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UNLAWFUL STATE AID: WHAT IS IT AND WHAT ARE ITS LEGAL CONSEQUENCES?

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1. Introduction

This article discusses how the EC state aid regime deals with the grant of unlawful state aid. This is an important issue given the frequency that aids are granted by Member States in breach of the procedural rules laid down.[2] As will be seen the powers of the Commission and the national courts are radically different in the case of unlawful aid.

2. Definition of Unlawful Aid

Unlawful aid is defined in Council Regulation 659/1999[3] ("the Procedural Regulation") as new aid put into effect in breach of Article 88(3)[4] of the EC Treaty. Article 88(3) of the EC Treaty imposes a pre-notification obligation in respect of plans to grant or alter aid. It provides:

> "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.

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2 Owing to the increase in aids granted in breach of Article 93(3)of the EC Treaty (now Article 88(3)) the Commission published in 1983 a Notice warning potential recipients of the risk of having to repay such aid. Even by 1999 some 18% of all cases dealt with by the Commission involved State aid measures that had not been notified, see *XXIXth Report on Competition Policy (1999)* at point 313.

3 OJ 1999 L83/1.

4 Article 1(f).

> The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

Article 88(3) concerns aid other than existing aid which is dealt with by Article 88(1), that is to say new aid. Article 2 of the Procedural Regulation requires notification of any plans to grant "new aid"[5]. The Procedural Regulation defines new aid as aid schemes and individual aid, which is not existing aid, including alterations to existing aid.[6] Such notifiable aids include those where the Commission has set certain thresholds for the notification of individual aids once the Commission has accepted the general scheme under which the aids are granted or where the Commission has imposed individual notification requirements amongst the terms and conditions of its authorisations. Further, certain of the Commission's Codes and Frameworks in relation to particular industries or particular types of aid require notification of all individual aids exceeding a certain amount granted pursuant to an authorised scheme.[7] Aids which benefit from a block exemption[8] do not require notification under Article 88(3).

The notification requirement extends to all necessary information in order to enable the Commission to undertake an assessment of the aid in question.[9] Thus the entire aid scheme must be notified and this includes any modifications to the proposed scheme subsequent to the initial notification. Where the Commission considers that information provided by the Member State concerned with regard to a notified measure is incomplete, it must request all necessary additional information to be provided within a specified period and, if such information is not provided, or if incomplete information is provided, the notification is deemed to be withdrawn and the aid thus becomes unnotified notifiable aid.[10]

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5 "Aid" is defined in Article 1(a) of the Procedural Regulation as any measure fulfilling all the criteria laid down in Article 92(1), now Article 87(1), of the EC Treaty.

6 Article 1(c).

7 See e.g. the Motor Vehicle Framework, OJ 1997 C279/1 where there is a notification requirement where the project costs exceeds 50 million ECUs or the amount of aid envisaged exceeds 5 million ECUs and *Nissan Motor Manufacturing (UK) Ltd* OJ 2001 L140/65.

8 There are now block exemptions for training aid and aid to SMEs, see Regs 68/2001 and 70/2001 respectively. *De minimis* aid that falls within Reg 69/2001 (broadly speaking aid of less than 100,000 Euros over a three year period but not in certain fields of activity) also does not have to be notified.

9 Article 2(2) of the Procedural Regulation.

10 Article 5 of the Procedural Regulation.

3. The Prohibition on Implementing Unlawful Aid

3.1 The Position of the Member State

Aid measures notifiable pursuant to Article 88(3) and Article 2(1) of the Procedural Regulation shall not be put into effect before the Commission has authorised, or is deemed to have authorised such aid.[11] The prohibition in Article 88(3) extends to aids that are implemented without notification to the Commission.[12] This prohibition applies equally to new aid that may benefit from the derogation in Article 86(2) of the EC Treaty.[13] An unnotified alteration to a proposed scheme prevents a Member State from putting the whole scheme into effect unless the alteration is a separate aid measure which should be assessed separately.[14] The Commission takes the view that an aid is put into effect when the legislative measures that enables the aid to be granted without further formality have been adopted.[15]

The Treaty does not lay down any time-limit for the Commission to rule on the notification, but it was held in *Lorenz*[16] that a period of two months is sufficient for the Commission to form a view and that time limit has been adopted in Article 4(5) of the Procedural Regulation. Time starts to run only from the receipt of a complete notification. By the end of that period, the Commission must adopt, after a preliminary examination, one of the decisions set out in Article 4(2) to (4) of the Procedural Regulation. Where new aid has been put into effect in breach of Article 88(3), the Commission is not bound by the two month period.[17] A Member State cannot terminate that period unilaterally.[18] If the Commission has not defined its position within that period, the aid is deemed to have been authorised by the Commission and the Member State may implement the plan after giving prior notice

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11 Article 88(3), third sentence, and Procedural Reg, Article 3.

12 Case 120/73 *Lorenz v Germany* [1973] ECR 1471, para 8 and *R. v Attorney-General ex p. ICI* [1987] 1 CMLR 72.

13 Case C-332/98 *France v Commission (CELF)*[2000] ECR I-4833.

14 Cases 91 & 127/83 *Heineken v Inspecteur de Vennootschapbelasting* [1984] ECR 3435, para 21.

15 Commission letter to Member States of 27 April 1989, SG (1989) D/5521.

16 *Lorenz*, n. 12 *supra* at para 4.

17 Article 13(2).

18 *Lorenz*, n. 12 *supra* at para 4 and Cases C-278/92, etc., *Spain v Commission (Hytasa No. 1)* [1994] ECR I-4103, paras 14-15.

to the Commission, unless the Commission takes a decision within 15 days of such prior notice.

3.2 The Position of the Commission: the *Boussac* Judgment

In the landmark *Boussac* case[19] the Court of Justice ("ECJ") had to consider whether the grant of aid by a Member State in breach of the pre-notification requirement of Article 88(3) meant that the aid was automatically incompatible with the common market. The Commission submitted that this was the case while France unsurprisingly submitted the opposite. Although the ECJ rejected the Commission's submission it did so with some hesitation. It is worth setting out the opening paragraph of its reasoning:

> "It must be observed that each of these two arguments is liable to give rise to major practical difficulties. On the one hand, the argument put forward by the Commission implies that aid which is compatible with the common market may be declared unlawful because of procedural irregularities. On the other hand, it is not possible to accept the French Government's argument to the effect that the Commission, when faced with aid which has been granted or altered by a Member State in breach of the procedure laid down in Article 93(3) of the Treaty, has only the same rights and obligations as those which it has in the case of aid duly notified at the planning stage. Such an interpretation would in effect encourage the Member State concerned not to comply with Article 93(3) and would deprive that paragraph of its effectiveness."

