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STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

Part II

**Recovery of unlawful State aid: enforcement of negative
Commission decisions by the Member States**

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TABLE OF CONTENTS

1.	INTRODUCTION, METHODOLOGY	509
2.	SUMMARY OF EC LAW ON RECOVERY OF UNLAWFUL AID	513
2.1	Regulation No. 659/1999 laying down detailed rules for the application of Article 88 EC (the "Procedural Regulation")	513
2.2	Regulation No. 794/2004 implementing Regulation No. 659/1999 (the "Implementing Regulation")	515
2.3	Case law of the ECJ and of the CFI	515
3.	SUMMARY, OBSTACLES TO EFFICIENT RECOVERY AND PROPOSED REMEDIES, PROPOSED BEST PRACTICE GUIDELINES	521
3.1	Summary	521
3.1.1	Competent authorities	521
3.1.2	Substantive rules applicable to recovery	522
3.1.3	Procedural rules applicable to recovery	523
3.1.4	Immediate enforcement and interim relief	524
3.1.5	Protection of legitimate expectations as a means of preventing recovery	525
3.1.6	Insolvency	526
3.1.7	Table on summary of key findings	527
3.2	Obstacles to efficient recovery and proposed remedies	535
3.2.1	Lack of clarity as to the national body that must issue the recovery decision, the beneficiary, and the amount of the aid	535
3.2.2	Questions regarding the applicable procedure	536
3.2.3	Lack of clarity as to the immediate enforceability of recovery orders/interim relief	536
3.2.4	Stay of national proceedings where Commission decision has been challenged	537
3.2.5	Recovery of aid granted at local level	537
3.2.6	Inherent conflict of interest of the Member State granting and recovering aid	538
3.3	Best practice guidelines	539
4.	BELGIUM	542
4.1	National authorities responsible for recovery	542
4.2	Rules applicable to recovery	542
4.2.1	Civil recovery procedure	542
4.2.2	Adoption of a law ensuring the recovery of the aid - The <i>Maribel</i> Case	544
4.2.3	Recovery of aid before foreign jurisdictions - the <i>Ryanair</i> Case	545
4.2.4	Recovery from a bankrupt company - insolvency proceedings	545

4.3	Actions for recovery (or opposing recovery) before national courts.....	547
4.3.1	Actions by the State enforcing recovery	547
(1)	Commercial Court of Kortrijk, Case No. 3176/02 R.K, 7 October 2003, Walloon Region v NV Ter Lembeek International (A) (see also Part I of the study).....	547
(2)	Commercial Court of Mons, RG 03630/01, 21 January 2002, SRIW (Walloon Region) v Mrs. BLONDIAU (Curator of the bankrupt estate of Verlipak) (A).....	548
(3)	Idealspun case	549
(4)	Beaulieu case.....	550
(5)	<i>Tubemeuse</i> (see Part I of the study).....	551
4.3.2	Actions by competitors to enforce recovery.....	551
4.3.3	Issues related to actions by the beneficiary to oppose a recovery order.....	551
(6)	<i>Dufrasne</i> (see also Part I of the study)	552
(7)	<i>Ford v ONSS-RSZ (Maribel)</i> - see Part I of the study.....	552
4.3.4	Arguments raised by beneficiary acting as a defendant.....	553
a)	Legitimate expectations (<i>Beaulieu</i> and <i>Idealspun</i> cases).....	553
b)	Legality of the Commission decision - Appeal to the CFI (<i>Ter Lembeek</i> case).....	553
4.4	Summary of the main difficulties in Belgian recovery proceedings.....	554
4.4.1	Belgian State / National authorities	554
4.4.2	The beneficiary of the aid	555
4.4.3	National courts.....	555
4.5	Identification of best practices and remedies for immediate and effective recovery.....	555
4.5.1	Best practices for immediate recovery of aid.....	555
4.5.2	System of surveillance of State aid in Belgium.....	556
5.	FRANCE.....	561
5.1	National authorities responsible for recovery	561
5.2	Rules applicable to recovery	561
5.2.1	Public law	561
a)	Recovery by the State.....	562
b)	Recovery by local authorities	562
c)	Suspensory effect and possible interim measures	563
5.2.2	Civil law	564
a)	Suspensory effect and interim measures.....	564
b)	Insolvency proceedings.....	564
5.3	Actions for recovery (or opposing recovery) before the national judges.....	566
5.3.1	Actions by the State to enforce recovery	566
5.3.2	Actions by competitors to enforce recovery.....	566
(8)	Administrative Court of Appeal of Paris, Centre d'exportation du livre français, 5 October 2004, Cases n°01PA02717, n°01PA02761, n°01PA02777 and n°03PA04060, AJDA, 7 February 2005, p. 260-268, Dr. Adm., February 2005, n°2, p. 20-21 (D/E/I).....	567
(9)	Administrative Court of Strasbourg, Ryanair, 24 July 2003, Case n°02-04641, LPA, 28 November 2003, n°238, p. 13; Administrative Court of Appeal of Nancy, Ryanair, 18 December 2003, Cases n°03NC00859 and n°03NC00864, AJDA, 2004, p. 396-401 (E/D).....	568
(10)	Cour de Cassation, Laboratoires Boiron, 14 December 2004, Case n°1837, Petition n°02-31.241, not published (B)	568
5.3.3	Actions by the beneficiary to oppose recovery order.....	568

(11)	Commercial Court of Paris, SA Sojerca c/o Jaunet, 21 January 2003, Case n°2000089112 in Repertory General: Gazette du Palais, 4 November 2003 n°308, p.28 (G/F)	569
(12)	Energy Regulation Commission, State aid recovery, 26 February 2004, not published (F/A)	569
(13)	Administrative Court of Clermont-Ferrand, SA Fontanille, 23 September 2004, Case n°0101282, AJDA 2005, Jurisprudence p. 385 (A)	570
5.4	Summary of the main difficulties in French recovery proceedings.....	571
5.4.1	Amount and beneficiaries of the aid	572
5.4.2	Procedural aspects	572
5.5	Identification of best practices and remedies for immediate and effective recovery.....	573
5.5.1	Immediate recovery of aid	573
5.5.2	Effective recovery of aid	573
6.	GERMANY	577
6.1	Authorities responsible for recovery.....	577
6.2	Rules applicable to recovery.....	577
6.2.1	Public law	578
6.2.2	Civil law	578
6.2.3	Immediate Enforcement and suspensory effect	579
6.2.4	Recovery in insolvency proceedings	581
a)	General Insolvency Act	581
b)	Practical problems.....	582
c)	Insolvency plan.....	583
6.3	Actions for recovery (or opposing recovery) before the national courts	584
6.3.1	Action by the State	584
(14)	Administrative Court (" <i>Verwaltungsgericht</i> ") of Berlin, 15 August 2005, 20 A 135/05 (A); Higher Administrative Court (" <i>Oberverwaltungsgericht</i> ") of Berlin, 8 November 2005	584
(15)	Regional Court (" <i>Landgericht</i> ") of Halle, 23 December 2004, 9 O 231/04 (A)	585
(16)	Higher Regional Court (" <i>Oberlandesgericht</i> ") of Dresden, 24 September 2004, 3 U-1013/04; Regional Court (" <i>Landgericht</i> ") of Chemnitz, 28 April 2004, 8 O-3619/02	585
(17)	Higher Regional Court (" <i>Oberlandesgericht</i> ") of Hamburg, 2 April 2004, 1 U-119/00; Regional Court (" <i>Landgericht</i> ") of Hamburg, 29 June 2000, 303O-358/96	587
(18)	Federal Court of Justice (" <i>Bundesgerichtshof</i> "), 20 January 2004, XI ZR 53/03, NVwZ 2004, 636	588
(19)	Federal Court of Justice (" <i>Bundesgerichtshof</i> "), 24 October 2003, V ZR 48/03, EuZW 2004, 254	589
(20)	Regional Court (" <i>Landgericht</i> ") of Magdeburg, 27 September 2002, 10 O 499/02 and Higher Regional Court (" <i>Oberlandesgericht</i> ") of Naumburg, 14 May 2003, 12 U 161/02 (E).....	589
(21)	Federal Court of Justice (" <i>Bundesgerichtshof</i> "), 4 April 2003, V ZR 314/02, VIZ 2003, 340	590
(22)	Regional Court (" <i>Landgericht</i> ") of Magdeburg, 8 August 2002, 4 O 194/02 and Higher Regional Court (" <i>Oberlandesgericht</i> ") of Naumburg, 18 December 2002, 5 U 100/02 (A).....	591
(23)	Regional Court (" <i>Landgericht</i> ") of Rostock, 23 July 2002, 4 O 468/01, VIZ 2002, 632	592

(24)	Higher Regional Court (" <i>Oberlandesgericht</i> ") of Nürnberg, 21 March 2002, 12 U 2961/01, Regional Court (" <i>Landgericht</i> ") of Amberg, 23 July 2001, 41 HKO 546/97	593
(25)	Action by competitors	594
6.3.2	Action by beneficiary (opposition)	594
(26)	Higher Administrative Court (" <i>Verwaltungsgerichtshof</i> ") of Baden-Württemberg, 10 December 1996	594
(27)	Federal Administrative Court (" <i>Bundesverwaltungsgericht</i> "), 17 February 1993; Higher Administrative Court (" <i>Oberverwaltungsgericht</i> ") of Münster, 26 November 1991; Administrative Court (" <i>Verwaltungsgericht</i> ") of Cologne, 21 April 1988	595
(28)	Federal Tax Court (" <i>Bundesfinanzhof</i> "), 12 October 2000, III R 35/95	596
(29)	<i>Alcan</i> case:	597
6.4	Difficulties encountered by the Commission in German recovery cases	599
6.4.1	General	599
6.4.2	Types of cases	600
6.4.3	Legal issues	600
6.5	Proposed best practice guideline	601
7.	ITALY	605
7.1	Actions available for enforcement of negative Commission decisions	605
7.1.1	Public law measures by national authorities	605
7.1.2	Recovery through legislative measures	607
a)	Recovery through other public law measures	608
7.1.3	Private law measures	610
a)	Payment order (" <i>procedimento di ingiunzione</i> ")	610
b)	Ordinary proceedings	611
7.1.4	Interim measures	611
7.2	Actions of beneficiary to oppose recovery order	613
7.2.1	Actions based on illegality of national recovery orders	613
7.2.2	Actions based on illegality of negative Commission decision	613
7.2.3	Actions based on legitimate expectations	613
7.3	Enforcement in insolvency proceedings	614
7.3.1	Preferential treatment of recovery actions under national insolvency laws	614
7.3.2	Enforcement in practice	615
7.4	Enforcement against third party beneficiary	615
7.4.1	Purchasers of businesses that benefited from State aid	615
7.4.2	Financial institutions that have granted financing to beneficiary	616
7.5	Obstacles to immediate and effective recovery	617
7.6	Best recovery practices	618
7.6.1	Recovery of aid granted through civil law transactions	618
7.6.2	Recovery of aid granted by administrative acts	619
7.7	List of cases	619

7.7.1	Action by the State	619
7.7.2	Action by competitors	619
7.7.3	Action by beneficiary ("opposition")	620
(30)	Administrative Supreme Court ("Consiglio di Stato"), Judgment of 16 September 2003, No. 5250, Ministero dell'Industria v. Società Siderurgica Lucchini	620
(31)	Administrative Supreme Court ("Consiglio di Stato"), Judgment of 9 May 2003, Ministero dell'Industria, del Commercio e dell'Artigianato v. Società Industrie Cantieri Metallurgici Italiani S.p.A.	620
(32)	Supreme Court ("Corte di Cassazione"), Judgment of 10 December 2002, No. 17564, Ministero delle Finanze v. Torrefazione Caffè Mattioni S.r.l.	621
(33)	Administrative Supreme Court ("Consiglio di Stato"), Judgment of 27 September 2002, No. 4946, Ministero delle Attività Produttive v. Diano S.p.A.	622
(34)	Administrative Supreme Court ("Consiglio di Stato"), Judgment of 29 January 2002, No. 465, Del Verde S.p.A. v. Ministero dell'Industria, del Commercio e dell'Artigianato et a.	622
(35)	Supreme Administrative Court ("Consiglio di Stato"), Judgment of 22 January 2002, No. 360, Acciaierie Ferriere Lombarde Falck S.p.A. v. Ministero dell'Industria, del Commercio e dell'Artigianato and others	623
(36)	Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment of 23 September 1999, No. 2876, Iris Biomedica v. Ministero dell'Industria Commercio e Artigianato	624
(37)	Court of First Instance of Cagliari ("Tribunale di Cagliari"), Judgment of 14 April 1992, Nuova Cartiera di Arbatax S.p.A.	624
(38)	Regional Administrative Court of Lazio, Rome ("Tribunale Amministrativo Regionale del Lazio", Roma), Judgment of 11 June 1990, No. 1071, Società Fonderia A. v. Ministero dell'Industria et a.	625
(39)	Administrative Supreme Court ("Consiglio di Stato"), Judgment of 24 January 1989, No. 30, Società Cooperativa Carrettieri La Rinascita et al. v. Ministero dei Trasporti and others	625
(40)	Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment of 6 December 1988, No. 1746, TERNI - Soc. Per l'Industria e l'Elettricità S.p.A. v. Cassa Conguaglio per il Settore Elettrico	626
(41)	Regional Administrative Court of Sicily, Palermo ("Tribunale Amministrativo Regionale della Sicilia", Palermo), Judgment of 18 November 1986, No. 875, Società Enosicilia et. a. v. Istituto regionale Vite e Vino et a.	627
(42)	Regional Administrative Court of Lazio, Rome ("Tribunale Amministrativo Regionale del Lazio", Roma), Judgment of 22 January 1985, No. 103, Società Cooperativa Trasporto Latte et a. v. Banca Nazionale del Lavoro.....	628
8.	SPAIN.....	633
8.1	Actions available for enforcement of negative Commission Decisions	633
8.2	Public law measures by national authorities.....	634
(43)	State aids C48/99 to C50/99, C52/99 to C54/99 and C58/00 to C/60/00, regarding illegal State aid granted to several companies located in the Basque Country.....	637
(44)	State aid C/70/2001 ES, in connection with Hilados y Tejidos Puigneró, S.A. ("Puigneró").....	638
(45)	State Aid C51/1999 ES, in favour of Paneles Eléctricos, S.A. in the region of Navarra.....	638
(46)	State Aid C95/2001 ES granted by two public offices of the Regional Government of Galicia to Siderúrgicas Añón.....	639
(47)	State aid C3/2002, ex NN 160/2001, to Refractarios Especiales, S.A.	639
8.2.2	Private law measures	640
8.2.3	Possible interim measures in enforcement proceedings	641

8.3	Actions of the beneficiary to oppose a recovery order	641
8.3.1	Actions based on the illegality of national recovery orders.....	641
8.3.2	Actions based on the illegality of the Commission's negative decision	642
8.3.3	Actions based on legitimate expectations	642
8.4	Enforcement in insolvency proceedings	642
8.4.1	State Aid C/70/2001 ES, in favour of Puigneró and State Aid C 39/2001, in favour of Minas de Río Tinto	643
8.4.2	State aid case C22/90, in favour of Hilaturas y Tejidos Andaluces, S.A. ("Hytasa")	643
8.5	Enforcement against third party beneficiary	643
8.6	Obstacles to immediate and effective recovery	644
8.7	Best recovery practices	645
8.7.1	Recovery through administrative law means.....	645
8.7.2	Recovery through private law enforcement.....	645
8.8	Description of cases	646
8.8.1	Action by the State	646
8.8.2	Action by competitors	646
8.8.3	Action by the beneficiary (opposition).....	646
(48)	Superior Court of Justice, Administrative Section, 4 May 2005, regarding State aid granted to Paneles Eléctricos, S.A.	646
(49)	Resolution of the Central Economic-Administrative Court number 368/2001, of 24 May, Appeal number 2824/1999.....	647
9.	OTHER MEMBER STATES:	651
9.1	Austria	653
9.1.1	Recovery Procedure.....	653
9.1.2	Aid granted by way of contract	653
9.1.3	Aid granted by way of an individual administrative act (" <i>Bescheid</i> ")	653
9.2	Denmark	655
9.2.1	Recovery Procedure.....	655
9.3	Finland.....	657
9.3.1	Recovery Procedure.....	657
9.4	Greece	659
9.4.1	Recovery Procedure.....	659
9.4.2	Decisions 1916/2002, 1917/2002 & 1918/2002 of the <i>Hellenic Conseil d'Etat</i> and decisions 1335/2002 and 1957/1999 of the <i>Hellenic Conseil d'Etat</i>	659
9.4.3	Decision 89/2002 of the Suspensions Committee of the <i>Hellenic Conseil d'Etat</i> (injunction proceeding)	660
9.4.4	Opinions of the Legal Council of State	661
9.4.5	Legal opinion 438/2003 of the Legal Council of State	661

9.5	Luxembourg	663
9.5.1	Recovery Procedure.....	663
9.5.2	Court Cases.....	663
	(50) Decision of the State Council dated 11 April 1989.....	663
9.6	The Netherlands	665
9.6.1	Recovery Procedure.....	665
9.6.2	Court Cases.....	667
	(51) Administrative court, 's-Hertogenbosch, LJN: AR6630, Awb 03/2581 BELEI, 26 November 2004, X v Minister van Landbouw, Natuur en Visserij (Secretary of Agriculture, Nature Management and Fisheries) (A)	667
	(52) Administrative court, Zutphen, LJN: AF9788, 02/551 WET, 20 May 2003, Demarol BV v Minister van Financiën (Secretary of the Treasury) (A)	667
	(53) President of the Administrative Court, Assen, LJN: AA7472, 00/718 WET P01 G01, 2 October 2000, X v Y (A).....	668
9.7	Portugal	671
9.7.1	Recovery Procedure.....	671
9.8	Sweden	673
9.8.1	Recovery Procedure.....	673
9.8.2	The enforcement of negative Commission decisions	673
9.9	United Kingdom	675
9.9.1	Recovery Procedure.....	675
9.9.2	Court Cases.....	675
	(54) Department of Trade and Industry v British Aerospace plc and Rover Group Holdings plc [1991] 1 CMLR 165	675
	(55) R v Customs and Excise Commissioners, ex parte Lunn Poly Limited and another [1999] STC 350	676
	(56) Customs and Excise Commissioners v Gil Insurance Limited others [2000] STC 204	678

INTRODUCTION, METHODOLOGY

1. Introduction, methodology

This study looks at the practice of enforcement of negative Commission decisions by Member States¹. The focus is on the five Member States with the largest total number of recovery cases as at 1 July 2005: Germany, France, Spain, Italy and Belgium.

We have applied an **empirical methodology**, looking at the practice of **administrative** recovery and corresponding **court decisions**. With respect to administrative practice, we have had conversations with the Commission about recovery cases pending as at 1 July 2005. As regards court decisions, we have relied on all published recovery decisions.

This part of the study starts with a summary in section 2 of EC rules applicable to the recovery of unlawful aid.

For ease of reference, we present at the outset, in section 3, a summary and a description of the obstacles to efficient recovery and proposed remedies, as well as proposed best practices guidelines, all derived from sections 4 to 8 of the study.

Sections 4 to 8 contain a detailed analysis of the recovery methods used in Belgium, France, Germany, Italy and Spain, structured as follows:

- description of the authorities responsible for recovery at national level
- rules applicable to recovery
 - administrative law rules
 - civil law rules
 - interim relief
 - recovery in insolvency proceedings
- actions for recovery (or opposing recovery) before the national courts
- main difficulties encountered in recovery proceedings
- proposed remedies and best practices

The situation in the all other old Member States is described briefly in section 9.

¹ The authors of this study express their gratitude to Eva Mona Götz and Charlotte Wright, lawyers from Lovells, for their invaluable contribution in compiling this study.

**SUMMARY OF EC LAW
ON RECOVERY OF UNLAWFUL AID**

2. Summary of EC law on recovery of unlawful aid

The procedure for the application of Articles 87 EC and 88 EC has been described in Part I of this study. Part II of this study is dedicated to examining recovery issues in five Member States (Belgium, France, Germany, Italy and Spain).

Before describing and discussing the ways in which these Member States deal with these issues, it is useful to recall briefly the main EC rules applicable to recovery of unlawful aid as derived from Articles 87 and 88 EC and construed by case law, as well as from Regulation No. 659/1999 and Regulation No. 794/2004. These regulations have, in fact, consolidated most of the principles on recovery of State aid which have been established over a period of 40 years in the case law of the ECJ and of the CFI.

2.1 Regulation No. 659/1999 laying down detailed rules for the application of Article 88 EC (the "Procedural Regulation")²

Recovery of State aid only concerns unlawful State aid, which is defined by Article 1 (f) of the Procedural Regulation as "*new aid put into effect in contravention of Article [88] (3) of the Treaty*".

Recovery can also concern the misuse of aid, which is assimilated to unlawful aid following a Commission decision (aid used by a beneficiary in contravention of a decision not to raise objections, a positive decision or a conditional decision; Article 1 (g) of the Procedural Regulation). All rules applicable to unlawful aid apply to "misused aid".

A 'recovery injunction' can first be ordered by the Commission pursuant to Article 11 (2) of the Procedural Regulation. However, the conditions imposed on the Commission when seeking such provisional recovery are so strict that it has not yet been used. The conditions are that there must be (i) no doubt that the measure concerned constitutes aid; (ii) urgency to act; and (iii) a serious risk of substantial and irreparable damage to a competitor.

If the unlawful aid is not recovered pursuant to such a recovery injunction, Article 12 of the Procedural Regulation empowers the Commission to refer the matter directly to the ECJ and to apply for a declaration that non-compliance by the Member State concerned constitutes an infringement of the EC Treaty. In the case of non-compliance by a Member State, the Commission will also be entitled to take a decision on the basis of the information available (Article 13 of the Procedural Regulation).

The most important provision of the Regulation concerning recovery decisions is Article 14, which sets out the following principles:

² Council Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty, OJ (1999) L 83/1.

- the Commission should order recovery of State aid once it has declared the aid unlawful and incompatible with the Common Market (confirmed by case law in 1973³ although this was deemed to constitute merely a power of the Commission);
- the amount of aid to be recovered includes interest, payable from the date on which the unlawful aid was at made available to the beneficiary until the date of its recovery; Articles 9 to 11 of Regulation 794/2004 implementing the Procedural Regulation contain detailed rules on the method for fixing the interest rate, on its publication and on the method of applying interest (see below);
- recovery has to be effected:
 - "*without delay*" (without prejudice to any order of the ECJ pursuant to Article 242 EC);
 - "*in accordance with the procedures under the national law of the Member State concerned*";
 - "*provided that they allow the immediate and effective execution of the Commission's decision*"; and
- (in order to achieve recovery) Member States are obliged to take "*all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law*".

These rules, echoing an underlying political compromise existing at the time of the adoption of the Regulation, nevertheless contain a powerful potential development in the light of the interpretation of the principle of supremacy of EC law over national laws (notably the words "*provided that...*").

Finally, Article 15 of the Procedural Regulation lays down a limitation period of ten years for the Commission to recover aid⁴. The limitation period starts to run from the day on which the unlawful aid was awarded to the beneficiary. It is interrupted by any action taken by the Commission, or by a Member State acting at the request of the Commission (the ten-year period starts to run afresh after the interruption)⁵. It will be suspended when proceedings are pending before the ECJ or the CFI.

³ Case 70/72, *Commission v Germany* [1973] ECR 813.

⁴ The CFI interpreted the scope of Article 15 in Case T-366/00, *Scott SA v Commission* [2003] ECR II-1763. This case has been appealed to the ECJ (Case C-276/03 P); the appeal was dismissed on 11 October 2005.

⁵ It can be deduced from the CFI's decision in the *Scott* case that they considered that a request for information from the Commission addressed to a Member State constitutes an action brought by the Commission which interrupts the limitation period.

2.2 Regulation No. 794/2004 implementing Regulation No. 659/1999 (the "Implementing Regulation")⁶

Recital 10 of the Implementing Regulation specifies that the purpose of recovery is to re-establish the situation existing before the aid was unlawfully granted. Therefore, as recital 10 continues, in order to ensure equal treatment, the advantage should be measured objectively from the moment when the aid was made available to the beneficiary.

In order to achieve this objective, Articles 9 to 11 of the Implementing Regulation lay down the methods for fixing the interest rate and of applying interest in recovery cases.

Article 9 specifies that, unless otherwise provided for in a specific decision, the interest rate to be used for recovering State aid granted in breach of Article 88 (3) EC shall be an annual percentage rate fixed for each calendar year. The interest rate will be calculated on the basis of the interbank swap rate and, where no such rate or similar reference point exists in a Member State, the Commission will fix the applicable rate in close cooperation with the Member State concerned (Article 9 (4)). This possibility will be of relevance mainly for new Member States.

The Commission publishes current and relevant historical interest rates in the Official Journal of the European Union (Article 10).

The Implementing Regulation further provides that the interest rate to be applied shall be the rate applicable on the date on which the unlawful aid was first at the disposal of the beneficiary (Article 11 (1)). Compound interest will be applied in order to ensure full neutralisation of the financial advantages resulting from the unlawfully paid aid (Article 11 (2)). Furthermore, the interest rate shall be recalculated at five-yearly intervals (Article 11 (3)).

This approach is in line with the Commission communication of 8 May 2003, which makes clear that the effect of unlawful aid is to provide the recipient with funding on conditions similar to those of a medium-term non-interest-bearing loan⁷.

2.3 Case law of the ECJ and of the CFI

The case law of the ECJ and the CFI has formed the basis of the Procedural Regulation and the Implementing Regulation. Nevertheless, it is useful to recall the principles on recovery set out in the case law of the Community courts.

First, the ECJ established the principle that the obligation on a Member State to abolish aid, which the Commission considers to be incompatible with the Common Market, has as its purpose to re-establish the situation previously existing. The ECJ considered that this

⁶ Commission Regulation No. 794/2004 of 21 April 2004 implementing Council Regulation No. 659/1999, OJ (2004) L 140/1.

⁷ Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered, OJ (2003) C 110/21.

objective is attained once the aid in question, increased where appropriate by interest, has been repaid by the recipient to the relevant public body that granted the aid. Indeed, according to the ECJ, by repaying the aid, the recipient forfeits the advantage enjoyed over its competitors on the market, and the situation existing prior to payment of the aid is restored⁸.

Secondly, with regard to the amounts to be reimbursed, established case law sets out the following principles:

- there is no obligation on the Commission to quantify the aid⁹;
- it is for the relevant authorities of the Member States to calculate the amount of aid to be recovered, particularly where that calculation is dependent on information which that Member State has not provided to the Commission¹⁰;
- interest to be recovered on the sums illegally granted is aimed at eliminating any financial advantages incidental to such aid; to refrain from claiming payment of interest on the sums illegally granted would be tantamount to enabling the undertaking in receipt of those sums to retain financial advantages resulting from the grant of the unlawful aid, in the form of an interest-free loan, and that, in itself, would constitute aid which could distort, or threaten to distort, competition; the CFI did, however, observe that interest may only be recovered in order to offset financial advantages that actually result from the allocation of the aid to the recipient, and must be in proportion to the aid¹¹;
- such interest is not "default interest", i.e. interest payable by reason of the delayed performance of the obligation to repay the aid; the interest must, instead, be equivalent to the financial advantage arising from the availability of the funds in question, free of charge, over a given period¹²;
- the interest period cannot start to run before the date (a date which, in principle, must be fixed by the Commission and not the national authorities) on which the recipient of the aid actually had those funds at its disposal¹³;
- the national authorities must take account of any potential tax implications (for example, tax deductions as a result of the aid) when calculating the basis of assessment in accordance with procedures and provisions of national law¹⁴; and

⁸ Case C-350/93, *Commission v Italy* [1995] ECR I-699, para. 21 and 22 (also in Case C-348/93, *Commission v Italy* [1995] ECR I-673).

⁹ Joined Cases C-67/85, C-68/85 and C-70/85, *Kwekerij Gebroeders van der Kooy BV and others v Commission* [1988] ECR 219.

¹⁰ Case C-382/99, *The Netherlands v Commission* [2002] ECR I-5163; see also Case T-67/94, *Ladbroke v Commission* [1997] ECR II-1.

¹¹ Case T-459/93, *Siemens v Commission* [1995] ECR II-1675, para. 97 to 99.

¹² *Ibid.*, para. 101.

¹³ *Ibid.*, para. 103.

- where an aid has been granted in the form of a tax exemption and has then been declared unlawful, it is not correct to assume that recovery of the aid in question must necessarily take the form of a retroactive tax, which would as such be absolutely impossible to enforce; indeed, the Member State must merely take measures ordering the undertakings which have received the aid to repay sums equivalent in amount to the tax exemption unlawfully granted to them¹⁵.

Thirdly, the ECJ has set out a number of principles with respect to the recovery of unlawful aid from a third party which has bought shares in the company that is the beneficiary of the aid:

- where an undertaking that has benefited from unlawful State aid is bought at the prevailing market price, i.e. at the highest price which a private investor acting under normal competitive conditions would be prepared to pay for that company in the situation that it was in, in particular after having benefited from State aid, the aid element is assessed at prevailing market price and is included in the purchase price; according to the ECJ, the buyer cannot, in such circumstances, be regarded as having benefited from an advantage in relation to other market operators¹⁶;
- however, this case law is far from being final since the ECJ has, in an earlier decision, held that "*the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery*" and that, accordingly, in the case of a sale of shares by the beneficiary, the State aid must, in any event, be reimbursed by the beneficiary¹⁷; and
- moreover, in the recent *Olympic Airways* decision, the ECJ endorsed the view of the Advocate General that the Commission may be compelled to require that recovery is not restricted to the original undertaking, but is extended to the undertaking which continues the activity of the original undertaking in cases where certain elements of the transfer point to economic continuity between the two undertakings; indeed, the ECJ considered that, where a transfer of assets from the beneficiary to a new company was structured in such a way that it would be impossible to recover the debts of the beneficiary from the new company, that operation created an obstacle to the effective implementation of the recovery decision¹⁸.

Fourthly, with regard to Member States' arguments relating to difficulties encountered when recovering aid, the ECJ has made the following observations:

¹⁴ *Ibid.* para. 82-84 and 107.

¹⁵ Case C-193/91, *Commission v Greece* [1991] ECR I-3131, para. 17.

¹⁶ See, for example, Case C-277/00, *Germany v Commission* [2004] ECR I-3925, para. 80.

¹⁷ Case C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission* [2003] I-4035, para. 83.

¹⁸ Judgment of 12 May 2005, Case C-415/03, *Commission v Greece*, not yet published, para. 33 and 34, and Opinion of Advocate General Geelhoed of 1 February 2005, also at para. 33 and 34.

- it is for the Member State concerned to present a proposal on how the difficulties relating to the recovery of the aid should be overcome, including those difficulties relating to the calculation of the aid¹⁹; and
- the only defence available to a Member State in opposing an application by the Commission under Article 88 (2) EC for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to properly implement the decision ordering recovery; a Member State cannot justify the non-application of a Commission recovery decision on the grounds that it was impossible to execute the decision in question if its difficulties were of a merely technical and administrative nature; moreover, an absolute impossibility to execute the decision does not exist if there are indirect ways of calculating the amount of the aid to be recovered²⁰.

¹⁹ See, for example, Case C-378/98, *Commission v Belgium* [2001] ECR I-5107, para. 41.

²⁰ *Ibid.*

**SUMMARY, OBSTACLES TO
EFFICIENT RECOVERY AND
PROPOSED REMEDIES, PROPOSED
BEST PRACTICE GUIDELINES**

3. Summary, obstacles to efficient recovery and proposed remedies, proposed best practice guidelines

3.1 Summary

This study is based on an analysis of the published case law of the Member States concerning the recovery of State aid pursuant to negative Commission decisions. It focuses on Belgium, France, Germany, Italy, and Spain, being the Member States with the largest number of recovery cases as at 1 July 2005 (the "Selected Member States"). With respect to the Selected Member States, this study contains a description of:

- the national authorities responsible for recovery;
- the substantive rules applying to recovery;
- the procedures for recovery;
- interim relief;
- the extent to which the legitimate expectations of the beneficiary can prevent recovery;
- recovery in insolvency proceedings; and
- obstacles to immediate and effective recovery.

This study also contains short general sections on the situation in the ten remaining old Member States, including relevant published court decisions.

The country rapporteurs of the Selected Member States described the law applicable to the recovery of aid in their respective Member States and have analysed relevant court cases. In addition, the rapporteur of each country has examined the list of recovery cases that were considered open as at 1 July 2005 provided by the Recovery Unit of the Directorate-General for Competition of the Commission. The rapporteurs have been informed in general about the difficulties encountered (if any) in each case.

3.1.1 Competent authorities

A principle common to all countries reviewed is that recovery must be effected by **the authority that granted the aid**. This leads to the involvement of a **variety of central, regional and local bodies**, as well as **public entities**, in the recovery process.

Among the Selected Member States, France and Germany have a **central body** that controls and oversees the recovery process: in France, the *Ministère de l'Économie et des*

Finances ("Trésor"); in Germany, the Federal Ministry of Finance. In Belgium, Italy, and Spain, there is no central body that controls the recovery process.

Whereas the evidence obtained from the range of cases reviewed by the authors is statistically insufficient to draw conclusions, it appears that the existence of a central body in charge of implementing recovery decisions that has ongoing contact with the Commission is more likely to ensure **efficient implementation** of recovery decisions than a system where a variety of central, regional or local bodies are actively involved in the process.

3.1.2 Substantive rules applicable to recovery

In each of the Selected Member States, recovery is effected either on the basis of **administrative law** or **civil law** or, sometimes, on the basis of a combination of both.

The applicable substantive law is determined by reference to the measure **underlying the grant of the aid**. If the aid was granted by means of an act of public law, it must be recovered under administrative law. If the aid was part of a **civil law transaction (granted by means of a loan, a capital injection or other civil law transaction)**, it must be recovered pursuant to civil law. The applicable law is therefore **determined by the nature of the act** on the basis of which the aid was granted. The authorities have **no discretion** in determining whether administrative or civil law rules should apply.

In France, Germany, Italy, and Spain, most of the recovery cases examined were based on administrative law. In Belgium, the basic recovery decision is based on administrative law (adopted by administrative bodies). However, if the beneficiary does not challenge this decision before the Council of State, then the actual recovery process is conducted under civil law (the administrative bodies sue the beneficiary in the civil courts).

- In **France**, the administrative act ordering recovery can be based **directly** on the negative Commission decision.
- In **Belgium**, the administrative act ordering recovery (which may simply be a letter to the beneficiary or proceedings) can also be based **directly** on the negative Commission decision.
- In **Germany**, the prevailing view of the courts is still that a negative Commission decision cannot provide a valid legal basis for a recovery order since the negative Commission decision is only addressed to the Member State. The courts in Germany therefore always **require a domestic legal basis**. In administrative law, this legal basis is section 48 of the Administrative Law Act, which provides that illegal administrative acts can be repealed. However, this does not apply where the aid was granted through a civil law transaction rather than by way of an administrative act. In principle, such aid must be recovered on the basis of civil law principles, based on the reasoning that the underlying transaction violates Article 88 (3) EC and is therefore

null and void (under section 138 of the German Civil Code). Under German civil law, the effect is that the aid may be reclaimed pursuant to the principle of **unjust enrichment**.

In the recent *Kvaerner* case (see below), the German government attempted to base an administrative law recovery action directly on the relevant negative Commission decision in order to avoid the usual problems associated with recovery under civil law. The Administrative Court of Berlin rejected this approach on the basis of principles of German constitutional law. The German government has appealed this decision.

- In **Italy**, there is little evidence of recovery through court actions.
- In **Spain**, a **specific law** (No. 38/2003) created a legal basis for the recovery of illegal subsidies (i.e. payments) granted by an administrative act, although the procedure for recovery must be carried out pursuant to general rules of administrative law. Spanish authorities have issued individual recovery orders based on **general principles of administrative law**. Whereas civil law recovery is an option in certain cases based on the nullity of the underlying transaction which violates EC State aid law, we have been unable to find (within the scope of our review) any cases on this point.

3.1.3 Procedural rules applicable to recovery

In the Selected Member States, the procedural rules follow the applicable substantive rules in principle, with the **exception of Belgium**. In Belgium, the basic decision ordering recovery is based on administrative law, whereas the procedure for collecting the amounts due is **based on civil law**.

Recovery pursuant to administrative law is **more efficient** and **faster** than recovery pursuant to civil law. This is because the State is generally able to obtain **immediate enforcement of its payment claim** on the basis of an administrative procedure. In civil law proceedings, obtaining the enforcement of a payment claim requires a court decision.

- Thus, in **France**, recovery can be obtained by means of an immediately enforceable act ("*acte exécutoire*"), directly based on the Commission's negative decision.
- In **Spain** the position is comparable to that in France. As a rule, administrative acts ("*actos ejecutorios*") are immediately enforceable.
- Similarly, in **Germany**, the body seeking recovery can issue an administrative act ("*Verwaltungsakt*"), which can be declared immediately enforceable where "**public interests**" are at stake.
- The same applies to a certain extent, to **Italy**.

However, the administrative procedure aimed at ensuring that an enforceable decision is promptly made available in **France** is often frustrated. In fact, the administrative procedure in France follows the principle that **every executory act is automatically suspended by an objection by the aid beneficiary**. In France, this appears to be a major obstacle in securing the rapid implementation of a negative Commission decision.

In some cases, notably where there is a large number of recipients, recovery can be carried out through a legislative procedure (*Maribel* case in **Belgium**).

3.1.4 Immediate enforcement and interim relief

Under Article 14 of Regulation No. 659/99, a Member State must enforce a negative Commission decision by ordering recovery "**without delay**". This means that the Member State cannot await the outcome of court proceedings, either at Community or at national level. To comply fully with this obligation, authorities must, wherever possible, seek **immediate enforcement of recovery claims** under national law. At the same time, it must be ensured that aid beneficiaries cannot delay repayment of the aid through the misuse of national proceedings.

In the Selected Member States, immediate recovery of State aid is more likely to be effective in **administrative proceedings than in civil law proceedings**. In general, an administrative repayment order is, or can be made, **immediately enforceable**:

- in Germany, an administrative act ("Verwaltungsakt") can be made immediately enforceable where immediate execution is "in the public interest"; the beneficiary must apply for a court order to stop the enforcement process;
- in Italy, an administrative payment order is immediately enforceable. However, if the beneficiary seeks interim relief, a high threshold test, generally recognised in most Member States, must be met: (i) a prima facie case; and (ii) the risk of serious and imminent damage to the claimant's interests if interim relief is not granted;
- the same procedure applies in Spain, where the effects of an administrative act can be suspended if the conditions for interim relief are met; and
- a major obstacle to efficient recovery in this respect exists in France, where it is sufficient for a beneficiary to file an objection to an administrative recovery in order to frustrate the execution of the order (suspension).

The situation for interim relief is different where recovery is sought pursuant to **civil law**. In civil law proceedings, the Member States authority seeking repayment will normally be the claimant that must **apply for interim relief** and **support the application by evidence**. In particular, this requires establishing urgency. It could be argued that Article 14 of Regulation No. 659/99 presupposes immediate repayment of the amount of aid. This could be

interpreted as imposing an obligation on the Member States to create procedures whereby immediate recovery can be ensured. Thus, it could be considered that establishing the condition of urgency may not always be necessary for a Member States' authority to apply for interim relief. However, it is not clear to what extent this would require a more fundamental reshaping of Member States' laws on civil procedure. In fact, by virtue of the principle of supremacy of EC law, an adequate remedy should be provided by giving full effect to the provisions of Article 14 of Regulation No. 659/1999 (and to the phrase "*provided that*"), which emphasise that national procedures should not prevent immediate and effective recovery. National courts should be encouraged to set aside any national procedural rules which render an efficient recovery procedure ineffective. The authors of the study have not found any evidence of interim relief being obtained by a Member State in civil law recovery proceedings.

