EUROPEAN COMMISSION

LEGAL SERVICE

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BY FAX AND BY REGISTERED MAIL

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Re: ICC 18519/GFG – Neckarpri GmbH (Germany) vs. EDF International S.A.S. (France) vs. Federal State of Baden-Württemberg (Germany)

Dear Professor Tercier,

In relation to your request of 23 May 2014 for an opinion of the European Commission ("the Commission") in the above-mentioned matter, I have the honour to provide you with the following response. It should be emphasised, however, as a preliminary matter, that only the Court of Justice of the European Union ("CJEU") may provide an authoritative, binding interpretation of Union law.

I. FACTUAL BACKGROUND AND QUESTION POSED

The Commission understands the dispute before your tribunal to concern a transaction concluded on 6 December 2010 between Neckarpri GmbH ("the Claimant"), which is wholly-owned by the Federal State of Baden-Württemberg ("the Land BW"), and Électricité de France International S.A.S. ("the Respondent"), according to which the Claimant purchased 45.01% of the shares in Energie Baden-Württemberg AG (hereinafter "EnBW") from the Respondent ("the contested transaction").

Both the Claimant and the Land BW allege before your tribunal that the purchase price for the shares is excessive, thereby entailing a grant of State aid by the Land BW to the

Respondent within the meaning of Article 107(1) TFEU. The contested transaction was never notified to the Commission.

In your letter, you invite the Commission to respond to the following question:

> "*Does the fact that a Member State refrains from notifying the European Commission of a transaction with an alleged excessive purchase price paid by that Member State to a company in another Member State result in a breach of Article 107 and/or Article 108 TFEU?*"

In addition to responding to that question, the Commission would like to use this opportunity to provide some general observations on the possible presence of State aid in the contested transaction (Article 107 TFEU) and the notification obligation of Member States (Article 108 TFEU), as well as comment on whether a Member State may invoke its own failure to notify, as examined in the opinions of Advocate-General Sir Francis Jacobs KCMG ("the Jacobs Opinion") and Professor Dr Martin Nettesheim which were forwarded to the Commission with your letter.

II. GENERAL OBSERVATIONS ON THE PRESENCE OF STATE AID (ARTICLE 107 TFEU)

An answer to the question posed by your tribunal is only relevant if the contested transaction is found to contain State aid within the meaning of Article 107(1) TFEU. That is because only State aid within the meaning of that provision is subject to the notification obligation laid down by Article 108(3) TFEU.[1]

For the contested transaction to constitute State aid within the meaning of Article 107(1), four cumulative conditions must be met:

(a) The transaction must be imputable to the State and financed through State resources.

(b) The transaction must confer an economic advantage upon the Respondent.

(c) That advantage must be selective, in that it favours only certain undertakings or sectors.

(d) The transaction must distort or threaten to distort competition and affect trade between Member States.

As regards the first condition, the Claimant is a public undertaking, wholly-owned by the Land BW. The mere fact that a measure is taken by a public undertaking is not, however, sufficient to consider it imputable to the State. Then again, it does not need to be demonstrated that in a particular case the public authorities specifically incited the public undertaking to the aid measures in question.[2] Rather, the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which the measure was taken.[3] Specifically, any indication, in the particular case, either, on the one hand, of the involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains, or, on the other hand, the absence of those authorities' involvement in the adoption of that measure is relevant.[4]

It appears from information available in the public domain that the Claimant was created by the Land BW as a special purpose vehicle for the purposes of the contested transaction, which is domiciled at the Ministry of Finance of the Land BW and whose CEO is a high official of that Ministry.[5] In addition, the Land BW appears to have given a guarantee to cover any losses which the Claimant may incur as a consequence of the acquisition of EnBW.[6] That guarantee was a necessary precondition to enable the Claimaint to raise the capital necessary to finance the transaction on the financial markets at advantageous conditions (i.e. at the cost of debt the Land BW would have to incur). If this information is accurate, there should therefore be no question as regards the imputability of the contested measure to the Land BW. Consequently, since the Land BW is capable of directing the Claimant's resources, the funds used for the acquisition of the

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1 Judgment in *Xunta de Galicia*, C-71/04, EU:C:2005:493, paragraph 32.

