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Appropriate Measures to Remedy the Consequences of Unlawful State Aid

An analysis of the ECJ Judgment of 12 February 2008 in
Case C-199/06 (*CELF/SIDE*)

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Abstract

This analysis deals with the judgment of 12 February 2008 of the European Court of Justice in the CELF/SIDE case and its effects on the enforcement of European State aid law. The Court answered two questions referred to it by the French Conseil d'État in an ongoing dispute about French State aid to book export centre CELF. According to the Court, Community law requires a national court to order appropriate measures to remedy the consequences of unlawful State aid. However, Community law does not impose an obligation of full recovery of unlawful aid in the event that the Commission subsequently declares the aid in question compatible with the common market. Are the measures chosen by the Court really appropriate to remedy the consequences of unlawful State aid? This analysis shows that the Court's judgment could have negative effects on the effectiveness of the enforcement of European State aid law.

I Introduction

This analysis deals with the judgment of 12 February 2008 of the European Court of Justice (hereinafter called the Court) in the *CELF/SIDE* case and its effects on the enforcement of European State aid law.¹ First, a short overview of the facts, the proceedings and the questions referred for a preliminary ruling in the *CELF/SIDE* case will be given (paragraph 2). Secondly, the relevant legal context and previous case law on unlawful State aid will be presented (paragraph 3). Then the Court's reasoning with regard to the first preliminary question in the *CELF/SIDE* case will be analysed in depth (paragraph 4). In the subsequent paragraph the effects of the Court's judgment on the effectiveness of both public and private measures meant to enforce European State aid law (paragraph 5) will be discussed.² This case analysis will be concluded with some final remarks (paragraph 6).

¹ Case C-199/06 *CELF/SIDE* [2008] ECR I-469 (hereinafter called *CELF/SIDE* judgment).

² See also Th. Jaeger, 'The CELF-Judgment: A Precarious Conception of the Standstill Obligation', *EStAL* 2008, p. 279-289; P.J. Slot, Case C-166/06, *Centre d'exportation du livre Français (CELF) v. Société internationale de diffusion et d'édition (SIDE)*, judgment of the

2 Facts, Proceedings and Preliminary Questions

The *Centre d'exportation du livre français* (hereinafter called CELF), being a book export centre, combines small book orders to be sent abroad. It enables foreign clients to deal with a single intermediary rather than a host of suppliers. CELF satisfies all the orders of operators, without regard to the size of the orders, even if they are unprofitable. In general, the object of this cooperative society in public limited company form is to perform any operations aimed particularly at increasing the promotion of French culture throughout the world. CELF uses several kinds of media for that purpose. On the website of CELF one can read:

'Le CELF exporte 700 000 volumes par an vers 6000 libraires du monde entier. Le CELF, avec son équipe de 40 personnes, prend en charge le suivi des commandes des libraires et assume entièrement le risque commercial lié à son activité.'³

It is not mentioned on the website of CELF that from 1980 to 2002, CELF received operating subsidies from the French State to offset the extra costs of handling small orders placed by booksellers established abroad. In the course of 1992, the *Société internationale de diffusion et d'édition* (hereinafter called SIDE), a competitor of CELF, complained under the European State aid rules to the European Commission about these subsidies. It would be the beginning of a long-lasting legal dispute.

The Commission concluded that the subsidies granted to CELF were to be considered State aid within the meaning of Article 87(1) EC. It confirmed that the aid had been implemented in breach of Article 88(3) EC. However, the Commission decided that this aid could be declared compatible with the common market on the basis of Article 87(3)(d) EC, given the special nature of competition in the book trade and the cultural purpose of the aid schemes in question. SIDE brought an action for annulment of the decision of the Commission before the Court of First Instance of the EC. In 1995 the Court of First Instance partly annulled the decision.⁴ The Commission adopted a new decision in 1998, again declaring the aid compatible. SIDE brought another action for annulment which resulted in a second judgment of the Court of First Instance. Once more, the Court of First Instance partly annulled the decision of the Commission.⁵ A few years later, the Commission adopted a third positive decision, which was followed by another action for annulment by SIDE. On 15 April 2008 the Court of First Instance, for the

Court (Grand Chamber) of 12 February 2008, [2008] ECR I-469, *CMLRev.* 2009, p. 623-639.