3.1.5 Protection of legitimate expectations as a means of preventing recovery

- Legitimate expectations, as a means of preventing recovery, have been an issue particularly in **Germany**. The German Administrative Law Act specifically provides that an act whereby a sum of money is granted cannot be revoked, even if the aid granted was illegal and if the recipient of the money has relied on the validity of the act. This provision of the German Administrative Law Act served as part of the argument relied on by the beneficiary in the *Alcan* case²¹. The ECJ ruled that domestic law must be applied in such a manner as to preserve the *effet utile* of the Commission's recovery decision. Domestic follow-up litigation in the *Alcan* case in Germany resulted in a final decision by the Federal Constitutional Court which, in February 2000, rejected the constitutional claim raised by the aid recipient and paved the way for recovery of the aid. Since 2000, there have been no further cases in which the principle of the protection of the legitimate expectations of the beneficiary has been relied on successfully. To apply this principle, the beneficiary of State aid will always be required to ascertain whether the aid has been properly notified to, and approved by, the Commission.

The situation in the other Selected Member States is similar:

- in **France**, the principle of legitimate expectations is **not one of domestic law**, but can be applied only in an EC law context; there is no evidence of cases in which beneficiaries have successfully relied on this principle before the French courts;
- in **Belgium**, the national courts will expect beneficiaries to verify whether the aid has been notified and approved; and
- in **Italy** and **Spain**, legitimate expectations are either (i) not a ground for refusing to repay aid or (ii) not recognised as a domestic legal principle.

²¹ Case 94/89, *Commission v Germany* [1989] ECR 175.

3.1.6 Insolvency

The Commission has dealt with a number of cases in which recovery had to be sought in the context of insolvency. In this regard, one particularly large category of cases is represented by certain unsuccessful privatisation projects in Germany's New Federal States ("*Neue Länder*").

Typically, the issues arising in insolvency proceedings relate to (i) **preferential treatment** of recovery claims and (ii) participation in a **restructuring plan**.

- **In Italy and Spain**, claims for repayment by the government are usually treated as preferential claims in insolvency proceedings. In these countries, it appears that, where the claim is based on administrative law, preferential treatment may also be available to State aid recovery claims.
- **In Germany**, the distinction between preferential and non-preferential claims has been abolished. The law distinguishes only between ordinary and subordinate claims. Some court decisions have clarified that State aid recovery claims are not subordinate, even in situations where a claim by a private party would have been subordinate (capital injections or the grant of a loan by a shareholder).

Restructuring plans in insolvency proceedings are a relatively new phenomenon in Europe. The question is to what extent the State can waive, as part of such a restructuring plan, part of a claim for repayment of aid in order to secure the continued existence of the insolvent business. The study (in particular, the section on Germany) suggests that there are a number of legal issues that need to be clarified between the Commission and the Member States.

3.1.7 Table on summary of key findings

	Belgium	France	Germany	Italy	Spain
Competent national authority for recovery	<ul style="list-style-type: none"> ▪ Federal or regional government that granted the aid ▪ Other public entities that granted the aid ▪ No central monitoring 	<ul style="list-style-type: none"> ▪ Ministry of Finance or other ministries ▪ Local authorities where aid granted by local entities ▪ Recovery monitored centrally by Ministry of Finance 	<ul style="list-style-type: none"> ▪ Federal government, Federal State's government, municipality, or other public body depending on who granted the aid ▪ Central monitoring and control by Federal Ministry of Finance 	<ul style="list-style-type: none"> ▪ Central government, local governments and other public bodies depending on who granted the aid ▪ No central monitoring 	<ul style="list-style-type: none"> ▪ Central government, local authorities or other public entities depending on who granted the aid ▪ Ministry of Foreign Affairs as channel to the Commission
Substantive rules for recovery	<ul style="list-style-type: none"> ▪ Recovery decision under administrative law ▪ Followed by recovery based on civil law only ▪ Recovery of aid granted by statute by amending statute 	<ul style="list-style-type: none"> ▪ Administrative law where aid granted by public law act ▪ Civil law where aid granted through civil law transaction 	<ul style="list-style-type: none"> ▪ Administrative law where aid granted by public law act: annulment of the initial act; recovery generally pursuant to a negative administrative act ▪ Civil law where aid granted through civil law transaction: underlying transaction null and void (section 138 Civil Code); recovery pursuant to 	<ul style="list-style-type: none"> ▪ Administrative law where aid granted by public law act: annulment of the initial act or other public law measure ▪ Civil law where aid granted through civil law transaction (no published case law): underlying contract null and void; recovery also pursuant to provisions on unjust enrichment 	<ul style="list-style-type: none"> ▪ Repayment of State aid pursuant to Law No. 38/2003 ▪ Recovery orders based on supremacy of EC law ▪ In appropriate cases recovery by means of individual administrative acts ("<i>orden foral</i>") ▪ Civil law where aid granted through private law transaction: nullity of private act based

	Belgium	France	Germany	Italy	Spain
			provisions on unjust enrichment	<ul style="list-style-type: none"> ▪ Recovery of aid granted by statute by amending statute 	on Article 6 (3) of Civil Code; recovery pursuant to rules on unjust enrichment
Procedural rules for recovery	<ul style="list-style-type: none"> ▪ Civil law recovery procedure before civil courts: Debt recovery procedure, i.e. letter of formal notice to the debtor and action before civil courts if failure to comply with formal request 	<ul style="list-style-type: none"> ▪ Administrative procedure: Recovery by means of an executory act which beneficiary can challenge before administrative court to avoid execution ▪ In rare civil law cases, court action before ordinary civil courts 	<ul style="list-style-type: none"> ▪ Negative administrative act must be challenged by beneficiary before administrative court in order to avoid immediate execution ▪ In civil law cases, payment action against beneficiary before ordinary courts 	<ul style="list-style-type: none"> ▪ Administrative procedure: Recovery generally by means of an administrative act which must be challenged by the aid beneficiary before the administrative courts to avoid execution. Ordinary court action against beneficiary, if does not fulfill repayment obligation ▪ In civil law cases, ordinary court action against beneficiary 	<ul style="list-style-type: none"> ▪ Administrative procedure: Recovery by means of an administrative act in the form of a claim for payment addressed to the beneficiary; other administrative means to enforce payment of debts ▪ In civil law cases, payment action against beneficiary before ordinary courts

	Belgium	France	Germany	Italy	Spain
Immediate enforcement of repayment claim (Interim relief)	<ul style="list-style-type: none"> ▪ Civil law procedure: Conditions to be met by State to be granted interim relief (high standard): <ul style="list-style-type: none"> - (i) urgency; - (ii) <i>prima facie</i> case; and - (iii) serious and imminent damage 	<ul style="list-style-type: none"> ▪ Administrative procedure: In principle, action against administrative act has no suspensory effect; however suspensory effect where order for recovery challenged by means of an opposition to execution ("<i>opposition à exécution</i>") ▪ Civil law procedure: Conditions to be met by State to be granted interim relief (high standard): <ul style="list-style-type: none"> - (i) urgency; - (ii) <i>prima facie</i> case; and - (iii) difficulties that could hinder the recovery process. 	<ul style="list-style-type: none"> ▪ Administrative procedure: No suspensory effect of action where immediate execution in the "public interest": immediate recovery of aid generally enforceable ▪ Civil law procedure: Conditions to be met by State to be granted interim relief (high standard): <ul style="list-style-type: none"> - (i) urgency; - (ii) <i>prima facie</i> case; and - (iii) serious and imminent harm 	<ul style="list-style-type: none"> ▪ Administrative procedure: In principle, high standards to be met for interim relief where administrative acts are challenged: <ul style="list-style-type: none"> - (i) <i>prima facie</i> case; and - (ii) danger of serious and imminent damage to the claimant's interests ▪ Civil law procedure (no case law): Conditions to be met for interim relief are the same as those applicable to administrative procedure 	<ul style="list-style-type: none"> ▪ Administrative procedure: Administrative act may be suspended; courts reluctant to grant interim relief on the grounds that negative Commission decision is challenged before Community courts; conditions to be met by State to be granted interim relief: <ul style="list-style-type: none"> - (i) <i>prima facie</i> case; and - (ii) danger of serious and imminent damage ▪ Civil law procedure: Conditions to be met for interim relief are the same as those applicable to administrative procedure

	Belgium	France	Germany	Italy	Spain
Legitimate expectations as a means to prevent recovery	<ul style="list-style-type: none"> ▪ Generally not: beneficiary must verify compliance with Article 88 EC procedure 	<ul style="list-style-type: none"> ▪ Not a principle of French public law; only applicable in a European context 	<ul style="list-style-type: none"> ▪ Generally not: beneficiary must verify compliance with Article 88 EC procedure ▪ Exceptional circumstances may be established 	<ul style="list-style-type: none"> ▪ Generally not (no case law) 	<ul style="list-style-type: none"> ▪ Generally not ▪ Exceptional circumstances, within the meaning of Community courts' case law may be established
Recovery in insolvency proceedings	<ul style="list-style-type: none"> ▪ State is not a preferential creditor ▪ Participation in a programme of judicial composition ("<i>concordat judiciaire</i>" / "<i>gerechtelijk akkoord</i>") possible. This permits debtor to restructure by temporarily suspending rights of creditors. 	<ul style="list-style-type: none"> ▪ Participation in restructuring plan possible 	<ul style="list-style-type: none"> ▪ State is a normal creditor (category of preferential creditors abolished by 1999 Insolvency Act) ▪ Repayment of capital injections and shareholder loans by State treated as ordinary claims (not subordinate) ▪ Participation of State in insolvency plan ("<i>Insolvenzplan</i>") possible under domestic law; details for purpose of State aid recovery unclear 	<ul style="list-style-type: none"> ▪ State may be a preferential creditor depending on the source of its claim (tax claims are in general privileged) 	<ul style="list-style-type: none"> ▪ State may be a preferential creditor

	Belgium	France	Germany	Italy	Spain
Competent national authority for recovery	<ul style="list-style-type: none"> ▪ Federal or regional government that granted the aid ▪ Other public entities that granted the aid ▪ No central monitoring 	<ul style="list-style-type: none"> ▪ Ministry of Economics and Finance or other Ministries ▪ Local authorities where aid granted by local entities ▪ Recovery monitored centrally by Ministry of Finance 	<ul style="list-style-type: none"> ▪ Federal government, government of a Land, municipality, or other public body depending on who granted the aid ▪ Central monitoring and control by Federal Ministry of Finance 	<ul style="list-style-type: none"> ▪ Central government, local governments and other public bodies depending on who granted the aid ▪ No central monitoring 	<ul style="list-style-type: none"> ▪ Central government, local authorities or other public entities depending on who granted the aid ▪ Ministry of Foreign Affairs as channel to the Commission
Substantive rules for recovery	<ul style="list-style-type: none"> ▪ Recovery decision under administrative law ▪ Followed by recovery based on civil law only ▪ Recovery of aid granted by statute through amending statute 	<ul style="list-style-type: none"> ▪ Administrative law where aid granted through public law act ▪ Civil law where aid granted through civil law transaction ▪ Recovery of aid granted by statute through amending statute 	<ul style="list-style-type: none"> ▪ Administrative law where aid granted through public law act: annulment of the initial act; recovery generally pursuant to a negative administrative act ▪ Civil law where aid granted through civil law transaction: underlying transaction null and void (Section 138 Civil Code); recovery pursuant to provisions on unjust 	<ul style="list-style-type: none"> ▪ Administrative law where aid granted through public law act: annulment of the initial act or other public law measures ▪ Civil law where aid granted through civil law transaction (no published case-law): underlying contract null and void; recovery also pursuant to provisions on unjust enrichment ▪ Recovery of aid 	<ul style="list-style-type: none"> ▪ Repayment of subsidies pursuant to Law 38/2003 ▪ Recovery orders based on primacy of EC law ▪ In appropriate cases recovery by means of individual administrative acts (<i>orden foral</i>) ▪ Civil law where aid granted through private law transactions: nullity of private acts based on Art. 6.3 of Civil Code; recovery

	Belgium	France	Germany	Italy	Spain
			enrichment	granted by statute through amending statute	pursuant to rules on unjust enrichment
Procedural rules for recovery	<ul style="list-style-type: none"> ▪ Civil law recovery procedure before civil courts: Debt recovery procedure, i.e. letter of formal notice to the debtor and action before civil courts if failure to comply with formal request 	<ul style="list-style-type: none"> ▪ Administrative procedure: Recovery by means of an executory act which beneficiary must challenge before administrative court to avoid execution ▪ In rare civil law cases, court action before ordinary civil courts 	<ul style="list-style-type: none"> ▪ Negative administrative act must be challenged by beneficiary before administrative court in order to avoid immediate execution ▪ In civil law cases, payment action against beneficiary before ordinary courts 	<ul style="list-style-type: none"> ▪ Administrative procedure: Recovery generally by means of an administrative act which the aid beneficiary must challenge before administrative courts in order to avoid execution of the administrative act. It may be necessary to resort to ordinary action against beneficiary, should it not fulfill its repayment obligation. ▪ In civil law cases, ordinary action against beneficiary 	<ul style="list-style-type: none"> ▪ Administrative procedure: Recovery by means of an administrative act in the form of a claim for payment addressed to the beneficiary; any other administrative means to enforce payment of debts ▪ In civil law cases, payment action against beneficiary before ordinary courts

	Belgium	France	Germany	Italy	Spain
Immediate enforcement of repayment claim (Interim relief)	<ul style="list-style-type: none"> ▪ Civil law procedure: Conditions to be met for State to be granted interim relief (high standards): <ul style="list-style-type: none"> - (i) urgency; - (ii) prima facie case; <i>and</i> - (iii) serious and imminent harm 	<ul style="list-style-type: none"> ▪ Administrative procedure: In principle, action against administrative act has no suspensory effect; however suspensory effect where order of recovery challenged by means of an opposition to execution ("<i>opposition à exécution</i>") ▪ Civil law procedure: Conditions to be met for State to be granted interim relief (high standards): <ul style="list-style-type: none"> - (i) urgency; - (ii) prima facie case; <i>and</i> (iii) difficulties that could hinder the recovery process. 	<ul style="list-style-type: none"> ▪ Administrative procedure: No suspensory effect of action where immediate execution in the "public interest": immediate recovery of aid generally enforceable ▪ Civil law procedure: Conditions to be met for State to be granted Interim relief (high standards): <ul style="list-style-type: none"> - (i) urgency; - (ii) prima facie case; <i>and</i> - (iii) serious and imminent harm 	<ul style="list-style-type: none"> ▪ Administrative procedure: In principle, high standards to be met for interim relief where administrative acts are challenged: <ul style="list-style-type: none"> - (i) prima facie case; <i>and</i> - (ii) danger of serious and imminent damages to the plaintiff's interests ▪ Civil law procedure (no case-law): Conditions to be met for interim relief are the same as in the administrative procedure 	<ul style="list-style-type: none"> ▪ Administrative procedure: Administrative act may be suspended; courts however reluctant to grant interim relief on the grounds that negative Commission decision has been challenged before the European courts; conditions to be met for State to be granted interim relief: <ul style="list-style-type: none"> - (i) prima facie case; <i>and</i> - (ii) danger of serious and imminent damages ▪ Civil law procedure: Conditions to be met for interim relief are the same as in the administrative procedure

	Belgium	France	Germany	Italy	Spain
Legitimate expectations as a means to prevent recovery	<ul style="list-style-type: none"> ▪ Generally not: beneficiary must ascertain compliance with Article 88 EC procedure 	<ul style="list-style-type: none"> ▪ Not a principle of French public law; only applicable in a European context 	<ul style="list-style-type: none"> ▪ Generally not: beneficiary must ascertain compliance with Article 88 EC procedure ▪ Exceptional circumstances may be established 	<ul style="list-style-type: none"> ▪ Generally not (no case-law) 	<ul style="list-style-type: none"> ▪ Generally not ▪ Exceptional circumstances, within the meaning of European courts' case-law may be established
Recovery in insolvency proceedings	<ul style="list-style-type: none"> ▪ State is not a preferential creditor ▪ Participation in a programme of judicial composition (concordat judiciaire/ gerechtelijk akkoord) possible. This permits debtor to restructure by temporarily suspending the rights of creditors. 	<ul style="list-style-type: none"> ▪ State may be a preferential creditor ▪ Participation in restructuring plan possible 	<ul style="list-style-type: none"> ▪ State is a normal creditor (category of preferential creditors abolished by 1999 Insolvency Act) ▪ Repayment of capital injections and shareholder loans by State treated as ordinary claims (not subordinated) ▪ Participation of State in insolvency plan (<i>Insolvenzplan</i>) possible under domestic law; details for purposes of state aid recovery unclear 	<ul style="list-style-type: none"> ▪ State may be a preferential creditor depending on the source of its claim (tax claims are in general privileged) 	<ul style="list-style-type: none"> ▪ State may be a preferential creditor

3.2 Obstacles to efficient recovery and proposed remedies

Based on the information available to us, we have been unable to assess whether Member States' discipline in recovery cases has improved or deteriorated over the past few years. In general, it seems fair to say that Member States appear to be **paying more attention to recovery than some ten years ago**. There is evidence of swift and efficient recovery in some of the largest and most complex State aid cases in recent years (*EDF* case, *Landesbanken* case). The perceived **excessive length** of recovery proceedings is a recurring theme in all country reports. There are various factors that must be considered when assessing the length of proceedings, not all of which are in the control of the Member States:

3.2.1 Lack of clarity as to the national body that must issue the recovery decision, the beneficiary, and the amount of the aid

Basic questions regarding the body responsible for recovering the aid, identification of the aid beneficiary, and the exact amount of the aid often lead to delays in the implementation of negative Commission decisions. It is the body originally granting the aid that must seek its recovery. Thus, depending on the circumstances, a number of different governmental entities may be involved in the process of recovery. A particularly telling example of how the involvement of different administrative players can delay recovery is the *Beaulieu* case in Belgium, where recovery took more than fifteen years from the date of the Commission decision.

We would suggest that:

- delays due to questions concerning the identity of the appropriate body for recovering the aid can be avoided by **nominating the body in charge of recovery proceedings** at the outset. The Member State should be invited to inform the Commission of the various governmental and administrative bodies involved in the recovery process within the two-month time limit granted for implementing a negative Commission decision. This recommendation has been included in our suggested best practice guidelines (section 3.3).

Similarly, in some recovery cases both (i) the identity of the party from whom recovery must be sought under national law; and (ii) the exact amount of the aid to be recovered have been a controversial issue. Difficulties relating to the identity of the beneficiary often arise where all of the assets of the beneficiary have been transferred to a third party. Difficulties relating to the amount of the aid most often arise in cases where the Commission fails to specify the exact amount of the aid to be recovered, including interest, in its negative decision.

- Again, both difficulties could be avoided if the relevant issues were **clarified from the outset** (although established case law allows the Commission not to address these issues). We have inserted a corresponding item in our proposed list of best practices.

3.2.2 Questions regarding the applicable procedure

Most country reports have identified the question of the determination of the applicable national laws as a problem area. This applies, in particular, to cases where it is not clear whether recovery should be effected pursuant to administrative or civil law.

Where the purpose is to secure immediate enforcement of a negative Commission decision, it is **preferable to resort to administrative law proceedings**, in which the State can order immediate repayment. However, Article 14 of Regulation No. 659/99 clearly provides that recovery must be effected pursuant to the laws of the Member States, and the distinction between administrative and civil law, in most Member States, is embedded in legal tradition. Thus, it will not be possible to provide that recovery must, in each and every case, be effected pursuant to the Member States' rules of administrative law.

- At the very least, the Member State should be invited to **clarify on or before the commencement of every recovery procedure** (i.e. within the two-month time limit for implementing the decision) whether recovery will be governed by administrative or civil law. If civil law is chosen, the Commission may inquire about the underlying reasons for this choice.

We have inserted a corresponding item in our suggested list of best practices.

3.2.3 Lack of clarity as to the immediate enforceability of recovery orders/interim relief

In the country reports and section 3.1, we describe to what extent national authorities dispose of the means to seek immediate enforcement of an order for repayment of illegal aid. Generally, where aid is recovered pursuant to administrative law, it is easier to secure immediate enforcement, as opposed to when civil law procedures must be followed.

There may be questions as to whether the French practice of providing for suspensory effect where an administrative appeal (opposition) has been filed by the beneficiary is compatible with EC law. Similarly, it could be considered whether Member States should have a general obligation to provide for immediate enforcement, even where civil law rules apply.

Based on our review, we believe that the law in this area is in flux and that it may be worthwhile to await further court decisions both at the national and at the Community level.

- In order to avoid misunderstandings, however, the Commission, as a rule, should consider asking the Member State, **at the outset of the recovery procedure, how the Member State will ensure immediate enforcement** of the recovery decision that it will have to obtain under its national law.

We have inserted an item to this effect in the best practice list.

3.2.4 Stay of national proceedings where Commission decision has been challenged

Another group of cases in which recovery appears to take a very long time is where the substance of the negative Commission decision has been challenged in court. There is evidence that these delays are caused both by litigation before the European courts in Luxembourg and before the national courts. Whereas we have not found any published decisions of national courts actually setting aside or willfully ignoring a Commission decision, the length of proceedings involving national court actions suggests that some acceleration may be achieved **by clarifying the rules (possibly in a notice)**:

(i) where the underlying Commission decision has been challenged before the European courts, the national court should be allowed to stay its proceedings **only if immediate implementation of the Commission decision threatens the financial survival of the aid recipient** (i.e. in practice, where the claimant has requested and obtained suspension of execution of this decision before the President of the CFI). The authors find that alternative approaches are incompatible with the principle of supremacy of EC law; in addition, one could argue that, where the Commission decision is challenged only as to its compatibility assessment (and not as to the existence of an aid, by definition unlawful), there should be no logical reason for a judge to stay the proceedings; and

(ii) where there is no such immediate risk, the national court must fully enforce the Commission decision without a stay, even if an action for annulment of such decision is still pending before the European courts.

In particular, it is necessary to clarify the rules on when the national judge can stay its proceedings pending an action for annulment against the underlying Commission decision in Luxembourg. The *Oberlandesgericht Dresden in Saxonia* and the Italian courts in a number of cases granted stays of their proceedings and thereby deprived the Commission decision of its immediate effect. Arguably, a suspension without appropriate interim measures to secure the ultimate enforcement of the recovery claim violates Article 242 EC. In any event, national courts will benefit from a clarification of the rules on the stay of their proceedings.

Finally, there is a last group of cases where the decision challenged is **the national recovery order only**, but **without contesting the legality/validity of the negative Commission decision**. In this case, where the Commission decision has not been challenged, any challenge of the national recovery order has the effect of delaying the implementation of the negative Commission decision. This delay may be contrary to the principle of supremacy of EC law if the argument on which the challenge is based should have been raised against the Commission decision.

3.2.5 Recovery of aid granted at local level

There is some evidence that, in systems where aid recovery at national level is not effected through a single agency, there will be some delays and inefficiencies.

This is, of course, particularly true in systems where aid has been granted by the regional government and the central government, the Commission's counterpart, which have no power to enforce a negative decision concerning aid granted at regional or local level. This appears to be the case particularly in Spain. Obviously, under EC law, the absence of national provisions to secure enforcement at regional or local level does not relieve the Member State of its recovery obligation.

- As a procedural point, however, consideration should be given to **providing the Commission with direct access to regional and local authorities** that must act in order to secure recovery. This might even be extended to the **aid recipient**.

More direct contact between the Commission and those who must take action to recover aid will limit both misunderstandings and the repetition of questions asked by the Commission to the Member States.

3.2.6 Inherent conflict of interest of the Member State granting and recovering aid

Based on our review, we have not found any cases where a national authority has openly acted in bad faith in seeking to recover aid pursuant to a negative Commission decision (despite significant delays in certain cases). Nevertheless, there are a number of factors indicating that there does exist an inherent conflict of interest for a Member State that is asked **to recover aid that it previously granted**: the length of recovery proceedings, the protracted procedures that are often used, and the extensive efforts required by the Commission to secure recovery, and particularly in those cases where the Member State has challenged a negative Commission decision in court.

An example of the inherent conflict of interest surfacing in court proceedings is reflected in the first instance judgment involving *Hamburger Stahlwerke* (Germany). In this case, the *Landgericht Hamburg* clearly stated that both the claimant and the defendant took the view that the underlying Commission decision was illegal. It is clear that this did not fail to make an impression on the court. A similar situation occurred in the *Scott Paper* case (France), in which both the beneficiary and the local authorities granting aid - although issuing recovery orders immediately suspended by objections - challenged the decision before the CFI. Conversely, also in France, the *EDF* case is an example: aid was fully reimbursed a few days following the national recovery order, before the beneficiary challenged (supported by the State) the Commission's decision before the CFI.

- (i) This issue and other delays in recovery proceedings could be avoided if the Commission was given an active role in national recovery procedures. This could be achieved by making the Commission an ***amicus curiae* in a similar way as under Regulation No. 1/2003**. Since the number of contentious State aid recovery cases is limited, it would be possible for the Commission to take an active role in each recovery case. To be efficient, this *amicus curiae* status should allow the Commission to take the position of an "intervening party" in the national procedure.

(ii) Another means of overcoming the inherent conflict of interest of a Member State, in particular in cases where the Commission's negative decision has been challenged, would be to entrust the recovery measures to **independent agencies** at Member State level. This would ensure that recovery progressed, regardless of whether the Member State itself still had (sometimes legitimate) doubts about the legality of the underlying Commission decision.

One possibility would be to allocate this task to the **national competition authorities** of the Member States ("NCA"), provided that they have the required degree of independence.

An alternative would be to place the recovery process in the hands of those government agencies that must supervise **the budget**. The attractiveness of this alternative is that it would result in, to a certain extent, a reversal of the conflict of interest: the government agencies responsible for supervising the budget are most likely to vigorously pursue claims for the repayment of amounts from aid recipients.

3.3 Best practice guidelines

1. Identify the administrative **body** that must **recover** the aid. Give Commission access to that body.
2. Identify the **beneficiary**, taking into account the transfer of assets pursuant to *Seleco/Banks* case law.
3. Calculate and communicate immediately to Commission the exact **amount of aid** to be repaid, **including interest**, based on Commission decision.
4. Identify **whether recovery should be effected pursuant to an administrative or civil law procedure**. Where the underlying transaction is not clearly a civil law transaction, then use **administrative procedure**.
5. **Administrative procedure**
 - 5.1 Issue executory administrative act.
 - 5.2 Declare an administrative act **immediately enforceable**.
6. **Civil law procedure**
 - 6.1 Set a **time limit of one month** for payment by the aid beneficiary. If no payment within time limit, seek **immediate court action for payment** before competent court of Member State.
 - 6.2 Seek **interlocutory relief** where grant and/or use of aid would lead to serious distortion of competition (i.e. provisional recovery).

7. **Insolvency**
- 7.1 Apply for **registration of recovery** claim with trustee.
- 7.2 Where trustee in bankruptcy does not recognise recovery claim, seek immediate **action for declaratory judgment** by the government.
8. **No stay of any national proceedings** at any stage **merely based on challenge of underlying negative Commission decision before Community courts.**
9. Provide **copies of all briefs** filed by parties in national proceedings to the Commission.

BELGIUM

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4. Belgium

4.1 National authorities responsible for recovery

In Belgium, a variety of national and regional bodies can be responsible for the recovery of aid, of their own initiative or following a negative Commission decision.

Indeed, in recovery cases, the Belgian Federal Government, the Walloon region, the Flemish region, the Belgian Social Security office, as well as public bodies responsible for granting financial assistance have taken measures to recover aid.

The Belgian Permanent Representation to the EC is generally the intermediary for correspondence between the Commission and the relevant authorities responsible for recovering the aid. Sometimes, the relevant authorities communicate directly with the Commission.

Actions concerning the recovery of aid will normally be brought before the civil courts.

4.2 Rules applicable to recovery

4.2.1 Civil recovery procedure

Under Belgian law, the addressees of negative Commission decisions can only be the relevant Belgian public authorities responsible for granting the unlawful State aid. Such a decision cannot therefore be directly used as an enforceable instrument ("*titre exécutoire*"), requiring the beneficiary of the unlawful aid to reimburse this aid (it should be noted that, under EC law, only Member States – and not the regional or local powers of a State - can be addressees of such a decision).

In the Belgian recovery cases examined, it is apparent that, in order to recover unlawful aid, the Belgian authorities follow the general Belgian civil rules relating to the recovery of a debt.

a) Description of the debt recovery procedure

The first step of this procedure requires the creditor (in this case, the relevant Belgian authority responsible for the recovery of the unlawful aid) to send a letter of formal notice to the debtor (i.e. the beneficiary of the aid) requesting it to pay its debt (i.e. the aid).

In the event that the beneficiary of the aid refuses to comply with the letter of formal notice, the relevant Belgian authority can bring an action before the civil courts in order to obtain a judgment ordering the beneficiary to pay its debt (i.e. the unlawful aid).

The first instance judgment (in general, by a Commercial Court) can be appealed to the Court of Appeal and then appealed on points of law only to the Supreme Court.

b) Provisional enforcement

If a judgment ordering the recovery of the aid has been appealed to the Court of Appeal, the first instance judge has the power to order the provisional enforcement of his own judgment by virtue of Article 1398 of the judicial code. In the event that a first instance judge authorises provisional enforcement of his judgment, the Belgian authority may then recover the aid from the beneficiary. However, the judge can require the Belgian authority to submit a guarantee. Moreover, enforcement of such judgment is subject to the risk that the Belgian authority may lose the appeal, and be required to return the sums recovered to the beneficiary. In addition, the Belgian authority may have to pay damages plus interest to the beneficiary if it loses the appeal.

On the other hand, if the first instance judge does not authorise the provisional enforcement of his judgment, the Belgian authority cannot recover the aid until final judgment of the relevant Court of Appeal.

It should be noted that an appeal, on points of law only, to the Supreme Court has no suspensory effect on the judgment of the Court of Appeal. The Belgian authority can therefore enforce a positive Court of Appeal judgment against the beneficiary of the aid. Again, such enforcement is at the Belgian authority's own risk (i.e. the risk that the Supreme Court reverses the findings of the Court of Appeal). A parallel can be drawn with the fact that actions for annulment against State aid decisions before the CFI also do not have suspensory effect.

In the Belgian State aid recovery cases examined, there is at least one example where a first instance court allowed for provisional enforcement of its judgment. In the *Idealspun* case, the first instance judge decided to allow for provisional enforcement of his ruling as it was in the interest of the Common Market that the unlawfully granted aid was recovered as soon as possible (see *Idealspun* judgment of the Commercial Court of Kortrijk). In Belgium, other forms of interim measures can be requested, such as the payment of the sum on a blocked account, or an order requiring the parent company of the beneficiary to warrant that the aid will be paid back at the end of the proceedings.

c) Interim measures

It is technically possible for the Belgian State to seek interim measures from the civil judge requiring the beneficiary of unlawful aid to pay a bank guarantee for the aid in question before final judgment.

The conditions for this type of interim measures are urgency, *prima facie* case and serious and immediate harm.

However, it is apparent from the sole recovery case in which such an interim measure action was brought that the "urgency" criterion is a very difficult one to satisfy.

Indeed, in the *Ter Lembeek* case, described in more detail in Part I of the study, an action for interim measures brought by the Walloon Region was rejected by the Commercial Court for lack of urgency. Indeed, the court considered that there was no evidence that the beneficiary of the aid, Ter Lembeek, would become insolvent in the near future, and that the Walloon Region would therefore suffer any irreparable damage.

From this sole example, it would therefore appear that a Belgian court would only grant interim measures where there is a possibility that the beneficiary of the unlawful aid will be unable to reimburse the aid in question at the end of the main recovery proceedings.

4.2.2 Adoption of a law ensuring the recovery of the aid - The *Maribel* Case.

There is only one example of a case whereby the Belgian State adopted a law so as to ensure the recovery of unlawfully paid aid. This is the *Maribel* case. The facts can be summarised as follows.

The Belgian Government increased the reduction of the social security contributions due from companies which were active in some specifically designated business sectors (the so-called *Maribel-bis* and *Maribel-ter* schemes). All of these sectors were exposed to very high international competition.

The Commission found that these schemes were unlawful and constituted incompatible aid and ordered the Belgian State on 4 December 1996 to recover from all of the beneficiaries the total amount of the aid²².

By virtue of the Law of 24 December 1999, the Belgian State had laid down the arrangements for the recovery of the aid. In the Commission's view, this law still did not enable all of the aid in question to be recovered. In fact, it allowed firms which had repaid the aid to deduct the amount repaid once more for tax purposes, which was tantamount to granting them fresh unlawful aid. Moreover, the application by the Belgian authorities of the *de minimis* rule appeared to the Commission to be incorrect in that it permitted firms in the excluded sectors (transport, agriculture, coal and steel) to benefit from the rule.

Following this disagreement, the Belgian Government and the Commission concluded a Protocol Agreement which laid down the arrangements for repayment of the unlawful aid. Shortly afterwards, the agreement was implemented in Belgian law by the Law of 30 December 2001. The *de minimis* rule was abolished and the tax deduction was limited to amounts which had been reimbursed before 31 December 2001 and compensated by a new tax imposed on the sums paid.

²² Decision 97/239/EC of 4 December 1996 (OJ (1997) L 97/25). On 19 February 1997, the Belgian State lodged an action for annulment against that decision (Case C-75/97). This action was dismissed by the ECJ on 17 June 1999. In parallel, the Commission brought, on 21 October 1998, an action against the Belgian State for failing to comply with its decision (Case C-378/98). The ECJ held on 3 July 2001 that Belgium had failed to comply with the decision.

The Law of 30 December 2001 was subsequently modified by the Law of 2 August 2002, on the basis of which a Royal Decree was passed. This Royal Decree of 3 October 2002 provided that the sums would be recovered by the Ministry of Finance and indicated that in the case of non-payment within the required time frame, the sums owed would be increased by ten per cent.

The relevant Belgian law further prescribed that those companies which did not benefit financially from the decrease in the corporate tax rate because of the burden caused by the payment of the reimbursements made in implementing the provisions of the Law of 24 December 1999, were not required to pay the reimbursements. The main beneficiaries of this new regime were companies which at the time of the original reimbursement had suffered fiscal losses.

It should be noted that implementation of the recovery of the Maribel aid also gave rise to individual disputes between targeted companies and the Belgian State.

4.2.3 Recovery of aid before foreign jurisdictions - the Ryanair Case

On 12 February 2004, the Commission decided to order recovery of the unlawful and incompatible aid granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi²³. Ryanair has challenged this decision before the CFI (Case T-196/04, pending at the time of writing this report).

Ryanair has been requested by the Walloon Region to repay all unlawful State aid. Ryanair has apparently written to the Walloon authorities and agreed to repay €4million to an escrow account until Ryanair's action is heard and the CFI (or the ECJ in case of appeal) renders a definitive decision on this matter.

The Walloon Region has also initiated proceedings before the Irish courts in order to seek the recovery of the aid in question. This is the first example of a case where a public authority has gone before another Member State jurisdiction in order to recover State aid²⁴.

4.2.4 Recovery from a bankrupt company - insolvency proceedings

Under Belgian law, once a bankruptcy judgment is made, the company which is declared bankrupt loses control of its current and future assets. The bankruptcy judgment is immediately enforceable even if there is an appeal or opposition against it.

A bankruptcy trustee is appointed to manage the assets of the bankrupt company. A creditor must file its claim for the debt at the registry of the Commercial Court within the time fixed by

²³ Decision 2004/393/EC ordering recovery of the unlawful and incompatible aid granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi (OJ (2004) L 137/1).

²⁴ It should be noted that, in the *Verlipack* case, a debt recovery action was brought by the Walloon region against Heye in Germany before the Court of Bückelburg on 25 April 2000 in order to recover aid paid out to this company. This action was brought on the grounds that Heye had not met its contractual obligations. This was technically not an action seeking to enforce a negative Commission decision. Indeed, in the *Verlipack* case, a Commission decision was only issued in October 2000.

the court in the bankruptcy judgment (which cannot exceed 30 days from the date of the bankruptcy judgment).

A creditor who misses the deadline can still file a claim by delivering a writ of summons to the company represented by the bankruptcy trustee up until the earlier of:

- the last creditors' meeting before the final distribution of the bankrupt's estate; or
- three years after the bankruptcy judgment.

This is what happened in the *Verlipack* case described below.

However, a creditor is disadvantaged if it files its claim late because:

- it must pay the legal costs for filing its claim and having the claim verified and admitted (or dismissed); and
- it cannot claim a share of earlier distributions.

The Belgian Bankruptcy Act does not impose a time limit on bankruptcy proceedings. A bankruptcy judgment (bankruptcy order) is usually rendered by the court within one or two days (especially in the event of petition by the insolvent debtor) or weeks (especially in the event of petition by the creditors). But the bankruptcy operations (i.e liquidation/recovery of the assets and distribution of the proceeds to the creditors) often last several years.

In the *Verlipack* case, it may still take a number of years before the Belgian authorities will be able to recover the aid in question.

Under Belgian law, there also exists a procedure that aims to give a company in temporary difficulties (the "Debtor") the possibility of restructuring by temporarily suspending the rights of its creditors. This procedure is known as judicial composition ("*concordat judiciaire*" / "*gerechtelijk akkoord*") and is described in the Belgian Statute on Judicial Composition (the "SJC").

The judicial composition may be granted to the Debtor if three conditions are met:

- The Debtor is experiencing temporary cash-flow problems or some other problem threatening its existence. This condition will be met, for example, when, due to losses, a company's net assets have been reduced to less than half of the value of the capital (being the subscribed capital mentioned in the company's articles of association). However, the Debtor may not have stopped paying its debts.
- The Debtor can resolve its difficulties. In the request for judicial composition the Debtor must show that it is possible to restructure the company.

- There is no manifest bad faith on the Debtor's part. The request for judicial composition may still be granted if the directors who have acted in bad faith are removed from the company's management.

There have been two cases²⁵ where the ONSS (the Belgian Social Security office) challenged a decision of a court authorising judicial composition which included the writing-off of the debtors' social security debts. The ONSS argued that such writing-off of the social security debts constituted State aid. In those cases the Supreme Court and the Commercial Court, dismissing the actions of the ONSS, held that as long as the partial write-off of social security debts is of the same nature as the write-off of debts to private creditors granted under the same restructuring and payment plan, the write-off does not constitute State aid.

4.3 Actions for recovery (or opposing recovery) before national courts

4.3.1 Actions by the State enforcing recovery

(1) Commercial Court of Kortrijk, Case No. 3176/02 R.K, 7 October 2003, Walloon Region v NV Ter Lembeek International (A) (see also Part I of the study)

Facts and legal issues: on 24 April 2002, the Commission issued a decision (Decision 2002/825) declaring that the State aid which Belgium had implemented for the Beaulieu Group (Ter Lembeek International) in the form of the waiver of a debt of BEF 113,712,000 (i.e. €2,818,846) was incompatible with the Common Market (OJ (2002) L 296/60). The Commission ordered Belgium to take all necessary steps to recover from the beneficiary the unlawful aid concerned.

Following Commission Decision 2002/825 ordering the recovery of the aid, the legal counsel of the Walloon Region sent a letter of formal notice to Ter Lembeek International requesting for the reimbursement of the aid, plus interest, amounting to €457,540.09.

After Ter Lembeek's failure to comply with the formal notice, the Walloon Region brought an action against Ter Lembeek before the Commercial Court of Kortrijk seeking the recovery of the aid in question.