2 Judgment in *Commerz Nederland*, C-242/13, EU:C:2014:2224, paragraph 32.

3 Judgment in *France v Commission (Stardust)*, C-482/99, EU:C:2002:294, paragraphs 52 to 56.

4 Judgment in *France v Commission (Stardust)*, EU:C:2002:294, paragraphs 56 and 57.

5 See, for further information, the website of the company, www.neckarpri.de. The current CEO of Neckarpi is Ministerialdirigent Rolf Schumacher from the Ministry of Finance.

6 See the annual report of Neckarpri, http://www.neckarpri.de/media/Jahresabschluss_und_Lagebericht_2013.pdf .

shares in EnBW from the Respondent should be considered State resources within the meaning of Article 107(1) TFEU.[7]

As regards the second condition for a finding of State aid, the CJEU has held that "*economic transactions carried out by a public body or a public undertaking do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions*".[8] In order to determine whether an economic transaction was carried out in line with market conditions it needs to be assessed whether the Land BW, in concluding the contested transaction, "*behaved like a market economy investor or whether the beneficiary undertaking received an economic advantage which it would not have obtained under normal market conditions*"[9] (also known as "the market economy operator principle").

That assessment needs to be carried out from an *ex ante* perspective. Only information which was available at the time that the contested transaction was concluded is relevant for that assessment.[10] By contrast, any information postdating the conclusion of that transaction cannot be taken into account for the purposes of applying the market economy operator principle, even if it confirms, in hindsight, the economic expediency of the decision made by the Land BW at the time the transaction was concluded.[11] In other words, the Land BW cannot be an "accidental" market economy operator.

Expert evaluations may be relevant in that assessment, provided they predate the contested transaction and were carried out for the purposes of the contested transaction on the basis of a generally-accepted standard assessment methodology, showing that that transaction was in line with market conditions. Such a methodology must be based on the available objective, verifiable and reliable data[12] which should be sufficiently detailed

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7 Judgment in *Stardust*, EU:C:2002:294, paragraph 38; judgment in *Greece v Commission*, C-278/00, EU:C:2004:239, paragraphs 53 and 54, and judgment in *Italy and SIM 2 Multimedia SpA v Commission*, C-328/99 and C-399/00, EU:C:2003:252, paragraphs 33 and 34.

8 Judgment in *SFEI*, C-39/94, EU:C:1996:285, paragraphs 60 and 61.

9 Judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale und Land Nordrhein-Westfalen v Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 208.

10 Judgment in *Commission v EDF*, C-124/10 P, EU:C:2012:318, paragraph 83.

11 Judgment in *Commission v EDF*, EU:C:2012:318, paragraphs 83 to 85, 105.

12 Judgment of 16 September 2004, *Valmont Nederland BV v Commission*, T-274/01, EU:T:2004:266, paragraph 71.

and should reflect the economic situation at the time at which the transaction was carried out, taking into account the level of risk and future expectations.[13] Depending on the value of the transaction, the robustness of the evaluation should normally be corroborated by performing a sensitivity analysis, assessing different business scenarios, preparing contingency plans and comparing the results with alternative evaluation methodologies. A new (ex-ante) valuation may need to be carried out if the transaction is delayed and it is necessary to take into account recent changes in market conditions. The acceptable valuation methodology or methodologies may depend on the circumstances of each case and the value of the transaction. Ultimately, the assessment tries to determine whether the transaction has been carried out in the same manner as private operator would have done.

The fact that the evaluation was paid for by the beneficiary does not automatically preclude its use for the purposes of that assessment. What matters is the substance of the evaluation, not who prepared it. Evaluations should normally be carried out with the support of experts with appropriate skills and experience. Such evaluations should always be based on objective criteria and should not be affected by policy or commercial considerations. Evaluations conducted by independent experts may provide an additional corroboration for the credibility of the assessment, while evaluations paid for by the beneficiary of a measure may draw more scepticism, but it is ultimately for the Commission (or the national court) to decide whether the evaluation in question has accurately estimated the market price of the transaction.

