March 2006

STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

Part I

Application of EC State aid rules by national courts

Part II

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

Coordinated by

Thomas Jestaedt, Jones Day
Jacques Derenne, Lovells
Tom Ottervanger, Allen & Overy

Foreword

Last year, the Commission presented its State Aid Action Plan: a comprehensive roadmap for the reform of State aid rules over the next five years. The programme of reform will improve the effectiveness, transparency, predictability and credibility of the EU State aid regime, and we are now working on its implementation. At the heart of the Action Plan is the principle of "less and better targeted state aid" – the central objective is to encourage Member States to reduce their overall aid levels, whilst redirecting resources at objectives that are of common Community interest. State aid is prohibited by the EC Treaty unless it is authorised, and the Commission will continue to take a strict approach towards the most distortive types of aid, in particular aid which is granted unlawfully.

Improving the enforcement of the state aid rules - at all levels - is an essential part of the Action Plan. Efficient and effective enforcement is essential to maintain a level playing field for all competitors in the Single Market. But the Commission cannot enforce the rules alone: national authorities and national courts play a crucial part. They have a particularly important role in enforcing the notification and standstill obligations set out in Article 88(3) of the EC Treaty, and in recovering incompatible aid.

This study was requested by the Commission in 2005, and was conducted by an international consortium of leading legal experts. It reviews the role played by national courts in the protection of competitors' rights to challenge aid granted in violation of the Treaty. It also examines the effectiveness of measures taken at national level to enforce decisions on State aid recovery.

The study confirms that there has been a sharp increase in the number of State aid related cases brought before national courts. National judges take seriously their responsibilities in the State aid arena, and are increasingly willing to take a firm stand against illegal aid and to protect individual businesses against violations of the EU rules. Regrettably, however, the powers of national courts are still not being used to the full. Companies are often hesitant to launch proceedings at national level to put an end to the illegal granting of aid to their competitors, or to assert their rights to claim compensation. In some cases, national courts themselves seem uncertain about the powers that they have in the State aid arena, and the locus standi of competitors.

This study contributes significantly to our understanding of the important role that national courts can and should play in the enforcement of State aid discipline. I particularly welcome the analysis of the procedures available in the then fifteen Member States to secure respect for the notification and standstill obligations set out in the Treaty, and the summaries of over 300 judgments of national courts. This information is an invaluable resource for all those involved in implementation of State aid policy. The recommendations put forward in the study are also an important contribution to the current debate on reform of EU State aid policy, and will help us to improve enforcement at national level.

Neelie Kroes

Foreword of the Coordinators

This study was prepared following a Commission tender[1] calling for an update of a study prepared in 1999 by the *Association des Avocats Européens* ("*AEA*") for the Commission (the "1999 Report"). The present study covers the application of EC State aid law by Member State courts in all its facets, like the 1999 Report. In particular, this study does not focus on private enforcement[2], only but describes judicial practice in Member State courts in all instances where EC State aid law has been applied.

In addition to updating the findings of the 1999 Report, the authors were asked to focus on the conditions for recovery of aid unlawfully granted. The sections on recovery in this study have been expanded considerably as compared to the 1999 Report, and the authors have prepared a second study (also referred to as "Part II") which focuses on recovery practices in Belgium, France, Germany, Italy, and Spain and contains briefer sections on other Member States.

In accordance with our terms of reference, this study covers only those countries that were EU Member States as of 30 April 2004.

The methodology of the study is empirical: the authors have attempted to describe Member States court practice and the underlying law as they have evolved over the years and as they stand as of 1 January 2006. The purpose was not to corroborate preconceived ideas, such as that the application of State aid law at the Member State level is underdeveloped. The goal was to reflect Member State practice in an accurate and unbiased way. The study is meant to inspire rather than criticise.

The country reports have been drafted by the rapporteurs according to an outline provided by the coordinators. The comparative legal analysis, summary of findings, recommendations, as well as all other parts of the Report have been jointly drafted by the coordinators.

The coordinators would like to thank the following country rapporteurs for their excellent work, and timeliness under tight deadlines:

Austria: Hanno Wollmann and Michael Schedl of *Schönherr Rechtsanwälte*;

Belgium: William Broere of *Lovells*, and Michel Struys and Karel Bourgeois of *Allen & Overy*, who assisted Jacques Derenne;

Denmark: Jens Munk Plum of *Kromann Reumert*;

Finland: Mikko Eerola of *Waselius & Wist*;

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1 European Commission - contract n° COMP/H4/010

2 which is the subject of the "Study on the Conditions of Claims for damages in case of infringement of EC competition rules" of 31 August 2004. The 2004 study deals with damages and actions by private parties for violations of Art. 81 or 82 EC, but not with State aid.

France: Alix Muller-Rappard of *Lovells*, who assisted Jacques Derenne;

Germany: Daniel von Brevern of *Lovells* and Alexandra Deege of *Jones Day*, who assisted Thomas Jestaedt,

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Ireland: Damian Collins of McCann Fitzgerald Solicitors;

Italy: Silvia d'Alberti and Lucio d'Amario of *Allen & Overy*;

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Spain: Pedro Callol García of *Allen & Overy*;

United Kingdom: Ciara Kennedy-Loest and Simon Albert of *Lovells*.

Throughout their work on the study, the coordinators have been in continuous contact with the members of Unit I4 of Directorate General Competition: Dominique Van der Wee, Bernadette Willemot, Anne Fort, Thomas Köster, and Nuria Marinas-Rojo. The numerous meetings and contacts with the members of Unit I4 were a steady source of inspiration for which the coordinators and authors of the study are grateful.

The coordinators would also like to thank Eva Mona Götz and Charlotte Wright of *Lovells* for their language review of the Report. We are also grateful to the secretaries who have worked hard to put the study together, in particular Ute Kalthoff and Romy Jäger at *Jones Day*, and Isabelle Gomez at *Lovells*.

Brussels and Amsterdam, 15 March 2006

Thomas Jestaedt Tom Ottervanger Jacques Derenne

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SUMMARY OF FINDINGS, RECOMMENDATIONS, COMPARATIVE LEGAL ANALYSIS

1. Introduction, Summary of Findings, Recommendations, Comparative Legal Analysis

1.1 Introduction

Section 1 of this study contains the summary of findings, recommendations, an outline of cases that could be brought before national courts and a comparative analysis of those cases. Sections 2 and 3 contain an outline of the judicial relief available in each Member State and an analysis of individual cases.

1.2 Summary of Findings

1.2.1 Application of EC State aid law in general

- Member States' courts apply EC State aid law in a **wide variety of procedural settings** ranging from actions brought by a Member State against the beneficiary of aid and actions commenced by taxpayers alleging that tax legislation providing for exemptions for certain categories of other taxpayers violates State aid law, to more "classical" private enforcement scenarios, i.e. actions by private parties against Member States or aid recipients alleging that the aid granted in a specific case was unlawful.

- Overall, there has been a **significant increase in the number of cases** over the past six years (from 116 to 357);

- **France, Italy and Germany account for the largest number of cases** followed by the Netherlands, Spain, Belgium and the United Kingdom; and

- Along with the development of EC State aid law at Community level over the past few years, parties have become **more sophisticated** in invoking EC State aid law in national court proceedings.

1.2.2 Private Enforcement

- The vast majority of cases (more than 50% of all cases) initiated by private parties concern situations where a private party **sought to relieve itself of a burden** that was not imposed on another party by way of an exemption under the aid scheme in question (mostly in the form of a tax exemption). One example are court actions in connection with environmental tax schemes.

- The number of cases in which private parties have brought **direct actions against competitors** that are being granted aid is still **limited** (in a quarter of all cases), but total numbers are increasing:

    - where private parties have successfully brought actions against unlawful aid granted to their competitors, they were able to obtain a **suspension of the**

aid and/or recovery only; the authors have found **no decisions where private parties were awarded monetary damages** based on the grant of illegal aid to a competitor;

- **most actions** by private parties relating to aid granted to their competitors were **brought directly against the Member States**; only a **handful of cases** were **brought against aid beneficiaries**; in a number of Member States, the legal basis of the action against aid beneficiaries still appears to be unclear; and

- the number of State aid cases initiated in the context of **public procurement** (i.e. in situations where the claimant competes with the aid recipient in a public tender) is **increasing**; however, there are not many cases in which tenderers have successfully invoked violations of EC State aid law.

- **Private enforcement** of EC State aid law at Member State level is still in its infancy. This is **not** due to shortcomings or inefficiencies in the Member States' legal systems or a lack of knowledge of EC law by Member States' judges but is, instead, due to the **diversity of Member States' procedural and substantive rules** applicable to situations involving the grant of State aid and the **uncertainties** (cost risks, uncertain outcome) **resulting from the absence of uniform procedures with a clear legal basis.**

1.2.3 Recovery

- While recovery of illegal or incompatible State aid has improved over the past few years, the authors have found that recovery of such aid by Member States still faces a number of obstacles:

  - lack of clarity as to the identity of the national body responsible for issuing recovery decision, of the beneficiary required to repay the aid and as to the exact amount of the aid to be repaid;

  - absence of a clear predetermined procedure to recover aid in some Member States;

  - no availablility or no use of interim relief to recover aid;

  - stay of the recovery proceedings while an appeal is pending; and

  - difficulties experienced by the governmental authorities of a Member State when recovering aid at local level.

1.3 Recommendations

The authors of the study recommend that the Commission:

- adopts a **new notice** based on the 1995 Commission notice on cooperation between the Commission and national courts ("Cooperation Notice")[3], which **should address all aspects of the application of EC State aid law by Member States' courts**; in particular, the new notice should clarify that, pursuant to most recent case law of the European Court of Justice ("ECJ"), competitors and other parties affected by a measure granting aid **must be granted a remedy in national courts**;

- discusses with Member States means to create a **minimum standard** to enable the competitor of the recipient of unlawful aid (i) to obtain swift recovery of the aid; and (ii) to obtain interim relief where a breach of Article 88 (3) EC is obvious, without having to show that the competitor would suffer irremediable harm in the absence of interim relief; one possible means of creating such a standard would be to adopt a **remedies directive for State aid cases**, which could be modeled on the remedies directive for procurement cases;

- discusses with Member States the desirability of creating **uniform conditions for the award of damages to competitors** in the event of an infringement of Article 88 (3) EC; and

- adopts **best practice guidelines** for recovery of State aid (discussed in more detail in Part II of this study).

1.4 Cases that could be brought before a national court

1.4.1 Procedure relating to State aid

The Commission and the national courts have complementary and distinct roles in the application of the State aid rules.

While the Commission has the exclusive power to decide whether aid is compatible with the Common Market, national courts are responsible for the protection of rights and the enforcement of duties, usually at the behest of private parties. In the Cooperation Notice, the Commission points out that, while it is not always in a position to act promptly to safeguard the interests of third parties in State aid matters, national courts may be better placed to ensure that breaches of the last sentence of Article 88 (3) EC are dealt with and remedied[4].

The following actions can be brought before national courts:

- actions by the Member State to obtain recovery from the beneficiary (or actions by the beneficiary against recovery procedures by the Member State);

[3] Commission notice on cooperation between national courts and the Commission in the State aid field, OJ (1995) C 312/8.
[4] See the Cooperation Notice cited above.

- actions by a company against the Member State for annulment of the (discriminatory) imposition of a financial burden (for example, a tax or other levy) from which another company is exempted or where the tax or levy is used to finance unlawful aid;

- disputes between different branches of the Administration as to the permissibility of State aid measures (institutional disputes)[5];

- actions by a competitor against the Member State for damages, recovery and/or injunctive measures; and

- actions by a competitor against the beneficiary for damages, recovery and/or injunctive measures.

In this subsection 1.4, we discuss actions available on the basis of the case law of the European courts and the decisional practice of the Commission[6]. Section 1.4.2 describes enforcement by the Commission. Sections 1.4.3 to 1.4.5 set out examples of cases where a national court could be required to deal with State aid issues.

1.4.2 Enforcement by the European Commission

Articles 88 (3) and 88 (1) EC provide for a specific procedure under which the European Commission ("Commission") monitors new aid and keeps existing aid under constant review. A Member State must notify the Commission of any plans to grant or alter aid before it can be put into effect. Following notification, the Commission conducts an initial review of the planned aid scheme during which it may not be put into effect. The Commission has a period of two months in which to raise objections. If the Commission does not take action within this two-month time limit[7], the Member State may proceed to implement its plans and the aid shall become existing aid, subject to the supervision rules contained in Article 88 (1) EC. If the Commission deems at the end of that review that there are questions on the compatibility of the aid with the Common Market, it must without delay initiate the formal investigation procedure under Article 88 (2) EC. In this case, the prohibition continues until the Commission reaches a decision on the compatibility of the planned aid with the Common Market.

The Article 88 (2) EC procedure that allows the Member State concerned and all other interested parties to submit comments within a period which normally does not exceed one month is concluded by issuing either a negative decision prohibiting the aid, a conditional decision allowing the aid subject to certain conditions or a positive decision. Non-notification does not automatically make such aid incompatible with the Common Market. The

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5 See, for instance, for a case where a national tax authority invoked a violation of the notification obligation in respect of the national legislation of its Member State: Case C-172/03, Heiser, not yet reported.

6 This study will refer to "the ECJ" for the Court of Justice of the European Communities and to "the CFI" for the Court of First Instance of the European Communities.

7 See also Regulation No. 659/1999, laying down detailed rules for the application of Article [88] of the EC Treaty, OJ (1999) L 83/1.

Commission is not relieved of the duty to examine the aid and test its compatibility with Article 87 EC.

If the Commission finds aid incompatible and the aid has already been paid, it will ask the Member State to recover the aid from the recipient with interest as from the day on which the recipient had the aid at its disposal[8]. A Member State is obliged to recover the aid and may not allow a rule of its domestic law to prevent recovery[9]. The ECJ has stated that a Member State may not plead provisions, practices or circumstances of its own legal system as a reason for not complying with EC law, while recipients of unlawful (or illegal) aid (i.e. non-notified aid) cannot, save in exceptional circumstances[10], invoke the principle of the protection of legitimate expectations. The CFI upheld the Commission's decision to make its authorisation of a new aid package subject to the suspension of payment of that aid until a prior aid to the same undertaking, which was declared incompatible, has been recovered[11]. Furthermore, the Commission stipulates that it may make an interim decision, requiring the beneficiary to immediately reimburse the non-notified and illegal aid to the Member State with interest, pending the Commission's decision on compatibility[12].

The Commission has also issued the Cooperation Notice. The Commission pointed out that national courts must, until the Commission renders its final decision, preserve the rights of individuals confronted with a potential breach of the prohibition contained in Article 88 (3) EC by State authorities. National courts are encouraged to use all national remedies to freeze payment or order repayment of sums illegally paid.

1.4.3 Direct effect of Article 88 (3) EC

While national courts have no jurisdiction to rule on the compatibility of aid with the Common Market, they must ensure that Member States comply with their procedural obligations.

The role of the national courts is to safeguard rights which individuals enjoy due to the direct effect of the prohibition in the last sentence of Article 88 (3) EC. National courts should use all appropriate means and remedies and apply all relevant provisions of national law to implement the direct effect of this obligation. The initiation of a procedure by the Commission under either Article 88 (3) EC or Article 88 (2) EC does not relieve national courts of their duty to safeguard rights of individuals in the event of a breach of the requirement to give prior notification[13].

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8 Article 14 of Regulation No. 659/1999.
9 Case C-74/89, Commission v Belgium [1990] ECR I-492.
10 Case C-5/89, Germany v Commission [1990] ECR I-3453.
11 Joined Cases T-244/93 and T-486/93, Deggendorf GmbH v Commission [1995] ECR II-2265.
12 Article 11 of Regulation No. 659/1999.
13 Case C-39/94, Syndicat Français de l'Express International (SFEI) a.o. v La Poste a.o. [1996] ECR I-3547.

First, a national court may have cause to interpret and apply the concept of aid in Article 87 (1) EC to determine whether State aid introduced without observing the preliminary examination procedure of Article 88 (3) EC ought to have been subject to this procedure[14].

Secondly, third parties, such as competitors who stand to suffer loss due to the grant of illegal aid (i.e. aid implemented prior to notification or during the contentious procedure) can obtain an injunction from a national court, thus preventing the actual grant of the aid.

Moreover, a national court may be required to declare prematurely granted aid unlawful and order recovery of such aid, without ruling on its compatibility. Even if the Commission finds the unlawfully granted aid compatible with the Common Market, the national court should declare measures adopted before such a finding unlawful and order the State to recover the aid with interest. When deciding on recovery of the non-notified aid, a national court may take account of general principles, including the principle of the protection of legitimate expectations, the circumstances of the case and earlier Commission decisions in which the recovery of aid was declined on the grounds of general legal principles[15]. Furthermore, national courts will have to keep in mind that, where the method of financing is an integral part of an aid measure, they must, in principle, in the event of non-notification order recovery of charges or contributions levied specifically for the purpose of financing that aid[16].

Finally, third parties who can prove that they have suffered loss as a result of the unlawful implementation of aid may have an action for damages in a national court against the Member State that granted the aid. In *SFEI v La Poste*[17], the ECJ also addressed the question of whether the recipient of aid who does not verify whether the aid has been notified to the Commission in accordance with Article 88 (3) EC may incur liability on the basis of Community law. The ECJ held that Article 88 EC does not impose a specific legal basis for the recipient to incur liability in such a case. Nevertheless, the ECJ held that this does not prejudice the possible application of national liability law to the grant of aid in breach of Article 88 (3) EC where acceptance by an economic operator of unlawful assistance causing damage to other economic operators creates a cause of action under national law.

1.4.4 Enforcement of negative Commission decisions

A national court can enforce a Commission decision under Article 88 (2) EC declaring a particular aid contrary to Article 87 EC. In *Carmine Capolongo v Azienda Agricole Maya*[18], the ECJ clarified that for aid declared incompatible with the Common Market, "*the provisions of Article* [87 (1)] *are intended to take effect in the legal systems of Member States, so that they may be invoked before national courts, where they have been put in concrete form by*

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14 Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v France [1991] ECR I-5505.

15 Case C-297/01, Sicilcassa and others [2003] ECR I-7849.

16 Joined Cases C-261/01 and C-262/01, Belgischer Staat v Eugène van Calster and Felix Cleeren and Openbaar Slachthuis NV [2003] ECR I-12249. For further elaboration on the term "integral part", see Case C-175/02, Pape, not yet reported and Case C-174/02, Streekgewest Westelijk Noord-Brabant, not yet reported.

17 Case C-39/94 cited above.

18 Case C-77/72 Carmine Capolongo v Azienda Agricole Maya [1973] ECR 611.

acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article [88 (2)]".

Where recovery of aid is sought following a negative decision of the Commission, recovery must take place in accordance with the relevant procedural provisions of national law. The provisions are not to be applied in such a way that recovery required by Community law is rendered practically impossible[19]. However, national insolvency laws may have a negative impact on the immediate and effective execution of the decision. Part II of this study contains a more detailed analysis of these issues and of the relevant case law.

Following a negative Commission decision, an action to obtain an injunction to prevent the actual grant of an aid or an action for damages by a third party (for example, a competitor or a creditor of the beneficiary who suffers loss as a result of recovery) may be initiated in a national court.

1.4.5 Implementation of positive Commission decisions

The competitor of a beneficiary of aid declared compatible with the Common Market by the Commission may want to challenge the Commission decision concerning the aid.

In *Salt Union v Commission*, which involved a challenge by a competitor of the grant of aid to a specific company under a general aid scheme approved by the Commission, the ECJ stated that it is open to competitors to contest, before the national courts, the decision of national authorities to grant State aid to an undertaking competing with them[20]. If the aid forms part of a general aid scheme, undertakings may call into question, in such national proceedings, the validity of the Commission's decision to approve the scheme. This can also apply to individual positive Commission decisions.

The ECJ further stated that, if these types of actions are brought in a national court, the latter will be obliged to refer a question to the ECJ for a preliminary ruling under Article 234 EC[21]. Where the claimant would, manifestly, not have standing to challenge the Commission decision directly before the CFI (and has not done so in the prescribed time limit), such a preliminary procedure will not be possible to incidentally review the validity of the decision[22].

1.5 Comparative legal analysis of the Member States' cases reviewed

1.5.1 Categories, Total Number, Allocation

We have analysed the case law of different Member States according to the categories in which the individual cases fall:

- recovery actions by Member State authorities

[19] Case C-142/87, Belgium v Commission [1990] ECR I-959; Case C-480/98, Spain v Commission [2000] ECR I-8717. See also Article 14 (3) of Regulation No. 659/1999.
[20] Case T-330/94, Salt Union Ltd v Commission [1996] ECR II-1475.
[21] Indeed, a national court cannot declare a Community act invalid: Case C-314/85, Foto Frost [1987] ECR 4199.
[22] Case C-188/92, TWD v Germany [1994] ECR I-833.

- discriminatory imposition of burden (tax)
- institutional disputes (central government/region)
- competitor against Member State: injunction and/or recovery
- competitor against Member State: damages
- competitor against beneficiary: injunction and/or recovery
- competitor against beneficiary: damages
- public procurement cases
- successful competitors

These categories were determined by reference to the economic goal pursued by the parties rather than the specific procedural setting in a given Member State.

Table I

The summary of our analysis is shown in the following table:

	Total cases	Recovery actions by Member State authorities	Discriminatory imposition of burden (tax)	Institutional disputes (central government /region)	Competitor against Member State: injunction and/or recovery	Competitor against Member State: damages	Competitor against beneficiary: injunction and/or recovery	Competitor against beneficiary: damages	Public Procurement cases	Successful competitors
AUT	7		3		2		2			
BE	28	12	9		2		4		2	1
DK	0									
FIN	3				3					
F	62	3	35	0	5	4	3	5	5	2
GER	70	18	42		7	1	2		1	
GR	9	1	2		6					
IRL	0									
IT	78	0	59	8	3		3	1	7	
LUX	1	1								
NL	45	7	19		15	2	1		2	
POR	2				1				1	
SP	32	3		16	12		1			
SWE	1				1					
UK	19	1	10	1	5	1		1		0
Total	357	46	179	25	62	8	16	7	18	3
	100%	12.89%	50,14%	7,0%	17,37%	2.24%	4,48%	1.96%	5,04%	0,84%
		A	**B**	**C**	**D**	**E**	**F**	**G**	**H**	**I**

The 1999 Report used the same categorisation. The relevant table was as follows:

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Table II

	Total Cases	Beneficiary resisting recovery by Member State	Discriminatory imposition of burden (tax)	Institutional disputes (central government /. region)	Competitor against Member State: injunction and/or recovery	Competitor against Member State: damages	Competitor against beneficiary: injunction and/or recovery	Competitor against beneficiary: damages	Public procurement cases	Successful competitors
AUT	1				1					
BE	5	2		1	1				1	1
DK	0									
FIN	1					1				
F	35	2	28	1	3		1			
GER	30	5	21		4					1
GR	1*					1*		1*		
IRL	0									
IT	22	5	4	9	2		1	1		
LUX	1	1								
NL	7		2		2	1			2	
POR	0									
SP	7		4		3					
SWE	1				1					
UK	5	1	1		3					1
Total	116	17	60	11	21	3	2	2	3	3
100%		15%	52%	9%	18%	2%	2%	2%	2%	2%
		A	B	C	D	E	F	G	H	

* This case falls into two categories.

While it is always difficult to draw conclusions from a limited number of court cases, it appears that, as compared to the situation described in the 1999 Report:

- there has been a **very significant increase** in cases (from 116 to 357); and
- the **percentage of each category of cases of the total number of cases has remained more or less identical**, with the exception, notably, of recovery actions (which have declined from 15 per cent to 12 per cent) and public procurement cases (which have increased from 2 per cent to 5 per cent). With regard to the former, this may suggest that Member States needed to resort to judicial recovery actions less frequently than in the period preceding 1999.

As to the allocation of cases among Member States, while Germany, Italy and France continue to be in the lead group, there is a significant increase in cases in the Netherlands, Belgium, Spain and the United Kingdom.

The categorisation of cases suggests that private parties are still mainly reactive rather than proactive in raising State aid questions in national courts. The most frequent cases are those where parties invoke State aid arguments in response to the discriminatory imposition of

burdens (such as taxes) (179 cases). The next category consists of cases brought by parties resisting recovery of aid (62 cases). There has been a steady increase in cases where competitors seek to enforce the State aid rules against the Member State or against the beneficiary. However, the number of these cases is still relatively limited in the light of the total number of cases and the State aid issues that arise in most of these jurisdictions.

Commission Cooperation Notice

We have found no evidence that the Cooperation Notice has ever been used by national courts to refer questions to the Commission. The Commission's services with whom we have discussed this are not aware of any such request either. Obviously, the Cooperation Notice may have been used by national courts in analysing what the position of private parties should be in litigation concerning State aid. We are not aware of any express reference to the Cooperation Notice on any key points such as *locus standi* or the legal basis for a claim by private party. In preparing a new notice, we suggest that the **title and scope of the Cooperation Notice be broadened to include litigation in the Member States as a whole** and in order not to be limited to cooperation between the Commission and Member States' courts. This may give the Cooperation Notice more prominence with courts and parties in the Member States.

Outline of analysis

Below we will discuss, first, those categories of cases which can be summarised under the heading of "Private Enforcement", i.e. cases where the initiative to review a State measure as to its compliance with Articles 87 EC and 88 EC was taken by private parties. Thereafter, we will analyse litigation brought to recover illegal aid following a negative Commission decision. Finally, we will briefly discuss cases involving institutional issues between the different governmental entities of a Member State.

1.5.2 Private Enforcement

a) *Most frequent cases: imposition of discriminatory (tax) burdens (Category B)*

More than a third of all cases (179 cases) relate to disputes regarding discriminatory impositions of taxes or other burdens. In those cases, the main concern has mostly been discrimination among beneficiaries and other market players. An example is the series of private cases brought in connection with the so-called Prodi Law in Italy which provided for beneficial treatment of large companies in insolvency proceedings. Another example is litigation about the environmental tax system in a number of Member States (such as Austria and Germany).

On their face, these cases concern situations where the action by competitors is often more **reactive** than **proactive** (typically, the State aid argument will be raised in response to a request to pay a tax). However, these cases do represent a significant contribution to the

enforcement of State aid rules by private litigation at Member State level. They provide a procedural vehicle to detect State measures that will often not be recognised as such at first sight. The fact that the number of these cases appears to be large is an encouraging sign that **awareness of the relevance of State aid law** in tax and other legislation on financial burdens and benefits is increasing among private parties. The authors believe that it is important to include these cases when assessing the overall level of private enforcement of EC State aid law in the Member States' courts.

b) *Actions for annulment of aid decisions (recovery of aid) against Member States and injunctive relief against Member States (Category D)*

In total, there have been 62 cases where a competitor sued a Member State for an injunction against the grant of the aid or a recovery of aid. This is a significant increase from 21 as compared to 1999.

When considering the total number of actions brought by private parties in State aid cases before national courts, it is important to be aware of the **wide variety of procedural settings in which State aid arguments are raised**. The appropriate court and procedure will depend on the nature of the aid, the entity that granted the aid and the defendant against whom the action is brought. Where an aid was granted under administrative law provisions of a Member State by an administrative agency which a claimant competitor wishes to sue, the action must typically be brought under administrative law rules in the courts competent to hear such actions. Where the State aid being challenged was granted in the context of a civil law transaction, an action must, in most cases, be brought under the civil law rules in the courts having jurisdiction to hear such cases in the respective Member State. Sometimes, both administrative law and civil law actions are available. Typically, actions against the recipient of the aid must be brought in the civil courts.

No uniform procedure at Member State level

The procedure and court chosen by a private party in the context of an action against the State aid determine questions such as ***locus standi***, the **availability of interim relief**, the **method of evidence collection and production**, and the **allocation of the burden of proof**. The cases analysed by us show that there is great diversity in the treatment of these issues depending on the applicable procedure and the individual judicial traditions of the Member States. The **lack of a uniform procedure at Member State level** for private parties to challenge the grant of State aid to a competitor and the uncertainties attaching to the wide diversity of procedures that may be applicable could be one of the main reasons for the low number of private actions.

Denmark has specific national laws that create a right for private parties to challenge the grant of State aid as a matter of competition law before the national authorities. That right is limited to cases that have no effect on trade between Member States and, thus, fall outside the scope of Articles 87 EC and 88 EC. While it is difficult to assess, based on the Danish

experience, how such a system would work in an Article 87 EC scenario (i.e. in cases affecting trade between Member States), it can be said, at least, that there is a large number of cases that have been brought by private parties under the respective Danish provisions. In Spain, there is a procedure under the Spanish competition Act which enables the Tribunal for the Defence of Competition, of its own initiative or upon request of the Minister of Finance, to issue advisory reports addressed to the Government in connection with particular aids or aid schemes. This procedure is without prejudice to the application of Articles 87 to 89 EC Treaty, but it appears not to be used in practice.

The experience in **public procurement cases** was that, following the adoption of the remedies directives, all Member States created procedures pursuant to which a private party that feels treated unfairly in a tender procedure can complain and go to court, which suggests that the **creation of a uniform procedure leads to an increase in private actions**. There are obvious similarities between public procurement and State aid cases and the cases that we have reviewed illustrate that private parties will pursue a State aid action most vigorously in tender situations or situations similar to tenders, i.e. where they compete directly with the aid recipient. The creation of a uniform procedure may be limited in effect where the measure in question does not clearly constitute State aid, but may be beneficial in the case of a clear violation of Article 88 (3) EC. However, the authors believe that the adoption of a "remedies directive" for State aid along the lines of the public procurement directives would enhance private enforcement.

Locus standi

The 1999 Report identified *locus standi* as an issue which may present a hurdle for private litigation. Simply put, the question is to what extent a private party should be allowed to claim that there was a violation of Article 88 (3) EC by a State measure that is not directly addressed to it.

A Member State in which this appears to be an issue is Italy where the courts have differed in their treatment of the question of *locus standi*: in a judgment of 13 July 1999, the Court of Appeal of Cagliari[23] stated that a claimant does not have standing in national proceedings concerning the implementation of a negative Commission decision if the decision is not directly addressed to it. The Court of First Instance of Genoa[24] appears to have come out the opposite way on the same question when deciding an action for unfair competition brought by the competitor of a cargo ferry service that had received State aid in 1993.

An illustration of how *locus standi* is dealt with by the French courts can be found in the decision of the Administrative Court of Pau in the *RyanAir* case of 3 May 2005[25]. In this case, the complaint against the aid granted to RyanAir by the airport of Pau was brought by an air carrier flying into the airport of Lourdes. The Administrative Court of Pau began its analysis

[23] See case 3.2.25 in Italy section.
[24] See case 3.2.36 in Italy section.

by remarking that a non-negligible part of passengers on the subsidised RyanAir flights to Pau were likely to go to Lourdes. Thus, the claimant was accorded standing in the administrative court proceedings.

Any remaining doubts as to the *locus standi* of private parties in national proceedings on State aid questions should have been **removed by the preliminary rulings of the ECJ in the *Streekgewest Brabant NFJ* and *Pape* cases**[26] (C-174/02; C-175/02). These cases concerned national proceedings brought against levies imposed on the claimants. The purpose of these levies was to finance aid granted to another company. That company, however, was not a competitor of the claimants. The actions were based on a breach of Article 88 (3) EC. The key question was whether persons subject to a levy that finances aid granted to other parties can also rely on Article 88 (3) EC **irrespective of whether or not they are affected as competitors**. The ECJ answered in the affirmative.

It is clear from *Streekgewest* and *Pape* that Member States must **make available a procedure to private parties affected by the grant of aid** in violation of Article 88 (3) EC. In the future, the *locus standi* question will have to be limited to a finding of whether or not the claimant is indeed affected by the measure. This will probably require a showing of either that the claimant is a (direct) competitor (on both the relevant market(s)) of the aid recipient or that the claimant will suffer economic loss as a consequence of the aid being granted.

The *Streekgewest* and *Pape* decisions give **important guidance to national courts**. It is essential to make national courts aware of these decisions. We suggest to include an explanation of these decisions in the new version of the Cooperation Notice.

No uniform substantive rules

A question directly related to that of *locus standi* concerns the national legal basis on which a claimant wishes to rely. It is established case law of the European courts that the direct effect of Article 88 (3) EC must be enforced **by relying on national law**. The rules applicable are the same as those normally applicable under national law in similar situations. In applying domestic rules in the enforcement of Article 88 (3) EC, national courts must secure the *effet utile* of this provision of the EC Treaty: the provision requires that aid that has been granted in violation of Article 88 (3) EC be repaid.