Decision: the Commercial Court suspended the proceedings pending the outcome of an action for annulment brought by Ter Lembeek before the CFI against the Commission decision (Case T-217/02)²⁶. The Commercial Court ordered Ter Lembeek to set up a bank guarantee for the sum owed which would become payable if the CFI upheld the validity of the Commission decision. No condition / time limit was imposed for the setting up of the bank guarantee. Accordingly, Ter Lembeek did not set up the bank guarantee.

²⁵ Judgment of the Supreme Court, 18 February 2005, ONSS/RSZ v Champagne Holding and others (acquittal of social security debt) and judgment of the Commercial Court of Liège, 16 April 2002, Office National de Sécurité Sociale v L. and Schroeder and Props.

²⁶ It can be noted that the claimant contests the qualification as State aid of the State measure in question.

Ter Lembeek has appealed to the Court of Appeal of Ghent against the Commercial Court's judgment ordering it to set up a bank guarantee.

The Walloon Region has cross-appealed against the fact that the Commercial Court ordered a suspension of the proceedings.

This case is still pending. As mentioned above, the Walloon Region also brought an action for interim measures in order to force Ter Lembeek to set up the bank guarantee. This action was dismissed on the grounds of lack of urgency.

Comments: the Commercial Court's judgment suspending the proceedings does not appear to be in line with the ECJ's case law concerning the jurisdiction of national courts to suspend enforcement of a national measure based on Community legislation²⁷. Indeed, according to the ECJ, in order for a national court to be entitled to grant such a suspension, it must:

- entertain serious doubts as to the validity of the Community measure;
- refer the question of the validity of the Community measure to the ECJ (if this has not yet been done);
- find that there is urgency in the sense that the claimant is threatened with serious and irreparable damage;
- take due account of the interests of the Community.

The Commercial Court does not appear to have complied with the first, third and fourth of the conditions mentioned above, i.e. it neither assessed the validity of the Commission decision in question nor addressed the question of whether there was urgency for the claimant while duly taking into account the Community interest (here, the restoration of the distorted competition by virtue of the obligation of Belgium to order recovery of the unlawful aid – or, more simply, the effectiveness of Article 88 (3) EC in order to allow EC State aid control to be carried out as provided for by Articles 87 and 88 EC).

(2) Commercial Court of Mons, RG 03630/01, 21 January 2002, SRIW (Walloon Region) v Mrs. BLONDIAU (Curator of the bankrupt estate of Verlipak) (A)

Facts and legal issues: on 4 October 2000, the Commission issued Decision 2001/856 (OJ (2000) L 320/28) finding that the BEF 350 million capital injected into Verlipack, the largest Belgian producer of hollow container glass, by the Walloon Region in April 1997 and the two loans of BEF 250 million granted by the region's investment company SRIW ("*société régionale d'investissement de Wallonie*") in March 1997 to Heye to finance Heye's capital contribution to Verlipack constituted unlawful and incompatible aid. Belgium was ordered to recover the aid.

²⁷Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen [1991] ECR I 540, para. 25 *et seq.*

The Commission's decision was upheld by the ECJ on 3 July 2003²⁸.

Since the normal term open to creditors under Belgian law to lodge their claims with the bankrupt's trustee had already passed, the Walloon Region had to seek an order from the Commercial Court allowing it to lodge its claim regarding the loans with the bankrupt's estate. The government therefore brought proceedings against three companies which were part of the Verlipack group in two different proceedings.

Decision: the Commercial Court issued two orders admitting the claim by the Walloon Region concerning the loans to the bankrupt's estate. Consequently, the Walloon Region was registered as a creditor.

Comments: without expressly saying so, the Commercial Court has accepted the Commission's decision in which recovery of aid was ordered as an autonomous cause of action, justifying admitting the State as a creditor of the bankrupt's estate. The approach of the Supreme Court in *Tubemeuse* (see below) does not seem to be contested any more.

(3) Idealspun case

Facts and legal issues: the Belgian Government subscribed to a capital increase of Idealspun N.V., a subsidiary of Beaulieu, the biggest Belgian textile group. The Commission decided on 27 June 1984 (Decision 84/508) that the participation by the State constituted aid which was incompatible with the Common Market. On 9 April 1987, the ECJ found that Belgium had failed to comply with the Commission decision for not having recovered the aid²⁹. On 19 February 1991, the ECJ found that Belgium had failed to comply with its 1987 judgment³⁰.

After these judgments, the Flemish Government (successor in title to the Belgian Government in the area of economic expansion policy) sued Idealspun and its other shareholders to recover the aid on the basis that the subscription was void.

The obligation to repay the aid was not contested as such by the recipient. The issue at stake was the legal basis of that obligation. The government was of the opinion that the contract under which it had subscribed to the capital increase was contrary to EC law and was therefore void *ab initio* (see *Tubemeuse* case of 1992 below). This gave rise to an obligation on Idealspun to repay the amount paid under the void contract. According to the recipient, the contract was not void and if any repayment was due, it was under the contract itself. The recipient also asserted that it could still challenge the negative Commission decision in court since it had not been a party to the procedure before the Commission and the ECJ (violation of Article 6 ECHR).

²⁸ Case C-457/00, Belgium v Commission [2003] ECR I-6931.

²⁹ Case 5/86, Commission v Belgium [1987] ECR I-1773.

³⁰ Case C-375/89, Commission v Belgium [1991] ECR I-383.

Decision: The case is interesting with regard to the defences raised by Idealspun, which were one by one rejected by the Commercial Court in its judgment of 20 September 1994.

First, Idealspun argued that the validity of the Commission decision could still be challenged. The Commercial Court rejected this argument, explaining that Idealspun had failed to bring an action for annulment against the decision before the CFI within the required time limits, and that, in all circumstances, the Commercial Court no longer had any competence to question the validity of the decision (*TWD* principles).

Secondly, Idealspun argued that there was a breach of the principle of the protection of legitimate expectations as it was not the addressee of the Commission decision. The Commercial Court simply noted that a beneficiary of aid is under a duty to act as a "careful entrepreneur" and should have checked whether the aid had been approved by the Commission.

The Commercial Court further ruled that its decision could be provisionally enforced pending any appeal on the grounds that it was in the Community's interest that the aid be recovered as soon as possible.

Idealspun appealed the Commercial Court's judgment to the Court of Appeal of Ghent. On 16 November 2000, the Court of Appeal upheld the Commercial Court's judgment on all grounds (for more details, see the summary in Part I).

Comments: It is interesting to note that it took more than four years for the Commercial Court to come to a ruling on the matter after the State introduced its action for recovery, and that it took another six years for the Court of Appeal to handle the appeal. All in all, the Belgian State's action for recovery took more than ten years. This is obviously not in line with the principles provided by Article 14 (3) of Regulation 659/1999. On the other hand, the Commercial Court did allow for the provisional enforcement of its decision. It is unclear whether the Belgian authorities decided to actually recover the aid on the basis of that first instance judgment.

(4) Beaulieu case

Facts and legal issues: Socobesom granted aid amounting to BEF 725 million to NV Fabelta, an insolvent synthetic fibre producer. The aid would take the form of a majority holding by Socobesom in a newly formed enterprise (NV Beaulieu Kunststoffen), in which a large private textile group, mainly engaged in carpet production, would take a minority holding of BEF 200 million and would use part of the aid to manage a rescue operation by undertaking certain investments in order to maintain the nylon production of the insolvent firm. This aid was notified to the Commission.

In its Decision 84/111 of 30 November 1983, the Commission decided that the aid was unlawful (implementation before the decision) and ordered the Belgian Government to

recover the aid. On 24 February 1989, the ECJ ruled that the Belgian Government had failed to implement the decision³¹.

Socobescom and the Belgian Government started proceedings to recover the aid. Due to the refusal of Beaulieu to return the aid, Socobescom and the Belgian Government filed an action for recovery before the Commercial Court. The defendants argued that the Commission decision was unlawful.

Decision: the arguments raised by Beaulieu are identical to those described in the *Idealspun* case and the Commercial Court, in a judgment of 25 February 1994, ordered Beaulieu to reimburse the aid.

The case was appealed to the Ghent Court of Appeal, and on 5 October 2000, the Court of Appeal came to a judgment upholding the Commercial Court's judgment.

Comment: this is again an example of a case where the national court proceedings took excessively long and delayed a rapid recovery of the aid.

(5) Tubemeuse (see Part I of the study)

Tubemeuse, the beneficiary of unlawful and incompatible aid, was subject to insolvency proceedings. The Belgian State requested that it should be registered as a creditor in order to recover the unlawful aid in accordance with a Commission decision.

The judge at first instance and the Court of Appeal rejected this request on the grounds that the Commission decision did not transform the Belgian State's participation in the capital of Tubemeuse into a simple debt for the receiver.

In an exemplary decision, the Supreme Court set aside the Court of Appeal's ruling and thus the application of national law, in order to ensure the full effectiveness of EC law. The Supreme Court considered that the Court of Appeal's refusal to register the Belgian State as a creditor did not recognise the effect of the absolute nullity of the capital injection (as a consequence of the violation of Article 88 (3) EC) and violated EC law.

4.3.2 Actions by competitors to enforce recovery

We are not aware of any case where a competitor has sought to obtain the recovery of unlawful aid (in one unfair competition case – *Breda*, see Part I- a cease and desist order was sought, not a recovery order).

4.3.3 Issues related to actions by the beneficiary to oppose a recovery order

There have been few actions brought by beneficiaries opposing a recovery order. This can be explained by the fact that a recovery order only becomes enforceable after a judgment of

³¹ Case C-74/89, Commission v Belgium [1990] ECR I-491.

the relevant court. However, the arguments raised by beneficiaries in order to oppose recovery in those cases are also interesting. In point (c) below, a short description is provided of those arguments.

(6) *Dufrasne* (see also Part I of the study)

In the *Dufrasne* case, described in more detail in Part I of the study, Dufrasne brought an action for annulment before the Council of State of a decision of the Walloon Region requesting the reimbursement of aid which the Walloon Region had granted to Dufrasne (the reason why Dufrasne brought an action was because it was still hoping to receive further aid from the Walloon Region).

The Walloon Region's decision ordering the recovery of the aid in question was not based on any Commission decision finding this aid incompatible. The national recovery decision was, in fact, based on the Walloon Region's interpretation of Commission Decision 3855/91/ECSC and on the fact that it had granted the aid without seeking the Commission's approval.

The Council of State annulled the recovery order on the grounds that there was in fact no Commission decision declaring the aid in question incompatible and ordering its recovery.

As explained in Part I of the study, the Council of State failed to draw all the normal consequences of the direct effect of Article 88 (3) EC, which provides that all non-notified aid is unlawful and should therefore be recovered.

(7) *Ford v ONSS-RSZ (Maribel)* - see Part I of the study

Ford brought an action against the Belgian State before the Employment Court of Tongeren, reclaiming part of the aid which it had reimbursed to the State by virtue of the law of 24 December 1999 implementing Commission Decision 97/239/EC of 4 December 1996 ordering the recovery of the aid.

Ford basically argued that the claim of the Belgian State to part of the aid was time-barred because the limitation for recovery should be five years rather than eight years, as provided by the law.

As described in more detail in Part I of the study, the Employment Court dismissed this argument, stating that the eight year period was appropriate, otherwise it would compromise the *effet utile* of the Commission's decision ordering recovery of the aid.

Ford also raised the principle of protection of legitimate expectations. The Employment Court simply held that the beneficiary of aid had a duty of care to determine whether the Belgian State had followed the proper procedure for granting the aid in question.

4.3.4 Arguments raised by beneficiary acting as a defendant

a) Legitimate expectations (*Beaulieu* and *Idealspun* cases)

In a number of cases in which the relevant Belgian authorities have sought to recover aid from the beneficiaries of the aid, the beneficiaries have argued that the Commission decision was unlawful.

Thus, in the *Idealspun* and *Beaulieu* cases (described in more detail above), the beneficiaries of the aid considered that the national court should refer questions to the ECJ in order to ascertain the validity of the Commission decisions in question and relied upon the principle of protection of legitimate expectations.

In the *Beaulieu* case, the beneficiaries of the aid measure in question argued that the principle of the protection of legitimate expectations prevented the national authorities from recovering the aid in question. The Commercial Court dismissed this argument. Indeed, the court considered that the relevant provisions of EC law on State aid should have been sufficiently known to the beneficiaries of the aid measure in question for the reasons set out below.

First, there was no doubt that the aid measure in question constituted State aid within the meaning of Articles 87 and 88 EC.

Secondly, the beneficiaries, before receiving the State aid, should each, as a "careful undertaking", have examined whether the State aid measure had been notified to and approved by the Commission.

Thirdly, the aid beneficiaries were undoubtedly familiar with transactions containing elements of State aid, given that they had also benefited from aid in the *Verlipack* and *Idealspun* cases.

Fourthly, the beneficiaries were surrounded by proficient advisors on Community law.

b) Legality of the Commission decision - Appeal to the CFI (*Ter Lembeek* case)

In the recent decision of the Commercial Court in the *Ter Lembeek* case (also summarised above), the court suspended proceedings pending the CFI's judgment on the action for annulment brought by Ter Lembeek against the Commission decision ordering the recovery of the unlawful aid.

Although the Commercial Court did require the beneficiary to set up a bank guarantee, the court's failure to impose any penalty payment on the beneficiary for failing to set up such a bank guarantee basically prevented the Walloon region from immediately recovering the unlawful aid.

4.4 Summary of the main difficulties in Belgian recovery proceedings

There are apparently still four Belgian recovery cases pending. Generally, the cooperation between the Commission and the national authorities is good. The Belgian authorities appear to do their best to recover the aid in question and keep the Commission up to date.

However, it is apparent from these pending cases and also the completed recovery cases that there are a number of difficulties in recovering aid in Belgium. For example, in one case, there was a disagreement between the relevant Belgian authority and the Commission on the amount of interest owed on top of the aid.

As described in more detail below, the difficulties in recovering aid are due to the behaviour of the national authorities, the behaviour of the beneficiaries of the aid, and the fact that legal proceedings need to be taken.

4.4.1 Belgian State / National authorities

The main problem encountered by the Commission is that in the past it has been required to bring actions against the Belgian State before the ECJ for failing to comply with its decision ordering the recovery of aid, or has had to defend itself in actions for annulment from the Belgian State.

In the *Idealspun* case referred to above, the Commission needed to go to the ECJ for a second time in order to obtain a ruling that Belgium had failed to comply with an earlier ECJ judgment. Only after the proceedings before the ECJ had ended in favour of the Commission (all the Belgian recovery cases brought before the ECJ were won by the Commission), did the relevant Belgian authorities commence seeking recovery of the aid in question.

It should however be noted that in a more recent case, although the Belgian Government disputed the validity of a Commission recovery decision, the relevant Belgian authorities did try to recover the aid in question, well before the proceedings before the ECJ had ended (this constructive attitude echoes the French approach in the recent *EDF* case, where the aid was fully reimbursed before the Commission decision was challenged – see French report).

Moreover, in the *Ter Lembeek* case described above, the Walloon Region attempted to secure from the Commercial Court an order that the beneficiary of the unlawful aid provide a bank guarantee for the State aid to be recovered, in spite of the fact that an action for annulment was pending before the CFI. The same can be said regarding the *Ryanair* case, where the Walloon Region has endeavoured to recover aid whilst the Commission decision is being challenged by Ryanair before the CFI.

4.4.2 The beneficiary of the aid

In the cases studied, beneficiaries of the aid have usually resisted returning the aid after the initial request from the Member State. The beneficiary has usually appealed against the court orders for payment of the unlawful aid. Such actions by the beneficiary, albeit logical, delay the date by which the aid can be fully recovered.

4.4.3 National courts

As described above, the Belgian authorities generally need to bring a debt action against an aid beneficiary before the Commercial Court in order to recover the aid paid out to the beneficiary if the beneficiary does not comply with the letter of formal notice requesting repayment of the aid.

Overall, the Belgian courts appear to have a good grasp of the EC State aid rules and the direct effect of Article 88 (3) EC. However, in one recent example (the *Ter Lembeek* case), the national court suspended recovery proceedings, pending judgment of the CFI. Such an order goes against the obligation of the Member State to seek immediate recovery of the aid (and against the principle that an action for annulment does not have suspensory effect).

Another problem is that the recovery proceedings can be lengthy, and if an appeal is made by the beneficiary of unlawful aid against the first instance judgment, the State has a right to recover the aid in question only after the ruling of the court of appeal (unless the first instance court allows for the provisional enforcement of its order).

This does not appear to be in line with Article 14 of Regulation 659/1999, which provides that "*recovery shall take place without delay and in conformity with the procedures foreseen by the national law of the Member State in question provided that they allow for the **immediate and effective** execution of the Commission decision*" (emphasis added).

4.5 Identification of best practices and remedies for immediate and effective recovery

4.5.1 Best practices for immediate recovery of aid

Ideal recovery cases are those where the beneficiary reimburses the aid to the State as soon as the Commission has adopted a negative decision and the beneficiary has been informed of this decision.

This type of recovery by the State takes place exclusively through the administrative channels, without any court intervention.

The Commission should encourage the practice (seen in an exceptional case in France, the *EDF* case) of having the beneficiary reimburse the aid **before** challenging the Commission's decision before the CFI. This solution is in compliance with EC law: the beneficiary is using the legal means at its disposal while avoiding a pending recovery situation. The risk of the

aid finally being compatible or there not being any aid is therefore transferred to the Commission.

Best practices by the State would therefore include the following:

- identification of the beneficiary, of the method of calculating the aid and the amount of aid and of the authority having to recover the aid (for example, in the case of a region or local authority having granted the aid);
- information from the State to the beneficiary regarding:
 - the obligation to recover the aid immediately;
 - applicable interest rates in case of late recovery;
 - the possible administrative and legal actions open to the beneficiary wishing to contest the recovery act or the Commission's decision, preferably stressing the importance of (i) introducing these actions after the aid has been recovered and (ii) the fact that if the beneficiary does not contest the Commission's decision, certain grounds of appeal against the recovery order (i.e. arguing that the Commission decision is invalid) will no longer be open to the beneficiary after the time for introducing an EC action has lapsed. As in the *Ter Lembeek* case, the national court should systematically request the beneficiary to repay the aid to a blocked account (unless the conditions of *Zuckerfabrik* have been met) when the latter challenges the national recovery order or the Commission's decision;
 - legal action in the event that the enforcement of the executory act is insufficient to obtain full recovery of the aid;
 - registration of a claim with the creditors' representative in the case of insolvency proceedings involving the beneficiary being opened; information of the administrator appointed by the Commercial Court and of the President of the Commercial Court regarding the mandatory recovery of the illegal aid;
 - information to the judges concerned that suspension of the proceedings should not be allowed in the case of a negative Commission decision ordering recovery (although the absence of suspensory effect is problematic if the Commission decision is being challenged by the State or by the beneficiary, or even by a competitor).

4.5.2 System of surveillance of State aid in Belgium

A general proposal for improving recovery procedures would be to create a national, independent authority in charge of controlling the granting and recovery of State aid in Belgium.

The surveillance authority could, at a preliminary stage, be in charge of advising beneficiaries of public subsidies in order to determine what constitutes State aid and question the Belgian (federal and regional) authorities on notification to the Commission.

This independent authority could also review notifications in order to ensure that all the necessary information has been provided. It could also monitor all actions of the six governments and the six Parliaments in Belgium, including lower local authorities, which are likely to contain elements of aid, and alert them against this situation while informing the Commission and the public, thereby discouraging the executive powers or the federal, regional and local legislators from engaging in actions contrary to the EC Treaty or at least encouraging strict compliance with EC procedure, avoiding any unlawful State aid.

Beyond this role of prevention of recovery issues, one could also imagine that this surveillance authority could compile a State aid database that judges could consult when faced with State aid decisions. Once the aid has been declared illegal, the national surveillance authority could advise on the most suitable way for recovery and could help monitor the process.

The difficulty with this type of surveillance authority would be its ties with the authorities granting the aid and the State with regard to guaranteeing its independence vis-à-vis the State. In order to be credible for all parties concerned (beneficiaries, competitors, national judges, national authorities and the Commission) the surveillance authority would have to have the status of an independent regulatory authority with all the privileges and organisational characteristics that correspond to such an authority.

FRANCE

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5. France

5.1 National authorities responsible for recovery

In France, the authority responsible for enforcing negative Commission decisions is mainly the Ministry of Finance ("*Ministère de l'Economie et des Finances*" or "*Trésor*"). Other ministries may also be responsible in some cases, such as the Ministry of Agriculture.

In cases where the State aid is granted by local authorities ("*collectivités locales*", such as regions or other State's departments) or other public bodies³² (such as the social security institutions), the Ministry of Finance must liaise with these local authorities in order for them to issue claims or acts requesting the recovery of State aid. The local authorities in question may be prefects, regional social security units or others, depending on which local authority granted the aid.

Communication with the Commission is generally via the French Permanent Representation to the EC in Brussels ("*Représentation permanente de la France auprès de l'Union européenne*"). In some cases, the Ministry of Finance deals directly with the Commission.

Actions concerning the recovery of aid will normally be brought before the administrative courts. However, the civil courts can also be competent if the aid was not granted by means of an administrative act but merely happened to be granted in practice, or when recovery is sought by competitors, which is rare in France (there has not yet been a final judgment on recovery)³³.

5.2 Rules applicable to recovery

As stated above, administrative law and procedure will generally be applicable to the recovery of illegal aid. However, in a few cases, generally dealing with tax matters, civil law may apply³⁴.

5.2.1 Public law

Generally, the French State will first inform the beneficiary of the obligation to reimburse the aid, following a negative Commission decision. The recovery procedure will then be initiated by the State or at the local level, in the same way as the State would proceed in order to obtain the reimbursement of a debt owed to the State³⁵.

³² The grantors can also be public or even private undertakings. In this case, the appropriate body of the State will liaise with them (the relevant ministry of the *préfets*, for instance).

³³ Commercial Court of Paris, UFEX, DHL & others v La Poste, SFMI, Chronopost & others, 7 December 1999.

³⁴ See Part I.

³⁵ It is important to note that in the case of a tax constituting State aid, the Commission may order the relevant national authorities to **reimburse** the tax to the tax payers who did not benefit from the aid **instead** of ordering **recovery** of the aid from the beneficiaries.

a) Recovery by the State

Illegal aid is recovered in France by means of an executory act ("*acte exécutoire*"), which is issued by the Judicial Officer of the Treasury ("*agent judiciaire du Trésor*")³⁶.

This executory act ("*titre de perception*" or "*ordre de restitution*") can be the object of an opposition procedure (pursuant to the usual procedure), i.e. an action for misuse of powers or an action for annulment ("*excès de pouvoir*") before the administrative courts on grounds relating to the inexistence, "payability" ("*exigibilité*") or amount of the claim. This type of action has suspensory effect.

If the undertaking concerned does not reimburse the aid, the State can turn to a third party that holds the undertaking's funds ("*avis à tiers détenteur*") to recover the aid directly by seizing ("*saisie administrative*") the funds deposited in a bank account.

The Administrative Court of Paris³⁷ has held that the act by which the French government recovers illegal aid presents the characteristics of an administrative act taken by national authorities when exercising their discretionary public powers falling within the authority of the State ("*prérogatives de puissance publique*") in order to comply with their international obligations.

If, for example, the aid was granted by unilateral decision of the State, that act must be withdrawn before the State can recover the aid. This applies to acts which create rights.

Where the aid was granted by law, for example under a law providing for tax breaks in specific circumstances, recovery of the aid must be imposed by a regulatory or legislative act or the applicable legislation, as amended. The beneficiaries of the illegal aid can challenge the regulatory act and the measure implementing the legislative act before the responsible administrative courts.

Finally, in insolvency proceedings, the State must register its claim with the creditors' representative once insolvency proceedings have been opened.

b) Recovery by local authorities

The State generally requests prefects ("*préfets*") to execute recovery at the local level but recovery could also be ordered by any other local authority: a municipality ("*la commune*"), the General Council ("*Conseil général*") of the French *départments*, the Regional Council ("*Conseil régional*") of the French *régions* or a local public undertaking.

A new provision has been inserted into the General Code for Local Authorities ("*Code Général des collectivités territoriales*") which came into force on 1 January 2005. It provides that "*any local authority [...] having granted aid to an undertaking is to proceed without delay*

³⁶ The executory act is a "demand" to recover direct taxes or a State claim other than taxes.

³⁷ Administrative Court of Paris, Société Augéfi et Société Sèvres of 16 February 1994, Case n°9008722, see Part I.

to its recovery if so requested by a Commission decision or a judgment of the ECJ, whether provisional or definitive. In the absence of such recovery, after a notice has remained without effect for a month from notification, the State representative will proceed to the recovery of its own motion and by all means. The local authorities [...] will bare the financial consequences that could result for the State from a condemnation for late or incomplete implementation of recovery decisions. This is compulsory expenditure [...]"³⁸.

The provision lays down the principle of liability of local authorities for not recovering State aid granted that should have been recovered pursuant to a Commission decision or a court judgment. It is interesting to note that the aid should be recovered, even if the beneficiary has, for example, challenged the Commission's decision.

The recovery act adopted by the local authority can be subject to forced execution. However, it can also be challenged by the addressee within two months following receipt of the executory act. The introduction of an action to challenge the recovery act will automatically suspend the recovery procedure.

c) Suspensory effect and possible interim measures

Article L.4 of the Code of Administrative Procedure ("*Code de justice administrative*") provides that "*except for specific legislative provisions, actions do not have suspensory effect unless the court decides differently*". In principle, an action against an administrative decision does not therefore suspend the effects of that decision, even if the decision is illegal.

There are derogations to this principle. In particular, actions by which the claimant challenges the existence, the amount or the "payability" ("*exigibilité*") of orders for recovery ("*ordres de recettes*", "*titres de perception*" or "*ordres de recouvrement*") by "opposition to execution" ("*opposition à execution*") have suspensory effect. This applies both to claims issued by the State and claims issued by local authorities³⁹.

Moreover, if the beneficiary of illegal State aid contests the validity of public accountants seizing ("*saisie administrative*") assets on the basis of the executory act, the opening of opposition to these administrative proceedings ("*opposition à poursuites*") also has suspensory effect.

This means that the process of recovery of illegal aid is suspended by the introduction of an action ("*opposition*") against the executory act ordering repayment of the illegal aid or any subsequent measure of execution of the executory act. The process will, however, not be suspended if the beneficiary simply challenges the State's liability or requests damages from the State.

³⁸ Free translation from French, Article L.1511-1-1 of the General Code for Local Authorities.

³⁹ See Article 6 of the Decree of 29 December 1992 regarding orders for recovery by the State; Article 164 and 201 of the Decree of 29 Decembre 1962 concerning national public undertakings; Article L.1617-5,1°, para. 2 of the General Code for Local Authorities.

In all cases of opposition, however, suspensory effect ceases when the competent court of first instance dismisses the beneficiary's action, even if the beneficiary appeals that decision⁴⁰.

French administrative case law specifically provides that suspensory effect cannot be "circumvented" by the Administration requesting an order for payment of the contested sum. As a result, no interim measures, it seems, are available to the Administration before the administrative judge⁴¹.

5.2.2 Civil law

It seems that there are very few civil cases dealing with recovery, mainly because most contracts, transactions and acts in which the State is involved will be governed by administrative law. However, recovery issues may arise before civil courts if the action is brought by a competitor, in the context of insolvency proceedings, for which the commercial courts are competent, or relating to certain taxes and contributions.

a) Suspensory effect and interim measures

If a beneficiary contests the validity of the proceedings leading to the execution of the executory act ("*voies d'exécution*"), this opposition to execution ("*opposition à exécution*") also has suspensory effect, as it does before the administrative courts.

However, interim measures are available before the civil judge. The following conditions must be met: (i) urgency; (ii) *prima facie* case; and (iii) existence of difficulties hindering the recovery process. The interpretation of these criteria is generally less strict than under EC law. For example, urgency can result from the purely financial consequences of the implementation of the contested measure.

Where illegal aid has been granted but the State does not seek recovery, a competitor of the beneficiary could, for example, bring an action against the beneficiary (civil liability) and request the civil judge to order provisional recovery of the aid, the constitution of a bank guarantee or any other provisional and/or conservatory measure deemed necessary.

b) Insolvency proceedings

Insolvency proceedings are provided for by the Commercial Code ("*Code de Commerce*", Articles L-611 to L-623). There are two types of procedure: the non-contentious procedure taking place at the preliminary stage and the contentious procedure.

⁴⁰ *Conseil d'Etat*, Opinion of 5 May 1995, *Sarl Laiterie Fromsac*, RFDA [1996], p. 130.

⁴¹ The "*référé provision*" (interim measures in order for the judge to allow prepayments) is not available in this case, see *Conseil d'Etat*, *Omilait*, 1 October 1993, DA [1993], n°463.

(i) Non-contentious procedure

In the context of the non-contentious procedure, the objective is to find a way of improving the company's financial situation. An *ad hoc* representative is appointed by the president of the competent court (i.e. "*tribunal de commerce*") who will informally consult with creditors in order to conclude an agreement, which will remain confidential. If no agreement is reached, the president of the court will appoint a mediator who will negotiate a more formal solution with all creditors. Such an agreement must be approved by the court. Actions can be suspended by the court during the negotiation phase. The president can also decide to commence the contentious procedure.

(ii) Contentious procedure

The contentious procedure is instituted either (i) by the company declaring that it cannot continue to carry out its activities ("*déclaration de cessation de paiements*"); (ii) by a creditor; (iii) by the public prosecutor ("*Procureur de la République*"), or (iv) by the court itself. The court must render a judgment opening insolvency proceedings ("*jugement d'ouverture*"). The court can either declare that the company should be liquidated immediately, or, if the court considers the company financially viable, impose an observation period.

During the six-months' observation period (which can be extended), an administrator is in charge of the company's activities ("judicial control"). The administrator also draws up a social and financial statement of affairs.

Creditors must declare their claims to the creditors' representative within two months of the judgment opening insolvency proceedings. During the observation period, the company is prohibited from paying any claim pre-dating the judgment. Generally, it is only possible for secured creditors to request advanced payments. The judgment opening insolvency proceedings also suspends actions by creditors pending before the courts and the accrual of legal or agreed interest and any late interest or surcharges.

On the basis of the administrator's assessment, the court will decide whether the company should (i) continue its activities; (ii) be sold; or (iii) liquidated. The court is not required to wait until the end of the six-month period to decide that the company must be liquidated.

If the court decides that the company may continue its activities, it will approve a recovery plan ("*plan de redressement*"). In that case, the court will renew the time limits for repayments or waivers of part of the claim granted by creditors who concluded an agreement with the debtor. The time limits for repayments or for such waivers may be reduced by the court if appropriate. For other creditors, the court will impose uniform time limits for repayments, subject, to longer time limits for long-term debt, agreed by the parties before the commencement of insolvency proceedings.

Appeals, including to the *Cour de cassation*, may be lodged by creditors against:

- the judgment opening insolvency proceedings;
- the decision laying down or rejecting the plan to continue the company's activities; and
- the decision amending the plan to continue the company's activities.

The main difficulty in recovery cases is that, once the court has decided to open the observation period, the State cannot enforce recovery of the aid and interest rates are frozen. The only solution for the State is to register its claim within two months of the commencement of the observation period with the creditors' representative.

It seems that it is possible for the State, in its capacity as creditor, to appeal the court's decision to open the observation period rather than requesting that the company be put into liquidation immediately. In case of liquidation, the Commission may find that any possible distortions of competition resulting from the grant of the aid will "disappear" for the future (although the past effects of the aid cannot be repaired).

In case of a sale of the assets of the company at market price, and depending on the nature of the aid, the State will probably not have priority over other creditors, especially if the latter have guarantees or security or if they are employees.

Finally, if the court decides that the company can continue its activities, the State must negotiate the timing of the reimbursement of the aid. It is not certain that the State will obtain priority over other creditors from the debtor and/or the court for the reimbursement of the aid.

5.3 Actions for recovery (or opposing recovery) before the national judges

All cases brought before the national judge to date are set out in more detail in Part I. The focus of this section is on issues that have arisen before the national judge during the recovery process. These issues will be considered, in turn, from the point of view of the State, the beneficiary's competitors and the beneficiary.

5.3.1 Actions by the State to enforce recovery

To the best of our knowledge, we are not aware of any cases where the State tried to obtain recovery of the aid by bringing an action in the administrative courts.

5.3.2 Actions by competitors to enforce recovery

If the State does not order recovery of the aid from the beneficiary following a Commission decision, competitors can request the State to act and bring an action for annulment of the State's decision of rejection in the administrative courts, and apply for an injunction (with a

daily fine for non-compliance) against the Administration to recover the aid. An action based on a claim for misuse of powers does not allow the national judge to order recovery.

- (8) **Administrative Court of Appeal of Paris, Centre d'exportation du livre français, 5 October 2004, Cases n°01PA02717, n°01PA02761, n°01PA02777 and n°03PA04060, AJDA, 7 February 2005, p. 260-268, Dr. Adm., February 2005, n°2, p. 20-21 (D/E/I)**⁴²

Facts and legal issues: the Commission considered that financial aid granted to CELF constituted State aid that was compatible with the Common Market. Its decision was annulled by the CFI. The case does therefore not deal with illegal, incompatible State aid.

Decision: the Administrative Court of Appeal of Paris held that the financial aid constituted State aid. The annulment of the Commission decision implied that the Minister should have suspended and recovered the aid. In the absence of a Commission decision concerning recovery when the Minister was required to recover the aid, the Paris Court considered that it was the responsibility of the State to assess whether legitimate reasons existed for not recovering the aid.

The Paris Court considered that there was no obstacle to recovery. It upheld the decision of the lower court and ordered recovery of the aid granted from 1980 to 2002 and imposed a penalty payment, but then rejected a claim for damages and State liability.

Comments: the Paris Court strictly applied Article 88 EC and the established case law of the ECJ and the CFI by ordering immediate recovery. Indeed, at the time of the request by the claimant, the Minister should have ordered recovery of the illegal aid. The Paris Court took this decision, although, at the time of the ruling, a new Commission decision declaring the aid compatible with the Common Market had been issued.

After the annulment of the first Commission decision by the CFI, the Commission adopted a second decision, which was again annulled by the CFI⁴³. The Commission adopted a third decision on 20 April 2004⁴⁴. However, at the time of the decision of the Paris Court, CELF had already introduced an action for annulment against this new decision (on 15 September 2004), disputing the finding that the measure constituted State aid (whether compatible with the Common Market or not, since this meant that it was required to recover the illegal aid)⁴⁵. The Paris Court mentioned the absence of a definitive Commission decision.

In any case, despite the positive Commission decision declaring the aid compatible, the mere fact that CELF had benefited from State aid was sufficient for the Paris Court to order recovery. It is noteworthy that the Paris Court also imposed a daily fine in case of non-compliance by the State, pursuant to powers granted to the administrative judge in 1995.

⁴² The letters refer to the relevant tables of classification of actions at the end of the study.

⁴³ OJ (1998) L 44/37 and Case T-155, SIDE v Commission [1998] ECR II-1179.

⁴⁴ OJ (2005) L 85/27.

⁴⁵ Case T-372/04, removed from the Register by order of 31 January 2005.

- (9) **Administrative Court of Strasbourg, Ryanair, 24 July 2003, Case n°02-04641, LPA, 28 November 2003, n°238, p. 13; Administrative Court of Appeal of Nancy, Ryanair, 18 December 2003, Cases n°03NC00859 and n°03NC00864, AJDA, 2004, p. 396-401 (E/D)**

In the Ryanair case, competitors brought an action before the administrative courts. However, because the action was based on an alleged misuse of powers by the Chamber of Commerce for having granted illegal aid, the Strasbourg Court was not competent to order recovery. It seems obvious, however, that the French authorities were intent to draw the necessary conclusions from the judgment and order recovery of the aid without having been ordered to do so (see part I).

- (10) **Cour de Cassation, Laboratoires Boiron, 14 December 2004, Case n°1837, Petition n°02-31.241, not published (B)**

Facts: a laboratory filed an action for reimbursement of social security contributions, arguing that the contributions were unlawful State aid, because certain other laboratories were exempted from paying them. Referring to the *Banks* case, the Court of Appeal ruled that, in this context, the sanction for granting unlawful State aid was its withdrawal and not the imposition of a tax refund for the benefit of the laboratories subject to the contributions.

Decision: the *Cour de Cassation* referred the following questions to the ECJ for a preliminary ruling: (i) whether EC law must be interpreted as meaning that a company may file a claim for a tax refund because certain companies are exempted from paying the tax and whether this exemption constitutes State aid; and (ii) whether EC law must be interpreted as meaning that the burden of proof on the claimant filing an action for a tax refund (who must prove, according to French civil procedural rules, that this tax exemption for certain companies constitutes State aid on the basis that it over-compensates these companies for the costs incurred by discharging public service obligations or because it does not fulfill the four criteria of the *Altmark* case) "makes it impossible or excessively difficult to exercise the right to recovery of the aid" within the meaning of established ECJ case law⁴⁶.

Comment: the answer in this case will be interesting in that there are numerous cases in France (see Part I) where the national courts allowed the claimant not to pay a tax or contribution instead of ordering recovery of the illegal aid. The *Cour de cassation* raises the issue of the repayment of the illegal tax and draws parallels with the conditions for recovery.

5.3.3 Actions by the beneficiary to oppose recovery order

As mentioned above, the procedure for recovery of unlawful aid is initiated on the issuance of the executory act ("*état exécutoire*") by the State requesting reimbursement. This act can be

⁴⁶ Case C-526/04, OJ (2005) C 69/11.

contested before the administrative courts⁴⁷. The arguments brought forth by beneficiaries in recovery cases are dealt with below, following an analysis of two special cases dealing with the identity of the beneficiary.

(11) Commercial Court of Paris, SA Sojerca c/o Jaunet, 21 January 2003, Case n°2000089112 in Repertory General: Gazette du Palais, 4 November 2003 n°308, p.28 (G/F)

In this case, a company ("target") that had benefited from aid was sold to another company ("purchaser") with the net asset value of target being guaranteed. Following a negative Commission decision in 1997, the State ordered recovery of the aid from the purchaser in 2000. The purchaser went into liquidation but the State did not register its claim with the creditors' representative. The Commercial Court of Paris therefore concluded that the purchaser had no grounds for claiming damages from target on the basis that target had not reimbursed the aid.

This case is interesting because the State sought to recover the aid from the purchaser of target. This decision was probably justified, considering that target had guaranteed the net asset value of the company.

(12) Energy Regulation Commission, State aid recovery, 26 February 2004, not published (F/A)

Facts: following the *EDF* decision by the Commission of 16 December 2003⁴⁸, the State ordered recovery of the aid from EDF. EDF sought reimbursement of part of the aid from RTE, EDF's department in charge of the high-voltage electricity network. Since the parties could not agree on the amount to be paid by RTE to EDF, RTE decided to refer the case to the Energy Regulation Commission.

The Energy Regulation Commission noted that the reserves which had not been taxed (therefore creating an advantage for EDF) had been incorporated into EDF's capital and had therefore benefited all activities and departments of EDF, including RTE. The Energy Regulation Commission considered that each department of EDF should bear a share of the recovery charge in proportion to its funds: 27 % for RTE, 17 % for the distribution department and 56 % for the production department.

Comment: it is interesting that EDF and RTE raised the issue of how recovery of the aid should be apportioned between the two entities before the Energy Regulation Commission. EDF had already paid the amount due to the State on 16 February 2004 when the above-mentioned apportionment was decided. EDF nevertheless challenged Articles 3 and 4 of the decision of the Commission (relating to the tax treatment of certain provisions)⁴⁹.