Finally, the Commission wishes to remark on one of the observations made in the first Jacobs Opinion on the application of the market operator test to the contested transaction, namely, that it would follow from the Commission's decisional practice that for a finding of aid under that test there must be a "substantial deviation" between the price paid and an expert's assessment of the market price.[14] The Commission sees no support for this position either in its decisional practice or in the case-law. An advantage for the purposes of the rules governing State aid can exist even where the figures calculated in connection

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13 Judgment of 29 March 2007, *Scott v Commission*, T-366/00, EU:T:2007:99, paragraph 158.

14 Paragraphs 31 to 51 of the first Jacobs Opinion.

with the market economy operator test are close together.[15] In any event, the Commission has not seen the expertise referred to, but it (and any national court) would have to carry out its own assessment whether the contested transaction was in line with market conditions.[16]

Should the contested transaction be found to give rise to an economic advantage, the Land BW's motives or intentions in granting that advantage are wholly irrelevant given that Article 107(1) "*does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects*".[17]

That advantage would also be selective, given that it was granted solely to the Respondent, so that the third condition for a finding of State aid would be fulfilled.

Finally, as regards the fourth condition, a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes.[18] For all practical purposes, a distortion of competition within the meaning of Article 107(1) is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition.[19] Similarly, an advantage granted to an undertaking operating in a market which is open to competition will normally be assumed to affect trade between Member States. As the case-law puts it: "*where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid*".[20]

Considering the Respondent is an economic operator in a liberalised market that carries out its activities on the internal electricity market of various Member States, the contested

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15 See Opinion of Advocate General Kokott in *Frucona Košice v Commission*, C-73/11 P, EU:C:2012:535, points 48 to 51.

16 Judgment of 16 September 2004, *Valmont Nederland BV v Commission*, T-274/01, EU:T:2004:266, paragraph 71.

17 Judgment in, *Netherlands v Commission*, C-382/99, EU:C:2002:363, paragraph 61.

18 Judgment in *Philip Morris*, 730/79, EU:C:1980:209, paragraph 11; judgment of 15 June 2000, *Alzetta*, T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151, paragraph 80.

19 Judgment in *Alzetta*, paragraphs 141 to 147.

transaction should be considered likely to distort competition and affect trade between Member States.[21] The fact that the aid is granted by the political subdivision of one Member State to an undertaking based in a different Member State is wholly irrelevant for a finding of State aid,[22] particularly since the Respondent operates on the internal electricity market of various other Member States, which are open to competition.

In conclusion, from the information at the disposal of the Commission it seems likely that the first, third and fourth conditions for a finding of State aid have been fulfilled as regards the contested transaction. Therefore, if your tribunal concludes that the purchase price paid by the Claimant for the acquisition of the shares in EnBW from the Respondent is higher than what a private market operator would have agreed to pay, the contested transaction should be considered to give rise to State aid for the Respondent within the meaning of Article 107(1) TFEU.

III. OBSERVATIONS ON THE REQUIREMENT OF PRIOR NOTIFICATION TO THE COMMISSION (ARTICLE 108(3) TFEU)

Under Article 108(3) TFEU, Member States have an obligation to notify any new State aid they intend to implement to the Commission. Article 108(3) also imposes a "standstill obligation", which means that the Member State may not implement the aid measure before the Commission has deemed the measure to be compatible with the internal market (Article 3 of Council Regulation (EC) No 659/1999[23], hereinafter "the Procedural Regulation").[24]

Where a Member State has failed to notify an aid measure before its implementation, or where the aid has been implemented prior to a Commission decision on its compatibility with the internal market, the following principles apply:

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20 Judgment of 4 April 2001, *Friuli-Venezia Giulia*, T-288/97, EU:T:2001:115, paragraph 41.

21 See, Commission decision in State Aid Case SA.13869 (C 68/2002), *EDF: Reclassification as capital of the tax-exempt accounting provisions for the renewal of the high-voltage transmission network (RAG)*, OJ C 186, 28.6.2013, p. 73, recitals 75 *et seq.*

22 Contrary to the position expressed in paragraph 24 of the first Jacobs Opinion.

23 OJ L 83/1, 27.03.1999, p. 1. The Procedural Regulation was last amended by Council Regulation (EU) No 734/2013 of 22 July 2013, OJ L 204, 31.7.2013, p. 15.

