

STATE AID CONTROL- "THE RULE OF LAW" OR GOVERNANCE BY GUIDELINE?

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The State aid context

The Treaty of Rome imposed the duty on the European Community of supervising the granting of aid by public bodies to private industry where this distorts or threatens to distort competition. This competence is unique to the European Community- giving power to the Community to regulate national and regional industrial policy. This area is of interest to lawyers, political scientists, and economists. Recent and current high profile cases in the airline and banking sectors have raised awareness of this under-researched area.

The Community's competence to control State aid has been interpreted very widely by the Commission (in its Competition Directorate General DG IV) and the European Courts of the Community, so that The Community has the power to manage the complex economic boundary between public and private sectors throughout the Community. Since the EEA Agreement this competence extends throughout the European Economic Area and, through various agreements entered into by the Community, much of central and Eastern Europe. With proposed future enlargements of the Community, in view of their former controlled economies, the ability to control the grant of State Aid in these countries is of grave concern.

The priority given by the Community to the internal market and the "level playing field" of Europe, further enhances the importance of this area. This competence has always been politically highly sensitive, but the internal market and the external affects require that the Community be seen to operate with efficiency, promptness and fairness.

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In the early years of the Community, DG IV proceeded with caution, in a small number of instances, on a case-by-case basis and focusing only on sectors where aid was acknowledged to be a problem. With the progressive removal of barriers to intra-Community trade, culminating in the single market, this highly political power has become used far more vigorously. Whereas DG IV at first implemented its powers by negotiation with national ministers, now individual firms and trade associations are entering the arena of State aid control by reporting grants of State aid to their competitors and challenging subsequent inaction or aid authorisation by DG IV. This possibility to challenge Commission inaction has forced the Commission to investigate State aid in all sectors and their resulting greatly increased workload threatens to overwhelm the Commission. Now, DG IV's case load is rapidly escalating and has already reached crisis proportions, threatening the previous DG IV practice of case-by-case analysis. Although speed is essential in dealing with cases, DG IV can no longer cope with the number of cases it must deal with. Some solution must be found.

DG IV has increasingly relied on a strategy of producing communications and frameworks to impose legal coherence in the control of State Aid, but these are at present of dubious legal effect, and have themselves been challenged before the Community Courts. A recent case "reinterpreted" a framework so that it was deemed to have expired six months previously. From the practical point of view, therefore, if the Commission is to use "legislative-type" instruments, as distinguished from mere statements of policy, and encourage those with which it deals to rely on them, there must be the confidence that these codes will survive legal challenge.

However, the subject of this paper raises broader issues than the control of State aid, important though this is. The accordance of a legally binding effect to some of these sectoral aid disciplines constitutes a source of law which has only comparatively recently been recognised as a source of legal obligation. This paper therefore constitutes a case study of the birth of a novel source of "law", a record of the attempt by the Courts of the European Community to determine the boundary between "real" law and

“mere” politics. The area examined is certainly not settled; many contradictions remain which will no doubt be clarified in future court challenges.

The legal context

The European Commission has increased its both its publication of and its reliance on State aid codes, frameworks and guidelines². Some of these documents state they are based on Article 93(1), in whole or part, while others have no stated legal base. For example, the aid codes for the synthetic fibre and motor vehicle industries are clearly intended to have legal effect and impose additional obligations on Member States, thus changing the rights to aid which undertakings would otherwise have had under national laws enacted implementing aid schemes the Commission had authorised. These schemes are most notably for regional aid, to raise living standards and employment in the Communities more deprived regions³.

It was not until 1993⁴ that a sectoral aid code was recognised by the European Court of Justice to have legal effect. Until this case the sectoral codes were held to constitute guidelines, statements of policy, which created no legal effects. Since the 1993 case there have been two challenges to the Community framework for aid to the motor vehicle industry, which have to some extent clarified how this framework becomes a legally binding act. However, these cases which restricted judicial decision very much to the facts of the case, leave many other questions unanswered. The precise requirements of the legal base of Article 93(1) for Commission aid frameworks remain uncertain. The principles laid down by the Court in these cases have not been reflected in subsequent Commission practice.

The norms of “the rule of law” include principles which ensure that parties should be able to determine their legal rights and obligations so that they can conduct themselves within that law. Acts which

² DG IV use these terms interchangeably, sometimes referring to these as communications. The court often uses the term sectoral disciplines. This paper also uses these terms interchangeably.

³ This is allowable under the Treaty under Article 92(3)(a) and (c). The conflict between regional policy and sectoral policy is a major problem in State aid control It was the basis for much of the conflict between Spain and DG IV which will be discussed later.

⁴ In Case C-313/90 CIRFS v Commission [1993] ECR I- 1125, discussed *infra*

change legal rights and obligations must therefore conform to certain norms. They must be known before they enter into force. It must be clear who is bound by these laws and what situations they cover. In modern societies, laws are published, and the published record must, in the interests of the rule of law, correspond to the true legal situation. Yet, this paper shows that to the extent that the State Aid sectoral codes have legal effect, they do not conform to either the Court's requirements or to the accepted norms of the rule of law. They are of uncertain legal status with indeterminate periods of duration and are frequently published retroactively. The published record does not always reflect the actual legal situation. This paper argues that the lack of priority given to these rule of law principles should give cause for concern.

The paper focuses on the recent decisions of the European Court of Justice which have examined the creation of legal effects in sectoral guidelines subject to certain conditions, and analyses the extent to which Commission aid codes and guidelines comply with these requirements. The creation of aid codes lacks a transparent procedure which would enable parties to determine whether they have complied with the requirements established by the Court. For the rule of law to be observed, transparent procedural processes and guarantees need to be devised by the Commission, or formulated by the Court, for these codes.

The Commission's need for a legislative competence in the control of State aid

The Treaty of Rome allotted the authority to assess individual instances of State Aid to the Commission by Article 93(3) and (2), and to keep under constant review all systems of existing aid in Article 93(1). However, the legislative competence, the optional power to create appropriate regulations for State Aid control was allocated to the Council of Ministers. This was the competence to determine the conditions of the Commission's exercise of discretion in assessment of aid, or to exempt categories of aid from assessment, was allocated to the Council of Ministers in Article 94.⁵

⁵ Since the Treaty on European Union Article 94 states- "The Council, acting by qualified majority on a proposal from the Commission and after consulting with the European Parliament, may make any appropriate

The Commission has made use of Article 94 in the sectors of agriculture, transport and shipbuilding but their two previous proposals for a regulation on this Article, in 1966 and 1972 were rejected.

This means that the Commission has been given the duty to regulate State Aid by only means of a case-by-case analysis, the resulting individual decisions taken on the basis of the facts of the particular case. This requirement to analyse each aid individually, together with the demands of the Court concerning the duty to give reasons⁶, has been demanding of Commission resources, and those of the Member State as they are under a duty to supply detailed information. The individual assessment of each instance of aid highlights the distinctions between individual cases of aid and encourages the political wrangling which commentators have noted.⁷ As Frank Rawlinson, the principle administrator of DG IV, writes, “Policy frameworks on State Aid, like all rules, reduce Member States’ room for manoeuvre in giving aid and the aid controller’s margin of discretion, choice and arbitrariness.”⁸

The Commission was faced with the duty to assess and control aid without a shared community of understanding of the standards to be applied. Unlike the Commission’s competences *vis-à-vis* private undertakings in Article 85 and 86, the Commission had no power to compel State Aid information from the Member States, and no swingeing sanctions to apply in the face of Member State evasion. This task has been made much more problematic in the face of Member State non-cooperation, at times becoming dishonest and deceitful⁹. This behaviour has been the most acute in the most sensitive sectors, where State Aid is most destructive to the Community.

regulations for the application of Arts 92 and 93 and may in particular determine the conditions in which Article 92(3) shall apply and the categories of aid to be exempted from this procedure.”

⁶ based on Article 190 of the EC Treaty, which states “Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council and the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained by this Treaty.”

