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THE APPLICATION OF THE COMMUNITY STATE AID RULES TO VOLUNTARY ORGANISATIONS

The creation of the economic conditions under which fair and equal competition can occur amongst firms established within the European Union has always been one of the prime objectives of the Treaty of Rome (as amended). The Treaty rules, protecting and promoting freedom of movement, have played an important part in this policy. However, of even greater significance are the long-standing rules on competition policy and the prohibition of State aid. Article 92(1) contains a presumption that any State aid which distorts or threatens to distort competition is incompatible with the common market insofar as it affects trade between Member States and is contrary to Community law.

The purpose of this paper is to examine the scope of the State aid rules, and to consider whether they extend beyond aid given to profit-making or seeking firms, and cover organisations with a voluntary and social character which provide a service or good which is also, or which could also be, provided by a non-charitable competitive firm.

Although the intention of the founders of the European Community may not have been to prohibit public assistance given to such voluntary organisations, it can be argued that, in certain cases, this is nevertheless the result of the State aid rules contained in the Treaty. This is not any less the case because, up until now, such support has not conventionally been seen as coming within the rules by the Commission, Member States, or by the organisations themselves. This paper will examine to what extent voluntary organisations which receive State support meet the criteria set out in Article 92(1) and consider whether there are any provisions which voluntary organisations or Member States can rely on to escape this prohibition. The impact of the State aid rules on large voluntary organisations, which have a significant turn-over and employ a sizeable staff, will be considered in particular detail.

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I. VOLUNTARY ORGANISATIONS AND THEIR ROLE IN THE ECONOMY

In the context of this article the term 'voluntary organisation' refers to non-governmental organisations (NGOs) which provide support or assistance to a (usually vulnerable or disadvantaged) sector of society.[1] Such voluntary organisations may aim to assist, for example, elderly people, young people or children, disabled people, immigrants and refugees, people disadvantaged by poverty, unemployment, homelessness, drug or alcohol abuse, or any other disadvantaged group. These organisations will usually have charitable status under national law, although this may not always be the case.[2] In any case, the legal and financial consequences of possessing charitable status will vary from Member State to Member State.

The vast majority of voluntary organisations active in the social field are small bodies relying on the work of volunteers and having a limited budget. Whilst these organisations frequently offer a valuable service, the scope of their activities is limited and in practical terms they can rarely be regarded as being in competition with commercial firms active in the same field. Even where some element of competition does exist these small organisations will almost certainly be able to rely on the 'de minimis' exception examined later in this paper (Chapter IV.C.) to justify any State aid received. However, the use of the term 'voluntary' should not be taken to mean that such organisations always and only consist of unpaid staff. A minority of social voluntary organisations are very large organisations with a turn-over of many millions of ECU and employing thousands of people. Indeed, some voluntary organisations operate an impressive chain of 'charity' shops or are 'multi-nationals', in that they are active in a number of Member States.[3] This is recognised in the Commission's Communication on Promoting the Role of Voluntary Organisations and Foundations in Europe, which states that voluntary organisations can have 'hundreds of professional staff, thousands of volunteers and a turnover of many millions of ECU's'.[4] Whilst in absolute terms such organisations only make up a small percentage of the voluntary organisations active in the social field within the European Union, they do provide a significant proportion of the services actually offered by voluntary organisations. This is confirmed by the Commission's statement: 'The contribution of the [voluntary organisation] sector to the economy is very

1. The Commission, in its Communication on Promoting the Role of Voluntary Organisations and Foundations in Europe, COM(97) 241 final (hereafter: Commission Communication), states that voluntary organisations share five features:
   a) 'some degree, however vestigial, of formal or institutional existence';
   b) non-profit making;
   c) independent, in particular of government or public authorities;
   d) managed in a 'disinterested' manner, i.e. those that manage the organisations 'ought not to do so in the hope of personal gain';
   e) 'active to some degree in the public arena' and activity aimed at contributing to the 'public good', pp.1-2.
2. It is worth noting that Declaration 23 to the Treaty on European Union, 1992, states: 'The Conference stresses the importance, in pursuing the objectives of Article 117 of the Treaty establishing the European Community, of cooperation between the latter and charitable associations and foundations as institutions responsible for welfare establishments and services'.
3. This process has in fact been aided by European Community funding for transnational initiatives. *See* Commission Communication, Sections IV and V, pp. 6-11.
4. *See supra* note 1, at 1.

considerable indeed' and by a 1994 survey carried out by Johns Hopkins University,[5] which found that the voluntary sector accounted for 3.7 per cent of the total employment in Germany, and 10 per cent of total service employment. The relevant figures for France, Italy and the United Kingdom were 4.2 per cent and 10 per cent; 2 per cent and 5 per cent; 4 per cent and 9 per cent respectively. The combined expenditure of the voluntary sector in these four countries was 127 billion ECU; whilst the figures for non-profit operating expenditures as a percentage of gross national product ranged from 2 per cent (Italy) to 4.8 per cent (United Kingdom).

The Commission's Communication, on the basis of a survey of 2,300 voluntary organisations carried out in 1993, also revealed the extent to which such organisations are both economically active and dependent on State subsidies. The survey found that European voluntary organisations derive on average 62 per cent of 'own resources' (i.e. resources generated through their own activities) from economic activities of one form or another. The same survey revealed that by far the most important source of 'external resources' for voluntary organisations in all but one Member State was reported to be subsidies from public authorities (52 per cent). Of all the resources (internal and external) subsidies were clearly the most important.

Voluntary organisations active in the social field provide a variety of services and assistance to their client groups and, at times, to the general public. In order to appreciate the possible impact of the Community State aid rules on such organisations it is necessary to briefly examine the kind of services provided by voluntary organisations active in the social field. An important task of practically all such organisations is the provision of *advice and support.* Voluntary organisations may, for example, advise on eligibility for social security benefits and provide legal assistance. They may also support individuals and families who face particular difficulties, such as the onset of disability or an eviction from their home.

A second task for some voluntary organisations is the *provision of short-term or permanent accommodation.* This service is provided to disabled people and elderly people who find it difficult to live independently, and may well be accompanied by additional support which can range from an occasional visit to check that everything is well to 24 hour care and nursing. The survey carried out by Johns Hopkins University referred to above found that non-profit organisations provided 60 per cent of residential care facilities in Germany and 40 per cent of such facilities in Italy, whilst non-profit organisations look after more than half of those in residential care in France.[6] Other organisations which provide accommodation focus on people who are homeless, including refugees and abused family members (typically women, children and young adults).

Voluntary organisations working with elderly people and disabled people may also provide *home care and medical care.* This will be offered to those living in voluntary organisation accommodation, but also takes the form of 'home-help', whereby voluntary organisation employees or volunteers visit elderly or disabled people in their own homes.

A further service offered by many voluntary organisations is *education and training.* This is probably most predominant in the pre-school and tertiary (both

5. Cited in *supra* note 1.
6. *See supra* note 1, at 3.

vocational training and higher education) sectors. Voluntary organisations may provide nursery education to support single parents, families with a disabled child or families facing other difficulties. Tertiary education and training is provided to a wide group, including unemployed people, elderly people, and those with poor literacy or numeracy skills. In addition some organisations may also provide school-age education to children with a particular form of disability, e.g. visual or hearing impairment.

Some voluntary organisations have also established *employment* programmes targeted at groups which find it difficult to enter the labour market. This is the case for organisations serving the long-term unemployed, young people, disabled people and other groups who could benefit from rehabilitation programmes, and unskilled individuals. These organisations will either seek to *place individuals in open employment*, providing the individual and the firm concerned with the necessary support, or establish special *programmes to employ individuals* themselves. Where the latter is the case the organisations in question will also often seek to *sell the services or goods produced under the programmes to the general public*. The nature of the services provided will depend, to a large degree, on the abilities of the employees, e.g. workers with a learning disability may provide catering or gardening services, whilst workers with physical disabilities could provide less physically demanding and more skilled work such as information technology services or 'cold calling' (telephoning potential clients). The goods produced under the employment programmes could be either sold through voluntary organisation shops or, perhaps more likely, in bulk to large purchasers.

Many voluntary organisations also seek to *provide services and goods to their own client group*. This applies to services such as day care, subsidised meals, social clubs, and specialised goods including books in braille or special equipment for older people who are less mobile.

Not all social voluntary organisations provide all of these services and goods. Smaller organisations may confine themselves to giving advice and assistance. However, some large organisations which operate within the European Union will cover all of the sectors referred to above.

It can be seen from this brief analysis of activities of voluntary organisations that many of the general services provided by such organisations are also provided by the commercial sector. The commercial sector provides specialised advice on various subjects through e.g. private health care practitioners or legal firms; accommodation through private landlords and hotels/hostels; home and medical care through specialised agencies; education and training at private schools and training institutes; employment placing services through private job agencies; and a wide variety of services and goods that may also be marketed by voluntary organisations. However, the nature of the services or products provided by commercial firms may not always be identical to that offered by voluntary organisations. For example, private job agencies may not want to, or be able to, place severely disabled people or the long-term unemployed in employment. In such a situation it is unlikely that voluntary organisations and commercial firms will be in competition with each other. However, in many cases it will be possible to identify commercial firms offering specialised services or products which are very similar to those provided by voluntary organisations. Here a situation of competition may exist.

II. BREACHING COMMUNITY STATE AID RULES: THE FOUR CONDITIONS CONTAINED IN ARTICLE 92(1)

To establish whether the assistance given by the State to voluntary organisations amounts to State aid the four criteria contained in Article 92(1), which must be met for any public assistance to be regarded as State aid, must be considered.

A. THE SUPPORT IS 'GRANTED BY A MEMBER STATE OR THROUGH STATE RESOURCES'

1. Financed from Public Funds

All aid which is provided from public funds can potentially fall under Article 92(1). This covers aid granted by central, regional or local government or authorities. The Court has noted that as long as the aid is provided from public funds, the actual source is irrelevant:

> 'Article 92(1) of the Treaty is directed at all aid financed from Public resources. It follows that aid granted by regional or local bodies of Member States, whatever their status and description, comes under the said provision'.[7]

This is particularly significant for voluntary organisations which often receive support from local or regional government to assist them in providing a locally based service. This not only applies to smaller organisations, which are based in a particular locality, but also to (large) national organisations, which seek to cover all, or most of a Member State.