The ECJ concluded that the structure of the state aid rules in the Treaty was such that any finding by the Commission that an aid was incompatible with the Treaty was intended to be the outcome of an appropriate procedure by the Commission under Article 88(2). On the other hand the ECJ recognised that the prohibition in Article 88(3) had to be effective and therefore considered that the Commission had the power to adopt interim measures to suspend immediately the payment of unnotified aid and to order the Member State to provide the Commission with all necessary documentation. If the Member State failed to comply with the suspension order, the Commission was entitled to bring the matter directly before the Court.[20]

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19 Case C-301/87 *France v Commission* [1990] ECR I-307, paras 9-24.

20 The ECJ referred to the procedure under the second sub-paragraph of Article 88(2) which enables the Commission to bring an immediate action before the ECJ in respect of a failure to comply with a decision requiring a Member State to abolish or alter a state aid in derogation from the lengthy procedures laid down in Article 226 of the Treaty.

4. The Commission's Powers in Respect of Unlawful Aid: the Procedural Regulation

The principles laid down in *Boussac* have now been codified and amplified by the Procedural Regulation. When the Commission has information about an alleged unlawful aid, it is entitled to request information from the Member State concerned.[21] The Member State is obliged to provide all necessary information to enable the Commission to take a decision under the preliminary examination or formal investigation procedure.[22] If the Commission's request for information is not complied with, or is only partially complied with, the Commission shall issue a formal decision (information injunction) requiring the information to be provided within the specified period of time.[23] If the Member State, in breach of the information injunction, fails to provide the requested information the Commission can terminate the procedure and make its decision on the basis of the information available to it.[24]

The Procedural Regulation also legislates for the Commission's power to take an interim decision requiring suspension of unlawful aid, after giving the Member State an opportunity of submitting its comments, pending the outcome of the examination of the aid.[25] If the Commission has doubts as to whether an individual aid falls within a previously authorised general aid scheme and is thus uncertain as to the classification of such aid as new or existing aid, it cannot order suspension but must first order the Member State to supply all information necessary to examine the compatibility of the aid with the previous authorisation.[26] If the Member State fails to supply the requested information, the Commission can then seek suspension.

The Procedural Regulation also grants the Commission the power to take an interim decision requiring repayment of non-notified aid. Prior to the adoption of the Procedural Regulation, the Commission, in the face of continuing breaches of

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21 Article 10(2) of the Procedural Regulation.

22 *Ibid.* Articles 2(2), 5(1) and (2), which, by virtue of Article 10(2), apply to information requested pursuant to that provision.

23 *Ibid.* Article 10(3).

24 Article 13.

25 Article 11(1).

26 Case C-47/91 *Italy v Commission (Italgrani)*[1994] ECR I-4635, paras 34-35.

Article 88(3), had issued a Communication[27] to Member States giving notice of its intention to take, in appropriate cases, a provisional decision (prior to the conclusion of any assessment of compatibility) ordering a Member State to recover any aid granted in breach of Article 88(3). The Commission considered that in some cases an interim decision merely requiring suspension of aid would not go far enough to counteract the infringement which may have been committed, particularly where all or part of the aid has already been awarded.[28] However in *Pantochim v Commission*[29] the Court of First Instance ("the CFI") stated that the only interim measure the Commission could take in relation to non-notified aid was to direct suspension of the aid and to require provision of all necessary information. Article 11(2) of the Procedural Regulation now provides that the Commission is entitled, after giving the Member State an opportunity of submitting its comments, to take an interim decision requiring provisional recovery of the aid pending the outcome of the examination of the aid. Recovery is effected in the same manner and in accordance with the same provisions as relate to recovery following a negative decision.[30]

When the Commission decides that unlawful aid is incompatible with the Treaty it shall issue a decision requiring the Member State concerned to take all necessary measures to recover the aid from the beneficiary (a recovery decision).[31] The Commission will lift the corporate veil and seek recovery not just from the original recipient but also from other undertakings controlled by the same persons to which the beneficiary's assets have been transferred.[32]

In its recovery decision the Commission is required to order the payment of interest at a rate determined by it, payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.[33] In its Communication

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27 OJ 1995 C156/6.

28 *XXVth Report on Competition Policy (1995)*, point 154.

29 [1998] ECR II-311, para 51.

30 Procedural Regulation, Article 11(2).

31 *Ibid.* Article 14(1). Prior to the Procedural Regulation the Commission had a discretion to decide whether to seek recovery of unlawful aid. Attempts to challenge the Commission's decisions where the Commission had decided to exercise its discretion in favour of seeking recovery failed, see *e.g.* Case C-142/87 *Belgium v Commission (Tubemeuse)* [1990] ECR I-959, para 66.

32 *XXIXth Report on Competition Policy (1999)*, point 314.

33 Procedural Regulation, Article 14(2).

on interest rates to apply when recovering unlawfully granted aid,[34] the Commission confirmed that the commercial rate of interest should be applied and stated that, in any decisions ordering the recovery of unlawfully granted aid, it will apply the reference rate used in the calculation of the net grant equivalent of regional aid measures as the basis for the commercial rate. The Commission is not entitled to order recovery of aid after a limitation period of ten years from the day on which the unlawful aid was awarded to the beneficiary either as an individual aid or as aid under an aid scheme.[35]

Article 14(1) of the Procedural Regulation provides, however, that the Commission shall not require the recovery of aid if this would be contrary to a general principle of Community law. This is an important recognition that the rules on recovery of unlawful state aids are not overriding and that they must yield, where appropriate, to fundamental principles of Community law of a higher norm. This recognition derives from the approach of the Community courts which have made it clear that the recipient of an unlawful state aid is entitled in exceptional circumstances to rely on the principle of legitimate expectation to defeat a claim for repayment.[36] The extent to which a Member State that has breached Article 88(3) is allowed to rely on legitimate expectation of a third party is dealt with in the section below.