Since the enforcement of Article 88 (3) EC in national courts is based both on the substantive and the procedural rules of the respective Member State, there is **considerable diversity in the practice of Member States** as regards private litigation to enforce Article 88 (3) EC. Where aid has been granted through an administrative procedure in violation of Article 88 (3) EC, most Member States and legal systems will find that the administrative decision is null and void or must be annulled. This can be the result of either the direct application of

[25] See case 3.4.8 in France section.

[26] Case C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën [2005] ECR I-85; Case C-175/02, F. J. Pape v Minister van Landbouw, Natuurbeheer en Visserij [2005] ECR I-127.

Article 88 (3) EC, such as it appears to be the case in France, or the application of general principles of national administrative law, such as, for instance, in the Netherlands where a breach of EC State aid law will be considered as a violation of the requirement of due care and leads to the nullity of the decision. While all Member States that distinguish between administrative and civil law systems eventually provide that State aid granted in administrative proceedings in violation of Article 88 (3) EC is null and void and must be repaid, it is a different question whether **a private party** can bring an action before an administrative court seeking a declaration that aid granted to a competitor is illegal and must be repaid.

Examples of administrative court proceedings in which private claimants were able to obtain a swift remedy where illegal aid had been granted[27] to competitors are the decisions of the Administrative Court of Strasbourg of 24 July 2003, the Administrative Court of Appeal of Nancy of 18 December 2003[28] and the decision of the Administrative Court of Pau[29] of 3 May 2005 in the ***RyanAir* cases**. In both cases, the administrative courts had to assess, independent of the Commission, whether the agreements between RyanAir and the respective regional authorities contained State aid elements, since there was no Commission decision on that point yet. In both cases, the administrative courts found that there was State aid and ordered the annulment of the underlying administrative decision.

Interim relief

There are **no cases** in which claimants successfully applied for interim relief to stop the grant of illegal State aid to a competitor. The Member States' legal systems all appear to require that, for a claimant to apply for interim relief, it must show: (i) a ***prima facie*** case, i.e. an obvious breach of the law, (ii) **urgency**; and (iii) **harm** that will be caused to it in the event that the measures being challenged will be put into effect. When challenging the grant of State aid to a competitor, a claimant, as a general rule, will be able to show **only the first requirement**: if the aid has not been notified, it is clear that it breaches Article 88 (3) EC. It might be more difficult to prove the second requirement of urgency. However, that condition may be met if the aid is granted by way of a measure that is irrevocable or can be revoked only on the basis of very narrow conditions in the respective Member State. The **element** that is **most difficult** to show in applying interim relief is that of **imminent harm to the claimant** in the event that the aid measure is implemented. In attempting to show harm, a claimant will encounter the same difficulties as when suing for damages: the claimant will have to show that the grant of the aid will cause economic loss.

Against the background of these uniform requirements of Member States' legal systems, the reference in paragraph 10 of the Cooperation Notice pursuant to which "[t]*he judge may, as appropriate and in accordance with applicable rules of national law* […] *grant interim relief,*

[27] See case 3.4.6 in France section.
[28] See case 3.5.2 in France section.
[29] See case 3.4.8 in France section.

for example by ordering the freezing or return of monies illegally paid" appears to be wishful thinking. To create a meaningful procedure whereby interim relief can be obtained by competitors, **interim relief would have to be available based on a mere showing that Article 88 (3) EC has been violated and that the party applying for relief is directly affected by this violation**.

c) *Damages actions against Member States or beneficiaries (Categories E and G)*

The total number of cases (15 cases) remains small but there is an increase as compared to 1999. We have found **no cases in which competitors were actually awarded monetary damages**. In one 2004 French case (see France, *Fontanille*)[30], an administrative court awarded monetary damages to a beneficiary who had relied on the lawfulness of the aid granted to it (violation by the State of Article 88 (3) EC).

Obviously, there is a reluctance on the part of the courts of a particular Member State to award damages to a private party who has suffered harm as a result of the anticompetitive conduct of the authorities of that very same Member State. The 2003 *Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH*[31] case illustrates how that reluctance could be overcome where claimants choose the right court for their actions in damages. In that case, the **High Court of London** had to decide an action brought by a UK claimant against a German defendant for loss suffered as a result of a misuse of aid (pursuant to a Commission decision) granted by the German authorities. The High Court dismissed the action because there was "*no applicable Community law tort*" which was, in its view, required. It should rather have analysed the extent to which the misuse of the aid constituted a tort under English law, because it harmed a UK competitor and, if English law was not applicable, the extent to which the claimant would be entitled to damages under German law. Since the claimant's loss had been suffered in the United Kingdom, the High Court did have jurisdiction pursuant to the Brussels Convention. The case is noteworthy because it is the only "cross-border" damages action which the authors have found with the claimants seeking relief from a court that was not located in the Member State that granted the aid.

The case illustrates the main obstacle to damages actions brought by private parties based on a violation of EC State aid law: **the lack of a clear legal basis under domestic law**. In *SFEI*[32], the ECJ merely stated that a breach of EC State aid law should trigger the normal consequences of similar breaches under domestic law. The ECJ did not require Member States to create a specific damages remedy. Private parties are therefore left with what the Member States' legal systems offer them.

While all Member States' systems provide for some form of damages action against public authorities for breaches of the law, the **standards** applicable in each case appear to be **very different**. Again, Member States may differ in the treatment of the question whether a private

[30] See case 3.6.2 in France section.
[31] See case 2.4 in United Kingdom section.
[32] See Case C-39/94 cited above.

party can obtain damages for a breach of Article 88 (3) EC. The main problem, however, appears to be the **requirement to prove causation between the breach of Article 88 (3) EC and the economic loss** sustained by the claimant. While this is already a challenging exercise in cartel cases[33], it is even more difficult to prove loss by a competitor in a State aid case: as a matter of fact, this requires a showing of how the market share of the claimant would have developed if no State aid had been granted to the competitor.

d) *Action/injunction by competitor against aid beneficiary (Category F)*

The questions of *locus standi* of a private party and of the legal basis for a claim that illegal State aid has been paid to a competitor also arise in cases brought before the civil courts based on national civil law. In civil law cases, claimants will often rely on provisions such as unfair competition to prevent aid from being granted to a competitor.

Unfair competition law as a legal basis

There are different views in Member States' courts as to **whether unfair competition law can be a legal basis for a claim challenging State aid** in civil proceedings before Member States' courts. In a case involving aid to a ferry service between Genoa and Sicily, the **Court of First Instance of Genoa found in 1993** that a violation of EC State aid law could constitute a violation of unfair competition law by the aid recipient[34]. Two cases by the **Austrian Supreme Court of 2002 and 2004**[35] also suggest that unfair competition law may be a legal basis, although in these specific cases the State aid issue was not dealt with specifically. However, the **Higher Regional Court of Munich**, in a judgment of **15 May 2003**[36], refused to apply unfair competition law in a case involving a claim by an operator of a crematorium who provided its services in competition with the City of Munich which also operated a crematorium. While the services provided by the claimant were subject to sales tax, the services provided by the City of Munich were not. The Higher Regional Court of Munich found that unfair competition law should not be applied because, in its view, Article 88 (3) EC was not designed to protect competitors. It should be noted that the case concerned a rather specific set of facts and it is doubtful whether German courts would follow the general approach of the Munich Court (which probably violates the requirement of preserving the *effet utile* of Article 88 (3) EC) in the future.

Nullity of transaction as a risk leading to private litigation

Whether or not a recipient of unlawful aid should be exposed to direct claims by its competitors is a question on which Member States' legal systems appear to differ. One relevant consideration is that it is the **Member State** itself (or one of its subdivisions) that **commits the unlawful act** of granting the aid. Some Member States' legal systems will

[33] As illustrated in the Ashurst Report, p. 70 *et seq.*.
[34] See case 3.2.36 in Italy section. In this specific case, the court rejected the claim because there was no State aid.
[35] See case 3.1.4 in Austria section.
[36] See case 3.1.42 in Germany section.

therefore hold the beneficiary liable only if it has actively induced the authorities to grant the aid.

As a practical matter, the more important question in the context of litigation between private parties based on EC State aid law is whether a violation of Article 88 (3) EC can **lead to the nullity of the entire civil law transaction involving the aid**[37]. There have been very significant recent developments at Member State level in this respect: two recent decisions of 2003 and 2004[38] by the highest German court in civil law matters ("*Bundesgerichtshof*") have taken the position that the transaction involving the aid is null and void. This jurisprudence illustrates that **accepting illegal aid within the framework of complex high-value transactions entails a significant risk of nullity** for the aid beneficiary.

e) ***Relief against beneficiaries in public procurement cases (Category H)***

The number of cases in which State aid issues were raised in the context of **public procurement tenders** is increasing. The standard argument in those cases is that a tenderer should be excluded, because it has been favoured by receiving State aid. The high number of new cases in that area suggests that tenderers are becoming increasingly more sophisticated in identifying State aid issues in connection with public procurement proceedings.

EC Directives

The increase in public procurement cases is due to the fact that, pursuant to the **EC procurement directives**, the grant of illegal State aid to a tenderer may be a ground for rejecting the tender. This has been clarified in Directive 2004/18/EC of 31 March 2004 on the Coordination of Procedures[39] for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts which in Article 55 (3) now specifically provides:

"*Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally*".

The predecessor directives already contained similar provisions. Although reliance on State aid arguments in public procurement cases therefore has a specific statutory basis, it appears that in practice, in most cases, tenderers that relied on this clause have been unsuccessful. The reason is that a tenderer must show that the illegal aid actually had an impact on the tender by his competitor and made that tender "abnormally low". It would appear that, in practice, it is almost impossible to make such a showing unless the aid is specifically related to the tender.

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[37] As opposed to the nullity of the grant of the aid only.
[38] See cases 3.2.8 and 3.2.6 in Germany section respectively.
[39] OJ (2004) L 134/144.

An efficient remedy would probably require that a tenderer that has received illegal State aid **be excluded from the tender altogether, regardless of whether the State aid had a specific influence on the tender submitted**. At least, one should consider to reverse the burden of proof as to the effects of the illegal aid on the tender: the tenderer should not be excluded only if it is able to prove that the illegal aid had no effect on its bid.

1.5.3 Recovery actions by national authorities

The number of this type of case has increased to 46 from 17 in 1999. Recovery actions will be dealt with in more detail in Part II of this study.

Since the State aid issues addressed in negative Commission decisions have become **more complex** in recent years (for example, regarding the application of the private investor principle to capital injections in public companies or the ordering of the recovery of aid from acquirers of businesses who have benefited from aid), the variety of issues encountered at the level of the Member States where recovery is sought in court actions has increased, too.

With respect to the recovery of aid following a negative Commission decision, Member States obviously have an **inherent conflict of interest** where they must recover aid that they themselves granted. In many cases, Member States will try to mitigate the consequences for the aid recipients. This may be one of the reasons for the considerable length of recovery proceeding, for example, in Belgium.

a) *Authorities that must recover*

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. Certain Member States, such as 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*") and, in Germany, the Federal Ministry of Finance. Other Member States, such as Belgium, Italy and Spain, have no such central body controlling the recovery process. A particular problem arises in Member States with a federal structure where the aid was granted by a region. Here, it is the central government that must respond to the Commission. Sometimes, the central government may lack the legal power to order recovery of aid granted by a region (this appears to be a problem in Spain).

b) *Commission decision as domestic legal basis?*

There are Member States where it is **sometimes not clear on which domestic legal rules a recovery action must be based.** This is particularly true of Member States which distinguish between administrative law and civil law courts. 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 is 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 thus **predetermined 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 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 (i.e. the administrative bodies sue the beneficiary before the civil courts).

There are different views in the Member States as to whether a **Commission decision as such can constitute a sufficient legal basis** under domestic law for the government to recover aid from a private aid recipient. While French courts are already in the position, since *Boussac*[40], that aid can be reclaimed under French law based on a negative decision only, the view of the German courts has long been that recovery of aid requires a specific legal basis under German administrative or civil law. In a recent case, however, the German government changed its view and issued a decision to reclaim illegal aid based on a negative Commission decision only[41]. It remains to be seen how the national courts will react (the German lower court rejected this approach but its decision was annulled by the competent court of appeal; a further appeal is pending). In **Belgium**, the administrative act ordering recovery (which may simply be a letter to the beneficiary) can also be based **directly** on the Commission's negative decision. In **Spain**, a **specific law** (No. 38/2003) provides the basis for recovery of illegal subsidies (i.e. payments) under administrative acts, although the procedure for recovery must take place pursuant to general administrative legal rules. Spanish authorities have issued individual recovery orders based on **general principles of administrative law.** While civil law recovery based on the nullity of the underlying transaction violating EC State aid law is an option in certain cases, we have not found (within the scope of our review) any cases on this point.

c) *Prompt recovery*

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

d) *Legitimate expectations*

[40] Administrative Court of Appeal of Paris, Boussac, 16 February 1994, Gaz. Pal. 1995, p. 813.
[41] See section 2.2 in Germany section.

Legitimate expectations as a means of preventing recovery have been an issue in Germany in particular. The German Administrative Law Act specifically provides that an act by which a sum of money is granted cannot be revoked, even where the aid is illegal, if the recipient of the money has relied on the validity of the act. This provision served as the basis for part of the argument raised by the beneficiary in the *Alcan* case[42]. 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 in February 2000[43] in which it rejected the constitutional claim of 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. The application of this principle will always require the beneficiary of State aid to ascertain that the aid has been properly notified to and approved by the Commission. The situation in other Member States is similar.

e) *Insolvency*

A number of issues have been raised at Member State level as to the relationship between the recovery of State aid and **national insolvency laws**. Typically, the issues arising in insolvency proceedings are (i) **preferential treatment** of recovery claims; and (ii) participation in a **restructuring plan**. In **Italy** and **Spain**, payment claims by the government are usually treated as preferential claims in insolvency proceedings. In those countries, where the claim is based on administrative law, it would appear that preferential treatment is also available for 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 injection or grant of a loan by a shareholder).

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

1.5.4 *Cases involving institutional disputes (Category C)*

This is the category of cases where State aid issues arise between administrative bodies, normally the central government and the regions, but in some cases also between the central government and other governmental entities. The number of cases has, again, more than

[42] Case C-94/89, Commission v Germany [1989] ECR 175.
[43] See case 3.2.14 in Germany section.

doubled since 1999. France, Italy and Spain are the only three countries in which this kind of dispute has arisen.

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2. Outline on the availability of judicial relief (update since 1999 Report)

According to the case law of the ECJ, Member States are required to use all appropriate devices and remedies and to apply all relevant provisions of national law to protect the rights enjoyed by individuals as a consequence of the direct effect of the "standstill obligation" under Article 88 (3) EC. However, as there are no specific Community rules governing this aspect, it is for each Member State to designate the courts and tribunals having jurisdiction and to lay down detailed procedural rules[44].

The objective of the following analysis is to define the causes of action that might be available in Austria to third party claimants in State aid proceedings. It is based on the 1999 Report submitted to the Commission in 1999, and it purports, in particular, to update the earlier report by giving summaries of cases specifically decided by Austrian courts which refer to Article 88 EC or deal with the issue of anti-competitive State aid more generally.

2.1 Procedures concerning the direct effect of Article 88 (3) EC

Basically, there are three types of scenarios where an Austrian court may become involved in State aid matters:

a) actions whereby a competitor seeks to prevent the granting of unlawful State aid (cease and desist) or claims damages following the granting of unlawful State aid;

b) actions whereby the Austrian government (or the governmental agency granting the aid) seeks recovery of unlawful State aid; and

c) actions against administrative decisions which allegedly violate the prohibition on State aid.

Competitors may either bring an action against the Austrian government (or the government agency granting the State aid) or against the recipient of the State aid. A recovery action can only be brought against the beneficiary of the State aid. Both types of action may either arise in cases concerning the direct effect of Article 88 (3) EC or in the course of enforcement of a negative Commission decision.

2.2 Actions by competitors

In the event that an action by a competitor is brought before a national court, parallel proceedings before the Commission and the national court may arise in certain cases. Such parallel proceedings are usually not problematic, since the role of the national courts is restricted to that vested in them by the ECJ. As such, national courts may only investigate whether or not a State aid exists and whether the public body that granted the aid respected

[44] See, for instance, Case C-431/93, Jeoren van Schijndel and Johannes Nicholaas Cornelis van Veen v Stichting [1995] ECR I-4705.

the obligation to notify the measure to the Commission. However, the national court does not have powers to assess whether or not the State aid is compatible with the Common Market[45].

2.2.1 Cease and desist

a) Preventive Action, based directly on Community Law

In the *Mayreder* case (see case summary below), the Vienna Trade Court ("*Handelsgericht Wien*") indicated (without giving any particular reasoning) that a cease and desist action in State aid matters could be based directly on Community law. In fact, Austrian law expressly or implicitly acknowledges that preventive action may be taken in some fields (for example, avoidance of personal injuries) in cases where the defendant is legally obliged to refrain from some kind of behaviour and where the claimant can show that the defendant's obligation is likely to be disregarded to its detriment in the immediate future ("*vorbeugende Unterlassungsklage*"). According to many legal writers, the availability of such action should be extended, by way of analogy, to all fields where the law contains an explicit prohibition of certain behaviour[46].

Article 88 (3) EC, last sentence, contains a prohibition on implementing new State aid measures or amending existing State aid prior to clearance by the Commission. Pursuant to established case law of the ECJ[47] this provision is capable of creating individual rights and obligations and has direct effect in the Member States. Individuals may therefore rely on the standstill obligation before the national courts, and competitors may arguably refer directly to Community law when challenging the validity of State aid measures before Austrian courts.

However, it should be noted that contrary to the legal writing mentioned above, established case law only allows for preventive action where an obligation to cease and desist results from a contract, or where the protection of an absolute right (i.e. personal integrity or property) is at stake, but not in situations where the law (as in the case of State aid rules) only protects the economic interests of third parties. Therefore, it still remains to be seen whether the rather broad concept embraced by the Vienna Trade Court in *Mayreder* will be followed by higher courts in the future.

If preventive action is possible, it may also be pursued by requesting interim relief. Here, the claimant has to show (a) *fumus boni iuris* and (b) an immediate risk of suffering irrecoverable damages.[48]

Article 88 EC is only addressed to Member States. It does not impose specific obligations on private undertakings, such as to investigate the lawfulness of a specific State aid measure

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[45] See, for assistance, Case C-77/72, Capolongo v Maya [1973] ECR 611, Case C-74/76, Ianelli v Meroni [1977] ECR 557 and the Notice on cooperation between national courts and the Commission in the State aid field, para. (b).

[46] See Reiscjaier in *Rummel*, *ABGB* II, ə 1294, No. 23.

[47] See, in particular, Case C-120/73, Lorenz v Germany [1973] ECR 1471 or Case C-44/93, Namur Les Assurance du Credit v Office National du Ducroire and Belgium [1994] ECR I-3829.

[48] See section 381 of the Austrian Enforcement Act ("*Exekutionsordnung*").

and/or to refuse receipt prior to clearance by the Commission. Consequently, a direct, preventive cease and desist action against the recipient of State aid is not available (in our opinion). This is in line with the *SFEI* ruling[49], where the ECJ stated that a recipient of State aid who fails to verify whether the State aid has been notified to the Commission in accordance with Article 88 (3) EC cannot incur liability merely on the basis of Community law. Recital 11 of Council Regulation (EC) No. 659/1999 (a procedural regulation) also suggests this by referring only to Member States as the parties bound by the notification obligation and the standstill obligation.

b) Act against Unfair Competition

The second – and main – legal basis for a competitor's cease and desist claim in State aid matters is section 1 of the Austrian Act against Unfair Competition ("*UWG*"). Section 1 *UWG* states (as does its German counterpart) that "*any person who, in the course of business for purposes of competition, commits acts which are contrary to good morals may be enjoined from such acts and held liable for damages*".

More specifically, section 1 *UWG* may be invoked in connection with Article 88 (3) EC on the basis that the Austrian government is in breach of Community law by infringing the standstill obligation, thus acting against good morals ("*Vorsprung durch Rechtsbruch*") and promoting the competitive interest of the beneficiary. Such a claim is somewhat compromised by the fact that any reasonable doubt which the Austrian government and/or the recipient may have as to whether the measure in question actually constitutes State aid is in itself a valid defence against the accusation of "immorality". The Austrian Supreme Court's decisions in *Transit and Tariff Association*, *Senior Aktuell* and *Spa Gardens* (see case summaries below) confirm this view.

However, in addition to relying on an argument of breach of law, it may also be possible to "combat" illegal State aid by claiming directly that the State aid unfairly interferes with the normal course of business. In a case which took place well before Austria acceded to the EU[50], the Austrian Supreme Court held that the State contravenes section 1 *UWG* if it employs means received by way of public office to promote a specific undertaking. Specifically, the Austrian Supreme Court enjoined the Austrian postal service to give one particular bank ("*Postsparkasse*" that also belongs to the public sector) the opportunity to use the network of post offices to distribute certain financial services without adequate financial contribution. It was held that this measure would put all other banking institutions at a competitive disadvantage, as it would be practically impossible for them to establish a comparable distribution system. Legal commentators have rightly pointed out that the *PSK* decision, at the end of the day, amounts to a prohibition on the State granting unfair State aid without making specific reference to Article 87 EC.

[49] Case C-39/94, SFEI v La Poste [1996] ECR I-3577.
[50] PSK – ÖBl 1990, 55.

The *UWG* only applies to cases where the State acts in the private economic sector. Sovereign acts (for example, individual administrative acts, ordinances or laws) do not fall within the scope of section 1 *UWG*.

On the other hand, claims based on section 1 *UWG* may be brought against the beneficiary as well as against the public authority granting the State aid. Even if the beneficiary does not itself breach Community law, it will usually have to be regarded as an accomplice. The ECJ has continuously held that undertakings to which State aid has been granted (or who have applied for State aid) may not, in principle, entertain a legitimate expectation that the aid is lawful, unless it has been granted in compliance with the procedure laid down in Article 88 EC. According to the ECJ, a diligent business person should normally be able to determine whether that procedure has been followed or not.[51] One may argue that if the recipient of State aid fails to inform itself about the lawfulness of the measure in question, it already participates in the unlawful conduct.

Competitors may apply for injunctive relief under the *UWG* without having to show that there is an immediate risk of suffering irrecoverable damages (section 14 *UWG*). They may further request the defendant to remove the illegal situation (section 15 *UWG*; this may amount to an obligation to recover the illegal aid) and are entitled to claim damages (only if negligence or intention can be shown; see section 16 *UWG*).

2.2.2 Damages

a) General

In *Francovic v Italy*[52], the ECJ laid down the principle that Member States infringing Community law may be liable under provisions of their own internal legal system for loss suffered by individuals as a result of those infringements. For the time being, no decisions regarding claims for damages in the field of State aid have been issued by the Austrian courts. However, there is no doubt the possibility of such a remedy exists.

b) Based on the Civil Code

Section 1295 *et seq.* of the Austrian General Civil Code ("*Allgemeines Bürgerliches Gesetzbuch*" or "*ABGB*") provides that anybody who negligently or intentionally acts in breach of the law shall be liable for the damage resulting thereof. This general rule may be invoked against the State who breaches EC State aid rules by acting as a private party in the private economy. The beneficiary of State aid may only be liable in damages in respect of aid received in violation of the standstill obligation if it can be shown that it promoted and thus participated in the breach of law.

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[51] See, for example, Case C-24/95, Rheinland-Pfalz v Alcan [1997] ECR I-1591.
[52] Joined Cases C-6/90 and C-9/90, Francovich and others v Italy [1991] ECR I-5357.

c) Based on the *UWG*

As set out above, a claim for damages may also be based on section 16 *UWG*.

d) Based on the Government Liability Act

In cases where State aid was granted by means of an administrative order ("*Bescheid*"), a competitor of the beneficiary may bring an action for damages against the State on the basis of the Government Liability Act ("*AmtshaftungsG*"). Pursuant to section 1 of this Act, the State shall be liable for the damage caused by its agents through unlawful and culpable behaviour in the exercise of their sovereign powers. This also covers damage resulting from violations of EC law to the extent that such provisions of EC law ought to protect individuals. The relevant provisions of the *ABGB* (section 1295 *et seq.*) apply *mutatis mutandis* to these illegal sovereign acts.

Procedurally, a civil court deciding a claim under the *AmtshaftungsG* may not itself establish the illegality of the order ("*Bescheid*") on which the aid is based. Rather, the competent court must apply to the Administrative Supreme Court ("*Verwaltungsgerichtshof*") to have the *Bescheid* declared void[53].

2.2.3 Public procurement

Section 52 of the Federal Act on Public Procurement ("*Bundesvergabegesetz*") provides in paragraph 1 (3) that an undertaking may be excluded from the bidding process if the pricing of its bid is not "plausible". In a recommendation dated 17 December 1997, the *Bundes-Vergabekontrollkommission* expressly stated that this provision may be applied to exclude a beneficiary of State aid from a public tender, provided that the beneficiary fails to show upon request that the aid received did not on the facts result in unduly low prices *in concreto*.

2.3 Administrative proceedings

2.3.1 Challenging administrative acts granting State aid

In cases where State aid is granted by a sovereign act (for example, an individual administrative act, ordinance or law), it is very doubtful whether competitors are legally capable of preventing the State aid measure in question at all. In particular, Austrian administrative law allows for third party objections ("*Widerspruch*"), although we understand that this is also available in, for example, Germany. Under Austrian law, the decisive question is whether the competitors of a beneficiary affected by a State aid decision are "parties" to the respective administrative proceedings within the meaning of section 8 of the Austrian Act on Administrative Procedure ("*Allgemeines Verwaltungsverfahrensgesetz*" or "*AVG*") and may therefore raise objections in the proceedings or even appeal against an order which, in their opinion, is in conflict with EC law. Although the definition of a "party" in

[53] See section 11 *AmtshaftungsG* and Article 131 (2) of the Austrian Constitution.

section 8 *AVG* is fairly broad, it does not usually encompass persons or undertakings that have a mere economic interest in the decision of the administrative authority. However, based on *Factortame*, the Austrian Administrative Supreme Court might be prepared to set this restriction aside in cases where the competitor of the company receiving the aid might otherwise not have the opportunity to assert its position.

2.3.2 Invoking the principle of equal treatment in administrative proceedings

Rather than challenging the administrative act granting the State aid, a competitor may directly address the grantor and request to be granted the same benefit, in order to remove the negative effect on competition. In Austria, such claims have been based on the principle of equal treatment, a constitutional right provided for in Article 2 *StGG* and Article 7 *BVG*. The infringement of a constitutional right principally renders the administrative act that gave rise to the violation unlawful. If the competent court finally annuls the contested act due to a violation of the principal of equal treatment, the administrative authority will be obliged to alter its initial position and grant the claimant the same benefit. This approach was chosen by the claimants in the *Energy Tax Rebate* case (see case summary below).

It has been correctly noted that the principle of equal treatment may be dangerous from the point of view of State aid. In particular, if the initial benefit was granted in violation of the standstill obligation under Article 88 (3) EC, or if it is incompatible with the Common Market, an extension of the same benefit to other claimants may enhance the anti-competitive effect rather than eliminating it. In principle, of course, these considerations would be valid under Austrian law. No "secondary aid" may be granted if this aid, in itself, would be incompatible with EC law. On the other hand, and this was the concept embraced by the Austrian Constitutional Court in the *Energy Tax Rebate* case, a State benefit only constitutes State aid if it is selective, meaning that it must only have been granted to a limited number of market participants. The character of an illegal State aid measure is avoided by removing this element of selectivity. In particular with regard to tax benefits, it seems therefore that a Member State may avoid having to request repayment of the tax advantage by granting the same benefit on a non-discriminatory basis as part of its general tax system. The recipient of the initial State aid may ask whether the case for a repayment order can be rebutted by arguing that the State should be obliged to extend the measure in question to all other businesses "in the same class" rather than withdrawing the initial aid. The *Energy Tax Rebate* case indicates that the Austrian Constitutional Court would consider that such a defence is acceptable.

2.4 Actions for recovery

Once the Commission has ascertained the illegality of a particular State aid measure and its incompatibility with the Common Market, it will order repayment. Abolishing unlawful State aid by means of recovery is the logical consequence of the competent court's finding that it is

unlawful.[54] The technique of recovery (and the applicable rules) will largely depend on the legal basis on which the aid was granted. For instance, the nature of the aid (whether it consists of a tax incentive or a capital increase in a public undertaking) does make a major difference for recovery proceedings. In the following sections, we only consider the straightforward case of the granting of State aid in the form of direct monetary transfers. Even here one has to distinguish between two different types of cases:

- where the aid was granted by contract under civil law; or
- where the aid was granted by an administrative order.

2.4.1 Aid granted by 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 EC State aid rules contain statutory prohibitions within the meaning of section 879 *ABGB*.

Consequently, a contract granting aid which infringes Article 87 (1) is void and restitution can be granted pursuant to the *ABGB* provisions on unjust enrichment (section 877 *ABGB*).

2.4.2 Aid granted by an individual administrative act ("Bescheid")

Under Austrian law, an order ("*Bescheid*") can only be revoked under exceptional circumstances. In particular, it can be declared void by a higher court if it suffers from a defect explicitly threatened by nullity under applicable law (section 68 paragraph 4 (4) *AVG*; special rules apply in tax matters). However, to date it is still unclear whether the provisions of the EC Treaty relating to State aid are qualified statutory prohibitions within the meaning of section 68 paragraph 4 (4) *AVG*. We believe that this is the case with particular regard to the unconditional obligation of the Member States to give full effect to EC law.

2.4.3 Comment

In our view, the remedies provided by the Austrian legal system for the recovery of State aid granted under a civil law contract seem to be satisfactory. This is primarily due to the fact that the *ABGB* in general offers an extensive legal framework for the recovery of unlawfully granted payments or other benefits. However, a number of issues remain unsolved regarding the recovery of aid granted by way of a *Bescheid*, For instance, it is unclear whether the order revoking a *Bescheid* for failure to comply with Article 87 EC may also provide details of how repayment shall be executed (for example, interest). Moreover, section 68 paragraph 4 *AVG* does not provide for the avoiding of orders issued by the highest administrative court.

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[54] See Case C-169/95, Spain v Commission (Province of Tervel) [1997] ECR I-135.

With regard to such measures, Austria could therefore find itself in a position where it is unable to comply with Community rules for the recovery of State aid on the basis of the law as it stands. Here again, the Administrative Supreme Court might be forced to set aside those provisions of the *AVG* that would render recovery of State aid impossible. For the time being, no recovery proceedings have yet been initiated in Austria, and many waters therefore still need to be tested.

3. List of cases with summaries

3.1 Actions brought by competitors before the civil courts

In all available cases, the claimants (competitors of the beneficiary of the State aid) applied for a cease and desist order claiming an infringement of section 1 *UWG*. In some instances, the claimants also directly relied on EC State aid provisions, in particular Article 87 EC. In one available case (the *Spa Gardens* case), the Supreme Court found that illegal State aid had been granted and upheld the action brought by the competitor. To our knowledge, no proceedings for damages for breach of the EC State aid rules have yet been initiated.

3.1.1 Vienna Trade Court ("Handelsgericht Wien"), judgment of 29 February 1996 (Mayreder case) (D)

Facts and legal issues: an Austrian construction firm, Mayreder, incurred operative losses from about 1991 and was on the brink of bankruptcy at the end of 1995. Another Austrian construction group, Alpine, offered to take over Mayreder at a price of ATS 100 million provided that Mayreder's creditors (suppliers and, in particular, creditor banks) waived ATS 350 million of accounts receivable. Some of these creditor banks (namely Girocredit, Creditanstalt and Bank Austria) were owned by the State.

A competitor of Alpine, Ilbau, was also interested in acquiring Mayreder and argued that this waiver of claims would constitute illegal State aid under Article 87 EC. Ilbau did not only submit a complaint to that effect to the Commission, but it also applied for a cease and desist order (also by way of a preliminary injunction) to the Vienna Trade Court.

Decision: the Vienna Trade Court applied the market economy rule to the case in question. It held that, *prima facie*, the waiver of claims by a creditor bank in order to rescue an insolvent company and to avoid even greater losses is common, also in the private sector. Therefore, in the Vienna Trade Court's opinion, Ilbau failed to show that a private investment bank would not have granted the same concessions to Mayreder or Alpine as the State-owned banks did in the present case. On these grounds, the claim for a cease and desist order was dismissed. This decision has become final.