Furthermore, it is not necessary that the body providing the aid is part of the State itself. This was confirmed by the Court in *Steinike und Weinlig*, where it was stated that Article 92(1) covers any public or private body established or appointed by the State to administer aid.[8]

The Court has also suggested that aid which is not provided from public funds, but which is administered or distributed by an organisation appointed by the State, can be regarded as State aid. This was established in *Commission* v. *France*[9] which involved a grant made to poor farmers by a public body, the French National Agricultural Credit Fund. The grant was financed through the Fund's profits,[10] and the decision to make the grants required approval from the public authorities. The Court found such grants breached Article 92(1), even though they were not provided from State funds:

> 'Aid need not necessarily be financed from State resources to be classified as State aid. ... Article 92 covers all aid granted by a Member State or through state resources and there is no necessity to draw any distinction according to whether

7. Case 248/84 *Germany* v. *Commission* [1987] ECR 4013.
8. Case 78/76 *Steinike und Weinlig* v. *Germany* [1977] ECR 575.
9. Case 290/83 *Commission* v. *France* [1985] ECR 439.
10. Which ultimately came from private sources.

> the aid is granted directly by the State or by public or private bodies established or appointed by it to administer the aid'.[11]

This principle has been subsequently applied by the Court in a number of cases.[12]

However, in a more recent case the Court has adopted a stricter interpretation of the concept of State aid, and found, in addition to the granting of a benefit to the recipient, that a charge on the public accounts was required. At issue in *Sloman Neptun*[13] was a provision of national law which allowed the owners of ships registered in Germany to employ seamen who were not ordinarily resident in Germany under the law of the seamen's home country. Since German law was not applicable to such contracts, the employers were not obliged to pay tax and social security contributions to the German State with regard to the workers in question. The salary and benefits available to such workers, who typically came from developing countries, were 20 per cent lower than those available to seamen resident in Germany. The Seaman's Council (*Seebetriebsrat*) claimed that this provision breached Article 92(1) since it allowed nationals of non-Member States to be engaged under worse conditions than those enjoyed by seamen engaged under the provisions of German law. Advocate-General Darmon, in a lengthy Opinion, argued that the requirement that the aid be financed out of State resources was not essential. He submitted that the test to establish whether the State aid rules had been breached was whether a certain industry had been put in an advantageous position by a well-defined State measure. He reached this conclusion, which was also supported by the Commission, in the light of Article 3f and the objective of undistorted competition.[14] However, the Court instead took this opportunity to give a restrictive interpretation of the concept of State aid, and held:

> '... only advantages which are granted directly or indirectly through State resources are to be regarded as State aid within the meaning of Article 92(1) of the EEC Treaty. The wording of this provision itself and the procedural rules laid down in Article 93 of the EEC Treaty show that advantages granted from

11. *See supra* note 9, para. 14.
12. The Court has therefore found that a loan provided by an organisation established by the French government, the Industrial Modernization Fund, which was financed by deposits made by the French households who received tax-free interest in return, was a State aid. Case 102/87 *France* v. *Commission* [1988] ECR 4067. *See also* Case 387/92 *Banco de Credito Industrial SA* v. *Ayuntamiento de Valencia* [1994] ECR I-877 and Case 61/79 *Denkavit* [1980] ECR 1205 (*obiter dictum*).
13. Joined Cases C-72/91 and C-73/91 *Sloman Neptun Schiffahrts AG* v. *Seebetriebsrat Bodo Ziesemeer der Sloman Neptun Schiffahrts AG* [1991] ECR I-887. *See* P.J. Slot, Case note, 31 *Common Market Law Review* (1994), 137-146 and Andrew Evans, *European Community Law of State Aid*, Clarendon Press, 1997, 40-42.
14. The Advocate-General nevertheless found the measure fell outside Article 92 EC. He held, as did the German government, that the mitigation of charges was only a consequence of the legislation which left the parties free to choose the law applicable to a contract of employment and that any loss of revenue by the Treasury could, if necessary, be justified by 'the nature or general scheme of this system', inasmuch as it is *standard practice* for taxes and social contributions to be calculated on the basis of workers pay. Where the mitigation of charges is not the result of standard practice, the measure may still qualify as aid, *see* Case 173/73 *Italy* v. *Commission* [1974] ECR 709, para. 15. [*see* para. 13 of the opinion].

> resources other than those of the State do not fall within the scope of the provisions in question.'[15]

It is difficult to see how the Court came to such a conclusion. There is nothing in the procedural rules of Article 93 to warrant such a conclusion and it is unlikely that this is what the framers of the Treaty had in mind when drafting the provision. Article 92(1) refers to 'aid granted by a Member State or through State resources'. In *Sloman Neptun* the Court did not recognise that the waiving of a sum usually charged by the State could amount to support funded from the State's own resources.[16] For this reason, amongst others, the narrow interpretation of State aid given by the Court in this case has been criticised.[17]

Thus far the Court has only re-embraced the narrow concept of State aid developed in *Sloman Neptun* once, in a case which was also decided in 1993.[18] This case, involving the exclusion of small businesses from a national system protecting workers against unfair dismissal, was also (coincidently?) a German case involving sensitive issues of labour law designed to stimulate the development of a certain industrial sector. In light of this seemingly luke-warm incorporation of the narrow interpretation of State aid within the Court's case law, its application in only two politically sensitive cases where the object of the disputed provision was to promote flagging or challenged industrial sectors, and the criticism which the judgment has provoked, it is perhaps too early to classify the new view as established case law.[19]

In light of this analysis the question arises whether funding provided from the income derived from a State sponsored lottery can be regarded as State aid. Many voluntary organisations receive significant financial support from such schemes. The legal status of organisations which administer lottery profits will vary. In many European countries, such as France, the State lottery is run by a government agency. In the United Kingdom, on the other hand, the State lottery is managed by a private (profit-making) company operating under a government licence.[20] However, even when the State does not administer the lottery directly it will have played an important role in appointing the public body or company managing the scheme and determining the rules according to which funds are distributed. The State exercises a significant degree of control over how lottery funds can be raised and distributed, and over the organisation providing for the day-to-day running of the lottery. A broad interpretation of the concept of State aid, as embraced in *Commission* v. *France* would lead one to conclude that funding provided to voluntary organisations (and other organisations which operate commercially) from this source could be regarded as State aid breaching Article 92(1). This view is reinforced by the Court's insistence that aid

15. *See supra* note 14, para. 19.
16. In that the State has declined to collect sums which it would otherwise have been entitled to.
17. *See* M. Slotboom, State Aid in Community Law: A Broad or Narrow Definition? 1995 *European Law Review*, 280.
18. Case C-189/91 *Petra Kirsammer-Hack* v. *Nurhan Sidal* [1993] ECR I-6185. *See* Margot Horspool, Case Note, 31 *Common Market Law Review* 1994, 1115-1124. *But see* the recent decision Joined Cases C-52/97, C-53/97, C-54/97 *Viscido and others* v. *Ente Poste Italiano*, judgment of 7 May 1998, not yet reported.
19. Although it should be noted that *Sloman Neptun* was decided by a full court.
20. This private company is not, however, responsible for selecting recipients of financial awards which are funded through lottery income.

granted by the State or through State resources 'in any form whatsoever' is covered by Article 92(1).[21] However, irrespective of the legal arguments suggesting that funding from a State lottery can amount to State aid, the Court may well not be willing to face the controversy and criticism provoked by such a judgment and therefore refrain from such an interpretation.

2. Mitigation of Charges Amounts to State Aid

The concept of State aid covers not only grants or subsidies given to undertakings, but also a reduction in the amount charged for a service or good which is provided by a public body.[22] The Court has confirmed this in *Belgium* v. *Commission*,[23] involving a preferential tariff system for supplies of natural gas, and in *SFEI and other* v. *La Poste and others*, concerning reduced charges for logistical and commercial support. In the latter case the Court stated:

> 'The concept of aid ... encompasses not only positive benefits, such as subsidies, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict sense of the word, are of the same character and have the same effect'.[24]

This is also of significance for voluntary organisations, which may benefit from reduced (or even no) rent where their landlord is a local government or another State body, or reduced property taxes.[25] It is worth noting in this respect that an overview of the legal and fiscal framework for voluntary organisations and foundations found that:

> 'All Member States allow some voluntary organisations – broadly speaking, those which are regarded as having purposes in the public interest – some degree of relief from direct taxation either by exempting them from taxes imposed on companies and other forms of profit making enterprise, or by imposing a lower rate than paid by companies, or by establishing a minimum income threshold below which tax is not incurred. ... Some Member States allow partial or full exemption from property taxes on real property owned or occupied by the voluntary organisation or foundation.'[26]

21. Case 323/82 *SA Intermills* v. *Commission* [1984] ECR 3809.
22. *See* the classic judgment in Case 30/59 *Steenkolenmijnen* v. *High Authority* [1961] ECR 1 in this respect.
23. Case C-56/93 *Belgium* v. *Commission* [1996] ECR I-723.
24. Case 39/94 *SFEI and other* v. *La Poste and others* [1996] ECR I-3547, para. 58.
25. In Case 387/92 *Banco de Credito Industrial SA* v. *Ayuntamiento de Valencia* [1994] ECR I-877, the Court held that a tax exemption granted to public credit institutions amounted to a State aid.
26. Communication from the Commission on Promoting the Role of Voluntary Organisations and Foundations in Europe, Annex II, II.12.