24 Alternatively, the Commission may conclude that a measure notified to it does not constitute State aid within the meaning of Article 107(1) TFEU (see Article 4(2) of the Procedural Regulation).

- Non-notified aid is unlawful,[25] but not necessarily incompatible with the internal market. The Commission has sole responsibility for deciding on an aid's compatibility,[26] and it cannot ask for recovery of the aid on the mere ground that the aid has not been notified to it.[27] On the other hand, any compatibility decision of the Commission only takes effect *ex nunc*, i.e. the finding of compatibility does not have retroactive effect to the date of (unlawful) implementation by the Member State.[28] The advantages resulting from the unlawful implementation can be recovered if a competitor asks a national judge to do so.[29]

- Incompatible State aid must in principle be recovered.[30] Concerning unlawful State aid for which the Commission has not yet taken a (positive or negative) compatibility decision, any interested party may seize the national courts to have the implementation of the aid suspended and, save for exceptional circumstances, to have aid already disbursed recovered.[31] Contrary to the view expressed in the first Jacobs Opinion (paragraphs 14, 21 and 27), that order of recovery by a national Court can be final in a situation where the Member State decides not to notify the measure in question to the Commission at all once recovery has taken place and, in that case, will concern the entire amount of aid granted (principal and interest). The Member State may, if and once the aid has been approved by the Commission, repay the principal, but not the interest.

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25 Article 1(f) of the Procedural Regulation.

26 Judgment in *Fédération nationale du commerce extérieur des produits alimentaires (FNCE)*, C-354/90, EU:C:1991:440, paragraphs 9 and 14.

27 Judgment in *France v Commission, ('Boussac')*, C-301/87, EU:C:1990:67 and judgment in, Belgium v Commission ('Tubemeuse'), Case C-142/87, C-142/87, EU:C:1990:125. In such a case, an interim decision must be issued requiring the Member State to halt the payment of aid pending the outcome of the compatibility assessment.

28 Judgment in *FNCE*, C-354/90, EU:C:1991:440, paragraph 16 and judgment in *Centre d'exportation du livre français (CELF)*, C-199/06, EU:C:2008:79, paragraph 40.

29 Judgment in *CELF*, EU:C:2008:79, paragraphs 39, 52 and 53. See also the Commission notice on the enforcement of State aid law by national courts, *OJ C* 2009, 9.4.2009, p. 1, points 26 *et seq.*

30 There are some (limited) exceptions to that principle where the recovery of unlawful incompatible aid is not required: Article 14 of the Procedural Regulation prohibits recovery of the aid if this would be contrary to a general principle of Union law. And according to Article 15 of the same Regulation, the recoverability of aid is subject to a limitation period of ten years, starting from the day on which the unlawful aid is granted.

31 Judgment in *FNCE*, EU:C:1991:440, paragraph 12.

- A national court is authorised to interpret the notion of State aid and to reach a conclusion on whether State aid is present,[32] but may not rule on its compatibility with the internal market, which is the exclusive purview of the Commission. Thus, contrary to the claim made at paragraph 52 of the first Jacobs Opinion, the case-law of the CJEU does not bar your tribunal from deciding that the contested transaction involved State aid, since that finding does not involve deciding on the question of compatibility.[33]

In sum, the failure by a Member State to notify the Commission of a new support scheme or measure, or the implementation by the Member State of such scheme or measure before the Commission has taken a (positive) decision on it, constitutes a breach of the notification obligation enshrined in Article 108(3) TFEU, provided that the scheme or measure constitutes State aid within the meaning of Article 107(1) TFEU. Where such scheme or measure does not fulfil the criteria set in Article 107(1) TFEU, the failure to notify the measure does not violate Article 108(3) TFEU. However, once the Commission has opened the formal investigation procedure, the Member State is obliged to comply with the stand-still obligation pursuant to Article 108(3), independently of whether the measure objectively constitutes State aid.[34]

