Common Market Law Review **34:** 431–437, 1997.

EDITORIAL COMMENTS

Reform of state aid control

At a time when most of the news on developments in the European Union seems to concern the EMU, the IGC or questions of enlargement, it is reassuring to note that the Community institutions have not lost sight of the need to ensure that the internal market can operate at its efficient best. The Commission appears to be particularly vigilant in respect of the regulatory framework for a "state of the art" system of effective and undistorted competition. Among the policy papers which it has recently presented are important documents such as the Green Paper on the review of the Merger Regulation[1] and the Green Paper on Vertical Agreements.[2] The Commission is also considering measures to improve the system of control of state aids. In a working document which it has submitted to the Council and which is annexed to an orientation paper of the Council,[3] the Commission suggests that the time has come to lay before the Council a proposal for a regulation for the implementation of Articles 92 and 93 EC.

Article 94, which is to be the legal basis for such a regulation, has not been used before.[4] In 1966, proposals for an implementation regulation pursuant to Article 94 were made in order to create more clarity with

1. COM(96) 19 FIN of 31 Jan. 1996.
2. COM(96) 721 FIN of 22 Jan. 1997.
3. Presidency Paper on state aid control, 20 Sept. 1996.
4. Art. 94 reads as follows: "The Council, acting by a qualified majority on a proposal from the Commission an after consulting the European Parliament, may make any appropriate regulations for the application of Articles 92 and 93 and may in particular determine the conditions in which Article 93(3) shall apply and the categories of aid exempted from this procedure."

regard to the requirement of timely notification of new aid and the period within which the Commission had to communicate its views on such aid to the Member State in question.The proposals also aimed to determine which categories of aid were to be exempted from the procedure of Article 93(3).[5] In 1972 the Commission proposed to the Council a regulation which was to specify the reporting requirements needed for monitoring the application of the Community framework for coordination of regional aids.[6] These proposals were withdrawn in February 1975, the Council not having been able to agree on the way forward and the Commission, so it may be presumed, being reluctant to limit its own freedom of action by involving the Council to a substantial extent in defining the modalities of the supervision of state aid. The situation has changed considerably since the early seventies.

For as long as the Community has been in existence, there has been concern over the competition distorting effects of national aid measures and also over the effectiveness of the Treaty machinery for controlling state aids. Over the years the Commission has made an important effort to develop a coherent set of rules and guidelines for the interpretation and application of Articles 92 and 93. It has shown itself conscious of the need to improve the transparency and the predictability of its policy and it has explained to the national courts that they are expected to play an important role in ensuring the observance by the Member States of their obligations under the Treaty's state aid provisions.[7] However, the system has become very complicated and the dictates of effectiveness and legal security militate very strongly in favour of the adoption of formal Community legislation, as an alternative or a complement to the host of rules, frameworks, principles for assessment, orientations, review criteria, policy guidelines etc. which are enshrined in informal instruments whose breadth and depth can only be fathomed by few.

One of the most important reasons for the activation of Article 94 is the current level of aid. Between 1992 and 1994, the industrial

5. COM(66)95 FIN of 30 March 1966.

6. COM(72)1523 FIN of 4 Dec. 1972.

7. See Commission Notice on cooperation between national judicial authorities and the Commission with regard to state aids, O.J. 1995, C 312/8 of 23 Nov. 1995.

sectors of the (12) Member States received some 50 billion ecus worth of state aid, and about the same amount was paid for the support of enterprises in other sectors of the economy. Even if aid for the conversion and restructuring of the economy of the former GDR is discounted, aid levels are on the increase. Moreover, the Commission has noted that some 75% of aid is granted in the central regions of the EU. The level of public support in the peripheral areas, which are most in need of a vigorous development effort (Portugal, Spain, Greece), has actually decreased over the last few years. Obviously, the resulting inefficient resource allocation and the trade distorting effects of aid which is granted without proper justification pose a serious threat to the unity of the single market and the development of healthy growth and sustainable employment. Without effective and strict control of aid, beneficiaries are in a position to squeeze more efficient competitors out of the market, at great cost for the society at large. Protectionist types of aid measures are damaging the interests of consumers and business enterprises, and the usual outbidding between Member States leads to a situation where social problems are not solved but transferred from one Member State to the next.