³ See <http://www.celf.fr/atouts.htm>.

⁴ Case T-49/93 *SIDE/Commission* [1995] ECR II-2501.

⁵ Case T-155/98 *SIDE/Commission* [2002] ECR II-1179.

third time in row, partly annulled the Commission's positive decision.⁶ At the moment of writing, the Commission will have to adopt a new decision.

Following the Court of First Instance's first judgment, SIDE made a request to the Minister for Culture and Communication that payment of the aid granted to CELF be stopped and that the aid already paid be repaid. That request was rejected in 1996. SIDE brought an action for annulment of that decision before the *Tribunal administratif de Paris*. This action was successful. In 2001, five years later, the administrative court annulled the contested decision. *The Cour administrative d'appel de Paris* upheld the judgment appealed against it and ordered the French State to recover the sums paid to CELF. Although the payment of aid granted to CELF was stopped in 2002, the sums already granted were not recovered. On the contrary, CELF and the Minister for Culture and Communication appealed to the *Conseil d'État* to set aside the judgments of the lower judges. Both parties argued that the fact that the Commission had recognised the aid's compatibility with the common market would preclude the obligation to repay the unlawfully granted aid. The *Conseil d'État* decided to stay proceedings and to refer two questions to the Court of Justice for a preliminary ruling:

1. 'Is it permissible under Article 88 [EC] for a State which has granted to an undertaking aid which is unlawful, and which the courts of that State have found to be unlawful on the ground that it had not previously been notified to the ... Commission as required under Article 88(3) EC, not to recover that aid from the economic operator which received it on the ground that, after receiving a complaint from a third party, the Commission declared that aid to be compatible with the rules of the common market, thus effectively exercising its exclusive right to determine such compatibility?
2. 'If that obligation to repay the aid is confirmed, must the periods during which the aid in question was declared by the ... Commission to be compatible with the rules of the common market, before those decisions were annulled by the Court of First Instance of the European Communities, be taken into account for the purpose of calculating the sums to be repaid?'

Before dealing with the Court's answer to the first question, it should be noted that the legal conditions have been changed since the Court's judgment in Case C-199/06. After the annulment of the third Commission decision by the Court of First Instance in 2008, the aid measures in question granted to CELF can no longer be considered to be compatible with the common market. The practical relevance of the Court's preliminary ruling of 12 February 2008, therefore, may have become rather relative, depending on the outcome of the Commission's deliberations on the aid given in the near future. Given this uncertain legal situation, the *Conseil d'État*, has recently referred new preliminary questions to the Court:

⁶ Case T-348/04 *SIDE/Commission*, n.y.r.

1. 'May the national court stay proceedings concerning the obligation to recover State aid until the Commission of the European Communities has ruled, by way of a final decision, on the compatibility of the aid with the rules of the common market, where a first decision of the Commission declaring that aid to be compatible has been annulled by the Community judicature?

2. Where the Commission has on three occasions declared the aid to be compatible with the common market, before those decisions were annulled by the Court of First Instance of the European Communities, is such a situation capable of being an exceptional circumstance which may lead the national court to limit the obligation to recover the aid?'

At the moment of writing, this new Case C-1/09 is still pending. This case analysis will, therefore, be limited to the consequences of the Court's judgment of 12 February 2008 in Case C-199/06. The outcome of Case C-1/09 may be the subject of another writing project in the near future.