5. The Duty of a Member State to Comply with a Repayment Decision of the Commission.

Once a recovery decision is made by the Commission, the Member State must seek recovery without delay in accordance with national law provided that it permits immediate and effective execution of the Commission's decision. To this end the Member State must take all necessary steps which are available in the domestic legal system, including provisional measures, without prejudice to Community law.[37] In cases decided before the Procedural Regulation came into force, the ECJ stated that the purpose of the obligation upon Member States to recover aid regarded as

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34 SG(95) D/1983 of 22nd February 1995.

35 Procedural Regulation, Article 15.

36 See section 6 below.

37 Article 14(3) of the Procedural Regulation. See *Dept of Trade and Industry v British Aerospace* [1991] 1 CMLR 165 in which High Court proceedings brought by the DTI pursuant to a Commission decision to recover £44.4m. from British Aerospace and Rover were stayed pending the outcome of the appeal of British Aerospace and Rover against the decision - which was successful, see Case C-294/90 *British Aerospace and Rover v Commission* [1992] ECR I-493.

incompatible with the common market is to re-establish the previously existing situation.[38] It has also stated that the recovery of illegally granted aid must take place in accordance with the relevant procedural provisions of national law subject to the proviso that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken into consideration in the application of any discretionary national rules.[39] Where the recipient is unable to repay the aid, the Member State must institute winding-up proceedings and to pursue the recipient as an unsecured creditor.[40]

In numerous cases the Court has had to consider what, if any defences, a Member State has in failing to comply with a decision requiring repayment of aid that is incompatible with the common market. Not surprisingly the Court has held that the only defence available is absolute impossibility on the part of the Member State.[41] Any other approach would undermine the rule of law. Commission decisions are legally binding on their addressees.[42] If a Member State disagrees with a decision, it should seek annulment, and, if necessary, suspension of the decision pending the judgment of the Court. If a Member State encounters, in giving effect to a decision requiring it to seek repayment, unforeseen and unforeseeable difficulties or perceives consequences overlooked by the Commission it must inform the Commission and propose suitable amendments to the decision[43] and in such a case the Commission and the Member State must respect the principle of sincere co-operation in Article 10 of the EC Treaty and must work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, in particular the provisions on aid.

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38 See *e.g.* Cases C-278/92 etc. *Spain v Commission (Hytasa No. 1)* [1994] ECR I-4103, para 75, and Case C-24/95 *Land Rheinland-Pfalz v Alcan Deutschland (Alcan No. 2)* [1997] ECR I-1591, para 23.

39 Case 94/87 *Commission v Germany (Alcan No. 1)* [1989] ECR 175, para 12 and *Alcan No. 2, supra*, para 50.

40 Case 52/84 *Commission v Belgium (Boch No. 1)* [1986] ECR 89.

41 See *e.g. Boch No. 1*, n.40 *supra* and Case 63/87 *Commission v Greece* [1988] ECR 2875.

42 Article 249 of the EC Treaty.

43 *Boch No. 1*, n. 40 *supra*, para 16 and Case C-75/97 *Belgium v Commission (Maribel bis/ter)* [1999] ECR I-3671, para 88.

In practice, a Member State cannot plead absolute impossibility if it has failed to take any step to recover the aid as required by the Commission decision.[44] In *Boch No. 1*[45] Belgium was unable to demonstrate absolute impossibility in recovering the aid from a financially weak aid recipient because it could have brought, but failed to bring, winding-up proceedings. Not surprisingly a Member State cannot rely on administrative difficulties[46] or provisions, practices or circumstances existing in its internal legal order to justify a failure to comply with its obligations under Community law. Thus in *BUG-Alutechnik*[47] the ECJ stated that it is not a defence for a Member State that it has failed to comply with a national time-limit for the revocation of an administrative act. In this respect, the ECJ has made clear that Community interests must prevail over the national time limits where the Commission decision orders recovery of aid found to be incompatible with the common market. In *Alcan No. 2*[48] the ECJ explained its approach more fully: time limits are an expression of the principle of legal certainty; once the Commission takes a recovery decision, the aid recipient is under no legal uncertainty as to the recovery of the aid; national authorities have no discretion in implementing the Commission's decision and accordingly where the national authorities allow the national time bar to come into effect, that is of no assistance either to the Member State or the aid recipient. Likewise in *ENI-Lanerossi*[49] the ECJ held, in proceedings brought by Italy to annul a recovery order, that the absence of a cause of action under national law for recovery of the sums required by the Commission decision did not absolve a Member State from the obligation to seek recovery of the aid and did not therefore invalidate the recovery order made by the Commission.

Where a Member State has failed to challenge a recovery decision in respect of an aid granted contrary to the rule laid down in Article 88(3), the Member State cannot rely on any legitimate expectations on the part of the beneficiaries of the aid in order to justify a failure to seek repayment of the aid; to do so would enable national authorities to rely on their unlawful conduct in order to deprive Commission decisions of their effectiveness.[50] However the ECJ has accepted that where aid has been granted in breach of Article 88(3), a Member State can rely on an aid

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44 *Alcan No. 1,* n. 38 *supra* at paras 10-11.

45 *Boch No. 1,* n. 40 *supra.*

46 *Maribel bis/ter*, n. 43 supra, para 90.

47 Case C-5/89 *Commission v Germany (BUG-Alutechnik)* [1990] ECR I-3437.

48 N. 38 *supra* at paras 33-38.

49 Case C-303/88 *Italy v Commission* [1991] ECR I-1433, para 60.

50 *BUG-Alutechnik*, n. 47 *supra*, para 17.

recipient's legitimate expectations in legal proceedings brought to challenge the recovery decision. This can be seen from *PYRSA*.[51] There Spain had failed, in breach of Article 88(3), to notify various aids granted by a regional authority. On receipt of a complaint the Commission decided to raise no objections to the aid. That decision was successfully challenged by the complainant.[52] The Commission then took a subsequent decision where it found the aid to be incompatible with the common market and sought repayment of the aid. Spain in turn challenged that decision. The ECJ accepted that Spain was able to rely, as one of its arguments, on any legitimate expectation on the part of the recipient of the aid that the aid was lawful. However the Court dismissed the challenge, relying on its earlier case law[53] that a recipient undertaking could not, in principle, entertain a legitimate expectation that an aid granted in breach of the procedure laid down in Article 88(3) would be lawful on the basis that a diligent operator should normally be able to determine whether that procedure has been followed. The fact that the Commission initially decided not to raise any objections to the aid did not create a legitimate expectation since that decision was challenged in due time by the complainant before the ECJ.