Comment: this decision dating from the early years of Austria's membership demonstrates the Austrian courts' general awareness of EC State aid rules and their willingness to apply them. Rather than rejecting the action on the grounds provided by national law (i.e. the

UWG), the Vienna Trade Court made clear, by applying the EC concept of the market economy rule, that EC law provisions will be also considered in proceedings governed by national law. Retrospectively, the case raises interesting questions with regard to the burden of proof when State aid measures are contested in the civil courts. According to general rules of procedure, the claimant must provide factual evidence supporting its allegations. In this context, evidence must be provided, in particular, on the question of whether a specific measure constitutes State aid. In *Mayreder*, this allegation was difficult to sustain, as private banks actually consented to a waiver of debts similar to that made by the State-owned banks. The Vienna Trade Court was therefore able to draw a direct comparison.

3.1.2 Supreme Court ("Oberster Gerichtshof"), judgment of 22 June 1999 (Tariff Association case) (D)

Facts and legal issues: the Austrian government and the Federal State of Upper Austria jointly granted State aid to a company operating coach transportation services. The affected routes were also serviced by another company (a concessionary line operator) that was a member of a tariff association established between several private transportation companies and public bodies, such as, primarily, the Austrian government and the Federal State of Upper Austria (“Tariff Association”). The primary objective of the Tariff Association was to establish a uniform tariff system for transport services within the entire region.

The recipient of the aid was not itself a member of the Tariff Association. However, facing competition from the concessionary line operator, the beneficiary was economically forced to charge the (lower) standardised tariff of the Tariff Association. The aid granted in the form of an annual fee was actually intended to enable the recipient of the aid to adopt the standardised tariff without running the risk of being eliminated from the market.

The claimant, the concessionary line operator, sought an injunction (under section 1 *UWG*) despite receiving aid from the Tariff Association as well, to force the grantors, the defendants, to cease paying any further aid to the "outsider".

Decision: the Supreme Court found in favour of the defendants. The Supreme Court stated that a public body can, in general, infringe section 1 *UWG* by abusively granting aid to market operators from means available to it as a result of its special public law status. However, the Supreme Court also pointed out that the claimant had also received aid from the defendants for servicing the routes concerned, notwithstanding that the aid had been granted to support the claimant's general activities under the umbrella of the Tariff Association. Therefore, the defendants had not unreasonably favoured the claimant’s competitors and not abused their sovereign powers.

Comment: the decision confirms that aid granted by a public body may be challenged by a competitor on the basis of section 1 *UWG* regardless of whether or not the financial aid constitutes State aid within the meaning of the EC Treaty. Given the purely national

character of the aid granted to the beneficiaries, it seems doubtful whether EC State aid rules would have been applicable at all to the contested State aid measures. As the grantor had not discriminated against competitors, there was no need for the Supreme Court to refer to EC State aid rules in particular.

3.1.3 Supreme Court ("Oberster Gerichtshof"), judgment of 22 March 2001 (Senior Aktuell case) (F)

Facts and legal issues: the defendant in this case was a society associated with the Vienna Chamber of Commerce. It received aid for organising a trade fair. The claimant challenged the aid on the basis of section 1 *UWG* in connection with Article 88 EC before the Vienna Trade Court, and, at the same time, filed a complaint with the Commission for infringement of Article 87 EC. The defendant argued, *inter alia*, that the aid at issue already existed at the time Austria acceded to the EU and therefore qualified as existing State aid.

Decision: the Supreme Court found in favour of the defendant. The Supreme Court confirmed that a State aid only infringes section 1 *UWG* in the event that the recipient of the benefit acted in an illegal manner and was subjectively aware that its behaviour was unlawful. Since financial aid granted before Austria's accession to the EU is valid until the Commission finds the aid incompatible with the Common Market, the beneficiary could not be held liable.

Comment: the decision is particularly interesting as it provides further detail on the conditions that must be satisfied in order to rely on section 1 *UWG* in matters involving aspects of EC State aid. On the basis of the decision, it is clear that a cease and desist order under section 1 *UWG* will only be granted if (i) the aid was granted unlawfully AND (ii) the beneficiary was subjectively aware of the unlawfulness of the aid. Thus, even where the State aid granted was illegal, section 1 *UWG* does not apply if the beneficiary received the aid in good faith.

3.1.4 Supreme Court ("Oberster Gerichtshof"), judgments of 16 July 2002 and 4 May 2004 (Spa Gardens case) (F)

Facts and legal issues: a municipality in Styria which owned a thermal bath ("spa garden") was interested in providing tourism in that region. To that effect, the municipality granted certain special benefits to a specific hotel operator. The benefits consisted of concessions by the grantor for booking a certain number of rooms in the beneficiary's hotel, favourable treatment by means of recommendations to spa guests, and the beneficiary's inclusion in some of the grantor's marketing operations. A competitor of the beneficiary, another hotel operator in the region, challenged the beneficiary's preferential treatment and initiated proceedings for an interlocutory injunction against the grantor.

Decisions: the Supreme Court ruled in favour of the claimants. Where a public body grants aid, it must refrain from treating an individual company unreasonably favourably. The

Supreme Court referred to the legal principle of equal treatment which a public body must respect where its activities pertain to the private sector. This is especially important where aid is granted.

Comment: rather than ruling on the State aid issue, the Supreme Court based its decision on the general legal principle of equal treatment which the State or other public body must respect when it acts in the private sector. The case provides the only example where a cease and desist order under section 1 *UWG* was actually granted.

3.2 Decisions taken by administrative courts

In the two cases described below, the claimants contested an administrative act for violation of EC State aid rules, since it had the effect of discriminating against the claimants. In the *Energy Tax Rebate* case, the claimants brought proceedings before the Constitutional Court claiming that their constitutional rights of equal treatment and protection of property had been violated by a federal statute. The Constitutional Court, largely of its own motion, raised the question of the compatibility of the respective act with Article 87 EC.

3.2.1 Supreme Administrative Court ("Verwaltungsgerichtshof"), decision of 20 March 2003 (AMA case) (B)

Facts and legal issues: a company operating a slaughterhouse challenged an administrative act ("*Bescheid*") issued by Agrarmarkt Austria ("AMA"), the governmental body which, *inter alia*, administers aid in the agricultural sector. Under a federal law concerning the organisation of agricultural markets, AMA levied a compulsory charge on different agricultural products. This money was then used to finance the promotion of certain agricultural goods. In the case of meat, the contribution was payable by companies operating slaughterhouses. The claimant lodged an appeal with the Administrative Supreme Court, claiming that the levying of the contribution violated, *inter alia*, EC State aid rules. According to the complaint, the contributions had to be paid by all slaughterhouses and stockbreeders. However, the funds were used mainly or exclusively for the promotion of products that participated in the national quality label scheme (*"AMA-Gütesiegel"*), a scheme in which the claimant's products did not take part. Since the levy did not benefit all contributors but only a small group, the mandatory contribution allegedly constituted illegal State aid, as did its use by *AMA*.

Decision: the Administrative Supreme Court confirmed that national authorities must not apply national legal provisions that infringe a directly applicable provision of EC law, including Article 88 (3) EC. The Administrative Supreme Court referred to ECJ case law[55] and held that, in general, parafiscal taxes may constitute State aid if, for instance, only certain recipients benefit from the way in which the funds are spent. Therefore, as the claimant alleged (and in contrast to the view put forward by AMA), the relevance of EC State aid provisions mainly depended on how the levies were used. In this respect, AMA failed to

[55] Case C-78/90, Compagnie commercial de L'Ouest v Receveur principal des douanes de la Pallice Port [1992] ECR I-1847.

determine whether the funds consisting of the individual contributions had been used acceptably for general marketing measures, or rather for promoting meat products participating in the national quality label scheme, in a disproportionate manner. For procedural errors, the case was referred back to the authority that issued the administrative act.

Comment: the Administrative Supreme Court strongly supported a strict application of EC State aid law. Notably, the Administrative Supreme Court confirmed that a provision of national law allowing for preferential treatment of certain individual may under certain conditions constitute illegal State aid, and that such a provision may not be applied by the administrative authorities.

3.2.2 Constitutional Court ("Verfassungsgerichtshof"), decision of 13 December 2001; following a reference to the ECJ for a preliminary ruling on 8 November 2001 (Energy Tax Rebate case) (B)

Facts and decisions: this case concerned a number of different proceedings before various Austrian courts and authorities in relation to the Austrian Energy Tax Rebate Act ("*Energieabgabenvergütungsgesetz*" or "*EAVG*") introduced in 1996. The *EAVG* granted a tax rebate for the use of electricity by undertakings whose activities consisted primarily in the manufacture of goods. Several companies in the service industry complained that their applications for similar tax rebates had been rejected by the competent authorities. These complaints were, *inter alia*, brought before the Constitutional Court. The claimants claimed that the *EAVG* violated their constitutional rights of equal treatment and protection of property by granting the tax rebate only to a specific industry sector.

The ECJ, in proceedings referred to it by the Constitutional Court, held that national measures granting a rebate on energy tax to companies active in the manufacture of goods (and not any other companies) were selective and constituted State aid within the meaning of Article 87 EC.

On the basis of the ECJ ruling, the Constitutional Court annulled the administrative acts rejecting the claimants' claims and referred the case back to the authorities.

In the meantime, the Commission had approved the energy rebates for the period from 1 June 1996 to 31 December 2001 as State aid compatible with the Common Market by decision of 22 May 2002. Subsequently, the Austrian authorities again rejected the pending complaints noting that they were no longer bound by the findings of the Constitutional Court in the light of this new development. The claimants challenged the negative administrative decisions again before the Administrative Supreme Court, claiming reimbursement for the period before the Commission decision authorising the State aid had been issued. The Administrative Supreme Court stayed the proceedings and referred the case to the ECJ, essentially asking whether the standstill obligation contained in Article 88 (3) precluded the

application of the *EAVG* for the period before the aid had been authorised by the Commission, even where the Commission later found the aid to be compatible with EC State aid provisions. The preliminary ruling of the ECJ is pending.

The new reimbursement rules for 2002 and 2003, which became effective on 1 January 2002, have again been qualified as State aid by the Commission and criticised for distorting competition. However, the Commission and the Austrian government finally agreed that, since Austria had acted in good faith, recovery of the tax rebates granted in 2002 and 2003 was not necessary. An entirely new reimbursement law has meanwhile entered into force with effect from 30 July 2004.

Comments: both the ECJ and the Constitutional Court made clear that any benefits granted in a selective manner constitute State aid within the meaning of Article 87 EC. Interestingly, the Constitutional Court interpreted the ECJ ruling in such a way that only the authorities' denial of equal tax rebates to service providers (rather than manufacturer) was illegal, not the *EAVG* as such.

3.2.3 Administrative Supreme Court ("Verwaltungsgerichtshof"), decision pending; following a reference to the ECJ for a preliminary ruling on 3 March 2005 (VAT case) (B)

Facts and legal issues: the claimant, a dentist, claimed to be eligible for certain VAT exemptions (waiver on adjusting deductions in the course of a transition from VAT liability to VAT exemption for medial services). The question arising before the Administrative Supreme Court was whether the exemptions constituted State aid within the meaning of Article 87 EC. The Administrative Supreme Court referred the case to the ECJ.

Decision: the ECJ followed the view of the lower courts and held that the tax exemptions should be deemed to qualify as State aid. The ECJ noted that the exemptions benefited only a specific sector, namely doctors, thereby fulfilling the condition of selectivity under Article 87 (1) EC. The Austrian government had argued that the measure should not be qualified as State aid because it pursued an objective of general social interest, namely facilitating the provision of medical services. The decision of the Administrative Supreme Court is currently pending.

Comment: as in the *AMA* and the *Energy Tax Rebate* cases, the question arose whether certain measures benefiting only a restricted number of individuals (here a specific sector) may infringe EC State aid rules. On the basis of the ECJ's ruling, it is to be expected that the Administrative Supreme Court will declare the tax exemptions to be illegal State aid.

Overview: Cases before national courts / authorities in the field of state aid

Name of case	Court	Type of proceedings	Provision applied	Status of proceedings	Comment
Mayreder	Vienna Trade Court	Cease and desist order	section 1 UWG Article 87 EC	completed	No violation of section 1 *UWG* Action dismissed
Transit and Tariff Association	Supreme Court	Cease and desist order	section 1 UWG	completed	No discrimination of competitors through aid Action dismissed
Senior Aktuell	Supreme Court	Cease and desist order	section 1 UWG Article 87 EC	completed	No violation of section 1 *UWG* Action dismissed
Spa Gardens	Supreme Court	Cease and desist order	section 1 UWG	completed	Defendants infringed principle of equal treatment Violation of section 1 *UWG* Action upheld
AMA	Administrative Supreme Court	Appeal against administrative decision	Article 87 EC Article 88 (3) EC	lower court to decide	Parafiscal taxes may constitute State aid if used in an unjust manner Contested act annulled
Energy Tax Rebate	Constitutional Court ECJ Administrative Supreme Court	Appeal against administrative decision Preliminary ruling Commission decision (Article 87 EC)	Article 87 EC Article 88 (3) EC	pending	State aid compatible with Common Market Complaints rejected Preliminary ruling on reimbursement pending
VAT	Administrative Supreme Court ECJ	Appeal against administrative decision Preliminary ruling	Article 87 EC Article 88 (3) EC	pending	Tax exemptions are State aid Administrative Supreme Court to take final decision

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2. Outline of the availability of judicial relief under the Belgian legal system

2.1 Procedures concerning the direct effect of Article 88 (3) EC

The violation of Article 88 (3) EC can be invoked before three different types of court in Belgium:

- the supreme (and unique) administrative court: the Council of State ("*Conseil d'Etat*"/"*Raad van State*");
- the judiciary courts (commercial and civil courts: courts of first instance and commercial courts, and their relevant courts of appeal – "*tribunal de première instance*"/"*rechtbank van eerste aanleg*", "*tribunal de commerce*"/"*rechtbank van koophandel*", "*cours d'appel*"/"*hoven van beroep*"- and the Supreme Court – "*Cour de cassation*"/"*Hof van cassatie*");
- the constitutional court, the Court of Arbitration ("*Cour d'arbitrage*"/"*Arbitragehof*"), which has the power to review legislative acts on limited points of constitutional law (constitutional disputes and the principle of non-discrimination between Belgian citizens).

2.1.1 Procedure before the Council of State

Any administrative act of a non-legislative nature can be reviewed before the Council of State (action for annulment - "*recours en annulation*" or "*recours pour excès de pouvoir*"). This type of action largely finds its origins in the judicial mechanism of the French Council of State. The action can be lodged by any party demonstrating an interest (such interest must be personal, present, certain, direct and legitimate). The time limit for submitting the action is two months from the notification, publication or full knowledge of the act.

Up until now, the State aid cases before the Council of State have involved challenges by beneficiaries against a recovery decision (*Dufrasne*), and against a decision rejecting a tender on State aid grounds (*Breda*). So far, no actions have been brought by competitors before the Council of State against a decision granting State aid in breach of Article 88 (3) EC.

It may be that the procedure before the Council of State, which is quite lengthy, is not very convenient for a claimant competitor of a beneficiary of unlawfully granted State aid. However, accelerated procedures do exist with respect to (i) actions challenging the decisions of the regulatory bodies in the financial, insurance, social security sectors; (ii) the application of the law on mortgages, and (iii) the expulsion of illegal foreigners. These accelerated procedures do not apply to State aid issues specifically and only the last one seems to be justified by the nature of the matters concerned.

More interesting is the possibility of requesting, in parallel with the action for annulment, the suspension of the challenged act (act granting State aid, for instance). A decision of the Council of State is then delivered within 45 days. The pleas invoked in a request for suspension must be "serious and likely to justify the annulment" and there must be a risk of a serious and irreparable harm (the latter condition is very difficult to fulfil since pecuniary damage is only deemed to be irreparable if it leads a claimant to bankruptcy).

If it is not possible for the claimant to wait 45 days, it can make use of the extreme urgent procedure ("*procédure d'extrême urgence*"). The risk of damage from an immediate implementation of the challenged act must be imminent or, at least, likely before the expiry of the 45 days; in addition, the claimant must have done its best to prevent the damage and must have lodged the request as soon as possible before the Council of State. The case may then be fixed immediately (within one or a few hours). A decision can be delivered on the day of the request.

Finally, a request for interim measures can be made before the Council of State (in parallel with a request for suspension, which in turn will require a request for annulment). It should be noted that neither the suspension procedure, nor the extreme urgent procedure nor the interim relief procedure has been used in State aid matters.

Moreover, the interim measures requested cannot have as their object so-called personal rights ("*droits subjectifs*"). In the event that a person wishes to protect such personal rights, he will need to seek interim measures before a civil court (usually, the President of the Court of First Instance) by requesting an appropriate order to prevent the damage to his personal rights.

The civil courts appear to have obtained jurisdiction on administrative matters by virtue of Article 159 of the Belgian Constitution which provides for the "exception of illegality", i.e. courts are required to apply administrative decisions of a general scope only where they are in accordance with the law. Through the use of Article 159, civil courts have kept their powers to suspend administrative acts (or prohibit the execution of such acts) where such acts have escaped the censure of the Council of State.

2.1.2 Procedure before the Court of Arbitration (Constitutional Court)

The Court of Arbitration is competent to review the constitutionality of certain legislative acts. It can legally review the compatibility of laws ("*lois*" from the federal parliament), decrees ("*décrets*"/"*decreten*": legislative acts of the Flemish region, of the Walloon region and of the French and German speaking Communities) and ordinances ("*ordonnances*"/"*ordonnanties*": legislative acts of the Brussels region) with:

- the rules laying down the division of powers between the State, the communities and the regions laid, down in the Constitution and in special laws;

- the fundamental rights and liberties guaranteed in Section II of the Constitution (Articles 8 to 32 of the Constitution);
- the principle of legality of taxation as laid down in Article 170 of the Constitution;
- the principle of non-discrimination in fiscal matters as laid down in Article 172 of the Constitution; and
- the protection for non-citizens as expressed in Article 191 of the Constitution.

A violation of EC State aid rules constitutes a violation of such fundamental rights. Thus, in some of the State aid case law examples (the *Schaerbeek* cases) described below, the Court of Arbitration found that the relevant laws breached Articles 10 and 11 of the Constitution (principle of non-discrimination) in parallel with State aid rules. Prior to the extension of the Court of Arbitration's competences in 2004, only the violation of this principle (and not the other fundamental rights mentioned in section 2 of the Constitution) could be directly invoked before the Court of Arbitration. This explains why the claimants in the *Schaerbeek* cases invoked the violation of this principle read in conjunction with the State aid rules. These rules remain of course an indirect ground of review after the extension of the Court's competences.

Regulations having the force of law, which are subject to constitutional control, include both substantive and formal rules adopted as *lois/wetten*, *décrets/decreten* and *ordonnances/ordonnanties* mentioned above. All other regulations, such as royal decrees; decisions of governments, communities and regions; ministerial decrees; regulations; and decisions of provinces and municipalities, as well as court judgments, fall outside the jurisdiction of the Court of Arbitration.

A case may be brought before the Court of Arbitration by virtue of a direct action or through a preliminary reference by another court.

(i) Direct Action

A case may be brought before the Court (in the form of an action for annulment) and may be instituted by any authority designated by statute or by any interested party.

The following authorities and persons may bring an action for annulment before the Court of Arbitration:

- the Council of Ministers and the governments of the communities and regions;
- the presidents of all legislative assemblies, at the request of two-thirds of their members;
- natural or legal persons, both in private law and public law, Belgian as well as foreign nationals.

The latter category of persons must be able to demonstrate an interest. This means that those persons must show in their application to the Court of Arbitration that they are liable to be personally, directly and unfavourably affected by the challenged legislative act.

Actions must be brought within six months of the publication of the challenged act in the *Moniteur belge/Belgische Staatsblad*.

The action for annulment does not suspend the effect of the challenged act. In order to guard against the possibility that the challenged act may cause irrevocable prejudice during the period between the introduction of the action and the judgment of the Court of Arbitration, and that a subsequent retroactive annulment may no longer have any effect, the Court of Arbitration may, at the claimant's request and in exceptional circumstances, order the suspension of the challenged act pending a judgment on the merits of the case. A decision on the merits of the case needs to be rendered within three months of the order suspending the act, otherwise the effects of the suspension order will cease.

If the action is well-founded, the challenged act will be entirely or partially annulled. Judgments annulling a challenged act have absolute binding force from the moment they are published in the *Moniteur belge/Belgische Staatsblad*. Such annulment has retroactive effect, which means that the annulled act must be deemed never to have existed. If necessary, the Court of Arbitration may moderate the retroactive effect of the annulment by upholding the effects of the annulled act (the principles are very similar to those applicable at the EC level following a ruling of the ECJ or the CFI on the basis of Article 230 EC).

(ii) Preliminary reference

Any court may refer preliminary issues to the Court of Arbitration.

If a question comes up in a particular court about the compatibility of laws, decrees and ordinances with the rules laying down the division of powers between the State, the communities and the regions or with Articles 8 to 32, 170, 172 or 191 of the Constitution, that court must in principle address a preliminary reference to the Court of Arbitration. "Preliminary" means before the court passes further judgment. When a court refers a question to the Court of Arbitration, the proceedings before the court in question are suspended, pending the answer of the Court of Arbitration. If the Court of Arbitration decides that the act in question conflicts with the rules mentioned above, the referring judge must no longer take this act into consideration during further adjudication of the case. The act in question, however, will be maintained in the legal system.

In cases which raise preliminary points of law, courts delivering judgment in proceedings involving the same parties and concerning the same legal issues (including courts of appeal) must comply with the ruling given by the Court of Arbitration on the preliminary point of law in question. Moreover, where the Court of Arbitration finds a violation, the act will remain part of

the system of law, but a new six-month term commences in which an action for annulment of the act in question can be brought.

Judgments of the Court of Arbitration are legally enforceable and are not open to appeal.

2.1.3 Procedure before civil courts

Actions may be brought before the civil courts (and the commercial courts) regarding litigation between private parties or between the latter and the State when it is not intended to request the annulment of a particular State measure (the sole administrative court in Belgium is the Council of State described above). Civil courts also have jurisdiction to rule on the State's liability.

The commercial courts have jurisdiction over litigation between professionals in the course of their business or over any litigation concerning business acts. Actions for damages brought against a competitor would be brought before commercial courts. Where the claimant is a non-professional, the action can also be brought before the civil courts. Judgments of the commercial courts are appealed to the commercial division of the courts of appeal and are further appealed on points of law only to the Supreme Court.

- Action to obtain an order to reimburse unlawful aid and/or a cease and desist order

Competitors can bring an action before a commercial court and request it to order the beneficiary to reimburse the aid to the relevant administration. Such an action would be based upon the principle of the supremacy of EC law over national law.

The complainant who wishes to obtain such an order must show sufficient interest. The enforcement of the law (in this case, Article 88 (3) EC) is not alone a sufficient interest. Therefore, a competitor would have to show how the grant of the aid directly affected it by putting it at a competitive disadvantage[56]. However, this rule should not undermine the "*objective of ensuring the effectiveness of the prohibition on implementation of aid referred to in the last sentence of Article* [88] *(3) EC*"[57].

There is also a specific procedure based on unfair competition law principles: a competitor may sue a beneficiary before the President of the Commercial Court with a view to obtaining a cease and desist order (in an accelerated procedure, similar to the interim relief procedure

[56] However, it should be noted that when the claimant contests the payment of an illegal tax, for instance, by relying upon Article 88 (3) EC, it does not have to show that this tax puts it at a competitive disadvantage (as compared to the beneficiaries of the aid financed by the tax, for instance) but only that it is affected by the tax being illegal (see the *Streekgewest* case: "*An individual may have an interest in relying before the national court on the direct effect of the prohibition on implementation referred to in the last sentence of Article [88](3) of the Treaty not only in order to erase the negative effects of the distortion of competition created by the grant of unlawful aid, but also in order to obtain a refund of a tax levied in breach of that provision. In the latter case, the question whether an individual has been affected by the distortion of competition arising from the aid measure is irrelevant to the assessment of his interest in bringing proceedings. The only fact to be taken into consideration is that the individual is subject to a tax which is an integral part of a measure implemented in breach of the prohibition referred to in that provision*", Case C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën, not yet reported, para. 19).

[57] See para. 20 of *Streekgewest* case cited above.

but this is an action on the merits of the case with a definitive decision) for any unfair competitive behaviour. This action is based on liability principles since an unfair trade practice constitutes a fault. The action is provided for by Article 93 of the Law of 14 July 1991 on trade practices and consumer information[58] (see *Breda* case described below). Within a State aid context, the unfair behaviour of the beneficiary that could be complained of from a competition perspective is the fact that the beneficiary would benefit from an unlawful aid whilst it is expected from any diligent economic operator to verify the procedural compliance of such grant. The fact that the beneficiary will act on the market by taking advantage of this unlawfully received/granted aid (for instance, in order to offer a lower price in a tender) may also be relevant. The President of the Commercial Court can only deliver cease and desist orders under this procedure. Any action for damages (see below) relying on such a decision will have to be lodged before the Commercial Court in a separate action.

- Action for liability and damages from the State

Damages can be sought from the Belgian State for not complying with Community law in the following two ways.

First, under national liability law, a person has to make good in full any damage caused by his fault (Article 1382 of the Belgian Civil Code) or by his negligence (Article 1383 of the Belgian Civil Code).

The Belgian State and its organs can also be held liable for fault or negligence under these provisions. Unlike French law, Belgian law therefore allows in principle the granting of damages in cases of State liability according to the same conditions as apply to individuals. It is necessary to prove fault, the resulting damage and a causal link.

These provisions can therefore be used to engage the responsibility of the State (including the legislator or even the judicial power in certain circumstances) for adopting an act which breaches Community law. Damage can include the breach of a legitimate interest.

Secondly, damages can also be sought from the Belgian State under Community law liability principles, in line with the principles set out in ECJ case law[59].

Under this case law, the liability of the State will be engaged where: (i) the rule of law infringed is intended to confer rights on individuals; (ii) the breach is sufficiently serious; and (iii) there is a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. As regards the second condition (sufficiently serious breach), where the State has a large margin of discretion in implementing a policy,

[58] Article 93 of the Act grants the right to order the cessation of an action contrary to fair trade practices by which a seller damages or could damage the professional interests of one or more other sellers. According to this provision, a seller can require the cessation of any action it deems contrary to fair trade practices, even if it has not been penalised or prohibited by a legal text.

[59] See notably Joined cases C-6/90 and C-9/90, Francovich and Bonifaci [1991] ECR I-5357; Joined cases C-46/93 and C-48/93, Brasserie du Pêcheur-Factoratame III [1996] ECR I-1090.

the ECJ has considered that the State's liability can only be engaged where the State has manifestly and gravely disregarded the limits on its discretion.

This second condition (sufficiently serious breach) can therefore be a much harder condition to satisfy than the test for breach under civil liability, where a simple breach is sufficient evidence of damage. However, this is not the case in the field of State aid as no margin of discretion is left to the Member States on the application of Article 88 (3) EC. By definition therefore, the violation of Article 88 (3) EC should always be regarded as a serious breach, likely to engage the State's liability within the meaning of the case law mentioned above. Concerning State aid rules, the ECJ's case law may therefore seem more favourable to (or least equivalent to, since any breach of the law by the State is regarded as a fault on behalf of the State) claimants than the traditional national liability system based on "*fault, damage and causal link*" (Article 1382 of the Civil Code).

- Action for suspension of the implementation

As before the Council of State, suspension of the implementation of the decision granting unlawful aid can be requested by competing undertakings before the relevant civil court (in fact, the president of the civil or commercial court, acting "*en référé*" - interim relief). However, suspension can only be requested when the administrative decision to grant the aid creates personal rights ("*droits subjectifs*") to the person seeking interim relief (see also section 2.1.1 concerning judicial review of administrative acts by the Council of State). The conditions for this type of interim measures are urgency, *prima facie* case and serious and immediate harm.

However, it should be noted that a judge may consider, according to the specific legal circumstances, that it is not competent to grant interim relief and ultimately decide that is up to the Council of State to deal with such an action.

- Action for liability and damages from the beneficiary

There has been no example of such a case under Belgian law (however, actions for unfair competition, described above, are based on liability principles).

The question of the liability of the beneficiary of unlawful aid will have to be brought before the civil courts under Article 1382 of the Civil Code described above.

The relevant courts will have to determine whether the beneficiary benefited from the aid in full knowledge of its unlawful character, or whether the beneficiary ought to have been aware of this illegality, as well as the amount of damages to be granted to the competitors. This would appear to be a difficult test to satisfy.

2.2 Procedures concerning the enforcement of negative Commission decisions

2.2.1 Action to recover

In order to recover unlawfully granted aid (whatever its form), the relevant Belgian authority responsible for granting the aid first sends a letter of formal notice to the recipient of the aid, requesting it to refund the aid within a specified period of time.

If the beneficiary of the aid refuses to refund the aid, the relevant Belgian authority can bring a civil action before the Commercial Court seeking a court order for reimbursement. Proceedings before the Commercial Court can last longer than one year. Such action will be subject to the general rules of civil proceedings contained in the Judicial Code.

Both parties to the proceedings can appeal the judgment of the Commercial Court to the Court of Appeal and, on points of law, to the Supreme Court.

2.2.2 Action contesting the recovery

The beneficiary of the aid can contest the recovery order by bringing an action for annulment before the Council of State (see the *Dufrasne* case below).

The beneficiary can also contest the recovery order before the Commercial Court in its defence of the recovery action undertaken by the relevant Belgian authority.

2.2.3 Action in case no recovery is ordered

If, following a Commission decision, the State does not order the recovery of the aid from the beneficiary, competitors may request the State to take action and, in case of a refusal, bring an action for annulment of this refusal before the Council of State (or initiate an action for damages for not having recovered the aid).

2.2.4 Action contesting the validity of the Commission decision

National courts have no jurisdiction under EC law to declare acts of the Community institutions void. Even though they might consider the Commission's negative decision to be illegal, a national court may not prevent the national recovery procedure. Should they disagree with a Commission decision, the courts should refer a preliminary question as to its validity to the ECJ under Article 234 EC[60]. Such requests are, however, inadmissible if a challenge to the Commission decision directly before the CFI under Article 230 EC would have been manifestly admissible (the Commercial Court of Ghent anticipated this rule a few days before the CFI in the *TWD* case[61]).

[60] Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199.

[61] See Commercial Court of Ghent, 25 February 1994 (see section 3.4.4 below) and Case C-188/92, TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland, [1994] ECR I-833.

In a recent example (*Ter Lembeek*, section 3.4.1 below), the national court suspended the proceedings of the Belgian State seeking recovery of aid from a beneficiary until the CFI came to a judgment on the action for annulment against the Commission decision ordering the recovery of the unlawful aid.

2.3 Procedures concerning the implementation of positive Commission decisions

Even if the Commission has found State aid to be compatible with the Common Market, claimants (beneficiaries of the aid or competitors of the beneficiaries) can challenge the validity of this decision before a national court by asking it to request a preliminary ruling from the ECJ under Article 234 EC ("*exception d'illégalité*"). Such requests by claimants are, however, inadmissible where the claimant could have challenged the Commission decision directly before the CFI under Article 230 EC and such action would have been manifestly admissible (see section 2.2.4 above).

If the aid is found to have been unlawful, a final decision of the Commission declaring the aid to be compatible with the Common Market does not prevent the claimant from requesting the recovery of the aid from the beneficiary, at least for the period prior to the adoption of such a positive decision.

2.4 Summary of conclusions of cases described in section 3 below

The cases analysed in section 3 below cover the period from 1992 to 2005. Hereafter follow some of the conclusions that can be drawn from the cases set out in that section.

2.4.1 Actions brought by competitors against beneficiaries

There has in fact only been one case where a Belgian court has had to rule on an action brought by a competitor against a recipient of State aid (the *Breda Fucine* case described in section 3.1.2 where the claimant successfully obtained a cease and desist order against an Italian company regarding its participation in a tender process).

As discussed in the conclusion further below, it is not really clear what discourages competitors from bringing proceedings against beneficiaries of State aid. There are no specific procedural or legal obstacles, except the difficulty encountered in some cases to qualify the measure as State aid or the usual length of the procedure before the courts in Belgium (however, the cease and desist order procedure mentioned above may lead to a quite satisfactory result from that point of view).

2.4.2 Actions for judicial review of an act introducing State aid

The claimants in such actions are not necessarily competitors of the beneficiary. First, in two cases the claimants were municipalities seeking to withdraw the tax exemption granted to a beneficiary of aid. Secondly, in some cases the claimants have been parties unwilling to pay taxes to a regime which may constitute State aid (see section 2.4.3 below for a more detailed

description of this case). Thirdly, in one case the claimant was a professional association representing insurance companies against a measure which would benefit a competitor of the members of that association.