⁴⁷ See, in absence of such an act, Commercial Court of Paris, SA Sojerca v Jaunet, 21 January 2003.

(13) Administrative Court of Clermont-Ferrand, SA Fontanille, 23 September 2004, Case n°0101282, AJDA 2005, Jurisprudence p. 385 (A)

Facts and legal issues: Under a 1996 law, the claimant entered into an agreement with the French government according to which the claimant would reduce the working time of employees in exchange for an additional reduction in social charges on low salaries.

The aid had been notified to the Commission and in a 1997 decision, the Commission declared the aid granted under the 1996 law incompatible with the Common Market. The decision was upheld by the ECJ⁵⁰.

The claimant, considering that Article 88 (3) EC had been violated, since the aid had been implemented prior to Commission approval, requested the State to award damages for the loss resulting from a delay when the company relocated (finally in 2000) as well as from a reduction in the company's gross margin due to the recovery of the aid.

Decision: the Administrative Court of Clermont-Ferrand rejected the arguments relating to the liability of the legislator because the strict conditions for such liability were not met in the present case.

The Administrative Court of Clermont-Ferrand then noted that the Administration could be held liable for having granted State aid prior to the Commission decision and that the claimant could therefore be awarded compensation for the loss sustained, although the claimant's own negligence must be taken into account when determining the amount of damages.

Moreover, the Administrative Court of Clermont-Ferrand held that the amount of damages could not include the amount received in aid under the agreement, since the judgment of the ECJ provided for the exact sum to be recovered by the State. However, the Administrative Court of Clermont-Ferrand stated that it could award damages for the harm suffered by the claimant and ordered an expert opinion.

The Administrative Court of Clermont-Ferrand noted that the agreement entered into by the State and the claimant was null and void and that the claimant could claim reimbursement of its expenses. The Administrative Court of Clermont-Ferrand added that, if the nullity of the contract resulted from a fault committed by the authorities, the claimant could, in addition, claim compensation for the loss resulting from the State's contractual liability for the nullity.

However, the Clermont-Ferrand Court considered that the claimant could not obtain an indemnity which would render the EC State aid rules ineffective by conferring on the claimant a benefit similar to that which the State had illegally granted.

⁴⁸ OJ (2005) L 49/9.

⁴⁹ Case T-156/04, EDF v. Commission, pending.

⁵⁰ Case C-251/97, France v. Commission, [1999] ECR I-6639.

Comment: in this case, the beneficiary did not contest the principle of recovery but asked for damages. The national judge expressly stated that damages could be awarded, provided they were not equivalent to the amount granted in State aid that was to be reimbursed by the claimant. In this respect, the national court should not confuse damages following a violation of EC law by the State with the fact that the aid must be reimbursed by the beneficiary of the State aid. Indeed, the amount awarded in damages only depended on the loss suffered by the claimant, regardless of the amount of illegal aid that must be recovered.

In general, the main arguments put forward by beneficiaries against recovery are the following:

- in several cases before the Commission, beneficiaries argued that reimbursing the aid would give rise to **financial difficulties**, and possibly bankruptcy;
- in the *CELF* case mentioned above, beneficiaries argued that recovery would threaten the **public service mission** carried out by the organisation by exporting French books; and
- beneficiaries have sometimes referred to the principle of legitimate expectations.

Although the principle of legitimate expectations is a general principle of EC law, it is not part of the French "public policy" ("*ordre public*")⁵¹. Moreover, the *Conseil d'Etat* held that the principle can only be applied in the French legal system if EC law applied to the case before the national court⁵² or if the contested decision was taken in order to implement EC law⁵³.

Courts of first instance⁵⁴ have held, however, that the Administration could be liable if the principle of legitimate expectations inherent in legal rules and administrative actions that are clear and foreseeable is not respected.

In the *CELF* case, the beneficiary raised the principle of legitimate expectations: considering the size of the undertaking, its activities and the fact that the State aid had been granted since 1980, the claimant argued that the company should not be required to recover the aid. This argument was dismissed.

5.4 Summary of the main difficulties in French recovery proceedings

As can be seen from the cases examined above, there are few cases which deal exclusively or primarily with the issue of recovery and can therefore serve as a reference point.

⁵¹ This means that if the principle has not been raised before the court of first instance, it cannot be raised before the *Conseil d'Etat* and the courts will not raise the principle of their own motion; see Part I.

⁵² *Conseil d'Etat*, 2 March 2002, Inédit Recueil Lebon, req. n°217647.

⁵³ *Conseil d'Etat*, 13 May 2001, Société TF1, published in Recueil Lebon, req. n°247353; *Conseil d'Etat*, Assemblée, 5 mars 1999, published in Recueil Lebon, req. n°194658; *Conseil d'Etat* section, 30 Décembre 1998, Entreprise Chagnaud SA, published in Recueil Lebon, n°189315; *Conseil d'Etat*, 16 Mars 1998, Association des élèves et Mlle Poujol, Dr. adm. 1997, n°149; *Conseil d'Etat*, 28 Juillet 2000, published in Recueil Lebon, req. n°205710; *Conseil d'Etat*, 9 Mai 2001, Transports

5.4.1 Amount and beneficiaries of the aid

In order to implement negative Commission decisions ordering recovery of illegal aid, the authorities need to identify the beneficiaries, as well as the amount of aid to be recovered. This information should, as far as possible, be included in the Commission decision.

The national authorities may encounter practical difficulties if more beneficiaries are granted illegal aid or in cases of indirect State aid (for example, tax breaks) where the amount granted in State aid varies considerably between beneficiaries.

Moreover, if national authorities are responsible for determining the amount of State aid, disagreements with the Commission could arise on the method of calculating the aid to be recovered.

5.4.2 Procedural aspects

Recovery in France seems to take place essentially via administrative channels, as is clear from the absence, to the best of our knowledge, of actions brought by the State to recover illegal aid.

There are also relatively few complaints dealing with the recovery of State aid. Two main factors could explain this:

- length and cost of the proceedings (between two to six years in average) which may thus not be a solution for competitors of the aid recipient to remedy distortions of competition; and
- choice of proceedings by the complainant (challenging the act granting aid rather than, where possible, directly requesting recovery).

Regarding the efficiency of recovery procedures, an important obstacle is the suspensory effect resulting from different types of procedures.

As described above, the action by the **beneficiary to contest the recovery order** or any executory measures has suspensory effect. Until the national court hands down its judgment, the State cannot recover the aid, not even by applying for interim measures before the administrative judge.

This suspensory effect is limited to the case where the beneficiary contests the recovery order. In all other cases, the judge can order interim measures, provisional or forced execution of a judgment, as well as conservatory measures.

Freytmuth, published in Recueil Lebon, req. n°210944; *Conseil d'Etat*, 11 avril 2003, Centre école régionale de parachutisme de Picardie, published in Recueil Lebon, req. n°221140.

⁵⁴ TA Strasbourg, 8 Déc. 1994, AJDA 1995, p. 555 ; JCP G 1995, II, 22474, concl. J. Pommier.

The problem of suspensory effect may also arise in the context of **insolvency proceedings**: under French law, where the court decides to open an observation procedure (in order to decide whether the company should be sold, put into liquidation or allowed to continue its activities), all creditor claims and payments are suspended. The authorities therefore cannot seek recovery of the aid until the court has taken a final decision on the future of the company.

In general, where there is a large number of beneficiaries who all contest the relevant recovery orders before the competent courts, the State authorities will not recover the total amount of the aid and may choose not to proceed with the recovery process until these actions have been decided, especially if a national court requests a preliminary ruling from the ECJ.

5.5 Identification of best practices and remedies for immediate and effective recovery

5.5.1 Immediate recovery of aid

Ideal recovery cases are those where the beneficiary has been informed of a negative Commission decision and reimburses the aid to the State as soon as the Commission has adopted a negative decision and

This type of recovery takes place exclusively via administrative channels, without any court intervention.

In the *EDF* case, it is interesting to note that the beneficiary reimbursed the aid **before** challenging the Commission decision before the CFI. This solution is in compliance with EC law: the beneficiary uses the legal means at its disposal while avoiding a pending recovery situation. The risk that there is no State aid or, if so, that it is compatible with the Common Market is therefore transferred to the Commission. The Commission should encourage this type of behaviour.

5.5.2 Effective recovery of aid

As outlined above, it is of primary importance to inform competitors and the French legal community of all available national actions and the EC law principles applicable to the recovery of illegal aid.

Competitors, for example, should be aware of the possibility, in some cases, to request recovery of illegal aid before the commercial courts, without first having to obtain a decision from the administrative courts which annuls the act that granted the illegal aid.

Judges, for example, should be aware of EC law principles according to which the suspensory effect resulting from certain types of procedures should be set aside.

It is suggested that, in order to increase the level of information available to all parties concerned and improve recovery procedures, a national, independent surveillance authority is created that will be in charge of controlling the grant and recovery of State aid in France.

The surveillance authority could, first, be responsible for advising beneficiaries on State aid issues, determine what constitutes State aid and question the French authorities on notification to the Commission.

The surveillance authority could also review notifications in order to ensure that all necessary information has been provided. It could also monitor all actions by the French government, the French parliament and local authorities that are likely to contain elements of State aid and alert them to the fact, if necessary, while also informing the Commission and the public. As a result, the French government or the French parliament would be encouraged to strictly comply with EC State aid law (notably procedural aspects), avoiding unlawful State aid.

In addition to this preventive approach, one could also imagine that the surveillance authority creates a State aid database which judges could consult when deciding State aid issues. Once the aid has been declared illegal, the surveillance authority could advise on the most suitable way to recover the aid and help monitor the recovery process.

The difficulty with this type of surveillance authority is that it would have close ties with the authorities granting the aid and the State, which makes it difficult to guarantee its independence vis-à-vis the State. In order to be credible to all parties concerned, i.e. beneficiaries, competitors, national judges, national authorities and the Commission, the surveillance authority must have the status of an independent regulatory authority with all corresponding privileges and organisational characteristics.

GERMANY

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6. Germany

6.1 Authorities responsible for recovery

The Federal Ministry of Finance of the Federal German government is responsible for dealing with the Commission on State aid matters.⁵⁵ The Federal Ministry of Finance also oversees the implementation of negative Commission decisions with recovery obligations.

Under the German Constitution, the Federal government can only implement recovery decisions where the aid which is to be recovered was granted by the Federal government or one of the public bodies controlled by it (such as the former Privatisation Agency for Businesses in the New Federal States ("*Treuhandanstalt*") and its legal successors). Where the aid to be recovered was granted by one of the sixteen Federal States ("*Länder*") or a municipality (or an entity controlled by one or more Federal States or a municipality), the Federal government must liaise with the officials of the Federal States responsible for State aid matters. Normally these officials are employed by the Federal Ministry of Finance of the respective Federal State. Sometimes, where several Federal States have an interest in a recovery case (such as in those *Landesbanken* cases where the banks were owned by several Federal States), the Federal government will consult with officials from more than one Federal State.

Since the officials of the Federal States are responsible for all State aid issues arising at the level of the Federal States (including the assessment of aid projects and the preparation of draft notifications), they have developed extensive knowledge and experience over time. Generally, the exchange between the Federal Ministry of Finance and the competent officials of the Federal States appears to function well.

We have not found any indications of differing opinions between the Federal Ministry of Finance and any of the Federal States in the matters which we have reviewed. In so far as there are difficulties in German recovery cases, they do not appear to be due to the German federal structure.

Theoretically, in the event of differing opinions between the Federal government and one of the Federal States on a recovery matter, the Federal government would have the right, under the German constitutional principle of "federal loyalty" ("*Bundestreue*"), to demand that a Federal State takes all steps necessary to recover aid in a specific manner.

6.2 Rules applicable to recovery

When examining recovery of State aid in Germany, a distinction must be made between recovery under administrative law and recovery under civil law. Where an aid has been

⁵⁵ Technically, correspondence is exchanged between the Commission and the Permanent Representation to the European Union.

granted under administrative law measures, such as State aid granted under a public law contract, the aid must be recovered pursuant to German administrative law. Any litigation regarding such recovery claims must be brought before the administrative courts.

If the illegal aid was granted by way of a civil law transaction, for example an injection of capital into a privately owned company or the issuance of a guarantee, the State aid must be recovered pursuant to the provisions of the German Civil Code ("*Bürgerliches Gesetzbuch*"). A court action regarding a recovery claim of this type must be brought before the ordinary courts.

6.2.1 Public law

Where illegal State aid has been granted by way of an administrative act ("*Verwaltungsakt*") under public law, the recovery of that State aid will normally also be effected pursuant to a so-called "negative administrative act" ("*belastender Verwaltungsakt*") under German public law. German administrative law is laid down in the Act on Administrative Procedure ("*Verwaltungsverfahrensgesetz*") which applies to administrative acts of the Federal government and its subdivisions. Similar legislative acts exist with respect to administrative acts of the Federal States. Also, similar rules apply where aid is granted in the form of tax benefits.

For a long time, legal discussion of administrative proceedings for the recovery of State aid in Germany has focused on the extent to which the recipient can rely on the principle of legitimate expectations. Section 48 (2) of the Act on Administrative Procedure contains a provision which specifically provides that the recipient of illegal State aid (irrespective of whether the illegality is based on EC law or on domestic German law) can prevent recovery of the aid if it relied in good faith on the legality of the grant. Section 48 (4) of the Act on Administrative Procedure provides that the recovery of aid is illegal if more than a year has expired since the administration learnt of the reasons for recovery. The recipient of the illegal aid invoked this provision in the *Alcan* case which was ultimately decided by the ECJ. The ECJ held that domestic law on recovery must not be applied in a manner that makes recovery impossible. Following the decision of the ECJ, the beneficiary of the aid went to the Federal Constitutional Court and claimed a violation of its basic rights. The Federal Constitutional Court rejected the claim in 2000.

It is notable that, since the final judgment in the *Alcan* case, there have been very few recovery cases before German administrative courts. Apparently, recipients of State aid and German courts have realised that reliance on general principles of administrative law is no longer possible, unless there is a clear case of reliance on good faith.

6.2.2 Civil law

Recovery of State aid is more complex in cases where incompatible aid was granted by way of a civil law transaction. Under German law, the Federal government, the Federal States'

governments and public entities all have the ability to enter into civil law contracts and transactions where this is necessary to carry out their tasks. Examples include capital injections, loans, and guarantees, as well as contracts for the purchase or sale of real estate, supply contracts and other transactions.

Where the State aid to be recovered was granted through a civil law transaction, recovery must, in principle, be sought through civil law means. Normally, recovery occurs pursuant to the provisions of the German Civil Code relating to unjust enrichment ("*ungerechtfertigte Bereicherung*") (sections 812 *et seq.*). These provisions require that the transaction underlying the grant of the aid be declared null and void.

Under German civil law, contracts and other civil law acts that violate a legal prohibition are null and void (section 134 *BGB*). It has long been in dispute whether section 134 *BGB* should be applied to violations of Article 88 (3) EC. The argument of those advocating non-applicability was that section 134 of the German Civil Code requires that *both* parties to the transaction must be in violation of the law. Since Article 88 (3) EC, on its face, is addressed to Member State only, the recipient of the aid would not be in violation of the law.

The legal uncertainty was removed in 2003 by a landmark decision of the Federal Court of Justice ("*Bundesgerichtshof*"), the highest German court for civil law matters, which held that section 134 *BGB* is indeed applicable to violations of Article 88 (3) EC. This is important, in particular, for transactions involving triangular relationships, such as the grant of a bank loan guaranteed by the State. In such case, where Article 88 (3) EC is violated, the question turns on whether it is only the actual payment of the loan by the bank to the ultimate recipient that is invalid or whether the breach of law also affects the guarantee given by the State to the bank. The decision of the Federal Court of Justice suggests that, because the transaction, in its entirety, is regarded as being in breach of the law, within the meaning of section 134 *BGB*, the grant of the guarantee to the bank by the State will also be affected.

It can be expected that the 2003 decision of the Federal Court of Justice, which it confirmed in another decision in early 2004, will further increase State aid discipline in Germany, in particular as regards the involvement of banks in the financing of such transactions.

6.2.3 Immediate Enforcement and suspensory effect

An appeal against an administrative act normally has suspensory effect (section 80 (1) of the Administrative Court Act ("*VWGO*")). However, the administrative body issuing the act can decide that an appeal should not have suspensory effect. This is permissible where the immediate execution of the act is in the "public interest" (section 80 (2) (4) *VWGO*). Generally, where State aid must be recovered pursuant to a negative Commission decision, immediate recovery and thus immediate enforcement of the administrative act ordering recovery are in the public interest. Thus, where recovery is sought pursuant to administrative law, it is relatively easy to ensure immediate enforcement of the national recovery decision.

This is different where recovery is sought pursuant to civil law. Under the German Code of Civil Procedure ("*Zivilprozessordnung*"), the claimant can freeze the assets of the defendant ("*Arrest*") against whom a payment action is brought, if it is able to show that, in the absence of a freezing order, enforcement of the judgment might become impossible ("*Arrestgrund*"). In addition, the claimant must show that the underlying claim is *prima facie* well-founded ("*Arrestanspruch*"). Similarly, a claimant in civil proceedings can obtain an injunction ("*einstweilige Verfügung*", for example, a prohibition on the defendant from spending certain monies) if it can show that, in the absence of an injunction, irremediable harm would be caused to the claimant. The thresholds to obtain an *Arrest* or an *einstweilige Verfügung* in civil proceedings are, therefore, very high. Whereas, in practice, defendants faced with private law actions for the recovery of State aid may accept mutually agreed interim measures, it is almost impossible to obtain an *Arrest* or *Einstweilige Verfügung* by means of a court decision. Thus, if the beneficiary refuses to repay the aid, the State must await the outcome of the court proceedings before any monies are repaid.

In certain cases, this is why, in order to ensure the swift and efficient implementation of a negative Commission decision in Germany, it is preferable to use administrative rather than civil law proceedings. The authority seeking recovery is not allowed to use its powers under administrative law in a case that is clearly governed by civil law. The applicable law is determined by statute. There is no discretion. However, the dividing line between administrative and civil law matters in the area of State aid is not always clear under German law. This is why the Federal government has very recently attempted to enforce a recovery claim in administrative proceedings based on the negative Commission decision alone (i.e. without a specific national legal basis).

The first test case was *Kvaerner*, which involved the grant of operating aid by the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), the privatisation agency for East-German businesses, to the Kvaerner shipyard. The Commission issued a decision pursuant to which part of that aid was incompatible. When Kvaerner refused to repay the aid, BvS issued an administrative act ordering immediate repayment of the amount in question rather than bringing an action against Kvaerner for repayment of the aid before the ordinary courts (which have jurisdiction in civil law matters). BvS declared that act to be immediately enforceable, because immediate enforcement was in the public interest. When Kvaerner brought an action which concerned immediate enforcement only, the Administrative Court of Berlin annulled the decision declaring BvS's administrative act immediately enforceable. The decision of the Berlin Court is based on a principle of German constitutional law pursuant to which any claim for reimbursement of aid by a State authority must have a statutory basis ("*Gesetzesvorbehalt*"). In fact, the German constitution prohibits actions by administrative authorities against private parties for which there is no statutory basis. On 8 November 2005, the Higher Administrative Court ("*Oberverswaltungsgericht*") of Berlin set aside the decision of the lower court and held that the *effet utile* of the Commission decision required that BvS be

allowed to recover the aid by way of an administrative act. In the opinion of the Higher Administrative Court, the public party recovering the aid is not necessarily bound to recover the aid in the same manner in which it was granted in the first place. If the decision of the Higher Administrative Court of Berlin is confirmed in the main proceedings, it can be expected that, in the future, recovery of aid in Germany will, in principle, be carried out pursuant to administrative rules.

The question of whether a negative Commission decision as such can constitute the legal basis for recovery under German law was also discussed in *Saxonia*. In that case, the negative Commission decision provided that Saxonia should repay part of the amount originally granted to its parent, Lintra. In national proceedings, commenced by a privatisation agency intending to recover those amounts, Saxonia claimed that there was no evidence in the Commission decision that any of the amounts paid to Lintra had actually been passed on to Saxonia. The Higher Administrative Court of Dresden found that, in the absence of proof that the monies had actually been transferred to Saxonia, the only legal basis for recovery of these amounts was the negative Commission decision itself. Since that decision had been challenged before the CFI, the Higher Administrative Court of Dresden thought it appropriate to suspend the proceedings pending the appeal.

The *Saxonia* case illustrates that, in practical terms, reliance on a national legal basis for recovery creates, under the German legal system, an incentive for parties to challenge aspects that may already have been dealt with in the Commission decision, whose implementation is being sought, such as the amount to be recovered, interest, and other aspects. Direct reliance on the negative Commission decision in national proceedings would limit the issues that could be addressed by the national court to those not expressly dealt with in the Commission decision.

6.2.4 Recovery in insolvency proceedings

a) General Insolvency Act

Of the 45 German recovery cases pending as of 1 July 2005, 20⁵⁶ are recovery cases against an insolvent beneficiary. Of these, 17 cases relate to aid beneficiaries located in the New Federal States (i.e. Eastern Germany), which became insolvent following a failed privatisation. The remaining cases concern sensitive sectors such as steel and shipyards. Thus, while the number of recovery cases involving insolvency does appear to be large, once

the remaining privatisation cases in the New Federal States have been closed, their number can be expected to decrease significantly.

Insolvency proceedings are governed by the Insolvency Act ("*Insolvenzordnung*") which entered into force on 1 January 1999 and which, in part, was designed to address the special situation of companies in the New Federal States. Pursuant to the Act, following the opening of insolvency proceedings, the local court ("*Amtsgericht*") appoints a trustee in insolvency ("*Insolvenzverwalter*") who administers the asset of the insolvent company. Creditors must notify the trustee of their claims. Where the trustee does not recognise the validity of a claim, the creditor can bring an action for a declaratory judgment before the ordinary courts. Following recognition of a claim (either by the trustee or by the court), the assets of the insolvent party are distributed to the creditor. The 1999 Insolvency Act abolished differential treatment of preferred and non-preferred creditors. The Act only distinguishes between normal creditors and subordinate creditors (for example, shareholders requesting repayment of their capital or shareholder loans). Secured creditors (for example, those who have a lien over a particular asset), and creditors of claims created by the trustee ("*Massenschulden*", i.e. claims arising after insolvency has been declared). In particular, tax, social security and other claims by the State no longer enjoy preferential treatment over other creditors.

The 1999 Insolvency Act introduced the so-called "insolvency plan procedure" ("*Insolvenzplanverfahren*") which is a restructuring procedure modelled on US-style Chapter 11 proceedings. In essence, the *Insolvenzplanverfahren* consists of a plan jointly worked out by the creditors pursuant to which each creditor waves a certain percentage of its claim in order to secure the continued existence of the debtor. Since the insolvency plan is designed to ensure the financial survival of the debtor, participation in such a plan may, in some cases, contravene the purpose of recovery of unlawful aid which, where full recovery cannot be secured, may require that the aid beneficiary be forced to stop its economic activities.

b) Practical problems

Capital injections and loans by the Federal government

In practice, since the entering into force of the 1999 Insolvency Act, there are fewer difficulties in assessing the correct treatment of State aid claims in insolvency proceedings in Germany:

⁵⁶ 2000/C31 Neuer Harzer Werke GmbH, 17/10/2001, L 134, 51-62, 22/05/2002, 10/12/2003, not yet published; 1992/C14 Bremer Vulkan Krupp & Hibeg, 25/02/1998, L 316, 25-32, 25/11/1998; 1994/C28 Hamburger Stahlwerke GmbH, 31/10/1995, L 78, 31-43, 28/03/1996; 1996/C07 MTW Schiffswerft und Volkswerft Stralsund, 22/07/1998, L 108, 34-43, 27/04/1999; 1997/C06 Dieselmotorenwerk Vulkan GmbH, 21/04/1999, L 232, 24-32, 02/09/1999; 1997/C45 SMI, 11/04/2000, L 238, 50-58, 22/09/2000; 1997/C56 Zeuro Möbelwerk, 21/12/2000, L 282, 1-14, 19/10/02; 1997/C58 Hartha, 03/02/1999, L 145, 32-36, 10/06/1999; 1997/C80 Pittler/Tomos, 28/07/1999, L 65, 26-32, 14/03/2000; 1998/C05 Brockhausen Holze, 28/07/1999, L 7, 6-13, 12/01/2000; 1998/C78, 21/04/1999, L 230, 4-8, 31/08/1999; 1995/C41, 13/03/1996, L 198, 40-46, 08/08/1996; 1994/C55, Neue Maxhütte Stahlwerke GmbH, 18/10/1995, L 53, 041-49, 02/03/1996; 1999/C26 Dessauer Geräteindustrie, 15/02/2000, L 1, 10-20, 04/01/2001; 1999/C36 Korn Fahrzeuge, 23/02/2000, L 295, 21-29, 23/11/2000; 1999/C41 Lintra, 28/03/2001, L 236, 3-14, 05/09/2001; 2000/C66 ZEMAG GmbH, 10/10/2001, L 62, 44-53, 05/03/2002; 2000/C44 SKL Motoren GmbH, 09/04/2002, L 314, 75-85, 18/11/2002; 2000/C28 Hirschfelder Leinen und Textil GmbH, 30/01/2002, L 314, 45-61, 18/11/2002; 2001/C13 Jahnke Stahlbau, 01/10/2003 not yet published; 1998/C42 CD Albrechts, 21/06/2000, L 318, 16/12/2000; 2000/C36 Henneberg Porzellan GmbH, 30/10/2001, L 307, 1; Lautex/ERBA Lautex, CR 23/97, CR 62/2001.

The key question concerned capital injections into companies. Pursuant to the Insolvency Act and German company law, a shareholder in a company who reclaims its capital is treated as a subordinate creditor. The same is true for a shareholder attempting to recover a loan at a time when a prudent shareholder would have provided capital ("*kapitalersetzendes Gesellschafterdarlehen*"). In the *Neue Max Hütte* case concerning a shareholder loan which the Federal State of Bavaria granted to a steel producer, the Regional Court of Amberg and, on appeal, the Higher Regional Court of Nürnberg were faced with the question of whether the claim for repayment of the loan by the Federal State (following a negative decision by the Commission) was a subordinate or an ordinary claim. The Regional Court of Amberg took the position that the reclaiming of the loan by the Federal State of Bavaria should be treated like any other claim for repayment of capital by a shareholder and thus be subordinate. The Higher Regional Court of Nürnberg rejected that approach and stated that it was necessary to disregard the position of shareholder of the Federal State of Bavaria when assessing the correct treatment of the claim for insolvency purposes, in order to safeguard the *effet utile* of the negative Commission decision. Thus, the Higher Regional Court of Nürnberg treated the loan repayment claim of the Federal State of Bavaria like an ordinary claim. The same results could have been achieved by relying on German law alone. Since, following the negative Commission decision, the loan agreement was null and void (pursuant to section 138 of the German Civil Code), the claim for repayment brought by the Federal State of Bavaria was no longer a claim by a normal shareholder, but should rather have been based on unjust enrichment. If the claim had been categorised accordingly, there would have been no question of subordination.

d) Transfer of business

Another practical issue, which has arisen in a number of insolvency proceedings in Germany in the past, is the extent to which the trustee in insolvency is able to transfer all or part of the insolvent business to a third party without exposing the acquirer to the risk of State aid recovery claim. This issue has been the subject of litigation at Community level (in *Seleco*, *SMI*, and *other banks*). The ECJ has established the principle that, where the fair market value is paid for the business, a recovery claim stays with the original beneficiary (i.e. the insolvent estate). A number of questions may arise regarding the proper method of valuation of the business, the requirement of a tender and other practical issues. However, in general, it is to be expected that issues regarding the resale of a business to secure payment of creditor claims will be handled more efficiently in the future. The authors of the report have not found a recent example of a German court case involving these issues.

c) Insolvency plan

The treatment of State aid recovery claims in insolvency plan proceedings is an open issue. There are no court cases on this point. A creditor voting on an insolvency plan will have to weigh whether the non-acceptance of the plan would lead to a situation where it recovers less than the percentage of the claim recoverable under the insolvency plan. For the State

this is a difficult judgment to make. We understand that the Commission takes the position that it is only possible for the State to participate in an insolvency plan if the plan provides for the complete repayment of the entire recovery claim within a short period of time (one year).

It should be noted that an insolvency plan can be accepted by a majority of creditors only if the voting creditors also hold more than 50 per cent of the claims (section 244 Insolvency Act). Thus, it is possible that, where the State rejects an insolvency plan, the plan will nevertheless be adopted by a majority of creditors. Any insolvency plan must be confirmed by the insolvency courts ("*sofortige Beschwerde*"). It is possible to challenge the confirmation decision by immediately bringing a complaint. It is an open question whether the court before which such a complaint is brought must set aside the insolvency plan despite the positive vote of the creditors, merely because the plan was rejected by the State reclaiming recovery of the aid.

6.3 Actions for recovery (or opposing recovery) before the national courts

6.3.1 Action by the State

(14) Administrative Court ("*Verwaltungsgericht*") of Berlin, 15 August 2005, 20 A 135/05 (A); Higher Administrative Court ("*Oberverwaltungsgericht*") of Berlin, 8 November 2005

Facts and legal issues: The case concerns the implementation of a negative Commission decision of 20 October 2004 in the so-called *Kvaerner* matter⁵⁷. The Commission decided that Kvaerner, a shipyard, had received unlawful State aid which Germany was required to recover. The Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), which was responsible for recovering the State aid, issued an administrative act ordering recovery of the aid. Kvaerner challenged the administrative act, arguing that it was not based on a valid legal basis ("*Rechtsgrundlage*"). BvS took the view that it was entitled to base administrative acts either on Article 14 (3) of Regulation 659/1999 or directly on the Commission decision itself.

Decision: The Administrative Court of Berlin decided that the recovery decision issued by BvS was unlawful. The German Constitution stipulates that every administrative act that imposes a burden on a person must be based on a specified legal basis ("*Vorbehalt des Gesetzes*", Article 20 (3) "*Grundgesetz*"). According to the Administrative Court of Berlin, the administrative act ordering recovery was not based on a valid legal basis. Both Article 14 (3) of Regulation (EC) No. 659/1999 and the Commission decision provided that recovery of unlawful State aid had to be implemented according to national law. The case law of the Community courts⁵⁸ does not, according to the Administrative Court of Berlin provide for an obligation to recover unlawful State aid by means of an administrative act. Similarly, the

⁵⁷ OJ (2005) L 120/21.

⁵⁸ In particular, Case T-155/95, *Stadt Mainz v Commission* [1996] ECR I-1557.

Berlin Court took the position that established case law⁵⁹ does not indicate that recovery of unlawful State aid can only be carried out if implemented by means of an administrative act.

On 8 November 2005, the Higher Administrative Court of Berlin set aside the decision of the Administrative Court of Berlin and ruled that the administrative act for recovery issued by BvS was well-founded. According to the Higher Administrative Court, the *effet utile* of the negative Commission decision required that administrative law provided means of recovery to the grantor of the aid.

Comment: The decision of the Administrative Court of Berlin and of the Higher Administrative Court of Berlin were handed down in preliminary proceedings. If the position adopted by the Higher Administrative Court of Berlin is confirmed in the main proceedings, it can be expected that recovery of aid in Germany will only be sought in administrative proceedings in the future.

(15) Regional Court ("Landgericht") of Halle, 23 December 2004, 9 O 231/04 (A)

Facts and legal issues: The claimant, the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), sued the insolvency trustee of Zemag, which had been part of the Lintra group and in respect of which insolvency proceedings were opened on 1 March 2001. The Lintra group had received aid declared illegal by the Commission by decision of 28 March 2001. Part of that aid had been allocated to Zemag. When BvS applied to have the recovery claim registered as an insolvency claim, the trustee rejected the request on the grounds that section 41 (1) of the Insolvency Act only provided for the registration of claims created before the commencement of insolvency proceedings. In addition, the trustee claimed that BvS failed to show that the aid in question had actually been paid by Lintra to Zemag. Finally, the trustee claimed that recovery of the aid would violate the principle of good faith laid down in section 242 of the German Civil Code.

Decision: The Halle Court found in favor of the claimant. It applied the case law developed by the Federal Court of Justice in 2003 pursuant to which contracts that involve the grant of illegal aid are null and void *ab initio* (under section 134 of the German Civil Code). Thus, section 41 (1) of the Insolvency Act did not prevent registration of the claim. The Halle Court also rejected the argument that the principle of good faith precluded recovery in insolvency proceedings.

(16) Higher Regional Court ("Oberlandesgericht") of Dresden, 24 September 2004, 3 U-1013/04; Regional Court ("Landgericht") of Chemnitz, 28 April 2004, 8 O-3619/02

Facts and legal issues: The case concerned the implementation of a negative Commission decision of 28 March 2001 in the so-called *Lintra* matter. Lintra was a holding company in the

⁵⁹ In particular, Case C-404/97, *Commission v Portugal* [2000] ECR I-4922.

New Federal States that was privatised in January 1995. The holding company comprised eight businesses, including Saxonia Edelmetalle GmbH that was sold to a third party. As part of the original privatisation deal, the German privatisation agency committed to paying a total of DM 824.2 million in restructuring aid. The Commission approved the aid in 1996, but subsequently opened proceedings for misappropriation of State aid. These proceedings were concluded by decision of 28 March 2001, in which the Commission ordered that an amount of DM 35 million should be repaid by the Lintra subsidiaries. DM 3.2 million of the total amount was allocated to Saxonia, the defendant. The defendant challenged the Commission decision before the CFI. Since the defendant refused to repay the amount voluntarily, the privatisation agency sued the defendant in the Regional Court of Chemnitz.

Decision: In the proceedings before the Regional Court of Chemnitz, the defendant argued that there was no basis for the privatisation agency to reclaim the money under the provisions of unjust enrichment contained in the German Civil Code (section 812 "*Bürgerliches Gesetzbuch*" or "*BGB*"). The defendant argued that, to be able to rely on section 812 *BGB*, the claimant would have to show that it had actually paid the amount reclaimed to the defendant. In the defendant's view, the aid had been paid to the parent (Lintra) and there was no evidence that any part of that payment had been passed on to the subsidiary. The Regional Court of Chemnitz held that these considerations under national law were irrelevant, because the Commission decision stated that this specific amount should be reclaimed from Saxonia. The Regional Court of Chemnitz explained that it was in no position to challenge the Commission decision on this point. The Higher Regional Court of Chemnitz did not follow the Regional Court of Chemnitz and suspended the proceedings, pending Saxonia's court action against the decision before the CFI. The Higher Regional Court of Chemnitz took the position that there was no legal basis under German national law for recovery of the aid from Saxonia because there was no proof that the aid had actually been paid to Saxonia. The only legal basis for direct recovery was the Commission decision specifying that this specific amount should be reclaimed from Saxonia. The Higher Regional Court of Chemnitz stated that the decision of the CFI was prejudicial to the outcome of the proceedings. It therefore suspended the proceedings pursuant to a section of the German Code of Civil Procedure that allows for the suspension of proceedings in the event that prejudicial proceedings are pending before another court. In the opinion of the Higher Regional Court of Chemnitz, this suspension did not violate Article 242 EC (which provides that an action against a Commission decision does not have suspensory effect). In the opinion of the Higher Regional Court of Chemnitz, the alternative to suspending national proceedings would have been to refer the case to the ECJ under Article 234 EC given the substantial doubts as to the legality of the Commission decision. The Higher Regional Court of Chemnitz considered that this was not advisable, since proceedings were already pending before the CFI and, accordingly, decided instead to suspend the proceedings.

(17) **Higher Regional Court ("Oberlandesgericht") of Hamburg, 2 April 2004, 1 U-119/00; Regional Court ("Landgericht") of Hamburg, 29 June 2000, 303O-358/96**

Facts and legal issues: These two judgments concerned the recovery of State aid pursuant to a negative decision of the Commission of 31 October 1995 in the case of *Hamburger Stahlwerke GmbH*. In its decision, the Commission found that loans granted to Hamburger Stahlwerke GmbH during the period from 1992 to 1993 amounting to DM 204 million constituted restructuring aid that was incompatible with Article 4 (c) ECSC. It ordered Germany to recover those amounts from the beneficiary of the aid. During the period in which the loans were granted, Hamburger Stahlwerke GmbH underwent a series of restructuring steps, each of which was accompanied by successive loans granted by a public bank that was controlled by the City of Hamburg, Hamburger Landesbank. Ultimately, the business of Hamburger Stahlwerke GmbH was transferred to an Indian steel manufacturing group ("ISPAT"). ISPAT acquired the loans granted to Hamburger Stahlwerke GmbH from Hamburger Landesbank at a price that was DM 90 million less than face value. The loans were subsequently transferred to another group member and eventually repaid by the new company operating the business of Hamburger Stahlwerke GmbH. Thus, the loans had eventually "disappeared". To implement the negative Commission decision, the City of Hamburg filed a court action against the defendant operator of the business of Hamburger Stahlwerke GmbH to recover the balance between the face value of the loans and the price paid by the ISPAT group.

Decision: The Federal government filed an appeal against the negative Commission decision, which was still pending when the Regional Court of Hamburg rendered its decision in the case brought by the City of Hamburg regarding the recovery of the loan. In its decision, the Regional Court of Hamburg noted that both the claimant and the defendant were of the view that the Commission decision was illegal and should be annulled by the ECJ. Nevertheless, the Regional Court of Hamburg went on to decide the case as if the Commission decision could stand. On the question before it, the Regional Court of Hamburg reached the conclusion that the action by the City of Hamburg should be dismissed, because the loan had been paid out by Hamburger Landesbank and not by the City of Hamburg and, due to the transfer of the loans to another entity of the ISPAT group and their subsequent repayment, there were no open claims that could be the basis for a recovery action. The Regional Court of Hamburg noted that this result, which it regarded as obligatory under national law, may be unfortunate, because the purpose pursued by the illegal aid, the continued operation of the business of Hamburger Stahlwerke GmbH, had been achieved and there was nothing that could be done to reverse this. However, according to the Regional Court of Hamburg, the result was inevitable, given the structure of the national legal provisions under which the illegal aid had to be recovered.

When the case was before the Higher Regional Court of Hamburg, the action by the Federal government against the negative Commission decision was dismissed by the ECJ. The Higher Regional Court of Hamburg set aside the judgment of the Regional Court of Hamburg

and held that the new owners of the business of Hamburger Stahlwerke GmbH would have to repay the loans received from Hamburger Landesbank directly to the City of Hamburg. In reaching this decision, the Higher Regional Court of Hamburg held that the violation of Article 88 (3) EC resulted in the invalidity of *both* the loan granted by Hamburger Landesbank to Hamburger Stahlwerke GmbH and the underlying agreement between the City of Hamburg and Hamburger Landesbank pursuant to which the loan had been granted. Thus, the City of Hamburg was in a position to bring a direct claim against Hamburger Stahlwerke GmbH (and its successors) for unjust enrichment. The Higher Regional Court of Hamburg explained that it was necessary to regard all contractual relationships surrounding the grant of the loan as null and void in order to preserve the *effet utile* of the Commission decision.

(18) Federal Court of Justice ("Bundesgerichtshof"), 20 January 2004, XI ZR 53/03, NVwZ 2004, 636

Facts and legal issues: The defendant, a producer of synthetic fibers and yarns, received an investment grant ("*Investitionszuschuss*") amounting to DM 1.2 million in 1982 from the claimant, a publicly owned bank. In addition, the claimant received an investment allowance ("*Investitionszulage*") amounting to DM 1.7 million in 1984 from another public authority. In 1985, the Commission decided that both the investment grant and the investment allowance constituted unlawful State aid and that they must be recovered⁶⁰. The Commission's decision was subsequently confirmed by the ECJ⁶¹, and the defendant repaid the investment allowance. In 1995, the claimant requested repayment of the investment grant plus interest from the defendant. The defendant refused, arguing, *inter alia*, that recovery of the investment grant would be contrary to the principle of good faith ("*Treu und Glauben*", section 242 *BGB*).

