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# THE EC TAX JOURNAL

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## The Editorial

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# EDITORIAL

Since the earliest days of the European Community, the Commission has been concerned about the impact which subsidies, grants and other benefits or concessions granted by governments or public authorities have on the functioning of the Common Market.

The Commission has been and continues to be particularly concerned at what might be regarded as covert competition between Member States as they try to prop up or support their own industries or to attract new investment to the detriment of those operating in other Member States.

Whether a grant, loan, indulgence or waiver of an obligation amounts to a state aid is not necessarily obvious and may be the subject of dispute between the relevant Member State and the Commission. Tax reliefs and concessions, including release from making social security payments, have been held in a number of cases to amount to state aid.<sup>1</sup> Para-fiscal charges on imported and domestic goods which are applied to support domestic producers amount to state aid.<sup>2</sup> Government guarantees may also constitute an aid.<sup>3</sup>

One of the Commission's greatest obstacles in enforcing the provisions of the EC Treaty on state aids has been the persistent failure of Member States to comply with their obligations to notify the Commission of proposed aid schemes and not to implement such schemes until they have been cleared as compatible with the EC Treaty. In 1980, the Commission felt obliged to send by letter a note reminding Member States of their obligation to notify plans to grant or alter aid. That letter was subsequently published in the Official Journal.<sup>4</sup>

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<sup>1</sup> Case 70/72 *Commission v Germany*.

<sup>2</sup> Case C-83/90 *Compagnie Commercial de L'Ouest*.

<sup>3</sup> Case C-329/93 *Germany v Commission*.

<sup>4</sup> OJ C252, 30.9.80; 10th Report on Competition Policy at point 162.

Three years later, the Commission announced that it would begin to recover aids which had been granted illegally, that is without proper notification. It would do this by requiring the Member State concerned to recover from the beneficiary value of the aid.<sup>5</sup> Thus, the Commission directly engaged businesses in assisting it in its task of policing state aids. Yet, of course, the business concerned has no power to insist that the relevant Member State notifies the aid scheme and is faced with the unwelcome position of potentially having to refuse aid offered to it. As the articles in this special issue show, the Community's courts have refused to accept that the business concerned has any legitimate expectation that the aid would have been granted lawfully. A significant example of the exposure of the beneficiary was the order issued by the Commission to the UK Government to recover the £44.4m of aid in the form of tax concessions and write-offs illegally granted to British Aerospace in connection with the sale to it of the Rover Group.<sup>6</sup> In 1999, the Commission issued 24 decisions ordering recovery of state aid in the manufacturing and services and transport sectors.

Among the Commission's more recent efforts to encourage Member States to comply with their Treaty obligations are two initiatives taken this year. The first is the creation of a State Aid Register, accessible on the website of the Competition Directorate General. This lists state aid cases currently being examined by the Commission. The aim is to assist third parties in finding out whether a particular aid scheme has been notified and its status in the Commission's proceedings. The second initiative, announced in July 2001, is the creation of a "Scorecard on State Aid". This is a source of information on the Commission's state aid policies and decisions. The Scorecard, also accessible on DG Competition's website, is intended to be developed and updated from time to time.

Of the EC Treaty's provisions on state aid, only the provision requiring Member States to pre-notify new or altered aid schemes is directly effective. The Commission has encouraged businesses to make use of this provision and in 1998 issued a Notice on cooperation between national courts and the Commission in the state aid field.<sup>7</sup>

The English courts have seen a number of challenges to tax provisions or arrangements, regarded as (more or less disguised) state aids. For example, in 1986 the Court of Appeal upheld ICI's right to challenge by way of judicial review certain

<sup>5</sup> OJ C318, 24.11.83; 13th Report on Competition Policy at point 220.

<sup>6</sup> In fact, the Commission's first order against the UK was annulled on procedural grounds and (Case C294/90 [1992] ECR 493 and a subsequent procedure was opened (OJ 1992 C122).

<sup>7</sup> 1995 OJ C312/8.

provisions of the Finance Act 1982, which, ICI argued, gave aid in the form of favourable valuation criteria for ethylene feedstock for use in ethylene cracker plants for the benefit of ICI's competitors.<sup>8</sup> It was held that the valuation was a state aid, which had not been duly notified.

The Court of Appeal in a judgment of 26th February 1999 held that differential rates of insurance premium tax on travel insurance, under which contracts sold by independent insurance companies attracted a lower rate of VAT than those sold by or through tour operators or travel agents, constituted state aid and was illegal in the absence of notification.<sup>9</sup> On the other hand, the High Court earlier this year rejected an argument that legislation intended to eliminate tax avoidance by small companies and individuals working in the UK knowledge-based contract industry known as IR 35, was not a state aid.<sup>10</sup>

Despite the significant consequences for beneficiaries and third parties following from the grant of illegal state aid, there is relatively little literature on the EC Treaty's state aid provisions.

For that reason, this special issue of the EC Tax Journal has been devoted to the topic of state aids, particularly in connection with tax schemes which might amount to state aids. There are four articles, each written by an acknowledged expert in Community law.

The first article, by Rhodri Thompson of Matrix Chambers, provides an overview of the Community's state aid rules. The second, by Christopher Vajda QC of Monckton Chambers, considers the consequences of unlawful state aid for beneficiaries and for third parties, such as banks which lend on the basis of a government guarantee. James Flynn, of Brick Court Chambers, looks at some of the tactical options available to companies whose competitors are benefiting from state aid in the form of tax breaks. Finally, Professor Alex Easson, Professor of Law at Queen's University, Kingston, Canada considers the relationship between the political initiative of the European Council reflected in the 1997 Code of Conduct on "harmful" tax measures and the state aid rules; specifically, Professor Easson considers the so-called Primarolo test of harmful tax measures.

Katherine Holmes  
October 2001

Joint Managing Editor

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<sup>8</sup> *R v AG ex p ICI* [1987] 1 CMLR 72.

<sup>9</sup> *R v Customs and Excise Commissioners, ex parte Lunn Polly Case* [1999] 1 CMLR 1357.

<sup>10</sup> *R v Inland Revenue Commissioners, exp Professional Contractors Group Limited*.