3. Economic Advantage which could not be Achieved in the Normal Course of Business

Both the Commission[27] and the Court of Justice have continually stated that for a measure to be a State aid it must provide the undertaking concerned with an economic advantage which it would not have received in the normal course of business (the market criterion test). This point was emphasised by the Court in *Belgium* v. *Commission, Re Tubemeuse*, in respect of capital holdings by the State, where it stated:

> 'In order to determine whether financial assistance granted by a Member State to an undertaking is in the nature of a State aid, the relevant condition is ... whether the undertaking could have obtained the amounts in question on the capital market'.[28]

In contrast, where the undertaking receives no benefit from the State support, there will be no question of Article 92(1) being breached.[29]

National and local government may well want to support voluntary organisations which provide services and goods to disadvantaged groups in society for a variety of non-commercial reasons. This support is at least partly based on the belief that society, in the form of government, has a duty to assist disadvantaged individuals. However it is probably also based on the belief that such support will reduce the (economic) burden on the State to care for and assist such individuals. In contrast, it could be argued that neither of these concerns is likely to motivate commercial firms to financially support voluntary organisations. Nevertheless, many large firms do make (significant) charitable donations to such organisations. This may be because such firms feel that they have a duty to return something to the community in which they are based. It could also be motivated by a desire to improve the corporate image, or even to gain certain fiscal advantages.

The existing test developed by the Court of Justice, which seeks to establish whether the relevant funds could also be raised commercially, fails to take account of the special situation of voluntary organisations described above. Only the State, because of the unique duty of care it owes to its citizens, has a 'commercial' interest in funding such organisations, whilst commercial firms, motivated by social rather than economic concerns, may choose to provide financial support.

27. European Community Competition XXVth Report 1995, para. 157; XXIVth Report on Competition Policy 1994, para. 343; XXIIIrd Report on Competition Policy 1993, para. 388.
28. Case C-142/87 *Belgium* v. *Commission, Re Tubemeuse* [1990] ECR 962, para. 26. The analysis focuses on the question whether 'the prospects of profitability [are] such as to induce private investors operating under normal market conditions to enter into the financial transactions in question [...]'.
29. *See* Case T-471/93 *Tierce Ladbroke SA* v. *Commission*, where the Court stated: 'A measure cannot be described as State aid within the meaning of Article 92(1) of the Treaty if it has not provided any advantage to the alleged recipient'.

4. Social Aim of State Aid is Irrelevant

The goal of the State aid is irrelevant. As a result, even a measure designed to achieve wholly laudable (social) objectives can still fall foul of the State aid rules.[30]

5. General Measures Permitted

However, general measures of economic, tax or social policy which are applicable to all undertakings in a Member State and which satisfy objective and non-discriminatory requirements do not constitute State aid.[31] In addition normal remuneration paid by the State to an undertaking for a good or service is also not covered by Article 92(1).[32]

It is therefore clear that certain benefits or support received from the State by voluntary organisations active in the social field will not amount to State aid. This is true for general measures which are applicable to all undertakings in a non-discriminatory manner, but which may be particularly attractive to voluntary organisations. This could be the case for schemes to promote employment amongst the long-term unemployed or other groups which are disadvantaged on the labour market. Voluntary organisations may be especially keen to employ members of their own client group under such schemes. However, where voluntary organisations benefit from restricted schemes targeted specifically at such organisations or other limited sectors, the situation is much less clear.

Secondly, the State aid rules will not be breached when a voluntary organisation provides a service or good to the State in return for normal remuneration. This could well be the case for many of the services referred to above, including accommodation (and nursing), home care, education and services/goods produced through an employment scheme. However, it should be noted that unless the voluntary organisation won such contracts as a result of a free and open competition, other provisions of Community law could well be breached.[33]

30. Consequently in Case 173/73 *Italy* v. *Commission* [1974] ECR 575 the Court found that a scheme which allowed employers in the textile industry to reduce contributions payable by employees in respect of family allowances was contrary to Article 92(1), even though it was an instrument of social policy, and even though it was not intended to give the Italian textile industry any competitive advantage.

31. On this basis the Commission has held that a job-creation scheme in Denmark which provided little or no discretion to the State authorities, and which was automatically applied to any firm and unemployed person meeting the precisely specified conditions did not fall within the State aid rules, XXIIIrd Report on Competition Policy 1993, para. 390. However, if such measures provide firms in one Member State with a competitive advantage over other firms they may be contrary to Articles 101 and 102 EC.

32. Therefore, the Commission found that the price paid by the Danish government to firms for collecting used tires and transporting them to a recycling plant did not constitute State aid, as it was normal remuneration for a public service. XXIVth Report on Competition Policy 1994, para. 345. However, such remuneration will have to comply with Directive 92/50 coordinating procedures for the award of public services contracts of 18 June 1992 [1992] OJ L209/1.

33. *See* Directive 92/50 coordinating procedures for the award of public service contracts ('the Services Directive'), [1992] O.J. L199/93 and the other public procurement directives.

In contrast, assuming the remaining conditions referred to in Article 92(1) are met, other forms of financial support provided by the State to voluntary organisations could amount to State aid and be contrary to Community law. This could apply to grants received from national, regional or local government, tax relief (e.g. the ability to claim back income tax on gifts, or the entitlement to reduced property tax), subsidized rents, and possibly even grants received from a State (or local government) lottery.

B. THE VOLUNTARY ORGANISATION RECEIVING THE AID IS AN 'UNDERTAKING'

The Court of Justice has given a very wide interpretation to the concept of an 'undertaking'. In *Steinike und Weinlig* the question arose as to whether a non-profit-making organisation which promoted the sale and export of German agricultural and food products was an 'undertaking' within the meaning of Article 92(1). All the parties to the case, including the Commission, were in no doubt that a non-profit-making organisation governed by public law should be regarded as an undertaking. This view was also shared by the Court, which stated that 'Article 92 covers all private and public undertakings and all their production'.[34]

The Court of Justice has also been called upon to interpret the concept of 'undertaking' in relation to Articles 85 and 86 of the Treaty. This case law, which reveals the importance of the activity in question being 'economic' in nature, may also throw some light on the meaning of the term 'undertaking' with regard to Article 92(1). In *Höfner and Elser*[35] the German government sought to argue that the activities of an employment agency did not fall within the scope of the Community competition rules (Arts. 85 and 86) where those activities were carried out by a public undertaking. The Court held:

> '... in the context of competition law, ... the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, ... employment procurement is an economic activity.'[36]

This reinforced earlier case law on Articles 85 and 86 which had found an economic activity to exist even when the activity of the party in question was not directly related to the production of, or trade in goods.[37] However, the notion of economic activity is not unlimited in scope; one important limitation is that the activity in question must be capable of being carried out on a profit-making basis.

Advocate-General Tesauro elaborated on this profit-making criterium when he applied the test to a social activity (insurance) in *Poucet and Pistre*.[38] The Advocate-General noted that:

34. *See supra* note 8, para. 18.
35. Case C-41/90 *Höfner and Elser* v. *Macroton* [1991] ECR I-1979.
36. *See supra* note 35, para. 21.
37. Case 127/73 *BRT SABAM and Fomoir* [1974] ECR 313, involving the management of copyrights.
38. Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637. These cases concerned a special social security scheme for self-employed persons who worked outside the agricultural sector.

> '... while the legal status of an organisation, the method by which it is financed and whether or not it is profit-making are not in themselves relevant for the purposes of determining whether an organisation is an undertaking, the organisation in question must in all cases be engaged in an economic activity which could, at least in principle, be carried on by an undertaking in order to make a profit.'[39]

Applying this test, the Advocate-General found that the activity in question was non-profit making, of a social nature, and was based on the principle of solidarity, as insurance was applied to all regardless of risk or state of health. He concluded that the activity was not economic and that the social insurance companies should not be regarded as undertakings for the purposes of Articles 85 and 86. However, he also stated that the fact that an organisation is non-profit making 'does not in itself mean that the rules of the Treaty on competition are not applicable to it'.[40] The Court followed its Advocate-General and held:

> 'Sickness funds, and the organisations involved in the management of the public social security system, fulfil an exclusively social function. That activity is based on the principle of national solidarity and is entirely non profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions'.[41]

Thus, with regard to Articles 85 and 86, and probably therefore Article 92(1), a voluntary organisation can avoid being classified as an undertaking (and therefore avoid the impact of EC competition law), if it can show that it is fulfilling a purely social function, based on the principle of national solidarity, and that it is non-profit-making. However, in practice this test is difficult to satisfy. In a second social security case, *Fédération Française des Sociétés d'assurance and others*,[42] the Court refused to apply its *Poucet and Pistre* judgment when it held that the social security scheme at issue was based on 'capitalization' rather than solidarity, and was therefore an economic activity.

It is clear that any organisation which has an economic dimension, and which carries out an activity which is, or which could also be, carried out on a profit-making basis, is to be regarded as an undertaking for the purposes of Article 92(1). This seems to be true even where a profit-making undertaking would only meet a portion of the demand presently being met by a voluntary organisation operating on a non-profit making basis with the support of State funding. The social objectives of the organisation therefore will not result in it avoiding the status of 'undertaking'.

39. *See supra* note 38, para. 8.
40. *See supra* note 38, para. 12.
41. *See supra* note 38, para. 18.
42. Case C-244/94 *Fédération Française des Sociétés d'assurance and others* [1995] ECR I-4013, para. 17 onwards.

C. THE AID 'DISTORTS OR THREATENS TO DISTORT COMPETITION'

When determining whether competition has been (or might be) distorted, the Commission (or Court) takes as a starting point the competitive position which existed prior to the granting of the aid.[43] If the aid has placed the recipient undertaking in a better position *vis-à-vis* its competitors the Commission (or Court) is likely to find that a distortion of competition has occurred or is likely to occur. This was established by the Court of Justice in *Italy* v. *Commission* when it stated:

> '... in the application of Article 92(1) the point of departure must necessarily be the competitive position existing within the common market before the adoption of the measure in issue'.[44]

Therefore, if a voluntary organisation is providing a good or service, such as specialised advice on coping with a disability, illness or unemployment, where there is no original situation of competition, there will also be no possibility of a distortion to competition occurring. Aid used to fund such activities will not fall foul of Article 92(1). However, it is unlikely that there will be many services or goods provided by voluntary organisations which are not also provided by the commercial sector in some form. In such situations it will be more difficult, or impossible to establish the absence of competition. Success may depend on a detailed economic analysis showing that the markets for voluntary organisation services and goods and for commercially provided services and goods are completely segregated. For many services and products this will not be the case, meaning that any aid received by the relevant voluntary organisation will in fact 'distort or threaten to distort competition' within the meaning of Article 92(1).