In light of this conclusion, it should be noted that since the prohibition on the implementation of new aid enshrined in Article 108(3) TFEU is defined with sufficient clarity and precision and does not need further implementing action, it should be considered to have direct effect, thereby giving rise to subjective rights in favour of affected natural and legal persons, which must be safeguarded, and establishing procedural criteria, which the national courts can appraise. Thus, where a national court is confronted with unlawfully granted aid, it must draw all legal consequences from this unlawfulness under national law and protect the rights of individuals affected by the unlawful implementation of the aid by providing the necessary remedies, as set out in the

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32 Judgment in *Steinike & Weinlig*, 78/76, EU:C:1977:52, paragraph 14. See also the Commission notice on the enforcement of State aid law by national courts, OJ C 2009, 9.4.2009, p. 1, points 8 *et seq.*

33 The judgment in *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269, would actually suggest the opposite, namely, that your Tribunal must decide on the existence of State aid to ensure the enforceability of that award in the national courts of the Member States.

34 Judgment in *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 33 and 36 to 42.

Commission notice on the enforcement of State aid law by national courts ("the Enforcement Notice"),[35] such as: preventing the payment of aid not yet disbursed, recovery of the aid paid, recovery of the interest, damages and interim measures.

While an arbitral tribunal is not a national court within the meaning of the Enforcement Notice,[36] this should not affect the conclusion that Article 108(3) TFEU has direct effect. It is particularly in the context of the future enforcement of an arbitral award applying the State aid rules that the direct effect of Article 108(3) TFEU should be considered. The State aid rules are public rules which deal with relationships between the State and economic entities and can thus be seen as fundamental rules of public policy. Accordingly, there is an important public policy interest in ensuring the uniform application of those rules, the failure to do so may render any award rendered by your tribunal unenforceable in the national courts of the Member States.[37]

IV. OBSERVATIONS ON THE MEMBER STATE'S ABILITY TO INVOKE ITS FAILURE TO NOTIFY

In the expert opinions submitted by Advocate General Sir Francis Jacobs KCMG and Professor Dr Martin Nettesheim, the question arises whether a Member State can invoke the absence of notification of State aid to the Commission to declare aid unlawful and demand its recovery when that absence of notification is due to the Member State's own failure to comply with its obligation under Article 108(3) TFEU.

In that respect, it has been suggested in the first Jacobs Opinion (paragraphs 22 to 38) that, in view of a general principle of law (*venire contra factum proprium*, respectively *Nemo auditur propriam turpitudinem allegans*), the Member State's ability to invoke its failure to notify could be doubted. In particular, it has been suggested that such a failure to notify would constitute an exceptional circumstance giving rise to legitimate expectations preventing recovery of the unlawful aid. The Commission does not, however, agree with that line of reasoning.

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35 Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p.1.

36 Commission Notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, p. 1..

37 See, by way of analogy, judgment in *Eco Swiss*, C-126/97, ECLI:EU:C:1999:269.

As a preliminary matter, the Commission notes that the Claimant is wholly-owned by the Land BW, a political subdivision of the Federal Republic of Germany. It is apparent, however, from the structure of Article 108(3) TFEU, which establishes a bilateral relationship between the Commission and the Member State, that only the Member States of the Union are under the obligation to notify new aid to the Commission. On the one hand, the notification requirement and the prior prohibition on implementing planned aid are directed to the Member States. On the other hand, the Member State is always the addressee of the decision by which the Commission finds aid incompatible with the internal market and the Commission always requests the Member State to abolish aid within the period determined by it, regardless of whom is the aid granting body.[38] That bilateral relationship is also apparent in Article 2 of the Procedural Regulation, which repeats that the notification obligation rests with the Member State concerned, and Article 3 of Regulation (EC) No 794/2004, which deals with the transmission of notifications to the Commission.[39] While political subdivisions of a Member State may request their Member State to notify new aid to the Commission, they cannot compel them to do so.[40] It is thus against the Member State concerned and not against its political subdivisions that the above mentioned line of reasoning could be invoked, if at all, as a bar for raising the claim that the contested transaction should have been notified to the Commission in accordance with Article 108(3) TFEU.