⁷ see, for example, Simon Bishop “The European Commission’s Policy Towards State Aid: a Role for Rigorous Competitive Analysis” [1997] 2 ECLR 84. “[T]he Treaty of Rome pit the Commission directly against the national governments. For this reason it is unsurprising that politics plays a larger part in the decision process in this area than any other area of competition law.” at page 84.

⁸ Frank Rawlinson “The Role of Policy frameworks, Codes and Guidelines, in the Control of State Aid” in Harden, Ian (ed.) “State Aid : Community Law and Policy” Koln: Bundesanzeiger (1993), at page 55

⁹ For two examples relevant to this paper see Commission communication pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning the proposal of the Spanish Government to award State Aid to the Volkswagen Group of its Spanish subsidiary Seat SA State Aid C34/95 (NN 63/94 and N

Because of the broad duty imposed by the Treaty in Article 92(1), “through State resources in any form whatsoever” the Commission were faced with the problem of regulation at many levels, many of which were very difficult for it to uncover, and known best to those parties who saw it as in their interest to conceal this from the Commission. The Commission were left to evolve the bare Treaty provisions into a coherent system of regulation, which possessed the necessary flexibility, and ability to produce fairness in each case, while respecting principles of equality and proportionality.

The Commission has formulated a proposal for an Article 94 regulation which will be discussed at a multilateral meeting with the Member State on 22nd and 23rd May 1997¹⁰. The impetus for this proposal is the changing nature of State Aid control. The European Court of Justice and Court of First Instance have imposed on the Commission a great amount of detail in the statement of reasons accompanying Commission State Aid decisions and have enforced greater rights of complainants.¹¹ The number of State Aid notifications has steadily increased- 594 cases of aid were notified by Member States in 1995 but this has increased to 802 in 1996¹². Not only has the number of cases increased but their complexity, with new sectors such as banking and insurance being controlled by DG IV. The element of cross subsidisation is particularly difficult to assess. Instruments of aid are also more complex.¹³ The application of State Aid control throughout the European Economic Area has increased

222/95) Spain 95/C 237/02, also Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and interested parties concerning aid provided by the Spanish authorities to Suzuki-Sanata Motor SA in support of the motor vehicle plant of that car manufacturer in Linares (Andaluucia) 95/C 144/04. This is not however, to suggest that the Spanish authorities differ from those of the other Member States.

¹⁰ A copy of this is unavailable, but for the issues involved, see Commission discussion paper on Article 94 of the European Community Treaty (Annexe to the Presidency document in preparation for the discussion planned for the Industry Council to be held on 14th November 1996). This is unpublished. The proposed regulation would empower the Commission to adopt exempting regulations from the requirement to notify certain categories of aid, e. g. to Small and Medium Enterprises, a definition of the *de minimus* rule, and certain sectors such as education, health, and allow the adoption of a procedural regulation.

¹¹ paragraph 9, discussion document. See also Case T-49/93 SIDE v Commission [1995] ECR II-2501, Case T-95/94 Skytravel v Commission [1995] ECR II-2651, Case T-277/94 AITEC v Commission [1996] ECR II-351, cited in paragraph 12. For a discussion of current issues, see Guiseppa Abbamonte “Competitors’ Rights to Challenge Illegally Granted Aid and the Problem of Conflicting Decisions in the Field of Competition Law” [1997] 2 ECLR 87

¹² paragraph 10

¹³ paragraph 11

pressure on the Commission to express rules for aid control in the interests of equality, as have the Europe agreement, and future enlargements will increase the workload and its complexity still further.

The Growth of Rules in State Aid Control

Clearly *ad hoc* case-by-case Commission action gave little guidance to Member States, and increased the emphasis on political factors in the assessment process.¹⁴ By 1971, in their first annual Competition Reports, the Commission announced their intention to become more proactive, to seize the initiative and announce rules for the future rather than reacting to Member State behaviour.¹⁵ These will, after sectoral analysis, announce rules for the sector in question, which will then be notified to the Member States.¹⁶

The only sectoral discipline which survives from the 1970's was the synthetic fibre code of 1977¹⁷ - this was the first sectoral code to be published, but this was not published in the Official Journal "C" Series until 1985.¹⁸ If there were other sectoral disciplines, as this extract suggests, these existed only as letters between the Member States. This lack of publication in the 1970's restricted the "co-ordinating

¹⁴ see Bishop, cited *supra* "[T]he Commission's approach to data, with its absence of an explicit framework or guidelines for the systematic assessment of competition issues, provides the latitude for politics to play a large and influential role." at p. 84. This paper contends that Bishop is here overstating his case. There are explicit frameworks and guidelines, and these proliferate each year, but the reason for this proliferation is precisely because of the problems caused by *ad hoc* aid assessment. Published rules which apply throughout the Community focus issues on Commission overall strategy in State Aid control rather than on the particular features of the particular aid being assessed.

¹⁵ "Furthermore, the Commission's influence regarding aid is exerted for the moment more by reaction to successive national initiatives rather than by Community action proper. The latter is rendered difficult by the institutional and political problems involved and the differing situations facing each Member State." First Annual Comp. Rep. (1971) paragraph 137.

¹⁶ "When the Commission is in a position to formulate an accurate diagnosis of the negative development noted or forecast in a particular sector, .. it tries to forestall matters and develop a "Community framework" within which national initiatives should take place. Such a framework should include the main guidelines of the industrial aims to be attained as well as details of the means to be used for this purpose and which would be favourably viewed by the Commission when dealing with an aid project for the sector concerned. The Member States will, of course, be properly advised of the contents of the Community framework." First Annual Comp. Rep. paragraph 166.

¹⁷ The 1977 Competition Report states that "The Commission therefore *requested* the Member States to abstain..." Paragraph 204. The other contemporary account, the Bulletin of the European Communities reports that "[t]he Member states have now agreed to *the request* issued by the Commission .. urging them not to provide aid ..." 11. 1987 2.1.47. There was also a letter to Member States concerning the steel sector ref. SG(77) A/5039 of 20 April 1977.

¹⁸ STATE AIDS Aids to the Community synthetic fibres industry (85/C 171/03). This was the synthetic fibre code, which stated in this publication, and in each version since that it was based on Article 93(1).

effect” to the Member States, rather than to all tiers of government and a wider audience of semi-public bodies. As the perception of the “regulated community” changed, the Commission began to publish State Aid sectoral frameworks, beginning with the synthetic fibre code, in the Official Journal “C” Series.

The growth of Community State Aid codes and frameworks

Throughout the 1980’s and 1990’s there has been a move from assessing each aid on its individual merits towards the formulation of intermeshing published norms which operate as rules. These were prompted by the increasing importance accorded to State Aid control and the rise in notifications of aid from Member States. Not only did these frameworks give notice of the Commission’s policy on which State Aid will be viewed favourably by the Commission, some of these codes were stated to have legal effects. Frank Rawlinson maintains that the Commission does not distinguish the *form* of the instrument when applying State Aid rules. Therefore, he states, the Commission does not apply the shipbuilding aid code more faithfully because it is a Council Directive than its own motor vehicle framework which it decided itself in an informal manner and which is not even termed a “decision” of the Commission.”¹⁹

The State Aid frameworks are designed to apply throughout all the Member States²⁰. Some frameworks are “horizontal” that is to say, applies throughout the Community across sectoral boundaries²¹. Some communications explain Commission interpretation of the prohibition of Article 92(1)²² or the Member

¹⁹ Frank Rawlinson cited at footnote 7, at page 59. This was written before the two challenges to the legality of the Community framework for aid to the motor vehicle industry discussed *infra*.