Decision: The Federal Court of Justice confirmed that contracts that infringe Article 88 (3) (3) EC are null and void according to section 134 *BGB*. Any payments or goods received under the respective contracts must be returned on the basis of the provisions of unjust enrichment ("*ungerechtfertigte Bereicherung*"). The Federal Court of Justice held that the defendant could not refuse to repay the investment grant by invoking the principle of good faith. In particular, the defendant could not draw conclusions from the fact that it took eight years from the ECJ judgment for the defendant to be asked to repay the investment grant. Also, recovery was not precluded by the fact that German public officials had frequently assured the defendant that the investment grant would not be recovered. With regard to recovery of unlawful State aid, national authorities do not have discretionary powers. Their role is limited to executing Commission decisions. Finally, the Federal Court of Justice decided that the claimant was entitled to ask for payment of interest, and that it was correct in calculating the level of interest on the basis of national law.

⁶⁰ OJ (1985) L 278/1.

⁶¹ Case C-310/85, Deufil GmbH & Co. KG v Commission [1987] ECR 901.

(19) Federal Court of Justice ("*Bundesgerichtshof*"), 24 October 2003, V ZR 48/03, EuZW 2004, 254

Facts and legal issues: The claimant, a sub-agency of the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), was responsible for the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*" or "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1997, the claimant sold 150 acres to the defendant, some of which were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* contained State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid⁶². The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be adapted retroactively to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts, requesting the additional payment. The defendant refused to pay, arguing that the Commission decision was unlawful.

Decision: The Federal Court of Justice ordered the defendant to make the additional payment.

(I) The Federal Court of Justice found that the question of the legality of the Commission decision was relevant for the case. However, it held, with reference to established ECJ case law⁶³, that the defendant was precluded from questioning the lawfulness of the Commission decision before a national court. The defendant, as the beneficiary of the unlawful State aid, could have challenged the decision before the ECJ, but instead allowed the mandatory time limit laid down in Article 230 (5) EC to pass.

(II) The Federal Court of Justice subsequently confirmed that recovery of unlawful State aid can be excluded in exceptional circumstances according to the principle of good faith ("*Treu und Glauben*", section 242 *BGB*). However, the arguments brought forward by the defendant were not sufficient to establish exceptional circumstances.

(20) Regional Court ("*Landgericht*") of Magdeburg, 27 September 2002, 10 O 499/02 and Higher Regional Court ("*Oberlandesgericht*") of Naumburg, 14 May 2003, 12 U 161/02 (E)

Facts and legal issues: The case concerned a claim for damages arising out of the alleged failure of the Federal State of Saxony-Anhalt ("*Land of Sachsen-Anhalt*") to notify aid in the steel sector within the time limit. The claim was based on a Commission decision under the ECSC Treaty allowing aid to steel producers in the German Federal States provided that the aid was notified to the Commission by 30 June 1994. The Federal government notified the

⁶² OJ (1999) L 107/21.

aid after the expiration of the notification period. The Commission found that the aid was incompatible. In the proceedings before the Regional Court of Magdeburg, the claimant claimed that the aid would have been compatible, had the Federal government abided by the notification period. Consequently, the claimant reclaimed a certain part of the amount that it was required to repay as damages under German tort law.

Decision:

The Regional Court of Magdeburg dismissed the claimant's action. It was unclear to what extent the Commission would have been able to approve the aid if the notification deadline of 30 June 1994 had been met. The claimant had referred to another case, *EKO-Stahl*, in which the Commission had granted such exceptional approval. The Regional Court of Magdeburg dismissed the action because the claimant had failed to show a causal link between the failure of the German administration to notify the aid within the time limit and the declaration of incompatibility of the aid by the Commission. The Regional Court of Magdeburg also stated that if it was to grant the claimant damages, that would amount to aid of its own. Subsequently, the Higher Regional Court of Naumburg dismissed the claimant's appeal and the Federal Court of Justice rejected the claimant's application for a further appeal.

(21) Federal Court of Justice ("*Bundesgerichtshof*"), 4 April 2003, V ZR 314/02, VIZ 2003, 340

Facts and legal issues: The claimant, a sub-agency of the Federal Institute for special tasks related to reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" ("*BvS*"), was responsible for the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1997, the claimant sold 200 acres to the defendant, some of which were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* contained State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid⁶⁴. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be adapted retroactively to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts requesting the additional payment. The defendant refused to pay, arguing that section 3 (a) *AusglLeistG* was unconstitutional, since it retroactively deprived the defendant of a vested legal entitlement.

Decision: The Federal Court of Justice ordered the defendant to make the additional payment.

⁶³ Case C-188/92, TWD Textilwerke Deggendorf GmbH v Germany [1994] ECR I-833.

⁶⁴ OJ (1999) L 107/21.

(I) Section 3 (a) *AusglLeistG* could only deprive the defendant of a vested legal entitlement if the purchase contract entered into in 1997 was valid. But this was not the case. The sale of the land below market price infringed Article 88 (3) (3) EC. Under section 134 of the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*"), a contract that infringes a legal prohibition ("*gesetzliches Verbot*") is void. Referring to the ECJ's case law⁶⁵, the Federal Court of Justice held that section 134 *BGB* must be understood as applying to infringements of Article 88 (3) (3) EC. This applies regardless of whether the Commission subsequently approves the aid in question. Only the nullity of the contract can remove any distortions of competition by enabling competitors to request recovery of the unlawful State aid.

(II) Generally, if a contract is void according to section 134 *BGB*, the parties to the contract must return any payments or goods received under the contract. Hence, the defendant would have been obliged to return the land to the claimant. However, the Federal Court of Justice held that, following the amendment to the *AusglLeistG* (section 3 (a) *AusglLeistG*), the contract was affirmed ("*Bestätigung*", section 141 *BGB*) subject to modified conditions, namely with a purchase price that did not amount to unlawful State aid.

(III) Finally, the Federal Court of Justice discussed whether recovery of unlawful State aid can be excluded according to the principle of good faith ("*Treu und Glauben*", section 242 *BGB*). Usually, the community interest in restoring competition prevails over the interests of the beneficiary of the aid, even if the beneficiary does not act negligently when receiving the unlawful aid. The Federal Court of Justice left open whether recovery may be excluded in exceptional circumstances, since the defendant did not argue that such exceptional circumstances existed in his case.

(22) Regional Court ("*Landgericht*") of Magdeburg, 8 August 2002, 4 O 194/02 and Higher Regional Court ("*Oberlandesgericht*") of Naumburg, 18 December 2002, 5 U 100/02 (A)

Facts and legal issues: The case concerned an action for the repayment of shareholders' loans granted by the Privatisation Agency for Businesses in the New Federal States ("*Treuhandanstalt*") to SKET, an equipment manufacturer. During the entire privatisation period in the early 1990s, SKET had received aid on an ongoing basis from the Privatisation Agency. In 1996, privatisation efforts finally failed and bankruptcy proceedings were opened regarding SKET's assets. In 1997, the Commission declared (some of) the State aid received by SKET incompatible and ordered its repayment. The Privatisation Agency brought proceedings before the Regional Court of Magdeburg against the trustee in bankruptcy who refused to recognise the recovery claim and, alternatively, took the position that the claim should be treated as a subordinated shareholder loan. The Regional Court of Magdeburg had to address a number of issues raised under German law relating to unjust enrichment and the question of whether a claim for the recovery of a loan granted by a public

⁶⁵ Case C-120/73, *Lorenz v Germany* [1973] ECR 1471; Case C-354/90, *FNCE v France* [1991] ECR I-5505.

shareholder, which had been found to constitute State aid, can be treated as a subordinate loan (pursuant to section 32 (a) of the German Act on Companies with Limited Liability).

Decision: The Regional Court of Magdeburg found in favour of the Privatisation Agency and set aside the defendant's arguments based on the law of unjust enrichment and the subordination of the loan. The Regional Court of Magdeburg based its decisions only on considerations of German law. Following the defendant's appeal to the Higher Regional Court of Naumburg, that Court affirmed the decision of the Regional Court of Magdeburg and, in addition, declared that the *effet utile* of the Commission decision required that the recovery claim be treated as a normal bankruptcy claim. The provisions of German corporate law which provide that claims for the repayment of a loan by a shareholder who granted a loan in a situation in which a prudent shareholder would have provided capital cannot be applied to a situation where State aid is reclaimed pursuant to a Commission decision.

(23) Regional Court ("Landgericht") of Rostock, 23 July 2002, 4 O 468/01, VIZ 2002, 632

Facts and legal issues: The claimant, a sub-agency of the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), was responsible for the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1998, the claimant sold land to the defendant, a local farmer. Some plots of land were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* contained State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid⁶⁶. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be retroactively adapted to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts, requesting the additional payment. The defendant refused to pay, arguing that at the time the contract was concluded, it could not have known that the *AusglLeistG* provided for unlawful State aid.

Decision: The Regional Court of Rostock decided in favour of the defendant, rejecting the claimant's request for additional payment.

(I) The Regional Court of Rostock discussed the ECJ's jurisprudence in detail, in particular the *Alcan* decision⁶⁷ and subsequent decisions by German courts. The Regional Court of Rostock acknowledged that the legitimate expectations of the recipients of unlawful State aid could be protected only in exceptional circumstances. In particular, the beneficiary of the aid recipient could not rely on legitimate expectations if he knew or should have known

⁶⁶ OJ (1999) L 107/21.

that the aid, although notifiable, had not been notified to the Commission. These principles applied regardless of whether the aid had been granted by an administrative act or under a private contract.

(II) The Regional Court of Rostock held that the request for additional payment was legitimately based on section 3 (a) *AusglLeistG*, but that it was contrary to the principle of good faith laid down in section 242 *BGB*. The defendant had, relying on the validity of the purchase contract, assumed various financial commitments, which, if it was required to repay the aid, could threaten its financial existence. As a local farmer, the defendant could not have known that a sale of land under the *AusglLeistG* comprised aid elements. The situation in the *Alcan* case was different, since Alcan was a globally active company, which knew that it had been granted aid. Taking into account that the effect of the unlawful aid was regionally limited, the Regional Court of Rostock held that, in this particular case, the interests of the defendant outweighed the Community interest, and that the claimant was therefore not allowed to recover the aid.

(24) Higher Regional Court ("Oberlandesgericht") of Nürnberg, 21 March 2002, 12 U 2961/01, Regional Court ("Landgericht") of Amberg, 23 July 2001, 41 HKO 546/97

Facts and legal issues: These decisions concerned the implementation of the negative Commission decision in the *Neue Maxhütte* case. In its decisions of 18 October 1995 and 13 March 1996, the Commission held that loans granted by the Federal State of Bavaria ("*Bayern*") to the ailing steel maker Neue Maxhütte-Stahlwerke GmbH amounting to DM 74 million constituted State aid granted in violation of Article 4 (c) ECSC. The Commission ordered recovery of this amount. During the entire period in which the loans were granted, the Federal State of Bavaria was a shareholder in Neue Maxhütte-Stahlwerke GmbH. Under the applicable German Act on Companies with Limited Liability ("*GmbH-Gesetz*", section 32 (a) (1)), a shareholder who grants a loan to a company with limited liability in a situation in which a diligent shareholder would have subscribed to equity (because the company was in a crisis) will be treated as a non-preferential creditor with a secondary claim ("*nachrangige Konkursforderung*") with respect to its loan if the company becomes insolvent. In the case before the Regional Court of Amberg, the trustee in bankruptcy claimed that the Federal State of Bavaria should be treated as a non-preferential secondary creditor, since it was a shareholder when it granted the loans in question.

Decisions: The Regional Court of Amberg held that the loans should be treated as ordinary claims in bankruptcy (not as unsecured secondary claims as the trustee in bankruptcy suggested). The Regional Court of Amberg explained that treating the loans differently would jeopardise the *effet utile* of the negative Commission decision. The Higher Regional Court of Nürnberg rejected the appeal brought by the trustee in bankruptcy as inadmissible. In particular, the Higher Regional Court of Nürnberg did not consider that it was necessary to

⁶⁷ Case C-24/95, *Land Rheinland-Pfalz v Alcan* [1997] ECR I-159.

refer the question concerning the proper treatment of the loans granted by the Federal State of Bavaria in its capacity as shareholder to the ECJ. The Higher Regional Court of Nürnberg applied the reasoning of the Regional Court of Amberg which had stated that the ECJ required in *Alcan* that illegal aid be recovered under national law in a manner which does not render recovery practically impossible.

(25) Action by competitors

There are no published German court cases on recovery where the recovery action was brought by a competitor.

6.3.2 Action by beneficiary (opposition)

(26) Higher Administrative Court ("Verwaltungsgerichtshof") of Baden-Württemberg, 10 December 1996⁶⁸

Facts and legal issues: The case concerned the grant of State aid to the receiver of a company in bankruptcy proceedings without prior notification under Article 88 (3) EC. The aid was granted by governmental agencies of the Federal State of Baden-Württemberg. The purpose of the aid was to allow for the acquisition of a newly established rescue company (of which the receiver was the sole shareholder) by a third party company. The rescue company used the aid to finance an increase in its share capital. Subsequently, the third party company merged with the rescue company and continued business under the name of the latter.

In its decision of 17 November 1987 addressed to Germany⁶⁹, the Commission found that the financial aid was State aid that was incompatible with the Common Market under Article 87 EC and ordered recovery of the aid. This decision was neither challenged by Germany nor complied with by the German authorities. In an action brought by the Commission against Germany, the ECJ handed down a declaratory judgment holding that Germany was in breach of the EC Treaty⁷⁰.

The governmental agency that had granted the State aid was informed of this judgment (as well as of the negative decision of the Commission) by the German Federal Ministry of the Economy and, accordingly, issued an order for repayment. This order was challenged by the rescue company as addressee of the order.

Decision on appeal (the decision of the Court of First Instance is unreported): The judgment of the Higher Administrative Court of Baden-Württemberg mainly dealt with the question of when the one-year time limit for orders of repayment of illegally granted State aid starts to run under the applicable German rules. The Higher Administrative Court of Baden-Württemberg held that the time limit had been complied with, which started to run when the

⁶⁸ Reported in NVwZ 1998, 87.

⁶⁹ OJ (1988) L 79/29.

⁷⁰ Case C-5/89, Germany v Commission [1990] ECR I-3437.

governmental agency responsible for recovery was informed of the negative decision of the Commission and of the judgment of the ECJ. The Higher Administrative Court of Baden-Württemberg emphasised that, as a general rule, the public interest in obtaining repayment of State aid granted in violation of EC law takes precedence over the legitimate expectations of the beneficiary to keep the State aid. It appears that the Higher Administrative Court of Baden-Württemberg is more inclined to consider the legitimate expectations of the beneficiary if the grant of State aid only violates German rules.

It is interesting to note that the Higher Administrative Court of Baden-Württemberg stated, *obiter dictum*, that an order for repayment cannot be issued if governmental agency could be considered to have acted in bad faith. The ECJ clearly took a different view in its judgment in the *Alcan* case, which was delivered only a few months after the judgment of the *Verwaltungsgerichtshof*. The ECJ held that a governmental agency must recover illegally granted aid even where it acted in bad faith.

(27) Federal Administrative Court ("Bundesverwaltungsgericht"), 17 February 1993⁷¹; Higher Administrative Court ("Oberverwaltungsgericht") of Münster, 26 November 1991⁷²; Administrative Court ("Verwaltungsgericht") of Cologne, 21 April 1988⁷³

Facts and legal issues: The case involved the grant of tax allowances. The Commission found that this amounted to illegal State aid, since no notification had been made under Article 88 (3) EC. The Commission further found the aid incompatible with the Common Market under Article 87 EC and, by decision of 10 July 1985, ordered recovery of the aid.

The recipient challenged the administrative act ordering recovery of the aid (which was issued on 27 March 1986, i.e. once the Commission had rendered its decision but before the ECJ delivered its judgment⁷⁴ confirming the Commission's view following the recipient's challenge of the decision before the ECJ). This administrative act was based on section 48 of the German Act on Administrative Proceedings ("VwVfG"), which empowers administrative agencies to annul illegal administrative acts.

Final decision: The Federal Administrative Court upheld the previous judgments in the case in full and dismissed the beneficiary's action. The Federal Administrative Court stated that orders for recovery of illegally granted State aid must be based on section 48 VwVfG. The Federal Administrative Court further stated that, as a general rule, although the interest of the beneficiary not to be ordered to repay the State aid must be weighed against the public interest that illegally granted State aid is recovered, there will be no legitimate interest of the beneficiary worthy of protection if State aid was granted without due notification under Article 88 (3) EC. This amounted to a narrow construction of section 48 VwVfG, which states that,

⁷¹ Reported in NJW 1993, 2764.

⁷² Reported in EuZW 1992, 286.

⁷³ Reported in EuZW 1990, 387.

⁷⁴ Judgment of 24 February 1987, Case C-310/85, Deufil GmbH & Co. KG v Commission [1987] ECR 901.

as a general rule, repayment of illegal payments must not be ordered where the recipient has a legitimate interest in retaining the sum granted. The provision further states that a legitimate interest will generally exist if the recipient has already spent the sum granted. The provision also lists the cases where no legitimate interest may be invoked by the recipient, i.e. if the recipient obtained payment by fraud or by misrepresentation of fact or was aware of the unlawfulness of the payment, or if the recipient's ignorance of the unlawfulness of the payment was due to gross negligence.

The Federal Administrative Court further stated that, as a general rule, a recipient can reasonably be required to check whether a notification pursuant to Article 88 (3) EC has been duly made. Finally, the Federal Administrative Court found that the order for repayment complied with the rule that such an order must be made within one year of the date when the administrative authority concerned becomes aware that the aid has been unlawfully granted.

It is interesting to note that the Higher Administrative Court of Münster stated, in this case, that the mere illegality of the grant of aid due to lack of notification under Article 88 (3) EC does not constitute a ground for an order for recovery. Although only *obiter dicta*, this would exclude actions by third party competitors seeking to obtain an order for recovery, before the Commission has pronounced itself on the compatibility of the aid with the Common Market.

(28) Federal Tax Court ("*Bundesfinanzhof*"), 12 October 2000, III R 35/95

Facts and legal issues: The Law on Investment Grants ("*Investitionszulagengesetz*" or "*InvZulG*") allowed for investment grants of 12% of the purchase price of certain goods in specific regions. In 1993, the Commission decided that the *InvZulG* amounted to unlawful State aid. The *InvZulG* was subsequently amended, henceforth allowing for investment grants of only 8% of the purchase price. The claimant applied in 1993 for an investment grant for goods he had purchased in 1992. The defendant granted an investment grant of 8%, but refused to grant 12%. The claimant challenged the refusal, arguing that it was retroactively deprived of a vested legal entitlement.

Decision: The Federal Tax Court rejected the complaint, holding that the claimant was not unlawfully deprived of a vested legal entitlement. The amendment of the *InvZulG* was based on a decision by the Commission, which had not been challenged within the mandatory time limit laid down in Article 230 (5) EC. Germany was therefore under the legal obligation to amend the *InvZulG*. In addition, the claimant could not rely on the principle of good faith, since, by the time the investment was made, the Commission had already initiated a formal State aid investigation. Accordingly, the claimant should have been aware that the 12% grant provided for in the *InvZulG* amounted to unlawful State aid.

(29) Alcan case:

Federal Administrative Court ("Bundesverwaltungsgericht"), 23 April 1998⁷⁵ after a reference for a preliminary ruling to the ECJ of 28 September 1994⁷⁶; Higher Administrative Court ("Oberverwaltungsgericht") of Koblenz, 26 November 1991⁷⁷ and Administrative Court ("Verwaltungsgericht") of Mainz, 7 June 1990⁷⁸

Facts and legal issues: The case involved aid amounting to DM 8 million granted to an aluminum plant operator in order to safeguard the future operation of the plant. Before the aid was granted detailed negotiations took place between the administrative agency granting the aid and the operator of the plant. Although the Commission, which became aware of the agency's intention to grant the aid through press coverage, had requested notification under Article 88 (3) EC, no notification was made. The Commission found that the aid was incompatible with the Common Market and ordered recovery⁷⁹. The German authorities, however, did not claim repayment. The Commission's order for recovery was upheld by the ECJ⁸⁰ in proceedings commenced by the Commission against Germany.

Following the ECJ's decision, the administrative agency issued an order for repayment of the aid. This order was challenged by the recipient of the aid, who invoked the principle of legitimate expectations as a defence to the claim for repayment. The defendant further argued that the amount granted in State aid had been fully spent and that the order for repayment violated the one-year time limit under section 48 VwVfG that applies to orders for repayment.

Decision by Court of First Instance and Court of Appeal: Both the Court of First Instance ("Verwaltungsgericht Mainz") and the Higher Administrative Court ("Oberverwaltungsgericht") of Koblenz found in favour of the recipient. The Higher Administrative Court of Koblenz reached a conclusion on the meaning of section 48 VwVfG that was contradictory to that set out in the judgment of the Higher Administrative Court of Münster handed down on the same day (and which is summarised above). The Higher Administrative Court of Koblenz stated that, in the absence of EC rules which provide for an obligation to repay illegal State aid that is compatible with the Common Market, any obligation to repay is governed by national law, like section 48 VwVfG. The Higher Administrative Court of Koblenz then went on to apply this provision, without modification, to this case (whereas the Higher Administrative Court of Münster construed the provision narrowly to be able to grant the order for repayment). The rationale for the judgment was that the order for repayment violated the one-year time limit of section 48 VwVfG. The Higher Administrative Court of Koblenz found that the time limit

⁷⁵ Unreported; file no. 3 C 15.97.

⁷⁶ Reported in EuZW 1995, 314; Judgment of ECJ of 20 March 1997, Case C-24/95, Land Rheinland-Pfalz v Alcan [1997] ECR I-159.

⁷⁷ Reported in EuZW 1992, 349.

⁷⁸ Reported in EuZW 1990, 389.

⁷⁹ Decision of 14 December 1985, OJ (1986) L 72/30.

⁸⁰ Judgment of 2 February 1989, Case C-94/87, Commission v Germany [1989] ECR 175.

started to run in June 1986, i.e. when the negative decision of the Commission had become final and absolute. The order was issued on 26 September 1989.

Reference for preliminary ruling after further appeal: The Federal Administrative Court, to which the case was then appealed, asked the ECJ in its reference for a preliminary ruling, whether an order for the repayment of illegal State aid must be issued by the national authority even if the time limit under national law for orders of repayment has expired. The Federal Administrative Court further asked whether there is a positive obligation to order repayment regardless of the fact that the national authority is fully responsible for the illegality of the grant of the aid, and that an order for repayment may therefore amount to an act of bad faith on the part of the national authority. Finally, the Federal Administrative Court asked whether an order for repayment can be issued even if the recipient has fully spent the State aid granted who may argue that there was no unjust enrichment. All these issues raised by the Federal Administrative Court correspond to various provisions of section 48 VwVfG which governs, *inter alia*, orders for repayment.

Judgment of ECJ: The ECJ, by judgment of 20 March 1997⁸¹, answered all three questions in the affirmative. The ECJ stated, in particular, that the recipient may only have a legitimate expectation as to the lawfulness of the granting of State aid if it has duly ascertained whether the procedures laid down in Article 88 EC have been fully complied with.

Final judgment of the Federal Administrative Court: The reasoning by the ECJ was fully adopted by the Federal Administrative Court in its judgment of 23 April 1998. The Federal Administrative Court emphasised that it was bound by the ECJ's judgment. The Federal Administrative Court rejected the argument of the recipient that the ECJ's judgment was *ultra vires*. Following the ECJ's judgment, the recipient argued that consequences as far reaching as the those resulting from the ECJ's judgment for the interpretation of German rules on recovery of illegally granted State aid can only be based on a Council Regulation under Article 94 EC. The Federal Administrative Court stressed that, notwithstanding the very restrictive interpretation of the defence of legitimate expectations by the ECJ (such that legitimate expectations may be asserted only if the beneficiary has duly verified that the notification and control procedure set forth in Article 88 EC have been complied with), the beneficiary can bring an action before the ECJ against Commission decisions ordering recovery of State aid in exceptional circumstances where the existence of legitimate expectations can be established.

The judgment does not indicate when this exception can be established. If one considers the general rule emphasised by both the ECJ and the Federal Administrative Court, i.e. that a beneficiary must check compliance with Article 88 EC if it wants to argue the defence of legitimate expectations successfully, it is clear that exceptional cases will be extremely rare. Up to now there has been only one case where the ECJ accepted the raising of the defence

⁸¹ Case C-24/95, Land Rheinland-Pfalz v Alcan Deutschland GmbH [1997] ECR I-1591.

of legitimate expectations against an order for recovery⁸². In that case, aid was granted on the basis of a scheme approved by the Commission but more aid was granted than originally foreseen. The Netherlands notified this modification to the Commission, which decided after 26 months that the aid was incompatible with the Common Market and ordered recovery. The ECJ held that this period of time was excessive and gave rise to legitimate expectations on the part of the beneficiary.

It appears therefore that this argument can only be raised where the Commission, upon due notification of an aid, fails to reach a conclusion within a reasonable period of time. However, it is impossible to predict what period of time may be considered unreasonable. Although the Commission has set itself the ambitious goal of carrying out investigations under Article 88 (2) EC within six months, this deadline is rarely met in practice. In fact, investigations frequently last substantially longer.

Federal Constitutional Court ("*Bundesverfassungsgericht*"), 17 February 2000, 2 BvR 1210/98, EuZW 2000, 445

Decision: The Federal Constitutional Court rejected the complaint. The Federal Administrative Court had, based on the ECJ's *Alcan* decision, correctly applied the law. In particular, the Federal Administrative Court had taken sufficient account of the claimant's legitimate expectations and other rights stemming from the principle of good faith. The fact that the Federal Administrative Court had decided that the Community interest in recovering unlawful State aid outweighed the claimant's interests did not infringe the claimant's fundamental rights. In addition, the Federal Constitutional Court had no reason to discuss whether the ECJ's *Alcan* decision exceeded the limits of Community law ("*ausbrechender Rechtsakt*").

6.4 Difficulties encountered by the Commission in German recovery cases

6.4.1 General

The main difficulties encountered by the Commission in implementing recovery decisions in Germany in recent years are the following:

- Delay resulting from the ambiguity as to whether recovery in a specific case should be claimed pursuant to administrative or civil law;
- Delay resulting from the suspension of national enforcement proceedings pending an appeal against a Commission decision before the Community courts;
- Transfer of the business or other assets of the recipient of the aid to another party; and

⁸² Case C-223/85, Rijn-Schelde-Berolme (RSV) Machinefabrieken en Scheepswerven NV v Commission [1997] ECR 4618.

- Enforcement of recovery claims in insolvency proceedings (including questions arising in the context of an insolvency plan).

6.4.2 Types of cases

We have reviewed 45 pending German recovery cases (as of 1 July 2005). Despite the large number of pending cases, overall, there appears to be a clear improvement in recovery discipline over the years. Only a few cases show no regular progress. Where the recipient of the aid is financially viable, recovery usually takes place within the time frame set by the Commission. A positive example are the recent *Landesbanken* cases in which the Commission decided that a total amount of EUR 2.815 billion should be recovered as illegal aid, following capital injections by several Federal States in the early 1990s. Whereas there are still open questions relating to recovery, the banks made payment within the time frame set by the Commission.

Not surprisingly, a large number of cases in Germany (i.e. eighteen) concerns the recovery of aid granted to companies in the New Federal States. In almost all of these cases, successful recovery ultimately led to insolvency proceedings.

Major obstacles have arisen in recovery proceedings where the recipient business was transferred by the original owner. For instance, in the *Hamburger Stahlwerke* case, both the business and a loan (which constituted incompatible State aid) were transferred to another industrial group following a negative Commission decision. Having structured the transaction in such a way that the recoverable loan "disappeared", the transferee group was in a position to resist recovery for some time.

6.4.3 Legal issues

In general, it appears that both the Federal Ministry of Finance and officials of German authorities responsible for state aid enforcement in Federal States have extensive experience in implementing Commission decisions and are aware of the necessity to do so swiftly and efficiently. Obstacles to effective implementation usually arise on legal grounds. The requirement under German law to base each and every recovery decision on an appropriate national statutory provision leads to additional complexity in recovery proceedings. This results very often in the revisiting, by the court, of issues that have already been addressed by the Commission. It would therefore be desirable to have, at national level, only one set of rules applying to the recovery of aid. If recovery at the national level was based directly on negative Commission decision along the lines of the new practice adopted by the Federal government in *Kvaerner Warnow* and other cases, a more efficient and simpler way of enforcing negative decisions could be achieved. It remains to be seen whether this approach will be upheld by the courts or whether specific legislation, i.e. a "State Aid Act", will be required.

It is still unclear whether a stay of national proceedings is permissible when an action against the underlying negative decision is pending before the Community courts. The order of the Higher Regional Court of Dresden to stay the proceedings in the *Saxonia* case is an example of a German national court disregarding Article 242 EC.

Considering German recovery procedures, it might be helpful to grant the national courts more direct access to the Commission in recovery procedures. One way of achieving this might be to give the Commission the role of an *amicus curiae*, similar to the provisions laid down in Regulation (EC) No. 1/2003⁸³. Since recovery procedures following negative Commission decisions are limited in number, it would be helpful to give the Commission a regular role in national proceedings to assist the national government in clarifying any issues arising. This is particularly true if, in the future, recovery in Germany will be based directly on the negative Commission decision.

6.5 Proposed best practice guideline

1. Identify administrative **body** (Federal government, Federal State or municipality or public entity) having to **recover** aid;
2. Identify **beneficiary** based on *Seleco/Banks* case law;
3. Calculate **amount of aid** to be repaid **including interest** based on Commission decision; and
4. Identify **whether administrative or civil law procedure** to be followed. Where the underlying transaction is not clearly a civil law transaction, use **administrative procedure**.
5. **Administrative procedure**
 - 5.1 Issue **negative administrative act** ("*belastender Verwaltungsakt*") within two-month time limit for implementation of Commission decision. Provide for repayment *ex tunc*, i.e. with interest;
 - 5.2 Declare administrative act **immediately enforceable** ("*Anordnung der sofortigen Vollziehung*");
 - 5.3 Where aid recipient successfully challenges decision to immediately enforce recovery act (before an Administrative Court), file **complaint** ("*Beschwerde*") immediately with Higher Administrative Court ("*Oberverwaltungsgericht*"); and
 - 5.4 Where addressee of negative administrative act successfully challenges act before Administrative Court, immediately file **appeal** ("*Berufung*") to Higher Administrative

⁸³ OJ (2003) L 1/1.

Court and, where applicable, further appeal ("*Revision*") to Federal Administrative Court ("*Bundesgerichtshof*").

6. **Civil law procedure**

6.1 Set **time limit of one month** for payment by aid beneficiary. If no payment within time limit, **immediate court action for payment** before Regional Court ("*Landgericht*");

6.2 Seek **interlocutory relief** ("*einstweilige Verfügung*") where grant and use of aid would lead to serious distortion of competition; and

6.3 Where Regional Court rejects court action, immediately **appeal** to Higher Regional Court ("*Oberlandesgericht*") and, where applicable, to Federal Court of Justice ("*Bundesgerichtshof*").

7. **Insolvency**

7.1 Apply for registration of recovery claim in insolvency register ("*Insolvenztabelle*"). Recovery claim to be given **same priority as other claims by government entities**;

7.2 Where trustee in bankruptcy does not recognise recovery claim, bring **declaratory action** ("*Feststellungsklage*") immediately; and

7.3 **No participation in an insolvency plan** ("*Insolvenzplan*") unless plan provides for total repayment of aid.

8. No **stay of any proceedings** at any stage **when underlying negative Commission decision challenged before Community courts**; and

9. Provide Commission with **copies of all briefs** filed by parties in national proceedings.

ITALY

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7. ITALY

7.1 Actions available for enforcement of negative Commission decisions

7.1.1 Public law measures by national authorities

No specific legislation exists in Italy regulating the procedure by which public entities may enforce negative Commission decisions and recovery obligations, nor is there a central body having responsibility for coordinating the implementation of negative Commission decisions. While the first point of call for the Commission is the Permanent Representation of Italy to the EC, which liaises with the presidency of the Council of Ministers, it is the duty of the authorities granting the State aid to take all appropriate actions provided for under national law in order to achieve immediate and effective enforcement of Commission decisions.

A variety of instruments have been used by the Italian authorities for recovery purposes. Legislation has been adopted where the effects of the State aid were widespread and general and, in general, any time that State aid has been granted through legislative measures.

Conversely, *ad hoc* measures and administrative acts have been employed when the aid has not had a general effect. Such administrative acts are issued in accordance with administrative procedures that are characterised by the participation of the beneficiary in the proceedings. When the procedure for the recovery of State aid implies the issuance of administrative acts, the beneficiary may appeal to the administrative courts against these act, namely the regional administrative courts ("*tribunali amministrativi regionali*" or "*TAR*"), in the first instance, and the Administrative Supreme Court ("*Consiglio di Stato*") as a court of appeal where appropriate, in order to have the administrative acts declared null and void.

When an appeal is filed against an administrative act, the latter keeps its effectiveness until it is eventually declared null and void by the court by means of a final decision. In order to obtain a suspension of the effectiveness of the challenged administrative act during the course of the proceedings before the TAR, the claimant must file an *ad interim* application according to the procedure described below.

The claimant may file an *ad interim* application alleging that a risk of serious and irrecoverable harm to the claimant's interests will result from the contested administrative act during the proceedings and before the final judgment is given. Usually, the application is aimed at obtaining the stay of execution of the administrative act, in order to temporarily suspend its effects. The *ad interim* application cannot be filed before the main petition. Usually, it is filed together with the petition, but it may be filed subsequently.

The administrative courts deal with *ad interim* or cautionary applications when the ordinary case is pending. An *ad interim* application for a stay of execution is discussed at a single hearing ("*camera di consiglio*"), which must be held immediately after the filing of the

application (usually within 15-20 days from the filing of the application). The parties may file a defence and other documents and may attend the hearing (which is not public). The administrative courts rule on the *ad interim* application basing their decision on the application filed by the claimant and the defence filed by the defendant and any other interested parties. The defendant and other interested parties have the opportunity to rebut the claimant's claims of serious, imminent harm, both in writing in their defences, and orally by participating in the hearing. The administrative court rules by issuing an order, admitting or rejecting the application, and this is usually published the day after the hearing.

The administrative court may issue an order allowing the application when (i) there is a *prima facie* case ("*fumus boni juris*"); and 2) if the claimant proves that there is a risk of imminent danger in respect of the contested right ("*periculum in mora*"). An order allowing an *ad interim* application is not easily granted, although it is not regarded as extraordinary relief. At the hearing of the *ad interim* application, the claimant and/or the other parties may try to convince the administrative court that it would be better (for instance, due to the complexity of the case) to fix a short hearing to discuss the merits of the case rather than discussing the *ad interim* application. The president of the court (taking into account factors such as the importance of the case, the reasons for urgency, and the workload of the court) sometimes indicates a possible early date for a hearing on the merits of the case to the parties. If the claimant waives its application for interim measures, the president of the court decides the hearing on the merits.

The typical effect of an order allowing the application is a stay of execution ("suspension of effect") of the contested administrative measure until the decision on the merits of the case is rendered. The order may also be a mandatory or prohibitory injunction, and may also set the date for the hearing on the merits. The order may be appealed to the Administrative Supreme Court.

Where illegal or incompatible State aid was given in the form of tax benefits, the tax authority may use the instruments normally used for tax assessments under Decree of the President of the Republic No. 602/1973 ("*DPR*"). The Italian Tax Authority ("*Agenzia delle Entrate*") issues a notice of assessment to the taxpayer, rectifying the annual tax return and disclaiming the tax credit. Generally, if a taxpayer believes that a notice of assessment is unjustified or incorrect, it may file an appeal within 60 days with the provincial tax commission ("*commissione tributaria provinciale*") of the place where the office that issued the notice of assessment is situated. The taxpayer may lodge an appeal against the decision of the provincial tax commission with the regional tax commission ("*commissione tributaria regionale*") within 60 days. It may then appeal to the Supreme Court ("*Corte di Cassazione*") within 60 days on questions regarding the interpretation of law. If the tax credit is due at the end of the above procedure it will be definitively included in the tax rolls. The Italian Tax Authority then issues a notice of payment ("*cartella di pagamento*"). If the taxpayer does not pay the amount due within 60 days, the Italian Tax Authority is entitled to recover the money owed by way of coercive measures, and the procedure is regulated according to the Italian

Code of Civil Procedure ("*Codice di Procedura Civile*"). The Italian Tax Authority is entitled to start an expropriation procedure ("*espropriazione*") within one year of the issue of the notice of payment. According to Italian tax legislation, the tax assessment shall be carried out only for tax years that are still subject to tax assessment. After this limitation period, which is five years for both direct taxes ("*IRES*" and "*IRAP*") and Value Added Tax ("*VAT*"), the Italian Tax Authority will have no opportunity to reclaim the tax credit. Where the Italian Tax Authority issues a notice of payment without having previously issued a notice of assessment, the taxpayer is entitled to appeal against it. The procedure is the same as that relating to the appeal of a notice of assessment. Conversely, if the Italian Tax Authority issues a notice of assessment which is not appealed within 60 days and subsequently issues a notice of payment, the latter cannot generally be appealed by the taxpayer.

7.1.2 Recovery through legislative measures

In a number of cases, Italian authorities have decided to implement negative Commission decisions through the adoption of legislative measures. In particular:

- State Aid NN 165/2003 (2004/C12) relating to the grant of fiscal incentives to undertakings taking part in trade fairs abroad was declared incompatible with the Common Market by Commission Decision No. 2004/4676/EC of 14 December 2004. A legislative measure aimed at suspending the State aid is to be adopted, ordering the beneficiaries to repay sums equal to the tax benefit granted thereto;
- State Aid NN 57/2003 (2003/C57) relating to tax credits for firms investing in municipalities seriously affected by natural disasters granted by Law No. 27/2003 (so-called "*Tremonti bis*") was declared incompatible with the Common Market by Commission Decision No. 2004/3893/EC of 20 October 2004. A legislative measure aimed at suspending the State aid is to be adopted, ordering the beneficiaries to repay sums equal to the tax benefit granted pursuant to it. Compliance monitoring is expected to be carried out by the Italian Tax Authority, which shall be entitled to apply coercive measures if the payments are not made or incorrectly made;
- State Aid NN 70/2000 (2000*/C54A) relating to the grant of fiscal incentives to Italian banks by Law No. 461/1998 and Legislative Decree No. 153/1999 was declared incompatible with the Common Market by Commission Decision No. 2001/3955/EC of 11 December 2001. The Italian government first adopted Law Decree No. 63/2002, which suspended the State aid and provided that an amount equal to the State aid should be set aside under a special accounting regime. The Italian authorities also carried out investigation procedures in order to estimate the amount of State aid to be repaid. The Italian parliament subsequently adopted Law No. 282 on 24 December 2002, requesting the Italian banks, by virtue of Article 1, to repay the State aid, specifying that, in the absence of repayment, the Ministry of Finance would apply coercive enforcement. Italian authorities then favoured a system according to which

recovery was enforced only at a second stage and using ordinary means of enforcement provided for by the Italian Code for Civil Procedure; and

- State Aid 1999/C27 (ex-NN 69/98) was granted by law in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding and was declared incompatible with the Common Market by Commission Decision No. 2003/193/EC of 5 June 2002. The Italian parliament adopted Law No. 62 on 18 April 2005. Article 27 of this law required the beneficiaries to repay the State aid and clarified that recovery of the tax exemptions shall be executed, with certain exceptions, by means of ordinary procedures for tax assessment and collection, whereas recovery of the State aid granted through subsidised loans is to be ordered by the Ministry of Finance ("*Ministero dell'Economia e delle Finanze*").

a) Recovery through other public law measures

Other public law measures adopted by the Italian authorities in order to implement negative Commission decisions have been the following.