3 Legal Context and Previous Case Law on Unlawful State Aid

3.1 Procedural Obligations For Member States Based on Article 88(3) EC

Article 88(3) EC imposes a notification obligation and a so-called standstill obligation on Member States when they intend to grant new aid or alter existing aid.⁷ As the Court held in the *Adria-Wien Pipeline and Wieterdorfer & Peggauer Zementwerke* case, these obligations facilitate the Commission's task and prevent *faits accomplis* for that institution.⁸ The notification obligation, laid down in the first sentence of Article 88(3) EC, means that Member States have to inform the Commission of any plans to grant or alter State aid within the meaning of Article 87(1) EC. The standstill-obligation is designed to ensure that aid measures cannot become operational before the Commission has had a reasonable period in which to study the proposed measures in detail and, if necessary, to initiate the procedure provided for in Article 88(2) EC.⁹ According to the Court in the *CELF/SIDE* judgment, Article 88(3) EC thus institutes prior control of plans to grant new aid.¹⁰ Aid granted after the Commission's approval will be considered to be

⁷ See also the Articles 2 and 3 of Council Regulation (EC) No 659/1999, *OJ* [1999], L 83/1.

⁸ Case C-143/99 *Adria-Wien Pipeline and Wieterdorfer & Peggauer Zementwerke* [2001] ECR I-8365, para. 23.

⁹ *CELF/SIDE* judgment, para. 36. The Court refers to Case C-301/87 *France v. Commission (Boussac)* [1990] ECR I-307, para. 17.

¹⁰ *CELF/SIDE* judgment, para. 37. The Court refers to Case 120/73 *Lorenz* [1973] ECR I471, para. 2.

lawful, as long as Member States fulfil the procedural obligations imposed by Article 88(3) EC.

3.2 Unlawful State Aid and the Consequences of Unlawfulness

State aid granted in breach of the procedural obligations of Article 88(3) EC will be regarded as unlawful.¹¹ In that case national courts must, in accordance with their national law, draw the necessary consequences of the unlawfulness, in order to protect the rights that private parties (e.g. competitors of the aid recipients) can derive from Community law.¹² However, provisions of national law can only be applied in accordance with the Community law principles of effectiveness and equivalence. Measures taken in disregard of the prohibition laid down by Article 88(3) EC will be invalid.¹³ The Court has repeatedly held (also in the *CELF/SIDE* judgment), that the national court must in principle allow an application for repayment of aid paid in breach of Article 88(3).¹⁴ The words ‘in principle’ had to be understood, at least until the *CELF/SIDE* judgment, to mean that there may be exceptional circumstances in which it would be inappropriate to order the repayment of the aid.¹⁵ No clear positive indications on exceptional circumstances could be derived yet from the case law of the Court. Given the severe approach of the Court towards recipients of unlawful State aid, however, exceptional circumstances may be supposed only when a diligent businessman could have gotten legitimate expectations on the basis of acts or statements of the Commission. On the basis of the last sentence of Article 88(3) EC, interested parties that suffer a loss from the unlawfulness of State aid could also claim for compensation for damage from the aid-granting authorities. Such a claim may be combined with a request to the national court to order recovery of the unlawful State aid.

According to the Court, these consequences of breach of Article 88(3) EC are necessary, since any other interpretation would have the effect of encouraging the Member States to disregard the prohibition on implementa-

¹¹ See Article 1(f) of Council Regulation (EC) No 659/1999.

¹² Case C-39/94 *SFEI* [1996] ECR I-3547, para. 40; Case C-368/04 *Transalpine Ölleitung* [2006] ECR I-9957, para. 47. See the Commission notice on the enforcement of State aid law by national courts, adopted in principle on 25 February 2009 (http://ec.europa.eu/competition/state_aid/legislation/rules.html).

¹³ Case C-354/90 *FNCE* [1991] ECR I-5505, para. 12. See also See Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, para. 52; Joined Cases C-34/01-C-38/01 *Enirisorce* [2003] ECR I-14243, para. 46; Case C-174/02 *Streekgewest Westelijk Noord-Brabant* [2005] ECR I-85, para. 16.

¹⁴ *CELF/SIDE* judgment, para. 39. See also Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, para. 53 and 54.