D. THE AID 'AFFECTS TRADE BETWEEN MEMBER STATES'

For a State aid to breach Article 92(1) it is not sufficient that it causes a distortion of competition; in addition the State aid must have some impact on intra-Community trade. This requirement is also found in Articles 85 and 86, and can best be regarded as a conflict of law rule which is intended to define the boundary between the areas respectively governed by Community law and national law. The deterioration in competition caused by the national measure falls under the prohibition of Community law only to the extent to which it may affect trade between Member States.[45]

The concept of effect on interstate trade is qualitative and not quantitative. In *Consten Grundig* the German government and Advocate-General Roemer maintained that the Commission had not established that the trade volume would have been larger in the absence of the agreement. The Court did not approve of such balancing holding that the true criterion is:

43. The requirement that national measures distort or threaten to distort competition is also found in Article 85. Here the Court also applies the test of examining the competitive position which existed prior to the contested agreement. Case 56/65 *Société Technique Minière* v. *Maschinenbau Ulm* [1966] ECR 235.
44. *See supra* note 30, para. 17.
45. Cases 56 and 58/64 *Consten Grundig* [1966] ECR 299.

> 'whether the agreement is capable of constituting a threat, either direct or indirect, actual or potential to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between states'[46]

and found that

> 'the fact that an agreement encourages an increase, even a large one, in the volume of trade between States is not sufficient to exclude the possibility that the agreement may affect such trade in the abovementioned manner'[47]

In *Consten Grundig* the Court was considering the inter-State trade criteria in the context of Article 85. However, it is worth noting that there are some important differences between Articles 85 and 92 in relation to this requirement. With regard to Article 85 the Court has found that the effect of the national measure must be appreciable to 'affect' inter-State trade. In essence this means that the measure must have an appreciable affect on both competition and inter-State trade.[48] There is no such cumulative requirement under Article 92, where the *de minimis* test only applies in respect of distortion of competition, and not with regard to the effect on inter-State trade.[49] Consequently, the requirement that inter-state trade be affected is in fact very easily satisfied with regard to Article 92(1). The Court has found that even a low level of State support, or the fact that the undertaking receiving the support is relatively small, can still result in a breach of Article 92(1):

> 'The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected'.[50]

Furthermore, it is not even necessary that the undertaking in question actually operates outside its home Member State. This is because the State aid may enable the recipient undertaking to strengthen its position in the domestic market to the disadvantage of its competitors, which may be based in another Member State.[51]

Assuming the other three conditions contained in Article 92(1) are met, this fourth condition will probably be easily satisfied by State support which is given to voluntary organisations. Neither the limited value of the State aid nor the small size of the recipient voluntary organisation will necessarily result in the support being found compatible with the Treaty.[52] Furthermore, the fact that most voluntary organisations will only seek to provide a service (or product) in their own Member

46. *See supra* note 45, para. 6.
47. Confirmed in Case 65/65 *LTM* v. *Maschinenbau Ulm* [1966] ECR 416.
48. *See* Case 5/69 *Völk* v. *Vervaecke* [1969] ECR 407 and the 'de minimis' notice, [1986] OJ C231/2. *See also* the Draft Commission Notice on Agreements of Minor Importance [1997] OJ C29/3.
49. *See* Case 248/84 *Germany* v. *Commission* [1987] ECR 4013, para. 18.
50. Case C-142/87 *Belgium* v. *Commission (Re Tubemeuse)* [1990] ECR I-959, para. 43.
51. For examples in the context of State aid *see* Case 102/87 *France* v. *Commission* and Case C-303/88 *Italy* v. *Commission* [1991] ECR I-1433.
52. This is subject to the Community rules which are designed to benefit Small and Medium Sized Enterprises and the *de minimis* rule (*see* Sections 6C and D below).

State (or perhaps even part of that Member State) is unlikely to result in the Commission (or Court) finding that intra-Community trade has not been affected. State aid supporting such activities may limit the opportunities available to commercial firms from other Member States which provide similar services (or products), causing them to sell less in the Member State in question. Even where such commercial (and competing) firms are not easily identifiable, the argument that intra-Community trade has been affected could still be made. This would be the case where the State aid has given voluntary organisations such a competitive advantage that other firms feel that it is pointless to try and enter the same market. Therefore, although it may initially appear that voluntary organisations which only operate in their home Member State will be able to avoid the application of Article 92(1) by arguing that intra-Community trade is not affected by any State aid given to them, the reality is that this requirement is easily satisfied and extremely difficult to disprove.

III. STATE AIDS PERMITTED BY THE TREATY

Article 92(1) does not declare all State aid to be incompatible with the common market. The article specifically reserves the possibility for other provisions of the Treaty to permit State aid ('save as otherwise provided in this Treaty'). Consequently Article 90(2), Articles 92(2) and (3), and, to a limited extent, Article 93(2), elaborate on the situations in which State aid will be regarded as compatible with the common market. By including these provisions in the Treaty the Member States have recognised that not all State aid is undesirable. In some cases undistorted competition will be unable to deliver the level or quality of goods or services required, and State intervention, in the form of financial assistance, can help to correct this situation. An examination of the specific exceptions provided for in these Articles reveals the extent to which State aid (granted to voluntary organisations) is recognised as an acceptable intervention needed to correct market failure, and in conformity with the common market.

A. ARTICLE 90(2)

In order for an undertaking to rely on Article 90(2)[53] to escape the application of the competition rules three conditions must be met:

53. Under the Amsterdam Treaty Article 90(2) has been reinforced by a new Article 7d (Article 16 Consolidated Version) which reads:

'Without prejudice to Articles 73, 86 and 87 (currently Articles 77, 90, and 92 EC), and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their mission'.

It is submitted that this will not substantively alter the scope of the protection given to services of general economic interest, nor result in an extension of the definition of such services.

i. The undertaking concerned must be 'entrusted with the operation of services of general economic interest' or have 'the character of a revenue-producing monopoly'.
ii. The competition rules must 'obstruct the performance' of the particular task assigned to the undertaking.
iii. By failing to apply the competition rules, the 'development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

In principle all undertakings are subject to the competition rules, including those undertakings which provide a service of general economic interest or which are a revenue-producing monopoly. It is only in exceptional circumstances, where the second and third conditions referred to above are also met, that an undertaking may escape the application of (some of) those rules.[54]

1. Which Undertakings can Rely on Article 90(2)?

Article 90(2) specifies that undertakings operating services of general economic interest or undertakings which operate a revenue-producing monopoly can rely on the provision.[55]

The Court has not developed a detailed definition of services of general economic interest, but has instead applied this criterium on an ad hoc basis, and produced little justification for regarding specific undertakings as providing, or not providing, such a service.

a. Act of a Public Authority Necessary

Whilst the Court accepted that private undertakings could rely on Article 90(2) in *SABAM*, it held that this would only be possible when such undertakings had been 'entrusted with the operation of services of general economic interest by an act of the public authority'.[56] Applying this criteria, the Court found that SABAM, an organisation with a *de facto* monopoly with regard to the management of copyrights in Belgium, could not rely on Article 90(2) as the State had not assigned it any tasks and it managed private interests.[57]

This criteria was subsequently also applied in *Ahmed Saeed Flugreisen*,[58] where the Court accepted that Article 90(2) could potentially apply to air carriers which were obliged by law to operate routes in the general interest which were not viable, but could not apply to a *de facto* monopoly where the State had not assigned any task to the air carrier.

54. Case C-41/90 *Höfner and Elser*, para. 24 and Case 127/73 *BRT* v. *SABAM and NV Fonior*, para. 19.
55. A revenue-producing monopoly is a monopolistic undertaking which has the power to levy taxes. The Court has not been called on to interpret or apply this section of Article 90(2), which is in any case not of relevance for voluntary organisations.
56. *See supra* note 54, para. 20.
57. *See supra* note 54, para. 23.
58. Case 66/86 *Ahmed Saeed Flugreisen and Others* v. *Zentrale zur Bekämpfung Unlauteren Wettbewerbs* [1989] ECR 803.

This suggests that only those voluntary organisations which have been assigned a specific task by a public authority can seek to rely on Article 90(2). It seems that the tasks could be assigned by either a national or local public authority, meaning that even relatively small voluntary organisations which operate in a particular locality could potentially make use of Article 90(2). However, those organisations which have not received such an endorsement from a public authority are, it seems, excluded from the scope of Article 90(2). This will be so even where they meet an important social need which, in their absence, would have to be met by a public authority.

b. Services of General Economic Interest must Exhibit Special (Distinguishing) Characteristics

In *Merci convenzionali porto di Genova SpA* v. *Siderurgica Gabrielli SpA*[59] the Court was invited to apply Article 90(2) to an undertaking which carried out dock work, including loading, unloading, transhipment, storage and general movement of goods at the port of Genova. The undertaking concerned had been granted a monopoly by statute with regard to these activities. The Court declined to apply Article 90(2) because it found, on the basis of the evidence presented, that dock work did not display any 'special characteristics' as compared with the general economic interest of other economic activities.[60]

This implies that it is not enough for an undertaking to operate an activity of 'general economic interest' – in addition the activity concerned must exhibit some special unspecified characteristics. However, the Court has not returned to this idea in its later case law, and it is therefore possible that it no longer places such an importance on undertakings which provide a service of general economic interest also possessing 'special characteristics'.

c. Public Utilities

In practice the Court has been reluctant to apply Article 90(2) to undertakings other than public utilities. The Court has therefore held that public utilities which have a monopoly under law, such as the public telecommunications network[61] or the Postal Services,[62] can be regarded as operating a service of general economic interest. The Court has also suggested that an electricity distributing company could also be regarded in this light.[63]

The Court has applied Article 90(2) on a case by case basis to date and has not sought to establish detailed guidelines with regard to this provision. This may leave the way open for the Court to develop its case law and to recognise voluntary organisations as 'services of general economic interest'. In order for this to happen

59. Case C-179/90 *Merci convenzionali porto di Genova SpA* v. *Siderurgica Gabrielli SpA* [1991] ECR I-5889.
60. *See supra* note 59, para. 27.
61. Case C-18/88 *RTT* v. *Inno* [1991] ECR I-5941.
62. Case C-320/91 *Corbeau* [1993] ECR I-2433.
63. Case C-393/92 *Municipality of Almelo and Others* v. *Energiebedrijf IJsselmij NV* [1994] ECR I-1477.

a voluntary organisation must, at the very least, show that it operates a social service (which can also be regarded as a 'general economic service') which could not be provided in the same manner and to the same client group by a commercial operator which did not benefit from a State aid.