- Coercive measures:
 - State Aid 1998/C49 concerning State aid granted to promote employment was declared incompatible with the Common Market by Commission Decision No. 2000/128 of 11 May 1999⁸⁴. Approximately 350,000 undertakings were potential beneficiaries. The Italian authorities ("*INPS*", "*Istituto Nazionale della Previdenza Sociale*") informed the beneficiaries that the State aid must be repaid. In the absence of voluntary repayment, the Italian authorities are expected to apply coercive measures;
 - State Aid 1997/C81 relating to certain provisions of Law No. 30/1997 and Law No. 206/1995, granting benefits on welfare contributions to undertakings active in the territories of Venezia and Chioggia, was declared incompatible with the Common Market by Commission Decision No. 2000/394 of 25 November 1999. Approximately 500 undertakings were potential beneficiaries. The Italian authorities applied coercive measures to recover the State aid. Almost 50% of the beneficiaries appealed the notice of payment and obtained the suspension of the national proceedings on the grounds that an action for annulment was pending before the CFI against the decision of the Commission (see section 7.2.2 below). The Italian authorities are expected to commence an expropriation procedure against the undertakings which did not appeal against the notice of payment;

It is worth noting that the CFI⁸⁵ rejected a number of actions for lack of interest on the part of the claimants. In particular, the CFI noted that claimants from whom the Italian government

⁸⁴ This decision was upheld by the ECJ in Case C-310/99, *Italy v Commission* [2002] ECR I-2289 and Italy was sanctioned for not having adopted the recovery measures requested by the Commission (see Case C-99/02, *Commission v Italian Republic* [2004] ECR I-3353).

had decided not to recover the State aid did not have legal standing to bring an action under Article 230 EC, since these claimants did not have an actual interest in the annulment of the Commission's decision. The CFI further stated that (i) given the lack of legal standing before the CFI, the Commission's decision was not binding on the national courts in their evaluation of the case; and (ii) claimants would still enjoy the right to appeal to the national courts - which, in turn, would be entitled to make a preliminary reference in respect of this matter to the ECJ for a preliminary ruling - against national measures ordering recovery of the State aid; and

- State Aid 1997/C27 relating to certain provisions of Law No. 549 of 28 December 1995 on the Rationalisation of Public Finances, which provided for investment aid in the form of tax exemptions for reinvested profits, was declared incompatible with the Common Market by Commission Decision No. 2000/2248 of 12 July 2000. Only two undertakings received such tax relief. Whereas recovery from one of these companies was executed without having to apply coercive measures, coercive measures were used against the second company, which was subsequently declared bankrupt. The recovery claim was therefore registered to be included in the insolvency procedure.
- Formal communications to beneficiaries:
 - State Aid 2003/C4 relating to loans granted to a company at a preferential rate was declared incompatible with the Common Market by Commission Decision No. 2004/1812 of 19 May 2004. Repayment was requested from the company by the Italian Ministry of Productive Activities ("*Ministero delle Attività Produttive*"). Pending the action for annulment before the CFI⁸⁵, a sum equal to the State aid plus applicable interest was paid into a blocked account;
 - State Aid 1997/C14 relating to loans granted at a preferential rate that were declared incompatible with the Common Market by Commission Decision No. 1999/195 of 1 July 1998. The recovery action was brought according to national insolvency procedures, since the two beneficiary companies were subsequently declared insolvent.
- Notices:
 - State Aid 2003/C22 (ex NN 168/02) relating to loans granted to training institutes at a preferential rate under Ministerial Decree No. 173/2001, was declared incompatible with the Common Market by Commission Decision No. 2005/429 of 3 March 2005. The Ministry of Labour and Social Politics ("*Ministero del Lavoro e delle Politiche*

⁸⁵ Order of the CFI in joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-276/00, T-281/00, T-287/00 and T-296/00 2005, Gruppo Ormeggiatori Porto di Venezia Soc. Coop. rl v Commission [2002] ECR I-4657.

⁸⁶ Case T-316/04, Wam SpA v Commission [2004] ECR I-345.

Sociali") sent a circular to all regions and autonomous provinces, delegating the task of adopting all necessary measures to recover the State aid.

7.1.3 Private law measures

No published case law has been found in this regard. In principle, should a company refuse to refund sums provided to it as State aid, the State may (i) seek a payment order ("*decreto ingiuntivo*"); or, alternatively, (ii) bring ordinary proceedings in the competent civil court.

a) Payment order ("**procedimento di ingiunzione**")

A procedure for a payment order allows the State to obtain, from the court, a payment order that can be enforced against the beneficiary (i.e. the defendant). This remedy is available only in relation to claims for payment of undisputed sums of money when performance of the obligation is overdue.

In order to obtain a payment order, the State can lodge an *ex parte* action, stating the exact amount claimed and providing the competent court with written evidence supporting the claim, pursuant to Article 633 of the Italian Code of Civil Procedure. Moreover, pursuant to Article 635 of the Italian Code of Civil Procedure, the Administration's mandatory books or registers, duly completed and signed by an authorised officer or a notary public, could be used as written evidence supporting the State's claim.

Both the order and the application must be served on the defendant. Service of the application marks the start of the proceedings. Having served the order, the defendant may oppose the order during the period set out in Article 641 of the Italian Code of Civil Procedure concerning voluntary compliance (i.e. usually 40 days). In principle, the order is not enforceable without further authorisation from the court, which is usually given on application by the claimant when the period for opposing the order has expired. However, on application by the claimant, the order may be made enforceable on an interim basis where the debt is based on a bill of exchange, a banker's draft, a cheque, a certificate of stock market liquidation (in cases where a stockbroker has become insolvent) or an instrument acknowledged before a notary public or other authorised public officer (Article 642 (1) of the Italian Code of Civil Procedure). The competent court may also make the order enforceable on an interim basis if delay would give rise to a risk of serious harm to the claimant (Article 642 (2) of the Italian Code of Civil Procedure).

If the beneficiary opposes the payment order within the prescribed time limit, the ordinary *inter partes* civil procedure will be followed (Article 645 of the Italian Code of Civil Procedure), in which case the claimant will be able to satisfy its claim only if and when a favourable judgment is obtained in the main proceedings.

If the order is not opposed, enforcement proceedings could be commenced approximately two to three months from the filing of the initial application. Where the action is unopposed, the competent court will declare the order enforceable, simply on application by the claimant.

Should the court refuse to grant a payment order, considering that the application discloses no reasonable cause of action, the State may bring an ordinary action against the beneficiary. Pending the ordinary proceedings, the claimant could request the judge to grant a payment order (i) relating to any undisputed sums - pursuant to Article 186 *bis* of the Italian Code of Civil Procedure; or (ii) when the requirements set out in Article 633 of the Italian Code of Civil Procedure are met - pursuant to Article 186 *ter* of the Italian Code of Civil Procedure.

b) Ordinary proceedings

In principle, where State aid has been granted by contract, the action brought by the State could be based on the alleged nullity of the contract. Under Article 1418 of the Italian Civil Code, a contract is void when it breaches mandatory rules, unless Italian law provides otherwise. In this respect, pursuant to Italian doctrine and case law, mandatory rules are those aiming to protect a public interest, which therefore cannot be amended by means of an agreement.

A void contract is totally ineffective as of the date it is entered into by the parties. Therefore, contractual performances carried out pursuant to it must be "returned" in order to restore the situation existing before its execution. In particular, a party that made an "undue payment" is entitled to restitution of the sums paid (plus interest thereon). Italian case law has specified that any payments made pursuant to an agreement that is subsequently found to be contrary to mandatory rules (and therefore, null and void) must be considered as "undue".⁸⁷

Italian law also provides for an action for unjust enrichment ("*arricchimento senza causa*"). Such an action may be brought if the following three conditions are met: (i) enrichment of an individual or entity to the detriment of another; (ii) the enrichment cannot be justified; and (c) no other action can be exercised by the injured party in order to obtain compensation for the damage sustained.

7.1.4 Interim measures

No published case law has been found in this regard.

Article 669 *bis* and following of the Italian Code of Civil Procedure provide for a common set of rules regarding interim measures.

One of the main interim measures set out in the Italian Code of Civil Procedure, which could be used by national authorities for recovery purposes, is seizure of property ("*sequestro*").

⁸⁷ See Supreme Court, Judgments No. 1252/00, No. 11973/95 and No. 11177/94.

Seizure may be sought when it is necessary to freeze assets in respect of which title is controversial and/or which guarantee the satisfaction of a debt.

The use of interim measures is subject to two essential conditions:

- (i) there must be a risk of "imminent danger" in respect of the contested right ("*periculum in mora*"); and
- (ii) there must be a *prima facie* case ("*fumus boni iuris*").

An application for an interim measure can be made before the competent court either before or after ordinary proceedings have been commenced.

In particular:

- a) where ordinary proceedings are not pending, the application must be filed with the court competent to conduct a hearing on the merits. A "pre-judgment" application of this type may be sought *ex parte* if a hearing before a judge in the presence of the other party could jeopardise the effectiveness of the remedy sought. However, in *ex parte* applications, the other party is entitled to submit pleadings and can be heard by the court after the date of the issue of the order. After the hearing, the court may confirm, modify or revoke the order;
- b) where ordinary proceedings are already pending, the application must be filed with the court in charge of the specific case.

Due to the provisional/interim nature of these judicial remedies, which are based only on a summary examination of the contested right, the following rules apply:

- the measure must be enforced by the claimant within 30 days of being granted; and
- within that time limit, ordinary proceedings for a full assessment of the right must be commenced.

Therefore, these remedies are only temporary and their effectiveness will ultimately depend on the outcome of the proceedings on the merits of the case.

The decision to reject an application for a preventive measure or to grant it may be challenged before a panel of three judges of the same court.

Interim proceedings are concluded in a rather short period of time. The first phase of the proceedings usually lasts between 30 to 60 days while the appeal phase tends to add a further 30 days.

7.2 Actions of beneficiary to oppose recovery order

7.2.1 Actions based on illegality of national recovery orders

No published case law has been found in this regard.

7.2.2 Actions based on illegality of negative Commission decision

In a number of cases, beneficiaries have successfully requested suspension of the national proceedings aimed at recovering the State aid on the grounds that an action for annulment was pending before the CFI against the decision of the Commission.

In particular:

- State Aid 1997/C14 mentioned at section 7.1.2 (a) above: an action was brought by the competent Sicilian authorities before the Court of First Instance of Palermo, as a consequence of the refusal of the beneficiary to recognise the debt owed to the said authorities. The Court of First Instance of Palermo upheld the request of the beneficiary to suspend the proceedings until the CFI had decided the action for annulment against the Commission's decision declaring the aid incompatible with the Common Market;
- State Aid 1997/C81 (see section 7.1.2 (a) above) relating to certain provisions of Law No. 30/1997 and Law No. 206/1995, which granted benefits on welfare contributions to undertakings active in the territories of Venezia and Chioggia, was declared incompatible with the Common Market by Commission Decision No. 2000/394 of 25 November 1999. Approximately 500 undertakings were potential beneficiaries. The Italian authorities applied coercive measures. 251 out of the 517 beneficiaries lodged actions before the competent court, asking for the suspension of the execution procedure until the CFI had decided the action for annulment against the Commission decision. The competent court upheld all requests. As anticipated in section 7.1.2 (a) above, the CFI declared a number of appeals inadmissible for lack of interest, but emphasised that there was a possibility for the parties to carry on pursuing legal proceedings in the national courts.

7.2.3 Actions based on legitimate expectations

No published case law exists with specific regard to recovery actions. In more general terms, as anticipated in section 2.2.3.1 above, the Italian courts have not upheld claims brought by potential beneficiaries contesting the legality of a decision refusing to grant State aid on the grounds that they had concluded civil contracts in the legitimate expectation of receiving the aid.

In this regard, it is worth noting that the ECJ in *Italy v Commission*⁸⁸, pointed out that (i) a recipient of unlawful State aid is not precluded from relying on exceptional circumstances that could justify its legitimate assumption that the State aid is lawful and thus declining to refund the State aid; and (ii) if such a case is brought before a national court, it is the duty of that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on their interpretation from the ECJ⁸⁹.

7.3 Enforcement in insolvency proceedings

7.3.1 Preferential treatment of recovery actions under national insolvency laws

No published case law has been found in this regard. There is no general provision under Italian law granting preferential status to public authorities for the recovery of unlawfully granted State aid.

Under Italian law, privileges may be granted to creditors according to the source of their claims. A case-by-case analysis must be carried out in order to verify whether the State aid (and thus the action to recover it) benefits from preferential treatment.

In principle, it could be argued that preferential treatment should apply if the State aid consisted in a reduction in tax charges. Indeed, according to Article 2758 of the Italian Civil Code, the State's claims to recover indirect taxes are privileged above any other claims regarding the assets to which the taxes relate and other items specified by the relevant laws. In addition, claims against the transferee or customer under the rules relating to VAT are granted the same privileges in respect of the assets that were the object of the transfers or to which the services relate.

In relation to income tax, Article 2759 of the Italian Civil Code provides that the State's claims relating to movable assets used in the course of the businesses' activities and goods located on business premises or in the business person's home enjoy preferential treatment.

In addition, pursuant to Article 2752 of the Italian Civil Code, the State's income tax claims (as distinct from taxes on income from real property) have priority over the debtors' movable assets, if these taxes have been entered into the enforcement proceedings' rolls, the collection of which was commenced during the year in which the relevant execution proceedings are being conducted and during the preceding year.

The State's claims to recover taxes on income from real property have priority over all real property located in the municipal area where the tax is to be collected (Article 2771 of the Italian Civil Code), whereas claims of the State to recover indirect taxes enjoy priority over the real property to which the taxes relate (Article 2772 of the Italian Civil Code).

⁸⁸ Case C-310/99, *Italy v Commission* [2002] ECR I-2289; see section 7.1.1.2 above and footnote.

⁸⁹ Case C-310/99, *Italy v Commission* [2002] ECR I-2289, para. 103.

With regard to recovery issues in the context of insolvency proceedings, the decision of the CFI in *Keller*⁹⁰ should be recalled: by upholding the Commission's decision, the CFI implicitly affirmed the duty of the State to recover State aid even if the beneficiary is the subject of insolvency proceedings.

7.3.2 Enforcement in practice

According to general principles of Italian insolvency law, the principle of equal treatment of creditors ("*par condicio creditorum*") applies after the commencement of an insolvency or other special administration procedure. This means that the debtors' creditors are prevented from initiating or continuing individual judicial proceedings and/or claiming enforcement measures against the insolvent party or in relation to its assets. Instead, the creditors participate in the common pool of assets of the debtor in proportion to the size and priority of their allowed claims.

In particular, Article 53 of Decree No. 270/1999 (on establishing liabilities in special administration proceedings) and Article 103 of Royal Decree No. 267/1942 (regulating claims for recovery, restitution and the separation of moveable assets in bankruptcy proceedings) state that the creditor shall file a petition with the court in order to recover any amounts due by the insolvent party.

The court (in the course of one or more hearings) shall examine all claims by creditors seeking to recover their receivables or their own movable assets in possession of the insolvent party. After this examination, the court issues a decree to decide the claims brought before it and to define the debtor's liabilities.

7.4 Enforcement against third party beneficiary

7.4.1 Purchasers of businesses that benefited from State aid

No published case law has been found in this regard.

In principle, it could be argued that the State could initiate ordinary proceedings against the purchasers of businesses that benefited from State aid.

Different rules apply in case of universal or particular succession. Universal succession occurs when a company ceases to exist following a merger or a spin-off and is replaced by a new company. Conversely, particular succession takes place in case of a business transfer.

Should the transfer of *all* the beneficiary's rights and obligations be executed by universal succession, then the acquirer will be held liable for any of the transferor's obligations arising prior to the transfer, as all rights and liabilities of a predecessor entity ceasing to exist are transferred to the successor entity by operation of law.

⁹⁰ Case T-35/99, *Keller SpA and Keller Meccanica SpA v Commission* [2002] ECR II-261.

On the other hand, in the event of particular succession the transferee will **only** be bound by the transferor's liabilities relating to the transferred activities.

If the relationship between the beneficiary and the third party qualifies as a transfer of a going concern, the relevant provisions contained in the Italian Civil Code apply⁹¹. In this regard, Article 2560⁹² of the Italian Civil Code states that the purchaser is jointly and severally liable only for debts reported in the mandatory accounting books⁹³. In this respect, it must be noted that relevant case law does not hold the purchaser liable for unreported debts, even if the transferee was aware of such debts from a different source⁹⁴.

Italian case law (especially employment case law)⁹⁵ states that the rules on transfers of businesses should not apply when the business is transferred pursuant to a share deal. In such cases, the company involved continues to exist as a separate legal entity, and is therefore still the owner of the assets and the relationships relating to the business. It could therefore be argued that, despite there being a change of control of the company involved in the share deal, that company could continue to be liable for its obligations.

In Case C-328/99 *Italy v Commission*⁹⁶, concerning a number of measures granted by the Italian authorities, the ECJ dealt with the recovery of unlawful aid from Multimedia, a company originally controlled by Seleco (i.e. the recipient of aid) and then sold to third parties. The ECJ annulled the Commission decision because the Commission's statement of reasons was inadequate and failed to prove that the measure resulted in an advantage for the addressee of the measure. However, the court upheld the Commission's statement that *"as in any other recovery procedure, the Member State must, like any other diligent creditor, exhaust all the legal instruments available under its own legal system, such as those used to combat fraud against creditors in the form of acts carried out by the firm in liquidation during the suspect period prior to the bankruptcy, which would allow such acts to be declared invalid"* (para. 69) in principle, and that *"in order to prevent the effectiveness of the decision to recover the aid from being frustrated and the market from continuing to be distorted, the Commission may be compelled to require that the recovery is not restricted to the original firm but is extended to the firm which continues the activity of the original firm, using the transferred means of production, in cases where certain elements of the transfer point to economic continuity between the two firms"* (para. 78).

7.4.2 Financial institutions that have granted financing to beneficiary

No relevant published case law has been found.

⁹¹ See Supreme Court, Judgments No. 2819/90 and No. 176/81.

⁹² Article 2560 of the Italian Civil Code: *"Debt of a transferred business: The transferor is not released from debts incurred in the operation of a transferred business prior to the transfer, unless it is shown that the creditors consented to such release. In the transfer of a commercial business, the transferee is also liable for such debts, if they are shown in the mandatory accounting books"*.

⁹³ Supreme Court, Judgment No. 4367/98.

⁹⁴ See, *inter alia*, Supreme Court, Judgment No. 8363/00 and Tribunale of Genova, 15 April 1992.

⁹⁵ See Supreme Court, Judgments No. 4012/93 and No. 10068/94.

⁹⁶ Joined Cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035.

7.5 Obstacles to immediate and effective recovery

An examination of the measures adopted by Italian public authorities in order to enforce negative Commission decisions and/or to recover illegal State aid shows that recourse to litigation is negligible before both administrative and civil courts. To the best of our knowledge, based on an examination of published case law, no actions before civil courts have been brought by the State or other public authorities in order to recover illegal and/or unlawful State aid. Recovery issues in proceedings in the administrative courts are also marginal.

The main obstacles to immediate and effective recovery appear to be the following:

- absence of a specific legal basis for recovery actions; as clarified in section 7.1.1 above, Italian public authorities enjoy significant discretion when deciding which type of public law measure they should adopt to recover the unlawful State aid;
- length of proceedings in both administrative and civil courts, for example, the following proceedings:

Case Acciaierie Ferriere Lombarde Falck S.p.A. v Ministero dell'industria, del commercio e dell'artigianato and others (see section 7.7.3.6) was commenced in 1986 in the Regional Administrative Court of Lazio). It took eight years to obtain a decision from the Regional Administrative Court of Lazio and a further eight years for the Administrative Supreme Court to render its final decision.

In *Ministero delle Finanze v Torrefazione Caffè Mattioni S.r.l.* (see section 7.7.3.32), the final judgment of the Supreme Court was obtained eight years after the commencement of the proceedings and, in addition, the case was before the tax authorities for four years and before the Supreme Court for four years.

- failure to enforce the Commission's decision pending an appeal before the Community courts. In a number of cases (see section 7.2.2 above), national courts upheld the beneficiaries' request to stay the proceedings pending an action for annulment before the CFI against the underlying Commission decision;
- the Commission's inability to actively intervene in national proceedings; Commission intervention in national proceedings would, for example, help to avoid having to adjourn proceedings unnecessarily. The Commission's knowledge of the merits of the case would also help the court to focus only on the specific issues relevant to the case.
- difficulties in identifying all beneficiaries when dealing with a State aid regime and in quantifying the sums to be repaid by each beneficiary;

- the Italian authorities' recourse to legislative measures ordering repayment of the State aid.

Strict coordination between the national authorities and the Commission is also advisable in order to facilitate the tasks of the national authorities, especially with regard to the handling of complex recovery cases. A good example of cooperation on the administrative level in complex circumstances is Case 1998/C49 (see section 7.1.2 (a) above), involving a large high number of beneficiaries, so that significant efforts needed to be made to quantify the sums to be recovered by each beneficiary.

Giving the Commission the possibility to actively take part in judicial recovery proceedings also appears to be a means which would significantly assist in overcoming most of the above obstacles.

7.6 Best recovery practices

It is impracticable to provide a comprehensive set of best recovery practices as a benchmark for assessing Italy's recovery practice in the absence of *ad hoc* national legislation regulating the procedure for the recovery of illegal and/or unlawful State aid and considering the variety of instruments used to date by the Italian authorities for recovery purposes. A general set of best recovery practices is however provided in the following section. In principle, situations where (i) State aid is granted through an administrative act must be distinguished from situations where (ii) the State aid is granted in the context of a civil law transaction.

7.6.1 Recovery of aid granted through civil law transactions

In light of the general background information provided in section 7.1.2 above, the following steps could be taken in order to recover illegal/unlawful State aid:

- 1) Formal payment request; this is the necessary legal act on the basis of which the State asks for reimbursement of the aid. If beneficiaries do not repay the aid, the State can bring proceedings against the beneficiaries;
- 2) Court action against the beneficiaries; the proceedings can take different forms depending on the facts and the requests made by the State. In order to recover the aid the State could:
 - 2.1) request a payment order; as explained in section 7.1.3 (a) above, the State could obtain a payment order from the competent civil court which would be enforceable against the beneficiary;
 - 2.2) request interim measures; as explained in section 7.1.4 above, interim measures could be granted by a civil court there is a risk of "imminent danger" in respect of the contested right ("*periculum in mora*") and if there is a *prima facie* case ("*fumus boni iuris*").

2.3) bring ordinary proceedings; after or independently of the adoption of interim measures, the State could commence proceedings in the competent civil court to obtain a court judgment assessing the right of the State to recover the aid. In that case, the judgment of the court of first instance could be appealed to the competent court of appeal and that judgment to the Supreme Court (“*Corte di Cassazione*”).

2.4) bring enforcement proceedings; a final judgment obtained in ordinary proceeding or a final order in *Procedimento di Ingiunzione* would empower the State to levy execution against the beneficiary's assets according to the procedure set out in Articles 483-604 of the Italian Code of Civil Procedure.

7.6.2 Recovery of aid granted by administrative acts

Should the aid be granted by an administrative act, the following steps could be taken in order to recover illegal/unlawful State aid:

1) adoption of a measure similar to the measure granting the aid. Also, the act ordering recovery would be an administrative act which, as a matter of law, may be challenged by the beneficiaries in the administrative courts (see section 7.1.1).

Except where the beneficiary obtains an annulment (or a suspension of the effect of) of the administrative act adopted under 1) above, the State could have recourse to the same procedures already described in section 7.6.1 above, i.e.:

- 2) Formal payment request;
- 3) Court action against the beneficiaries:
 - 3.1) Requesting a payment order (“*Procedimento di ingiunzione*”);
 - 3.2) Requesting interim measures;
 - 3.3) Commencement of ordinary proceedings; and
 - 3.4) Commencement of enforcement Proceedings.

7.7 List of cases

7.7.1 Action by the State

No published case law has been found in this regard.

7.7.2 Action by competitors

No published case law has been found in this regard.

7.7.3 Action by beneficiary ("opposition")

(30) Administrative Supreme Court ("Consiglio di Stato"), Judgment of 16 September 2003, No. 5250, Ministero dell'Industria v. Società Siderurgica Lucchini

The Administrative Supreme Court recalled its previous case law (i.e. Judgment No. 465 of 29 January 2002), confirming that Commission decisions declaring State aid incompatible with the Common Market are directly applicable and that all subsequent national measures must therefore comply with them.

Facts and legal issues: the Ministry of Industry failed to implement an aid scheme for the benefit of the steel industry established by Law No. 183/1976 and the Decree of the President of the Republic No. 902/1976 since the aid scheme was incompatible with the Community rules concerning aid to the steel industry established by Commission Decisions No. 2320/81/ECSC of 7 August 1981 and No. 3484/85/ECSC of 27 November 1985. Società Siderurgica Lucchini appealed to the Regional Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*") that upheld its request to be granted the aid. The Ministry of Industry appealed to the Administrative Supreme Court.

Decision: the Administrative Supreme Court upheld the appeal brought by the Ministry of Industry and quashed the decision of the Regional Administrative Court of Lazio. The Administrative Supreme Court stated that, since Commission decisions declaring State aid incompatible with the Common Market are directly applicable, national authorities must comply with them. National legislation that is incompatible with a Commission decision cannot be enforced, even if it has not yet been abrogated and is therefore still in force. In addition, allowing a company to benefit from the aid would be in breach of the recovery obligation imposed on Member States. The Administrative Supreme Court also specified that the only way to appeal Commission decisions is to bring an action for annulment before the ECJ under Article 230 EC, or, at most, to request a preliminary ruling under Article 234 EC.

(31) Administrative Supreme Court ("Consiglio di Stato"), Judgment of 9 May 2003, Ministero dell'Industria, del Commercio e dell'Artigianato v. Società Industrie Cantieri Metallurgici Italiani S.p.A.

The Administrative Supreme Court upheld an appeal against a judgment of the Regional Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*") according to which the Ministry of Industry, Trade and Craftsmanship ("*Ministero dell'Industria, del Commercio e dell'Artigianato*") had unlawfully suspended a procedure granting aid provided for by Italian law on the grounds of ECSC decisions declaring such aid incompatible with the Common Market.

Facts and legal issues: the Ministry of Industry, Commerce and Craftsmanship failed to implement an aid scheme provided for by an Italian law in favour of Società Industrie Cantieri Metallurgici Italiani S.p.A., a company. The aid at issue had been declared incompatible with

the Common Market by the Commission. However, the Italian law providing for the aid was not officially repealed. The company successfully appealed to the Regional Administrative Court of Lazio claiming that the Ministry was not competent to disregard an Italian law in order to enforce an ECSC decision.

Decision: the Administrative Supreme Court upheld the Ministry's appeal against the decision of the Regional Administrative Court of Lazio, affirming that, under Article 249 EC, Commission decisions "*shall be binding in [their] entirety upon those to whom [they are] addressed*" and that these decisions are directly effective without having to be implemented by Italian legislation. This was confirmed, in the view of the Administrative Supreme Court, by the fact that the EC system provided for a beneficiary's right to appeal Commission decisions.

(32) Supreme Court ("Corte di Cassazione"), Judgment of 10 December 2002, No. 17564, Ministero delle Finanze v. Torrefazione Caffè Mattioni S.r.l.

In December 2002, the Supreme Court ("*Corte di Cassazione*") rendered this groundbreaking judgment, in which it considered a number of issues concerning the relationship between EC law and national law. In its judgment, the Supreme Court expressly recognised for the first time that a negative Commission decision under Article 88 (2) EC had direct effect.

Facts and legal issues: Torrefazione Caffè Mattioni S.r.l. sued a local tax authority and the Italian Ministry of Finance in the Tax Court of Gorizia for the Court to officially uphold its right to certain tax benefits provided for by Law No. 26 of 29 January 1986. The request was upheld by both the competent local and regional tax court. The Italian Ministry of Finance and the local tax authority concerned appealed to the Supreme Court, alleging that the Commission had declared the aid granted pursuant to Law No. 26/1986 incompatible with the Common Market. On these grounds, the Supreme Court quashed the decision of the competent regional tax court.

Decision: the Supreme Court noted, first, that (i) the Italian government was under an obligation to enforce negative Commission decisions under Article 88 (2) EC by adopting all necessary measures to abrogate the legislative measures declared incompatible with the Common Market by the Commission; (ii) the national authorities, including judicial bodies, are bound by Commission decisions adopted under Article 88 (2) EC; and (iii) the decision of the Commission had become definitive given that it had not been challenged under Article 230 EC within the prescribed time limit.

The Supreme Court stated that, in the absence of measures by the Italian government to abrogate the legislative measure providing for the aid, which had been declared incompatible with the Common Market by the Commission, the decision of the Commission under Article 88 (2) EC had direct effect, since it was sufficiently clear and precise, unconditional, and did not give discretionary powers to the Italian government for its implementation. The Supreme

Court also specified that (i) it is not necessary for the decision to be final to have direct effect, since, should the decision not be final and should a national court doubt its validity, that national court could refer this matter to the ECJ under Article 234 EC; and (ii) the compatibility of a measure with EC law may be assessed *ex officio* by the national courts.

(33) Administrative Supreme Court ("Consiglio di Stato"), Judgment of 27 September 2002, No. 4946, Ministero delle Attività Produttive v. Diano S.p.A.

Facts and legal issues: by means of Decree No. 119 of 2 August 1995, the Ministry of Industry ("*Ministero dell'Industria*") admitted Diano S.p.A. ("Diano") to an investment program. By notice of 31 October 1995, the Ministry of Productive Activities ("*Ministero delle Attività Produttive*") rejected Diano's application for the State aid on the basis of Commission Decisions No. 2320/81/ECSC and No. 3484/85/ECSC. Diano appealed against the notice, alleging that the Ministry had failed to give reasons for rejecting its application and the Regional Administrative Court ("*Tribunale Amministrativo Regionale*") upheld the claim. The Ministry then appealed to the Administrative Supreme Court on the grounds that Diano failed to meet the requirements set out in the Commission decisions.

Decision: the Administrative Supreme Court upheld the Ministry's appeal and held that the aid could not be granted in the absence of specific authorisation from the Commission and that the notice from the Ministry of Productive Activities was therefore in compliance with Commission Decisions No. 2320/81/ECSC and No. 2484/85/ECSC, which were both directly applicable.

(34) Administrative Supreme Court ("Consiglio di Stato"), Judgment of 29 January 2002, No. 465, Del Verde S.p.A. v. Ministero dell'Industria, del Commercio e dell'Artigianato et a.

The Administrative Supreme Court dismissed an appeal brought against a judgment of the Regional Administrative Court of Abruzzo ("*Tribunale Amministrativo Regionale dell'Abruzzo*") upholding an act which refused to grant certain benefits provided for under a law in favour of investment plans that are to be implemented in Southern Italy, since the Commission had declared that law incompatible with EC State aid rules.

Facts and legal issues: the Ministry of Industry, Trade and Craftsmanship ("*Ministero dell'Industria, del Commercio e dell'Artigianato*") did not assign certain benefits to Del Verde S.p.A., a pasta manufacturer, in favour of investments in Southern Italy granted by Law No. 120/1987. Del Verde petitioned to the Administrative Court of Abruzzo asserting its legal right to receive the aid and claiming that, although the Commission had declared the aid incompatible with EC rules on State aid, a national entity could not disregard an Italian law on the basis of a decision by the Commission when that law was still in force.

Decision: the Administrative Supreme Court dismissed the appeal, expressly departing from its findings in its previous Judgment No. 30/1989 (see section 7.7.3.39 below). The Administrative Supreme Court noted that under Article 249 EC, Commission decisions "*shall*

be binding in [their] entirety upon those to whom [they are] addressed" and that these decisions are directly applicable without having to be implemented by Italian legislation. This was confirmed, in the view of the Administrative Supreme Court, by the fact that the EC system provided for the beneficiary's right to appeal Commission decisions. Moreover, the Administrative Supreme Court emphasised that it was unnecessary to implement the Commission decision. Finally, the Administrative Supreme Court noted that it would be inconsistent for a State to grant an aid that should be recovered under EC law.

(35) Supreme Administrative Court ("Consiglio di Stato"), Judgment of 22 January 2002, No. 360, Acciaierie Ferriere Lombarde Falck S.p.A. v. Ministero dell'Industria, del Commercio e dell'Artigianato and others

In January 2002, the Administrative Supreme Court dismissed an appeal brought by Acciaierie Ferriere Lombarde Falck S.p.A. ("Falck") against the decision of the Regional Administrative Court of Lazio not to quash a notice, in part, from the Italian government addressed to the ECSC of 28 May 1985 ("the Notice") and the consequential denial of access to an aid scheme for steel industries.

Facts and legal issues: In Commission Decision No. 2320/81/ECSC of 7 August 1981 establishing Community rules for aid to the steel industry⁹⁷ the ECSC laid down general rules for aid granted within the framework of restructuring programmes concerning the steel industry, requiring notification to the Commission of these programmes by the Member States. Pursuant to later decisions, 31 May 1985 was the ultimate notification deadline.

On 28 May 1985, the Italian government notified aid schemes it intended to implement to restructure the Italian steel industry. In doing so, it provided a relatively small aid package in favour of privately owned steel industries, including Falck. Later on, upon Falck's complaint, the Italian government notified an amended aid scheme that provided an increased aid package to privately owned steel industries on 22 July 1985. The ECSC dismissed the request since it was time-barred. The Italian State therefore denied to grant the increased aid.

Falck brought actions before the ECJ, which upheld the ECSC decision not to authorise the amended aid scheme, and the decision of the Regional Administrative Court of Lazio ("*TAR Lazio*") which had upheld the Ministry's decision not to grant the increased aid.

Decision: the judgment of the Regional Administrative Court of Lazio was appealed by Falck to the Administrative Supreme Court which upheld the judgment.

The Administrative Supreme Court stated that the exercise by the Italian government of its discretion to grant the aid depended on political choices and was not an act due by law. It was not possible, therefore, to claim that rights would be violated if the State failed to

⁹⁷ OJ (1981) L 228/14.

exercise this discretion or exercised it in an unsatisfactory manner. Hence, the State's denial to grant further aid could not be challenged before the Court.

(36) Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment of 23 September 1999, No. 2876, Iris Biomedica v. Ministero dell'Industria Commercio e Artigianato

The Administrative Court of Lazio stated that national public authorities must comply with a Commission decision declaring an aid incompatible with the Common Market, even if that aid had been granted pursuant to a law that had not yet been repealed.

Facts and legal issues: Iris Biomedica appealed to the Administrative Court of Lazio against a decision of the Ministry of Industry in which it denied to grant aid provided for under Article 6 of Law Decree No. 8 of 26 January 1987, which later became Law No. 120 of 27 March 1987, to Iris Biomedica. The Ministry's refusal was based on the grounds that such aid had been declared incompatible with the Common Market by the Commission and the ECJ.

Decision: the Administrative Court of Lazio rejected the claim. It pointed out that the Ministry had correctly refused to grant the aid and to apply Article 6 of Law Decree No. 8/1997. The Administrative Court of Lazio stated that, although the legislative measure granting the aid was still in force, the Ministry was bound by the negative Commission Decision No. 91/175/EEC of 25 July 1990, upheld by the ECJ⁹⁸, due to the direct effect of negative Commission decisions.

(37) Court of First Instance of Cagliari ("Tribunale di Cagliari"), Judgment of 14 April 1992, Nuova Cartiera di Arbatax S.p.A.

The Court of First Instance of Cagliari declared Nuova Cartiera di Arbatax S.p.A. ("NCA") insolvent and ordered that its decision be notified to the Ministry of Industry and Commerce for the Ministry to take subsequent measures.

NCA filed a petition with the Court of First Instance of Cagliari to be admitted to the special administration regime established by Law No. 95/1979 ("Prodi law"). The request was based, *inter alia*, on the assumption that NCA was required to repay ITL 67.529 billion received as State aid after the Commission had declared the aid illegal by decision of 27 November 1991. Since NCA's capital amounted to ITL 100 billion, the amount due represented more than 51% of its capital (i.e. compliance with the percentage set by the Prodi law as one of the conditions for admission to the special administration procedure). The Court of First Instance of Cagliari upheld NCA's request to be admitted to the special administration regime.

⁹⁸ Case C-364/1990, Italian Republic v Commission [1993] ECR I-2097.

(38) Regional Administrative Court of Lazio, Rome ("Tribunale Amministrativo Regionale del Lazio", Roma), Judgment of 11 June 1990, No. 1071, Società Fonderia A. v. Ministero dell'Industria et a.

The Administrative Court of Lazio dismissed the claimant's petition concerning the right to receive State aid notwithstanding a Commission decision declaring such State aid incompatible with Article 92 EC.

Facts and legal issues: the Ministry of Industry ("*Ministero dell'Industria*") refused to grant Società Fondiaria A. ("SFA") a reimbursement relating to electricity costs pursuant to Law No. 627/1981, which had been declared incompatible with the Common Market by the Commission in its Decision No. 396/1983. SFA then petitioned to the Regional Administrative Court of Lazio asserting its legal right to receive the reimbursement.

Decision: the Regional Administrative Court of Lazio dismissed SFA's petition. It declared that the Administration could set aside an internal act that was in conflict with a Commission decision, notwithstanding the existence of conflicting internal regulations that had not yet been repealed. An individual could benefit from a State aid only if this had been authorised by the Commission. In the absence of authorisation, SFA's claim for reimbursement could not be upheld⁹⁹.

(39) Administrative Supreme Court ("Consiglio di Stato"), Judgment of 24 January 1989, No. 30, Società Cooperativa Carrettieri La Rinascita et al. v. Ministero dei Trasporti and others

In January 1989, the Administrative Supreme Court upheld an appeal brought by Coop. Carrettieri la Rinascita against the decision of the Ministry of Transport ("*Ministero dei Trasporti*") to repeal two previous notices ("the Notices") implementing Law No. 815 of 27 November 1980 ("the Law") introducing an aid scheme (i.e. subsidised loans) for the period 1980-1983 in favour of hauling companies.

Facts and legal issues: Under Law No. 815, the Italian State provided for a subsidised loans programme for hauling companies. Law No. 815 was implemented by the Ministry of Transport by issuing the Notices. On the legal basis of the notices, Coop. Carrettieri la Rinascita was granted subsidised loans.

On 20 July 1983, the Commission decided that the subsidised loans programme introduced by Law No 815 qualified as State aid and should have been notified to it prior to implementation. The Commission, having also noted that the subsidised loans scheme was

⁹⁹ For the appeal, see Administrative Supreme Court, Judgment No. 167 of 16 March 1992, *Società Fondiaria Assicurazioni v. Cassa Conguaglio Settore Elettrico* (on appeal to Administrative Court of Lazio, Sec. III, Decision No. 1071 of 11 June 1990 asking for a preliminary ruling from the ECJ). For similar conclusions, see also Administrative Supreme Court, Judgment No. 168 of 16 March 1992, *Società Terni et a. v. Cassa Conguaglio Settore Elettrico*; Administrative Supreme Court, Sec. VI, *Società Terni v. Società Italsider and Cassa Conguaglio Settore Elettrico*. See also Administrative Supreme Court, Sec.: VI, Judgment No. 312 of 29 March 1995, *Società Terni Spa et a. v. Cassa Conguaglio Settore Elettrico*; Administrative Supreme Court; Sec. VI; Judgment No. 483 of 20 May 1995, *Fonderia S.p.a. v. Cassa Conguaglio Settore Elettrico*.

capable of distorting competition and thus infringed Article 92 (1) EC, ordered Italy to repeal the aid scheme within three months.