It would be a mistake to attribute the rising level of aid expenditure to a failure of the Member States to allow the Commission to assess the compatibility of national aid with the common market. The truth is that the Member States tend to comply more fully than ever before with their obligations under Article 93(3). Recent Court decisions and the Commission's practice of ordering the Member States systematically to recover illegal aid from the recipients, as well as the role of national courts in enforcing respect for the discipline imposed by Article 93(3), all this may be thought to have contributed toward improved compliance with the requirements of notification. In fact, not only do Member States comply more fully with notification obligations, they also tend to contact the Commission informally more frequently than previously in order to obtain clearance for various projects, new legislation or proposed privatizations. The upshot of this is that the Commission's limited resources do not allow it to deal with notifications in the most efficient way. For the first time a backlog of state aid cases has built up in the last few years. Figures mentioned in the XXVth Report on

competition policy (1995) show that the number of cases registered was 594 in 1994 and 803 in 1995. The number of cases disposed of in 1994 was 527. However, the corresponding figure for 1995 had not risen proportionately with the increase of notified cases. In 1995 the file was closed in respect of 619 cases. The statistics also show that only 3% of all notifications encounter partial or total opposition by the Commission.

The preceding facts obviously suggest that there exists at present a combination of system overload and possible inadequate attention to cases of considerable economic importance. The Commission considers that these problems are likely to persist, in particular as a result of the steadily expanding membership of the EU and the emergence of areas where the state aid rules should now be applied but where such application was not thought necessary or feasible in the past. Thus, Articles 92 and 93 may be of relevance in assessing public support measures in economic sectors which in the past were not exposed to foreign competition but are now jockeying for position in the international arena (e.g. banking, insurance), or in areas which are no longer wholly withdrawn from trade and competition (e.g. culture, sports, health, education) or other areas where the definition of what falls under the scope of Article 92 is problematic (e.g. the social field, infrastructure, certain public services and public service obligations).

It is in light of the changed context which now conditions the review of national public support measures that the Commission and the Council are contemplating the adoption of a regulation under Article 94. This regulation should allow the Commission to use its limited resources in the best possible way and to concentrate these resources on major distortions of competition. The way ahead lies in the introduction of devices such as group exemptions, retrospective monitoring and also some benign neglect of aids of minor importance. Indeed, major Commission resources should not be devoted to cases of aid granting which do not perceptibly affect intra-Community trade and competition or where the assessment of compatibility with the common market does not require a complex analysis.

More specifically, the Commission in its reflection document suggests that the implementing regulation under Article 94 will be made to

include provisions authorizing the Commission to designate categories of state aid which are presumed to be compatible with the common market and which need not be notified to it pursuant Article 93 (3).This approach is comparable to the system which has gained currency in the field of cartel law where e.g. Regulation No. 19/65 (O.J. 1965, p. 533) has empowered the Commission to introduce block exemptions with regard to certain groups of agreements and concerted practices between undertakings which satisfy the requirements of Article 85(3) EC.

The scope for the proposed delegation is potentially very wide. The Commission has indicated that it would like to create exemptions from notification in respect of aid for the SME sector, certain aids in the area of research and development, aids for job creation and aids for environmental purposes. Likewise, the determination of the areas within the Member States which may qualify for regional aid, and also of the aid intensities that are permissible in eligible areas, could be accomplished by the Commission acting on the basis of delegated authority. The same would apply with regard to aids for export credits. These could qualify for an exemption if they were proven to be granted in conformity with the applicable OECD arrangements.[8]