The Belgian courts had to address a wide range of issues in these cases, ranging from whether an aid measure constituted existing aid, to the question of whether a State aid measure found to be compatible with EC law can apply retroactively to a State aid measure which was not notified.

Generally, the civil courts appear to have a better grasp of State aid law than the constitutional court which, on two occasions, erred in its application of Article 88 (3) EC. For example, in one case, the Court of Arbitration considered that it was not competent to act because the failure by the Belgian State to notify a State aid measure to the Commission was a mere procedural fault, not affecting the substance of that State aid measure.

2.4.3 Cases relating to the 1987 law on animal health requiring parties to make contributions to the system

There have been at least five separate cases concerning the Law of 24 March 1987 on animal health. This law required slaughterhouses to make contributions to a fund aimed at combatting animal diseases.

The Commission had ruled in 1991 that this constituted incompatible aid. However, the Commission did approve the subsequent 1998 law modifying this regime.

In four cases, parties brought proceedings before the civil courts against the Belgian State seeking reimbursement of the contributions they had made to the fund. The parties were successful in three of these cases (and one case is still pending) on the grounds that the fund constituted unlawful State aid. Remarkably, in three out of these four civil proceedings, the relevant court referred a question for a preliminary ruling to the ECJ (only in the *Voeders Velghe* case did the Supreme Court not make a reference but applied the ECJ's reasoning in the *Van Calster* judgment[62], concerning the same tax, to come to its ruling (see section 3.3.2 below)).

One interesting question that arose in a number of cases was whether the subsequent approval by the Commission of the modified aid regime in 1998 allowed the Belgian State to keep the contributions made to the fund prior to this approval.

The Court of Arbitration, the constitutional court, considered that the 1998 law could have such retroactive effect. This ruling went against the earlier EC case law concerning the impact of non-notification of State aid measures.

[62] Joined Cases C-261/01 and C-262/01 [2003] ECR I-12249.

Fortunately, in the *Van Calster* case, the Court of Appeal of Antwerp referred a question to the ECJ on this point. On the basis of the ECJ's ruling, the Supreme Court in the *Voeders Velghe* case held that the Court of Arbitration's ruling was wrong (although the Supreme Court cannot overturn this ruling) and that it would be a breach of Article 88 (3) EC to provide the 1998 law with retroactive effect.

2.4.4 Recovery cases

There have been six cases where the Court has had to deal with recovery actions brought by the State against beneficiaries of State aid as a result of a Commission decision declaring the aid in question to be incompatible and ordering recovery of the aid. These cases are analysed in more detail in Part II of this study.

There have also been some cases where the relevant authorities have, of their own initiative, sought to recover alleged unlawful State aid from parties.

Two cases concerned the question of whether a creditors' arrangement, whereby the creditors of an insolvent company agreed to partially write off social security debts, constituted unlawful State aid. The relevant courts did not consider that such arrangements constituted State aid.

In a third case, a local Brussels *taverne* in financial difficulties was granted by the VAT administration a favourable VAT repayment scheme. In this case, the court applied the private investor test to conclude that the measure constituted non-notified State aid. In another similar case (preceding the former one), the Commercial Court raised of its own motion the State aid issue and referred a preliminary question to the ECJ which led to the "private creditor test" (*DMT* case[63]).

2.4.5 Actions by beneficiaries

There have only been a few direct actions brought by beneficiaries of State aid.

Two of these cases were actions for annulment brought before the Council of State against administrative measures taken by a relevant national authority or public body which had negatively affected the beneficiary of the State aid[64]. One case was brought by a beneficiary of State aid before an Employment Tribunal challenging a recovery order of the Social Security service[65].

In the first case before the Council of State, a company successfully challenged a decision of the national authority suspending further payment of aid to this company and ordering reimbursement of aid already paid on the grounds that this constituted unlawful aid which

[63] Case C-256/97, DMT [1999] ECR I-3913.
[64] See Council of State decisions in the *Breda Dufrasne* and *Fucine* cases described in sections 3.5.3 and 3.54 below.
[65] See Employment Court of Tongeren (*Tribunal du travail*), Case No. 2775/2000, 7 June 2002, Ford against Rijksdienst Sociale Zekerheid, unreported. Described at section 3.5.2 below.

had not been notified to the Commission. The Council of State annulled the national authority's decision on the grounds that there was no decision of the Commission prohibiting the aid in question.

In the other case before the Council of State, a company was prevented from submitting a tender offer because it had benefited from unlawful State aid. The company's action for annulment against that decision was dismissed.

2.4.6 Conclusions

Over the last few years there has been a steady increase of the number of State aid cases handled by the Belgian courts.

There have been remarkably few actions brought by competitors. In particular, no party has ever brought an action for damages in relation to a State aid measure. There is no clear explanation for this as Belgian law does provide adequate opportunities for competitors to bring actions. Possibly, parties are discouraged by the length of judicial proceedings before the Belgian courts, preventing them from seeking a quick remedy.

There are also only a few examples of actions brought by beneficiaries. However, this may be more understandable given that beneficiaries are generally the defendants in recovery proceedings initiated by the State.

On the other hand, national authorities have been more willing to bring State aid actions.

Although there have been no actions for damages, there have been a number of cases brought by parties seeking the reimbursement of certain contributions made to the State to set up a fund which was later considered to be an unlawful aid scheme.

The length of judicial proceedings, especially in the civil courts, is probably the main obstacle to the effective application of EC State aid rules in Belgium. Indeed, a case can last up to ten years when it has to run through all of the various levels of courts (including references for a preliminary ruling to the ECJ).

In most of the cases analysed below, the Belgian courts have willingly and correctly applied the EC State aid rules. Moreover, Belgian courts have in a number of cases not hesitated to refer questions to the ECJ in order to obtain clarification on various points of law, although it is interesting to note that neither the Court of Arbitration (the constitutional court) nor the Council of State has ever made such a reference in relation to a State aid matter.

Only in a minority of cases have the national courts incorrectly applied EC State aid rules. In two cases, a national court refused to consider whether a measure constituted unlawful aid on the grounds that the Commission had not issued a negative decision on that aid measure. In other cases, national courts, although possibly arriving at the right decision, applied EC State aid rules where it may not have been necessary to do so. It is not clear whether this will

constitute a trend or not. The most worrying aspect is that most errors in the application of EC State aid law have been made by the Court of Arbitration, against whose rulings there is no right of appeal.

The following points can be emphasised from this review of the Belgian courts' application of the EC State aid rules:

(i) on three major points of law, the Court of Arbitration's interpretation of the EC State aid rules contrasts with the interpretation by most civil courts (the Council of State having not had the opportunity to rule on a true State aid case, which is an indicator of the type of claimant in EC State aid matters in Belgium):

– concept of existing aid: the Court of Arbitration arrived at the qualification of existing aid merely by reference to a Commission's decision to close a file in which the Commission had not explicitly taken a position on this qualification; in fact, the Court of Arbitration should have justified this qualification itself without referring it to the Commission in the absence of a formal Commission decision; this contrasts with one civil court which referred this issue to the ECJ in order to take a position duly informed by the latter (*Namur-Les Assurances du crédit - Office National du Ducroire*);

– scope of Article 88 (3) EC: in one case, the Court of Arbitration seemed to consider that an infringement of Article 88 (3) EC did not affect the substance of a law but only its procedural character; this contrasts with the exemplary and landmark case decided by the Supreme Court in *Tubemeuse* where it was decided that a violation of Article 88 (3) implies that the measure affected should be regarded as null and void, the EC State aid rules having primacy and constituting public policy rules;

– in another case, the Court of Arbitration ruled against the principles established by the ECJ considering the impact of the non-notification of State aid measures and the fact that a decision of compatibility by the Commission could not regularise the illegality; this contrasts with an ECJ ruling on this point specifically following a preliminary reference by a civil court;

(ii) the length of proceedings before national courts is an issue which leads to a serious level of inefficiency regarding the application of EC State aid rules:

– sometimes, the national courts will reach a suitable decision, but only after years of proceedings (for example in *Lornoy*, the Supreme court correctly applied the EC law principles 15 years after the violation of Article 88 (3) EC and nine years after an ECJ ruling);

– sometimes, the courts will decide to stay the proceedings until a judgment of the CFI on the legality of the Commission decision. One may wonder whether the

Masterfoods principles set out by the ECJ[66] can be applied in the State aid area in view of the specific characteristics of Article 88 (3) EC; indeed, the *Masterfoods* principles require national courts to avoid giving decisions which may conflict with a decision contemplated by the Commission in the implementation of Articles 81 and 82 EC. In such circumstances, the ECJ considered that the national court should either concur with the Commission's decision or stay proceedings until a challenge to that decision was definitely adjudicated by the European Courts. However, Article 88(3) EC contains a strict obligation on Member States not to grant State aid until a final decision has been taken by the Commission; in recovery proceedings, the national court's task should simply concern the enforcement of this strict obligation, whether or not the aid in question is compatible with EC law. The only situation where a national court could possibly be required to stay proceedings pending the outcome of a decision of the CFI should be where there is serious doubt as to whether the aid measure in question actually constituted State aid (and this assumes that the challenge before the CFI specifically concerns the qualification of State aid; if this is not the case – i.e. only the compatibility assessment is challenged - any stay of proceedings would be totally irrelevant).

– when the negative Commission decision is definitive (i.e. was not challenged), it is all the more surprising to wait for more than 15 years in order to have a recovery order which may be executed (*Idealspun* and *Beaulieu* cases); claimants who neglect to challenge the Commission decision in this context should be limited in their legal means to delay in this manner the execution of recovery decisions;

(iii) finally, and to conclude on a positive point, it should be noted that Belgian courts are at the source of numerous landmark cases of the ECJ and have allowed the case law to progress by sometimes delivering innovative and long-awaited rulings, which can only serve as an example to all national courts:

– *Tubemeuse*, 1992: State aid rules are public policy rules and the measures affected by the violation of Article 88 (3) EC are null and void;

– *Breda*, 1995: the recipient of unlawful aid commits an act of unfair trade practice;

– *Beaulieu*, 1994: the validity of a negative Commission decision can no longer be put into question by a beneficiary before the national courts by virtue of a request for a preliminary ruling under Article 234 EC if this beneficiary was manifestly admissible in challenging such a decision before the CFI and has not done so;

– *DMT*, 1997: private creditor test.

[66] Case C-344/98, Masterfoods Ltd v HB Ice Cream Ltd [2000] ECR I - 11369.

3. List of cases with summaries

The cases are sub-divided in the following way:

- actions by competitors against beneficiaries;
- actions for judicial review of national legislation;
- cases relating to the 1987 law on animal health requiring parties to make contributions to the system;
- actions for recovery by the State:
  - enforcing a negative Commission decision;
  - actions against beneficiaries seeking to withdraw allegedly illegal State aid;
- actions by the beneficiary.

3.1 Actions by competitors against beneficiaries

3.1.1 President of Commercial Court of Brussels, 15 September 2000 and Court of Appeal of Brussels of 7 December 2001, Hays v La Poste (Assurmail service) and Key Mail, unreported (F)

Facts and legal issues: Hays brought an action for a cease and desist order against the conditions adopted by La Poste for setting up a division (Assurmail) which would compete with Hays' Document Exchange service (DX) in the insurance sector.

Hays claimed that Assurmail benefited from cross-subsidies constituting non-notified State aid in breach of Article 88 (3) EC. Hays also claimed that La Poste's action breached Article 82 EC.

Decision: The President of the Commercial Court decided to refer a question the Commission, but on the day of the re-opening of the oral hearing, its decision was appealed; the Court of Appeal did not come to a ruling on this matter as the Commission issued a decision (on 5 December 2001) declaring that the service was in breach of Article 82 EC. This was sufficient for La Poste to discontinue Assurmail (the Court of Appeal decided on 7 December 2001 to stay the proceedings until the adoption of a Commission decision, which was adopted two days before the delivery of this judgment).

3.1.2 President of Commercial Court of Brussels, Judgment of 13 February 1995, Breda Fucine Meridionali v Manoir Industries, JTDE, 1995, p. 72 (F/H/I)

Facts and legal issues: the Belgian national railways (SNCB-NMBS) launched a tender for the provision of railways materials. Breda, an Italian company, and Manoir Industries, a

French company, submitted competing offers. It appeared that Breda's offer was 40 % lower than Manoir's offer.

Manoir filed a complaint with the Commission, alleging that Breda benefited from State aid granted by the Italian State. Manoir also lodged an action for a cease and desist order before the President of the Brussels Commercial Court alleging that Breda's offer was abnormally low and unfair due to this State aid, which had not been notified to the Commission. An order was rendered by default in favour of Manoir. Breda filed an opposition with the same judge, requesting a contradictory judgment.

Decision: the President of the Brussels Commercial Court first recalled, rejecting Breda's pleas, that the national court has powers to interpret and apply the concept of aid with a view to determining whether a State measure had to comply with Article 88 (3) EC. The President of the court explicitly referred to *Steinike & Weinlig*[67].

The President of the court further rejected the argument that the definitive and non-provisional character of the powers of the court, in the context of the cease and desist order procedure, would be incompatible with a possible Commission decision on the compatibility of the aid with the Common Market. The Court referred this time to *Saumon - FNCE*[68] in order to confirm that any Commission decision could not have the effect of a posteriori regularising a violation of Article 88 (3) EC. The national court may therefore not be requested to stay the proceedings while waiting for such a Commission decision.

Finally, the President of the court ruled that Breda could not exonerate itself by arguing that the notification obligation bears on the Italian State and not on itself, the State aid being "*incompatible with the Common Market, and therefore unacceptable, on this market,* [sic] *Breda committed an abuse in intervening on it as it did with its offer to the SNCB, with the help of such State aid; this abuse constitutes an act of unfair competition prohibited by Article* [88] *of the Law on the protection of commerce and consumers since it infringes or may infringe a subjective right of Manoir to an undistorted competition, inherent to its professional interests*".

Comments: this is an exemplary decision which refers to all the consequences, vis-à-vis the beneficiary of unlawful aid, of the violation of Article 88 (3) EC. The State claiming any benefit from this violation constitutes an act of unfair competition under national legislation[69]. The competitor of such a beneficiary has the right to stop this act of unfair competition by having recourse to an efficient litigation procedure which leads to a definitive decision, although the latter is adopted by virtue of an interim relief procedure (specific procedure for a cease and desist order).

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67 Case 78/76, Steinike & Weinlig [1977] ECR 595.

68 Case C-354/90, Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de Saumon [1991] ECR I-5505.

69 See Case C-39/94, SFEI a.o. v La Poste a.o. [1996] ECR I-3547.

There is, however, one confusing point in the judgment. Rejecting Breda's argument, the President of the court rightly stated that the question of the eventual compatibility of the State aid was not at stake. However, in its concluding decision, the President of the court wrongly qualified the State aid in question as being "incompatible aid with the Common Market". This was perhaps an error of wording, but it should nevertheless not be repeated in order to avoid confusing the important distinction between the legality/lawfulness of the aid, on the one hand, and its compatibility with the Common Market, on the other hand (the only scope of intervention of the judge under Article 88 (3) EC read in conjunction with Article 87 (1) EC).

It should be noted that Breda later on brought an action before the Council of State seeking to annul the decision of the SNCB to avoid the tender to Manoir. This is described in more detail in section 3.5.4 below.

3.1.3 Court of Appeal of Brussels, 5 February 1993, Namur-Les Assurances du Crédit SA and Compagnie Belge d' Assurance Crédit SA v The Office National du Ducroire and the Belgian State, unreported[70] (F)

Facts and legal issues: under the Belgian Law of 31 August 1939 on the Office national du Ducroire ("OND"), that body, which is a public establishment responsible, in particular, for guaranteeing risks relating to foreign trade transactions, was accorded a number of advantages. These were: a State guarantee, formulated as a general principle, capital endowment of State income-producing bonds, the covering of its annual financial deficit by the State and exemption from the tax on insurance contracts and from corporation tax.

Namur-Les Assurances du Crédit SA and Compagnie Belge d'Assurance Crédit SA, another private undertaking operating on the same market, considered that, in view of the advantages accorded by the State to the OND, the enlargement of its field of activity was of such a nature as to distort competition. They therefore lodged a complaint with the Commission, alleging infringement of Articles 87 and 88 EC. They also made an application to the national court seeking, in particular, on the basis of Article 88 (3) EC, suspension of the OND's activity as a credit insurer for exports to Member States until the adoption by the Commission of a decision on the compatibility of the aid accorded or the delivery of a judgment on the substance of their action against the OND and the Belgian State.

Decision: the Court of Appeal of Brussels referred a request for a preliminary ruling to the ECJ and asked inter alia the following question: "*(1) Must Article* [88]*(3) of the Treaty be interpreted as meaning that the granting or alteration of aid includes a decision of a Member State to authorize, after the entry into force of the Treaty, a public establishment, which previously engaged only incidentally in credit insurance for exports to other Member States, to exercise that activity in future without restriction, so that the aid which was granted by that*

[70] Summarised in Case C-44/93, Namur-Les Assurances du Crédit SA v Office National du Ducroire and the Belgian State [1994] ECR I-3829.

State to the establishment under legislation predating the entry into force of the Treaty now applies to the exercise of that activity as thus extended?"

The ECJ responded that "*enlargement, in circumstances such as those described in the judgment making the reference, of the field of activity of a public establishment which is in receipt of aid granted by the State under legislation predating the entry into force of the Treaty cannot, where it does not affect the system of aid established by that legislation, be regarded as constituting the granting or alteration of aid which is subject to the obligation of prior notification and the prohibition on putting aid into effect laid down by that provision*"[71].

Comments: this case helped the ECJ clarify the scope of the notion of existing State aid.

3.2 Actions seeking judicial review of legislation before the Court of Arbitration

3.2.1 Court of Arbitration, Case 195/2004, 1 December 2004, Nestlé Waters Benelux and others (action for annulment of provisions of the law on fiscal aspects of environmental taxes and ecobonuses and the programme act of 2003), excerpt published in Belgisch Staatsblad/ Moniteur belge of 10 December 2004, p. 81699[72] (B)

Facts and legal issues: Nestlé Waters and others filed actions for annulment of some provisions of the law on fiscal aspects of environmental taxes and eco-bonuses and the Programme Act of 2003. These provisions introduced a new tax regime for drinks' packaging. This regime involved so-called 'eco-bonuses' in the form of a reduction of excise duties and value added taxes on drinks and a levy on packaging, subject to an exemption under certain conditions.

The Programme Act of 2003 abolished the legal provision which exempted from the levy packaging that was made up of a minimum percentage of recyclable raw materials. At the same time the Programme Act gave the government the power to introduce such an exemption and expressly provided that the exemption could only enter into force after authorisation by the Commission. This legal change was triggered by a letter from the Commission to the Belgian Government, expressing doubts as to the possible State aid character of this exemption.

The claimants challenged the new tax regime for drinks' packaging under various headings. The majority of their arguments related to infringements of taxation principles, such as legal certainty, predictability and legality. The latter principle requires that there is a parliamentary act which determines the essential elements of the tax. Other arguments concerned alleged breaches of EC law, in particular Articles 28 and 30 EC, Article 90 EC and certain directives.

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[71] Case C-44/93, cited above.

[72] Full text available on the website of the Court of Arbitration at http://www.arbitrage.be/.

The claimants also challenged the new framework for exemptions of recyclable raw materials from the levy, submitting that it amounted to an illegitimate discrimination between re-usable packaging on the one hand, which is exempted by the Act itself, and recyclable packaging on the other hand, which can only be exempted after the government decides to grant the exemption.

Decision: the Court of Arbitration rejected all of the actions, except for the challenge to the provision which allowed the government, instead of the legislator, to change the tax bands, since this amounted to an infringement of the principle of legality of taxes.

In order to justify the new exemption regime which led to discrimination between re-usable and recyclable packaging, the Court of Arbitration expressly referred to the Commission's letter expressing doubts as to the possible State aid character of this exemption, which prompted the legislator to provide that the new exemption could only enter into force after approval by the Commission.

3.2.2 Court of Arbitration, Case 32/2004, 10 March 2004, Municipality of Schaarbeek against the Belgian State (preliminary question – tax exemption of the public telecoms operator), excerpt published in Belgisch Staatsblad/ Moniteur belge of 10 May 2004, p. 37541[73] (B)

Facts and legal issues: in a dispute between the Municipality of Schaarbeek and the Belgian State before the Court of First Instance of Brussels, the latter court referred a preliminary question to the Court of Arbitration regarding the constitutionality of Article 25 of the Act of 19 July 1930 establishing the Telegraph and Telephone Agency ("R.T.T."). This article exempted Belgacom (successor of the R.T.T.) from all taxes in favour of municipalities, despite the fact that the company was performing both a public service and a commercial activity.

Complaints had been filed with the Commission, alleging that the exemption after the liberalisation of the market constituted illegal and incompatible State aid. The Commission closed its file on this matter once it learned from the Belgian State of its intention to repeal the measures in question, which it did in August 2002.

In this procedure, Schaarbeek alleged that the tax exemption constituted an infringement of Articles 10 and 11 of the Belgian Constitution (non-discrimination), read in conjunction with Articles 86 and 87 EC. In particular, it submitted that the fact that Belgacom had continued to be exempted in the period between the liberalisation of the market and August 2002 was unconstitutional, in that it favoured Belgacom over its competitors.

Decision: according to the Court of Arbitration, it can be inferred from the Commission's decision to close the file that the tax exemption is an existing State aid (the exemption was

[73] Full text available on the website of the Court of Arbitration at http://www.arbitrage.be/.

enacted in 1930), although the Commission did not state whether it concerned existing aid or new aid (at least the judgment did not elaborate on the reasoning of the Commission for closing the file). The Court of Arbitration ruled that the aid can only be considered incompatible after a negative Commission decision. Since the Commission filed the complaint, there had been no such decision. Moreover, the exemption had been abolished by the Belgian State upon request by the Commission. The Court of Arbitration therefore concluded that Articles 87 and 88 EC had not been infringed.

Furthermore, the fact that the exemption was not abolished with retroactive effect was not found to be unconstitutional. Belgacom had to be given the appropriate time to adjust to the requirements of a liberalised market.

Comments: the Court of Arbitration is competent to judge on the compatibility of a parliamentary act with the Belgian Constitution when read in conjunction with the articles in the EC Treaty on State aid. In making this judgment, the Court of Arbitration respected the (alleged) view of the Commission as to whether there was (existing) aid.

One can query the fact that the Court did not simply state that it was not competent to adjudicate on the matter as the aid in question concerned existing aid (an area in which national courts have no competence to adjudicate).

3.2.3 Court of Arbitration, Case 143/2004, 5 November 2003, Province of Hainaut and municipalities of Schaarbeek and Sint-Joost-Ten-Node (action for annulment of programme act of 2001), excerpt published in Belgisch Staatsblad/ Moniteur belge of 25 November 2003, p. 56634[74] (B)

Facts and legal issues: as indicated in the case cited in section 3.2.2., Belgacom was exempted from municipal and provincial taxes by virtue of the Law of 19 July 1930. Complaints were filed with the Commission against this measure on the grounds that it constituted incompatible State aid contrary to Article 87 EC. As a result of these complaints this tax exemption was repealed by Law in 2001 and 2002 with *ex nunc* effect ("the contested measures"). The Commission closed its file on this matter once it learned from the Belgian State of its intention to repeal the measures in question.

The claimants, the Municipalities of Schaerbeek and St Josse Ten Noode, sought the annulment of the contested measures in so far as they had no retroactive effect. According to the claimants, since the liberalisation of the telecommunications market in Belgium in 1992, the tax exemption in question violated inter alia Articles 87 and 88 EC in so far as the exemption favoured Belgacom over other economic operators. Accordingly, the complainant considered that Belgacom should be required to pay the municipalities all unpaid taxes since 1992.

[74] Full text available on the website of the Court of Arbitration at http://www.arbitrage.be/.

Decision: the Court of Arbitration inferred from the Commission's decision to file the complaint against the measures in question that the Commission considered that the tax exemption constituted existing aid, the repeal of which by the Law of 2001 and 2002 was sufficient to meet the requirements of the EC Treaty.

The Court of Arbitration ruled that, as the measure constituted existing aid (it was enacted in 1930), it could only be considered as incompatible with the EC Treaty once the Commission had adopted a decision to that effect.

The Court of Arbitration therefore concluded that there was no violation of Articles 87 and 88 EC.

Comments: See comment in section 3.2.2.

3.2.4 Court of Arbitration, Case 17/2000, 9 February 2000, Georges Lornoy & Sons and others (action for annulment of provisions of act establishing budgetary fund for the health and quality of animals and animal products), published in Belgisch Staatsblad/ Moniteur belge of 7 March 2000, p. 6681[75] (B)

Facts and legal issues: see section 3.3.1 below for a description of the case.

3.2.5 Court of Arbitration, Case 20/97, 15 April 1997, Professional Association of the Belgian and foreign insurance companies operating in Belgium (action for annulment of provisions of the Law of 20 December 1995 containing social provisions), published in Belgisch Staatsblad/Moniteur belge of April 1997, p. 9567[76] (B)

Facts and legal issues: an association of insurance companies (the "UPEA") filed an action challenging the constitutionality of a specific regime of deductibility of contributions to retirement funds and the provision of a State guarantee for the solvability margin of one social fund, i.e. the "*Caisse de Prévoyance*" of doctors, dentists, and pharmacists (the "Doctors' fund").

The State guarantee was only granted to one social fund and not to the traditional insurance companies. The UPEA therefore alleged that a competitive advantage was being granted to the Doctors' fund by way of a State aid measure which had not been notified to the Commission. In the UPEA's view this amounted to an infringement of the Belgian Constitution, read in conjunction with the EC Treaty provisions on State aid.

Decision: the action was dismissed. The Court of Arbitration considered the absence of notification of a potential State aid measure as a matter relating purely to the establishment of the legislative act in question rather than to its substance. Therefore, as the objection did

[75] Full text also available on the website of the Court of Arbitration at http://www.arbitrage.be/.
[76] Full text also available on the website of the Court of Arbitration at http://www.arbitrage.be/.

not concern the substance of the challenged legislative act but rather the way in which that act was established, the Court of Arbitration considered that it was not competent to rule on the matter.

Comments: the Court erred in law by holding that the absence of notification of a potential State aid measure is a procedural matter, which relates to the establishment of the legislative act introducing the measure and does not affect the substance of the act itself. If a newly introduced State aid measure has not been notified to the Commission, the aid is unlawful on the basis of Article 88 (3) EC, and so should be declared null and void under national law. In light of the supremacy of EC law, the legislative act introducing the aid should then be regarded as unlawful.

3.3 Cases relating to the 1987 law on animal health requiring parties to make contributions to the system

3.3.1 Court of Arbitration, Case 17/2000, 9 February 2000, Georges Lornoy & Sons and others (action for annulment of provisions of act establishing budgetary fund for the health and quality of animals and animal products), published in Belgisch Staatsblad/Moniteur belge of 7 March 2000, p. 6681[77](B)

Facts and legal issues: the Law of 24 March 1987 on animal health established a system to finance services combatting animal diseases and improving animal hygiene and the health and quality of animals and animal products. The claimants were required to make contributions to this system. The Belgian State failed to notify this aid scheme to the Commission in breach of Article 88 (3) EC.

On 7 May 1991, the Commission adopted Decision 91/538/EEC on the animal health and production fund in Belgium. The Commission ruled that the aid granted by Belgium in the beef, veal and pork sectors was incompatible with the Common Market within the meaning of Article 87 EC and must be discontinued in so far as the compulsory contribution was also imposed on products imported from other Member States at the stage of slaughter.

On 16 December 1992, the ECJ, following a request for a preliminary ruling by a Belgian court (see case summary in section 3.3.3 below), held that the contributions in question could constitute a charge having equivalent effect to a customs duty contrary to Article 12 EC, as well as State aid contrary to Article 87 EC[78].

The 1987 Law was repealed and replaced by the Law of 23 March 1998 on the establishment of a budgetary fund for the health and quality of animals and animal products. The 1998 regime had retroactive effect with regard to the measures introduced by the 1987 law requiring persons to make contributions to the fund. This State aid scheme was properly

[77] Full text also available on the website of the Court of Arbitration at http://www.arbitrage.be/.
[78] Case C-17/91, Georges Lornoy en Zonen NV and others v Belgian State [1992] ECR I-6525.

notified to the Commission and approved in 1996 (Commission Decision of 9 August 1996 relating to aid measure N 366/96).

The claimants brought an action seeking the annulment of the 1998 regime. They claimed inter alia that the 1998 regime breached Articles 10 and 11 of the Belgian Constitution, read in conjunction with Articles 87 and 88 EC, the principle of legal certainty, and the general principle of the non-retroactivity of laws. According to the claimants, the 1998 regime deprived Article 88 (3) EC of its effectiveness in so far as it prevented them from seeking reimbursement of the contributions made under the 1987 regime.

Decision: the Court of Arbitration dismissed the actions of the producers on the grounds set out below.

First, the Court of Arbitration noted that Belgian law allows a measure to have retroactive effect when it is indispensable for achieving an objective of general interest, such as the good functioning of the public service.

The Court of Arbitration then considered that the 1998 law only consolidated the provisions of the 1987 regime. It did not contain any new provision which differed from those contained 1987 regime. The national producers should therefore have expected that Belgium would maintain the measures in question after meeting its obligation to notify these measures.

The Court of Arbitration finally considered that this did not go against Community law. Indeed, as the Commission had, by virtue of its 1996 Decision, approved the 1998 regime without any condition, and, given the importance of the measure in question, the Court considered that the 1998 law was compatible.

Comments: this judgment runs contrary to the principles established in the earlier judgments of the ECJ concerning the impact of non-notification of State aid measures in breach of Article 88 (3) EC[79].

The ECJ's later ruling in 2003 in the *Van Calster and Cleeren* case[80] concerned the same measures examined by the Court of Arbitration. The ECJ noted that Article 88 (3) EC precludes the levying of charges which finance specifically an aid scheme that has been approved by the Commission, in so far as those charges are imposed retroactively in respect of a period prior to the date of that decision (the Court of Appeal of Antwerp, which referred this *Van Calster* case to the ECJ[81], has not yet delivered its judgment).

According to the ECJ, the 1996 Commission decision does not approve the retroactive effect of the 1998 regime; even if the Commission did examine the compatibility of the charges

[79] See, in particular, Case C-354/90, Saumon - FNCE [1991] ECR I-5505 and Case C-39/94, SFEI a.o. v La Poste a.o. [1996] ECR I-3547.
[80] Joined cases C-261 and C-262/01 [2003] ECR I-12249.
[81] Court of Appeal of Antwerp, 28 June 2001, Belgium v NV Openbaar Slachthuis.

imposed with retroactive effect, it does not have competence to decide that an aid scheme put into effect contrary to Article 88 (3) EC is legal.

As illustrated in section 3.3.2 below, unlike the Court of Arbitration, the Supreme Court has now taken into account the ECJ's ruling.

3.3.2 Supreme Court, Case no. C.02.0133.N, 11 March 2005, Voeders Velghe – De Backer v Belgian State (contributions on basis of Law on animal health)[82] (B)

Facts and legal issues: see the ruling of the Court of Arbitration in the *Lornoy* case cited above. This case concerns the same 1987 law referred to in the *Lornoy* case and its amendment in 1998.

The claimants brought an action seeking recovery of the contributions they made under the 1987 law on the grounds that this constituted unlawful State aid.

The Court of Appeal of Brussels (following the Court of Arbitration ruling in *Lornoy* summarised above) considered that the 1998 law retroactively brought to an end the unlawfulness of the 1987 law and that there was therefore no need to reimburse the relevant contributions.

The parties lodged an appeal on points of law ("*pourvoi en cassation*") before the Supreme Court, which upheld the parties' appeal and annulled the judgment of the Court of Appeal.

Decision: the Supreme Court first noted that where a State aid measure is implemented in breach of the obligation to notify, the national judicial bodies are obliged to order the reimbursement of the relevant contributions setting up this measure.

The Supreme Court observed that, whilst the assessment of the compatibility of aid measures with the Common Market falls within the exclusive competence of the Commission, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 88 (3) EC is infringed.

The Supreme Court then referred to the ECJ's judgment in *Van Calster and Cleeren* (cited in section 3.3.1 above), in which it specifically examined the 1987 Belgian law. The Supreme Court ruled that a Commission decision declaring the draft 1998 law compatible does not retroactively remedy the failure to notify the 1987 law.

On this basis, the Supreme Court considered that the Court of Appeal was therefore wrong to consider that the 1998 law could have retroactive effect and regularise the contributions made under the 1987 law, a measure which was not notified to the Commission in breach of Article 88 (3) EC.