6. The Position of the Recipient of Aid That Is the Subject of a Recovery Order

In the face of the growing numbers of aids granted in breach of Article 88(3), the Commission published a communication in 1983[54] warning potential recipients of the risk of having to repay aid that was granted unlawfully in breach of what was then Article 99(3), now Article 88(3) of the EC Treaty.[55] It is not surprising that in the light of this statement the Community Courts have had little sympathy with recipients of an unlawfully granted State aid who seek to avoid repayment of aid on the basis of a legitimate expectation that the aid was lawfully granted. Thus in *Alcan No. 2*, confirming its existing case law, the ECJ stated:

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51 Case C-169/95 *Spain v Commission (PYRSA)* [1997] ECR I-135.

52 Case C-198/91 *Cook v Commission* [1993] ECR I-2487.

53 *BUG-Alutechnik*, n.47 *supra*, para 14.

54 OJ 1983 C 318/3.

55 The Notice predates the judgment in *Boussac* which laid down that the Commission could make a recovery order only if the aid was incompatible with the common market (whether notified or not), see section 3.2 above.

> "Although the Community legal order cannot preclude national [law] which provides that the principles of the protection of legitimate expectations and legal certainty are to be observed with regard to recovery, it must be noted that, in view of the mandatory nature of the supervision of State aid by the Commission under Article [88] of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that Article. A diligent businessman should normally be able to determine whether that procedure has been followed".[56]

In *BUG-Alutechnik* the ECJ held that an aid recipient can rely on the principle of legitimate expectation to preclude recovery of an unlawfully granted aid only "in exceptional circumstances".[57] It is clear that the concept of "exceptional circumstances" is to be narrowly construed, although the case law is not entirely consistent on the question of whether the concept of exceptional circumstances is a matter solely of Community law or a matter of both Community and national law.

In *PYRSA* the initial (albeit subsequently held to be erroneous) decision of the Commission not to object to the aid was held by the ECJ not to be an exceptional circumstance.[58] That was a case where there was little doubt that the measures in question were aid within the meaning of Article 87. It was also a case of a direct action by a Member State in the ECJ to the recovery decision in the national court where the State sought to rely expressly on the legitimate expectation of the aid recipient as a ground for annulling the decision. By contrast in *EPAC*[69] which was a direct action by EPAC, the aid recipient itself, the CFI considered that it was for the national court to determine whether there were exceptional circumstances which would enable EPAC to rely on a legitimate expectation as a defence to the recovery of the aid. The CFI relied on a paragraph of the ECJ's judgment in *BUG-*

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56 N. 38 *supra*, para 25.

57 N. 47 *supra*, para 16.

58 N. 51 *supra*. This decision would seem to cast doubt on the earlier dictum of Jacobs A G in Case C-39/94 *SFEI and others v Commission* [1996] ECR I-3547 at para 76 where he considered that the Commission's initial decision not to open proceedings was relevant to the existence of exceptional circumstances, a dictum endorsed by the Court in *SFEI* at para 70 of its judgment. In Case 310/85 *Deufil v Commission* [1987] ECR 901 the Court held that the absence of a product from an aid code did not give rise to a legitimate expectation on the part of an aid recipient. The aid code could not derogate from the pre-notification requirement under Article 88(3).

59 Joined Cases T-204 & 297/97 *EPAC v Commission* [2000] ECR II-2267, para 143.

Alutechnik[60] but failed to appreciate that in that case there had been no challenge to the recovery decision in the ECJ and therefore it did not lie in the mouth of Germany as a defence to the non-implementation of the recovery decision to rely on any legitimate expectation of the aid recipient. In such a case, it is understandable that the ECJ said it was for the aid recipient to raise the question of any legitimate expectation in the national court.

Just two days after the *EPAC* judgment, a different Chamber of the CFI considered and ruled on the legitimate expectation raised by aid recipients in another direct action, *Mauro Alzetta v Commission*.[61] The CFI held that there was no legitimate expectation on the basis that the failure to comply with the notification requirement under Article 88(3) in principle precluded reliance on the principle of legitimate expectation despite the fact that the beneficiaries of the aid were small undertakings. The CFI placed emphasis on the fact that the international transport market had been opened to competition since 1969 which meant that was clear that there was an obligation to notify aid.

It is submitted that an aid beneficiary who challenges a recovery decision in respect of unlawful aid before the CFI should be entitled to raise and have determined before that Court the question of whether the decision infringes his legitimate expectation. In this respect the approach in *Mauro Alzetta* is to be preferred to that in *EPAC*. The approach in *EPAC* would also appear to be at odds with that laid down by the ECJ in *TWD (No. 1)*[62] where the ECJ held that a national court is bound by a Commission decision under Article 88(2) when the recipient of the aid failed to bring an action for annulment within the time laid down by Article 230 of the Treaty. An Article 234 reference to the Court of Justice cannot be used to challenge the validity of the decision to circumvent that time limit. Although it does not appear that TWD raised the issue of legitimate expectation in the national court, the whole thrust of the ECJ's approach in *TWD No. 1* was to prevent state aid decisions being litigated in the national court by an aid recipient who could have challenged the decision directly in a Community court. If *EPAC* were correct on this point, the recipient could sit back, not challenge the decision and then raise the legitimate expectation in proceedings brought to enforce the recovery decision in the national court.

Turning to the substantive question of what constitutes exceptional circumstances, there are dicta by two Advocate Generals suggesting that where it is unclear that the measure in question is an aid, there may be scope for a beneficiary to rely on a legitimate expectation. In *BUG-Alutechnik*, which, as already explained, was a