2. When will the Competition Rules Obstruct the Performance of the Task Assigned to the Undertaking?

In order to rely on Article 90(2) the undertaking in question must show that the application of Community competition rules would obstruct it in performing the tasks which it had been assigned by the State. In *Corbeau*, which involved a challenge to the monopoly of the Belgian Postal Services (a public agency) rather than the State aid rules, it was alleged that the monopoly constituted an abuse of a dominant position contrary to Article 86. The Court began by examining the reasons for granting the Postal Services operator a monopoly. It found that the monopoly position was based on the need to offset less profitable sectors against more profitable sectors, so enabling the Belgian Postal Services to operate in 'conditions of economic equilibrium'. This need justified a restriction on competition, preventing commercial operators from under-cutting the Belgian Postal Services in commercially profitable sectors.[64] However, the Court continued:

> 'the exclusion of competition is not justified as regards specific services dissociable from the service of general interest which meet special needs of economic operators and which call for certain additional services not offered by the traditional postal service, ... in so far as such specific services, by their nature and the conditions in which they are offered, such as the geographical area in which they are provided, do not compromise the economic equilibrium of the service of general economic interest performed by the holder of the exclusive right'.[65]

The same approach was adopted by the Court in *RTT* v. *Inno* where, although the Court found that the Belgian public telephone network constituted a service of general economic interest,[66] this did not justify the exclusion of competition with regard to the marketing of telephone equipment. RTT had argued that it needed to be able to approve all telephones sold in Belgium in order to guarantee the safety of users and of the network. However, the Court found that this objective could be achieved by less restrictive means, including the setting of specifications and establishing a procedure for type-approval.[67]

The Court therefore applies a proportionality test in determining whether any restriction on the application of the competition rules is truly necessary in order to maintain the provision of a service of general economic interest.

64. *See supra* note 62, paras. 17 and 18.
65. *See supra* note 62, para. 19.
66. *See supra* note 61, para. 18.
67. *See supra* note 61, para. 22.

With regard to the State aid rules and voluntary organisations, it could be argued that a restriction on the ability of the State to finance such organisations could seriously undermine their ability to deliver services. This is particularly so when the voluntary organisation in question either charges no fee, or a below cost fee, for the services which they deliver. In many cases therefore this second requirement would easily be met by voluntary organisations benefitting from State aid.

3. No Adverse Effect on the Development of Trade

This third requirement seems to have attracted little judicial attention.[68] It is therefore probable that if a (social) undertaking can show that it is of the kind defined in Article 90(2), and that the application of the competition rules are obstructing the performance of its task, then this third requirement will pose little obstacle. This is particularly true for voluntary organisations which do not usually engage in intra-Community trade on a large scale.

4. Application of Article 90(2) to State Aid Rules

It is clear from the wording of Article 90(2) that it potentially applies to all the rules on competition, as well as to other Community rules. However, the article is most frequently invoked in cases dealing with cartels (Article 85) and an abuse of a dominant position (Article 86). In principle though, there is no reason why the article could not be successfully relied on with regard to Article 92. This was confirmed by the Court in Case C-387/92 *Banco de Credito Industrial SA* v. *Ayuntamiento de Valencia*.[69]

5. The Direct Effect of Article 90(2)

The Court of Justice made it clear from an early stage that Article 90(2) does not have direct effect.[70] However, in a series of later cases, including *SABAM* (1974), *Corbeau* (1993) and *Almelo* v. *Energiebedrijf IJsselmij* (1994), the European Court held that it is for the national court to consider whether the undertaking concerned meets the criteria needed in order to rely on Article 90(2). This led Advocate-General Lenz to conclude that Article 90(2) 'is directly applicable in the regulatory context of

68. However, in Case C-202/88 *France* v. *Commission* [1991] ECR I-1223, para. 12, the Court did allude to this third requirement:
'In allowing derogations to be made from the general rules of the Treaty on certain conditions, that provision [i.e. Art. 90(2)] seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market'.

69. *See* Case C-387/92 *Banco de Credito Industrial SA* v. *Ayuntamiento de Valencia*, paras. 11 and 21. *See* more recently in Case T-106/95 *FFSA and others* v. *Commission* Judgment of 27 February 1997, not yet reported.

70. Case 10/71 *Minister Public of Luxembourg* v. *Hein* [1971] ECR 723, paras. 13-15.

Article 90 in conjunction with Article 86'.[71] However, the Advocate-General continued to find that the effect of Article 90(2) with regard to the State aid rules is much less clear, and that:

> 'in the context of the relationship between Article 90(2) and Articles 92 and 93, Article 90(2) may not be relied on at the outset, particularly since the application of Article 90(2) sets the framework for the review of Community-law criteria for the safeguarding of Community interests.'[72]

Advocate-General Lenz therefore substantially agreed with the Commission, which had intervened in the case, and which had argued that the supervision of State aid envisaged in Article 93, for which it is responsible, includes the assessment of aid with reference to Article 90(2). The Commission argued that all aid, including that which a Member State feels is exempted under Article 90(2), must be notified to the Commission. Article 90(2) can only be applied once it has been established that the measure in question amounts to State aid, and therefore falls under Article 92.[73] This latter task is the sole responsibility of the Commission.[74]

6. Use of Article 90(2) by Voluntary Organisations

In order for any voluntary organisation to rely on Article 90(2) it must show that it meets the three criteria referred to above. In many cases a voluntary organisation will be able to establish that the application of the competition rules would obstruct the performance of its tasks (in that the withdrawal of State funding would prevent the organisation from delivering services) and that the development of trade is not being affected by the State aid in a manner contrary to the interests of the Community. The main hurdle is therefore most likely to be establishing that a voluntary organisation is providing a 'service of general economic interest'. The case law reveals that only undertakings which provide a service by virtue of an act of public authority (*SABAM*) can fall under this heading. This is also hinted at in the article itself where reference is made to 'the particular tasks *assigned* to them (i.e. the undertakings; italics added)'. Many voluntary organisations which act on their own initiative to respond to a perceived unmet need will not be able to satisfy this requirement. However some organisations, and in particular the larger organisations, will have been asked by the State to provide a service, and received funding for this purpose. But even in this situation, it is not clear that a voluntary organisation will fall within Article 90(2). The article only covers undertakings providing a 'service of general *economic* interest' and the Court has stated that this criteria is met by undertakings which are used by the State as 'instrument of economic and fiscal policy'.[75] The fact that the services provided by voluntary organisations are potentially in competition with other

71. Opinion of Advocate-General Lenz in Case C-387/92 *Banco de Credito Industrial SA* v. *Ayuntamiento de Valencia*, para. 43.
72. *See supra* note 71, para. 71.
73. This approach was also supported by the Court in Case 52/76 *Benedetti* v. *Munari* [1977] ECR 163.
74. *See supra* note 71, para. 53.
75. Case C-202/88 *France* v. *Commission* [1991] ECR I-1223, para. 12. *See further* footnote 53 above.

(commercial) operators, and therefore have an economic dimension, does not mean that the services, or the organisations which deliver them, are an element of 'economic policy', and does not detract from the fact that the services are designed to meet a social need. Therefore, if the Court is to view such voluntary organisations as providing a 'service of general economic interest', it must provide a far wider interpretation of this concept than it has done thus far. Furthermore, it should be noted that the Court has rarely accepted that all three requirements contained in Article 90(2) have been met, and the other competition rules should be disapplied. However, such an extension to the concept of 'service of general economic interest' should not be ruled out altogether.

If voluntary organisations which have been assigned tasks by the State are unable to rely on Article 90(2) because they do not provide 'services of general *economic* interest', they may instead seek to argue that they provide a service in the public interest which is *not* economic in nature, and which should therefore not be subject to the Community competition rules at all.

Such an approach was adopted by the Court in *Cali Figli* v. *SEPG*.[76] At issue in this case was an alleged breach of EC competition law (Article 86) by an undertaking which had been made responsible, by a decree passed by a public body, for anti-pollution surveillance in the Port of Genova. The undertaking monitored all vessels using the port to check for pollution, and charged vessel owners a fee for this 'service'. The Court found that the State had made the undertaking in question responsible for a 'task in the public interest' and this task formed 'part of the essential functions of the State'.[77] Consequently, the Court found the pollution surveillance to be connected with 'the exercise of powers ... which are typically those of a public authority', and continued 'It [the surveillance activity] is not of an economic nature justifying the application of the Treaty rules on competition'.[78]

Therefore, if a voluntary organisation can show that the State has delegated to it part of the States' essential functions, and that the activities carried out by the organisation are, as a result, 'not of an economic nature', the organisation should be able to escape the application of Article 92. However, the concept of 'essential' functions seems very limited and, as argued above, many activities of voluntary organisations do contain an economic dimension, and are to some degree in competition with commercial operators. This means that it will be far more difficult to find that such activities are 'not of an economic nature' than was the case in *Cali Figli*, where it was unlikely that pollution surveillance would have been carried out at all in the absence of State intervention.

B. ARTICLE 92(2)

This article sets out a number of aid categories which are always compatible with the common market.

76. Case C-343/95 *Diego Cali Figli Srl* v. *Servizi ecologici porto di Genova SpA* [1997] ECR I-1547.
77. *See supra* note 76, para. 22.
78. *See supra* note 76, para. 23.