²⁰ By the European Economic Area (EEA) Agreement, and the decisions of the European Free Trade Area (EFTA) Surveillance Authority. These disciplines are applied throughout the EEA. see, for example, Decision 23/96/COL of 6 March 1996, OJ L 140, 13. 6. 96., p. 54, concerning the latest version of the synthetic fibre code, which can be found 96/C 94/07. Note that these EFTA decisions are published in the “L” Series, whereas the codes themselves are published in the “C” Series. Note also that here, too, there is delayed publication. The “rules” state that they come into force on 1 April 1996, but are not published until 13 June that year. For a recent discussion of the problems of State Aid control see Evans, Andrew “Contextual Problems of EU Law: State Aid Control under the Europe Agreements” [1996] 21 E.L.Rev 263

²¹ Community guidelines on State aid for rescuing and restructuring firms in difficulty OJ C 368, 23. 12. 94., p. 12.

²² e.g. Application of Articles 92 and 93 of the EEC Treaty to public authorities’ holdings (Bulletin EC 9-1984)

State obligations in State Aid,²³ These measures can be found under “Legislation” of State aid on DG IV’s Home Page on the Web.

In addition to these measures which apply to all Member States, the Commission has approved many Member State aid schemes, many for regional aid or environmental aid. Aid which fulfils the criteria for these schemes can be granted without prior notification or distinct Commission approval²⁴. However, these Member State aid schemes specifically exclude sectors where there are special sectoral rules²⁵. Where State Aid is accorded under these schemes to a sector where there is a legally binding aid code, it cannot, therefore come within the automatic authorisation of that scheme, but must first be notified as “new” aid under Article 93(3), and cannot be applied without assessment and authorisation from the Commission²⁶. The authorisation of aid schemes within the Member States and across the Community as a whole simplify the assessment of aid proposals by the Commission. This is particularly important now when despite the increasing priority given to State Aid control in the context of the single market, DG IV has received no corresponding increases in either its budget or the number of its personnel.

According to the Commission’s statistics, “in the areas for which DG IV is responsible, 281 of the 619 decisions taken by Commission in 1995 (45%) were taken by authorisation.”²⁷ This authorisation is of one of two types, on the one hand State Aid communications applicable throughout the Community²⁸ and on the other hand authorised Member State systems of aid for regional development embodying earlier Commission decisions specifying, for the Member State in question, the eligible areas and aid intensities authorised in those regions.

²³ E.g. Commission letter to Member States SG (89) D/5521 of 27 April 1989

²⁴ See Case T-154/94 *Comité des Salines de France and Compagnie des Salines du Midi de L’Est SA v Commission* of 22 October 1996 paragraph 46, “the Commission would not even have had the power to take a specific decision as to the legality of that aid, since ... the disputed aid was covered by the Netherlands scheme, a general aid scheme already approved by [the Commission].” This case cited Case C-47/91 *Italy v Commission* (“*Italgrani*”) [1994] ECR I-4635, paragraphs 24 and 25.

²⁵ see the facts of the CIRFS case, mentioned below.

²⁶ see Case C-169/95 *Spain v Commission* 14 Jan 1997, paragraphs 26 to 31. This case is discussed below.

²⁷ footnote 6 of Commission discussion paper on Article 94 cited at footnote 9.

²⁸ Mentioned specifically are communications on Small and Medium sized Enterprises, State Aid for Research and Development, and State Aid rules on environment aid and employment aid.

This paper examines the communications which comprise sectoral disciplines applicable to the sector concerned throughout the Community. These frameworks, codes and guidelines in State Aid control²⁹ often impose additional duties, such as the formulation of reports on aid in that sector given by the Member State concerned, such as in the Community framework for aid to the motor vehicle industry. Aid to sectors covered by frameworks cannot be given under previously authorised Member State schemes, notable regional aid schemes, but is subject to a duty of prior notification before it cannot be lawfully given.

The first of these sectoral guidelines was the Textile and Clothing guidelines³⁰, supplemented by the 1977 Communication³¹. These were at the time letters from the Commission to Member States, but they can now be found published in full in DG IV's "Competition Law in the European Communities Vol. II A Rules Applicable to State aid"³². No legal base was attributed to these communications, and these read as a statement of Commission policy towards aids in this sector³³. The synthetic fibre aid code³⁴ was very different. It had a time limit of two years from its inception, and has been renewed regularly since, being amended as was deemed necessary. The fact of its creation was reported at the time, although it was not published in full, in the Bulletin of the European Communities, and from the first published version in the Official Journal "C" Series has been stated to be based on Article 93(1). The next published discipline was the Framework for certain steel sectors not covered by the ECSC Treaty³⁵, in 1988, based on Article 93(1) with an indefinite time period. The Community framework on

²⁹ See footnote 1. When referring to sectoral disciplines, the terms "code" "framework", "guideline" will be used interchangeably.

³⁰ Commission Communication to the Member States (SEC (71) 363 final July 1971

³¹ Commission Communication to the Member States SG (77) D/1190 of 4 February 1971 and Annexe (Doc. SEC (77) 317, 25. 1. 1977)

³² European Community Directorate General IV Competition "Competition Law in the European Communities Vol. II A Rules Applicable to State aid. Situation at 31 Decision 1994" Brussels. Luxembourg 1995

³³ but see the recent case discussed *infra* Case T-380/94 Association Internationale des Utilisateurs de Fils de Filaments Artificiels et Synthétiques et de Soie Naturelle (AIUFFASS) and Apparel, Knitting and Textiles Alliance (AKT) v Commission 12 December 1996. This is discussed *infra*.

³⁴ Brief contemporary reports can be found in Bulletin 7/8-1977 and 1.5.3. and 11/77, 2.1.47. I have found no complete document of the original letter to the Member states. For the amendments see 85/C 171/03, 87/C 183/04, 89/C 173/05, 91/C 186/04, OJ C 346, 30. 12. 1992., p. 2., 94/C 224/03, 96/C 94/07.

³⁵ OJ C 320, 13. 12. 1988, p. 3.

State Aid to the motor vehicle industry also followed in 1988³⁶, with, as is explained later, a time limit of two years. In 1994 the guidelines on State aid to the aircraft industry³⁷, although breaking records for its great length and the number of footnotes, was not based on Article 93(1). However, the guidelines for the aid to fisheries and aquaculture³⁸ were based on Article 93(1); although they were for an indefinite period, a new version was published this year which announced it had replaced the older version.³⁹ In 1996 the communication on agricultural investments⁴⁰ was published, as was the communication on short-term loans in agriculture⁴¹. These were both based on Article 93(1) and published several weeks after they stated that they had entered into effect.

The Scheme of Article 93

Article 93 lays down the procedures by which the Community may regulate State aid. Under Art 93(3), Member States must notify proposals for all new aid and allow the Commission to investigate these before putting these into effect. If the Commission is not satisfied that the aid proposal is compatible with the common market, it must open the investigatory procedure of Article 93(2), and if it determines that the aid is incompatible with the Common market, it must then produce a negative decision. Article 93(1) allows the Commission to monitor all existing aid, and propose to the Member States “appropriate measures”. It is this last power of the Commission which is being rapidly extended to become a source for competence to create legal obligations on the part of the Member States and to change the legal position of Community undertakings. The emphasis of this paper is on how far these “appropriate measures” conform to established “rule of law” principles, notably legal certainty.

³⁶ 89/C 123/03

³⁷ 94/C 350/07

³⁸ Guidelines for the examination of State aid to Fisheries and Aquaculture 94/C 260/03

³⁹ Guidelines for the examination of State aid to Fisheries and Aquaculture 97/C 100/05 27. 3. 97.

⁴⁰ Guidelines for State Aid in connection with investments in the processing and marketing of agricultural goods OJ C 29, 2. 2. 96., p. 4.

⁴¹ Commission on State Aids ; subsidised short term loans in agriculture (*crédits de gestation*) (96/C 44/02)

Article 93(1) as a legal basis, the preliminary problems

Article 93(1) states

The Commission shall, in co-operation with Member States, keep under constant review all systems of aid existing in the Member States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.”

This sub-section is used by the Commission to monitor existing aid. But also, from 1985, it has been used by the Commission as a legal base for sectoral frameworks which control all grants of aid *in the future*.