¹⁵ See Case C-39/94 *SFEI* [1996] ECR I-3547, para. 70.

tion of planned aid.¹⁶ For that reason, actions of interested parties against alleged unlawful State aid can be considered as a possible contribution to the effective enforcement of EC State aid law.¹⁷ In the *Banks* case the Court made clear that with regard to claims of private parties for recovery of unlawful State aid before national courts the same rationale applies as to recovery decisions of the Commission. Namely, that withdrawal of an unlawful aid measure by way of recovery is the logical consequence of a finding that it is unlawful. The Court held:

‘In that regard, restoring the situation prior to the payment of aid which was unlawful or incompatible with the common market is a necessary requirement for preserving the effectiveness of the provisions of the Treaties concerning State aid and the national court must examine, in the light of the circumstances, whether it is possible to uphold the individuals’ claims so as to help restore that previous situation.’¹⁸

3.3 Recovery of Unlawfully Implemented Aid Declared Compatible with the Common Market?

In 1990, long before the *CELFI/SIDE* case came before the Court of Justice, the French *Conseil d’État* had already referred a question to the Court about the possible effect, on the validity of measures giving effect to aid, of a final decision by the Commission declaring the aid compatible with the common market.¹⁹ In its preliminary ruling in the *FNCE* case the Court held:

‘It must be stated in this regard that the Commission’s final decision does not have the effect of regularizing ex post facto the implementing measures which were invalid because they had been taken in breach of the prohibition laid down by the last sentence of Article 93(3) of the Treaty [now 88(3) EC], since otherwise the direct effect of that prohibition would be impaired and the interests of individuals, which, as stated above, are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance by the Member State concerned of the last sentence of Article 93(3) [now 88(3)] and would deprive that provision of its effectiveness.’²⁰

¹⁶ Case C-39/94 *SFEI* [1996] ECR I-3547, para. 45.

¹⁷ See also A. Ward, *Judicial Review and the Rights of Private Parties in EU-Law*, Oxford: Oxford University Press 2007, p. 160.

¹⁸ Case C-390/98 *Banks* [2001] ECR I-6117, para. 74 and 75.

¹⁹ Case C-354/90 *FNCE* [1991] ECR I-5505, para. 15.

²⁰ *Ibid.* para. 16.

Advocate General Jacobs was of the opinion that a national court should, in principle, even ensure the recovery of all aid paid prematurely in the given circumstances. The Advocate General pointed out that the way for Member States to keep inconvenience and delay as a result of such recovery to a minimum is for them to refrain from giving effect to plans to grant or alter aid before they have been cleared by the Commission.²¹

The Court did not deal with the recovery aspect in the *FNCE* case. However, it came back to it a few years later in the *Transalpine Ölleitung* case. The Court held:

‘Depending on what is possible under national law and the remedies available thereunder, the national court may thus, according to the case, be called upon to order recovery of unlawful aid from its recipients, even if that aid has subsequently been declared compatible with the common market by the Commission. In the same way, a national court may be required to rule on an application for compensation for the damage caused by reason of the unlawful nature of the aid.’²²

4 The *CELF/SIDE* Judgment in Case C-199/06

4.1 No Community Law Obligation to Order the Recovery of Unlawful but Compatible Aid

In the *CELF/SIDE* judgment the Court first seems to confirm its case law from the above mentioned cases *FNCE*, *SFEI* and *Transalpine Ölleitung*.²³ However, the opposite is true. Contrary to the opinion of Advocate General Mazák, the Court breaks with its previous line of reasoning.²⁴ To the first preliminary question referred by the *Conseil d’État* the Court replied that the national court is not bound to order the recovery of aid implemented contrary to the last sentence of Article 88(3) EC, where the Commission has adopted a final decision declaring that aid be compatible

²¹ Opinion of Advocate General Jacobs in Case C-354/90 *FNCE* [1991] ECR I-5505, para. 30-32.

²² Case C-368/04 *Transalpine Ölleitung* [2006] ECR I-9957, para. 56.

²³ In three separate paragraphs the Court repeats that the national courts must ensure all appropriate conclusions from an infringement of the last sentence of Article 88(3) EC (para. 41), that the Commission’s final decision does not have the effect of regularising, retrospectively, implementing measures which were invalid because they had been taken in disregard of the that prohibition (para. 40), and that the national courts must in principle allow an application for repayment of aid paid in breach of Article 88(3) EC (para. 39).