60 N. 47 *supra* Para. 16.

61 Joined Cases T-298/97 etc. [2000] ECR II-2319, §171-173.

62 Case C-188/92 *TWD Textilwerke Deggendorf (No. 1)* [1994] ECR I-833.

direct action by the Commission against Germany for failure to implement a recovery decision, Germany sought to argue that it was absolutely impossible to implement the decision because it would breach the legitimate expectation of the aid recipient under German law. Although that argument was rejected as a defence to the Commission proceedings for non-implementation of the decision, Advocate General Darmon referred to doubts which some undertakings may have had in respect of notification of "atypical" forms of aid.[63] He indicated that this was a matter to be investigated by the national court, if necessary, after a reference for a preliminary ruling. The ECJ endorsed that approach. In *SFEI*,[64] which was a reference for a preliminary ruling, Advocate General Jacobs had to consider a similar question in respect of the powers of a national court to enforce the prohibition in Article 88(3) on putting into effect unlawful aid. He considered that the aid recipient could rely on any legitimate expectation as a defence to such an order on the same basis as in the case of a recovery decision made by the Commission. The alleged aid concerned the provision of logistical and commercial assistance by the French Post Office to a subsidiary which, in the view of the Advocate General, did not "self-evidently constitute aid". This was one of the reasons that he considered it doubtful that a diligent businessman ought to have realized that the measures in question constituted aid which could be granted only in accordance with the procedure laid down in Article 88(3), and hence that a legitimate expectation might be made out by the aid recipient. The Court cited this passage with approval and stated that it was for the national court to determine whether exceptional circumstances were present so as to preclude repayment.[65] Although the judgment of the CFI in *Mauro Alzetta* that the small hauliers did not have a legitimate expectation may be right on the particular facts, there may well be cases where the size of the aid might be considered (albeit erroneously) sufficiently small either not to affect to an appreciable extent competition in a given market[66] or trade between Member States and therefore to fall outside Article 87(1) and not to require notification under Article 88(3). There is no difference in principle between, on the one hand, such a case or a case of an "atypical aid", and, on the other hand a case where there may be doubts as to notification.

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63 N. 47 *supra,* para 26 of his Opinion at pp. 3439-50.

64 [1996] ECR I-3547.

65 See paras 70-71 of its judgment. As pointed out at n. 58 above, the A.G also relied on the Commission's initial failure to open proceedings but the validity of this point as giving rise to a legitimate expectation must be open to doubt in the light of *PYRSA*.

66 Although since the introduction of Reg. 69/2001on *de minimis* aid (see n. 8 *supra*) the position is now clearer and there may be less excuse for non-notification.

As a matter of principle, an aid recipient should be able to rely, in an appropriate case, on a legitimate expectation to block recovery of the aid. It is to be remembered that the duty of notification falls on the Member State and not the recipient of the aid. There might be a number of reasons why a Member State might not notify a measure that is subsequently held to be an aid. Moreover, the recipient may have little, or no influence, over the question of notification. Nevertheless the ECJ, no doubt influenced by the 1983 Communication of the Commission, appears to have taken a policy decision in effect to require recipients of aid to check whether the aid has been notified. The sanction for a failure by the aid recipient to check whether there has been a notification is the presumption that the aid recipient cannot rely on the defence of legitimate expectations if there is a subsequent recovery order either by the Commission or the national court. The presumption can be rebutted only if there are exceptional circumstances. The Court (and the Commission) are in effect seeking to employ aid recipients as policemen to ensure compliance by Member States of their obligations under Article 88(3). While the approach of the Court is understandable in the light of the well-known problem of the disregard by Member States of the pre-notification obligation in Article 88(3), one is entitled to question whether the policy objective of seeking recovery of aid in order (as far as possible) to restore the *status quo ante* leaves too little scope for recognition of any potential legitimate expectation of the recipient of the aid. The irony of this policy approach is that if anyone is to blame for a failure to notify, it is the Member State but the Member State will in effect escape without any sanctions.[67] The only obligation on the Member State is that it will have to recover the aid granted together with interest thereon. In financial terms that is hardly a sanction. In commercial terms it may well not be a sanction either. In many cases the Member State may have achieved the commercial objective of the aid (for example the start-up of a new industry or the staving off of bankruptcy of a failing firm) and the repayment of the aid from the recipient will not in reality restore the *status quo ante*.

7. The Position of the Lender Where the Unlawful Aid Consists of a State Guarantee to the Lender

There is, generally, a fundamental difference between the position of a lender who benefits from a state guarantee and a borrower who is able to borrow more cheaply, or indeed to borrow at all, on the basis of a state guarantee. The object and effect of the guarantee is to grant the particular borrower an advantage that the borrower would otherwise not enjoy. It is therefore an aid to the borrower as it distorts competition between the borrower and its competitors. However, in normal circumstances, the guarantee is not aid to the lender. The guarantee is made

[67] Subject to any action brought against the State in the national court, see section 8 below.

available to all potential lenders and so there is no distortion of competition between lenders as a result of the guarantee. The question arises as to how one should deal with the position of the lender in a case where the guarantee involves aid to the beneficiary where the aid is to be abolished and recovered.

The position of lenders who advance money on the basis of state guarantees was dealt with in a Communication issued by the Commission to Member States of 18th October 1991 which, so far as is here relevant, was republished on 13th November 1993.[68] Paragraph 38 of that Communication (in both its original and republished forms) was in the following terms:

> *Guarantees*
>
> 38. The position currently adopted by the Commission in relation to loan guarantees has recently been communicated to Member States. It regards all guarantees given by the State directly or by way of delegation through financial institutions as falling within the scope of Article 92(1) of the EEC Treaty [now Article 87(1) of the EC Treaty]. It is only if guarantees are assessed at the granting stage that all the distortions or potential distortions of competition can be detected. The fact that a firm receives a guarantee even if it is never called in may enable it to continue trading, perhaps forcing competitors who do not enjoy such facilities to go out of business. The firm in question has therefore received support which has disadvantaged its competitors i.e. it has been aided and this has had an effect on competition. An assessment of the aid element of guarantees will involve an analysis of the borrower's financial situation .... . The aid element of these guarantees would be the difference between the rate which the borrower would pay in a free market and that actually obtained with the benefit of the guarantee, net of any premium paid for the guarantee. Creditors can only *safely claim* against a government guarantee where this is made and given *explicitly* to either a public or a private undertaking. *If this guarantee is deemed incompatible with the common market* following evaluation with respect to the derogations under the Treaty, reimbursements of the value of any aid will be made by the undertaking to the Government even if this means a declaration of bankruptcy *but creditors' claims will be*

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68 Commission Communication of 18.10.91 [1991] OJ C273/2, republished on 13.11.93 [1993] OJ C307/3, as amended - in respects not material hereto - following on the judgment of the European Court of Justice in Case C-325/91 *France v Commission* [1993] ECR I-3283, relating to other parts of the 1991 Communication. Although the first sentence of paragraph 38 of the Communication, as published in both 1991 and 1993, refers to a Commission Communication dated 5th April 1989 as amended by letter of 12th October 1989, that earlier Communication, unlike paragraph 38 of the 1991 and 1993 Communications, did not refer to the position of creditors.

honoured. These provisions apply equally to public and private undertakings and no additional special arrangements are necessary for public enterprises other than the remarks made below.