1. Article 92(2)(a) Aid to Individual Consumers

This paragraph authorises aid to individuals (not undertakings) to enable them to acquire goods or services which have a 'social character'. This covers essentials such as food or housing, and probably access to specialised equipment or services such as wheelchairs or physiotherapy, and possibly education or training (for unskilled workers or the long-term unemployed). Such aid can therefore be of benefit to those people who voluntary organisations aim to help; however, the aid cannot be provided directly to such organisations. Any aid granted pursuant to Article 92(2)(a) must be without discrimination as to the origin of the goods or services provided. Member States therefore cannot require consumers to exclusively purchase services from (certain) voluntary organisations, and the Article cannot be used as a means of providing indirect financial support to such organisations.

However, in some cases it may be impossible to grant the aid directly to consumers, and instead producers or distributors will need to be given the task of implementing the scheme. This will inevitably result in benefits to the undertakings given this responsibility and, possibly a distortion in competition. It is unclear if such programmes will also fall within the scope of Article 92(2)(a), or whether they will be regarded as contrary to Article 92(1). If the former is true, there is a possibility that in this situation, voluntary organisations, by virtue of the fact that they are delivering 'aid of a social character' to individuals, will be able to escape the prohibition contained in Article 92(1).

2. Article 92(2)(b) Natural Disasters or Exceptional Occurrences

This paragraph permits the granting of aid to make good damage caused by natural disasters or exceptional occurrences. This probably covers events such as floods, volcanic eruptions, earthquakes and (civil) war or disturbances. Whilst this provision is targeted primarily at aid to assist undertakings to re-establish themselves after a catastrophe, it probably also covers voluntary organisations which seek to provide assistance, such as accommodation or medical care, to (sections of) the general population following a natural disaster or exceptional occurrence. However, this provision will only apply to very few voluntary organisations operating in exceptional circumstances, and does not amount to a broad exception to the rule contained in Article 92(1).

3. Article 92(2)(c) Economic Aid to Areas Affected by the Division of Germany

This paragraph is clearly aimed at addressing 'economic disadvantages' rather than correcting social problems. This, combined with the provision's geographic specificity, means that it is unlikely to be of much relevance to voluntary organisations.

C. ARTICLE 92(3)

Article 92(3) refers to a number of categories of aid which may be declared compatible with the common market by the Commission. The Commission has a wide margin of discretion when deciding whether to authorise aid under this Article. The Commission has stated that, in making its assessment, it will consider whether the aid promotes a development which is in the interest of the Community rather than a national interest, whether the aid is necessary to bring about the development in question, and whether the costs associated with the aid are in proportion to the benefits (to be) achieved.[79]

The Court, in reviewing the exercise of the Commission's discretion, confines itself to establishing that the rules of procedure have been complied with, that the reasoning is sufficient, the facts are correct, and that there is no manifest error of assessment or misuse of powers.[80]

1. Article 92(3)(a)

> 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment'.

This paragraph allows for regional aid to undertakings located in areas which are particularly disadvantaged. The Court has given some guidance on how such disadvantaged areas are to be identified in *Philip Morris Holland* v. *Commission*.[81] Philip Morris Holland sought to rely on Article 92(3)(a) to justify aid to enable the cigarette company to increase its production capacity at a factory located in an area which was disadvantaged in relation to the rest of the Netherlands. The Court rejected their claim, and held that the question of whether there is an abnormally low standard of living or serious unemployment in a region has to be judged from a Community perspective, and not from a national point of view.[82] Therefore, the fact that a region has a low standard of living or high levels of underemployment relative to the rest of the Member State in question is insufficient to bring it within the scope of Article 92(3)(a).[83]

Aid which does not form part of a national programme of Community interest (*ad hoc* aid) does not, in principle, fall under Article 92(3)(a) as it does not meet the requirement of 'regional specificity'. In such cases it will be presumed that the aid is to support the operation of undertakings in difficulty, rather than to promote regional development. However, the Member State in question may rebut this presumption.[84]

The Commission also takes the view that aid which will result in increased production in a sector where there is already considerable over-production is contrary

79. XIIIth Report on Competition Policy, 1993, Point 160.
80. Joined Cases T-244/93 and T-486/93 *TWD Textilwerke Deggendorf GmbH* v. *Commission* [1995] ECR II-2265, para. 82.
81. Case 730/79 *Philip Morris Holland* v. *Commission* [1980] ECR 2671.
82. *See supra* note 81, para. 28.
83. Confirmed and elaborated on in Case 248/84 *Germany* v. *Commission* (*see supra* note 49), para. 19. *See also* Case 301/87 *France* v. *Commission* [1990] ECR I-307, para. 51.
84. Joined Case C-278, 279, 280/92 *Spain* v. *Commission* [1994] ECR I-4103, para. 49.

to the common interest, and will not promote the economic development of the area at issue.[85]

This provision can only benefit those voluntary organisations which operate in an area which is recognised as having an 'abnormally low' standard of living or which is suffering from serious underemployment. Furthermore, the recipient organisation will have to demonstrate that the aid enables it to 'promote the economic development' of the area. This may be possible for organisations providing education or training which is job related, but will probably be more difficult for those organisations offering less 'economic' services, such as support to members of the population who are not, and who do not wish to be, or cannot be, economically active.

2. Article 92(3)(b)

> 'Aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State'.

This paragraph refers to two very different kinds of aid:

a. An Important Project of Common European Interest

The Commission has relied on this paragraph to permit aid which supports the development of inter-State infrastructure or technology, e.g. the Airbus venture and the European High Definition Television project. The provision has also been used to allow aid to environmental projects. Aid which results in the transfer of an investment which, without the State intervention, would have occurred in another Member State in a less favourable economic condition, cannot be permitted under this provision.[86]

Once again, the Commission has a wide discretion in deciding whether to invoke this paragraph. However, it is unlikely that voluntary organisations, which usually operate in a local or national setting, rather than on a European scale, can be covered by this provision. This would only be a (slim) possibility if several organisations from across the European Union linked up to implement a particular project.

b. A Serious Disturbance in the Economy of a Member State

This provision, which has only been rarely used, permits aid to help remedy disturbances affecting the whole of the economy of a Member State, and not just particular sectors. It is therefore also extremely unlikely that voluntary organisations could benefit from the exercise of the Commission's discretion with regard to this provision.

85. Case 310/85 *Deufil GmbH und Co.KG.* v. *Commission* [1987] ECR 901, para. 18.
86. *See supra* note 81, para. 25.

3. Article 92(3)(c)

> 'Aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

This provision is often used when none of the other exceptions provided for in Article 92(3) are applicable. It is therefore the broadest exception; however, unlike paragraphs (a) and (b), it can only be relied upon when the aid in question does not 'adversely affect trading conditions to an extent contrary to the common interest'.

In determining whether any aid is compatible with the Treaty under Article 92(3)(c) the Commission must examine the issue in the context of the Community as a whole, and not from the point of view of a single Member State.[87] The Commission therefore considers whether the State aid will allow the undertaking in question to strengthen its competitive position *vis-à-vis* other producers in the market, e.g. by lowering the investment costs of the recipient undertaking and enabling it to purchase new more productive equipment. If so, the Commission is likely to find that the aid will have (or has had) an adverse effect on trading conditions and is contrary to the common interest.[88]

However, the Court may have signalled a relaxation of its requirement that the compatibility with the Treaty of aid under Article 92(3)(c) must be considered exclusively from a Community perspective in *Germany* v. *Commission*, where it stated:

> 'The exception in Article 92(3)(c) ... is wider in scope [than the exemption in Article 92(3)(a)] inasmuch as it permits the development of certain areas without being restricted by the economic conditions laid down in Article 92(3)(a) .... That provision [Article 92(3)(c)] gives the Commission power to authorise aid intended to further the economic development of areas of a Member State which are disadvantaged in relation to the national average.'[89]

In *Germany* v. *Commission* the aid in question was regional ('certain economic areas'); however, Article 92(3)(c) can also be used to authorise aid to a particular sector ('certain economic activities').

In order for any aid to be acceptable under Article 92(3)(c) it must 'facilitate ... development' of the activities or areas in question. This suggests that some progress or improvement must be achieved as a result of the aid. Therefore aid which is simply used to keep an unprofitable group of undertakings in business will not be permitted. However, Article 92(3)(c) can justify aid to undertakings in difficulty, but only when the aid is 'bound to a restructuring programme designed to reduce or redirect their activities'.[90] Unless the aid can result in a continuous development it is probable that it will only be regarded as acceptable for a limited period of time, and possibly on a descending scale.

87. *See supra* note 81, para. 26.
88. *See supra* note 85, para. 16.
89. *See supra* note 49, para. 19.
90. *See supra* note 49, para. 67.

Article 92(3)(c) can only be relied on where market conditions would not result in the desired 'development' and State intervention is required in order to achieve this aim.[91] The paragraph cannot be used to fund 'normal modernization'[92] which should be funded from an undertaking's own resources. Such aid is regarded as 'operating aid'.[93]

This exception is probably of most interest to voluntary organisations which cannot meet the demanding conditions set by the other paragraphs in Article 92(2) and (3) and Article 90(2). This provision may allow the Commission to permit aid to voluntary organisations operating in a particular sector ('certain economic areas'), e.g. the voluntary sector working with elderly people, disabled people, children, etc.

However, aid permitted under this paragraph must not affect trading conditions to an extent contrary to the common interest, and must result in a development of the economic area in question. With regard to the first condition, it could well be argued that State aid to such organisations is actually in the common interest, and that free market conditions would result in many vulnerable people being unable to purchase the services or goods which they need, and which, with State assistance, voluntary organisations are able to provide. However, it is unclear if such State aid can be regarded as facilitating 'the development' of the voluntary sector. It is probably more realistic to regard State aid as maintaining voluntary organisations. Therefore, a strict interpretation of this requirement could result in only a limited and temporary amount of State intervention being regarded as permissable. In contrast, a dynamic interpretation of this provision would allow the Commission to exempt voluntary organisations from the general prohibition on State aids. To date the case law with regard to this provision has been largely confined to aid given to conventional profit-making firms. However, the Commission (and Court) may choose to expand its present interpretation of the provision to cover aid given to voluntary organisations.