²⁴ Opinion of Advocate General Mazák of 24 May 2007 in Case C-199/06 *CELF/SIDE* [2008] ECR I-469 (hereinafter called *CELF/SIDE* opinion), para. 33.

with the common market within the meaning of Article 87 EC.²⁵ It appears from the text of the judgment that the grounds for this change in the Court's reasoning are not related to the exceptional circumstances, as they were mentioned before.²⁶ Nor can the change in the Court's reasoning be explained by the misplaced reference in the text of the judgment to Article 14 of Council Regulation (EC) No 659/1999. This provision refers to a negative decision adopted by the Commission in a case of unlawful aid, which is precisely what was lacking in the *CELF/SIDE* case.²⁷ The real reasons for the Court not to require a national court to order recovery in the given circumstances will have to be derived from subsequent paragraphs in the judgment which read:

'The last sentence of Article 88(3) EC is based on the preservative purpose of ensuring that an incompatible aid will never be implemented. That purpose is achieved first, provisionally, by means of the prohibition which it lays down, and, later, definitively, by means of the Commission's final decision, which, if negative, precludes for the future the implementation of the notified aid plan.²⁸ The intention of the prohibition thus effected is therefore that compatible aid may alone be implemented. In order to achieve that purpose, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission's final decision.²⁹ When the Commission adopts a positive decision, it is then apparent that the purpose referred to in paragraphs 47 and 48 of the present judgment has not been frustrated by the premature payment of the aid.³⁰

I doubt whether this reasoning makes sufficiently clear why the Court finds that, contrary to previous case law, no recovery is required in case of unlawful but compatible aid. The considerations of the Court cited above only emphasize the preventive character of the standstill obligation laid down in the last sentence of Article 88(3) EC. As the Court made clear, the purpose of this prohibition is to guarantee that only compatible aid will be implemented. According to the Court, this purpose has not been frustrated by the premature payment of aid when the Commission adopts a positive decision.³¹ In my opinion, a positive decision of the Commission does not take away from the fact that there has been a serious breach of Community law in such a situation, namely a breach of the procedural obligations provided for

²⁵ *CELF/SIDE* judgment, para. 46 and 55. See further P.J. Slot 2009, p. 630 et seq. on the question when there is a final decision of the Commission.

²⁶ *CELF/SIDE* judgment, para. 46.

²⁷ *CELF/SIDE* judgment, para. 44.

²⁸ *CELF/SIDE* judgment, para. 47.

²⁹ *CELF/SIDE* judgment, para. 48.

³⁰ *CELF/SIDE* judgment, para. 49.

³¹ *CELF/SIDE* judgment, para. 49.

in Article 88(3) EC. Exactly for this reason, the Court seems to have ruled earlier in its judgment that a final decision of the Commission does not have the effect of regularising, retrospectively, implementing measures which were invalid because they had been taken in disregard of the prohibition laid down in Article 88(3) EC. According to the Court, ‘any other interpretation ‘would have the effect of according a favourable outcome to the non-observance, by the Member State concerned, of the last sentence of Article 88(3) EC and would deprive it of its effectiveness’.³² Given the importance attached to a procedural breach of Article 88(3) EC earlier in the judgment, it is remarkable that the Court does not come back to it where it departs from its previous case law. It now seems that the Court tries to gloss over the procedural breach of Community law in case of unlawful but compatible State aid as far as recovery is concerned. It is well-known that several parties (France, Denmark, Germany and the Commission) have called upon the Court to change (or at least differentiate) its case law in this respect.³³ Since the Court has answered this call, one wishes that the Court would have produced more convincing arguments. The Court did not give these arguments in the *Wienstrom* judgment either, although it confirmed the line of reasoning and the outcome of the *CELF/SIDE* judgment in that case.³⁴ Having said this, the question raised is: which measures, in stead of recovery, would the Court find appropriate in the case of unlawful but compatible aid?