38.1 Public enterprises whose legal status does not allow bankruptcy are in effect in receipt of permanent aid on all borrowings equivalent to a guarantee when such status allows the enterprises in question to obtain credit on terms more favourable than would otherwise be available.

38.2 Where a public authority takes a holding in a public undertaking of a nature such that it is exposed to unlimited liability instead of the normal limited liability, the Commission will treat this as a guarantee on all the funds which are subject to unlimited liability. It will then apply the above described principles to this guarantee." (emphasis added).

The penultimate sentence of the main body of paragraph 38 of the Communication could be reasonably understood as meaning that creditors could safely claim against a State guarantee even if it were found to give rise to a State aid to the borrower that was found to be incompatible with the common market. There was nothing to suggest that that sentence did not include guarantees that were not notified in accordance with Article 88(3). In the example of aid given in that Communication (namely the difference in the rate of the loan with and without the guarantee net of any premium paid for the guarantee) the Commission considered that the objective of repayment of the aid by the borrower could be achieved without putting at risk the position of the lender.

Subsequent decisions by the Commission and case law of the Community courts suggest, contrary to the impression created by that Notice, that the Commission may require Member States to cancel state guarantees that are unlawful and incompatible with the common market even at the expense of creditors' claims.

The first case before the ECJ to consider this issue was *Bremer Vulkan*,[69] which was an appeal against a Commission decision which had found that monies advanced under a state guarantee granted in November 1991, that is to say just one month after the publication of the 1991 Communication in the Official Journal, constituted unlawful state aid[70] which was incompatible with the common market. The Commission decision sought recovery of the money advanced and also abolition of

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69 Joined Cases C-329/93 etc. *Germany v Commission* [1996] ECR I-5151.

70 The aid was in fact notified to the Commission but only after the guarantee had been signed and the aid was implemented while the Commission was examining the case.

the state guarantee. One of the issues on the appeal was whether the abolition of the guarantee was in breach of the legitimate expectation of the creditor banks which had assumed that the guarantee had complied with earlier guidelines approved by the Commission. Advocate General Cosmas concluded that the banks could not rely on any legitimate expectation.[71] He reached his conclusion by relying first on the restrictive case law in respect of legitimate expectations in the case of aid *recipients*, and the important policy objective of ensuring that the state aid provisions would be effective. He considered that the same policy considerations applied in the case of creditor banks. He then considered the facts of the case and found that there was nothing in the documentation to show that the creditor banks had actually formed an expectation that the guarantee was granted in conformity with the guidelines approved by the Commission. However, although the guarantee was given shortly after publication of the 1991 Communication, the Communication does not appear to have been drawn to the attention of the Court. This omission is significant since the Communication had proceeded on an entirely different basis from the Opinion of the Advocate General, namely that the position of creditors and aid recipients were not to be equated.

More recently in *EPAC*[72] the CFI followed the approach of the Advocate General in *Bremer Vulkan*. As part of its plan to restructure EPAC, a publicly owned company which was at the time heavily indebted, the Portuguese Government authorised EPAC in 1996 to negotiate a loan, part of which was covered by a state guarantee. The guarantee was not notified to the Commission in accordance with Article 88(3). There was a complaint. The Commission took an interim measures decision in April 1997 requiring Portugal to suspend the aid in the form of the state guarantee granted to EPAC and then a final decision in July 1997 which found that the guarantee was state aid incompatible with the common market and required Portugal to cancel the aid and to take the necessary measures to recover the aid within two months. The CFI rejected the argument (advanced by the aid recipient) that the banks had any legitimate expectation: it was equally incumbent on lending banks as on aid recipients to show the requisite care and to take the necessary steps to verify the position with regard to the lawfulness of the aid. Again it appears that the Court's attention was not drawn to paragraph 38 of the 1991/1993 Communications which represented the Commission's official position in 1996 at the time when the State guarantee in issue in the *EPAC* case was given. Accordingly the CFI was almost certainly unaware that the Commission had treated the position of lenders and aid recipients differently and given a public assurance that "creditors' claims would be honoured".

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71 See §§98-103 of his Opinion. The Court did not consider this point as it annulled the decision on grounds of lack of reasoning.

72 See n. 59 *supra* at para 144.

Shortly before the CFI gave judgment in *EPAC*, the Commission published in the Official Journal of 11th March 2000[73] a new Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees Communication which expressly replaced earlier Commission letters and communications to Member States on the subject of State guarantees, including paragraph 38 of the Commission Communication of 18th October 1991, as republished in 1993. Section 6 of the Notice ("Consequences of the infringement of Article 88(3)") contains the part of the Notice that effectively supersedes paragraph 38 of the Communication of 18th October 1991, as republished in 1993. Paragraphs 6.4 and 6.5 of the 2000 Notice state that:

> "...guarantees differ from other State aid measures, such as grants or tax exemptions, in the sense that in the case of a guarantee the State also enters into a legal relation with the lender. Therefore, consideration has to be given to whether the fact that a State aid has been illegally granted also has consequences for third parties.

The question whether the illegality of the aid affects the legal relations between the State and third parties is a matter which has to be examined under national law. National courts may have to examine whether national law prevents the guarantee contracts from being honoured, and in that assessment the Commission considers that they should take account of the breach of Community law."

This Notice was also not drawn to the CFI's attention. The approach indicated by the Notice is that cancellation of the guarantee is *not* a matter of Community law but of national law which must take account of applicable Community law. This distinction between the scope of Community law and national law does not appear to have formed any part of the Commission's decision in *EPAC* (which simply required Portugal to "cancel the aid") nor that of the CFI's judgment. On the contrary the argument before the CFI and the CFI's judgment proceeded on the basis that the position of the lenders was a matter of Community law, albeit that it would be for the national court to determine whether there were "exceptional circumstances" on the facts of that case to preclude recovery of the aid.