However, even if it were the Member State relying on its failure to notify, and not just a political subdivision thereof, the Commission sees no ground for accepting as a general principle that that Member State should be barred from relying on Article 108(3) TFEU in adversarial proceedings because of that failure. It is a fundamental principle of State aid law that aid which is found to be incompatible with the internal market must be recovered. According to the CJEU, "*the obligation on a State to abolish aid regarded by the Commission as being incompatible with the common market has as its purpose to re-establish the previously existing situation [...]. That objective is attained once the aid in*

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38 See, by way of analogy, judgment in *P&O European Ferries (Vizcaya) v Commission*, C-442/03 P and C-471/03 P, ECLI:EU:C:2006:356, paragraph 103; Judgment of 5 April 2003, *P & O European Ferries (Vizcaya) v Commission*, T-116/01 and T-118/01, ECLI:EU:T:2003:217, paragraph 64.

39 Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty

question, increased where appropriate by default interest, has been repaid by the recipient [...] to [...] the public body responsible [...]. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored".[41] Hence, the justification for recovery does not lie in restoring the integrity of the State budget by retrieving the public money disbursed. The justification lies in preserving the competitive level-playing field by restoring the *status quo ante*. In light of this objective and the direct effect attributed to Article 108(3) TFEU, a possible breach of the notification obligation should be considered *ex officio* in adversarial proceedings, so that a Member State could raise the argument regardless of its own failure to notify.

It follows from the case practice of the CJEU itself that the failure by a Member State to notify an aid measure does not constitute a bar to recovery. Thus, in *Heiser*,[42] in the proceedings before the national court which gave rise to a preliminary ruling to the CJEU on the existence of State aid, the Finanzlandesdirektion für Tirol argued that, when it considered an appeal brought by Mr. Heiser against its tax assessment, it did not apply an exemption contained in Austrian legislation for medical practitioners from the requirement to adjust input VAT, because the failure to adjust deductions constituted unnotified State aid under Article 107 TFEU, while under Article 108(3) the authorities of a Member State may not implement unnotified aid. The CJEU agreed with that line of reasoning and made no mention of the Finanzlandesdirektion being barred from relying on it simply because Austria had failed to notify the measure at issue. Similarly, in *Residex* and *Commerz Nederland*,[43] the CJEU did not see any reason to question the reliance of the Municipality of Rotterdam on the argument that the guarantees granted by the sole director of the Port Authority of Rotterdam, an entity it controlled entirely, constituted illegal State aid, since they had not been notified by the Dutch authorities to the Commission in accordance with Article 108(3) TFEU.

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40 However, the fact that an aid measure has not been approved by the Commission means that the political subdivision cannot implement it, unless it does not constitute State aid.

41 Judgment in *Commission v Italy*, C-348/93, EU:C:1995:95, paragraphs 26-27.

42 Judgment in *Heiser*, C-172/03, EU:C:2005:130.

43 Judgment in *Residex Capital IV*, C-275/10, EU:C:2011:814 and Judgment in *Commerz Nederland*, EU:C:2014:2224.

Moreover, contrary to the view expressed in the first Jacobs Opinion (paragraph 23), it is not "extraordinary" for the Member State or a public entity of a Member State to seek repayment of aid that it has granted.[44] The Commission, in its decisional practice, has taken a number of decisions concerning such situations.[45] There are hence – in spite of the view expressed in the first Jacobs Opinion[46] – numerous examples where public entities have relied on the standstill obligation.