Several questions immediately arise from this particular choice of legal base-

1. The legal base of Article 93(1) applies to “all systems of aid existing...”, yet is used by the Commission to control future *ad hoc* grants of aid.
2. The legal base of Article 93(1) allows the Commission to “*propose*” yet is used as a base for measures which create legal obligations on the part of the Member States and to change the legal position of undertakings.
3. The Commission is authorised to “*keep under constant review*” all systems of aid but uses measures based on this Article to produce measures which are indefinite in time.

The first problem has never been addressed by the Court.

The second and third problems are the main topic of this paper and will be fully addressed later.

The birth of a Legal Base for measures which are legally binding

The Commission published the first of its sectoral policies based on Article 93(1) with the synthetic fibre code in 1985. This has been updated every two years or so and has remained constantly in force.

The code announced a total ban on certain types of aid to the sector, and had the effect of requiring prior notification and approval for aid in this sector even when the aid was granted under a previously authorised scheme.

A case in 1987, brought by Deufil⁴² appeared to state flatly that the synthetic fibre code was not capable of creating binding legal effects, but was merely a statement of policy about how the Commission intended to act.

“The aid code constitutes guidelines setting out the course of conduct the Commission intends to follow and with which it asks the Member States to comply in regard to aid in the synthetic yarns and fibres sector. It does not derogate from the provisions of Article 92 and 93 of the EC Treaty, nor could it do so.”⁴³

A judicial “U” turn came about in CIRFS.⁴⁴ In this second case, aid had been granted under a regional aid scheme⁴⁵ This aid scheme had been authorised “without prejudice” to “present or future special rules on aid to particular industries”. Whether the aid fell within the ambit of the sectoral code for synthetic fibres was therefore crucial to the determination of the CIRFS case⁴⁶. The applicant and the Commission disagreed as to the ambit of the code, because each approached it from a different logic. The applicant used a literal logic, by interpreting the wording of the code; the Commission used an economic, purposive logic.⁴⁷ Whatever the ambit of the code, this would affect the definition of the aid as new or existing only if it could be capable of creating legal effects.

The Commission maintained that the code had created a legal effect, as “the principles set out in its communication” had been agreed by the Member States; where there had been no such agreement, the

⁴² Case 310/85 Deufil v Commission [1987] ECR 901

⁴³ paragraph 21

⁴⁴ Case C-313/90 CIRFS v Commission [1993] ECR I- 1125.

⁴⁵ Decision 85/18/EEC of 10 October 1984 on the French regional aid scheme “Prime D’aménagement du territoire” OJ 1985 L 11, p. 28.

⁴⁶ If the aid fell within the ambit of the framework, the measure was excluded from the authorised aid scheme and could not be implemented as a new aid without prior notification under Article 93(3) and prior approval by the Commission; if on the other hand the aid did not come within the ambit of the sectoral code, or the code had no legal effects, the measure must be allowed under the authorised regional aid scheme, as all parties agreed it complied with the criteria laid down by that scheme, and by virtue of falling within this approved scheme the aid measure did not require prior notification under Article 93(3).

⁴⁷ The Commission maintained that the synthetic fibre code, at the relevant time, only covered synthetic fibres intended for textile use, and not those destined for industrial end-use. In the report for the hearing, CIRFS observed that “With the exception of acrylic fibres, [the fibres covered by the code at the time] can all be used for industrial and textile applications. The raw material is identical for both types of application and the manufacturing process is also identical up to the last part of the process. Industrial and textile fibres can be, and often are, produced on the same site.” Report for the Hearing I-1137.

Commission could initiate the Article 93(2) procedure against that Member States and could adopt a binding decision under Article 93(2) to enforce the terms of the code on the Member State⁴⁸.

The Court asserted that the code created legal effects⁴⁹, and proceeded to interpret its ambit at the time the commitment to grant the aid was made. The Court used a literal interpretation of the code, but the Commission insisted that the code should be interpreted according to the economic logic underlying the discipline. The code has been formulated to avoid increases in production in sectors where there was already overproduction and excess in production capacity. This excess capacity at the time in question was to be found only in synthetic fibres for textile applications⁵⁰. The Commission also pleaded their previous practice in the sector, and a previous unpublished decision.⁵¹

This case established, therefore that a sectoral code, based on Article 93(1) and not coming within Article 189⁵², gave rise to legal effects⁵³, and that its ambit could be interpreted by the Court according to the wording of the code⁵⁴ rather than the economic logic applied by the Commission.

⁴⁸ This argument is set out at I-1154/5. The Commission refers to the adoption of an Article 93(2) decision against Germany to enforce the terms of the Community framework for aid to the motor vehicle industry. Commission Decision 90/381/EEC of 21 Jan 1990 amending German aid schemes for the motor vehicle industry (OJ 1990 L 188, p. 55). This Article 93(2) decision had predated the case, although not the granting of the aid or the formulation of the synthetic fibre code applicable at the time in question.

⁴⁹ “.. the rules set out in this discipline and accepted by the Member States themselves have the effect, *inter alia*, of withdrawing from certain aid falling within its scope the authorisation previously granted and hence of classifying it as new aid and subjecting it to the obligation of prior notification.” judgement paragraph 35.

⁵⁰ paragraph 39. See also the Report for the Hearing, where the Commission sets out their application of the code- “.. the aid code in the sector of synthetic fibres and yarn *prohibits the grant of aid which has the effect of increasing capacity in products in surplus.*” (my emphasis)

⁵¹ paragraph 42 of the judgement. This was an authorisation of State Aid to a producer of synthetic fibres for non-textile end-use; the Commission argued in the CIRFS case that it had had to take this into account in the present case to comply with the principle of equality of treatment. At the time the Bottrop decision was taken authorisations of State Aid were not published.

⁵² Article 189 states “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to whom it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.”

⁵³ “.. in this case the rules set out in the discipline and accepted by the Member States themselves have the effect, *inter alia*, of withdrawing from certain aid falling within its scope the authorisation previously granted and hence of classifying it as a new aid and subjecting it to the obligation of prior notification.” paragraph 35. For a recent discussion of the problems of these acts, see Gautier, Agnès “Le Conseil d’Etat français et les actes <<hors nomenclature>> de la Communauté européenne” [1995] 31 RTD 23.

⁵⁴ see also Advocate General Opinion in Case C-135/93 Spain v Commission [1993] ECR 1951, paragraph 25., discussed *infra*.

The Community framework on State Aid to the motor vehicle industry

The creation of the legal effect which had been relied on by all parties in the CIRFS case was examined in the context of the Community framework for aid to the motor vehicle industry.

This framework had been first published on 18th May 1988⁵⁵, and stated that it had the effect of imposing an obligation of prior notification on aid, even where this was to be granted under a previously authorised aid scheme, and annual reports on all aid granted to the sector. The framework stated that it

“shall enter into force on 1st January 1989. ... The appropriate measures shall be valid for two years. The Commission shall at the end of this period review the utility and the scope of this framework.”⁵⁶

Therefore for the first few months of 1989, it appeared that the framework applied to all 12 Member States. However, this later proved not to have been the case, and implementation of the framework was later explained, by the Commission in 1991⁵⁷, to have been delayed for the first six months of 1989, until it was accepted by 10 out of the then 12 Member States.

The first published indication that not all Member States had accepted the framework was when the Commission opened Article 93(2) procedures on all aid schemes which could be applied in Spain and Germany⁵⁸. This was published on the 7th November 1989. Under the threat of a negative Article 93(2) decision against all their approved aid schemes in operation in their country which could benefit the motor vehicle industry, Spain accepted the Community framework in January 1990⁵⁹, but a note to this effect was not published until late 1991. Germany, even then, refused to accept the framework, and the

⁵⁵ Community framework for aid to the motor vehicle industry OJ C 123, 18. 5. 1989., p. 3

⁵⁶ point 2.5, at p. 4.

⁵⁷ Community framework for aid to the motor vehicle industry (91/C 81/05) footnote 2.