When considering the possibilities of an 'expansion' of the kinds of aid permissable under Article 92(3)(c), the development of the Commission's attitude towards aid granted to Small and Medium Sized Enterprises (SMEs) may be a useful comparator. It has been argued that, paradoxically, the more the Commission has developed a rigorous monitoring system with regard to State aid, the less those rules have been applied to SMEs.[94] The numerous exemptions for SMEs are referred to in more detail below (Section 5D), but in essence SMEs are permitted to receive a certain level of State support without this breaching Article 92. Lavdas and Mendrinou have argued that this relaxed attitude to State aid given to SMEs can be explained by a number of factors, all of which interestingly also apply to voluntary organisations. Firstly, Lavdas and Mendrinou note that the object of assisting small businesses was long-held by both the Commission and the Member States, and that the Commission felt that the Member States could contribute to this objective by 'some direct financial assistance'.[95] References to the role of Member States in promoting the voluntary sector can also be found in the Commission's 1997 Communication on the Role of

91. *See supra* note 81, para. 26.
92. *See supra* note 85, para. 16. This principle was also applied in Case 301/87 *France* v. *Commission* [1990] ECR I-307, para. 50.
93. Case T-459/93 *Siemens SA* v. *Commission* [1995] ECR II-1675, paras. 76/77.
94. Kostas Lavdas and Maria Mendrinou, 'Competition policy and institutional politics in the European Community: State aid control and small business promotion', *European Journal of Political Research*, 28(2), 1995, 171-201.
95. O.J. [1992] C 213, point 1.5.

Voluntary Organisations and Foundations in Europe.[96] Secondly, as the rules for enforcing Article 92 became more elaborate and rigorous, the problems with applying those rules to SMEs increased: 'it would be politically too risky while at the same time it would cause a Commission overload'.[97] Both of these factors are clearly true with regard to voluntary organisations today. It has already been shown that voluntary organisations rely heavily on State subsidies and that they perform important (social) functions, whilst Directorate General IV of the Commission is already considerably over-stretched with regard to monitoring the application of the Community competition rules. Finally, Lavdas and Mendrinou submit that '[t]he Commission has often relied on the EP's [European Parliament] support to get political backing for its policy on competition and state aid' and therefore the concerns expressed by the Parliament concerning small businesses in the single market were taken seriously by the Commission.[98] The Parliament is also highly concerned with the welfare of the voluntary sector as can be seen from its reaction to the recent *United Kingdom* v. *Commission* judgment,[99] in which the Court found that a budget line providing for support for Non-Governmental Organisations active in the field of poverty did not have the necessary dual legal base and was therefore invalid. These factors may suggest that over time, the Commission will choose to use the possibilities opened up by Article 92(3)(c) to permit aid granted to voluntary organisations. However, for this to occur, aid to voluntary organisations must first be notified to the Commission by Member States or, alternatively, the Commission must investigate the matter ex officio. This does not seem to be occurring at present.

4. Article 92(3)(d)

> 'Aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest'.

This paragraph, which was inserted by the Maastricht Treaty, will clearly only be of use to a limited number of voluntary organisations active in the specified areas.

5. Article 92(3)(e)

> 'Such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission'.

96. *See supra* note 1, para. 1.4, p. 1, which states: 'This document presents a series of measures which could be taken at Member State level ...'.
97. *See supra* note 1, p. 190.
98. *Ibid.*
99. Case C-106/96 *United Kingdom* v. *Commission*, judgment of 12 May 1998, not yet reported. The Parliament intervened in the case in support of the Commission. For Parliament's reaction *see* transcript of Parliamentary debate, 1-7-1998, pp. 8-14.

This provision has only been used occasionally, and has allowed the Council to adopt a number of Directives concerning aid for shipbuilding.

D. AID TO VOLUNTARY ORGANISATIONS WHICH HAS BEEN AUTHORISED BY THE COMMISSION PURSUANT TO ARTICLES 92 AND 93

When Member States notify their intention to implement a programme of State aid it is for to the Commission to consider whether the aid should be declared compatible with the common market under Article 92(2) and (3). In response to the notifications the Commission regularly publishes lists of the aid to which it does not raise any objection. Although these lists do not specify the grounds on which the aid has been permitted, it seems, from the brief descriptions of the programmes, that many of them fall under either Article 92(3)(a) or (c). Some of the aid permitted in the past has been of a kind which could possibly benefit voluntary organisations. The Commission has therefore allowed aid to develop a trial programme to promote the employment of the long-term unemployed,[100] numerous measures to promote the cooperative sector,[101] aid to promote self-employment which provided for extra benefits for disabled people,[102] aid for the social rehabilitation of former drug addicts,[103] aid to promote new employment through e.g. cooperatives, representative associations, small businesses,[104] aid to promote vocational training,[105] aid to allow unemployed people to set up in business,[106] and aid to fund a youth employment scheme.[107]

Although these kinds of aid programmes may be of interest to some voluntary organisations it is clear that they relate mainly to employment and are generally for a limited duration. Large scale programmes providing support to organisations serving a less economic purpose (i.e. organisations which are not seeking to help people enter the work force), will find little of interest in the aid which has been permitted in the past.

100. Aid No. 332/93 adopted on 23 September 1993. The British Workstart programme based on Section 2 of the Employment and Training Act 1973 (as amended), with a budget of ECU 3.44 million and a duration of one year. OJ C [1993] 286/5.
101. For example Aid No. 338/93 adopted on 6 October 1993. Proyecto de Orden por la que se reforma la Orden de 4 de marzo de 1991 sobre medidas in promoción de la economía social, with a budget of ECU 13.8 million, in 1993. OJ C [1993] 302/7.
102. Aid No. 368/93 adopted on 27 August 1993. Orden de 31 de marzo de 1993 to promote employment in firms and cooperatives in the self-employed sector. The scheme provided for an investment of up to 2 million Pta. for each job created for a disabled person (as opposed to 500,000 Pta. for jobs created for non-disabled workers), and grants for job adaptions (total budget of ECU 16 million plus ECU 5.5 million to for disabled people). The programme had a duration of one year. OJ C [1993] 282/3.
103. Aid No. 249/93 adopted on 6 July 1993. Decreto providing for grants to firms to promote the rehabilitation of former addicts, with a budget of ECU 0.97 million, in 1993. OJ C [1993] 252/5.
104. Aid No. 482/92, 483/92, 485/92, 488/92 and 189/92 adopted on 26 January 1993. Proyectos de derecho del Gobierno Vasco, with a total budget of circa ECU 3 million and a duration of one year. OJ C [1993] 36/16.
105. For example Aid No. 105/94 adopted on 6 July 1994. A Decreto funding vocational training grants for the unemployed and job-holders, with a budget of ECU 123 million in 1994. OJ C [1994] 259/7.
106. Aid No. NN 93/92 b adopted on 5 May 1993. Lovbekendtgørelse nr. 556 of 17.7.1991 samt and Lovbekendtgørelse nr. 634 of 17.7.1992 vedrørende lov om arbejdstilbud til ledige, with a budget of ECU 90 million in 1992, and for an indefinite period.
107. Aid No. 80/94 adopted on 30 March 1994. Loi du 26 juillet 1993 allowing for an exemption from social security contributions in respect of the employment of young job-seekers for a 3 year period. OJ C [1994] 153/20.

E. ARTICLE 93(2) COUNCIL AUTHORIZATION OF AID IN EXCEPTIONAL CIRCUMSTANCES

In very exceptional circumstances the Council can authorise aid which would otherwise be illegal, and thus overrule the Commission.[108] Such an authorization is rarely given, not least of all because it requires unanimity and because the State aid will probably result in undertakings outside the donor State being placed at a disadvantage. In *Commission* v. *Council*[109] the Commission challenged such an authorization allowing aid for the distillation of certain wines in Italy and France. The Commission had earlier ruled that such aid was incompatible with the common market. The Court found that the Council had a wide discretion in deciding whether to make use of Article 93(2). This discretion applies to the nature and the scope of the measures to be taken and also, to some extent, to the findings of fact since the Council can rely on general findings if necessary. The Court also held that, when deciding whether exceptional circumstances justify an aid being considered compatible with the common market, the Council had to carry out an assessment of a complex economic situation.

It is highly unlikely that aid to support voluntary organisations will be regarded by the Council as amounting to an exceptional circumstance. A further restriction contained in Article 93(2) is that it may only be possible to rely on the provision to authorise specific aid, and not general aid, targeted at a whole sector.[110]

IV. VOLUNTARY ORGANISATIONS: AVOIDING THE CONSEQUENCES OF THE STATE AID RULES

The above analysis reveals the extent to which voluntary organisations are covered by the State aid rules, and the exceptions provided by the Treaty to these rules. If a voluntary organisation is unable to benefit from the exceptions referred to above, there are still a number of provisions on which it may be able to rely in order to avoid being adversely affected by the prohibition.

A. STATE FUNDING IS ONLY USED TO SUPPORT NON-COMMERCIAL ACTIVITIES

The above analysis of the requirements contained in Article 92(1) revealed that only undertakings with an economic dimension are covered by the State aid rules, and only State aid which has an effect on inter-State trade and which (threatens to) distort competition is prohibited.[111]

108. Assuming the Commission has already decided not to apply one of the exceptions allowed for in Article 92.
109. Case C-122/94 *Commission* v. *Council* [1996] ECR I-881.
110. Bellamy and Child, *Common Market Law of Competition*, Sweet & Maxwell, 1987, 3rd ed., 14.018.
111. *See* Sections IIC (no original situation of competition) and IIB ('economic' concept of an undertaking) of this paper for further elaboration.

Whilst many, or perhaps most, voluntary organisations carry out activities with an economic dimension, it is also possible that some of their activities do not fall into this category. This may apply to free advice (which is probably not medical or legal) given to people on e.g. coping with a disability, drug addiction, dealing with government authorities etc. If voluntary organisations can clearly separate these non-commercial activities from their other work, then it should be possible to use State funds in these areas without breaching Article 92(1). In this respect accounting practices are very important. If this route is followed, care must be taken to avoid using State funds to support the general administrative work of the organisations, which covers both commercial and non-commercial activities.