Further to the Commission's decision, the Ministry of Transport annulled the Notices by means of a further notice of 23 February 1984. The appellant appealed to the Regional Administrative Court of Lazio ("*TAR Lazio*") claiming that the Ministry of Transport was not entitled to depart from Law No. 815, which provided for the subsidised loans that had been declared unlawful by the Commission.

On the grounds of the principle of the supremacy of Community law over national law, the Regional Administrative Court of Lazio dismissed the appeal. The appellant therefore appealed the decision of the Regional Administrative Court of Lazio to the Administrative Supreme Court.

Decision: the Administrative Supreme Court upheld the appeal and quashed the judgment of the Regional Administrative Court of Lazio.

The Administrative Supreme Court specified that Commission decisions on State aids are not directly applicable. The Commission decision was addressed to the Republic of Italy and provided for, impliedly, the abrogation of the Law. The Ministry could not, prior to the abrogation of the Law, retrospectively annul its Notices, whereby it would comply with the Commission decision but infringe the Law.

As anticipated in Part I, in its more recent case law (for example, Judgments No. 465/2002 and No. 5250/2003, respectively under sections 3.3.7 and 3.3.2) the Administrative Supreme Court departed from the principle in this decision and expressly recognised the direct effect of Commission decisions.

(40) Regional Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*"), Judgment of 6 December 1988, No. 1746, TERNI - Soc. Per l'Industria e l'Elettricità S.p.A. v. Cassa Conguaglio per il Settore Elettrico

The Administrative Court of Lazio correctly stated that national public authorities (i) must comply with a Commission decision declaring an aid incompatible with the Common Market; and (ii) correctly sought to recover an unlawful aid, notwithstanding the fact that the aid had been granted pursuant to a law that had not yet been repealed.

Facts and legal issues: Cassa Conguaglio per il Settore Elettrico ("*Cassa*") refused to grant TERNI - Soc. Per l'Industria e l'Elettricità S.p.A. ("*Terni*") a reimbursement relating to the consumption of electric energy, as provided for by a ministerial decree of 26 January 1982 and Law No. 617 of 4 November 1981, which converted Law Decree of 4 September 1981, No. 495. Cassa also asked Terni to repay any reimbursements previously granted to it. Cassa observed that ECSC Decision No. 87/396 of 29 June 1983 clarified that (i) the reimbursements amounted to State aid; and (ii) only reimbursements granted to privately

owned companies could be considered compatible with the Common Market. Terni appealed Cassa's decision to the Administrative Court of Lazio.

Decision: the Administrative Court of Lazio rejected the claim. It pointed out that, first, Terni must be considered as a public undertaking for the purposes of this case and recalled ECSC Decision No. 2320 of the Commission of 7 May 1981 establishing Community rules for aids to the steel industry and ECSC Decision No. 87/396 of 29 June 1983. It stated that Cassa had correctly asked for the repayment of the aid unlawfully granted, specifying that public authorities were bound by negative Commission decisions although the aid had been granted pursuant to a national legislative measure which was still in force.

(41) Regional Administrative Court of Sicily, Palermo ("Tribunale Amministrativo Regionale della Sicilia", Palermo), Judgment of 18 November 1986, No. 875, Società Enosicilia et. a. v. Istituto regionale Vite e Vino et a.

The Administrative Court of Sicily dismissed the appeal brought by Società Enosicilia ("SE") and Consorzio Produttori Vini Siciliani Cooperativa ("CPVSC"), requesting annulment of an administrative order issued by the Istituto Regionale Vite e Vino ("IRVV") withdrawing a regional aid for wine producers.

Facts and legal issues: both SE and CPVSC were producers and marketers of wine. IRVV was a regional administrative body responsible for the wine industry in Sicily and the *Assessore Agricoltura e Foreste Regione Siciliana* ("AAFRS") was a member of the Sicilian Regional Assembly for forestry and agriculture. In 1973, the Region of Sicily enacted Regional Law No. 28/1973, granting financial aid to IRVV for the marketing of Sicilian wine in Italy and abroad. However, in June 1982, the Commission delivered a reasoned opinion pursuant to Article 169 EEC (now Article 226 EC) stating that the Italian government had infringed Regulation No. 816/70 as amended, and inviting Italy to comply with the provisions of such opinion.

As a result, the Region of Sicily enacted Regional Law No. 58/1983, repealing Regional Law No. 28/1973 and limiting the amount of economic aid. IRVV then issued Regional Decree No. 3210/1983 ("*Circolare No. 3210/1983*") declaring that it had ceased to pay out the aid already approved for the years 1982 and 1983 to promote the wine sector. AAFRS then sent a facsimile to IRVV requesting immediate suspension of any aid to CPVSC.

SE and CPVSC appealed to the Administrative Court of Sicily asking for:

- (i) the annulment of IRVV's Regional Decree;
- (ii) the annulment of AAFRS's facsimile request; and
- (iii) payment of aid for the years preceding the enactment of Law No. 58/1983 on the basis of the rule *tempus regit actum* rule.

Decision: the Administrative Court of Sicily dismissed the appeal. In particular, the Administrative Court of Sicily held that both IRVV 's Regional Decree and AAFRS's facsimile request were valid.

In addition, the Administrative Court of Sicily concluded that SE and CPVSC were not entitled to State aid for the years preceding the enactment of Law No. 58/1983 (with particular reference to aid for 1982 that had yet to be paid), as it was in breach of Regulation No. 337/1979 regulating the European wine industry.

(42) Regional Administrative Court of Lazio, Rome ("Tribunale Amministrativo Regionale del Lazio", Roma), Judgment of 22 January 1985, No. 103, Società Cooperativa Trasporto Latte et a. v. Banca Nazionale del Lavoro

The Administrative Court of Lazio dismissed the action filed by Società Cooperativa Trasporto Latte ("SCTL"), a milk transporting company requesting the annulment of a ministerial decree enacted by the Ministry of Transport ("the Decree"). By means of the Decree, two previous ministerial decrees enacted in 1981 granting aid were revoked. Banca Nazionale del Lavoro ("BNL") was the bank that had granted loans to SCTL and the other appellants.

Facts and legal issues: In 1981, the Ministry of Transport enacted two decrees in order to implement Law No. 815/1980, granting aid to companies for the purchase of vehicles. The aid was granted by means of government-assisted loans. However, the Commission found that Law No. 815/1980 was incompatible with the Common Market. Therefore, the Ministry of Transport repealed these two decrees and declared that SCTL and other companies were not entitled to the aid.

SCTL appealed to the Administrative Court of Lazio, requesting the annulment of the Decree according to which the aid had been withdrawn on the grounds that:

- (i) having legitimately relied on the Decree, it had begun to renovate its fleet of vehicles and had therefore suffered a serious loss;
- (ii) it had obtained significant bank loans which it intended to repay using the State's aid.

Decision: The Administrative Court of Lazio ruled that the Decree was lawful. Furthermore, the Administrative Court of Lazio stated that, if the Commission decided that aid was not compatible with the Common Market and requested annulment by the State within a given period of time, the Administration could decide to annul the relevant ministerial decree

immediately, without having to commence a formal procedure to revoke the legislative instrument¹⁰⁰.

¹⁰⁰ On appeal, however, the Administrative Supreme Court expressed a slightly different opinion. According to the Administrative Supreme Court, the decisions taken by the Commission pursuant to Article 93 EC have the same effect as Community directives and, therefore, are not directly applicable. Consequently, when the Commission issues a decision requesting the annulment of State aid that is declared incompatible with the Common Market, the State must, first, modify its legislation and, then, repeal the administrative acts adopted to implement such legislation. See Administrative Supreme Court, Sec.: VI, Judgment of 2 December 1988, *Società Cooperativa Trasporto Latte v. Ministry of Transportation*. See also Administrative Supreme Court, Sec.: VI, Judgment of 24 January 1989, *Cooperativa Carrettieri "La Rinascita" et alia v. Ministero dei Trasporti et a..*

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8. Spain

8.1 Actions available for enforcement of negative Commission Decisions

- Responsibility for recovery

In Spain, a variety of national and regional bodies can be responsible for the recovery of aid. In the recovery cases described below, the Central State, the Spanish Ministry of Tourism, Commerce and Industry, the Official Credit Institute ("*Instituto Oficial de Crédito*"), the County Councils ("*Diputación Foral*") and the competent offices of the different regional authorities have been involved in the recovery of aid. Potentially, any organ of the Public Administration, be it a territorial Administration (Autonomous Community, local Authority or the State Administration), or an institutional Administration (public autonomous entities or State-owned companies) may be involved in recovery proceedings if it has been the source of, or has acted as the instrument for the payment or execution of, State aid.

- Relationships with the Commission

Concerning relationships with the Commission, the competent authorities file their reports and communications through the Permanent Representation of Spain to the European Union, who, in turn, files them with the Commission.

- Means of effecting recovery

Recovery of aid will be done through administrative law means or private law enforcement. The Spanish Courts have confirmed that a Commission decision has an enforceable nature, and therefore an appeal before the ECJ against a Commission decision ordering recovery does not suspend the execution of such decision, unless the ECJ expressly determines such suspension.

However, the Commission decision will not, in most cases, allow the immediate initiation of an executory action (i.e. a legal action intended to obtain the payment due, where coercive measures, for instance seizure of property, may be adopted). On 22 February 2001, the Council of State ("*Consejo de Estado*") issued Resolution 2690/2000, which clarified some points regarding the recovery proceedings. This resolution concerned State aid granted by the Spanish State to State-owned shipyards, which was declared by the Commission as incompatible with the Common Market (Decision 2000/131/EC, of 26/10/1999). The Council of State concluded that the Commission decision at issue could not be considered as a writ of execution (i.e. a document delivered by certain public authorities enabling obligations such as, for example, the payment of a sum of money, to be automatically dealt with and which allows the immediate enforcement of the right) in favour of the entity that had granted such aid, since neither that entity had been mentioned, nor had the concrete debtors (those persons/entities who had benefited from the aid) or the amounts to be recovered been

specified in the decision. However, the Council of State did not contest the possibility, in theory, for a Commission decision to constitute a writ of execution. Therefore, in that particular case, the Council of State concluded that, in order to initiate execution against beneficiaries of State aid, a writ of execution specifying all of the above-mentioned elements should be issued, either by the State or by the Commission, but a different outcome should not be excluded in all cases.

The choice of administrative or private means will depend on the nature of the instrument through which the aid was granted. In the case referred to above, the Council of State concluded that the public law/administrative proceedings were best suited (since the recovery of public funds was at issue).

8.2 Public law measures by national authorities

- Problem: inexistence of an *ad hoc* procedure

The recovery of illegal aid in Spain poses a significant, although not insurmountable, problem, relative to the inexistence in the Spanish legal system of provisions establishing an *ad hoc* procedure for the execution of an order for the recovery of State aid arising from a Community decision.

- Possible means of recovering aid

Where the absence of appropriate national regulatory tools has been evident, execution procedures have been exercised in the light of the principle of the supremacy of EC law, according to which an interpretation of the national legal systems assuring compliance with an order for the recovery of aid is necessary. The use by the Spanish authorities of the principle of the supremacy of EC law can be a useful tool which may help overcome deficiencies in national law, and judges should be ready and willing to fill in gaps in the national procedure rules to comply with that general principle (see below).

Given the absence of procedural tools of national law specifically aimed at the recovery of illegal State aid, it should be expected that any payment (or advantage granted) which has been declared to be illegal State aid will be claimed by the public entity that granted the State aid in the form of a claim for payment of moneys due (this is the criterion provided for in Law 38/2003 of 17 November on Subventions). Likewise, where no national rule is available, interested parties must be heard in the recovery proceedings (in accordance both with national and EC law).

It is generally accepted that legal interest payments are due in the event of delay in complying with the recovery order.

It is expected that the Spanish authorities should use generally applicable (regulatory or legislative) measures whenever the State aid at stake affects wide categories of persons or

entities: That has been the case of the general State aid granted by the Basque country, which is discussed below. For instance, State aid case 51/1999, discussed in section 8.2(3) below, shows that the Navarra Authority ordered recovery by means of individual acts ("*Orden Foral*") addressed to the beneficiaries.

Ultimately, the recovery of aid could depend on the instruments generally used by the State to enforce the payment of debts with the Public Administration, such as executive proceedings that include coercive charges, as well as interest for delay ("*vía de apremio*").

Under Spanish legislation, tax debts may be collected either by their voluntary payment by the taxpayers, or through an enforced collection procedure. The collection of the tax debts managed by the Spanish Tax Authorities is carried out through the "*vía de apremio*", or compulsion procedure.

Articles 160 to 173 of Spanish Law 58/2003 of 17 December on General Tax (hereinafter the "Spanish General Tax Law"), and the Spanish General Regulation of the Collection of Tax Revenue ("*Reglamento General de Recaudación*"), passed by Royal Decree 1684/1990 of 20 December, regulate the compulsion procedure, which is a purely administrative procedure handled exclusively by the Spanish Tax Authorities.

The procedure is initiated the day after the expiry of the voluntary period established by the corresponding legislation to settle the tax debts cleared by the Spanish Tax Authorities.

Therefore, the procedure can only be initiated when the Spanish Tax Authorities have cleared the corresponding tax liquidation or assessment requesting the taxpayer to pay the sum owing, and the taxpayer has failed to settle the tax debts within the period set by law.

In order to ensure the collection of the tax debt, the Spanish Tax Authorities in charge of the collection procedures are entitled to examine and investigate the existence and location of the taxpayer's assets and rights, and to adopt precautionary measures, as in the case of tax audit procedures.

The procedure must be initiated by notifying the taxpayer of the compulsion decision ("*providencia de apremio*") which must include where and when payment must be made, indicating that if the payment is not satisfied, the Spanish Tax Authorities shall proceed to the seizure of the goods or execution of the guarantees granted. It must also expressly mention the delay interest and costs that could be charged, as well as the possibility of requesting an adjournment of the payment. Finally it will also mention that the procedure may not be suspended, except in the cases specifically provided for by the law.

- The new Law on Subventions

Law 38/2003 of 17 November on Subventions provides, under Article 37(1)(h), that repayment of granted subventions is due (plus interest accruing from the moment of payment

of the subvention until the date of the decision ordering repayment) in the event that a decision ordering repayment is issued under Articles 87 to 89 EC. The procedure must follow the general rules on administrative proceedings provided for by the Law on Administrative Procedure ("*Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*").

The competent body to order repayment to the beneficiary is the same one which granted the aid (Article 41(1) of Law 38/2003). In the event that recovery is ordered by an EC institution, the competent body to enforce such order is the one responsible for managing the appeal (Article 41(2) of Law 38/2003). This procedure must be initiated by the competent body, of its own initiative, further to an order from a superior body, further to a reasoned request addressed by another organ or upon complaint. Interested parties must be heard in the proceedings (Article 42 of Law 38/2003).

This Law on Subventions has not really filled the current gap. First, it applies to 'subventions' (direct money payments by the Public Administration), which is a far narrower concept than that of 'State aid'. Secondly, Law 38/2003 refers to the general laws on administrative procedure as far as the recovery procedure is concerned (Article 42(1)). Nonetheless, Law 38/2003 reminds that a Commission decision ordering repayment creates a legal obligation to carry out the repayment (Article 37(1)h of Law 38/2003). Law 38/2003 may provide some guidance and/or indications regarding the issue of recovery of State aid.

- Interim measures

Interim measures are available in the course of the administrative procedure under Article 72 of Law 30/1992 of 26 November on Administrative Procedure (Article 35 of Law 38/2003 regulates the suspension of payments, as far as the State aid concerned fits the notion of subvention). This may be useful in particular to interrupt payments by the relevant Public Administration, provided that the State aid has been partially given and that it is of a nature (for example, payment of sum of money, loans, etc.) that renders the interruption of payments an effective means of action.

Pursuant to the rules on court procedure, interim measures may also be granted by a court on review, when necessary to ensure the success or effectiveness of a legal action (Article 129 of the Spanish Act governing judicial review of administrative action - Law 29/1998 of 13 July on Administrative Court Procedure - "*reguladora de la Jurisdicción Contencioso-Administrativa*").

Article 129 allows suspension of the administrative act (which is the measure most commonly granted). Any other measures deemed necessary to ensure effectiveness may also be granted, although it is to be noted that goods or assets belonging to the Public Administration (to the extent the interim measures requested affect them) may in principle not be frozen or appropriated.

The substantive requirements for the grant of interim measures (both in the administrative and judicial phases) are:

- the existence of a *prima facie* case (a case where there is a high probability regarding the existence of the right) which deserves judicial protection (*fumus boni iuris*); and
- the existence of a risk that the effectiveness of the final judgment may be jeopardised if there is not an immediate judicial decision ensuring preservation (*periculum in mora*).

Audience must be granted within ten days of filing the petition of interim measures and decided upon within the following five days. The interim measures remain in force until a final judgment is given, although the judge may decide to modify them during the course of the procedure.

Decisions on interim measures may be appealed before the court that issued the decision in first instance and, ultimately, before the Supreme Court, administrative division.

(43) State aids C48/99 to C50/99, C52/99 to C54/99 and C58/00 to C/60/00, regarding illegal State aid granted to several companies located in the Basque Country

In accordance with the information provided, tax aids were granted to more than one hundred companies located in Vizcaya, Álava, Guipuzcoa and Navarra. The competent authorities had adopted measures to enforce recovery but it does not appear that they had informed the Commission of these measures.

The "*Consejo de Estado*" (highest consultative body of the government) has issued two warnings in the context of the ongoing proceedings, indicating that there are not any express provisions under Spanish law that enable the review *ex officio* of administrative acts enforcing a Commission decision finding State aid to be illegal. Nevertheless, the authorities should overcome that problem by resorting to the principle of the supremacy of Community law as developed by the case law of the ECJ. Pursuant to that legal principle, national authorities must act to recover the illegally granted amounts, even if there is no legal procedure devised to that end under the national laws on procedure.

The County Council ("*Diputación Foral*") of Vizcaya has appealed before the CFI the Commission decision in the cases referred to above. We are not aware of any information on the merits or substance of the judicial decision on the matter.

Further to the failure to recover the aid by the Spanish Authorities, the Commission, on 19 November 2003, brought Article 88(2) EC infringement proceedings before the ECJ on cases C48/99 to C50/99 and C52/99 to C54/99 (Court cases C-485-490/03), which are still pending.

(44) State aid C/70/2001 ES, in connection with Hilados y Tejidos Puigneró, S.A. ("Puigneró")

The Commission started a procedure to investigate aid (in the form of securities and tax breaks) granted by the Catalonian Institute of Finances ("*Instituto Catalán de Finanzas*") ("CIF") to Puigneró for restructuring purposes, in response to a formal complaint filed by another interested party in the textile industry. In the meantime, other interested parties filed formal complaints.

The Commission reviewed the guarantees granted by the CIF to Puigneró. In order to determine whether these guarantees provided a selective advantage to the company, the Commission used the principle of the private operator. The Commission concluded that these constituted illegal State aid, incompatible with the Common Market. The case also focused on the persistent non-payment of social security contributions and tax obligations by Puigneró.

At the moment when the Commission issued its decision, Puigneró suspended payments (suspension of payments ("*suspensión de pagos*") is provided for by Articles 870 to 873 of the Commercial Code, and consists of the possibility that a company requests the suspension of the payments to its creditors in the event that it cannot make the payments on the dates they are due). However, the financial situation of the company worsened still and it was declared bankrupt.

At the time of the suspension of payments (and prior to the declaration of bankruptcy), Puigneró had initially suspended payments. During this part of the procedure, the *Generalitat de Catalunya* attempted to explain to the Commission that recovering the aid could lead the company to insolvency, which could have a negative social impact on the area where the company was located. The Commission's understanding, however, was that the recovery could not be challenged for social reasons.

The CIF requested the amounts due to Puigneró by means of notarised notifications. During this procedure, the company could not recover from its negative financial situation and it was declared bankrupt by an order of 29 December 2003 issued by the court of first instance, number 2, of the city of Vic.

(45) State Aid C51/1999 ES, in favour of Paneles Eléctricos, S.A. in the region of Navarra

This case refers to illegal aid granted to Paneles Eléctricos, S.A. by the Government of Navarra. The Commission declared the illegality of such aid by Decision 11 July 2001, and requested recovery. The aid consisted of a tax benefit of a 50% deduction to the total tax due from those companies initiating their activity and in compliance with several requirements related to investment and the creation of jobs.

Although several companies profited from this measure and were ordered to return the aid, Paneles Eléctricos, S.A. was the only company which appealed against the recovery order before the national jurisdiction.

The Government of Navarra ordered the recovery of the aid by decrees addressed to the affected companies and issued by the members of the Council of Navarra ("*Orden Foral*"). These decrees established the reimbursement of the aid to the public funds of Navarra.

Paneles Eléctricos, S.A. applied for an administrative remedy, but the Government of Navarra issued an Agreement ("*Acuerdo de Gobierno*"), rejecting the appeal brought by the company.

In the meantime, the Government of Navarra controlled the tax behaviour of Paneles Eléctricos, S.A. and kept the monetary and financial situation of the company under review.

At the time of the adoption of these measures, the Government of Navarra also applied for review of the Commission decision of 11 July 2001 before the ECJ, but has since withdrawn that appeal.

(46) State Aid C95/2001 ES granted by two public offices of the Regional Government of Galicia to Siderúrgicas Añón

In this case, the aid, consisting of several measures (such as a beneficial loan with low interest, the participation in the share capital of the company, and different subsidies) was granted by the government of the region of Galicia by means of a cooperation agreement with the government and was declared illegal by a decision of 16 June 2004. The beneficial loan with no interest was granted to Siderúrgicas Añón by two other bodies (SODIGA, S.A. and IGAPE), by virtue of a cooperation agreement with the government for the carrying out of some works.

The Commission ordered the recovery of the aid by a decision of January 2004 (on 20 October 2004, a corrigendum was issued in order to reduce the interest rate to be applied to one of the subsidies granted).

The measures adopted by the competent authorities were (i) complete divestiture of the participation in the beneficiary company by SODIGA, S.A.; and (ii) the cautionary stay of any payment related to the ownership files affected by the Commission decision.

(47) State aid C3/2002, ex NN 160/2001, to Refractarios Especiales, S.A.

This State aid was generated by the lack of initiative on the part of the relevant organs of the Public Administration to recover social security debts against Refractarios Especiales, S.A., a lack of initiative which is interpreted as being an economic advantage granted to that company.

In this particular case, recovery of the debt seemed to be taking place in an effective manner by means of the *vía de apremio*. Nonetheless, the legal remedies and appeals available (both administrative and judicial) have largely had the effect of delaying the procedure. For instance, Refractarios Especiales, S.A. filed an administrative appeal against the decision to recover the moneys which was rejected by the Ministry of Labour. However, Refractarios Especiales, S.A. applied for judicial review of the confirming decision by the Ministry of Labour, which is, to our knowledge, currently pending. It will not be possible to know with certainty when the aid will be recovered until a decision on that procedure is reached by the administrative courts.

8.2.2 Private law measures

Actions for recovery have been brought under private law (private action) rather than under administrative law. This is the case when the State aid has taken the form of a loan, guarantee or comparable agreement governed by commercial law.

The general regulation on private law obligations is contained in the Spanish Civil Code. Pursuant to Article 6.3 of the Civil Code, private acts or agreements contrary to imperative rules (such as the rules on State aid) are null and void. Therefore, acts or payments made in contravention of State aid law would be forbidden and this may form the basis for a private action. Furthermore, pursuant to Article 1895 of the Civil Code, a party who has received moneys without being legally entitled to a payment may be subject to a duty to repay the amount received on the basis of the doctrine of 'unjust enrichment'.

If a private agreement or instrument is executed before a notary public (as would normally be the case with loans and financial guarantees), the agreement is regarded as a writ of execution: the affected party may file an application for judicial execution of the agreement and, in principle, that party does not have to go through the entire 'declaratory procedure' (judicial proceedings where the parties engage on discussion and production of evidence regarding the merits of the claim). This type of instrument may be an effective tool to ensure immediate compliance with recovery orders, by regulating a negative Commission decision as an event of default, the occurrence of which would subject the beneficiary to an executory obligation to repay, without discussion of the merits of the repayment claim.

The case below illustrates a situation of private enforcement.

In State aid case C39/2001 ES, in favour of Minas de Río Tinto, S.A., the actions brought before the courts were civil, not administrative, procedures. The Commission stated in its decision that the restructuring aid granted by Spain to Minas de Río Tinto was not compatible with the Common Market. The aid consisted of (i) a loan granted by the *Instituto de Crédito Oficial* ("ICO"), the State financial agency attached to the Ministry of Economic Affairs and (ii) the extension of the guarantee granted by the Government of Andalusia on loans granted by private banks to Minas de Río Tinto.

Regarding the measures adopted in relation to the recovery of aids, it is necessary to distinguish between the measures adopted by the Andalusian Assembly ("*Junta de Andalucía*") and the Official Credit Institute ("*Instituto de Crédito Oficial*").

- the Official Credit Institute agreed to the early termination of the loan agreement dated 28 March 2001 granted to Minas de Río Tinto. Once early termination was agreed, the Official Credit Institute claimed the amounts due under the loans and, on 29 July 2004, the Official Credit Institute initiated legal action. The credit that the Official Credit Institute holds against Minas de Río Tinto is a post-insolvency credit (and therefore a credit against the mass of assets in insolvency proceedings). This means that the liquidation commission must repay the credit with the amounts obtained from the liquidation.
- The Andalusian regional Authority (Autonomous Community) granted two guarantees in favour of Minas de Río Tinto. The regional Authority had claimed the amounts paid due to these guarantees before the courts and the courts issued two rulings ordering the re-payment to the regional Authority. The enforcement of these rulings is still pending.

8.2.3 Possible interim measures in enforcement proceedings

For relevant cases on interim proceedings, see the decisions summarised under section 8.8.3 below.

The law applicable to interim measures is set out under section 8.2 above.

There seems to be a tendency not to accept suspension of repayment orders on the grounds that an application for judicial review before the Community courts has been filed. The Spanish courts seem to be ready to grant suspension occasionally (see appeal 1260/2003, under section 8.3.1 below); however, they seem reluctant to accept suspension of a repayment order on the grounds that the negative Commission decision has been appealed before the Community Courts, unless suspension has been granted by the Community Court in the procedure for judicial review of the Commission decision (see below).

8.3 Actions of the beneficiary to oppose a recovery order

8.3.1 Actions based on the illegality of national recovery orders

- **Appeal 1260/2003 Superior Court of Justice of Navarra** (see section 8.8.3(1) below.) The beneficiary requested the annulment of the administrative order of recovery, on the grounds that: (i) the body that had issued such order was incompetent; (ii) the adequate procedure had not been applied; and (iii) had the aid not been granted, it would have been entitled to other tax incentives. It also requested the suspension of execution of the contested order. The Superior Tribunal

of Justice of Navarra consented to stay the execution, but in the end dismissed the appeal.

- **Appeal 2824/1999 Central Economic-Administrative Court** (see section 8.8.3(2) below.) The beneficiary alleged that the administrative act of recovery infringed the national law under which the aid (consisting of the cancellation of the debt) had been granted and that the action for recovery would infringe the national principle under which the Public Administration may not act against its own actions. The tribunal dismissed the appeal.

8.3.2 Actions based on the illegality of the Commission's negative decision

In Appeal 2824/1999 (see section 8.8.3(2) below), the beneficiary asked for the suspension of the national recovery proceedings on the grounds that an action for annulment against the Commission decision was pending before the ECJ, the suspension of the execution of such decision having been requested. The Central Economic-Administrative Court denied the petition since the Commission decision was executory, the appeal before the ECJ only leading to suspension should the court expressly allow it.

8.3.3 Actions based on legitimate expectations

This argument has been used, although it is unlikely to be successful (see section 8.3.1, in particular the reference to Appeal 2824/1999). In principle, it is unlikely that a legitimate expectation may arise out of an illegal situation (unless the facts merit the application of the principle of legitimate expectations narrowly defined by the case law of the ECJ. See, for instance, the conclusions of the AG in case C-5/89, Rec. 1990, in particular at point 3445). For similar reasons, claims of damages against the national Public Administration pursuant to Article 139 of Law 30/1992 on Administrative Procedure are unlikely to succeed unless the facts of the case are such that they adequately support a finding of a legitimate expectation.

8.4 Enforcement in insolvency proceedings

Insolvency proceedings are brought before the commercial courts. Insolvency proceedings are governed in Spain by Law 22/2003 of 9 July. Pursuant to Article 91 of Law 22/2003, amounts due to the Treasury ("*retenciones tributarias*") and social security, owed in connection with the fulfillment of a legal obligation, are regarded as privileged. This means that they are given preference over other obligations that the bankrupt party may have and which do not enjoy privileged status.

Once a company has been declared bankrupt, individual creditors are precluded from seeking satisfaction of their individual debts independently. Each creditor is entitled only to claim its debt from the overall mass of assets, in accordance with the ranking and the amount of its credit.

A summary of the measures adopted to enforce recovery actions under national insolvency laws may be found below.

8.4.1 State Aid C/70/2001 ES, in favour of Puigneró and State Aid C 39/2001, in favour of Minas de Río Tinto

In connection with the enforcement of the decision of the Commission regarding State aid C/70/2001 ES, in favour of Puigneró and State aid case C 39/2001 (see 8.2(2) above), in favour of Minas de Río Tinto, the recovery actions were made in accordance with the national insolvency laws.

8.4.2 State aid case C22/90, in favour of Hilaturas y Tejidos Andaluces, S.A. ("Hytasa")

The beneficiary went bankrupt and recovery of the aid had to comply with the procedures applicable to bankruptcy. In this particular case, the State requested the judge dealing with the bankruptcy proceedings to regard the aid as a preferential credit for the purposes of recovery. The judge dealing with bankruptcy proceedings did not allow the inclusion of the aid in the creditors' list and declared that (i) no claim for payment in that regard had taken place prior to the bankruptcy and (ii) the Commission decisions annulling the aid had been admitted for review by the ECJ. Subsequently, the Spanish Authorities initiated common judicial proceedings for the recognition of the credit. This demand was dismissed by the court of first instance. The Authorities appealed to the *Audiencia Provincial de Sevilla*, which upheld the decision. Proceedings are now pending before the Supreme Court.

Enforcement in the framework of insolvency is, in practice, a long procedure. From the information provided, we understand that the relevant authorities are taking all the necessary measures to recover the illegal State aid granted to insolvent companies.

8.5 Enforcement against third party beneficiary

No case law has been found in this regard. Nonetheless, there are some statutes that may provide legal solutions to this type of situation.

- Acquirers of businesses that have benefited from aid

In the case of claims being addressed to beneficiaries which are independent legal entities purchased by a third party, the responsibility remains, in principle, with the autonomous legal entity. Arguably (although very unlikely), the doctrine of lifting of the corporate veil may become applicable in order to invoke the responsibility of the owner of a legally autonomous company. However, in the context of bankruptcy or insolvency, the applicable bankruptcy laws state that sales or other divestments undertaken by a company may be rescinded if they took place up to two years prior to the declaration of bankruptcy (for example, a company that disposed of a given business may see the disposal rescinded if it took place up to two years before bankruptcy).

- Merger by absorption

In the case of merger by absorption of the beneficiary entity, the absorbing entity would, pursuant to the general rules on companies, assume all of the assets and liabilities of the purchased company.

- Extinction or dissolution of the beneficiary company

In the case of the extinction or dissolution of a beneficiary company, one possible interpretative rule would be that the partners or shareholders of the former entity be deemed jointly and severally responsible for the repayment (this is the solution given by Law 38/2003 of 17 November on Subsidies, subsidies being, as discussed, a far narrower concept than that of State aid, but the law may provide useful guidance). Another possibility is that the liability is transferred to the successor entities or the entities that have in fact benefited (rule on transfers regarding tax obligations, Law 58/2003, *General Tributaria* of 17 September). It is uncertain, however, what would happen should the situation arise in the context of State aid as contemplated by EC law, and the situation has not, to our knowledge, arisen.

- Spin-off

In the case of spin-off, the spin-off project regulated under the relevant statute (in particular in case of *Sociedades Anónimas*, Article 225 of Royal Legislative Decree 1564/1989), should state which rights and liabilities go to which of the companies that benefit from the spin-off. If the spin-off project does not clarify which company assumes the obligations, all the companies that benefit from the spin-off will be jointly and severally liable.

8.6 Obstacles to immediate and effective recovery

The following may be considered to be obstacles:

- Delay of the Spanish authorities in providing the information requested and their sending incomplete responses.
- Length of proceedings is also a very common obstacle. Sometimes, the length of proceedings is due to the lack of an *ad hoc* procedure in place to recover State aid; sometimes, it is due to the lack of cooperation of the Spanish authorities; sometimes is due to the length of administrative and/or judicial proceedings.
- In some of the files reviewed, the beneficiary had gone bankrupt and recovery of the aid had to comply with the procedures applicable to bankruptcy.
- The fact that, in most cases, the same regional authority which grants the aid is the authority in charge of enforcement of the decision may be one of the reasons for the delay in the recovery. The procedures could benefit from a clear allocation by a centralised, co-ordinated power, which currently does not exist.

- No specific legislation exists in Spain to regulate the procedure according to which public entities may enforce negative Commission decisions and recovery obligations.

8.7 Best recovery practices

As it has been discussed, there are no *ad hoc* procedures that enable us to give a judgment on whether or not Spanish national practices on recovery are appropriate. Law 38/2003 was a lost opportunity for introducing a more comprehensive regulation on recovery. It remains to be seen to what extent this will be an effective tool for recovery.

One possible means of assessing Spanish practice may be based on the distinction between private law and public/administrative law measures for recovery.

Another measure that may possibly help improve co-ordination between the different authorities (i.e. at the national, regional and local levels) involved at national level may be to confer authority to a central administrative organ, be it the *Comisión interministerial para asuntos de la Union Europea*, or another well-suited body for that purpose. We are aware that such centralisation may have implications in the internal distribution of powers within Spain. Nonetheless, devolution to a central organ seems in principle the best way to ensure that the system is workable in practice.

8.7.1 Recovery through administrative law means

(1) The administrative body that advanced the aid should seek repayment by means of an administrative act, complying with the appropriate formalities, to order repayment. Other administrative acts, such as formal claims for repayment and administrative interim measures, if still applicable, could be included here.

(2) Execution, if necessary, using coercive means.

8.7.2 Recovery through private law enforcement

(1) Formal request for payment as regulated by the underlying contract.

(2) Judicial action against beneficiaries.

- In the case of executory obligations (those where there is already a writ of execution) the creditor may initiate executory proceedings, which are quicker and more effective.
- Otherwise, a declaratory action with full discussion of the merits must be commenced. This may include, if applicable, interim measures. The judgment recognising the obligation to reimburse the State aid may be used to start executory proceedings, in the event that the beneficiary does not voluntarily pay the appropriate amount.
- In both cases, execution may need to be coupled with coercive measures.

8.8 Description of cases

8.8.1 Action by the State

No published case law has been found in this regard.

8.8.2 Action by competitors

See section 8.1 above.

8.8.3 Action by the beneficiary (opposition)

(48) Superior Court of Justice, Administrative Section, 4 May 2005, regarding State aid granted to Paneles Eléctricos, S.A.

Facts and legal issues: As referred to above, this case refers to illegal aid granted by the Regional Government of Navarra, consisting of a tax benefit of a 50% of deduction in the total tax due for those companies initiating their activity and complying with several requirements relating to investment and the creation of jobs. The illegality of such aid was declared by the Commission in its decision of 11 July 2001. Although this decision affected different companies located in the region of Navarra, Paneles Eléctricos, S.A. was the only company which appealed against the recovery order deriving from a Regional Decree of the competent authority.

Regarding the specific actions of the beneficiary company to oppose the recovery action, in this case, Paneles Eléctricos, S.A. firstly applied for an administrative remedy against Decree 53/03 of 26 February regarding recovery of the aid, in order to exhaust the available administrative procedures ("recurso de alzada"), which is compulsory under Spanish law in order for the administrative courts to review the administrative action.

After this appeal was rejected by an agreement of 15 September 2003 issued by the Regional Government, the company initiated judicial proceedings and asked for the suspension of execution of the contested decree. The Court, in this case, consented to stay the execution, but required security from a bank, in order to guarantee the purpose of the proceedings.

Paneles Eléctricos appealed again, this time against the order for bank security. Given that the Government of Navarra did not oppose this appeal, the Court decided to continue with the proceedings.

Decision: Decision 446/2005, issued by the Court on 4 May 2005, finally settled the judicial proceedings initiated by Paneles Eléctricos, S.A. against the order for recovery contained in Decree 53/03. The Court decided to reject this appeal based on different arguments.

Once the jurisdiction of the Court had been affirmed, the Court considered the General Decree to have been an appropriate measure for enforcing the Commission decision.

Although under Spanish law there is no common procedure established for the recovery of illegal aid, the decision has to be considered an executory order, binding on the State.

The appellant applied for the annulment of Decree 53/03, alleging that the benefit obtained from the State aid prevented Paneles Eléctricos, S.A. from obtaining other economic incentives under Spanish law that were incompatible with the illegal aid (which the company had renounced in order to obtain the aid). The Court stated that this argument was not valid and that Paneles Eléctricos, S.A. would be able to claim for the other incentives in the event that the granting of the State aid damaged the company. In fact, the agreement of 15 September 2003 showed the favourable position of the Government of Navarra regarding the availability of those incentives.

Finally, regarding the applicability to this case of the statute of limitations, declared by Paneles Eléctricos, S.A. for the fiscal years of 1998 and 1999, the Court stated that the time limits to be followed in the proceeding were those applicable under the Community legal order. That meant a time limit of ten years from the date the aid was granted, and not the four-year period established under Spanish law for this kind of proceedings.

For all of the above reasons, the Court decided in Resolution 446/2005 to reject the appeal of Paneles Electricos, S.A. and to regard the agreement adopted by the government as compliant with the law.

(49) Resolution of the Central Economic-Administrative Court number 368/2001, of 24 May, Appeal number 2824/1999

Facts and legal issues: As part of an arrangement with creditors within a temporary receivership process, the Spanish Central Government cancelled a debt against the company, subject to such process. The Commission declared this cancellation of the debt as illegal State aid and ordered the Spanish State to recover the aid. This case concerns the appeal filed by the beneficiary of the aid against the decision issued by the National Tax Authority ("*Agencia Estatal de Administración Tributaria*") ordering payment of the debt cancelled.

Decision: The Tribunal found that the beneficiary could not oppose the execution of the Commission decision by means of the fact that an appeal against this decision had been filed before the ECJ and that suspension of the Commission decision had been requested to the ECJ (Articles 256 and 243 EC). Also, the beneficiary could not rely on the argument that cancellation of the debt was an act covered by the national legislation on temporary receivership. The Tribunal held that actions for recovery would infringe the national principle according to which the Public Administration may not act against its own actions ("*doctrina de los actos propios de la Administración*", a variant of the principle of legitimate expectations) (Articles 10 and 256 EC). Finally, the Tribunal stated that the competent entity for the recovery of illegal State aid resulting from a negative decision of the Commission is

the National Tax Authority (Article 8.4 of Royal Decree 225/1993, Articles 4 and 7 of the General Regulation on Tax Collection and Article 103.1 of Law 31/1990).