4.2 Appropriate Measures in Case of Unlawful but Compatible Aid

Community law may not require the national court to order the recovery of unlawful but compatible aid, nevertheless it requires the national court ‘to order the measures appropriate effectively to remedy the consequences of the unlawfulness’.³⁵ In the *CELF/SIDE* judgment the Court held:

‘In a situation such as that in the main proceedings, the national court must therefore, applying Community law, order the aid recipient to pay interest in respect of the period of unlawfulness. Within the framework of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State’s right to reimplement it, subsequently. It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid.’³⁶

³² *CELF/SIDE* judgment, para. 40.

³³ *CELF/SIDE* opinion, para. 28 and 29.

³⁴ Case C-384/07 *Wienstrom/Bundesminister*, n.y.r., para. 28-30.

³⁵ *CELF/SIDE* judgment, para. 46.

³⁶ *CELF/SIDE* judgment, para. 52 and 53.

Community law obligation to order the aid recipient to pay interest

The Court's ruling on the interest order is based on a comparative assessment of the positions of the aid recipients and other operators in case of unlawful State aid. The Court held:

'In that case, from the point of view of operators other than the recipient of such aid, its unlawfulness will, first, expose them to the risk, in the result unrealised, of the implementation of incompatible aid, and, second, make them suffer, depending on the circumstances earlier than they would have had to, in competition terms, the effects of compatible aid. From the aid recipient's point of view, the undue advantage will have consisted, first, in the non-payment of the interest which it would have paid on the amount in question of the compatible aid, had it had to borrow that amount on the market pending the Commission's decision, and, second, in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts.'³⁷

It is unclear to me if, and how, the value of 'the risk, in the result unrealised, of the implementation of incompatible aid' can be expressed in monetary terms. Taking into account the other aspects mentioned by the Court, it is beyond dispute that the unlawfulness of State aid alone can cause an imbalance between the competing market operators. I doubt, however, whether this unbalance will be fully compensated by imposing the obligation to pay interest on the recipient. As the Court held in the paragraph cited above, the recipient of unlawful State aid not only obtains an advantage consisting of the non-payment of the interest, his position in the market compared to other operators could improve during the period of unlawfulness as well. One can think of brand recognition reached through advertisements financed with unlawfully obtained State aid. In my opinion, the Court could have paid more attention to this aspect in determining the appropriate measures in cases of unlawful but compatible State aid. I assume, recovery with an obligation to pay interest might have been more appropriate to remedy the advantages gained by the recipients in these circumstances.

Recovery of unlawful aid within the framework of domestic law

As was noted above, we know from consistent case law that national courts must, in accordance with their national law and the Community law principles of effectiveness and equivalence, draw all the necessary consequences of a breach of Article 88(3) EC, in order to protect the rights

³⁷ *CELF/SIDE* judgment, para. 51. The Court did not rule on the applicable interest rate in these circumstances. It will probably be the same rate applicable to the implementation of recovery decisions adopted by the Commission. See Article 14(2) of Council Regulation (EC) No 659/1999 and Chapter 5 of Commission Regulation (EC) No 794/2004, OJ [2004] L 140/I.

that private parties (e.g. competitors of the aid recipients) can derive from Community law.³⁸ A national court that is obliged *under its domestic law* to order recovery in case of unlawful State aid, therefore, will have to do so even if the aid has been declared compatible, as the Court explicitly confirms in the *CELFI/SIDE* judgment. Given the Court's previous case law, this may seem to be a logical way of reasoning. However, the explicit reference to the possibility of recovery following from national law is somewhat strange after the Court clearly denied such an obligation under Community law originally. Does the Court want to suggest that recovery may be an appropriate measure though exclusively in cases of unlawful but compatible aid? Probably not, since it also holds that the Member State after such a recovery order under domestic law still have the right to re-implement the aid, subsequently. I suppose, the Court wants to stress that the latter right follows from Community law, since 'compatible' means that the granting of aid is allowed under the European State aid rules. However, what is the sense of stressing the possibility of recovery under domestic law, if, under Community law, the Member State concerned can immediately repay the aid that was to be recovered?