[82] Full text available on the website of the Supreme Court at http://www.juridat.be/juris/jucf.htm, 8 April 2005.

Comments: this judgment rightly applies the principles of the ECJ's case law, in particular cases C-354/90 *Saumon - FNCE*, C-39/94 *SFEI a.o. v La Poste a.o.* and Joined cases C-261/01 and C-262/01 *Van Calster*. This case illustrates that the Belgian civil courts have not applied the Court of Arbitration's reasoning in the *Lornoy* case (mentioned in section 3.3.1 above), and are now correctly applying EC case law.

3.3.3 Supreme Court, Case no. C 96.0091.N, 19 January 2001, Belgian State against Georges Lornoy & Sons and others (parafiscal retributions)[83] (B)

Facts and legal issues: in this case, the Belgian State was pursued by veal importers before Civil courts seeking the reimbursement of the contributions they had to make to the fund for the health and safety of animals (which was set up by the 1987 law on animal health). This is the same fund referred to in the Cour of Arbitration's ruling in the *Lornoy* case and the Supreme Court's ruling in the *Voeders Velghe* judgment. However, this case does not concern the impact of the subsequent amendment of the law in 1998 which was the subject in those other cases.

In 1991, the Court of First Instance of Turnhout made a reference for a preliminary ruling to the ECJ, asking whether this measure constituted incompatible State aid. On the basis of the ECJ's response to its request for a preliminary ruling (see Case C-17/91, *Lornoy*, cited above) and the Commission's Decision of 7 May 1991 declaring that the State aid was incompatible with the Common Market, the Court of First Instance of Turnhout ordered the Belgian State to reimburse the contributions. This judgment was upheld in 1995 by the Court of Appeal.

On appeal, on points of law, the Belgian State argued that the Supreme Court should set aside the Court of Appeal's judgment on, among others, the following grounds:

- the Court of Appeal should not have considered that the entire aid regime constituted incompatible State aid in so far as the Commission decision of 7 May 1991, declaring this aid incompatible, did not require the parties to change the obligatory contributions established for national products - i.e. in the Belgian State's view only the charges imposed on imported goods should be reimbursed;

- by virtue of a Law of 21 December 1994, the 1987 law had been amended so as to bring the aid regime in line with the Commission's decision; and

- the reimbursement of the contributions could lead to an unjust enrichment of the parties involved.

Decision: the Supreme Court confirmed the Court of Appeal's ruling and rejected arguments submitted by the appellant.

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[83] Full text available on the website of the Supreme Court at http://www.juridat.be/juris/jucf.htm, 18 October 2001; *Arr. Cass.*2001, afl. 1,141.

First, by failing to notify the aid regime (and subsequent modification) to the Commission, the State violated Article 88 (3) EC. The Court of Appeal had to draw all the consequences concerning the validity of the measures in question. By virtue of Article 88 (3) EC, the sanction for not notifying the aid in question was to render it impossible for the Member State in question to apply the 1987 law.

Secondly, the Law of 19 December 1994 amending the 1987 law introduced a new aid regime which should have been notified to the Commission in accordance with its Decision of 7 May 1991. The Supreme Court noted that the Belgian State had failed to do so. The Supreme Court considered that by virtue of Article 88 (3) EC, the Commission should have been informed of each proposed aid measure that the Member State wished to introduce.

Thirdly, the Supreme Court, relying on the ECJ's judgment in the *Dilexport* case[84], considered that the national judge could indeed consider that the reimbursement of the contributions in question might constitute an unjust enrichment. However, national authorities would not require persons seeking reimbursement of such contributions to submit evidence that they had not passed on the debt to third parties.

Comments: the Supreme Court has correctly applied the principles of EC law and fully drew the consequences of the State's failure to notify a State measure in breach of Article 88 (3) EC. The parties needed ten years of legal proceedings in order to obtain a final order for the reimbursement of their contributions. It is interesting that in this case the Supreme Court did not even refer to the earlier Court of Arbitration ruling on the retroactive effect of the 1998 law.

3.3.4 Court of Appeal of Brussels, Case no. 95KR248, 4 December 1997, NV De Moor Gilbert and others against the Belgian State (contribution to fund for the health and production of animals)[85] (B)

Facts and legal issues: this case concerned a dispute between undertakings trading in pig meat, on one hand, and the Belgian State, on the other, about the legality of a compulsory contribution levied upon the slaughter or export of beef cattle, calves and pigs, for the benefit of the fund for the health and safety of animals (the "1987 law" referred to above).

In a previous action, the undertakings had sought and received an order under which the State was prohibited from cashing the contributions pending the adoption of a Commission decision. However, the Court of First Instance ordered the slaughterhouses to transfer the amounts claimed to the Deposit and Consignation Fund in order to preserve the rights of the State pending that Commission decision. The Court of First Instance also submitted three preliminary questions to the ECJ[86]. The questions submitted by the Brussels Court of First

[84] Case C-343/96 [1999] ECR I-579.
[85] Full text available at http://www.juridat.be/cgi_juris/jurn.pl.
[86] Joined Cases C-144/91 and C-145/91, Gilbert Demoor en Zonen NV and others v Belgian State [1992] ECR I-6613.

Instance were very similar to the preliminary questions submitted by the Court of First Instance of Turnhout in the *Lornoy* case referred to above[87].

In this case, the slaughterhouses requested the release of the money blocked in the special fund. In the meantime, the Commission had decided on 7 May 1991 that the aid paid with the money collected through the contributions was incompatible with the Common Market. The ECJ for its part had ruled on the preliminary questions and had pointed to the role of the national judge to uphold the rights of those affected by a possible breach by the State of the prohibition on putting aid into effect without awaiting a positive Commission decision.

Decision: the release of the blocked money was granted. On appeal, the Court of Appeal reasoned that the Belgian State had not notified the potential State aid measures and that a State could never implement State aid measures in the absence of a final positive Commission decision. Therefore, the State was not legally entitled to cash the contributions.

Comments: this case highlights the division of powers between the national judge and the Commission in State aid matters, noting the Commission's exclusive competence to assess the compatibility of aid with the Common Market and the national court's duty to draw the consequences of the failure by a State to notify an aid, in breach of Article 88 (3) EC.

3.4 Recovery actions by the State

a) Actions for recovery against beneficiaries for unlawful aid following a negative Commission Decision

3.4.1 The Ter Lembeek Case (2004)

3.4.1.1. Commercial Court of Kortrijk, Case no. 3176/02 R.K., 7 October 2003, Walloon Region v NV Ter Lembeek International, unreported (A)

Facts and legal issues: on 24 April 2002, the Commission issued a decision (Decision 2002/825) declaring that the State aid which Belgium implemented for the Beaulieu Group (Ter Lembeek International) in the form of the waiver of a debt of BEF 113,712,000 was incompatible with the Common Market. The Commission ordered Belgium to take all necessary steps to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to it.

[87] There were other cases on the same issue before lower courts - see, notably, Court of First Instance of Leper, 11 February 1994, Ministry of Agriculture v Gérard Claeys (which led to a preliminary ruling of the ECJ (Case C-114/91 [1992] ECR I-6559) in which the ECJ ruled that "[a] *parafiscal charge of the kind at issue in the main proceedings may, depending on how the revenue from it is used, constitute State aid incompatible with the common market if the conditions for the application of Article* [87] *of the Treaty are met, that being a matter for the Commission to determine in accordance with the procedure laid down for that purpose in Article* [88] *of the Treaty. In that respect, regard must also be had to the jurisdiction of the national courts where, in introducing the charge, the Member State concerned failed to comply with its obligations under Article* [88]*(3) of the Treaty, and where a Commission decision under Article 93(2) of the Treaty has found the levying of the charge as a method of financing State aid to be incompatible with the common market*".

On 22 July 2002, Ter Lembeek International brought an action before the CFI seeking the annulment of the Commission Decision (Case T-217/02, still pending).

The Walloon Region brought an action before the Commercial Court seeking the recovery of the unlawful aid.

Ter Lembeek requested the Commercial Court to suspend proceedings until after the judgment of the CFI. The Walloon Region claimed on the other hand that the decision of the Commission was binding and that actions before the ECJ have no suspensory effect.

On a subsidiary basis, the Walloon Region requested a bank guarantee. Ter Lembeek disagreed on the grounds that it was a solvent company.

Decision: the Commercial Court noted that this case concerned the division of competences between the Commission and the national judge in State aid matters. The Commercial Court noted that where it is required to make a judgment under Articles 81 and 82 EC in a matter already adjudicated by the Commission, the national judge may not take a decision which goes against the Commission decision.

The Commercial Court considered that the Commission's decision would still be respected if it suspended the proceedings until the judgment of the CFI. Indeed, according to the Commercial Court, the Walloon Region would not suffer any damage as it could claim interest on the sums owed. The Commercial Court therefore suspended proceedings until the CFI's ruling in Case T-217/02.

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 date was provided as regards the date by which this bank guarantee should be set up.

Comments: by staying the proceedings until judgment of the CFI, the Commercial Court has not given full effect to Article 88 (3) EC and the Commission's order to recover the unlawful aid. The Commercial Court's decision is clearly motivated by the fact that it would not wish to arrive at a situation where the CFI would annul the Commission's decision when Ter Lembeek had already repaid the aid.

It should be noted that Ter Lembeek appealed the judgment to make a bank guarantee available to the Court of Appeal.

3.4.1.2. Commercial Court of Kortrijk, Case 088/03, 26 February 2004, Walloon Region against Ter Lembeek International NV (interim action), unreported (A)

Facts and legal issues: this case is a follow-up to the Commercial Court's judgment in the case referred to above.

The Walloon Region pleaded that Ter Lembeek had not executed the Commercial Court's ruling to set up a bank guarantee. Indeed, the Commercial Court's ruling had not provided any time-limit by which the bank guarantee should be set up. The Walloon Region therefore requested the Commercial Court to require Ter Lembeek to execute the court's ruling in the above case by setting up a bank guarantee and order that any failure to do so would be subject to a penalty payment.

Decision: the Court dismissed the Walloon Region's action on the ground that there was no urgency involved in the application for interim measures. Indeed, in the Commercial Court's view, there was no evidence that Ter Lembeek would become insolvent prior to the CFI's judgment on the Commission decision and that the Walloon Region would therefore suffer any irreparable damage.

Comments: the impact of this ruling in combination with the Commercial Court's ruling in the case summarised above is that Ter Lembeek can avoid taking any substantial measures to reimburse the aid, as long as an action for annulment against a Commission declaring the aid incompatible is pending before the CFI.

3.4.2 Commercial Court of Mons, RG 03630/01, 21 January 2002, SRIW (Walloon Region) v Mrs BLONDIAU (curator of the bankrupt estate of Verlipack), unreported (A)

Facts and legal issues: the Belgian State granted aid to the Verlipack group in form of a capital injection to Verlipack and two loans granted to a private company in order to finance the acquisition of a majority share in Verlipack. In its Decision of 4 October 2000, the Commission declared the aid illegal and incompatible with the Common Market and ordered the Belgian State to recover the aid from Verlipack. The Commission's decision was upheld by the ECJ on 3 July 2003[88].

Since the normal term open to creditors under Belgian law to lodge 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 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 in the bankrupt estate. Consequently, the Walloon Region was registered as a creditor.

Comments: without expressly saying so, the Commercial Court accepted the Commission's decision in which recovery of the aid was ordered as an autonomous cause of action which

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

justifies 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.

3.4.3 The Idealspun case (recovery capital investment) (A)

3.4.3.1. Commercial Court of Kortrijk, Case No. 1310/90, 20 September 1994, Gimvindus and Flemish Region v Idealspun, De Clerck and others, unreported (A)

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 by not having recovered the aid[89]. On 19 February 1991, the ECJ found that Belgium had failed to comply with its 1987 judgment[90].

After these judgments of the ECJ, the Flemish Government (successor in title of 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 they 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).

Decision: the Commercial Court ruled in favour of the government. According to the Commercial Court, the contract was void since the Commission had decided that the aid was unlawful and incompatible with the Common Market, and this decision was not subject to review by the national judges.

Article 6 ECHR had not been infringed since the recipient of the aid could have intervened in the procedure before the Commission and challenged the Commission's decision before the CFI, but neglected to do so. The Commercial Court also did not accept that Idealspun had legitimate expectations regarding its entitlement to retain the aid. The Belgian Government had implemented the aid before the Commission had taken a decision. A diligent

[89] Case 5/86, Commission v Belgium [1987] ECR I-1773.
[90] Case C-375/89, Commission v Belgium [1991] ECR I-383.

businessman would have known that the Belgian State had not complied with the standstill obligation under Article 88 (3) EC.

Comments: the Court drew the right legal conclusions from the Commission's decision in which the capital participation was declared to be aid which was incompatible with the Common Market. This should indeed lead to the conclusion that the contract under which the State had subscribed to the capital increase was contrary to EC law and was therefore void *ab initio*.

The judgment drew all the consequences of the illegality under Article 88 (3) EC and applied the principles set out in the *Tubemeuse* judgment, which states that a statutory violation of EC law is deprived from any legal consideration.

3.4.3.2. Court of Appeal of Ghent, Case No. 1995/AR/55, 16 November 2000, Idealspun, De Clerck and others v Gimvindus, Flemish Region and Belgian State, unreported

Facts and legal issues: the recipient of the aid appealed against the judgment of the Kortrijk Commercial Court. The recipient argued that at the time the negative Commission decision was adopted, in light of certain developments in the case law on admissibility of direct actions on the basis of Article 230 (4) EC, it was not clear that it could have challenged the decision. The recipient also urged the Court of Appeal to refer preliminary questions to the ECJ about the validity of the Commission's decision.

Decision: the Court of Appeal confirmed the judgment in all of its aspects. According to the Court of Appeal, it was beyond doubt that the recipient undertaking, as the beneficiary of individual aid, had standing to appeal the negative Commission decision. The undertaking could not rely upon its wrong assessment of its right to appeal.

The Commission decision was final and could not be contested before the national judge. Therefore, the Court of Appeal ruled that the request for a preliminary procedure was pointless. The Court of Appeal concluded that the aid was illegal and the capital injection should be reimbursed (it should be noted that the Commercial Court of Ghent – see *Beaulieu* case below - reached the same conclusions six years beforehand by even anticipating this principle recognised by the ECJ in 1994 (see *TWD* in section 2.2 above)).

Comments: six years have passed since the Commercial Court's ruling ordering recovery of the aid and 16 years since the Commission decision ordering reimbursement of the aid.

3.4.4 The Beaulieu case (recovery capital investment) (A)

3.4.4.1. Commercial Court of Ghent, 25 February 1994, Socobesom, Flemish Region, Belgian State v Beaulieu and others, extract published in J.T.D.E. 1994, p 141

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 its decision) and incompatible 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 decision[91].

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

Decision: the Commercial Court upheld the arguments of the claimants on the same grounds as those set out in the Idealspun case described earlier. Indeed, the Commercial Court considered that only the ECJ could annul the Commission decision, and that the defendants had had the opportunity to challenge the decision before the CFI under Article 230 EC, but had failed to do so within the required time limits. The Commercial Court therefore considered it inappropriate to make a reference for a preliminary ruling before the ECJ relating to the validity of the Commission decision.

The Commercial Court further noted that the defendants could not rely upon the principle of legitimate expectations. Indeed, the claimants, before receiving State aid should, each as a "careful undertaking", have examined whether the State aid measure had been notified and approved by the Commission. Furthermore, the Commercial Court noted that, as the defendants were undoubtedly familiar with transactions containing elements of State aid and were surrounded by efficient advisors on Community law, the relevant provisions of EC law should have been sufficiently known to them.

The Commercial Court ordered the defendants to reimburse the aid, including interest to be counted from 19 December 1988 (the date on which the Commission had sent a reasoned

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

opinion to Belgium claiming that it had failed to comply with its obligations under the EC Treaty).

Comments: as mentioned above, it is remarkable that the Commercial Court reached this reasoning a few days before a landmark case of the ECJ on the question of inadmissibility of a preliminary reference under Article 234 EC when the Commission's negative decision had not been challenged[92].

3.4.4.2. Court of Appeal of Ghent, Case No. 1994/AR/1609, 5 October 2000, NV Imcopack, Beaulieu and others v NV Socobesom, Flemish Region and Belgian State (recovery capital investment), unreported

Facts and legal issues: this is NV Beaulieu's appeal against the judgment of the Commercial Tribunal of Ghent mentioned above. The arguments raised on appeal are very similar to those raised in the main proceedings.

NV Socobesom cross-appealed claiming that interest should be paid on the aid granted from 28 July 1983 to date.

Decision: the Court of Appeal dismissed the appeal on the same grounds as the Commercial Court.

The Court however did consider that interest should be paid on the sum owed from 1 January 1985 rather than from 19 December 1988.

3.4.4.3. Supreme Court, Case No. C010093N/1, NV Imcopack, 22 February 2002, Beaulieu and others v NV Socobesom, Flemish Region and Belgian State, unreported (recovery capital investment)

This is NV Beaulieu's appeal against the judgment of the Court of Appeal. The Supreme Court dismissed the appeal.

3.4.5 Supreme Court, Case No. 9152, 18 June 1992, Belgian State v NV Tubemeuse (recovery capital investment)[93] (A)

Facts and legal issues: the Belgian State granted aid to the company Tubemeuse through the form of a subscription for shares in the capital of the company. In its decision of 4 February 1987, the Commission declared the aid incompatible and ordered the Belgian State to recover the aid (which had not been notified).

Tubemeuse was subject to insolvency proceedings. The Belgian State requested that it should be registered as a creditor in order to recover the unlawful aid. The judge at first

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

93 Full text available on the website of the Supreme Court at http://www.juridat.be/juris/jucf.htm, 18 October 2001; *Arr. Cass.* 1991-92, 985.

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.

The case was appealed to the Supreme Court.

Decision: the Supreme Court stated that the EC State aid rules were public policy rules and therefore any act granting State aid contrary to these provisions would be illegal.

Accordingly, the capital injection introduced by the Belgian State in SA Tubemeuse was deprived of any legal cause and should be declared null and void. The absolute nullity of the capital injection would allow the Belgian State to recover the aid.

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 and violated EC law. In this respect, the Court of Appeal's judgment was overturned.

Comments: this exemplary decision of the Supreme Court illustrates how efficient the application of EC law can be if all of the consequences of violating Article 88 (3) EC and a Commission decision are recognised by the judge.

The Supreme Court went on to set aside the application of national law in order to ensure the full effectiveness of EC law.

b) Actions for recovery against beneficiaries for alleged illegal aid where there has been no negative Commission decision

3.4.6 Supreme Court, Case No. C.03.0409.N, 18 February 2005, Rijksdienst voor Sociale zekerheid v Champagne Holding and others (acquittal of social security debt)[94] (A)

Facts and legal issues: the *Rijksdienst voor Sociale zekerheid/ Office National Sécurité Sociale* (the "Social Security Service") challenged the restructuring and payment plan for Champagne Holding. The plan had been approved by a majority of creditors and the Commercial Court, and provided for a write-off of all debts up to 40% of the amount due.

The Social Security Service alleged *inter alia* that the partial write-off of social security debts constituted illegal State aid and, since the rules on State aid were matter of public policy, the Commercial Court had wrongly approved the restructuring and payment plan.

Decision: the Supreme Court rejected this and all other arguments. According to the Supreme Court, 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

[94] Full text available on the website of the Supreme Court at http://www.juridat.be/juris/jucf.htm.

payment plan, the write-off does not constitute illegal State aid. The loss of social security contributions for the State in such a situation does not prove the existence of a burden on the State nor of a benefit for the recipient. To support this argument the Supreme Court cited cases C-480/98, *Spain v Commission* [2000] ECR I-8717 and C-200/97, *Ecotrade* [1998] ECR I-7907.

Comments: the Supreme Court took a very narrow approach to the concept of burden on the State and benefit to the recipient of the aid. A write-off of social security debts clearly places a burden on the State treasury to the benefit of the creditor. The comparison with the write-off of debts to private creditors does not appear to be relevant in that respect.

3.4.7 Commercial Court of Liège, 16 April 2002, Office Nationale de Sécurité Sociale v L and Schroeder and Props (bankruptcy – social security debt), published in jurisprudence, de Liège, Mons et Bruxelles 2002/31 p. 1373 (A)

Facts and legal issues: Mr L was in deep financial trouble. By virtue of the Law of 17 July 1997 on Arrangements with Creditors, a plan was approved by the majority of Mr L's creditors (in terms of numbers and money owed) in order to settle Mr L's debt. The ONSS, the social security service, which was one of Mr L's creditors, was against this arrangement as it would reduce Mr L's social security contributions.

The ONSS brought an action before the Commercial Court claiming *inter alia* that the reduction of social security contributions was contrary to Article 87 EC and contrary to the ECJ's ruling of 17 June 1999 concerning Belgium's *Maribel* aid scheme[95].

Decision: the Commercial Court considered that the *Maribel* case law was not pertinent as it concerned a situation where the collecting entity granted the aid in question to one specific undertaking in a discretionary manner. In the case at hand, the 1997 law would apply to all undertakings in difficulty, and any positive measure would need to satisfy the objective conditions set out in the 1997 law.

The Commercial Court, applying a private creditor test, further noted that Mr L's private creditors voted massively in favour of the measures demanded by Mr L, thus illustrating that the private creditors were happy with that kind of measure.

3.4.8 Commercial Court Brussels, 7 July 1997, Déménagements-Manutention Transports (DMT) – summarised in ECJ ruling of 29 June 1999[96] (A)

Facts and legal issues: the Commercial Court was examining the question of whether it should, of its own motion, declare DMT insolvent. Indeed, under the national applicable rules, insolvency may be pronounced by judgment of the Commercial Court upon application by the

[95] See Case C-75/97, Belgium v Commission [1999] ECR I-3671.
[96] Case C-256/97, DMT [1999] ECR I-3913t

insolvent trader, or on the application of one or several creditors, or of its own motion. An investigation into the possible insolvency of an undertaking is initially carried out by the investigating judge who, once he has sufficient information to suggest that the undertaking may be insolvent, refers the matter to the Commercial Court. That is what happened in this case. DMT's balance sheet showed that DMT could not, with its current assets, meet current liabilities. Notably, DMT owed social security contributions to the *Office National de Sécurité Sociale* (National Social Security Office) ("the ONSS"). It is accepted that the ONSS may, at its discretion, grant periods of grace to employers and vary such periods.

Decision: the Commercial Court pointed out that the ONSS appeared to have shown "exceptional patience" towards DMT in exercising that power. It therefore took the view that, by those payment facilities, the ONSS had contributed to sustaining, artificially, the business of an insolvent undertaking which was unable to obtain funding under normal market conditions. Accordingly, the Court decided to stay the proceedings and refer the following questions to the ECJ for a preliminary ruling: "*1. Is Article* [88] *of the Treaty to be interpreted as meaning that measures in the form of payment facilities granted by a public body such as the ONSS enabling a commercial company to retain over a period of at least eight years a proportion of the sums collected from staff and to use those sums in support of its commercial activities, when that undertaking is unable to obtain funding under normal market conditions or to increase its capital, are to be considered State aid within the meaning of that article? 2. If the first question is answered in the affirmative, is Article* [87] *of the Treaty to be interpreted as meaning that such aid is compatible with the common market?*"

The ECJ ruled that the Commercial Court had, of course, no jurisdiction to refer the second question, the Commission being exclusively competent to examine the compatibility of State aid with the Common Market. On the first question, the ECJ developed the so-called "private creditor test" and ruled that "*Payment facilities in respect of social security contributions granted in a discretionary manner to an undertaking by the body responsible for collecting such contributions constitute State aid for the purposes of Article* [87]*(1) of the EC Treaty if, having regard to the size of the economic advantage so conferred, the undertaking would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation vis-à-vis that undertaking as the collecting body*" (operative part of the ruling).

Comments: this case resulted from specific powers granted to the Commercial Court in the control of insolvent companies; however, it illustrates how Article 88 (3) EC can be given full effectiveness if national courts raise, within the limits of their powers, of their own motion, the violation of public policy rules such as Article 88 (3) EC. The Commercial Court did not rule any further on the matter. The sums in question were recovered.

3.4.9 Commercial Court Brussels, 8 February 1999, Public Prosecutor v SA Taverne Falstaff (payment scheme VAT), extract published in DAOR, 1999/99 p. 49 (A)

Facts and legal issues: the public prosecutor demanded the bankruptcy of SA Taverne Falstaff. In its defence, the Taverne invoked the payment scheme granted to it by the VAT administration. This scheme allowed the Taverne to repay its debt in monthly installments over a period of seven to eight years, applying an interest rate much below the market rate. Therefore, the Taverne argued that it was not in a situation where it had lost the confidence of its creditors, which is a precondition to being declared bankrupt.

Decision: The Taverne was declared bankrupt by the Commercial Court. It held that the payment scheme constituted illegal State aid which had not been notified to the Commission, since the debt at stake concerned money received by the tax payer and distorted competition, particularly in light of the interest rate below market conditions. Therefore, the credit granted to the Taverne was void.

In support of its decision, the Commercial Court invoked the opinion of Advocate Jacobs in DMT, which set out the private investor test for the first time (see case mentioned above).

Comments: it may be doubted whether in this case the aid granted actually (or even potentially) affected trade between Member States.

3.5 Actions by the beneficiary

3.5.1 Council of State, case no. 110.759, 30 September 2002, VZW V.K.W Limburg and VZW Kamer van Handel en Nijverheid van Limburg v Flemish Regions[97] (F)

Facts and legal issues: on 26 October 2000, the Flemish Government notified to the Commission certain amendments to "directives" on soft aid for consultancy, training and studies (Flanders) which implemented inter alia the Law of 30 December 1970 concerning economic expansion and the Law of 4 August 1978 concerning economic reorientation. This aid scheme was approved by the Commission in a letter dated 12 January 2001 (aid No 712/2000) and on 14 December 2001, the Directives entered into force.

The claimants, the association of Christian employers of the Limburg Region and the Chamber of commerce of Limburg, filed actions for annulment and suspension of the measure in question.

The parties argued that their members would be negatively affected by the amendments introduced to the aid scheme.

Decision: the Council of State examined only whether it should suspend the measure in question or not. The Council of State pointed out that it can only suspend a measure if the

[97] Published on the website of the Council of State at http://raadvst-consetat.fgov.be/.

claimants concerned can show that there are serious grounds for annulling the measure and that the claimants themselves will suffer irreparable damage due to the implementation of the measure.

The Council of State considered that, where the members of associations are individually affected by a measure, those members must themselves bring an action for the suspension of the measure in question. An association cannot bring an action for suspension of a measure on behalf of third parties.

The Council of State therefore dismissed the action for suspension.

Comments: this case is interesting in so far as it shows that associations are not able to seek before the Council of State the suspension of State aid on behalf of the beneficiaries (who are members of the association in question) of the measure.

It should be noted that the action for annulment was later on withdrawn by the parties.

3.5.2 Employment Court of Tongeren (tribunal du travail), Case No. 2775/2000, 7 June 2002, Ford v Rijksdienst Sociale Zekerheid (Maribel aid scheme), unreported (A)

Facts and legal issues: in common with many other companies, Ford received aid from the Belgian State in the form of reductions of social security contributions (the so-called *Maribel-bis* and *Maribel-ter* scheme). This scheme was declared unlawful and incompatible by the Commission, which ordered the Belgian State to recover the aid (Decision 97/239 of 4 December 1996). The ECJ rejected the Belgian State's action seeking the annulment of the Commission decision (Case C-75/97 cited above). Shortly afterwards, the Belgian State and the Commission concluded a Protocol Agreement which laid down the arrangements for repayment of the illegally granted aid.

Ford repaid the amount which was due on the basis of the National Act implementing the Protocol Agreement. However, it then attempted to reclaim part of this sum, asserting that the claim of the Belgian State to this part was time-barred.

In support of this claim, Ford argued that the applicable limitation period was five years, i.e. the limitation period applicable to claims by the Social Security Service against employers regarding social security contributions. According to Ford, the starting point of this limitation period was the date on which the aid was granted since the Commission decision declaring the aid incompatible with the Common Market had retroactive effect.

Decision: the Employment Court rejected Ford’s claim. According to the Employment Court, the applicable limitation period was eight years and not five years, as claimed by Ford. The obligation to reimburse reductions of social security contributions is a specific obligation stemming from the EC State aid regime, and is not the same as the general obligation to pay

social security contributions. Moreover, the act implementing the Protocol Agreement expressly laid down a limitation period of eight years.

The Employment Court considered that as to the starting point of the limitation period, the issue was when the claim of the State became due. The Employment Court considered, citing the *FNEC* case[98], that when aid is granted in breach of Article 88 (3) EC is subject to a negative Commission decision, the transaction under which the aid granted is void *ab initio*. According to the Employment Court, this does not mean that the right to recover the aid existed from the moment the aid was granted. Citing the *Ladbroke* case[99], the Employment Court stated that it is for the Member State to determine the legal basis for recovery of the aid. Therefore, the right to recover was due only once the act implementing the Protocol Agreement had been adopted, shortly after the judgment of the ECJ which finally confirmed the obligation for the Belgian State to recover the aid.

The Employment Court upheld the retroactive effect of the act establishing a prolonged limitation period of eight years. To hold otherwise would render it impossible for the Belgian State to recover the aid. According to the Employment Court, the principle that acts should not have retroactive effect should not be followed by the legislator when exceptional circumstances exist. In this case, the Employment Court recognised that the obligations of Belgium under the law of the EC constituted exceptional circumstances in light of the supremacy of EC law. Lastly, the Employment Court confirmed the principle established by the ECJ, according to which the breach of the obligation to notify aid prevents the recipient undertakings from relying on the principle of protection of legitimate expectations, as held by the ECJ[100].

Comments: the Employment Court stretched the case law of the ECJ on the implementation of the obligation of the Member States under EC law to recover illegal aid. The ECJ has always recognised that the recovery of aid must take place in accordance with the relevant procedural provisions of national law, subject, however, to the condition that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible (see also Article 14 (3) of Regulation No 659/1999). Moreover, the illegal and void character of the aid resulted directly from Article 88 (3) EC and not from the Commission's negative decision. Therefore, the supremacy of EC law (and Regulation No 659/1999) should have been used in order to justify that the limitation period of five years could not be applied, since this would have rendered the recovery practically impossible.

In this case, the Employment Court did not find that the application of national procedural law (i.e. the five year limitation period) would render the recovery impossible. The Employment Court therefore did not justify its statement that the non-applicability of the normal limitation period was justified by the application of EC law.

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98 Case C-354/90, Fédération nationale du commerce extérieur [1991] ECR I-5505.
99 Case T-67/94, Ladbroke/Commission [1998] ECR II-1.
100 Case C-24/95, Land Rheinland Pfalz v Alcan Deutschland GmbH [1997] ECR I-1591.

3.5.3 Council of State, case no. 94.080, 16 March 2001, SA Dufrasne Métaux v the Walloon Region (action for annulment of decision to withdrawing decision granting investment aid)[101] (A)

Facts and legal issues: in 1995, investment aid was granted by the Walloon region to the company Dufrasne Métaux SA in order to purchase a specific piece of machinery.

In June 1996, the Walloon region discovered that the aid did not fall within the scope of the Community Framework of Aid to Steel Industry. On this basis it decided to withdraw the aid granted to Dufrasne, request it to refund the aid already paid out, and not provide it with final instalments of the aid.

Dufrasne brought an action seeking the annulment of this decision.

The Region considered that the action was deprived of any purpose since, if annulled, the new act could only be identical. Indeed, the sum granted to Dufrasne would constitute an unlawful aid contrary to Article 88 (3) EC. By virtue of the *Alcan* case law[102], this would require the Walloon Region to seek reimbursement of that aid.

Decision: the Council of State did not accept the argument of the Walloon Region. According to the Council of State, it was not clear whether the measure in question would be prohibited by Commission decision 3855/91/ECSC, establishing Community rules for aid to the steel industry.

Moreover, the *Alcan* case is not relevant since the present case does not concern an obligation to withdraw an aid declared incompatible by a definitive Commission decision. Indeed, in the present case there exists no Commission decision declaring the aid incompatible.

The Council of State further considered that there was no reason not to apply the case law stating that an act 'creating rights', even if irregular, cannot be withdrawn after the expiry of the time period for challenging it (60 days). On this basis, the contested decision was annulled.

Comments: the judgment contains no reference to Article 88 (3) EC, the violation of which would seem to justify a solution similar to *Alcan* (obligation to withdraw an illegal act even if not allowed under national law). Indeed, given that the measure in question did not fall within the scope of the Community Framework of Aid to Steel Industry (Walloon Region), any implementation of the aid measure in question would breach the notification requirement to the Commission under Article 88 EC.