⁵⁸ Commission communication to other Member States and interested parties concerning the refusal of the German Government to apply the Community framework on State Aid to the motor vehicle industry. (89/C 281/05), and Commission communication to other Member States and interested parties concerning the refusal of the Spanish Government to apply the Community framework on State Aid to the motor vehicle industry. (89/C 281/06),

⁵⁹ see 1991 extension, *supra*

Commission made a final negative decision against them under Article 93(2), decided on 21 Feb. 1990, and published on 20 July 1990.

The Final Negative 93(2) Decision addressed to Germany

This Commission Decision under Article 93(2) is unlike any Commission Decision before. These decisions normally give the statement of reasons why the aid in question comes under Article 92(1), but cannot be allowed under Article 92(2) or 92(3).⁶⁰ This entails a detailed assessment of the nature of the measure and the granting institution, whether the competitive position is distorted or is threatened to be distorted, and whether and to what extent there is trade between Member States. This decision and its statement of reasons deal with totally different matters, being an explanation of why the Commission cannot allow the rejection of the framework by Germany.

The decision sets out the history of the dispute, and Germany's reasons for objecting to the framework. Germany's objections to the framework are then dealt with, one by one. The Commission points out that decisions under Article 93(2) are directly applicable, but that "obligation cannot have retroactive effect and cover which has already been approved", so the obligations of the framework (notification and reporting) are imposed proactively, from 1 May 1990⁶¹. A non-exhaustive list of aid schemes was annexed to the decision, but again not published.

The Commission had therefore succeeded in imposing a framework on a *refusnik* Member State, by a novel application of their competence under Article 93(2). The obligations of reporting and notification, contained in the framework, are reproduced in the Member States, in a form which is directly applicable⁶².

⁶¹ In the only other decision of this type, (Commission Decision of 20 December 1995 amending Spanish aid schemes for the motor vehicle industry (96/313/EEC) OJ L 119, 16. 5. 1996., p. 51), decided after the Spanish Government refused to accept the 1996/7 framework, the imposition of the legal obligation to follow the terms of the framework is also only proactive. It would seem that although the Commission believes that in exceptional circumstances the frameworks under Article 93(1) can impose legal norms retroactively, the Article 93(2) mechanism can only impose them proactively.

⁶² for the Commission's statement of the legal effect of a framework before the national courts, see Notice on cooperation between national courts and the Commission in the State aid field (95/C 312/07)

This decision changed the Commission's attitude to sectoral State Aid codes. The possibility of imposing an aid code on a Member State which did not accept this voluntarily was cited in subsequent the CIRFS case above and the two Spanish challenges discussed below. It has been repeated in subsequent aid codes⁶³.

Whereas the other Member States were subject to the Community framework on State Aid to the motor vehicle industry for a period of two years duration, and were part of a consultative procedure for its extension, Germany was subject to an obligation of unlimited duration⁶⁴. This imposition of legal norms, and the extent of this obligation was not subject to any consultation requirement or agreement on the behalf of the Member State. By the time of the next extension of the framework, Germany had decided to agree to it, and in a footnote to this, the Commission Decision amending German aid schemes for the motor vehicle industry was declared no longer valid⁶⁵.

It would appear that the framework thereafter applied to 11 out of the 12 Member States by Article 93(1), and to Germany by Article 93(2), until it accepted the framework in May 1990.

The distinction between the true legal situation and the apparent legal situation from publication

From the publication of the framework, therefore, in May 1989, until the first extension, the officially recorded and published legal situation had borne little correlation with the true legal situation. The publication of the framework before it had been accepted by even ten of the then twelve Member States, stating a date when it had "entered into effect" nearly five months earlier when the Commission later

⁶³ see for example Guidelines for State Aid in connection with investments in the processing and marketing of agricultural products (96/C 29/03) 2. 2. 96, fifth paragraph. "Pursuant to Article 93(1), the Commission is requesting the Member States to confirm within two months from the date of receipt of this letter that they will comply no later than 1 January 1996 with the annexed communication by amending their existing aids where such aids do not comply with these guidelines and appropriate measures. **If it does not receive such confirmation, the Commission reserves the right to open the procedure provided for in Article 93(2) of the Treaty.**" See also where the Commission opens Article 93(2) procedure on Germany to apply this aid scheme. 97/C 36/12, published 5 February 1997.

⁶⁴ The Article 93(2) decision applying the Community framework for aid to the motor vehicle industry to Spain did not follow this precedent of applying it for an indefinite period of time. The framework was applied for two years. This was because of the judgement in Case C-135/93 Spain v Commission.

⁶⁵ Community Framework on State aid to the motor vehicle industry (91/C 81/05), footnote 4. This is the only occasion the Commission have declared a Commission decision under Article 93(2) no longer valid.

stated it had not been operational for its first six months presented a very misleading picture. The five month delay in publishing the negative decision against Germany again caused a very long period of legal uncertainty.

The true legal position only came to light with the first review and extensions, but the problems to legal certainty caused by this was greater even than those caused by the initial problems with the framework.

The 1991 and 1992 framework reviews

In 1991, the Commission carried out its promised review of the framework, and published a notice in the Official Journal “C” series that the framework was being renewed “in its present form” (with one amendment concerning the former GDR which was now part of the Community). The communication states that the Commission will review the framework in two years time and not modify the framework without consulting the Member States.⁶⁶

In February 1993, the Commission wrote to the Member States to make it known that

“the Commission had decided not to modify the Community framework. Again, it pointed out that the framework would not be extended either as it had already been extended for an indefinite period by the first extension.”⁶⁷

This communication was preceded by a meeting at which the Commission made it clear that this did not constitute a “consultation of the Member States pursuant to Article 93(1) of the Treaty”⁶⁸.

The notice was published in the “C” series, citing Article 93(1). This stated that

In December 1990, the Commission decided to renew the framework without setting a time limit on its application. .. and that they [the Commission] had decided the framework would not be modified.”

⁶⁶ “After two years the framework shall be reviewed by the Commission. If modifications appear necessary (or the possible repeal of the framework) these shall be decided upon by the Commission following consultations with the Member States.” section 5

⁶⁷ Spain v Commission, Advocate General Opinion paragraph 10. The notice was published OJ C 36 (93/C 36/06)

⁶⁸ See Case C-135/93 Spain v Commission, Opinion of Advocate General Lenz paragraph 9.

The framework was stated to “remain valid until a next review to be organised by the Commission.” Spain challenged the 1992 Commission decision, and the 1991 extension, insofar as the 1991 decision was based on this.

This case raised interesting questions of admissibility under Article 173. The Commission argued that the 1992 decision could not be challenged before the court because “it is of a purely internal nature and does not alter the legal position of the applicant under the 1990 extension decision.⁶⁹” As such, it was not susceptible to challenge under Article 173 of the Treaty. The decision which had created legal effects had been the 1990 extension of the framework- this had changed the period of the validity of the framework. This could not be challenged under Article 173(1) as it was two years before the challenge, and therefore “out of time”.

The Advocate General Opinion and the judgement of the European Court of Justice were sharply divergent. Advocate General Lenz was clear that

“the provisions of the Community framework constitute “appropriate measures” pursuant to Article 93(1) of the EEC Treaty. Such measures are initially only proposed by the Commission. They are to be regarded as recommendations within the meaning of Article 189 of the EEC Treaty and are not binding. **Such measures do not become binding on the Member States until they have approved them.**⁷⁰”

Since the Commission had not spelled out in their first framework extension that they had intended this to be for an indeterminate period, the Member States could not be deemed to have agreed to this. The first extension must, the Advocate General concluded, have been for two years only⁷¹. According to Advocate General Lenz, whether the Commission was competent to extend the duration of validity of the framework by the 1992 decision under Article 155⁷², on the basis of the first extension of the

⁶⁹ paragraph 13

⁷⁰ paragraph 31

⁷¹ paragraph 34

⁷² Article 155 states “In order to ensure the proper functioning and development of the common market, the Commission shall:

-ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;

-formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;

-have its power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for it by this Treaty;

Treaty, required prior “consultation” the Member States by the wording of that first extension of the framework⁷³. As Advocate General Lenz points out, consultation is capable of sustaining two meanings- prior enquiry or a requirement of prior consent⁷⁴. However, as this framework is based on Article 93(1), the consent of the Member States is necessary, this (1992) decision could only become binding by obtaining the consent for the Member States. As Advocate General Lenz points out, that consent was not given. He concludes his analysis-

“It follows that there was no consent on the part of the Member States. As a result, the Commission was not entitled to effect that extension for an indefinite period.”⁷⁵”

He therefore proposed that the Court should annul the decision of December 1992.