A number of problems arise. The first is how it is possible to reconcile the approach in *Bremer Vulcan* and *EPAC* with that of either the old Communications or the new Notice. At first sight the approaches in the cases seem totally different from those set out in the Communications (which themselves diverge). Of course, if there is a conflict (and there is), the case law must prevail since the Communications and Notice are "soft law" which is not legally binding. It is possible that the scope for conflict may be reduced if in future, as a result of the Notice, the Commission

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73 OJ 2000 C71/14. The Notice itself was adopted on 24th November 1999.

ensures that its recovery decisions do not require abolition of the state guarantee and expressly leaves that question to national law. There may, however, be cases where that is not possible; for example, where a public undertaking automatically benefits from a state guarantee and so it has a permanent advantage which distorts competition. In such a case it may be that the Commission decision would put an end (1) to *past* distortions of competition by requiring the Member State to recover from the aid beneficiary either (a) the difference between the cost of any loans with the state guarantee and the cost had such loans been obtained without a guarantee or (b) where no loans would have been made at all but for the guarantee, the value of the loans received, in cases both (a) and (b) with interest, and (2) to *future* distortions of competition by requiring abolition of the guarantee for the future. In this way the Commission could preserve the effectiveness of the state aid regime and also ensure that the lenders could enforce the state guarantee in respect of the loans that they had made. In such a case the Commission would in effect revert to the policy set out in the 1991/1993 Communications and depart from that set out in the more recent Notice.

Secondly, even assuming that the Commission's future decisions are in a form foreshadowed by the new Notice, one must ask how a particular national law will apply to a contract of guarantee that a Commission decision does not require to be abolished but is the means of granting an aid whose abolition and recovery is required by that decision. It is understood that the reason that the Commission decided to state in its new Notice that the question of whether the guarantee was enforceable was a matter of national law arose from submissions made to the Commission by the Financial Law Panel ("FLP").[74] In their Note to Sponsors of February 2000 the FLP said this:

> "In English law a contract may be unenforceable if it is connected to another transaction which is illegal. Whether an illegal transaction renders a connected contract unenforceable is a complex question and depends on the circumstances of the particular case. Our paper *"State Guarantees and Illegality Under English Law"*, October 1998, contains a detailed analysis of whether a guarantee will be unenforceable if the associated arrangement between the borrower and the Member State is found to be unlawful. The paper concludes, at page 32, that
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> > *"...there would seem to be strong arguments that, in an arm's length agreement between a bank, a borrower and a state guarantor, the bank's rights are sufficiently separated from the aid and the bank is sufficiently lacking in culpability for the guarantee*

[74] See the Financial Law Paper of February 2000 entitled "State Aid in the form of guarantees: Note to Sponsors". That Note publicly welcomes the new Commission Notice.

to be both valid and enforceable by the bank."

It remains to be seen how this approach will work in practice. The FLP itself has recognised that the Notice is not a "therapy". In the case of future guarantees or alterations or renewals of existing guarantees, the FLP recommends that a lender should find out from the Commission whether any State guarantee has been notified and approved; in the case of existing guarantees the FLP is unable to offer any comfort, pointing out that the answer depends on "a detailed knowledge of all the facts, which may simply be unavailable." The FLP's caution is understandable. As *Chitty on Contracts* states, English law on illegality is "inevitably complex".[75] Chitty suggests that where a plea of illegality or public policy is raised as a defence to a contractual claim, one should ask whether public policy requires that this claimant, in the circumstances of this case, should be refused relief to which he would otherwise be entitled.[76] In addition it is suggested that once a court finds that a contract is illegal and unenforceable, a second question should be posed, namely do the facts justify the granting of some consequential relief (other than enforcement of the contract) to either party to the contract. However the general rule of English law is much simpler: where a contract is illegal at the time of its formation (which would generally be the case with a contract of guarantee), the courts will not enforce the contract or provide any other remedies arising out of the contract.[77] The position as regards apparently innocent contracts that are tainted with illegality of another contract is less clear cut.[78] Whether a state guarantee that was not notified and is the vehicle for granting aid that is incompatible with the common market is to be found itself to be an illegal contract, or illegal because it is tainted with the illegality of the grant of the aid to the aid beneficiary, or enforceable because it is not so tainted remains to be seen. Plainly, however there is a risk that a lender who does not check whether a guarantee, pursuant to which he makes a loan on a date subsequent to the publication of the Commission Notice in March 2000, has been properly notified to the Commission, will be in no better position under national law than he would be than if the enforceability of the guarantee were a matter of Community law and *Bremer Vulkan* and *EPAC* apply to the guarantee.

At the same time, one has to remember that the purpose of the state aid rules is to ensure that competition is not distorted by unlawful and incompatible aids and where beneficiaries are recipients of such aids, that objective is to be achieved by seeking

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75 Para 17-001 of 28th Ed. (1999).

76 *Ibid.*

77 *Holman v Johnson* (1775) 1 Cowp.314, 343.

78 See Chitty at 17-159 to 160 and especially *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1.

to recover the value of the aid from the recipient and not to penalise the lender.[79] Even in the case of state guarantees the former does not entail the latter. Merely because the State has breached the State aid rules by wrongly granting aid to a beneficiary through the medium of a state guarantee does not mean that the State should be entitled to deprive creditor banks of the guarantee. After all the banks are not recipients of aid. This is a matter that should be borne in mind when considering the validity of a guarantee under either Community or national law.

The above discussion on the impact of national law has been restricted to English law. The position may well be different under other national laws. One of the problems of leaving the enforceability of the guarantee to national law is that different national laws may produce different results. That is not an outcome that would be conducive either to legal certainty or the paramount need for uniformity in the field of state aids. Different results under national law could themselves distort competition between lenders.

8. The Legal Consequences of Unlawful Aid in the National Court

In contrast to the rest of the state aid provisions in the Treaty, the prohibition on the implementation of a new aid prior to notification and the outcome of the Commission's assessment contained in the last sentence of Article 88(3) has direct effect and is therefore enforceable in national courts.[80] In *FNCEPA*[81] the ECJ had an opportunity of confirming its earlier case law in the light of its judgment in *Boussac*.[82] As in *Boussac*, the ECJ contrasted the different roles of the Commission and the courts of the Member States: the former has the exclusive role of deciding whether aids are compatible with the Treaty, whereas the latter have the duty to protect the rights of individuals in a case where there has been a breach of Article 88(3). The prohibition is thus absolute and is not affected by the initiation of a preliminary examination under Article 88(3) by the Commission or indeed any delay by the Commission in completing the preliminary examination.[83] Even if the

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79 There may often be cases where total recovery may prove absolutely impossible because even after the recipient is wound up, there are not sufficient assets to pay back the aid together with interest.