OTHER MEMBER STATES

9. Other Member States:

- Austria
- Denmark
- Finland
- Greece
- Luxembourg
- The Netherlands
- Portugal
- Sweden
- United Kingdom

9.1 Austria

9.1.1 Recovery Procedure

Once the Commission has ascertained the illegality of a particular aid measure, it will order its repayment. Abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful (*Spain v Commission: "Province of Teruel"*). The technique of recovery (and the applicable rules) will largely depend on the legal basis on which the aid was granted. For instance, whether aid consists of a tax incentive or of a capital increase in a public undertaking does make a major difference for recovery proceedings. In the following, we only consider the straightforward case of aid in the form of a direct monetary transfer. Even here, one has to distinguish between two different types of case:

- aid that has been granted by contract under civil law; and
- aid that has been granted by an administrative order.

9.1.2 Aid granted by way of contract

If the aid was awarded by contract, the rules of the Austrian General Civil Code ("ABGB") apply. Pursuant to section 879 ABGB, a contract is void (and may be revoked with retroactive effect) if it infringes *bonos mores* or a statutory prohibition. Based on the ECJ's case law in *Lorenz* and its progeny, it is hardly disputable that the Community State aid rules contain statutory prohibitions within the meaning of section 879 ABGB.

Consequently, a subsidy contract which infringes Article 87 (1) EC is void and restitution can be ordered pursuant to the ABGB provisions on unjust enrichment (section 877 ABGB).

9.1.3 Aid granted by way of an individual administrative act ("*Bescheid*")

Under Austrian law, a *Bescheid* can only be revoked under exceptional circumstances. In particular, it can be declared void by a higher body if it contains a defect explicitly dealt with by nullity under the applicable law (see section 68(4)(4) AVG, "*Allgemeines Verwaltungsverfahrensgesetz*"); special rules apply in tax matters. As for aid granted by way of civil law contracts, the main question is whether the provisions of the EC Treaty relating to State aid are statutory prohibitions in the meaning of section 68(4)(4) AVG. For the same reasons (i.e. in particular with regard to the unconditional obligation of Member States to give effect to Community law) we believe that this is the case. However, there is still much uncertainty. For instance, it is unclear whether the order with which a *Bescheid* is revoked for failure to meet Article 87 EC may also provide details of how repayment should be effected (interest etc).

Please note that section 68(4) AVG does not entail any possibility to have orders avoided which were issued by the highest administrative instance. With regard to such measures, Austria could find itself in the position of being unable to comply, on the basis of the law as it

stands, with Community rules regarding recovery of illegal State aid. Here again, the Supreme Administrative Court might be forced to set aside those provisions in the AVG which would render the recovery of aid impossible.

9.2 Denmark

9.2.1 Recovery Procedure

A Danish court may order the repayment of illegal aid at the request of a public authority, in accordance with the general rules of Danish law. This implies that an authority may generally recover payments made in breach of the relevant rules, even if this is due to a mistake by the authority itself. It may generally be assumed that the Danish courts will follow this rule, also taking into account the case law of the ECJ concerning recovery of illegal aid.

Moreover, a third party may be able to obtain a judgment against the recipient, ordering repayment of illegal aid. Further, the courts may order the responsible public authority to pay damages to third parties, including competitors, under the same conditions, as a means of enforcing a negative Commission decision. The fact that third parties suffering loss due to the recovery of the aid from the recipient may be in a position to claim damages from the authority is likely to be problematic. Finally, injunctions may be granted against the implementation of aid which the Commission has declared illegal. In this situation, the Bailiff's Court ("*Fogedretten*") can rely on the Commission's decision.

9.3 Finland

9.3.1 Recovery Procedure

Under the Act on Application of Certain European Community Law Provisions Relating to State Aid ("*Laki eräiden valtion tukea koskevien Euroopan yhteisöjen säännösten soveltamisesta*", statute number 300/2001), aid pursuant to Article 87 EC may be recovered from its recipient, either wholly or in part, in accordance with the Commission's decision to that effect.

9.4 Greece

9.4.1 Recovery Procedure

If the Commission issues a negative decision declaring aid incompatible with the EC Treaty, the Member State in question, i.e. Greece, must, as the case may be, either abolish, alter or refuse to grant the unauthorised aid.

Under these circumstances interested third parties may challenge the compatibility of such aid with Article 87 (1) EC before the Greek courts, once this provision has been applied by a specific decision of the Commission under Article 88 (2) EC. The courts with jurisdiction are those described under sections 2.1 and 2.2 above.

Beneficiary undertakings which are requested to reimburse aid illegally granted have *locus standi* to challenge the relevant administrative act and also to request damages where they can establish extraordinary circumstances justifying a legitimate expectation in the legality of the administrative act which awarded them such aid in the first place. A preliminary question may be addressed to the ECJ in this respect¹⁰¹.

In Decision 5024/1995, the Administrative Court of First Instance of Thessaloniki held that the course of action above would be open to the claimant, but that it did not have to rule on it.

In Decisions 1957/1999, 1916/2002, 1917/2002, 1918/2002 and 1335/2002 the *Hellenic Conseil d'Etat* had to rule on whether Article 78 (2) of the Greek Constitution was infringed by the retroactive revocation of a tax exemption concerning the export activity of Greek undertakings while this tax exemption was found by a Commission decision to constitute illegally granted State aid, a ruling which was subsequently confirmed by the ECJ. This constitutional provision prohibits the retroactive application of taxation or financial charges beyond the year during which they were imposed, and could allegedly invalidate the legislative provision by which the exemption of the export activity of Greek undertakings from the relevant tax had been revoked. The *Hellenic Conseil d'Etat*, however, ruled that the initial provision exempting the export activity of Greek undertakings from taxation had been invalid from the start (as contrary to Article 87 (1) EC) and therefore the imposition of the tax payment to the export activities of Greek undertakings did not constitute an infringement of a constitutional provision.

9.4.2 Decisions 1916/2002, 1917/2002 & 1918/2002 of the *Hellenic Conseil d'Etat* and decisions 1335/2002 and 1957/1999 of the *Hellenic Conseil d'Etat*

Facts and legal issues: In 1988, a decision of the Minister of Finance, later ratified by law, imposed an extra charge on the profits of undertakings. It exempted, however, their profits from export activity. The Commission considered this exemption to constitute illegal State aid to the undertakings with an export activity, which infringed Article 88 (3) EC and was not

¹⁰¹ Decision 5024/1995, Administrative Court of First Instance of Thessaloniki, reported in *Dikitiki Diki*/1996 (1039) (E. G).

compatible with the Common Market in accordance with Article 87 (1) EC. It therefore requested, in its Decision 89/659/EEC¹⁰², that the Greek State revoke the State aid by collecting the part of the exempted charge. Further, the Commission brought an action before the ECJ on the basis of Article 88 (2) EC, second subparagraph, and the ECJ, by its judgment of 10 June 1993¹⁰³, ruled that Greece had not complied with the above Commission decision, without there being any valid reason of impossibility of executing such decision, and thus had infringed its Treaty obligations. In view of the above developments, Greece subsequently introduced a legislative provision, which retroactively replaced the initial ministerial decision, and revoked the initial exemption from the extra tax on profits relating to exports to EC Member States.

In all of these judgments, the *Hellenic Conseil d'Etat* had to rule, as a supreme court of appeal on previous decisions of the administrative courts, on whether Article 78 (2) of the Greek Constitution was infringed by the retroactive revocation of a tax exemption concerning the export activity of Greek undertakings, while this tax exemption was found by a Commission decision (which was confirmed by a judgment of the ECJ) to constitute illegally granted State aid. This constitutional provision prohibits the retroactive application of taxation or financial charges beyond the year during which they are imposed and could allegedly invalidate the legislative provision by which the exemption of the export activity of Greek undertakings from the relevant tax had been revoked.

Decision: The *Hellenic Conseil d'Etat*, however, ruled that the initial provision exempting from taxation the export activity of undertakings had been invalid from the start (as contrary to Article 87 (1) EC) and therefore, the imposition of a tax payment to the export activities of Greek undertakings which were initially exempt from it did not constitute an infringement of a constitutional provision.

Comments: It is very positive that in all of the above judgments, the *Hellenic Conseil d'Etat* did not hesitate to uphold the constitutionality and validity of the provisions imposing the reimbursement of illegal aid as a result of the enforcement of a negative Commission decision.

9.4.3 Decision 89/2002 of the Suspensions Committee of the *Hellenic Conseil d'Etat* (injunction proceeding)

Facts and legal issues: In this case, the claimant requested suspension of the execution of a ministerial decision against which it had lodged an action before the *Hellenic Conseil d'Etat*. This decision revoked the submission of the complainant company's business plan under the provisions of law 1892/1990 and requested the reimbursement by the claimant of a State grant. The complainant claimed, *inter alia*, that the administration had infringed Article 88 (3) EC by deciding that its failure to notify the Commission of the submission of the above

¹⁰² Commission Decision 89/659/EEC (OJ (1989) L 394/1).

¹⁰³ Case C-183/91, Commission v Hellenic Republic [1993] ECR I-3131.

business plan (under the State aid system introduced by law 1892/1990) obliged it to revoke such aid.

Decision: The *Hellenic Conseil d'Etat* rejected the above and the other grounds for suspension of the execution of the administrative act as being clearly unfounded.

Comments: The *Hellenic Conseil d'Etat* did not allow the suspension of the execution of a ministerial decision imposing the reimbursement by the claimant of a State grant which, in the opinion of the Greek State, infringed Article 88 (3) EC and thus facilitated the reimbursement thereof.

The *Hellenic Conseil d'Etat* did not hesitate to uphold the constitutionality and validity of the provisions imposing the reimbursement of illegal aid as a result of the enforcement of a negative Commission decision in a series of its judgments (1916/2002, 1917/2002, 1918/2002, 1335/2002 and 1957/1999).

9.4.4 Opinions of the Legal Council of State

Although the Legal Council of State is not a court of justice but a State advisory body giving legal advice to the State sector, its legal opinions 441/1994 and 438/2003 on issues involving the EC law on State aid constitute a positive element, assisting in the correct application of EC State aid law in Greece.

9.4.5 Legal opinion 438/2003 of the Legal Council of State

The Legal Council of State advised the Greek State that it should legally request the reimbursement by Olympic Airways of the restructuring State aid, which was found incompatible with the Common Market¹⁰⁴ in accordance with Article 87 EC.

¹⁰⁴ By Commission decision 2003/372/EC of 11 February 2002.

9.5 Luxembourg

9.5.1 Recovery Procedure

It often happens that the Commission, in ordering the discontinuance of incompatible State aid, also orders the public authority to recover the funds from the recipient.

In this case, the public authorities first have to withdraw the administrative act which previously granted the aid.

Pursuant to Article 8 of the grand-ducal decree dated 8 June 1979 on the procedure to be followed by the local or State administrations, the retroactive withdrawal of a decision which has created or recognised rights is - unless otherwise provided - only possible during the period in which contentious proceedings may be introduced against the decision, as well as during the period of the contentious proceedings themselves. The withdrawal of such a decision is only permitted for the same reasons as those that would have justified its annulment.

This provision nevertheless has to be viewed in the context of European case law, according to which the recovery of aid should be ordered in accordance with national procedures, including the national provisions relating to legal certainty and legitimate expectations on the withdrawal of an administrative act. On the other hand, the recipient of State aid may only have legitimate confidence in the regularity of this State aid if it has been granted to it in accordance with Article 88 EC¹⁰⁵. In relation to national provisions regarding the period of time during which a withdrawal of an administrative act is possible, the ECJ has stated that these provisions are, like any other national provisions, to be applied in a way which does not render the recovery practically impossible¹⁰⁶.

Should the recipient refuse to refund the aid, the public authority has to initiate ordinary proceedings before the civil courts in accordance with the general rules of civil law.

9.5.2 Court Cases

(50) Decision of the State Council dated 11 April 1989

The commercial company Moulins de Kleinbettingen filed for a subsidy with the Ministry of Agriculture, in accordance with the Act dated 18 December 1986, promoting agricultural development. The application was refused by the Ministry on the grounds that the claimant did not fall within the scope of application of Article 39 paragraph 1 of the act, which lists the potential beneficiaries of such subsidy, stating that such beneficiaries may, *inter alia*, be those undertakings whose main purpose is to increase the income of farmers in general.

¹⁰⁵ Case C-5/89, Commission v République Fédérale d'Allemagne [1990] ECR I-3437.

¹⁰⁶ *Idem*.

The claimant instituted an administrative action against this decision before the State Council by arguing, firstly, that the act had not been correctly applied by the Ministry and, secondly, that, by such incorrect application of the act, Article 87 EC had been infringed in the sense that anti-competitive structures had been created.

As far as the first argument is concerned, the State Council held that the aim of the act was to enable the Ministry of Agriculture to promote the agricultural sector. Hence, the potential beneficiaries of the subsidies were to be found amongst the agricultural population and the rural establishments. The subsidies foreseen by the act were paid by the budget of the Ministry of Agriculture. As public expenditures must not be diverted from the purpose given to them by the legislator, it was held that the Minister of Agriculture must restrict the granting of subsidies to those entities for which his Ministry is in charge. This was not the case of the company Moulins de Kleinbettingen, a private company which falls under the competence of the Department of Industry and Middle Class affairs. Accordingly, the decision of the Minister of Agriculture was upheld by the State Council.

As far as the claimant's second argument is concerned, the State Council simply considered, without any further comments or explanations, that the aid granted under the act, just like the aid benefiting to the industrial sector as provided by an act dated 14 May 1986, was compatible with the exceptions set out under Article 87 (2) and (3) EC. The State Council also stated that the claimant could not reasonably assert that there was a risk of the balance of the Common Market being disturbed by the mere fact that Luxembourg granted structural aid to the agricultural sector by means of the act.

9.6 The Netherlands

9.6.1 Recovery Procedure

A Commission decision by which aid is declared incompatible with the Common Market should be enforced by the agency that granted the aid. The agency should order repayment of the aid from the recipient.

Under Dutch law there are – depending on the nature of the aid – three legal possibilities to recover the aid: (i) a recovery procedure based on administrative law (for example, in the case of subsidies), (ii) a civil law procedure (for example, in the case of selling State property under the market value or financing a company on favourable conditions), and (iii) a procedure based on the General Tax Act ("*Algemene Wet inzake Rijksbelastingen*").

9.6.1.1 Recovery procedure on the basis of administrative law

A decision by an agency to recover State aid is governed by the *Algemene wet bestuursrecht* ("*Awb*"). The legal basis for such a decision is the (originally civil law) concept of "undue payment" ("*onverschuldigde betaling*") or "unjust enrichment" ("*ongerechtvaardigde verrijking*"). This was established in respect of "undue payment" by the Council of State's decision of 21 October 1996 in the case *Nanne v Secretary of State*, and in respect of "unjust enrichment" in its decision of 26 August 1997 in the case between Noord Kennemerland and the Ministry of Housing, Planning and the Environment. According to the Council of State, these principles are administrative in nature if they are applied in a case governed by administrative law¹⁰⁷. An appeal against such a decision by a State aid beneficiary ordered to repay the aid can therefore be lodged before the competent administrative court.

The *Awb* and a number of Subsidy Framework Acts provide for special provisions on recovery in the case of subsidies. Note that Article 4:57 *Awb* states that the agency has to recover the subsidy within a period of five years (instead of ten years for a decision by the Commission¹⁰⁸) after the decision to recover the State aid was made by the agency. It is questionable whether this rather short time limit is in conformity with EC law on State aid.

A complication arises when the agency is a local public authority that does not intend to enforce a negative Commission decision (in the case referred to in section 9.6.2.(1) below, the court held that the negative Commission decision has direct effect). It is assumed that the Central Government does not have authority to force recovery by such agencies. However, competitors may request a review procedure and subsequently lodge an appeal at the competent administrative court against a written refusal by an agency to recover illegal aid. Even if the Commission would take a positive decision and declare unlawfully

¹⁰⁷ According to national case law, a public law basis is required in order for the recovery to include interest. Even though the Council of State considers for Article 14(2) of Regulation 659/1999 to have direct effect, this provision does not authorise the State to claim interest as to the recovery of the State Aid. Such claim can only be based on civil law. See ruling by the Council of State of 11 January 2006, LJN:AU9416.

¹⁰⁸ Regulation (CEC) No 659/1999, Article 15.

introduced aid compatible with the Common Market, a court has to find measures which have been adopted before such finding to be unlawful. A beneficiary is therefore not protected against actions to order an agency to recover aid.

The cases referred to in sections 9.6.2.(1) and 9.6.2.(2) below demonstrate the obstacles faced by a beneficiary when requesting annulment of the decision on the basis of the principles of good faith and legal certainty. The court found that the claimant failed to show facts or circumstances that could enable it to successfully argue that it could legitimately presume that the aid would not be recovered. The court reiterated the continuous line of jurisprudence in which the ECJ has determined that a legitimate expectation only exists if the aid was granted in accordance with Article 88 EC, something that a normal, cautious undertaking could be expected to determine by itself without too much difficulty. In both cases, there could be no legitimate expectations on the part of the recipients. The application for annulment was dismissed. The claimants in the case referred to in section 9.6.2.(3) successfully relied on the principles of proper administration in their defence against an action for recovery.

9.6.1.2 Recovery procedure on the basis of civil law

Private law instruments to recover State aid are based on the legal concept of "undue payment" ("*onverschuldigde betaling*") or "unjust enrichment" ("*ongerechtvaardigde verrijking*"). In order for legal obligations arising from a legal transaction to end under Dutch civil law, a new judicial act is required. An exception applies in regard of void legal transactions. Presumably, private law transactions in violation of Article 88 EC can be considered as void¹⁰⁹.

There is a time limit of five years for recovering sums of money. This rather short time limit may conflict with EC law on State aid.

9.6.1.3 Recovery procedure on the basis of tax law

The General Tax Act provides explicit statutory provisions in the case of the imposition of too little tax. The tax inspector is authorised to impose additional tax but, as far as important categories of taxes are concerned, only if a 'new fact' emerges. It is unclear whether a negative decision by the Commission, finding the tax to be illegal because of State aid, can qualify as a 'new fact'. Under Dutch Tax Law there is a five-year time limit to impose additional taxes after the duty to pay the taxes arose. Again, this rather short time limit may conflict with EC law on State aid.

¹⁰⁹ Please see report by Centrum voor Wetgevingsvraagstukken of Tilburg University, "Terugvordering van staatssteun – een rechtvergelijkend onderzoek", available at http://www.wodc.nl/Onderzoeken/Onderzoek_346.asp.

9.6.2 Court Cases

(51) Administrative court, 's-Hertogenbosch, LJN: AR6630, Awb 03/2581 BELEI, 26 November 2004, X v Minister van Landbouw, Natuur en Visserij (Secretary of Agriculture, Nature Management and Fisheries) (A)

Facts and legal issues: Proceedings in first instance (administrative law), agricultural sector.

X applied for subsidies under the "*Bijdrageregeling proefprojecten mestverwerking*" (contribution scheme for a pilot manure processing project), which were initially granted by the Secretary. As a result of a Commission decision declaring the subsidy granted to the applicant contrary to the EC provisions on State aid¹¹⁰, the Secretary ordered recovery of the subsidies granted, including interest. The central issue was whether the decision revoking the aid was unjustified.

Decision: The Court found that the recovery decision was justified as it had been based on a directly effective Commission decision. Since the Commission decision had not been appealed within the time limits, it had become definitive. Moreover, X failed to substantiate that it could rely on a legitimate presumption that the aid would not be recovered. The court reiterated the ECJ's case law, stating that legitimate expectations only exist if aid is granted in accordance with Article 88 EC, something that a normal, cautious undertaking could be expected to determine without too much difficulty. Since the aid had not been granted in accordance with the Article 88 EC procedure, the claimant could not rely on the principle of legitimate expectations. Finally, the court found that it could not be expected of the Secretary to act in defiance of a Commission decision and that this Commission decision did not provide the Secretary with any leeway to test the recovery decision against the principle of reasonableness. The action was dismissed.

(52) Administrative court, Zutphen, LJN: AF9788, 02/551 WET, 20 May 2003, Demarol BV v Minister van Financiën (Secretary of the Treasury) (A)

Facts and legal issues: Proceedings in first instance (administrative law), petrol.

Demarol BV operated a number of petrol stations along the Dutch-German border. According to a specific Act, such petrol stations were eligible for a maximum of €100,000 worth of aid over a three-year period to compensate the negative competition effects arising from excise differences in the Netherlands and Germany. Demarol BV applied for, and subsequently received, aid under the Act. Since the Commission deemed the aid granted under the Act incompatible with EC State aid provisions, the Secretary notified Demarol BV that the aid received was to be repaid, including interest. The Secretary denied the application for annulment of the recovery decision upon which Demarol BV initiated these proceedings.

¹¹⁰ 2001/521/EC, 13 December 2000 (OJ (2001) L 189/13).

Decision: The Court found that the Secretary was justified in ordering the recovery of part of the aid based on the Commission's decisions¹¹¹ declaring the aid incompatible with Article 88 (2) EC. Moreover, Article 4:49(1) and sub (b) of the *Awb* (General Administrative Act) and the identical Article 13 (1) and sub (b) of the Act in question enable the Secretary to recover or amend the amount of aid granted if the decisions by which the aid was granted were flawed and the recipient was or should have been aware of such flaw. Through the correspondence between the State and Demarol BV, Demarol BV was, or should have been, aware that the Commission had initiated proceedings at the time of the aid grant without having reached a definite conclusion, and that any aid granted pending such proceedings would fall under the prohibition of Article 87 (1) EC. The Court found, moreover, that Demarol BV could not invoke the principle of legitimate expectations or legal certainty because ECJ case law clearly states that those principles may be relied on only if the aid in question is granted in accordance with Article 88 EC, something that a normal, cautious undertaking could be expected to determine without too much difficulty. In light of the above, the Secretary was justified in making this decision and therefore the application for annulment was dismissed.

(53) President of the Administrative Court, Assen, LJN: AA7472, 00/718 WET P01 G01, 2 October 2000, X v Y (A)

Facts and legal issues: Application for an interim injunction (administrative law), petrol.

X operated petrol stations along the Dutch-German border. According to a specific Act ("*Tijdelijke regeling subsidie tankstations grensstreek Duitsland*") such petrol stations were eligible for a maximum of €100,000 (NLG 223,250) worth of aid over a three-year period to compensate the negative competition effects arising from excise differences in the Netherlands and Germany. X was granted aid in the amount of €95,556 (NLG 210,600) under the condition of possible amendments or recovery of the aid. Before and after the aid was granted there had been extensive written contact between the claimant and the defendant. Because of the fact that the claimant did not respond to several requests by the defendant for information, the defendant decided to recover the aid. The claimant was of the opinion that by ordering recovery of the aid and interest within a period of four weeks after publishing the relevant decision, the defendant had acted in violation of several administrative principles, most notably the principles of proportionality, legitimate expectations and reasonable consideration of the interests involved. The defendant argued that it was confronted with a Commission decision declaring the aid illegal and, thus, with an incontrovertible obligation to recover the aid granted, which in turn led it to demand repayment within the contested period.

Decision: The President of the Court firstly considered that injunction proceedings were not suitable for the case at hand as several proceedings had been commenced at the European Courts which could potentially result in overturning prior national court rulings. The scope of

¹¹¹ 1999/705/EC, 20 July 1000 (OJ (1999) L 280/87).

the present proceedings was thus limited to the recovery order for the entire subsidy sum within a four-week period. Pursuant to a Commission decision¹¹², the aid should be recovered in accordance with the relevant national rules. The President thus found that the recovery the principles of proper administration ("*algemene beginselen van behoorlijk bestuur*") applied. As the total sum granted was spread over several years and the defendant had not indicated from the outset that there was a possibility of recovery due to issues at European level, this could have created expectations. The President found that the defendant could have offered a longer repayment schedule than the four-week period and annulled the decision in so far as it referred to a four-week period for repayment.

¹¹² 1999/705/EC, 20 July 1999 (OJ (1999) L 280/87).

9.7 Portugal

9.7.1 Recovery Procedure

The enforcement by national authorities of Commission decisions declaring State aid to be incompatible may be effected by non-judicial means, under the provisions on the revocation of administrative acts, as long as the aid has been granted by an administrative decision. However, the reimbursement may be challenged in these cases by the beneficiary of the aid, on the basis of the rule under which unlawful acts are only revocable within the longest time limit for bringing an action for annulment (currently one year). This rule has a long-standing tradition in Portuguese law because of the accepted principle that time eliminates the consequences of invalidity, unless the law exceptionally considers the act as being null and void as opposed to merely voidable¹¹³.

The ECJ considered, in the *Alcan*¹¹⁴ case, that the expiry of national time limits for revocation cannot prevent Member States from enforcing Commission decisions and that the beneficiary undertaking may not invoke its legitimate expectations in the maintenance of an aid considered incompatible with the Common Market or granted in violation of Article 88 (3) EC. This understanding is not in accordance with the rationale behind Portuguese law, which tends to protect individuals, irrespective of their good faith, and to preserve the stability of non challenged administrative acts, which has been consistently applied by administrative courts.

The courts may also take the view that if a positive Commission decision does not eliminate the illegality, then a negative decision should similarly not harm the individual by extending the time limit for revocation.

Another difficulty which may arise in the enforcement of Commission negative decisions concerns the aid granted by public administration independent entities, whether at local level ("*autarquias locais*", mainly municipalities) or at regional level ("*regiões autónomas*").

As a consequence of their constitutionally protected autonomy, the government has no means of imposing on these local or regional entities the enforcement of the reimbursement of an aid granted in violation of last sentence of Article 88 (3). Government supervisory powers over municipalities are restricted to inspections and other investigative procedures. The results of these inspections can lead to the dismissal of the authority responsible for recovery or authority member, but only in a certain number of situations strictly defined by law, none of which cover the infringement of Article 88 (3) EC. As to the "*regiões autónomas*" (Azores and Madeira), they are not subject to any control by government.

¹¹³ The principle that unlawful acts are merely voidable is a main feature of the Portuguese system of administrative law, in contrast with common law systems, and implies the consolidation of non-challenged acts as definitive and conclusive resolutions: see, for example, decision by STA of 24 May 1994 (AD n. 395, November 1994, p. 1250).

¹¹⁴ Case C-24/95, Land Rheinland-Pfalz v Alcan Deutschland [1997] ECR I-1591.

This lack of means of enforcement can hardly be compensated by the use of judicial remedies, either before the administrative courts or any other courts. Outside the collection of taxes and debts, judicial enforcement of public authority decisions is exceptional in the Portuguese law system. The government, as a rule, will not by itself apply to the courts for any kind of orders or injunctions against individuals or lower authorities. Such orders or injunctions may be sought by special magistrates acting as public attorneys ("*Ministério Público*" agents), but "*Ministério Público*" magistrates are seen as a judiciary rather than an executive body, and accordingly enjoy a large degree of autonomy. Unless the law imposes on them a specific obligation to apply to the courts (as in the case of actions for dismissal of local authorities or their members, when applicable), the decision to bring an action remains within their discretion, although they are expected to act on the government's well-grounded requests. In any case, all that the government would be likely to be able to obtain through this narrow path would be an action for annulment brought against the local or regional authority's decisions. A *Ministério Público* has *locus standi* to seek injunctions in administrative courts only when fundamental rights or a "*specially relevant public interest*" are involved.

The possibility of competitors requesting judicial enforcement of negative Commission decisions is of considerable importance. After the 2004 reform, Portuguese law extended the possibility for competitors to obtain appropriate remedies, allowing them to request, not only the annulment of an administrative decision granting aid declared incompatible with the Common Market, but also an order requiring the administration to do what is necessary to redress the situation. Some difficulties may arise from *locus standi* rules, as the latter remedy can be sought only by those who show a right or a legally protected interest in obtaining it. The competitor's interest is accepted as a direct one, but it is not certain that the courts will see it as an interest specifically protected by State aid rules.

We are not aware of any cases in which the Portuguese courts have applied Articles 87 EC or 88 EC to invalidate administrative decisions, or any other acts of a public body. The search of all available databases has not shown any annulment or injunction decisions, or the awarding of damages, as a result of the direct application of Article 88 (3) EC.

State aid has been discussed in a small number of cases, in which the court has either ruled on an issue other than the legality of the act granting the aid, or has decided that there was no illegal State aid at all.

9.8 Sweden

9.8.1 Recovery Procedure

According to the Act regarding the implementation of the European Communities competition and State aid rules ("*Lag 1994-1845° om tillamningen av Europeiska ge, enskapernas konkurrens- och statstödsregler*") the government may annul a municipality or Court Council decision granting aid if the Commission or the ECJ has declared the aid to be in breach of Article 87 EC. The government is responsible for such a decision *ex officio*.

If a private complaint is lodged before a court prior to such action by the government, the courts are also competent to annul the decision.

There are no explicit rules on recovery in Swedish law. This means that it is far from clear how a recovery decision would be implemented. As there has only been one Swedish case on recovery, it is also difficult to say how it would work in practice. However, it seems as if the government would have to act *ad hoc* in this situation. In the case of recovery described under in Part I (3.2), the government (without prior court decision) required the Swedish National Tax Board ("*Skatteverket*") to execute the recovery in accordance with Council Regulation (EC) No 659/1999 of 22 March 1999, laying down detailed rules for the application of Article 88 EC. By formal letter, the National Tax Board successfully requested the recovery from the beneficiaries.

9.8.2 The enforcement of negative Commission decisions

To the best of our knowledge, a decision by a Swedish national authority implementing a negative Commission decision has not yet been challenged before a Swedish court. It should be noted, however, that, according to information that we received from the Ministry of Industry, the Swedish Government is currently handling its first case for recovery of illegal aid (tax benefits granted to companies active in the electricity sector).

The government informed the Commission by a letter dated the 12 July 2005 that the recovery had been completed (N2005/5064/NL).

9.9 United Kingdom

9.9.1 Recovery Procedure

The Commission has the exclusive power to declare State aid compatible with the Common Market. The Commission can therefore require the recovery of that State aid by the government if that State aid has been found incompatible and it was granted before the Commission reached its final decision in the case.

National courts can declare that a measure is a State aid and that the government should recover that aid where it has not been notified on the sole basis that the aid has not been notified. Thus, a claimant can go before a national court and secure a finding that a certain State aid is illegal (i.e. unnotified). The national court can then order the government to recover the State aid.

Where the Commission has issued a decision finding that certain benefits equivalent to State aid under Article 87 (1) EC are incompatible and illegal, and requiring the UK Government to ensure that the aid is refunded, the practice appears to be for the UK Government to bring an action in the High Court against the recipient of the illegal aid. The statement of claim accompanying the action is founded upon the UK Government's duty to comply with the decision of the Commission, and that duty affords the government the right to seek recovery through the domestic courts for the whole of the illegal State aid. It is clear from the ECJ's jurisprudence that the government is under a duty to ensure that a suitable mechanism is in place which allows recovery of illegal aid, even if this means changing its own laws.

9.9.2 Court Cases

(54) Department of Trade and Industry v British Aerospace plc and Rover Group Holdings plc [1991] 1 CMLR 165

Facts and legal issues: In 1988, the Commission approved certain aid to British Aerospace to assist in the purchase of Rover from the UK Government. Following that decision, the UK Government made available a further £44.4 million in aid, which had not been approved by the Commission. By a second decision of 17 July 1990, the Commission declared that the £44.4 million in question amounted to State aid within the meaning of Article 87 (1) EC and ordered the UK to obtain from British Aerospace repayment of the £44.4 million. The UK Government duly instituted proceedings in the High Court for the recovery of the money. On 24 September 1990, British Aerospace and Rover brought proceedings in the ECJ under Article 173 (2) EC for annulment of the Commission's decision of 17 July 1990 on the grounds that in taking this decision, the Commission had failed to observe the procedural rules laid down in Article 88 (2) EC. British Aerospace and Rover also applied in the High Court for a stay of the recovery proceedings. The Court held that it was appropriate to exercise its inherent jurisdiction and grant a stay until delivery of judgment by the European Court.

In the report of the case relating to the stay of the High Court proceedings, the judge comments in passing upon the claim made by the DTI against British Aerospace and Rover. The report states that the government's claim for repayment of the illegal State aid is founded upon the government's duty to comply with the 1990 decision of the Commission and that it was also claimed that the duty imposed upon the government by the Commission afforded the government the right to seek recovery through the English courts for the entirety of the aid.

Counsel for British Aerospace apparently told the High Court that British Aerospace would be submitting that the government's pleadings, as framed, disclosed no cause of action in English law and that it would invite the Court to strike them out.

Following the stay of the High Court proceedings, on 4 February 1992, the ECJ, annulled the 1990 decision insofar as that decision required the UK Government to recover from British Aerospace State aid of £44.4 million¹¹⁵. The Court found for British Aerospace on procedural grounds, namely that in taking its 1990 decision, the Commission had failed to observe the procedural rules laid down in Article 88 (2) EC, which includes a hearing of the interested parties.

Subsequently, the Commission followed the procedure under Article 88 (2) EC in respect of the aid of £44.4 million and found that it was illegal State aid and required repayment. Repayment was made and the initial High Court proceedings for recovery brought by the Department of Trade and Industry were not continued.

(55) R v Customs and Excise Commissioners, ex parte Lunn Poly Limited and another [1999] STC 350

Facts and legal issues: in January 1999, three judges of the Court of Appeal heard an appeal by the Commissioners of Customs and Excise against a decision of the previous year by the High Court, finding that the differential rates of Insurance Premium Tax ("IPT") provided for in the Finance Act 1997 constituted an unlawful State aid contrary to Article 87 EC.

That earlier application for judicial review before the High Court had been brought by Lunn Poly Ltd, a travel agent, and Bishopsgate Insurance Ltd, specialist insurers who provided Lunn Poly with a range of travel insurance policies which Lunn Poly endorsed and sold as Lunn Poly insurance. The case arose because the Finance Act 1997 replaced the previously uniform rate of 2.5% IPT with two different rates: a standard rate of 4%; and a higher rate of 17.5% which applied only to certain travel insurance contracts. The effect of the change made the premiums on travel insurance arranged by tour operators or travel agents or persons connected with them subject to the higher rate. By contrast, if the insurance was arranged by an independent insurance company, only the lower rate was payable.

¹¹⁵ Case C-294/90, British Aerospace and Rover Group Holdings v Commission [1992] ECR I-493.

The High Court accepted that those paying IPT at the lower rate were receiving State aid because the UK was foregoing the difference between the higher rate tax and the lower rate tax in the case of those who were not subject to the higher rate.

The Commissioners appealed the High Court finding that the differential rates were State aid under Article 87 EC.

Decision: before assessing the State aid point, Lord Justice Woolf considered a preliminary point raised by the Commissioners. They queried the role of the High Court in the earlier proceedings, suggesting that it might be limited only to reviewing the decision for breach of the principles of sound administration, rather than extending to finding a breach of the State aid rules. Lord Woolf responded that *"if the provision in national legislation conflicts with a requirement of the Treaty, it is the responsibility of the domestic courts to provide a remedy of the type granted by the Divisional Court in this case if the provision which is contravened is of direct effect"*. The relevant provisions (Article 88 (3) EC) were of direct effect.

In considering what constitutes 'aid', the Commissioners had argued that in this case there was no transfer of State resources and no foregoing by the State of tax revenue. Rather, there were simply different rates of taxation set by Parliament. Lord Woolf found that to determine this issue, it was necessary to look at the position before the differential tax rates were introduced. If there were an objective justification for the introduction of the differential this would be relevant.

By way of justification for the differential, the Commissioners had argued that the different rates were introduced to avoid the loss of revenue as a result of value shifting - the travel sector allegedly sold insurance by earning low margins on the principal product of holidays, whilst earning high margins on the related travel insurance. Lunn Poly and Bishopsgate Insurance denied that any of their activities could be seen as tax avoidance. It was found, however, that there was *"no loss of tax which provides an objective justification for the discriminatory rate of tax imposed on tour operators and agents providing insurance. The higher rate contrary to the stand adopted by the Commissioners cannot be objectively justified as an anti-tax avoidance measure"*.

Lord Woolf went on to find that the reason high margins could be achieved on travel insurance was because *"demand for travel insurance is highly price inelastic. This enables travel agents, in particular, to charge their customers a premium which they should find uncompetitive. They do not do so because they are guided by factors other than price when making their purchasing decision on insurance"*.

The Commissioners then argued that there was no State aid because the 'selectivity' requirement was not met. The higher rate applied to "the generality of taxpayers" as opposed to a "specific undertaking". Lord Woolf responded that *"specific (...) should not be regarded as meaning that there can only be a State aid in relation to an individual undertaking."* A

group of taxpayers could receive State aid where another body of taxpayers does not receive the same benefit. In this case, Lord Woolf stated that

"those providing travel insurance, who are not subject to the higher rate of tax, are a clearly defined part of the group providing travel insurance and they received a benefit in the form of a lower tax rate which another defined part of those providing travel insurance, namely the travel operators and travel agents, did not receive. The aid was both specific and selective".

As for the distortion of competition and the effect on inter-state trade, Lord Woolf held that the High Court was "entitled" to find that the differential tax rates were bound to affect trade between Member States. He commented that "the extent of the difference between the two rates would make it surprising if there was no distortion".

Lord Justice Clarke continued that the differential tax rates were "not justified by the general scheme of the tax system in the United Kingdom" and "not objectively justified by the considerations advanced by the applicants".

The appeal was therefore dismissed.

(56) Customs and Excise Commissioners v Gil Insurance Limited others [2000] STC 204

Facts and legal issues: the Commissioners of Customs and Excise appealed from two interlocutory decisions of the Value Added Tax and Duties Tribunal concerning, *inter alia*, its jurisdiction to hear, and the conduct of, appeals by Gil Insurance Ltd and others (the "taxpayers") against the Commissioners' refusal of their claims to repayment of Insurance Premium Tax.

The taxpayers all provided insurance for domestic appliances. A change to the Finance Act 1994 in 1997 introduced Insurance Premium Tax ("IPT") at a higher rate for premiums of some descriptions and at a standard rate on others. The taxpayers, who had been taxed at the higher rate, alleged that the differential rate was unlawful State aid and sought repayment of sums paid by way of higher rate IPT. The Commissioners rejected the claim. They asserted that even if the differential did constitute State aid, it would not follow that amounts paid by way of higher rate IPT would have been paid by way of tax that was not due to the Commissioners.

The taxpayers appealed on the basis that differential tax was contrary to Community law as it was a State aid which had not been notified to the Commission.

The Commissioners applied for a direction that the State aid issue be struck out or be heard as a preliminary issue of law. On 26 October 1999, the Value Added Tax and Duties Tribunal held that it was arguable that the higher rate or the differential was illegal. It declined to strike out the State aid issue or direct that it be heard as a preliminary issue of law.

Decision: the Commissioners' appeals were dismissed.

The Value Added Tax and Duties Tribunal's decision not to strike out the ground of appeal on the State aid issue was a decision properly open to it.

Furthermore, the Value Added Tax and Duties Tribunal was entitled to take the view that there were reasonable grounds for the taxpayers to raise the State aid issue. It was acknowledged that the remedy was not obvious. The Commissioners argued that the taxpayers could not be repaid the differential as this would exacerbate rather than alleviate the State aid issue. Richards J. held that, while these arguments had considerable force, it was possible that the taxpayers might succeed in a restitutionary claim as this was an uncertain and developing area of the law. The fact that it was a lead case, and substantial amounts of tax were at stake, was also relevant in determining whether the matter should be dealt with at a full hearing. Moreover, the Value Added Tax and Duties Tribunal had not erred in refusing to direct that the State aid issue be heard as a preliminary issue because a resolution of that point would not be decisive of the litigation.