Claims for damages

More understandable is the Court's consideration that the national court may also be required to uphold claims for compensation for damage caused by reason of unlawful implementation of State aid. One could easily get the impression that the Court's reference to the *SFEI* case and the *Transalpine Ölleitung* case in this respect would mean that claims for compensation for damage could only be based on national law. In the *SFEI* case the Court held that Community law does not provide a sufficient basis for the recipient to incur liability where he has failed to verify that the aid received was duly notified to the Commission.³⁹ However, given the general case law of the Court on State liability for breach of Community law, claims for compensation for damage against the authorities of the Member State concerned will be possible in case of unlawful but compatible aid. In procedures before national courts, interested private parties, like competitors, could therefore rely on the last sentence of Article 88(3) EC, being a directly effective provision of Community law. On that basis, recipients of unlawful aid may also claim for compensation for damage as a result of the unlawfulness of the aid given. Under Community law such actions will be allowed only if the compensation is not State aid in itself.

³⁸ Case C-39/94 *SFEI* [1996] ECR I-3547, para. 40; Case C-368/04 *Transalpine Ölleitung* [2006] ECR I-9957, para. 47.

³⁹ Case C-39/94 *SFEI* [1996] ECR I-3547, para. 74 en 75; See also Case C-368/04 *Transalpine Ölleitung* [2006] ECR I-9957, para. 56.

5 Effects of the Court's Judgment on the Enforcement of European State Aid Law

Having discussed the Court's choices and considerations in reply to the first preliminary question in the *CELF/SIDE* judgment, I will now turn to the question: what could be the results of the Court's judgment on the effectiveness of the enforcement of European State aid law?

From a substantive point of view, one could argue that the effective enforcement of State aid law primarily has to guarantee that only State aid compatible with the common market will be implemented. State aid incompatible with the common market will have to be recovered in this approach. Once State aid has been declared compatible the aid may be implemented and, therefore, no need for recovery exists. This was the chosen approach of the Commission in the *CELF/SIDE* case.⁴⁰

From a procedural point of view, one could argue that the effective enforcement of State aid law should guarantee particularly that Member States fulfil their procedural obligations in order to make the State aid control function. Breaches of the relevant provisions of Community law, in this approach, will have to be remedied, regardless of whether the aid subsequently appears to be compatible with the common market or not. As noted above, this approach was the leading one in the Court's case law on the consequences of unlawfulness of State aid over the last few years, based on the *effet utile* of the control system for State aid measures, as laid down in Article 88(3) EC. Advocate General Mazák clearly decided to continue this 'procedural' line of reasoning in his opinion in the *CELF/SIDE* case. The notification and standstill obligations established by Article 88(3) EC constitute, in his view, cornerstones of the State aid rules established by the EC Treaty.⁴¹

As explained above, the Court has chosen a mixed approach in the *CELF/SIDE* judgment. Procedural violations of State aid rules should be sanctioned by ordering interest, but no recovery is required if the aid has been declared compatible by the Commission. It is good that the Court has tried to find a practical approach towards aid that is allowed under the State aid rules, while in the same time trying to give incentives to the Member States to guarantee that they comply with the procedural rules. Several annotators, therefore, have welcomed this rather practical approach of the Court.⁴² Though, I agree with Advocate General Mazák, who argues:

'in order to preserve the carefully crafted system of review of State aids, failure to comply with the requirements of Article 88(3) EC must constitute more than a mere procedural irregularity which can be remedied *ex post facto*

⁴⁰ *CELF/SIDE* opinion, para. 29.

⁴¹ *CELF/SIDE* opinion, para. 30.

⁴² See e.g. Jaeger 2008.

by a Commission decision declaring the aid compatible with the common market.⁴³

In the Court's approach, there is a risk that the single obligation for the recipient to pay interest, will reduce the incentive of Member States to comply with the procedural rules as laid down in Article 88(3) EC. Of course, Member States should also take into account the possibility that the Commission comes to a negative decision, in which case recovery will be the logical consequence. One must realize that as a result of the *CELF/SIDE* judgment, the Member States' decision of whether or not to make a notification will be more strategically chosen than before. If that's the case, the *CELF/SIDE* judgment will also influence the scope of the Commission's obligation to review State aid prior to it being put into effect. Aid measures that are incompatible with the common market could then elude the Commission's attention. So, by losing the reins from a procedural point of view, the judgment of the Court could unintentionally undermine the effectiveness of the enforcement of the State aid rules from a mere substantive point of view.