80 *Costa v ENEL* [1964] ECR 585; and Case 120/73 *Lorenz v Germany* [1973] ECR 1471, para 8.

81 Case C-354/90 [1991] ECR I-5505, See also *SFEI*, n. 64 *supra*, paras 34-52.

82 See section 3.2 above.

83 *SFEI*, n. 64 *supra,* paras 44-46.

Commission subsequently decides that the aid is compatible with the common market that cannot validate *a posteriori* measures taken in breach of Article 88(3).[84] In consequence national courts:

> "must offer to individuals in a position to rely on such a breach [of Article 88(3)] the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures."[85]

It is obvious therefore that the remedies to be sought for breach of Article 88(3) are to be sought in the national court and not before the Commission. The most obvious remedy is an order seeking repayment of the aid. Such an order is not, however, automatic. As already pointed out, in *SFEI*[86] the ECJ stated that any order for repayment of an aid to be made by a national court pursuant to Article 88(3) would be subject to any legitimate expectation of the aid recipient in the same way as if the order were made by the Commission. In English courts competitors of aided undertakings have sought declarations in judicial review proceedings.[87] The approach of the English courts to the grant of interim relief in respect of aids granted in breach of Article 88(3) would be guided by the principles laid down by the House of Lords in *Factortame*,[88] particularly if the aid took the form of a legislative measure. Thus the strength of the Applicant's legal case is likely to be more important than in ordinary private litigation and in looking at the balance of convenience regard must be had to the public interest.

It was pointed out by Advocate General in *SFEI* that repayment of an aid may not be a wholly adequate remedy for a breach of Article 88(3), in particular where the aid has damaged third parties, and he indicated that the State may be liable in

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84 *FNCEPA* at para 13 and *SFEI* at paras 76-69.

85 *FNCEPA* at para 12.

86 See section 6 above.

87 *R. v Attorney General, ex p. ICI*, [1987] 1 CMLR 72, (CA) and *R. v Customs and Excise ex parte Lunn Poly and Bishopsgate Insurance* [1999] 1 CMLR 1357.

88 *R. v Secretary of State for Transport, ex p. Factortame Ltd. (No. 2)* [1991] 1 AC 603 (HL) where the interim relief sought was in respect of primary legislation. See also *R v HM Treasury ex p. British Telecommunications* [1994] 1 CMLR 621 (CA), a case involving secondary legislation.

damages.[89] The basis for a claim in damages against a Member State for breach of Community law is now reasonably clear following a series of judgments of the ECJ starting with *Francovich*.[90] The case law may be briefly summarised as follows. Community law confers a right to damages where three conditions are met: (1) the rule of law infringed must be intended to confer rights on individuals, (2) the breach must be sufficiently serious, and (3) there must be a direct causal link between the breach by the State and the damage suffered by the injured parties. There can be little doubt that the prohibition in the last sentence of Article 88(3), being of direct effect, is intended to confer rights on individuals. A more difficult question is whether a breach of Article 88(3) would be sufficiently serious. A breach of Community law is sufficiently serious where, in exercise of its legislative powers, a Member State has manifestly and gravely disregarded the limits on the exercise of its legislative powers. Relevant factors may include the clarity and precision of the rule breached. On one view a Member State has no margin of discretion in deciding whether to notify a state aid under Article 88(3) since the obligation in Article 88(3) is clear and precise. On the other hand, as has been pointed out,[91] the ECJ seems to be considering not so much whether a Member State has a "margin of discretion" as that concept is commonly understood in public law, but rather an "interpretative discretion" in respect of the relevant provision of Community law. Or to put it in another way, did the Member State commit an obvious error of law? While there can be no dispute that the notification requirement in Article 88(3) is itself clear enough to leave no room for an error of interpretation, there may be cases where there is a genuine doubt whether a particular measure falls within the scope of Article 87 as an aid and hence whether the obligation in Article 88(3) applies at all.[92] In such a case it cannot be assumed that a breach of Article 88(3) will be sufficiently serious so as to sound in damages.

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89 N. 64 *supra* at para 77 of his Opinion. See also Case C-404/97 *Commission v Portugal*, [2000] ECR I-4897 at para 53.

90 Joined Cases C-6 & 9/90 *Francovich* [1991] ECR I-5357; Joined Cases C-46 & 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029; Case C-392/93 *R v HM Treasury ex parte British Telecommunications* [1996] ECR I-1631; Case C-5/94 *R v MAFF ex parte Hedley Lomas* [1996] ECR I-2553; Joined Cases C-178/94 etc. *Dillenkofer v Germany* [1996] ECR I-4845; Case C-140/97 *Rechberger* [1999] ECR I-3499; and Case C-150/99 *Stockholm Lindöpark* [2001] STC 103.

91 See P.P. Craig *Once More Unto the Breach: The Community, the State and Damages Liability* (1997) 113 LQR 67.

92 See, in this context, the observations of Advocates General Darmon and Jacobs in *BUG-Alutechnik*, n. 63 *supra* and *SFEI*, n. 64 *supra* respectively discussed in section 6 above.

In the case of aid recipients who may suffer loss as a result of a recovery order of a national court consequential on an aid not having been notified and therefore seek damages against the Member State that awarded the aid, there may be an issue of contributory negligence where there was a failure to check whether the measure had been notified to the Commission.[93] As Advocate General Tesauro put it in his Opinion in *Brasserie du Pêcheur* and *Factortame*:-[94]

> "In this connection, it should first be recalled that the Court itself has held that there is a general principle common to the legal systems of the Member States to the effect that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself." (Joined Cases C-104/89 and C-37/90 *Mulder* [1992] ECR I-3061 at paragraph 33.)

Consequently, the injured party is under a duty to act diligently, a duty which consists in taking steps so as to avoid the damage or, at any rate, to reduce its scale. That principle may apply also to lenders. Where a lender, at least since the Commission Notice of March 2000 did not take the "standard precaution", to use the word of that Notice, of inquiring from the Commission about the status of the guarantee under the State aid rules of the Treaty, he too may be held to be contributory negligent.

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93 If the aid was to be found in any to be found event by the Commission to be incompatible with the common market, there may be an issue as to whether the recipient's loss was caused by the failure to notify or the fact that the aid could never in event have been granted, even if notified.

94 N. 90 *supra*, [1996] ECR I-1029 at para. 98.