[101] Published on the website of the Council of State at http://raadvst-consetat.fgov.be/.
[102] Case C-24/95, Land Rheinland Pfalz v Alcan Deutschland GmbH [1997] ECR I-1591.

3.5.4 Council of State, case no. 55.426, 27 September 1995, Breda Fucine Meridionali v SNCB (action for suspension of decision SNCB rejecting offer by Breda Fucine Meriodionali and allotting assignment to competitor)[103] (H)

Facts and legal issues: the claimant sought the suspension of the implementation of the decision taken by the SNCB to reject the claimant's tender and award the contract to other bidding companies.

The claimant was accused of having submitted an abnormally low bid, supported by illegal State aid granted by the Italian State. Upon the request of another bidding company, the President of the Commercial Court of Brussels ordered the claimant to withdraw its bid. The claimant challenged this judgment. Shortly afterwards, the Commission decided that the SNCB should not award the contract to the claimant since its bid was partially financed by State aid which had not been approved by the Commission. On hearing the challenge, the President of the Brussels Commercial Court confirmed its earlier judgment (procedure on opposition).

Following this judgment, the claimant notified the SNCB in writing that it had withdrawn its bid, but expressly stated that it was appealing the judgment of the President of the Brussels Commercial Court.

In the meantime, the SNCB had awarded the contract to other bidding companies.

Decision: the action for suspension was rejected because of a lack of interest on the part of the claimant in filing the action. The Council held that the claimant had withdrawn its own bid pending the judgment on appeal. Therefore, the claimant filed this action for suspension for the sole purpose of delaying the new decision to award the contract until the judgment on appeal was rendered. Since the suspension procedure cannot be used to block an executory administrative decision, the Council rejected the action.

[103] Published on the website of the Council of State at http://raadvst-consetat.fgov.be/.

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2. Executive Summary

In Denmark, cases contesting infringements of Article 88 EC are submitted to the ordinary courts. There exist no procedural or substantive provisions specifically dealing with EC State aid law. Consequently, the legal basis for any procedure concerning the direct effect of Article 88 (3) must be founded on Articles 87 and 88 EC.

A Danish court may order the repayment of illegal aid at the request of a public authority or a private party in accordance with the general rules of Danish law. Further, the courts may order the responsible public authority to pay damages to third parties, including competitors.

There seem to be no published State aid cases decided by Danish courts.

In 2000, the Danish Competition Act was amended to include regulation of State aid that has no effect on trade between Member States. This regulation contains a procedural and economic possibility for undertakings to have contested State aid investigated and tried easily, and the number of State aid cases before the competition authorities is quite comprehensive (ten per year approximately).

2.1 Member State legal system and availability of judicial relief

Under Danish law there exist no rules or regulations specifically dealing with the enforcement of EC State aid law. Thus, the ordinary Danish courts also deal with proceedings concerning EC State aid.

Proceedings may be brought before the local City Courts ("*Byretten*"), subject to appeal to the High Courts ("*Landsretten*"). However, if a case involves the examination of a public act - a decision to grant aid - or is directed at or started by a public authority, proceedings may start in the High Courts, or may be referred to the High Courts by the City Courts. Further, any civil case with an economic value exceeding DKK 1 million may be brought directly before the High Courts.

Judgments of the High Courts may be appealed to the Supreme Courts ("*Højesteret*").

The ordinary courts may grant injunctions in cases involving State aid, provided that the relevant general conditions are met. Injunctions may be granted by the Bailiff's Courts ("*Fogedretten*"), which are subdivisions of the City Courts. If an injunction is granted, confirmatory proceedings before the ordinary courts have to be initiated within eight days.

In 2000, the Danish Competition Act was amended and a special provision concerning State aid having no effect on trade between Member States was included in section 11a.

The wording of that provision is as follows:

11a(1) The Competition Council may issue orders for the termination or repayment of aid granted from the public funds, which has been granted to the benefit of specific forms of business activities.

(2) An order pursuant to subsection (1) may be issued, where the aid

i. directly or indirectly has as its object or effect the distortion of competition, and

ii. is not legitimate according to public regulation.

(3) The minister in question or the relevant Supervisory Board makes the decision regarding the legitimacy of aid granted according to public regulation, unless otherwise provided for by law. Such decisions must be made not later than four weeks after receipt of the Competition Council's inquiry. The Competition Council may prolong this deadline.

(4) An order for repayment of aid pursuant to subsection (1) may be issued to private undertakings, to private foundations and to corporate undertakings which are wholly or partly owned by the public. The Minister for Economic and Business Affairs may lay down further rules to the effect that orders for repayment of aid may also be issued to specific corporate undertakings, which are wholly or partly owned by the public.

(5) The Competition Council's powers pursuant to subsection (1) to order repayment of aid becomes statute-barred five years after payment. In accordance with the Act on Calculation of Interest, the Competition Council fixes the amount of interest accrued in connection with a repayment order pursuant to subsection (1), including rules that the interest due may be calculated from the time of payment of the distortive aid.

(6) Upon notification, the Competition Council may declare that on the basis of the facts in its possession, the public aid is not covered by subsection (2) (i) and accordingly, there are no grounds for issuing an order pursuant to subsection (1). The Council may lay down further rules on notification, including rules on the use of specific notification forms.

The concept of State aid corresponds to the concept under Article 87 EC.

In relation to section 11a(6), it should be noted that such declaration does not exclude the possibility that the Commission is competent to assess whether or not the State aid in question is covered by Articles 87 and 88 EC.

Private parties cannot directly rely upon section 11a in civil courts. However, a complaint can be made to the Competition Council and its decisions under sections 11a(1) and (6) can be

brought before the Danish Competition Appeals Tribunal. Appeals may be lodged by the party to whom the decision is addressed and by other parties who have an individual and substantial interest in the case. Such parties could be the public authority granting the State aid, the party obtaining the State aid or a competitor to such a party.

Decisions made by the Competition Council under the Competition Act cannot be brought before any other administrative authority than the Competition Appeals Tribunal and cannot be brought before the courts of law until the Appeals Tribunal has made its decision. The Competition Appeals Tribunal consists of a Chairman, who must be qualified for the position of Supreme Court Judge, and four other members, two proficient in economics and two in law. The procedure before the Appeals Tribunal is largely similar to that of a civil court.

An appeal must be lodged with the Competition Appeals Tribunal within four weeks of the decision having been communicated to the party concerned. If heavily justified, the Appeals Tribunal may disregard the fact that the time limit has been exceeded.

Decisions made by the Competition Appeals Tribunal can be brought before the ordinary courts within eight weeks of the decision having been communicated to the party concerned. If that time limit is exceeded, the decision of the Appeals Tribunal is final.

2.2 The direct effect of Article 88 (3) EC

The procedures described in section 2.4 may generally be considered available in the ordinary courts.

As mentioned above, Danish law today contains procedural and substantive provisions specifically dealing with questions relating to the granting of State aid covered by the Danish Competition Act. However, it does not contain any procedural or substantive provisions specifically dealing with EC State aid law. Consequently, the legal basis for any procedure concerning the direct effect of Article 88 (3) EC must be founded on Articles 87 and 88 EC.

It follows from general principles of law that a third party who can establish a sufficient legal interest may challenge public acts in court. This principle will apply to public acts granting State aid covered by Article 87 EC. Moreover, a decision made by the Competition Appeals Tribunal concerning State aid under section 11a of the Danish Competition Act may be challenged in court by persons with sufficient legal interest.

It is likely that a competitor would be able to establish a sufficient legal interest for it to have standing in procedures challenging the legality of an act granting State aid in breach of Articles 87 and 88 EC, if based on non-compliance with Article 88 (3) EC.

Under Danish law, a public authority may incur liability for damages caused by that authority's failure to observe obligations placed on it. It may be assumed that such liability could occur were a public authority to breach the obligation to notify State aid under Article

88 (3) EC, and a third party could establish that the decision to grant the aid damaged its interests. A claim for damages may also be based directly on the rules on Member State liability developed by the ECJ.

However, it is unlikely that the recipient of illegal aid could incur liability for damage sustained to competitors or other third parties.

The injunction procedure may be available for a third party and/or competitor in order to hinder the implementation of a decision to grant aid which contravenes the notification requirement under Article 88 (3) EC.

2.3 The enforcement of negative Commission decisions

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 ECJ's case law concerning the recovery of illegal aid.

Moreover, a third party may be able to obtain a judgment ordering repayment of illegal aid against the recipient. Further, the courts may order the public authority responsible 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.

2.4 The implementation of positive Commission decisions

Provided that a third party, which may be a competitor, has sufficient legal interest, it may invoke the procedures described in section 2.1 to challenge decisions of public authorities giving effect to aid approved by the Commission.

A competitor would have to claim that the act was illegal, arguing that the basis on which the act was founded, i.e. the Commission decision to approve the aid was not correct.

Consequently, the legal basis for challenging the legality of aid approved by the Commission would in effect be the jurisprudence of the ECJ concerning Articles 87 and 88 EC.

3. Member State cases

As at 31 March 2005, there are no published Danish court cases in which Articles 87 and/or 88 EC have been applied.

There are no published Danish court cases in which section 11a of the Competition Act has been applied.

However, after the introduction of section 11a into the Danish Competition Act, the Danish competition authorities have issued numerous decisions concerning local State aid. Section 5 of this study lists cases brought under section 11a of the Competition Act (not Articles 87 and 88 EC), categorised by topic.

4. Assessment of the existing system

To our knowledge, there exist no State aid cases decided by the Danish courts. However, since the introduction of a State aid provision to the Danish Competition Act, the Danish competition authority has dealt with a number of cases concerning State aid that does not affect trade between Member States.

In some of these cases it seems that the Danish competition authorities have dealt with State aid under the Danish regulation, even though it could be argued that the relevant State aid was capable of affecting trade between Member States. Thus, for example, in the *Horesta* case (Danish Competition Authority's decision of 24 April 2002), the Competition Authority considered a complaint concerning State aid that seemed to be above the *de minimis* level, without referring the case to the Commission.

5. Summaries of cases brought under section 11a of the Competition Act

CULTURAL ISSUES

29.09.04	Spøttrup municipality	A riding school complained that a competitor could rent facilities at a lower rent than it could itself. Held to distort competition, but legitimate according to public regulation.
28.04.04	Tangsø Sportcenter – Lemvig municipality	Tangsø Sportcenter complained that the contribution from Lemvig municipality to the establishment and operation of Lemvig swimming bath amounted to State aid. Held to distort competition, but legitimate according to public regulation.
28.01.04	Mandø-centeret	State aid given to Mandø-centeret in general and not for specific purposes. No action taken as State aid would, in the future, only be given after presentation of vouchers.
28.01.04	Bonnier Publications A/S	VAT exemption for daily newspapers and not for magazines and weekly papers was found not to distort competition.
28.08.04	Amazing Sun Varde ApS – Varde municipality	Complaint that public funds for swimming baths were used to reduce prices on solarium services that were exposed to competition. The Competition Authority recommended that the municipality separate the accounts of the solarium from those of the swimming baths.
28.08.02	Tommy Havdrup	Complaint about distortion of competition due to State aid given to some public dancing schools and not to private dancing schools. The Competition Authority advised the municipality on how to avoid distortion of competition.
28.11.01	Herning Centralbibliotek (library)	Notification to the Competition Authority of a data-providing service offered by the library to private firms. Declaration given as service did not distort competition.
31.10.01	Gyldendal's Encyclopædi	Complaint about State aid given to the on-line version of Encyclopedia. No action taken as on-line version stopped.
25.08.99	Lyngby Bio XYZ – Lyngby-Taarbæk municipality	Complaint about distortion of competition due to State aid granted to one out of two cinemas in the municipality.
25.08.99	Dansk Magasinpresses Udgiverforening	Complaint about distortion of competition due to VAT exemption for daily newspapers, which cannot be given to magazines and weekly papers.
28.04.99	Horsens Internet café I/S – Horsens municipality	Complaint about distortion of competition since the municipality, in co-operation with 2 public schools, opened two free internet cafés for young people aged between 14 and 24. Held to be legitimate according to public regulation.
25.03.98	2 private internet cafés	Complaint about distortion of competition due to a public youth club's use of free access to PCs and internet for its members.

CATERING TRADE

24.09.03	Gitte Nielsen – Grenaa municipality	Gitte Nielsen complained that the café of a cultural house received State aid. Held that the café did not receive State aid as accounts were separated from the other activities of the cultural house.
27.08.03	Stenvad Kro – Nørre Djurs municipality	Complaint about distortion of competition due to State aid granted to cafés placed in connection with sport and culture centres. Held not to distort competition as there were no competing cafés in the area and as the profit was small. Recommended that the cafés have separated accounts.
26.03.03	HORESTA – Jelling municipality	Complaint about subsidies to a public building where a catering firm was placed. Held that the aid was not used on activities exposed to competition.
29.08.01	Haderslev barracks cafeteria	Complaint about distortion of competition due to the use of the cafeteria at the barracks. Use of cafeteria for private business purposes stopped.

EDUCATION

24.11.04	Aalborg Tekniske Skole	Complaint that design students from two universities were preparing projects free of charge for business near the universities. Held not to be State aid as the Competition Authority found that the business had expenses with teaching the students and that the value of the students' work was often dubious.
28.04.04	PKV-Landtransportskolen	PKV complained that the school for transportation on land cross-subsidised courses exposed to competition with aid given to courses not exposed to competition. Held that PKV did not cross-subsidise.
26.11.03	Brancheforeningen Private Kursus Virksomheder – Skolen for luftfartsuddannelser	Complaint about cross-subsidisation from the education of air mechanics (which received aid) to the education of pilots (which received no aid). Held that some of the State aid was legitimate according to public regulation. Another part concerned education on an international market that affected trade between Member states, for which reason this part was remitted by the Competition Authority for treatment by the Commission. However, the latter decision was changed by the Competition Appeals Tribunal, stating that referral would only be necessary if it was proven that cross-subsidisation had occurred.
29.01.03	Danpep project	A private institution complained that the Danpep project distorted competition, as it received aid for the completion of surveys by private practice doctors, mapping patients' satisfaction with treatment. The survey was carried out in co-operation with the research unit at the University of Aarhus. Held to be legitimate according to public regulation
29.08.01	Brancheforeningen PKV – Sko-len for	PKV complained that an aviation school cross-subsided aid given to courses that were not exposed to competition to

	luftfartsuddannelser	courses exposed to competition. Held to be legitimate according to public regulation.
27.01.99	Institut for Musik og Kreativitet – Statens Musikråd	Complaint about the administration of aid to post-qualification training of musicians. Held that the criteria for obtaining aid were non-transparent for the applicants and based on discretion. The criteria were changed.

INFRASTRUCTURE

28.01.04	Dragør municipality	Complaint that Dragør municipality had sold a property to Copenhagen Airport at a price below the market price. After a concrete assessment of the selling price it was held that the selling price corresponded with the market price and that therefore no aid had been given to the airport.
27.02.02	DTL – Storebæltsforbindelsen	Complaint that the tariffs for using the Great Belt Bridge distorted competition between road and train traffic as the part of the bridge carrying lorries paid a relatively smaller part of the capital expenditures compared with the part that carried trains. Based on an overall assessment of the prices, the Competition Authority did not interfere.
27.02.02	The shipping line Jens Larsen	A shipping line complained that competition was distorted due to the fact that owners of vessels below 100 tons could obtain a preferential tax treatment if they also had a vessel above 100 tons. Held to be legitimate according to public regulation.
16.12.98	FDB – Andelsfægeselskabets Læsø a.m.b.a.	FDB complained that the ferry tariff was lower for carriers domiciled on Læsø than for carriers domiciled outside the island. Held to be legitimate according to public regulation.

HEALTH CARE

27.04.05	Aalborg municipality	Aalborg municipality had miscalculated its hourly price for home care which could affect private undertakings competing with the municipality. A correct recalculation showed that the mistakes counterbalanced, with the effect that the hourly price was correct and no distortion of competition had occurred.
24.11.04	A private supplier of home care services	A private supplier of home care services complained that competition was distorted by the VAT regulation that excepted public services from VAT. The Competition Authority agreed but decided not to take any action as the relevant ministries decided to change regulation.
24.11.04	Tårnby municipality	Complaint that the municipality used a specific firm as supplier of laundry services in the home care sector. Held not to be State aid as the municipality's expenses to laundry did not exceed the cost paid to the laundry service provider.
29.09.04	Aalborg municipality	The municipality based its hourly rate for home care services on its expected savings for becoming more efficient. Held to put private service providers at a disadvantage. Suggested that the municipality make a refund if the expected savings were not reached.
29.09.04	Århus county	The county paid private doctors' marketing expenses in connection with a campaign against flu which was found to distort competition vis-à-vis private immunisation clinics. The municipality was asked not to favour specific business in future campaigns.
17.12.03	Aalborg municipality	The municipality based its calculation of the hourly rate for home care services on the allocated amount of hours and not the hours spent by the municipality's employees, which was the way in which private undertakings should have calculated the rate. Moreover the rate used included wages from employees in training that private undertakings could not employ. Held that the hourly rate should be calculated according to the same principles as were used by private undertakings.
29.08.01	Sydals municipality	An owner of an inn complained that the municipality did not add VAT to its prices for delivering meals to senior citizens. Held to be legitimate according to public regulation.
26.08.98	Ballerup municipality	Experiment with free dental care to elderly in the municipality. Private dental clinics were not included in the experiment. Held that the experiment should not last for a longer period than necessary for its purpose.
17.06.98	Vejle County	A pharmacy complained that the municipality handed out drugs free of charge to patients not hospitalised. Held not to distort competition significantly.

OTHER AREAS

15.12.04	Copenhagen municipality	A private supplier to a public purchase organisation complained that Copenhagen municipality had calculated a price requirement wrongly. Held that competition was not distorted due to the fact that there were no public suppliers in the purchase organisation.
27.08.03	Gallup A/S – National Institute of Social Reach	Gallup complained that the public-owned National Institute of Social Reach used public funds to reduce the price on activities exposed to competition. Held that public funds were not used to reduce prices.
27.11.02	Copenhagen municipality	A private interpreting bureau complained that the municipality only gave private doctors a salary for the use of interpreters if they had used the bureau of the municipality. The municipality changed this practice before a formal decision was reached.
25.09.02	Næstved municipality	The municipality notified an agreement to the Competition Authority according to which the municipality would not charge a rent on a property if the tenant, being a private company, paid expenses for maintenance and operation of the property instead of paying rent. Held not to be aid.
24.04.02	HORESTA – Arbejdsmarkedets Feriefond	HORESTA, an employer association within the hotel and tourist business, complained that only funds and independent institutions could obtain aid. Held to be legitimate according to public regulation.
24.04.02	Vejr2 A/S – DMI	Vejr2 complained that DMI, which had been granted public services, was using funds allocated to the public services to reduce prices on its activities exposed to competition. Held that no cross-subsidisation occurred. DMI was recommended to keep separate accounts.

FINLAND

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2. Outline on the availability of judicial relief under the legal system (updated since the 1999 Report)

2.1 Procedures concerning the direct effect of Article 88 (3) EC

2.1.1 Procedures before administrative courts

Based on the direct effect of Article 88 (3) EC, Finnish courts have a general obligation to safeguard third parties' rights in the event of aid being granted in breach of EC law.

In the case that the aid has, for example, been left unnotified or granted and/or paid out in the absence of a Commission decision, Finnish courts may be requested to intervene in the matter, as administrative decisions that result in the granting of aid that does not comply with EC law may be found to be unlawful and, consequently, unenforceable.

Although national courts are not vested with an authority to rule on the compatibility of aid with EC law, they may be required to examine whether the aid subject to appeal should have been notified to the Commission.

Depending on the public body which made the decision on the aid, such a decision may generally be challenged pursuant to the Administrative Judicial Procedure Act (*Hallintolainkäyttölaki*, statute number 586/1996, as amended) or the Act on Municipalities (*Kuntalaki*, statute number 365/1995, as amended).

Under the Administrative Judicial Procedure Act, parties having standing to appeal include the addressees of the decision on the aid and those whose right, obligation or benefit has been directly affected by the decision on the aid, as evidenced by the appealing party in question.

In the administrative courts' jurisprudence, a third party's right to appeal has been interpreted rather narrowly. Whilst, due to scarce decision-making practice, no general guidance in relation to State aid in this respect is yet available, the existing decision-making practice on the concept of "directly affected" suggests that the right to appeal might be difficult to prove in an individual case. However, it has not yet been tested as to how, for example, the principle of effectiveness, as construed in the jurisprudence of the European Courts, would affect the interpretation of the above requirement under certain circumstances, if the right to appeal were not *de facto* provided for by the applicable Finnish legislation.

Under the Act on Municipalities, in addition to addressees and those whose right, obligation or benefit has been directly affected by the decision, certain third parties, such as residents of a municipality, have a general standing to appeal against decisions of the municipality or its organs, as stipulated in more detail therein.

The appellate court in relation to an aid decision in each matter depends on the authority who has decided on the aid in question, generally being either the Supreme Administrative

Court ("*Korkein Hallinto-oikeus*") or the competent Administrative Court ("*Hallinto-oikeus*"), whose decisions may be appealed before the Supreme Administrative Court.

Under both the Administrative Judicial Procedure Act and the Act on Municipalities, the implementation of the aid decision subject to appeal may be expressly prohibited by the appellate court pending decision on the substance of the case, if the appeal has not already suspended implementation. Such a prohibition may be made by the court of its own initiative or upon a request by the appealing party and will be considered separately, based on a case-by-case analysis.

2.1.2 Procedures before civil courts

a) Action against authority granting unlawful aid

A third party who is able to show that it has incurred damage due to an unlawful aid decision may be entitled to damages under the Act on Damages (*Vahingonkorvauslaki*, statute number 412/1974, as amended) from the authority who granted the unlawful aid. If unclear, the competent court may also be required to decide on whether the aid subject to an appeal should have been notified to the Commission.

Under the Act on Damages, an authority is liable to compensate damage incurred by a third party, should such damage have been caused by the authority through fault or neglect in the course of its public duties. This liability has, however, been limited in so far as it will be triggered only in the event that the authority has not complied with the reasonable requirements placed on it considering the quality and purpose of the authority's duty in question.

Under the Act on Damages, in addition to the above requirement, a party seeking damages would need to be able to prove that there is a causal link between the incurred damage and the authority's decision by virtue of which the unlawful aid has been granted.

Notably, it has never been tested in Finnish courts how the criteria for a Member State's liability to compensate damage, as developed by the European Courts would, in a particular case, affect the application of the above-described criteria under the Act on Damages.

An action for damages may be initiated, in the first instance, in a competent District Court, whose decision may be appealed before a competent Court of Appeal and, possibly, to the Supreme Court.

b) Action against a competitor

As the decision to pay unlawful aid has been made by an authority, it appears unlikely that a claimant could successfully seek compensation for damage from the recipient of the unlawful aid. Therefore, such compensation should, in the first place, be requested from the authority in question.

2.2 The enforcement of negative Commission decisions

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. The said Act does not include more detailed provisions dealing with the actual recovery of unlawful aid.

2.3 The enforcement of positive Commission decisions

There is no specific legislation relating to the enforcement of positive Commission decisions, but it appears that the claimant could initiate proceedings in an administrative court, as set out in section 2.1.1 above.

However, due to the existing limitations in competence of national courts to adjudicate on the compatibility of aid with EC law, it would be necessary to refer the matter to the ECJ.

3. List of cases with summaries

For the purposes of this study, we have researched publicly available databases by using relevant key words in Finnish. However, it should be noted that there are no available databases regarding decisions by first instance civil or administrative courts, and that databases regarding decisions by higher civil and administrative courts are not comprehensive. Also, we have enquired of the Finnish Ministry of Trade and Industry, as to whether, to its knowledge, there have been or are pending any cases regarding State aid.

In addition to the cases below , publicly available databases contain a few case, where either a party has unsuccessfully argued that a measure undertaken by a municipality or the State of Finland constitutes unlawful State aid, or where the court in question has ruled that it has no jurisdiction in the matter.[104]

3.1 KHO 2005:47 The Supreme Administrative Court, 1 July 2005/1657, Kokkolan Voima Oy v The State of Finland (DNo. 218/1/05)

Facts and legal issues: A local energy company disputed the national allocation plan for emission trading, as regards emission allocation granted to the claimant, and demanded an adjustment thereof.

[104] KHO 2004:101 The Supreme Administrative Court, 29 November 2004, DNo. 2642/1/03, where it was found that municipality's pre-emption right of real property is not a measure conferring State aid. Dno. 7/03/JH Market Court, 10 June 2003, Scandinavian Airlines System, Denmark-Norway-Sweden v The State of Finland / Ministry of Finance, where the Market Court ruled that it is not the competent court to examine possible State aid issues because the civil courts are competent for competition law issues.

Decision: The Supreme Administrative Court ruled that the allocation had been conducted in accordance with the existing EC and national legislation, including provisions on State aid, and dismissed the claim.

3.2 KHO 2005:46 The Supreme Administrative Court, 1 July 2005/1656, Hyvinkään Lämpövoima Oy v The State of Finland (DNo. 207/1/05)

Facts and legal issues: A local energy company disputed the national allocation plan for emission trading, as regards emission allocation granted to the claimant. The claimant argued that the allocation was not reasonable and, among other things, that the allocation de facto amounted to unlawful State aid to the claimant's competitor.

Decision: Among other things, the Supreme Administrative Court found that the Commission had reviewed the emission allocation plan concerned in the light of Articles 87 and 88 EC and had submitted that a possible State aid would likely be compatible with the Common Market, if it were assessed pursuant to Article 88 (3) EC.

Consequently, the Supreme Administrative Court ruled that the allocation had been conducted in accordance with the existing EC and national legislation, dismissed the claim, and held that the claimant's request for preliminary ruling did not meet the criteria pursuant to Article 234 EC.

3.3 DNo. S99/380 Helsinki Court of Appeal, 29 September 2000, Civil Engineer Reino Meriläinen, Merime-Kehitys Oy v The State of Finland / Ministry of Finance.

In this case, the Helsinki Court of Appeal upheld the earlier decision by the District Court of Helsinki that the alleged aid did not constitute State aid. According to the Helsinki Court of Appeal, it had not been shown by the appealing party that the aid, granted to a local golf club, would affect trade between Member States.

Therefore, the Court of Appeal did not consider the case further, but ruled that the granted aid did not meet the criteria set forth for State aid pursuant to EC law.

4. Assessment of the existing system

Whilst a conclusive assessment of the existing system is difficult due to the limited number of cases, it appears at the outset that the existing legal framework of remedies available pursuant to national legislation would, as such, be adequate. However, practical difficulties in establishing a right to appeal may result in a third party enforcing its rights primarily through the Commission rather than at a domestic level.

FRANCE

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2. Outline of the availability of judicial relief under the French legal system

Three main types of procedures should be distinguished:

- procedures whereby the claimant raises a violation of Article 88 (3) EC before the national court directly (section 2.1);
- procedures whereby the claimant seeks to enforce a negative Commission decision (section 2.2); and
- procedures whereby the claimant seeks to enforce a positive Commission decision (section 2.3).

A few particularities relating to the procedure before the administrative courts and to the application of EC law principles and EC case law by the administrative courts will be emphasised (section 2.4).

Analytical conclusions will then be drawn (section 2.5) from the State aid cases detailed in section 3 below.

2.1 Procedures concerning the direct effect of Article 88 (3) EC

2.1.1 General

In France, an infringement of Article 88 (3) EC can be contested by means of private actions both before the administrative and the civil courts.

Most actions will be brought before the administrative courts, in particular when claimants bring an action for annulment of a State decision or a State measure involving State aid (for example taxes, regulations and tenders) or an action for State liability in order to obtain damages from the State (in principle, the State can only be sued in the administrative courts).

The competent courts are the administrative courts ("*tribunaux administratifs*"), the administrative courts of appeal ("*cours administratives d'appel*") and the Council of State ("*Conseil d'Etat*"). The *Conseil d'Etat* is competent in the first and final instance for actions against decrees, actions against decisions within its exclusive competence and, also, actions against administrative decisions applicable throughout the French territory. Actions before the *Conseil d'Etat* are generally dealt with within two to three years on average. Some actions against decrees or taxes can be decided within a year. However, since the case first progresses through the lower administrative courts (just under two years for the administrative courts of appeal), the *Conseil d'Etat* may deliver its judgment, as the court of last instance, up to seven years after the facts of the case.

An action may be brought before the civil courts (including the commercial courts) in litigation between private parties, for example private law claims against a State-owned company and its subsidiaries (i.e. cross-subsidy issues)[105]. Moreover, the civil courts have exclusive jurisdiction in some specific areas, for example indirect taxes. The competent courts are the courts of first instance, ("*tribunaux d'instance*" and "*tribunaux de grande instance*"), the courts of appeal ("*cours d'appel*") and the Supreme Court ("*Cour de cassation*").

The commercial courts ("*tribunaux de commerce*") have jurisdiction in litigation between professionals acting in the course of their business and in any other litigation concerning business acts. Actions for damages brought against a competitor can be brought before the commercial courts, although, where the claimant is a non-professional, an action can also be brought before the civil courts. Judgments of the commercial courts can be appealed to the commercial division of the courts of appeal ("*cours d'appel*") and can be further appealed to the Supreme Court ("*Cour de cassation*") on points of law. An action before the *Cour de cassation* can take between one to two years to be resolved. Depending on whether there is an appeal on points of law ("*pourvoi*"), a case can take between five to six years total to be resolved (around six months before a commercial court, two years before a court of appeal and two years before the *Cour de cassation*).

Finally, opinions that address State aid issues can also be adopted by national regulatory authorities, for example the Competition Council ("*Conseil de la concurrence*") or the Energy Regulation Commission ("*Commission de régulation de l'énergie*"). In the future, the national telecommunications regulatory body, the renamed *Autorité de régulation des postes et des communications électroniques* ("ARCEP"), whose competence has recently been extended to postal matters, is also likely to adopt opinions on State aid related issues in postal and telecommunications matters.

2.1.2 Different types of actions

French administrative law distinguishes between two main types of actions. Depending on the object of the dispute, the claimant can either contest the legality of a decision of the Administration ("*contentieux de l'annulation*" or "*contentieux de l'excès de pouvoir*") or bring an action for damages for the harm caused by a decision of the Administration ("*plein contentieux*" or "*contentieux de pleine juridiction*"), whereby the Administration's decision or act can also, incidentally, be declared illegal.

For both types of actions, it is mandatory for the claimant to submit a preliminary request to the Administration ("*recours administratif préalable*") before bringing an action in the competent administrative court. This requirement, which may take the form of an

[105] See the *SFEI* (now *UFEX*) case, in which the *Tribunal des conflits* (a specific court made up of representatives of the *Conseil d'Etat* and the *Cour de cassation* competent to decide conflicts between the judicial and administrative orders of courts) ruled that the dispute in question was aimed at bringing to an end to and making good damage caused by certain commercial practices that were likely to distort competition, and that, when such a dispute does not involve activities connected with the exercise of public authorities' powers, the civil courts have jurisdiction (*Tribunal des conflits*, 19 January 1998, Case n°03084 in Recueil Lebon - see 1999 Report).

administrative action or a *recours hiérarchique*, obviously lengthens the procedure in case the Administration refuses to act, in which case the claimant would be required to challenge the decision of the Administration in court.

The first action, the "*contentieux de l'excès de pouvoir*", has the object of holding the Administration accountable and obtaining the annulment of an administrative decision. The action is subject to strict deadlines. Usually, the claimant has two months from the date of notification or publication of the decision to bring the action. In cases where a legislative or regulatory act provides for this, it will be necessary to submit a preliminary request to the Administration ("*recours administratif préalable*"). In all other cases, the claimant must bring an action before the competent administrative court within the deadlines mentioned above.

The claimant must show that it has an interest in challenging the decision ("*décision faisant grief*"). Various interests have been held to justify the bringing of an action by the claimant, including a purely financial interest. The conditions for admissibility are less strict than those of the *contentieux de pleine juridiction*.

The second action, the *contentieux de pleine juridiction*, has the object of protecting the rights of the natural or legal person subject to the Administration in the context of State liability or contracts with the State. The claimant must demonstrate that it has a personal interest in the action. This requirement is not difficult to meet when the claimant requests damages from the State.

The claimant must bring the action within a two-month deadline, running from the date of publication or notification of the contested decision. In most cases, the claimant must, within these two months, first bring a preliminary administrative action ("*recours / decision préalable*"), requesting the Administration to take a decision (for example, to withdraw a previous decision and/or to award damages). If the Administration refuses to withdraw its decision and to award damages, the claimant can challenge this refusal before the competent administrative court. This action should be brought within two months of the notification of the refusal.