Finally, the Commission sees no room to accept the Member State's failure to notify as an exceptional circumstance giving rise to a legitimate expectation on the part of the Respondent that the contested transaction was lawful. The CJEU has given a very restrictive interpretation to the principle of the protection of legitimate expectations in the context of recovery. As such, it has held that "*in view of the mandatory nature of the supervision of State aid by the Commission under Article [108 TFEU], undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that Article*"[47]. Indeed, "*[i]f that were possible, Articles [107] and [108 TFEU] would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct or negligence in order to render decisions taken by the Commission under the provisions of the Treaty ineffectual*".[48] In other words, where State aid has not been notified to and approved by the Commission in accordance with Article 108(3) TFEU, the aid beneficiary's reliance on the principle of the protection of

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44 To the knowledge of the Commission, the German courts have also accepted cases brought by public entities concerning aid measures they failed to notify, most notably in the case concerning Messe Köln (OLG Köln, judgment of 30 March 2012, Az. 1 U 77/11, http://openjur.de/u/454221.html), Neuwoges (LG Rostock, judgment of 28 November 2008, Rostock is Az. 3 0 203/07) and Biria (BGH, judgment of 13 September 2012, Az. III ZB 3/12, http://openjur.de/u/535565.html).

45 See: Commission Decision of 16 September 2014 on aid in relation to the privatisation of housing blocks in Neubrandenburg (Case SA.23129 – Germany), not yet published in the OJ; Commission Decision of 2 October 2013 on compensation to be paid to Simet SpA for public transport services provided between 1987 and 2003 (State aid measure SA.33037 (2012/C) – Italy), OJ L 114, 16.4.2014, p. 48.; Commission Decision of 2 October 2013 on Expropriation compensation of Nedalco in Bergen op Zoom NL (Case SA.32225 - Netherlands), summary notice in OJ 2013 C 335/1;Commission Decision of 7 April 2006 on State aid implemented by the Slovak Republic for Frucona Košice, a.s. (State aid measure C 25/2005 – Slovakia), OJ L 112, 30.04.2007, p. 14; Commission Decision of 19 Janury 2005 on Latvijas Gaze – Latvia (Case N 380/2004), summary notice in OJ 2005 C 136/41.

46 Paragraph 6.

47 Judgment in *Land Rheinland-Pfalz v Alcan Deutschland*, C-24/95, EU:C:1997:163, paragraph 25.

legitimate expectations to prevent recovery would basically render the direct effect attributable to that provision meaningless.

While it is true that the CJEU accepted, in its *SEFI* judgment of 1996,[49] that the presence of exceptional circumstances could render the repayment of unnotified aid inappropriate in the context of national proceedings, there is not a single instance in which that court has found such circumstances to exist to found a claim, on the principle of the protection of legitimate expectations, that an aid measure is lawful in the absence of notification to the Commission. As a matter of fact, the CJEU appears to adopt the view in its more recent case-law that, in the absence of sufficiently precise assurances arising from a positive action taken by the Commission which lead the beneficiary to believe that the measure does not constitute State aid, no exceptional circumstances can warrant the application of the principle of the protection of legitimate expectations to prevent recovery in the context of national proceedings if that aid measure was not notified to the Commission.[50] Indeed, it is long-standing case-law that the principle of the protection of legitimate expectations cannot be relied upon against a precise provision of Union law and that the conduct of a national authority responsible for applying Union law, which acts in breach of that law, cannot give rise to legitimate expectations on the part of an economic operator that he will benefit from treatment which is contrary to that law.[51]

Contrary to the claim made in the first Jacobs Opinion, the CJEU did not follow the Advocate Generals in its *Alcan*[52] and *SEFI* judgments on the detailed description as to what may constitute exceptional circumstances. As regards the Commission decision in *France Telecom*,[53] the absence of recovery is primarily based on a possible violation of the rights of defence of France due to the impossibility of calculating precisely the amount of aid to be recovered. The subsidiary reasoning on legitimate expectations is based on the fact that the Commission for the first time found State aid in a declaration

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48 Judgment in *Commission v Germany*, C-5/89, EU:C:1990:320, paragraph 17; judgment in *Spain v Commission*, C-169/95, EU:C:1997:10, paragraph 48 and judgment of 14 January 2004, *Fleuren Compost BV v Commission*, T-109/01, EU:T:2004:4, paragraph 143.