The Court’s Analysis in Case C-135/93

The Court’s analysis was significantly different. It found the 1992 communication ambiguous, and therefore gave preference to the interpretation consistent with the Treaty.⁷⁶ Article 93(1) imposed certain duties and restrictions on the Commission-

Under that provision the Commission, in cooperation with the Member States, is to keep under constant review all systems of aid existing in those States. It is to propose to them any appropriate measures required by the progressive development or by the functioning of the common market. **The provision thus involves an obligation of regular, periodic cooperation on the part of the Commission and the Member States, from which neither the Commission nor a Member State can release itself for an indefinite period depending on the unilateral will of either of them.**⁷⁷”

The Court stated that the first “extension” fulfilled the requirements of Article 93(1), “by making the application of the framework subject to the acceptance of the Member States” and extended the framework for 2 more years. In the light of the obligation for “regular, periodic cooperation” imposed

-exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

⁷³ paragraph 57

⁷⁴ paragraph 60. As will be seen below, this question was addressed by the European Court of Justice in the subsequent challenge.

⁷⁵ paragraph 63

⁷⁶ This followed Case 218/82 *Commission v Council* [1983] ECR 4063, paragraph 15, and Joined cases 201/85 and 202/85 *Klensch v Secrétaire d’Etat* [1986] ECR 3477, paragraph 21.

⁷⁷ paragraph 24

by the legal base of Article 93(1), the Court interpreted the 1992 decision as extending the framework only until the next review, which was to take place after a period of two years.⁷⁸

Analysis of the distinction between the Court's judgement and the Advocate General Opinion

Whereas Advocate General Lenz based his analysis on Member State *consent*, and insisted that the framework could not be valid without this, the Court is satisfied with *cooperation*. It is difficult to determine from this case what limitations the Court imposes on the Commission by this requirement of cooperation⁷⁹ - certainly here the Commission could not unilaterally change the framework from one of a limited duration to an unlimited one. But what is clear is that either the court is prepared to find cooperation in circumstances where the Advocate General cannot find consent, or that the substantive requirement itself is lower.

The consequences for legal certainty are equally perturbing. The Advocate General Lenz was clear that the Commission proposal itself had no legal effect, but the Member States' consent was necessary. Yet the Commission proposal is all that is published; where Member States consent this is not available in published form. On the other hand the Court avoided the issue, discussed by Advocate General Lenz, that the 1992 decision had not sought the consent of the Member States and had been explicitly rejected at the time by Spain⁸⁰. The Commission denied before the court that the 1993 document was a proposal, or that their multilateral meeting in December 1992 was a consultation as required by Article 93(1)⁸¹. If the Commission intended and stated that the framework was of an unlimited duration, and the Member States were not asked for their consent, or gave it⁸², how does this constitute agreement? The European Court of Justice held that the 1992 decision should be construed as a two year extension of the framework, yet this is not either the Commission proposal (which was a framework of unlimited

⁷⁸ paragraph 39

⁷⁹ It may be that both the Court and Advocate General Lenz are enforcing something of the species of a Self-Regulatory Association, such as is analysed by Julia Black in "Constitutionalising Self-Regulation" [1996] 59 MLR 24

⁸⁰ see Advocate General Opinion par 62 -63.

⁸¹ See Advocate General Lenz's opinion, par 9. This fact was not mentioned in the judgement of the Court.

⁸² Silence on the part of the Member States cannot be construed as consent. CIRFS *supra* Advocate General Opinion, par 28.

duration) or anything to which the Member States had agreed, as their agreement was not believed necessary. Thus, with respect, the European Court of Justice's findings are difficult to reconcile with their interpretation of the requisites of Article 93(1). Justice was probably done in this case, but the waters have been muddied. At least where there is no obvious agreement, an agreement may be "discovered" in the European Court of Justice.

The Court is satisfied to find cooperation in these circumstances where many would question the goodwill of the Commission. It could well be argued that the Commission had deliberately tried to "pull the wool over the eyes" of the Member States, and also deliberately evade any possibility of review of the framework by the Court. This lack of fair play sits as ill with concepts of cooperation as it does with concepts of consent.

The legal lacuna of the framework in 1995

According to this judgement, the framework had expired at the end of 1994. The date of the judgement was 29th June 1995; the Commission therefore found itself in a legal lacuna, with the framework having expired six months earlier. Without the safeguards of this framework, any aid granted to the motor vehicle sector under previously authorised aid schemes, e.g. for regional aid, would not require the prior notification and authorisation deemed necessary under the framework, but would be deemed "existing aid" under the authorised aid scheme. Indeed the Commission would have no power to prevent this aid if it accorded to the terms of the authorised aid scheme under which it had been granted⁸³. It would be difficult for the Commission to take into account the sectoral effects of the aid, and would also be difficult for any party, such as a competitor, to challenge the authorisation of the aid if the conditions of the authorised schemes had been respected. To compound the problem, Spain refused to accept the new framework, thus avoiding its legal obligations for the whole of 1995.

⁸³ see Case C-169/95 Spain v Commission 14 January 1997. This case concerned aid given under a regional aid scheme to a sector which fell within the Framework for certain steel sectors not covered by the ECSC Treaty. The fact that the code covered the sector in question meant that the aid had to be assessed with its conformity to the code rather than the regional aid scheme.

This case was decided on the 29th June 1995. A few days later, on the 4th of July, the Commission held a multilateral meeting of the Member States⁸⁴. The following day, on the 5th July, the Commission sent two letters⁸⁵ to each Member State, firstly prolonging retrospectively the framework from January 1st 1995, so “the framework thus remains in force without interruption”. According to Spain, eight Member States indicated they were against this and four other Member States reserved their position.

The multilateral meeting also discussed an extension of the 1989 framework which would enter into force at the latest on 1st January 1996, and remain in force for two years. At the end of 1997 the Commission would re-examine⁸⁶ and possibly revise or abolish the framework, organising in advance a multilateral meeting with Member States representatives to discuss any proposed changes.

The Member States were required to inform the Commission within 30 working days of their agreement, otherwise the Commission would open the Article 93(2) procedure on all approved aid schemes which may benefit the motor vehicle industry. Later, the Commission invoked the obligation of Article 5 on Member States not to grant aid without first notifying this and waiting for the Commission’s final decision in accordance with the rules of the framework.

The Commission stated that the high level of State Aid had not changed throughout the period of the framework, and was therefore still required.

The Commission justified the retroactive aspect of the decision in view of the fact that the Court had delivered its judgement after the date on which the framework should have been reviewed. They state

“Although, as a general rule, the principle of legal certainty means that the point in time from which a Community act starts to run must not be set at a date before that on which it was adopted, an exception to this rule may arise where the objective to be obtained so requires and where the legitimate expectations of the parties concerned are duly respected.”

⁸⁴ see Commission notice C304, page 14. Discussed *infra*. Further information can be obtained from Case C-292/95 *Spain v Commission* 14 March 1997.

⁸⁵ The first was published at the end of October OJ C284 P. 3. 1995-10-28. Corrigendum OJ C307 p.22 1995-11-18, notice number 95/C307/15 It was further discussed in Commission Notice C304 p. 14, discussed *infra*.

⁸⁶ According to DG IV, this re-examination has already begun.

The Spanish Response⁸⁷

On the 16th August the Spanish Government informed the Commission that it refused to agree to the reintroduction of the motor vehicle industry framework as an appropriate measure within the meaning of Article 93(1) of the EC Treaty. They supported this refusal with six main arguments.