If the Administration fails to respond to the claimant's request, the Administration is deemed to have adopted an implicit decision rejecting the request ("*décision implicite de rejet*") once the two-month time limit has lapsed. Thereafter, the claimant has a further two months (from the end of the first two months running from the publication or notification of the contested decision) to bring this action in the competent administrative court.

French administrative law provides for a specific regime for cases of State liability. If the claimant challenges the State's liability, it has between five and ten years (depending on the State liability regime) to bring an action, starting from the date of notification of the Administration's refusal to award damages to the claimant. It is not mandatory to submit a

preliminary request save where this is expressly required by a legislative or regulatory provision.

Concerning actions before the civil courts, the only actions to date have been actions for liability brought by competitors against the beneficiary of State aid.

Irrespective of the legal classifications mentioned above, the different actions which can be brought before a French civil or administrative court concerning State aid are presented below, according to the objective pursued by the claimant in bringing the action:

- action for annulment or contesting the legality of the act

In order to obtain the annulment of the administrative act granting aid without clearance by the Commission (whether the aid has been notified or not) or to obtain a declaration of illegality, both administrative actions mentioned above can be used, depending on the specific circumstances.

In the context of taxes, for example, decrees establishing a tax regime can be contested (within the prescribed time limit) by means of an action for misuse of powers ("*excès de pouvoir*"). However, claimants contesting an act that imposes certain tax payments on them should bring an action requesting that they should not be subject to the tax by contesting the legality of the act ("*plein contentieux*").

In this regard, the tax cases analysed below, in particular regarding the tax levied on the disposal of animal carcasses, are a good example, since, in some cases, the claimant's right to reimbursement of the illegal tax was recognised, whereas, in other cases, it was the claimant's right not to pay the illegal tax.

Regarding contracts with the State, the decision to enter into the contract can be challenged by means of an action for misuse of powers ("*excès de pouvoir*"). The annulment of such a decision can result in the nullity of the contract. Decisions relating to the execution of the contract can only be challenged by third parties (by bringing an action for misuse of powers). The parties to the contract must file an action for damages ("*plein contentieux*")[106].

- action to obtain an order to reimburse unlawful aid

From the point of view of administrative procedure, it is possible to request the Administration to adopt an order for reimbursement of public monies. These *arrêtés de débet* ("*état exécutoire*") are orders for reimbursement rendered mandatory by the Minister of Finance which are then delivered to the beneficiary of unlawful State aid, requiring it to reimburse the unlawful State aid to the relevant public authority[107]. In addition, the Judicial Officer of the

[106] The *Ryanair* cases provide an example of a contract involving State aid concluded between the State (Chamber of Commerce) and an airline.

[107] See Decree of 29 December 1962, Article 84 ("*Décret portant règlement général sur la comptabilité publique*").

Treasury ("*agent judiciaire du Trésor*") can be delegated the authority, by the Minister, to render mandatory and deliver such orders.

The competitor of a beneficiary of State aid could therefore request the Administration to adopt an *arrêté de débet*. In case of refusal by the Administration or in case of silence for over two months (implicit decision of rejection, see above), the competitor may challenge this decision before an administrative court. The administrative judge can order the Administration to act by means of an injunction.

The *arrêté de débet* is immediately enforceable ("*exécutoire par provision*"). Enforcement cannot be suspended by an action. An *arrête* cannot be contested before the civil courts.

Once the State aid has been declared unlawful by an administrative court in an action for damages ("*plein contentieux*") or by a civil court or even by a Commission decision, competitors of the beneficiary can also obtain an injunction from the administrative court requiring the Administration to order recovery of the unlawful aid ("*exécution de jugement*"). This type of request was introduced in 1995 with the purpose of ensuring that court decisions are executed by the Administration[108]. An injunction ordering the Administration to execute a judgment can be requested by the claimant before judgment is given. In the absence of a request prior to judgment, the claimant can apply for an injunction once the Administration has failed to comply with a judgment that has become definitive.

In addition to the action in the administrative courts, competitors could, at the same time, bring parallel proceedings before a commercial court, seeking an order that the beneficiary reimburses the aid to the Administration. This action would be based on unfair competition (i.e. involving the civil liability of the beneficiary for accepting illegal State aid, see the *Ufex* case and the *Ducros* case before the *Cour de cassation* discussed below). Claimants could also request the judge to order interim measures: these measures would be based on the principle of supremacy of EC law over national law, so that the judge must set aside any national legislation or regulatory act that is contrary to Article 87 EC (in case of a negative Commission decision) or Article 88 (3) EC.

- action for liability and damages from the State

To seek an award for damages from the State in an action regarding State liability, the claimant must, first, bring an administrative law action against a specific decision or request the Administration to adopt such a decision, before bringing an action in the administrative courts (rule of the "prior decision" or "*recours* / *décision préalable*").

The Administration generally has two months to react before the claimant can turn to the administrative courts. Should the Administration fail to adopt a decision ("*décision implicite de rejet*"), the deadline for the claimant to file an action with the administrative courts is five

[108] See the case before the Administrative Court of Appeal of Paris, Centre d'exportation du livre français ("CELF") of 5 October 2004 and see section 3.4 on actions by competitors below and, also, the criticism in the 1999 Report, p. 48.

years from the date of notification of the Administration's refusal (if there is one). The action before the administrative courts actually consists in requesting annulment of the administrative decision refusing to award damages or compensation.

It is important to note that the conditions for awarding damages in cases of State liability are very strict under French law. Moreover, the court will not automatically award damages, even if it finds that the State is liable[109]. Damages can be awarded only if (i) the rule breached intended to confer rights on individuals; and (ii) there is a direct causal link between the damage sustained and the breach of the relevant rule. The main liability regime is liability for fault ("*responsabilité pour faute*"), although, in specific areas, liability of the State can be triggered without proof of fault on the part of the Administration ("*responsabilité sans faute*").

The liability of the State could also be based on EC law, according to the conditions laid down in the *Francovich* case[110].

Competitors of the beneficiary of unlawful State aid, and, also, the beneficiary itself, can request damages from the State in the administrative courts, regardless of whether the Commission finally declares the aid compatible[111] or not.

The liability of the State under EC law was relied on, for the first time, in a State aid case[112] brought by a beneficiary of unlawful aid before the Administrative Court of Grenoble in 2003[113]. The claimant argued that the liability of the State for breach of EC law, namely Article 88 (3) EC, could be raised without proof of fault on the part of the State, and that it concerned all "emanations" of the State, including the legislator. It was alleged that liability arose both under principles of French liability law and those principles of EC law derived from the ECJ's *Francovich* case law. The action was dismissed for reasons relating to the condition of causation.

The Administrative Court of Clermont-Ferrand held in 2004[114] that the State can be liable under French law for failing to fulfill its obligations under EC State aid law.

In that case, the Administrative Court of Clermont-Ferrand examined for the first time whether the legislator could be held liable for violation of EC law (i.e. the enactment of a law contrary to Article 87 EC), although, following established case law of the *Conseil d'Etat* (contrary to EC law), the Administrative Court of Clermont-Ferrand refused to establish liability on the basis of the principle of supremacy of EC law over national law. Damages were not awarded because the Administrative Court of Clermont-Ferrand considered that

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109 On State liability and the award of damages for violation of secondary EC law, see M. Deguergue, "*La responsabilité en matière de police sanitaire*" on Case *Sté Gillot*, *Conseil d'Etat*, 12 May 2004, Case n°236834, in AJDA of 19 July 2004, p. 1487.

110 Joined Cases C-6/90 and C-9/90, Francovich and Bonifaci [1991] ECR I-5357, para. 35 and 41.

111 See the *Saumon* case, (i) Case C-354/90, National Federation for Foreign Trade of Food Products (Fenacomex) v France [1990] ECR I-5505, para. 14; and (ii) *Conseil d'Etat*, 2 June 1993, see 1999 Report, p. 77.

112 The 1999 Report did not report any State liability cases.

113 Administrative Court of Grenoble, Société Stéphane Kélian, 15 October 2003 (see section 3.6 on liability claims below).

114 Administrative Court of Clermont Ferrand, SA Fontanille, 23 September 2004 (see section 3.6 on liability claims below).

Article 87 EC did not confer rights on individuals (this debatable argument will be further discussed below).

The Administrative Court of Clermond-Ferrand also found the Administration liable for violation of Article 88 (3) EC. Here, the conditions for damages were fulfilled and damages were awarded to the beneficiary, although the amount of damages had to be fixed by an expert.

- action for suspension of implementation (interim measures)

Competing undertakings can request that the implementation of a decision granting unlawful State aid be suspended ("*référé-suspension*"). In theory, this type of action could be based on the principle of supremacy of EC law but that principle has never been invoked in State aid cases[115].

The *référé-suspension* was introduced into French law in 2000[116]. The judge can order suspension of a contested decision in the context of an action for annulment. Suspension can only be requested when the administrative decision granting the aid has not yet been fully implemented[117].

The conditions for this type of interim measure are (i) urgency; (ii) the establishment of a *prima facie* case; and (iii) harm to the claimant if the contested measure is put into effect. The interpretation of these criteria is generally less strict than under EC law. For example, urgency may be established on the basis of the purely financial consequences resulting from the implementation of the contested measure[118].

- action for liability and damages from the beneficiary

An action challenging the liability of the beneficiary of unlawful State aid must be brought before the civil courts. The judge must determine whether the beneficiary benefited from the aid (regardless of whether the beneficiary had full knowledge of or should have known about the unlawfulness of the aid, i.e. the violation of Article 88 (3) EC) and must ascertain the amount of damages to be awarded to the beneficiary's competitors.

The *Cour de cassation* confirmed the principle of extra-contractual liability of the beneficiary of unlawful State aid in several cases. Since, according to the ECJ, the principle cannot be

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115 For the period before 1999, see the 1999 Report, p. 47 and 48, as well as the *SFEI* case, Case C-39/94, SFEI a.o. v La Poste a.o. [1996] ECR I-3547 and p. 80 and 81 of the 1999 Report.

116 Law n°2000-597 of 30 June 2000, Official Journal of 1 July 2000, in force on 1 January 2001.

117 See various cases mentioned below, where, however, all actions were dismissed: *Conseil d'Etat*, Syndicat national de l'industrie des viandes a.o, 11 February 2004; *Conseil d'Etat*, AFORM a.o., 28 September 2001; *Conseil d'Etat*, SA Bouygues a.o., 28 July 1999.

118 On the differences between French and EC law regarding interim measures, see P. Cassia "*La contribution du juge administrative français des référés au caractère complet des voies de droit communautaire*" on the Order of the *Conseil d'Etat*, 29 October 2003, Sté Techna a.o., Cases n°260768, 261033 and 261034 in Europe, éditions du Juris-Classeur, January 2004, p. 5-11.

derived from EC law alone[119], it must be based on the principle of unfair competition, i.e. on Article 1382 of the French Civil Code (proving fault, damage and a causal link between the fault and the damage).

2.2 Procedures concerning the enforcement of negative Commission decisions

- action contesting recovery

The procedure for the recovery of unlawful State aid can be initiated by the State issuing an act for recovery ("*état exécutoire*") which can be subject to forced execution. This act can only be contested by the addressee of the act by way of an opposition action in the form of an action for misuse of powers ("*excès de pouvoir*")[120]. This action has suspensory effect.

- action in case the aid has been granted and no recovery is ordered

If, following a Commission decision, the State does not order recovery of the aid from the beneficiary, competitors could request the State to act and, in case of refusal, bring an action for annulment of this refusal before the administrative courts[121].

Competitors could also apply for interim measures in the competent civil court. Several types of interim measures could be ordered by the judge in the context of State aid: provisional recovery of unlawful aid and/or the issuance of a guarantee seem the most obvious measures. The civil judge could also order conservatory measures ("*mesures conservatoires*"), the object of which is to prevent the beneficiary of unlawful aid from proceeding with claims against third parties pending seizure of its goods ("*saisie*"). If the judgment has been delivered but is not executed, the judge can order execution or provisional execution of the judgment.

- action contesting the validity of the Commission decision

National courts have no jurisdiction under EC law to declare acts of the Community institutions void[122]. Even if the national courts consider a negative Commission decision to be illegal, the national courts cannot prevent the parties from initiating a national recovery procedure. However, as explained below, a preliminary reference concerning its validity should be made to the ECJ under Article 234 EC.

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[119] Case C-39/94, SFEI a.o. v La Poste a.o. [1996] ECR I-3547, para. 75 (see the 1999 Report, p. 80-81). The case (now renamed *UFEX* case) is still pending, at national level, before the Court of Appeal of Paris.

[120] See the *Boussac* case, Administrative Court of Paris, 16 February 1994; see the 1999 Report, p. 74. In the absence of such an act, see Commercial Court of Paris, SA Sojerca v. Jaunet, 21 January 2003.

[121] Administrative Court of Appeal, Centre d'exportation du livre français, 5 October 2004 (see section 3.4 on competitors below).

[122] Case C-314/85, Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR I-4199.

Moreover, as explained in the *SFEI* case[123], the national courts should take appropriate interim measures while awaiting judgment by the ECJ. This has not yet been put into effect by the administrative courts.

- action for damages from the State after a negative Commission decision[124]

Damages can be awarded in an action for damages, based on the illegality of an act by the Administration.

Such an action could also be based on a Commission decision. Moreover, in accordance with the *Brasserie du Pêcheur* and *Factortame* cases[125], since Article 87 EC can be considered to have the object of conferring rights on individuals, the national courts should grant relief if this rule of law is violated by a Member State, whether or not it has direct effect. This principle applies, *a fortiori*, to any breach of Article 88 (3) EC.

However, considering the ruling in the above-mentioned *Clermont-Ferrand* case regarding the liability of the legislator, it is unlikely that the French administrative judge will accept to declare the legislator liable for breach of Article 87 EC.

One of the main difficulties for the claimant is to prove the causal link between the damages and the incompatible and unlawful State aid[126].

2.3 Procedures concerning the enforcement of positive Commission decisions

Even if the Commission decided that a State aid scheme is compatible with the Common Market, claimants (whether they are competitors or beneficiaries, for which the grant of aid is subject to certain conditions) may challenge the validity of this decision before a national court by applying to the national court for a preliminary ruling from the ECJ under Article 234 EC ("*exception d'illégalité*").

The claimant's request will, however, be inadmissible if the claimants have standing but fail, within the prescribed time limit, to bring an action challenging the Commission decision directly before the CFI under Article 230 EC, where that action could have been admissible[127].

To our knowledge, there have been no such cases before the French national courts to date.

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[123] Case C-39/94, SFEI o.a. v La Poste o.a. [1996] ECR I-3547, para. 53. See p. 80 and 81 of the 1999 Report.

[124] Also see above on State liability.

[125] Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur-Factortame III [1996] ECR I-1090, para. 20: "*The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee* […]. *The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State*".

[126] See *Conseil d'Etat*, Société Pantochim SA, 31 May 2000 (see section on other tax measures below).

[127] See case C-188/92, TWD Textilwerke Deggendorf v Germany [1994] ECR I-833, para 26.

If the State aid is unlawful, a final decision of the Commission declaring the aid compatible with the Common Market does not prevent the claimants from requesting recovery of the aid from the beneficiary, at least for the period until adoption of the positive decision, once the positive decision has been issued,[128].

2.4 Some specific procedural issues regarding the role of the French administrative judge in the application of State aid rules

This section will outline a few particularities relating to the procedure before the French administrative courts and to the application of EC case law and legal principles by the French administrative courts.

2.4.1 Raising Article 87 EC or Article 88 (3) EC: prohibition of infra petita and ultra petita

In several cases, the parties based their claim on Article 87 EC (explicitly contesting the compatibility of the State aid measure with the Common Market) but their claims were rejected by the national courts which considered that Article 87 EC could not be invoked by individuals before the national courts[129]. Indeed, it is clear that the Commission has exclusive competence to assess the compatibility of a State aid measure with the Common Market under Article 87 (3) EC. However, in these cases it appears that, by implication, the judge refused to consider the parties' claims because they had not invoked Article 88 (3) EC.

The administrative judge is under the obligation to take decisions within the ambit of the parties' claims before it. On the one hand, for example, the judge cannot omit to take a decision on the reparation of certain types of harm alleged by the claimants, whereas, on the other hand, the judge cannot award damages if the parties fail to request damages in their written pleadings, or award an amount of damages that exceeds the amount of loss established in evidence by the parties.

However, this obligation is subject to the judge's interpretation of the parties' claims. The judge may interpret these claims in order to be able to take a decision in conformity with the parties' real intentions. The judge is therefore competent to reinterpret the object of a party's claim.

Depending on the facts of the case and the type of action filed, it seems that the judge could choose to interpret a claim based on Article 87 EC as meaning that the parties' real intention

[128] See the *Saumon* case, case C-354/90, National Federation for Foreign Trade of Food Products (Fenacomex) v France [1990] ECR I-5505 and *Conseil d'Etat*, 2 June 1993, see 1999 Report, p. 77.

[129] See Court of Appeal of Douai, SA HCF, 30 May 2000; Court of Appeal of Paris, Comité de développement et de promotion du textile et de l'habillement, 20 September 2001; *Conseil d'Etat*, M. Guivarch, 5 September 2001; *Conseil d'Etat*, Union Nationale des Services Publics Industriels et Commerciaux, 5 March 2003; *Conseil d'Etat*, Fédération nationale des syndicats d'agents généraux d'assurance, 28 March 2001; Court of Clermont-Ferrand, SA Fontanille, 23 September 2004 to the extent that this case concerned the liability of the legislator. In addition, please refer to many cases reported in the 1999 Report.

was to invoke Article 88 (3) EC[130]. There are very few cases where this has clearly been the case[131].

2.4.2 Raising Article 88 (3) EC of the judge's own motion: grounds of public policy ("ordre public")

Where the parties do not explicitly raise a violation of Article 88 (3) EC but claim that a State measure constitutes State aid, it is questionable whether the judge can examine the State measure under Article 88 (3) EC of its own motion.

Under French administrative law, the judge is under the obligation to raise grounds of public policy of its own motion. Most of these grounds have been determined by case law according to the importance of regulating certain types of behaviour. These public policy grounds include, for example, incompetence on the part of an administrative authority signing a decision or a contract and "misapplication of the scope of application of the law" ("*méconnaissance du champ d'application de la loi*").

As a ground of public policy, "misapplication of the scope of application of the law" covers not only legislative acts, but also administrative regulations and case law. It must be raised, for example, where the legality of an administrative decision is based on a legislative act, regulation or case law that cannot be applied to the individual or situation concerned.

The *Conseil d'Etat* is not prepared to recognise the "misapplication of the scope of application of the law" as a ground of public policy in situations where national law and EC law are incompatible.

This interpretation is contrary to the EC Treaty and the principle of supremacy of EC law. Indeed, in the *Peterbroeck* case, the ECJ held that "*the impossibility for national courts or tribunals to raise points of Community law of their own motion does not appear to be reasonably justifiable by principles such as the requirement of legal certainty or the proper conduct of procedure*".[132] Article 88 (3) EC should be regarded as a provision of public policy, which the national courts should be able to raise of their own motion. By analogy, it should be recalled that Article 81 EC has been held to constitute such a fundamental provision[133].

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[130] At least when the claimant does not explicitly rely on Article 87 (3) EC, i.e. the compatibility of the measure with the Common Market.

[131] Court of Appeal of Lyon, Ministre de l'Economie v. Gemo, 13 March 2001 where the applicants did not explicitly refer to Article 88 (3) EC but mentioned lack of notification.

[132] Case C-312/93, Peterbroeck Van Campenhout & Cie SCS v Belgian State [1995] ECR I-4599, para. 19. Para. 20 reads as follows: "*Community law precludes the application of a domestic procedural rule whose effect* […] *is to prevent the national court, seized of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law*". It should, however, be noted that the ECJ recalled in a similar case that "*Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in the application of those provisions bases his claim*", see Joined cases C-430/93 and C-431/93, Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten [1995] ECR I-4705, para. 22.

[133] Case C-126/97, Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-3055, para. 41.

In conclusion, the judge is prohibited from ruling *ultra petita*. If the parties explicitly refer to the issue of compatibility of the State aid, the judge should dismiss the action. However, the judge is under an obligation to reinterpret the parties' claims. For example, where the parties simply claim that there is a State aid issue, the judge could reinterpret this as referring to both the existence of the State aid and the question of its notification. Moreover, the judge is required to raise public policy grounds of its own motion. In the opinion of the authors, this would include a violation of Article 88 (3) EC by the French State (i.e. the legislator or the Administration).

2.5 Summary conclusions drawn from the cases below

The cases analysed in section 3 below cover the period from June 1999 to June 2005 and are divided into several categories. Hereafter follow some conclusions that can be drawn from each category.

2.5.1 Cases relating to the 1996 tax levied on the disposal of animal carcasses

The section on taxes contains the highest number of cases and was also the biggest section in the 1999 Report. It seems that claimants are well aware that the State aid argument is particularly relevant to contesting the payment of certain taxes and contributions.

Following a comparison of nine cases concerning the tax levied on the disposal of animal carcasses, the following conclusions can be drawn:

- first, knowledge by the competent administrative court of most recent Commission decisions and court cases[134] was uneven, although, in this case, the interpretation at EC level had not yet been settled at the time;

- secondly, several forms of judicial relief were used by the claimants regarding this tax: action for annulment, summary proceedings requesting suspension of the act and successful applications for a preliminary ruling from the ECJ, which shows that, in general, claimants are using various legal means of action at their disposal; and

- finally, some judgments conclude that the tax paid should be reimbursed, whereas other judgments conclude that the claimant has the right to refuse to pay the tax. The judgments differ as to the conclusions to be drawn from the unlawfulness of the tax on the basis of the different factual scenarios raised in each case. However, the main difficulty stems from the type of action filed by the claimant. In an action for *excès de pouvoir*, the judge cannot grant damages, which is possible in an action for *plein contentieux*. This is an important particularity of French administrative law.

[134] See the differences in interpretation between the Melun Court and the Dijon, Lille or Lyon Courts.

2.5.2 Cases relating to other taxes

Different tax measures were contested before both the administrative and the civil courts. Two judgments, which specifically refer to negative Commission decisions, show what measures need to be taken in accordance with these Commission decisions declaring the taxes incompatible with the Common Market[135].

These cases raise the issue of claimants basing their action on Article 87 EC or Article 88 EC. Two administrative judgments[136] dismissed the actions brought before them by arguing that the claimants referred to Article 87 EC, "*which does not create individual rights which may be invoked by individuals in national courts*". This analysis seems to be based on the reasoning that it is only when examining whether Article 88 (3) EC has been violated that the national judge can examine whether a measure constitutes State aid under Article 87 EC, before examining whether the aid has been notified to the Commission. Accordingly, if a claimant invokes Article 87 EC instead of Article 88 EC, some national courts consider that the action should be dismissed, without further interpreting the claimant's claims.

Although it is true that Article 87 EC does not have direct effect as far as Article 87 (3) EC is concerned (giving the Commission exclusive jurisdiction to examine the compatibility of State aid with the Common Market)[137], it could be argued that Article 87 (1) EC has as its object the protection of individual interests, as well as of general interests, at least to the extent that Article 87 (1) EC can be read in combination with Article 88 (3) EC. Claimants should therefore be able to refer to Article 87 EC and, based on the supremacy of EC law, obtain a ruling from their national courts examining whether Article 88 (3) EC has not been violated in that respect[138].

In civil cases, the *Cour de cassation* comes to different conclusions as to the burden of proof, which is on the claimant with regard to notification (only new State aid has to be notified). Whereas, in one case, the claimants were required to bring evidence of the absence of notification, in another case, the judgment of a court of first instance was quashed because that court did not examine whether the aid had been notified. There are therefore uncertainties regarding evidence before the civil courts.

Finally, the *Pantochim* case addresses the question of the award of damages from the State for having repealed an act, which the Commission declared contrary to Article 87 EC (i.e. incompatible State aid). Since the conditions for awarding damages are interpreted strictly, in particular with regard to causation, it is crucial for claimants to choose the right action among

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135 See the *CINH* and the *Pantochim* cases.

136 See the *SA HCF* and the *Textile* cases.

137 In the *Capolongo* case, the ECJ ruled that "*for the purposes of interpretation, the first paragraph of Article* [87] *cannot be regarded in isolation, but must be considered within the framework of the scheme of Article* [87] *to* [89]", para. 5 of Case C-77/72, Capolongo v Maya [1973] ECR 611. It can be inferred from this case and from the *Steinicke* case mentioned below that, if Article 87 is invoked before a national court, the judge should examine whether Article 88 (3) has been complied with (see above).

138 Case C-78/76, Steinike & Weinlig v Germany [1977] ECR 595, para. 14. See, for example, the *Gemo* ruling of the Administrative Court of Lyon (see section 3.7.1), where, although the claimants had only raised Article 87 EC, the Court did not dismiss their action, but requested a preliminary ruling from the ECJ.

those available. In this case, the claimant chose to request the competent minister to repeal the act and award damages, whereas the claimant would have stood a better chance if it had filed an action for State liability regarding the grant of the aid.

2.5.3 Cases relating to State measures other than taxes per se

Only seven orders or decrees were challenged before the administrative courts. In each case, the *Conseil d'Etat* found that there was no violation of Article 88 (3) EC. In order to reach this conclusion, it interpreted the concepts of transfer of public resources, existing State aid and resulting advantage in such a way that there was no (new) State aid. These decisions could have been more thoroughly explained, as the justification for the finding that there was no State aid was merely implied.

2.5.4 Cases brought by competitors

Competitors have brought eleven actions concerning State aid before the administrative and civil courts since the 1999 Report. They were successful to some extent in three cases only. In the two *Ryanair* cases, the claimants obtained a declaration from the court that the measures constituted illegal State aid, but did not obtain an order for recovery of the aid, due to certain provisions of French administrative procedure. In the third case regarding the *Centre d'exportation du livre français* ("CELF"), recovery of the State aid was ordered, but the claimants did not obtain damages. In the *SFEI/UFEX* case, the Court of Appeal of Paris stayed the proceedings to await judgment in these State aid cases from the ECJ and the CFI[139].

In the remaining cases, the courts interpreted the notion of "advantage" and the obligation to notify and ruled on the absence of aid in a tender procedure. Commission decisions have been relied on in four cases.

2.5.5 Recovery cases

There have been four main recovery cases before the national courts and recovery was refused in only one case on procedural grounds. In two cases, the courts (including an independent regulatory authority) examined from whom the aid should be recovered.

On the basis of an analysis of the French legal system, it seems that recovery is carried out through administrative channels and is an issue very rarely brought before the national courts (see Part II of this study).

2.5.6 Liability claims

Two actions concerning State liability were brought before the administrative courts (see above). They both concerned the "Borotra plan", the State aid scheme set up in 1996 in

[139] Case T-613/97 RV, Ufex and Others v Commission [2000] ECR 11-4055.

favour of the textile and shoe industry. One action was dismissed because the applicant failed to prove the causal link between the damage and the violation of Article 88 (3) EC. The question of State liability, especially the legislator's liability, is problematic in France, since the administrative courts are reluctant to apply the principle of supremacy of EC law.

Three actions concerning the liability of the beneficiary were brought before the civil courts. It is interesting to note that the beneficiary's liability can be established on Article 1382 of the French Civil Code (extra-contractual liability).

In one case, the *Cour de cassation* held that the beneficiary could, in principle, have been held liable under national law for not having verified whether the State aid had been notified to the Commission. The *Cour de cassation* quoted the ECJ stating that the beneficiary could not be held liable, under EC law, for not having verified whether the State had fulfilled its procedural obligations.

In another case, the national court held that the mere fact that the aid granted enabled the beneficiary to make a lower offer in a bid could trigger liability under civil law (a very similar case occurred before the Belgian courts - see the 1995 *Breda* case). The third case was dismissed because of lack of evidence. However, the principle concerning the liability of the co-contractor who benefits from State aid that has not been notified was not contested.

2.5.7 Preliminary rulings

The French courts have prompted some notable judgments, for example in the *Baxter* and the *Ferring* cases. The answer to the question referred to the ECJ on the burden of proof on claimants regarding the evaluation of public service costs will also be very interesting[140] in terms of, first, the impact it may have on French procedural law, and, secondly, in terms of the ECJ's reaction when faced with the conditions which the ECJ itself set for determining whether undertakings entrusted with public service obligations benefit from State aid (the *Altmark* criteria).

2.6 Conclusions

Under EC law, the judiciary is responsible for ensuring direct, immediate and effective protection of individuals and could be held liable for not doing so. In particular, the national courts must apply EC law and, of their own motion, do all that is necessary to remove national measures that are contrary to EC law, whether they are of a legislative, administrative or judicial nature, including relevant judicial rules of procedure.

The most interesting cases are those dealing with liability (that of the State or the beneficiary) and damages (awarded to competitors or to the beneficiary). The main conclusion to be

[140] See *Cour de cassation*, Laboratoires Boiron, 14 December 2004, Case C-526/04, OF (2005) C 69/11, pending before the ECJ.

drawn is that there are still a few obstacles in applying EC State aid rules, in particular as interpreted by the ECJ. These various difficulties are:

- there are legal obstacles, especially in terms of procedural rules (the burden of proof and the difficulty of establishing the existence of State aid), which impinge upon (i) the protection of individuals against the grant of unlawful State aid; and (ii) the award of damages to competitors of the beneficiary. We would, for example, recommend raising potential claimants' awareness of the formulation of their claims as well as judges' awareness of their obligations under EC law and of whether they should raise grounds of their own motion or give full effect to the principle of supremacy of EC law over national law;

- the choice of the type of procedure to be commenced before the administrative courts is of primary importance for the award of damages, given the particular nature of French administrative procedure;

- there are obstacles of a more "psychological" nature, considering the reluctance, which is historical, of the French administrative courts to apply EC law principles and to use all means at their disposal, as determined by EC case law; this is quite obvious in respect of their reluctance to hold the legislator liable for breach of both Articles 87 and 88 EC, for instance, for having adopted a law granting illegal State; however, the cases above indicate that, overall, there is no reluctance to apply the EC State aid rules in general.

In comparison with the 1999 Report, there has been a steady increase in the number of cases and, also, of interesting cases, where the national courts, especially courts of first instance, applied the relevant State aid rules correctly. It is noteworthy that the 1999 Report only reported one action by competitors (the *SFEI* case), whereas, in this study, there are over a dozen cases brought by competitors against the State or against the beneficiary, three of which were successful. State liability cases (brought by beneficiaries!) also constitute a new development in the enforcement of State aid cases in France.

2.7 Research methodology (search covering the period from June 1999 to June 2005)

2.7.1 Sources:

- CD-ROM Le Doctrinal since 1993: this database comprises all articles published in about 200 French legal journals and a few journals in English;

- LexisNexis: internet website offering a database similar to that of Le Doctrinal (about 10 journals since 1990);

- LexisNexis: complete database comprising decisions of courts of first instance and of courts of appeal;

- Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a.: French language database comprising decisions of national administrative courts applying EC law :

  - http://193.191.217.21/fr/jurisprudence/jurisprudence_fr.lasso , or

  - http://www.raadvst-consetat.be/Juradmin/home.html (website of the Belgian *Conseil d'Etat*); and

- Lamyline Reflex: internet website offering an exhaustive database comprising case law of the *Cour de cassation* (since 1959) and of the *Conseil d'Etat* (since 1960).

2.7.2 French key words used to research cases:

- (aide* d'état*) and (Article 92 [87] EC) or (Article 93 [88] EC) or

- (régime* d'aide*) and (Article 92 [87] EC) or (Article 93 [88] EC) or

- (mesure* d'aide*) and (Article 92 [87] EC) or (Article 93 [88] EC).

2.7.3 Abbreviations used:

- BOCCRF: *Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes* (Report of the opinions of the Competition Council);

- Bull. civ.: *Bulletin civil* (Report of the judgments of the *Cour de cassation*);

- Lebon: Report of the judgments of the *Conseil d'Etat*;

- RJF: *Revue de jurisprudence fiscale (Editions Francis Lefebvre)*;

- RFDadm: *Revue française de droit administratif*;

- AJDA: *Actualité juridique droit administratif*.

3. Case list with summaries[141]

The section below contains a brief description of and a commentary on the State aid cases that have been brought before French courts since the 1999 Report. These cases have been classified under the following main headings and have been further sub-divided between actions before the administrative courts and actions before the civil courts:

[141] The authors thank Eric Paroche for his research and contribution to the drafting of this section. They are also grateful to Stéphane Laget for his useful assistance in compiling State aid decisions before French courts.