49 Judgment in *SEFI*, C-39/94, EU:C:1996:285, paragraph 71.

50 Judgment in *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraphs 104 to 111.

51 Judgment in *Commission v Italy*, C-217/06, EU:C:2007:580, point 23 and the case-law cited.

52 Judgment in *Land Rheinland-Pfalz v Alcan Deutschland*, EU:C:1997:163.

made by a Minister. The present case, on the contrary, seems to concern a standard situation, which is the purchase of a good by the State at a price allegedly above the market price. As for the *RSV* judgment[54], which is cited in footnote 8 of the first Jacobs Opinion, this concerns the principle of legal certainty and not legitimate expectations. Furthermore, the factual circumstances of that case are very different from the present case, as the Commission had already issued a first decision and had been informed by the Member State of all measures in due time. In any event, the latter judgment is no longer considered good case-law and has subsequently not been followed by the CJEU.[55]

In the present case, the exceptional circumstance upon which, according the Jacobs Opinion, the Respondent would seek to rely emanates from the omission of the German authorities to notify the contested transaction in the first place, or at least of the Land BW to request those authorities to do so, as required by Article 108(3) TFEU. Considering that the measure was never notified to the Commission and that the Commission never gave precise assurances which could have lead the beneficiary to believe that the measure does not constitute State aid, accepting that failure to notify as an exceptional circumstance would effectively usurp the Commission's power to control the granting of State aid for reasons beyond its control, even if that transaction is eventually notified to it by the German authorities at a later date. As for the suggestion in paragraph 53(4) of the first Jacobs Opinion that the Respondent could base its legitimate expectations on the failure of the Commission to open an investigation into the contested transaction on its own initiative, the CJEU has clearly stated that any apparent failure to act is irrelevant when an aid scheme has not been notified to the Commission.[56]

In conclusion, the fact that the contested transaction was not notified to the Commission does not constitute a bar to the aid granting authority relying upon Article 108(3) TFEU

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53 Commission decision 2006/621/EC, OJ 2006 L 257/11.

54 Judgment in *RSV v Commission*, 223/85, EU:C:1987:502.

55 See, for example, judgment in *Italy v Commission*, C-298/00 P, EU:C:2004:240, paragraph 90, judgment in *Greece v Commission*, C-278/00, EU:C:2004:239, paragraph 106, and judgment in *Germany v Commission*, C-334/99, EU:C:2003:55, paragraph 44.

56 Judgment in *Demesa and Territorio Histórico de Álava v Commission*, C-183/02 P and C-187/02 P, EU:C:2004:701, paragraph 52.

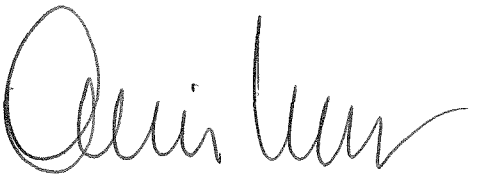
to declare aid unlawful in adversarial proceedings, even if that failure to notify lies with the authority itself, or at least with the Member State concerned.

In light of this conclusion, the Commission would like to note, as a final matter, that if your tribunal concludes that no aid is present in the contested transaction, that finding would not create a legitimate expectation for the Respondent that the aid was lawfully granted.[57] Conversely, if your tribunal decides that the contested transaction constitutes State aid within the meaning of Article 107(1) TFEU, it remains open to the Respondent, as an interested party within the meaning of Article 108(2) and Article 1(h) of the Procedural Regulation, to inform the Commission of the allegedly unlawful aid measure in accordance with Articles 10(1) and 20(2) of the Procedural Regulation, which the Commission is obliged to examine, contrary to the claim made in the first Jacobs Opinion that the Respondent would essentially be left out in the cold or that recovery would be final,[58] even if the Member State still refuses to notify the measure.

V. ANSWER TO THE QUESTION POSED BY YOUR TRIBUNAL

Considering the foregoing, the Commission is of the opinion that the fact that a Member State refrains from notifying a transaction with an excessive purchase price paid by a wholly-owned subsidiary of a political subdivision of that Member State to a company in another Member State results in a breach of Article 107 and Article 108 TFEU.

Yours faithfully,



Luis ROMERO REQUENA

Director-General

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57 See, by way of analogy, judgment of 16 July 2014, *Zweckverband Tierkörperbeseitigung v Commission*, T-309/12, EU:T:2014:676, paragraph 238.

58 Paragraph 27 of the first Jacobs Opinion.