The Commission initiated the Article 93(2) procedure which set out the Spanish criticisms together with their reply.⁸⁸ The Commission began its arguments by explaining the very serious results of the challenge to the framework and the legal vacuum the case had created. They were particularly concerned about the discrimination the vacuum would cause in the application of the framework, the Member States who had kept to the framework being disadvantaged by their compliance. The Commission presented their analysis of the Spanish arguments against the extension of the framework and conclude that

“there are no grounds for accepting the refusal of Spain to agree to the reintroduction of the Community framework on State Aid to the motor vehicle industry as proposed by the Commission by means of its decision of 5 July based on Article 93(1) of the European Community Treaty and discussed with the Member States at the multilateral meetings of 4 July and 17 July 1995.”

The Commission stated that Spain is the only Member States to fail to agree to the 1996/7 extension of the framework, and initiated the Article 93(2) procedure on all aid schemes in operation in Spain under which aid could be awarded from 1 January 1996.

⁸⁷ This is taken from the “Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and other parties concerned regarding refusal of the Spanish authorities to the Commission’s proposal for reintroduction of the EC framework on State aid to the motor vehicle sector”. 95/C 304/08. Published 15 November 1995

⁸⁸ This section is also taken from “Commission notice pursuant to Article 93(2) of the EC Treaty to other Member States and other parties concerned regarding refusal of the Spanish authorities to the Commission for re introduction of the EC framework on State aid to the Motor vehicle sector”. OJ C304 p.14 1995-11-15

The Article 93(2) decision against Spain

The final Commission decision under Article 93(2)⁸⁹ followed the same format as the opening of the procedure and both parties made similar arguments. No other Member States or interested parties made representations. The Commission repeated its intention to replace the sectoral frameworks with a horizontal approach, but defended the Community framework on State Aid to the motor vehicle industry's application as being "fully effective"⁹⁰. The Commission pointed out that in addition to the two Article 93(2) investigations in progress⁹¹, the Spanish authorities had notified, or already granted aid to other motor manufacturers⁹² on which the Commission had not then made a decision.

The decision applied the framework to Spain.

"From 1 January 1996 until 31 December 1997, Spain shall notify the Commission pursuant to Article 93(3) of the EC Treaty of all aid measures granted in respect of projects costing more than ECU 17 million under any existing or approved aid schemes to undertakings operating in the motor vehicle sector as defined in points 2.2 and 2.3 of the said framework. Spain shall, moreover, submit annual reports as required by the Community framework."

The 1995 Spanish challenge Case C-292/95⁹³

Spain challenged the Commission decision to retroactively extend the framework of 1992.

The Advocate General Opinion, again from Advocate General Lenz, confirmed his previous assertions. The Commission had argued that their action was justified given the exceptional circumstances, to urgently fill the legal gap caused by the previous framework challenge. These circumstances were the reason why it was not necessary to conform to the normal procedure, which was time consuming.⁹⁴ The Commission therefore argued that for an extension of a previously accepted framework for a limited

⁸⁹ Commission Decision of 20 December 1995 amending Spanish aid schemes for the motor vehicle industry (96/313/EEC) OJ L 119, 16. 5. 1996.

⁹⁰ In countering the Spanish argument that "The measures and instruments used to restructure the industry could not be based exclusively on competition criteria, without taking into account competitiveness, industrial organisation and regional development aspects", at p. 52

⁹¹ C 1/95 *Suzuki-Sanata* and C34/95 *VW-Seat*, see footnote 8.

⁹² *Nissan Motor Ibérica, Mercedes Benz, Opel España, FASA Renault and Ford España*

⁹³ *Case C-292/95 Spain v Commission* 15 April 1997

⁹⁴ *Case C-292/95 Spain v Commission*, Advocate General Opinion par 17.

period of validity it had the right to proceed with a mere consultation “conforming to the obligation of cooperation laid down in Article 93(1)⁹⁵.”

When Advocate General Lenz analyses the procedure to be applied to the Commission decision to reintroduce the framework, he considers not only the Treaty, but the rules envisaged by the framework itself. The second extension to the framework, which had also been challenged, laid down that it would remain in operation until the next assessment, to be organised by the Commission. This extension did not make any provision on the conduct to be adopted when a modification was considered necessary.⁹⁶ Advocate General Lenz was clear that the refusal by one Member State to accept the framework could not affect the validity of the act, because the maintenance of the framework would then be abandoned at the choice of any Member State.⁹⁷

According to Advocate General Lenz, the urgent situation must be taken into account, whereby the Commission was left with a legal loophole which must be filled to prevent competition being distorted. Advocate General Lenz found the framework was proportionate to the problem faced by the Commission. The principle of legitimate expectations could not be evoked against the retroactive extension because from 1st January until the judgement in June, all Member States according to the Commission had respected the framework.⁹⁸

The Court came to its conclusions by distinguishing the legal requirements for a simple extension and for a novel framework. They noted that at the time the Commission stated they were “extending” the framework in July 1995, it had already expired the previous year. Therefore the 1995 “extension” must follow the procedure applicable to initiating new frameworks. This had not been followed, because the multilateral meeting between the Commission and the Member States which had preceded this framework could not satisfy the requirement of regular and periodic cooperation which was laid down

⁹⁵ “une simple consultation des États membres, conformément à l’obligation de coopération prévue à l’article 93, paragraphe 1 ” Advocate General Opinion par 20

⁹⁶ paragraph 24

⁹⁷ paragraph 43

⁹⁸ paragraph 55

in the previous case⁹⁹. Because the framework had ceased to be valid before the 1995 “extension” this resulted in a modification of the existing legal situation and therefore had to be adopted according to the procedure applicable to new frameworks.¹⁰⁰ Even if the exceptional circumstances invoked by the Commission could have permitted the retroactive effect of the framework, they could not have dispensed the Commission from seeking the agreement of the Member States¹⁰¹. Because this consent was lacking, the Court therefore annulled the 1995 Commission decision applying the Community framework on State Aid to the motor vehicle industry throughout 1995.

Analysis of the 1997 case of Spain v Commission

Again the Advocate General Opinion and the judgement of the Court differ greatly from each other, as they did in the previous Spanish challenge to the framework. Here, however, it is the Court which was prepared to take the harder line on the obligations of the process.

In this case the issue is still one of obtaining Member State consent. For the Commission to hold a multilateral meeting with the Member States, to put to those Member States a proposal for a new framework, or the renewal of an expired framework, cannot *by itself* fulfil the requirements of Article 93(1). For the framework to be a valid measure it needs Member State agreement.

The European Court of Justice in this case answered Advocate General Lenz’s speculation in his opinion in the previous challenge. Mere consultation had not here been enough. The Member States must agree, and the Commission cannot compel acceptance of a framework under Article 93(1).

Yet, it would also appear from the judgement, that mere consultation *would* have been acceptable were the *renewal of an existing framework* to have been concerned. It is difficult to reconcile the omission of this requirement where a framework is merely extended, without modification, with the requirement for

⁹⁹ paragraph 22

¹⁰⁰ paragraph 30

¹⁰¹ paragraph 34

the “regular, periodic cooperation” of the Commission with the Member States deemed necessary by the court in the previous case.

It is difficult to determine the logic in the Court, in the previous case annulling the unilateral extension by the Commission of the framework for an indefinite period of time, but in the present case suggesting that the Commission may lawfully extend an existing framework with mere consultation and without the consent of the Member States. It is difficult to determine the distinction between the Commission regularly *renewing an unaltered framework*, without the consent of the Member States, which the court seems to suggest in this later case would have been lawful, and the Commission *changing the framework to be one of indefinite duration*, which was condemned in the earlier Spanish challenge.

The facts of this case demonstrate the problems with determining the extent to which the Member States have consented to a framework. This was an issue upon which the Commission and Spain disagreed- it is difficult to understand how Spain can justifiably argue that eight countries disagreed with the framework and four more reserved their opinion, and yet the Commission can maintain that all Member States except Spain were in agreement. This difference in assessing agreement, where the Member State agreement of measures based on Article 93(1) is deemed necessary, gives cause for concern. If the parties present at these meetings can disagree to this extent, this highlights the problems for third parties who can be in no position to determine these facts, and therefore the legality of the measure in question.

