> Joined Cases T-30/01, T-31/01, T-32/01, T-86/02, T-87/02, T-88/02 Territorio Histórico de Álava and joined Cases T-227/01, T-228/01, T-229/01, T-265/01, T-266/01, T-270/01, Territorio Histórico de Álava.

Furthermore, since it also leads to a diminishing scope of the Commissions review, the Commission will not examine as many aid measures, and more room will be left for competitors to bring proceedings before national courts because of illegal State aids. This may, by way of Article 234 EC, perhaps generate the first successful claim on legitimate expectations under a preliminary ruling. Consequently, it is with great interest one may follow the development of the notion of legitimate expectations.

## **5.2 Final Remarks**

The principle of the protection of legitimate expectations was earlier in this thesis referred to as the air bag of the EC State aid rules regime; a protection against the unforeseeable, something that may save you in the case of misfortune. It is furthermore a device that only may help you under exceptional circumstances, since surely, both what concerns automobiles and the recovery of illegal or unlawful State aid, such circumstances must prevail for the air bag to be put in to use. There are however one important difference: whereas the air bag of a vehicle is supposed to set off in a specific situation, the principle of the protection of legitimate expectations, and thus the beneficiary, is under the Community judicatures' discretion. Hence, knowing the procedures in the State aid field and, if any problems would occur, the potential sources of legitimate expectations may be crucial.

## 6. Epilogue

### 6.1 The CELF-case – Further Clearance on the Scope of Legitimate Expectations?

As frequently held by the Community courts, if a beneficiary in a national court, claims exceptional circumstances and thus declines to refund an unlawful State aid, it is up to the national court to assess the circumstances and if necessary obtain a preliminary ruling from the Court.<sup>207</sup> This was expressed by the Court in the recent CELF-case, discussed above. And since the Court, concerning the recovery of the aid in that case merely stated that the obligation to remedy the consequences of the unlawful aid also comprises the aid in question, save for exceptional circumstances,<sup>208</sup> not much information concerning exceptional circumstances was given to the national court. It is thus not surprising that the French Conseil d'État, concerning the recovery, has referred two questions to the Court for a preliminary ruling. The question of interest for this thesis reads as follows. *“Where the Commission has on three occasions declared the aid to be compatible with the common market, before those decisions were annulled by the Court of First Instance of the European Communities, is such a situation capable of being an exceptional circumstance which may lead the national court to limit the obligation to recover the aid?”*<sup>209</sup>

Despite the examination just completed, it is not easy to predict a judgement when the notion of exceptional circumstances is involved. What can be mentioned though is the fact that all three of the annulments by the CFI were carried out within the time limit for appeal, which means that there exists no final positive Commission decision. Thus, as expressed under the section “Legitimate expectations due to a positive Commission decision”, legitimate expectations cannot be entertained if a Commission decision has been challenged in due time. Consequently, according to this, there should be no room for CELF to be exempted from recovery. On the other hand however, the circumstances in CELF are rather exceptional. Since, while no final positive Commission decision has been delivered, CELF has been the target of three Commission decisions,<sup>210</sup> where the first was taken 16 years ago,<sup>211</sup> and five

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<sup>207</sup> Case C-199/06 CELF, para. 43 and Case C-5/89 Commission v Germany, para 16.

<sup>208</sup> Case C-199/06 CELF, para 69.

<sup>209</sup> Reference for a preliminary ruling from the Conseil d'État (France) lodged on 2 January 2009 — Centre d'Exportation du Livre Français (CELF), *Ministre de la Culture et de la Communication v Société Internationale de Diffusion et d'Édition*, (Case C-1/09), (2009/C 69/42).

<sup>210</sup> Commission Decision, NN 127/92 of 18 May 1993, *Aid to exporters of French books* OJ 1993 C 174, p. 6,

judgments from the Community courts, the last taken in 2008. Hence, a legitimate expectations claim might be possible. Anyway, it would indeed be welcomed if the Court could bring further clearance and guidance on the scope of the protection of the principle of legitimate expectations.

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