The Commission also considers that it would be in the interest of legal certainty that its current policy of not requiring notification in cases of minor importance[9] would receive a firm legal foundation. We think this is a very important issue. Indeed, it is by no means certain that the Court of Justice is prepared to accept that Article 92 in conjunction with Article 93 admits of an interpretation according to which certain aids for all practical purposes escape from the application of the prohibition in principle laid down in Article 92(1). In any event, the case law does not support the conclusion that public measures which interfere with the free flow of goods in intra-Community trade (e.g. Articles 12, 30, 95 *and* 92) are exempt from the Treaty prohibitions as long as the

8. See the Decision of the Council of 14 Dec. 1992, O.J. 1992, L 44/1.

9. This policy is now based on the Commission's *de minimis* Communication of 6 March 1996, O.J. 1996, C 68/9.

effects of such measures are small.[10] It goes without saying that an administrative practice of the Commission is not the best legal basis for admitting exceptions to the obligation of notification. A regulation based on Article 94 is obviously to be preferred, especially since it can also provide for some sort of opposition procedure in cases where private persons wish to challenge a Member State's determination that proposed aid qualifies for an exemption. It is evidently quite important not to isolate this matter from the need to improve transparency and legal certainty. Especially third parties who consider themselves wronged by a refusal from the Commission to take action in respect of aid measures which they regard to be infringing the rules, are now pressing for a right to be better informed by the Commission and to be heard by it, and, in general, claim better procedural rights such as access to the file. Recent decisions by the Court of First Instance back up some of these demands.[11]

The second main motive for presenting a proposal for a Council regulation under Article 94 is the need to remove the existing uncertainty over the modalities of notification and the procedural rights of interested parties (States, beneficiaries,competitors, trade organizations, etc.). As a consequence of the judgment of the CFI in the *Sytraval* case,[12] the Commission is now under an obligation to grant extensive procedural rights to complainants even in cases where it does not see fit to initiate the adversary procedure of Article 93(2). The Commission has instituted appeal proceedings before the Court of Justice against the *Sytraval* judgment[13] and it will probably refrain fom submitting concrete proposals on this issue for as long as the Court of Justice has not given a definitive ruling. In the meantime, the Commission may be expected to prepare proposals on other important elements of the regulation such as the contents of notifications, time limits and periods of limitation, the form and method of achieving recovery of illegal aid, the creation of a legal right for the Commission to address aid

10. See in particular Case 142/87, *Belgium* v. *Commission*, [1990] ECR I-959, and also Case 730/79, *Philip Morris* v. *Commission*, [1980] ECR 2671.
11. See Case T-95/94, *Sytraval*, [1995] ECR II-2651.
12. See the previous note.
13. Case C-367/95 P.

recipients directly in order to obtain information, as well as the type of information concerning notifications received that is to be published in the Official Journal.

The conclusion is that there are many very good reasons for contemplating legislation on the basis of Article 94. The application and enforcement of the state aid rules may be facilitated by such an initiative and legal certainty is certain to be enhanced. As much attention is likely to be devoted to the drafting of precise rules on the application of a *de minimis* rule and of group exemptions, many of the prospective regulation's provisions will probably meet the requirements for direct effect and will therefore be susceptible of application by the courts of the Member States. In our view it could also be interesting to consider the possibility of using Article 94 for introducing *per se* prohibitions, e.g. in respect of aids which have no redeeming features at all (aid for exports to other Member States, certain objectionable forms of operating aids). This would permit the national judge to prohibit certain aids directly (because the regulation declares them to be incompatible with the common market) without involvement of the Commission and without there being any need for examining the question of whether such aids had been properly notified or could profit from an exemption. If it is possible to formulate precise enough rules for allowing the national judge to "disapply" Article 93(3) in conjunction with Article 92, there appears to be no valid reason to rule out the possibility that a regulation could set forth carefully circumscribed instances where aids can under no circumstances be tolerated. Direct effect would attach to such provisions and the national judges would be in a position to call offending Member States to order. The idea is attractive. After all, is there any doubt that direct effect in the hands of the national courts has proven to be the single most important instrument of effective enforcement of Community law?