The obligations imposed by the Court on Commission sectoral measures

The obligations, imposed by the Court in the first framework challenge, on all Article 93(1) measures was “regular, periodic, cooperation” to “keep under review” Member State aid under that Article. It was not possible for the Commission to alter the Community framework on State Aid to the motor vehicle industry to an indefinite period of validity. The judgement in the second challenge added that Member State agreement was necessary for the Article 93(1) measure to be valid. What implications does this have for other sectoral frameworks?

Does the measure based on Article 93(1) need to have a stated period of application? Do measures which claim to remain in force contravene the need for “regular, periodic cooperation”?

There is no stated period of validity or review mechanism for Guidelines for State Aid in connection with investments in the processing and marketing of agricultural goods¹⁰² and the communication on loans in agriculture¹⁰³. Both these measures are stated to be based on Article 93(1). They were stated to come into effect after the first Spanish challenge, yet do not incorporate the obligation of regular, periodic cooperation which that judgement held to be determinative to measures based on Article 93(1).

In the framework for certain steel sectors not covered by the ECSC Treaty, the measures were said to enter into force on the 1st January 1989. Again no period of validity is set. More worryingly, from the viewpoint of standards of legal norms, notably legal certainty, the Commission¹⁰⁴ “reserves the right to change” the list of subsectors where reports are mandatory under this framework. No mechanism for Member State agreement to these changes is laid down in the framework, which as a whole does not request Member State consent.

The Guidelines for the examination of State aid to Fisheries and Aquaculture has no starting or expiry date. No Member State agreement is called for in this guideline, and the review mechanism enshrined in this measure is that

“The Commission will continue to amplify or modify these guidelines as and when experience is gained in the regular examination of inventories of State aid and in the light of the gradual development of the common fisheries policy.”¹⁰⁵

Although these guidelines are specifically based on Article 93(1), the obligations of cooperation between the Commission and the Member States is absent. It is possible that Commission practice contradicts the published record, but the Advocate General Lenz insisted on relying on the published

¹⁰² Guidelines for State Aid in connection with investments in the processing and marketing of agricultural products (96/C 29/03) 2. 2. 96.

¹⁰³ Commission on State aids: subsidised short-term loans in agriculture (*crédits de gestion*) 96/C 44/02, OJ C 44/ 16. 2. 96., p. 2.

¹⁰⁴ Framework for certain steel sectors not covered by the ECSC Treaty OJ C 320, 13. 12. 1988, p. 3.

¹⁰⁵ point 1.7

documents, and discounted any possibility of recognising agreements between the Commission and Member States in meetings “behind closed doors” which contradicted these.

After the Spanish challenges to the Community framework on State Aid to the motor vehicle industry, imposing the obligation of regular, periodic review, could it be said of these measures that they demonstrate a grave, obvious irregularity recognisable from reading them, within the meaning of *Conorzio v Commission*¹⁰⁶?

According to the criteria for validity set out in the Spanish challenges to the Community framework for aid to the motor vehicle industry, the sectoral aid guidelines which most obviously demonstrate a complete absence of the “obligation of regular periodic cooperation” are the textile guidelines.¹⁰⁷ These were contained in letters to Member States, unpublished until late 1989, setting out the Commission’s policy to that sector. The first letter, in 1977, far from claiming to constitute rules, or to have any binding legal effect, explicitly states that it has been sent to “guide the Member State in formulating” their aid plans, and

The notification of these criteria is obviously without prejudice to the provisions of the EEC Treaty, in particular those of Article 93(3). In no case does it supersede the positions which the Commission may adopt with regard to aid in virtue of the powers conferred on it by the EEC Treaty.”

It does not request Member State consent, have any period of validity, or have any mechanism for review, other than to say that it may “be specified in more detail, at the proper time and as may be required.” A further letter was sent to Member States in 1977¹⁰⁸, but there have been no more published communications in this sector. Yet a Case decided in December 1996¹⁰⁹, challenging Commission authorisation to regional aid to a textile manufacturer in Northern Ireland, classified these guidelines as “rules”. It said that

¹⁰⁶ Case 15/85 *Conorzio v Commission* [1987] ECR 1036, paragraph 10, cited by Advocate General Lenz in Case C-135/93 *Spain v Commission*

¹⁰⁷ “Competition Law in the European Communities Vol. II A Rules Applicable to State aid”, page 233, cited at footnote 31

¹⁰⁸ *ibid*, at page 237

¹⁰⁹ Case T-380/94 *Association Internationale des Utilisateurs de Fils de Filaments Artificiels et Synthétiques et de Soie Naturelle (AIUFFASS) and Apparel, Knitting and Textiles Alliance (AKT) v Commission* 12 December 1996

“[S]ince the undertaking for which the proposed aid is intended is part of the textile sector, the Court must also check that the defendant complied with the guidelines which the defendant itself laid down in the 1971 communication and in the 1977 letter in so far as they are not contrary to the Treaty.”¹¹⁰

As the textile guidelines “debar” aid which produces a significant rise in overcapacity, these guidelines “put the Commission under a duty to prove in a well substantiated manner that the project at issue is not liable to increase excess capacity.”¹¹¹ The court cited Deufil as authority that the textile and clothing guidelines constituted rules. There are two inconsistencies here. The first is that Deufil stated that the aid code in question there constituted guidelines which had no legal effect. The second is that the synthetic fibre code which was at issue there is a very different document to the textile and clothing guidelines at issue in the recent case.

The Spanish challenges to the motor vehicle industry framework lay down certain conditions of validity of aid codes. These conditions are clearly not fulfilled by the textile guidelines. Unlike the synthetic fibre code which has been regularly updated, the textile guidelines were formulated as two unpublished letters to Member States. The textile guidelines were formulated in the 1970’s, a different era in State Aid control, an era characterised by negotiation, and closer to international relations than the relative transparency now.

A surprising feature of aid codes is that they have no common format, and have not incorporated the lessons learnt for previous court cases into subsequent guidelines. Even amongst sectoral aid disciplines published since the first Spanish challenge in 1995, the lessons from that judgement and the clarification of the obligation of regular, periodic cooperation has not been incorporated into these most recent frameworks. More fundamentally, the frameworks are still being published without consideration for legal certainty.

¹¹⁰ paragraph 57, citing Case 310/85 Deufil v Commission [1987] ECR 901, paragraph 22

¹¹¹ paragraph 103

How can undertakings, their legal advisors, and national judges¹¹² determine legal rights and obligations when frameworks are published after they come into effect? These actors have no way of determining whether any given Member State has consented to the framework and therefore may be bound by its terms. Where the Commission opens an Article 93(2) procedure, and produces a negative decision addressed to that Member State to apply the framework to that State, these are published very late, decreasing legal certainty. Finally the Court itself has failed to lay down strict criteria for the legislative criteria. When is a law not a law? When is it a sectoral aid code?

The Commission is planning to introduce a new horizontal framework on investment aid which may eventually replace many if not all sectoral codes¹¹³. If this were to be annulled by the European Court of Justice the consequences for the Commission's State Aid control would be drastic. If the problems which have plagued the Community framework for aid to the motor vehicle industry's validity is to be avoided there must be some consensus as to the procedure necessary to create a legally valid code. Either sectoral aid codes should be based on an Article 94 regulation, or the Commission must develop a "legal consciousness" and the Court must formulate strict criteria, applied by the Commission to every sectoral aid code, which will clarify their legal status.

¹¹² National judges may be called upon to determine the validity of aid frameworks indirectly because Article 93(3) has been held to have direct effect. Case 120/73 *Lorenz v Germany* [1973] ECR 1471, see also Notice on cooperation between the national courts and the Commission in the State Aid field 95/C 312/07

¹¹³ see synthetic fibre code 96/C 94/07