This possible negative consequence on the effectiveness of the enforcement of State aid law could be strengthened by the expected decline in actions of private parties against alleged unlawful State aid after the *CELF/SIDE* judgment.⁴⁴ In 2006 research showed that private enforcement of EC State aid law at Member State level is still in its infancy.⁴⁵ After the *CELF/SIDE* judgment it is even more questionable 'whether in such circumstances private litigants would have any incentive to bring proceedings before national courts if the present sanction of recovery of the unlawful aid were to be replaced, for instance, by a mere obligation to pay interest for the premature payment of aid or by an action for compensation for damages suffered', as Advocate General Mazák argues.⁴⁶ The Court considers that claims for compensation of damage caused by reason of unlawful State aid should be upheld by national courts, but it is usually very difficult for a competitor to prove a causal link between the premature payment of aid and any alleged damage suffered.

The Commission does not have the power to sanction unlawful but compatible aid. Only national courts are in such a position, depending on the applicable provisions of national law. A decline of actions by private parties before national courts as a result of the *CELF/SIDE* judgment could

⁴³ *CELF/SIDE* opinion, para. 31.

⁴⁴ See further Jaeger 2008, p. 288 et seq.: 'In fact, CELF may be the next-to-final blow to private enforcement. But since the patient is sick anyway, there will probably be few noticeable changes.'

⁴⁵ Th. Jestaedt, J. Derenne & T. Ottervanger (coördinators), *Study on the enforcement of State aid law at national level*, Luxembourg: Office for Official Publications of the European Communities 2006, p. 34.

⁴⁶ *CELF/SIDE* opinion, para. 32.

therefore jeopardize the effectiveness of the enforcement of the State aid rules. To avoid such a risk, Advocate General Mazák argued, that national courts should ‘continue to be required in principle to penalise, by ordering the recovery of unlawful aid in accordance with national procedural rules, irrespective of a subsequent decision by the Commission declaring the aid compatible with the common market.’⁴⁷ I agree that this procedure will safeguard the Commission’s role in the system of State aid control laid down by Articles 87 EC and 88 EC and will ensure that it is not diminished, instead of weakening the role of the Commission, by allegedly rendering its final decision declaring an aid compatible of little or no importance in some cases.⁴⁸

6 Final Remarks

The French *Conseil d’État* asked the Court of Justice which measures are appropriate in cases of unlawful but compatible State aid. The answer given by the Court has been dealt with in this contribution. Particular attention has been paid to the reasoning of the Court and the choice to overturn earlier case law. The Court namely held that Community law does not require a national court to order recovery of unlawful but compatible aid. The reasons for this choice given by the Court are not really convincing. From a practical point of view, it has been showed that ordering interest without recovery might not be an appropriate measure in all cases to remedy the consequences of unlawfulness. A more fundamental point of criticism concerns the negative effect that the *CELF/SIDE* judgment could have on the enforcement of State aid law, both from the perspective of the Commission and from the perspective of private parties. The imposition of a more dissuasive sanction in cases of infringements of Article 88(3) EC would probably have been appropriate to guarantee the *effet utile* of the partly decentralised State aid control system in the long term.⁴⁹ The real relevance of the *CELF/SIDE* judgment for the underlying case remains unclear. As was noted in the introduction, the Commission will have to adopt a new decision after the Court of First Instance annulled the last positive decision of the Commission. If the Commission were to declare the aid to be incompatible with the common market this time, the legal circumstances of the case will become completely different. New procedures will probably follow. The French *Conseil d’État* has already referred new preliminary questions to the Court. At the moment of writing, the real outcome of the *CELF/SIDE* case, therefore, is still unknown. To be continued.

⁴⁷ *CELF/SIDE* opinion, para. 33.

⁴⁸ *CELF/SIDE* opinion, para. 33.

⁴⁹ See also the *CELF/SIDE* opinion, para. 31.