B. NO EFFECT ON INTRA-COMMUNITY TRADE

Some (small) voluntary organisations may carry out commercial activities which, because of their extremely limited scope have no effect on trade. Aid to support such activities will not breach Article 92(1). This has been confirmed by the Commission:

> 'some SMEs, and microenterprises in particular, carry on businesses in which there is no trade between Member States (providing local services, for example). Aid given to them for activities of this sort falls outside the scope of Article 92(1).'[112]

However, the analysis above shows that it is difficult for an undertaking which receives aid to meet this requirement.[113]

C. THE 'DE MINIMIS' THRESHOLD

In 1992, in an effort to reduce the administrative burden placed on the Commission and the Member States, and recognising that not all aid had an appreciable effect on trade and competition, the Commission decided to introduce a *de minimis* rule with regard to State aids.[114] This rule set a threshold figure, below which Article 92(1) did not apply, and aid with a value below this figure did not need to be notified to the Commission. In 1996 the *de minimis* rule was revised, and it now covers aid of up to ECU 100,000 granted over a three year period, beginning with the first *de minimis* aid granted.[115] Whilst Small and Medium Sized Enterprises (see below) are the main beneficiaries of this rule, there is no restriction on the size of the undertaking which can receive *de minimis* aid. The *de minimis* rule covers all forms of public assistance, whether granted by national, regional or local authorities, with the exception of export aid. Aid which is not in the form of a cash grant or subsidy, such as tax relief or a loan guarantee, must be converted into a cash equivalent for the purposes of applying the rule. The Commission notice advises on how this is to be done.

112. OJ C [1996] 213.
113. *See* Section IID of this paper.
114. Community guidelines on State aid for small and medium-sized enterprises (SMEs), OJ C [1992] 213/2.
115. Commission notice on the *de minimis* rule for State aid, OJ C [1996] 68/9.

The *de minimis* rule can make a significant difference to the amount of aid regarded as being compatible with the common market. This is demonstrated by the Commission's negative decision concerning a French plan to reduce social costs in the textile, clothing and footwear sectors. The French authorities had already distributed aid to 13,000 undertakings before the Commission rejected the plan. However, of the 13,000 undertakings which received aid, 11,300 were exempt from the application of Article 92(1) by virtue of the *de minimis* rule. The Commission instructed the French authorities to recover the aid paid to the remaining firms which exceeded the *de minimis* limit.[116]

The *de minimis* rule will be of great help to those smaller (and larger) voluntary organisations which receive limited financial assistance from the State. It is likely that, for a high number of organisations, and particularly those operating at a local or regional, rather than a national level, this rule will exempt them from the application of Article 92(1). However it is probable that some larger organisations will receive State assistance which exceeds the financial limits set in the *de minimis* rule, and which will, in principle, breach Article 92(1).

D. SPECIAL TREATMENT FOR SMALL AND MEDIUM SIZED ENTERPRISES

In 1992 the Commission adopted a set of Community Guidelines on State aid for Small and Medium Sized Enterprises (SMEs).[117] These Guidelines recognised that SMEs faced certain difficulties in raising capital and making investments, and specified that certain levels of aid for SMEs could be approved by the Commission and would not breach Article 92(1). The 1992 Guidelines were amended and clarified in 1996.[118] Aid which falls within the limits set in the Guidelines must still be notified to the Commission (unless the *de minimis* rule applies), but the Commission will not usually raise any objection.

Under the Guidelines an SME is defined as an enterprise which has fewer than 250 employees and has either an annual turnover not exceeding ECU 40 million or an annual balance sheet total not exceeding ECU 40 million. Small enterprises, which can benefit from additional levels of aid, must have fewer than 50 employees and either an annual turnover not exceeding ECU 7 million or an annual balance sheet total not exceeding ECU 5 million. In both cases the enterprises must be sufficiently independent, (e.g. not a branch of a larger undertaking). Undertakings meet this independence requirement unless 25 per cent or more of the capital or of the voting rights are owned by an enterprise which is not an SME or small enterprise, or jointly by several such companies.

The new Guidelines treat tangible investment (i.e. investment in fixed assets such as a new establishment or restructuring or modernising an existing establishment) and intangible investment (i.e. the transfer of technology through e.g. research and development) in the same way. The Guidelines thus allow the Commission to grant

116. Agence Europe, 14 March 1997, p.14 and 10 April 1997, p. 9.
117. OJ C [1992] 213/2.
118. OJ C [1996] 213/4. The Guidelines apply to all aid granted to SMEs unless special Community rules governing State aid have been laid down in the EC or ECSC Treaties. None of these special rules apply to social organisations.

exemptions under Article 92(3)(c) for aid to SMEs where the value of the aid as a proportion of the costs of the investment does not exceed 7.5 per cent. In the case of small enterprises the relevant sum is a more generous 15 per cent. In certain defined disadvantaged 'assisted' areas (those areas which meet the requirements set in Articles 92(3)(a) or 92(3)(c)) (much) higher levels of aid may be permitted. In addition aid of up to 50 per cent[119] will generally be allowed for consultancy or staff training. These percentage limits apply irrespective of whether the aid is provided entirely for domestic reasons, or is part-financed by the Community structural fund.

E. OFFSETTING THE BENEFITS OF STATE AID AGAINST THE DISADVANTAGES OF HAVING CHARITABLE STATUS

Many voluntary organisations have acquired charitable status. The requirements needed to obtain this status, and the benefits associated with it, vary from Member State to Member State. A typical benefit is the ability to claim back tax on gifts given by private parties.[120] However, charitable status can also result in certain financial or fiscal disadvantages, such as the inability to reclaim Value Added Tax paid on goods where this option would be available to commercial undertakings.

This raises the question of whether, in calculating the level of State aid given to voluntary organisations, it is possible to subtract the costs associated with having charitable status from the benefits, thus resulting in a lower total sum (which would be more likely to fall within the *de minimis* rule). The alternative, less favourable scenario, that the whole of the financial benefit gained as a result of having charitable status is regarded as State aid, and any financial disadvantages are ignored, would result in more findings of State aid which exceeds the *de minimis* rule.

This point was raised in *France* v. *Commission*.[121] In that case the French authorities had provided financial assistance through the National Employment Fund to a company to enable it to establish a social plan to provide various benefits to its workers who were being laid off. About 25 per cent (FF 27.25 million) of the cost of the social plan was borne by the State. France challenged the Commission's finding that this support amounted to State aid. One of the arguments which France relied on was that the firm was providing much more assistance to its laid off workers than it was required to do. It was claimed that if the firm had only met the minimum legal requirements this would have cost it less than the beneficial social plan which was in fact adopted. This was so even when the absence of the State assistance to meet the minimum standards was taken into account. It was argued that this should be considered in determining whether any State aid existed. The Court did not accept this analysis and found for the Commission which had argued:

> 'assistance for certain undertakings ... is to be classified as aid even if it is used to finance costs incurred voluntarily by the undertaking concerned.'[122]

119. A greater percentage may be applied to aid granted to undertakings in 'assisted' areas.
120. This is possible for charities in the United Kingdom; in contrast in the Netherlands donors can reclaim the tax paid on the donations, thereby encouraging them to donate more. It may be more difficult to classify the latter provision as a State aid.
121. Case C-241/94 *France* v. *Commission* [1996] ECR I-4551.
122. *See supra* note 121, para. 30. The Commission had nevertheless allowed the aid under Article 92(3)(c).

If this is a correct interpretation, one could argue by analogy that voluntary organisations have voluntarily incurred any costs associated with having charitable status, and that these costs will not be taken into account when determining the level of State aid which such organisations have received.

V. CONCLUSION

It is clear that the Community State aid rules were not designed with voluntary organisations in mind. This applies as much to the prohibition of State aids contained in Article 92(1), as to the mandatory and discretionary exceptions contained in Articles 90(2), 92(2) and 92(3). As a result voluntary organisations which are economically active and/or which can be viewed as (potentially) being in competition with other undertakings easily fall within the scope of the prohibition and the exceptions do not seem to readily apply. If the law were to be applied in this manner then only those (smaller) organisations, which could rely on the *de minimis* rule or the Guidelines on SMEs, would be untouched. In quantitative terms these provisions would probably cover most voluntary organisations. However, there would probably remain a significant number of large organisations, which supply high levels of care, advice and support, which would find their very existence threatened. Because of the nature of the services provided by such organisations it would probably be very difficult or impossible for smaller voluntary organisations, commercial undertakings or government agencies to step in and fill the vacuum left behind. Whilst Community law may not seem to readily offer a solution to this threat, politics clearly demands that one is found. Article 92(3)(c), with its general reference to 'certain economic activities', may provide one possible solution. However this would involve the Commission giving a broader and more dynamic interpretation to the provision than has thus far occurred. Other solutions, such as an expansion of the concept of 'services of general economic interest' contained in Article 90(2), may also be relevant.

Before the Commission can develop a legal solution to this problem, it must first begin to address the problem. At present Member States are not generally notifying the Commission of aid given to voluntary organisations, and the Commission is not examining such aid *ex officio*. This may be because the Commission prefers not to see such aid and face the problem head on. This situation may change in the future, either because Member State's notification practice begins to differ, or the Commission receives complaints from disgruntled competitors of voluntary organisations. Such a change would give the Commission an opportunity to recognise this support as State aid, but to permit it under Articles 90(2), 92(3)(c) or some other exception. A change in practice would of course also give the Commission the opportunity to find the aid incompatible with the common market. It is doubtful that the Commission would find all aid for voluntary organisations illegal; however, it is possible that some aid, and some social sectors, would lose out and find that the relevant aid is incompatible with the Treaty. The voluntary organisations in question will be obliged to repay the aid, or at least will not continue to receive such aid in the future. Until the Commission (and the Court of Justice) address this issue one can only speculate what forms of aid to voluntary organisations will be regarded as (un)acceptable.