(i) control of the legality of State acts, for example taxes and other administrative measures;

(ii) actions by competitors;

(iii) recovery cases;

(iv) liability claims; and

(v) requests for preliminary rulings.

For ease of reference, the references of cases mentioned in the 1999 Report have also been inserted under the appropriate headings.

Finally, each case has been categorised in the tables included at the end of this report. The letters after each case refer to the classification in these tables.

3.1 Control of legality of State acts: tax levied on disposal of animal carcasses

In 1996, the French government set up a system for the free collection and disposal of animal carcasses and slaughterhouse waste for stockbreeders and slaughterhouses. This system was financed by a tax payable by any person active in the retail sale of meat at the distribution level. The question whether this tax constituted State aid was finally answered by the ECJ in the *Gemo* case[142].

a) Administrative courts

3.1.1 Administrative Court of Melun, Société Picard Surgelés, 11 March 1999, Case n°97-3181, 97-3182 and 98-1392, Revue de jurisprudence fiscale 1999, n°944 (B)

Facts and legal issues: Picard, the first distributor of frozen products in France, contested the legality of the tax, arguing, *inter alia*, that it was part of an unlawful State aid scheme. It argued, in particular, that the carcass disposal service relieved French stockbreeders of a burden which their competitors had to bear in other Member States.

Decision: the Administrative Court of Melun rejected the claim and considered that the system in place did not constitute State aid.

First, it considered that the public carcass disposal service could not be regarded as an aid for carcass disposal companies as the remuneration received by these carcass disposal companies was full compensation for the service rendered.

Secondly, the Administrative Court of Melun stated that this system did not represent aid for stockbreeders and did not bring about a significant restriction of competition, in particular

[142] Case C-126/01, Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA [2003] ECR I-13769.

because the carcass disposal service had always been free for French stockbreeders. In any case, the Administrative Court of Melun considered that the claimant should have indicated what proportion of the total cost of meat production represented carcass disposal costs and how these costs were borne by competitors in other Member States.

Comments: the Administrative Court of Melun applied the approach of the Commission at the time (see the *FFSA* decision of 8 February 1995[143]), according to which no State aid is found to exist when the State measure offsets additional charges imposed by the State for public service reasons. However, the Court of First Instance had already annulled the Commission decision in 1997[144] holding that, even though there was no overcompensation for the cost of discharging the public service, the measure constituted State aid that could be exempted under Article 86 (2) EC. The Administrative Court of Melun did not therefore comply with the then applicable case law.

Moreover, it is difficult to follow the Administrative Court of Melun's reasoning, specifically the Melun Court's finding that the fact that the meat producers have always benefited from a free carcass disposal service explained why the service did not distort competition, in particular with regard to operators importing meat products from other Member States.

3.1.2 Administrative Court of Caen, Société Uniservice Distribution and Société Honfleur Distribution, 2 December 1999, Cases n° 98-1460 and n° 99-526 (B)

Facts and legal issues: the claimant contested the legality of the tax, arguing *inter alia* that it was part of an unlawful State aid scheme.

Decision: the Caen Court stated that the scheme financed by this tax was not State aid. The Caen Court justified its decision by the fact that the tax paid to the undertakings in charge of carcass removal was full compensation for the service rendered.

The Caen Court also considered that the measure did not constitute aid for stockbreeders since carcass removal cannot be considered to be a burden only on stockbreeders. Stockbreeders in other countries also benefited from this service, as well as milk producers and other animal owners. Since this service was always free of charge for French stockbreeders, the tax could not restrict competition.

Moreover, the claimant did not provide sufficient detail on the effect of the cost of carcass removal on meat prices and the cost borne by the competitors of French stockbreeders.

Comment: the Caen Court confirmed the decision of the Administrative Court of Melun in its decision *Société Picard Surgelés*.

[143] OJ (1995) C 262/11.
[144] Case T-106/95, FFSA v Commission [1997] ECR II-229.

3.1.3 Administrative Court of Dijon, SA Nevers Viandes, 25 May 2000, Case n°99-1071, Revue de jurisprudence fiscale 2001, n°119 (B)

Facts and legal issues: the claimant contested the legality of the tax in question, as well as that of another tax financing the processing of bones. It argued that these taxes were incompatible with Articles 90, 87 and 88 EC.

Decision: first, the Administrative Court of Dijon considered the tax to be incompatible with Article 90 EC relating to discriminatory internal taxation.

Secondly, the Dijon Court stated that, without public financing, stockbreeders and slaughterhouses would have to pay for carcass disposal and processing of bones. According to the Dijon Court, the political and economic circumstances relating to the establishment of the public carcass disposal and bone processing services, their general nature and aims demonstrated that they constituted advantages for stockbreeders and slaughterhouses. The Dijon Court considered that such advantages corresponded to a State aid scheme and that trade between Member States was "necessarily" affected.

The Administrative Court of Dijon observed that the French government had established a service of general economic interest which could benefit from the exemption laid down in Article 86 (2) EC. However, it considered that the potential application of Article 86 (2) EC did not exempt the State from the notification requirement.

The Dijon Court noted that the Commission had not been notified of the provisions establishing either tax. Because of this breach of Article 88 (3) EC, these provisions were declared illegal and the Administrative Court of Dijon allowed the claimant's right to be reimbursed of both taxes.

In its judgment, the Administrative Court of Dijon explicitly mentioned that it was useless to refer the case to the ECJ for a preliminary ruling.

Comments: the Administrative Court of Dijon applied EC State aid rules strictly, as interpreted by the CFI in the *FFSA* and *SIC* cases, regarding the link between Article 86 (2) EC and services of general economic interest[145]. This is one of the few cases where an administrative court actually ordered restitution of the contested tax.

3.1.4 Conseil d'Etat, Confédération française de la boucherie, boucherie-charcuterie, traiteurs, 28 July 2000, Case n°206594, Lebon report of cases, Tables, p. 979 (B)

Facts and legal issues: the Ministry of the Economy, Finance and Industry published an administrative notice ("*instruction*") merely mentioning the provisions of the law. The legality of this notice was challenged.

[145] Case T-46/97, SIC v Commission [2000] ECR II-2125.

Decision: according to established case law, the *Conseil d'Etat* considered that this notice did not create new legal rights or obligations in comparison with the provisions of the relevant legislation and therefore could not be contested. The fact that the provisions of the relevant legislation mentioned in the notice could be contrary to EC State aid rules was considered irrelevant.

Comments: the *Conseil d'Etat* did not rule on the State aid issue, since the *Conseil d'Etat* considered that the notice in question could not be the subject of an action for misuse of powers ("*excès de pouvoir*"). This case is therefore of limited interest.

3.1.5 Administrative Court of Orléans, SA Sobledis, 8 August 2000, Case n° 98-2311 (B)

Facts: the claimant contested the legality of the tax, arguing, *inter alia*, that it was part of an unlawful State aid scheme.

Decision: the Administrative Court of Orléans stated that the scheme financed by this tax did not consititute State aid. The Orléans Court justified its decision by the fact that the tax financed a public service created in the interest of public health and the protection of the environment (and not in the interest of stockbreeders). Since the stockbreeders never paid this tax, the new tax could not have the effect of exempting the meat producers from a cost they would normally have to bear. The French authorities therefore were under no obligation to notify the tax to the Commission.

Comment: the Administrative Cour of Orléans confirmed the ruling of the Administrative Court of Caen in its decisions *Société Uniservice Distribution* and *Société Honfleur Distribution*. It did not examine whether the measure constituted State aid but focused on the notion of general economic interest and the fact that, before the introduction of the tax, the stockbreeders did not pay for the carcass removal service.

3.1.6 Administrative Court of Lille, SA Lianoudis, 21 December 2000, Case n°9803864, Lebon report of cases, Tables, p. 979 (B)

Facts and legal issue: The claimant contested the legality of the tax.

Decision: the Administrative Court of Lille stated that stockbreeders were the quasi-exclusive beneficiaries of the services financed by the tax. The Lille Court considered that the system constituted State aid, even though it related to a public service obligation and was already offered for free to farmers before the introduction of the tax.

The Lille Court upheld the claimant's right to refuse to pay a tax financing a State aid measure that had not been notified to the Commission, as provided for by Article 88 EC.

Comments: The Administrative Court of Lille came to the same conclusion as the Administrative Court of Dijon. It is not clear from the judgment (although EC law principles

would imply it) whether the right to refuse to pay the tax also results in the reimbursement of any tax unduly paid by the claimant until judgment.

3.1.7 Administrative Court of Appeal of Lyon, Ministre de l'Economie, des Finances et de l'Industrie v SA Gemo, 15 January 2004, Case n°00LY02270; Conseil d'Etat, 15 July 2004, Case n°264494, not published (B)

Facts and legal issues: Gemo, a medium-sized supermarket, contested the legality of the tax.

In 2000, the Administrative Court of Lyon ordered the reimbursement of the tax to Gemo. The Minister of the Economy, Finance and Industry appealed this decision and the Administrative Court of Appeal of Lyon decided to refer the case to the ECJ for a preliminary ruling (see section 3.7 of this study). In a judgment of 20 November 2003[146], the ECJ declared that the system constituted a State aid scheme.

Decision of the Court of Appeal of Lyon: the Administrative Court of Appeal of Lyon noted that the State aid scheme had not been notified to the Commission and therefore concluded that the tax provisions were unlawful. It upheld Gemo's right to be reimbursed for the tax it had paid.

The Minister argued that the State could not reimburse a tax, the burden of which had been passed onto consumers and the reimbursement of which would result in undue enrichment ("*enrichissement sans cause*") of the company.

The Lyon Court rejected this argument since the Minister had not demonstrated (i) that the tax did not have a negative impact on the relevant sector; and (ii) that, even if the burden of the tax had been passed onto consumers, its reimbursement would constitute undue enrichment of the company.

The Lyon Court applied the ECJ's case law both on State aid and on the reimbursement of illegal taxes strictly.

Decision of the *Conseil d'Etat*: the appeal (appeal on points of law, "*pourvoi en cassation*") brought by the Minister of the Economy, Finance and Industry focused on the concept of undue enrichment.

The *Conseil d'Etat* considered that, in the case of a tax refund, the burden of proving undue enrichment lies on the Tax Administration. However, it only requested the Administration to satisfy the standard of proof, which was "a sufficiently high level of likelihood".

Finally, the *Conseil d'Etat* upheld the Lyon Court's analysis. Even if the tax amount was passed onto consumers, it necessarily resulted in undue enrichment. Moreover, the national

[146] Case C-126/01, Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA [2003] ECR I-13769.

courts should have assessed the negative effects of the tax on the taxpayer's economic situation.

The *Conseil d'Etat* rejected the appeal.

3.1.8 Conseil d'Etat, Syndicat national de l'industrie des viandes et autres, 11 February 2004, Case n°264346, not published in the Lebon report of cases (B)

Facts and legal issues: professional associations for the agricultural sector filed a claim, in summary proceedings, for the suspension ("*référé-suspension*") of a ministerial order ("*arrêté*") setting out different methods for implementing the tax. They argued, *inter alia*, that the ministerial order was part of a new State aid scheme and that the notification requirement under Article 88 (3) EC had not been fulfilled.

Decision: the *Conseil d'Etat* dismissed the claim because the conditions for summary proceedings, in particular the criterion relating to urgency, were not met. The *Conseil d'Etat* did not rule on procedural issue of State aid.

3.1.9 Conseil d'Etat, Société Doux, 23 March 2005, Case's n°269059 and n° 269060, not published (B)

Facts and legal issues: the claimant requested the *Conseil d'Etat* to annul an order ("*arrêté*") of the Ministry of the Economy, which laid down the method of calculation and rates of slaughter tax, allocated to the financing of the elimination of animal waste and by-products.

The claimant argued that the contested order was made in violation of Article 87 EC and of a Council Regulation on the grounds that the rate fixed by this decision would pass onto the poultry sector part of the financing of the cost incurred by the public carcass disposal service.

Decision: the *Conseil d'Etat* noted that, in order to comply with the *Gemo* judgment of 20 November 2003 adopted by the ECJ, the General Tax Code established a slaughter tax to be paid by companies responsible for the slaughter of animals. The rates for each type of animal fixed by the decision were calculated by dividing the cost of this service between the stockbreeding sectors, depending on the volume of animal carcasses. The *Conseil d'Etat* stated that the claimant had not submitted evidence to show that the volume of poultry carcasses had been overestimated when calculating the rates.

The *Conseil d'Etat* also referred to the ECJ's case to conclude that the tax did not have the effect of distorting competition, nor affected trade between Member States, nor even had an influence on market prices because the tax represented an inherent cost of the economic activities carried out by stockbreeders and slaughter houses. The *Conseil d'Etat* therefore dismissed the action.

Comment: in this case, the *Conseil d'Etat* did not reject the claimant's action, although the action was based on Article 87 EC only. The *Conseil d'Etat* directly referred to the judgment of the ECJ to justify its finding that there was no State aid in this case.

b) Civil courts

No cases.

3.2 Control of legality of acts: other taxes

a) Administrative Courts

3.2.1 Conseil d'Etat, Union des industries chimiques and others, 5 October 1998, Case n°162562, Rec. Tables, p. 798-805-890 (B)

Facts and legal issues: the claimant requested the *Conseil d'Etat* to annul a decree ("*décret*") relating to the creation of a special tax on basic oils in favour of the Agency for the Environment and the Management of Energy ("*Agence de l'environnement et de la maîtrise de l'énergie*"). It argued that the decree should have been notified to the Commission.

Decision: the *Conseil d'Etat* noted that the special tax on basic oils was instituted with a view to promoting the collection, treatment and elimination of used oils and that part of the tax income would be allocated to aid schemes for companies collecting used oils and be used as investment aid for companies that collect, treat and eliminate used oils. It stated that this aid corresponded to indemnities provided for in the EC directives relating to the elimination of used oils.

The *Conseil d'Etat* noted that in its decision of 7 February 1985, but rather consideration for the services performed by the collection or disposal undertakings the ECJ had ruled that such indemnities "*do not constitute aid* […]."[147]

Therefore, the *Conseil d'Etat* rejected the argument based on a breach of Article 88 (3) EC.

Comment: the *Conseil d'Etat* referred to an ECJ case without having to further interpret the notion of State aid.

3.2.2 Conseil d'Etat, Comité national interprofessionnel de l'horticulture florale et ornementale et des pépinières ("CNIH"), 6 November 1998, Cases n°171574 and n° 171576 (Revue de jurisprudence fiscale 1999, p. 70), (Gazette du Palais, 1999

[147] Case 240/83**,** Procureur de la République v Association de défense des brûleurs d'huiles usagées ("ADBHU") [1985] ECR 531, para. 18.

II Panor, p. 92) Case n° 178322; Conseil d'Etat, CNIH, 2 December 1998, Cases n°171648 et seq. p. [148], Europe, February 1999, n° 84, p. 23, not published (B)

Facts and legal issues: horticulturists contested the legality of a tax that was payable to the National Interprofessional Committee for Horticulture. The Administrative Court of Appeal of Paris ruled that the tax was illegal because it breached Article 90 EC relating to discriminatory internal taxation. The National Interprofessional Committee filed an appeal on points of law ("*pourvoi en cassation*") before the *Conseil d'Etat*.

Decision: the *Conseil d'Etat* quashed the Paris Court's judgment for misapplication of Article 90 EC. However, instead of referring the case back to a lower court, it considered the other arguments that had been raised which considered the tax from a State aid point of view.

It noted that the tax financed different forms of aid and that, in 1990, the Commission had ruled that the State aid scheme was incompatible with the Common Market and had refused its renewal.

The Paris Court also observed that the regulations establishing the scheme had not been notified to the Commission and were therefore unlawful. The Paris Court upheld the claimant's right not to pay the contributions.

Comments: the *Conseil d'Etat* directly referred to a Commission decision on the relevant taxes and drew the necessary conclusions from the direct effect of Article 88 (3) EC.

3.2.3 Administrative Court of Appeal of Paris, Comité national interprofessionnel de l'horticulture florale et ornementale et des pépinières ("CNIH"), 30 December 1998, Case n°96PA03013; Administrative Court of Appeal of Paris, CNIH, 1 April 1999, Case n°96PA01659; Administrative Court of Appeal of Paris, CNIH, 1 April 1999, Case n°96PA03012 (B)

Facts and legal issues: horticulturists contested the legality of a tax paid to the National Interprofessional Committee for Horticulture. The Administrative Court of Appeal of Paris declared the tax illegal because of its incompatibility with Article 90 EC. The Committee appealed.

Decision: the Administrative Court of Appeal of Paris considered that the Administrative Court had committed an error of law by basing its decision on incompatibility with Article 90 EC, without considering whether the contributions contested by the horticulturists had been established on the basis of purchases relating to products of other Member States.

[148] According to the legal review *Europe* (February 1999, p. 23), there would be a total of 280 cases dealing with horticulturists and CNIH, all based on the same reasoning.

The Administrative Court of Appeal of Paris noted that the tax financed works that related to research, experiments and market knowledge, as well as actions related to professional training, dissemination of knowledge and promotion of products, and constituted a State aid measure. It noted that the measures financed by the CNIH were put into practice without the draft decrees having first been notified to the Commission. Accordingly, it held that the tax paid in 1984, 1986 and 1988 was illegal.

The Administrative Court of Appeal of Paris also noted that the Commission had granted the French authorities a deadline in which to abolish the State aid. This decision of 14 December 1990 had been notified to the French authorities on 7 February 1991. The Paris Court held that the decree of 9 January 1991, which provided for the collection of the tax in 1991, breached Article 88 (3) EC. It stated that the claimant was therefore justified in refusing to pay these contributions from 1 January to 7 February 1991.

Comment: the Paris Court changed the position taken in previous cases and followed the interpretation of the *Conseil d'Etat* in respect of this tax and the notification requirements in its judgment of 6 November 1998.

3.2.4 Administrative Court of Appeal of Lyon, SA Editions Glénat, 28 April 1999, Case n°96-214; Conseil d'Etat, SA Editions Glénat, 23 November 2001, Case n°209974, Rec., p. 566-568 (B)

Facts and legal issues: publishers paid a publishing tax to the National Centre for the Humanities ("*Centre national des lettres*") that promotes literature and the distribution of books. The publisher Glénat contested the legality of the tax. The Administrative Court of Grenoble rejected the claim but the Administrative Court of Appeal of Lyon considered that the tax constituted part of a State aid scheme established in breach of the notification requirement, and therefore allowed the claim for non-payment of the tax. The Minister of the Economy, Finance and Industry filed an appeal on points of law before the *Conseil d'Etat*.

Decision: the *Conseil d'Etat* quashed the Lyon Court's decision because the Lyon Court had failed to establish whether the tax affected trade between Member States.

The *Conseil d'Etat* held that the financial aid granted by the National Centre for the Humanities, a public undertaking, to writers, translators, libraries, non-profit organisations or events promoting literature and books had no effect on competition between publishers. It also observed that, where financial aid was granted to publish books or literary reviews, their topics were so specific and their readership so restricted that they could not be considered to be in competition with books published in other Member States. The *Conseil d'Etat* concluded that this financial aid could not be considered as affecting trade between Member States and therefore did not fulfil one of the conditions for State aid.

Comments: although the *Conseil d'Etat* was justified in quashing the Lyon Court's decision for not having examined all qualifying conditions for State aid, its interpretation of effect on

trade between Member States seems to be much more restrictive than the interpretation of the ECJ, the CFI and the Commission. The latter bodies have a broader perception of the notions of distortion of competition and effect on trade between Member States in the area of State aid.

3.2.5 Conseil d'Etat, Syndicat de la presse périodique culturelle et scientifique et autres, 29 September 1999, Cases n°186227 and n° 186356, Rec. Tables p. 680-689-930; Conseil d'Etat, Publishing company Documentation Organique, 29 September 1999, Case n°194317 (B)

Facts and legal issues: French regulations provided for specific postal rates for the distribution of newspapers. These specific postal rates were inserted in a decree ("*décret*") of 1997, which amended the Post and Telecommunications Code. The legality of the decree was contested for breach of the notification requirement under Article 88 (3) EC.

The publishing company requested the *Conseil d'Etat* to annul a decision whereby the Joint Commissions for Publications and Press Agencies refused to grant the benefit of the specific postal rates to the publishing company on the basis of misuse of powers. Its argument was based, *inter alia*, on the incompatibility of the provisions of the Post and Telecommunications Code, as amended by the 1997 decree, with EC State aid rules.

Decision: the *Conseil d'Etat* considered that the scheme constituted existing State aid because the decree of 1997, which simply summarised the postal rates applicable to the distribution of newspapers, did not question the principle of granting State aid to the press sector and did not amend the conditions for granting that aid. Therefore, the decree could not be considered to amount to a modification of the State aid scheme, did not constitute new State aid and was not subject to the notification requirement.

Comment: the *Conseil d'Etat* interpreted the notion of existing State aid, but did not verify whether the existing State aid at issue had been notified in the past.

3.2.6 Administrative Court of Appeal of Douai, SA HCF, 30 May 2000, Case n°96-1653, RJF, November 2000, Case n°1373 (B)

Facts and legal issues: the claimant contested the legality of a tax financing the Coordination Committee of Mechanical Research Centres ("*Comité de coordination des centres de recherches en mécanique*"), arguing, *inter alia*, that the tax breached Article 87 EC.

The Administrative Court of Amiens rejected the claim and the claimant appealed.

Decision: the Administrative Court of Appeal of Douai held that Article 87 EC did not create individual rights which may be invoked by individuals before the national administrative courts.

Comments: the finding of the Douai Court that Article 87 EC does not have direct effect was correct to the extent that it related to Article 87 (3) EC, but not concerning Article 87 (1) EC in connection with Article 88 (3) EC. The Douai Court seemed to rely on the fact that the claimant had not expressly referred to Article 88 EC, thus voluntarily omitting to assess whether the procedural rules laid down by Article 88 EC had been complied with, which may be invoked by individuals in national courts.

3.2.7 Conseil d'Etat, Société Pantochim SA, 31 May 2000, Cases n°192006 and n°196303, Revue de jurisprudence fiscale 2000 p. 729-730 (B)

Facts and legal issues: certain provisions of the Finance Act of 1992 ("*loi de finances*") provided for an exemption of the tax on the consumption of certain petroleum products. In 1996, the Commission considered the scheme to be incompatible with the Common Market and requested the French government to abolish the scheme by 29 March 1997 at the latest.

On 9 June 1997, an undertaking requested the Minister of Agriculture to repeal the ministerial order ("*arrêté*") adopted in order to apply the unlawful provisions of the Finance Act of 1992 ("the Act"). The Minister refused, stating that the order would be modified by new legislation at the end of the year. The undertaking filed an action for annulment of the Minister's refusal to repeal the order and requested damages.

Decision: according to the *Conseil d'Etat*, since the ministerial order was unlawful because it was based on the illegal Act the Minister had misused its powers when refusing to repeal the order. However, the *Conseil d'Etat* rejected the claimant's claim for damages for alleged losses resulting from the impossibility of marketing certain products. The *Conseil d'Etat* considered that the loss suffered by the undertaking actually resulted from the fact that it had not benefited from the tax break and had therefore not been able to lower its market prices. The *Conseil d'Etat* concluded that there was no direct causal link between the loss suffered and the Minister's failure to repeal the unlawful order.

Comments: the *Conseil d'Etat* applied the principle of supremacy of Commission decisions over national law. However, the condition of a causal link between the loss suffered by the undertaking and the Minister's misuse of powers when refusing to repeal the act was interpreted strictly by the *Conseil d'Etat*. Since the claimant did not itself benefit from the tax break, the action was aimed at eliminating this advantage for competitors. In this context, the *Conseil d'Etat* held that there was no causal link between the loss suffered by being at a disadvantage compared to competitors and the refusal of the Minister to repeal the Act (and to eliminate the benefits to competitors). It seems that the undertaking would have stood a better chance if it had filed an action for State liability (since the State had introduced an incompatible State aid scheme) or a civil action against its competitors.

3.2.8 Court of Appeal of Caen, Société Etablissements Friedrich c/ ANIVIT (Association Nationale Interprofessionnelle des Vins de Table et des Vins de Pays de France), 21 November 2000, Case n° RG 99/00877 (B)

Facts : the National Professional Association of French Wines ("*Association nationale interprofessionnelle des vins de table et des vins de pays de France*" or "ANVIT"), created by the French public authorities, promoted table wines and French wines. ANVIT's only financial resource was a single contribution, voted on by the board of directors and rendered obligatory by decree.

This contribution was notified to the Commission as State aid in 1983 and was found to be compatible with Article 87 EC in 1984. However, in 1993, the Commission published a Commission recommendation declaring the aid incompatible because of its financing.

From October 1991, ANVIT, refused to pay its contributions, since its budget had grown significantly and was essentially used to promote exports, whereas it mainly sold its wine in France, arguing that these contributions constituted new aid,.

Decision: the appellant relied on Article 88 (3) EC to argue that the regime had changed and that it must be renotified to the Commission. Without a notification, this new State aid would be illegal.

The Court of Appeal of Caen rejected the appellant's argument, holding that the regime had not changed significantly since the last notification to the Commission in 1984. The regime was not new State aid but constituted an adjustment to developing economic and legal circumstances.

Although the Commission had informed France in 1993 that it considered the aid to be incompatible because of its financing, the Court of Appeal of Caen rejected the appellant's argument relating to the modification of the aid on the grounds that the basis for the contribution ("*assiette*") had not changed since 1983, as opposed to the use made of the contribution.

Considering that the Commission recommendation did not apply to contributions paid from 1991 to 1993, the Court of Appeal of Caen found that the appellant was unable to rely on the Commission recommendation. The appellant therefore had to pay its contributions.

Comment: see *Société des Etablissements Friedrich* case by the *Cour de cassation*[149].

[149] *Cour de Cassation*, Société des Etablishements Friedrich, 26 January 1999, Case n° 289, Petition n° 97-11225, Bull, Civ, VI, n° 22, p.18; see section 3.2.13.

3.2.9 Administrative Court of Appeal of Paris, Comité de développement et de promotion du textile et de l'habillement, 20 September 2001, Case n°98PA01610, not published (B)

Facts and legal issues: two textile companies filed a claim for the reimbursement of excess tax paid to the Committee for the Development and Promotion of Textiles and Clothing ("*Comité de développement et de promotion du textile et de l'habillement*"). They argued, *inter alia*, that the tax constituted State aid granted to the textile sector in violation of Article 87 EC.

Decision: the Administrative Court of Appeal of Paris ruled that Article 87 EC did not create rights which could be invoked by individuals in the national courts.

3.2.10 Conseil d'Etat, Syndicat national de l'industrie pharmaceutique et autres, 3 December 2001, Cases n°226514, n°226526, n°226548, n°226553, n°226554, n°226555, n°226556, n°226557, n°226558, n°226569, n°225670 and n°226571, not yet published in the Lebon report of cases (B)

Facts and legal issues: an association representing the pharmaceutical industry and pharmaceutical companies brought an action for annulment of a decree ("*décret*") that imposed a new tax on pharmaceutical companies, replacing an older tax, which had been ruled contrary to the EC Treaty and, therefore, reimbursed to the companies that had paid the illegal tax. The parties argued, *inter alia*, that certain pharmaceutical companies benefited from a financial gain equal to the difference between the amount of money reimbursed and the amount of the new tax, which constituted State aid. They claimed that the decree should have been subject to the notification requirement.

Decision: the *Conseil d'Etat* found that the gain corresponding to the difference between the amount of money reimbursed and the amount of the new tax could not have the consequence that the new tax constituted State aid in favour of certain companies and the decree was not, therefore, subject to the notification requirement.

Comments: the *Conseil d'Etat* did not explain its reasoning in detail in this matter, although it seems clear that the gain, benefiting certain undertakings as a result of these two tax regulations, is not derived from any particular public act in favour of specific undertakings.

b) Civil courts

3.2.11 Cour de cassation, Société Huttepain, 16 June 1998, Case n°1277, Petition n°96-19.109; Cour de cassation, Société Marcel Braud, 20 October 1998, Case n°1652, Petition n°96-18.682; Cour de cassation, Société Sanders, 20 October 1998, Case n°1651, Petition n°96-18.682, not published (B)

Facts and legal issues: several companies brought actions against the Regional Directorate of Customs and Indirect Duties of Nantes to obtain the reimbursement of a special tax for cereal storage during the 1986-1987 and 1987-1988 campaigns. They argued, *inter alia*, that the tax was used as illegal State aid. The Civil Courts of Mans and Nantes dismissed their actions because the claimants did not submit evidence of a Commission decision to that effect and because the Civil Courts of Mans and Nantes were not competent to declare the aid incompatible. The claimants appealed on points of law ("*pourvoi en cassation*") to the *Cour de cassation*.

Decision: the *Cour de cassation* quashed the judgments of Courts of First Instance since the Civil Courts of Mans and Nantes should have examined whether the French authorities had notified the State measure in question. However, the *Cour de cassation* found that the appellants had not demonstrated in their submissions that the storage tax collected during the 1986 to 1987 and 1987 to 1988 campaigns constituted new State aid compared to the tax which had been collected since 1953. The *Cour de cassation* held that the appellants had not justified the application of Article 88 (3) EC and rejected their claims.

Comment: the Courts of First Instance did not correctly apply EC State aid rules. The appellants must submit evidence justifying the application of Article 88 (3) EC.

3.2.12 Cour de cassation, Société Guyomarch Vertou, 20 October 1998, Case n°1649, Revue de jurisprudence fiscale 1999 n°282, p. 173-174 (B)

Facts and legal issues: the applicant contested the legality of a tax on the stocking of cereals, paid in 1986, 1987 and 1988, arguing its incompatibility with different EC rules, including EC State aid rules.

The Court of Appeal rejected the claim and the applicant lodged an appeal to the *Cour de cassation* on points of law. The appellant argued, in its submission, that (i) national courts should protect the rights of individuals where Member States violated the notification requirement and the standstill obligation; (ii) an individual could invoke a breach of Article 88 (3) EC even if the Commission had not initiated a formal investigation procedure; (iii) national courts should assess whether the contested measure constituted new or modified State aid that was, therefore, subject to the notification requirement.

Decision: the *Cour de cassation* noted that the tax levied on the stocking of cereals was established in 1953. The *Cour de cassation* stated that the appellant had not explained why the tax paid in 1986, 1987 and 1988 would constitute new State aid.

Therefore, the *Cour de cassation* considered that the applicant had not justified the application of Article 88 (3) EC and rejected the claim.

Comments: according to French civil law proceedings, the burden of proof lies on the appellant. The *Cour de cassation* considered that the same principle should apply to State aid rules. The appellant should have demonstrated that the tax constituted new State aid in order to establish the breach of Article 88 (3) EC.

3.2.13 Cour de cassation, Société des Etablissements Friedrich, 26 January 1999, Case n°289, Petition n°97-11.225, Bull. civ. , IV, n°22, p. 18 (B)

Facts and legal issues: according to a legislative act of 1975 and certain ministerial orders ("*arrêtés ministériels*"), wine producers and traders had to pay contributions to the National Professional Association of French Wines ("*Association nationale interprofessionelle des vins de table et des vins de pays de France*" or "ANIVIT"). A company refused to pay its contributions, arguing that the contribution was part of a State aid scheme established in breach of the notification requirement.

The Civil Court of Appeal of Rennes rejected this argument because (i) the scheme corresponded to an existing State aid, even if it had been established after 1957; and (ii) the Commission itself, when requesting the French government to modify the tax, referred to Article 88 (1) EC - related to existing aid - in a letter to the French authorities about this scheme.

The appellants argued that the Court of Appeal of Rennes had violated Article 88 (3) EC by concluding from the Commission's letter to the French authorities that the aid was existing State aid. The appellants also argued that, even if the aid had originally been notified, it had been modified and should therefore have been notified again.

Decision: the *Cour de cassation* mentioned the ECJ case law on the notion of existing State aid, quoting the 1994 *Namur-Les assurances du crédit* case, as well as on the direct effect of Article 88(3), quoting the Lorenz case of 1973. It concluded that the Civil Court of Appeal of Rennes had erred in law. Since the scheme was established in 1983, the Court should have verified whether the scheme had been notified to the Commission.

Comments: the *Cour de cassation* applied EC State aid rules strictly by referring to the relevant ECJ case law. The case was referred back to another Court of Appeal. It is interesting to read this case in conjunction with the *Guyomarch* case above, where the *Cour de cassation* found that the appellant had to submit evidence of the absence of notification of the aid to the Commission.

3.2.14 Cour de cassation, Mr Le Guen, 23 October 2001, Case n°1812, Petition n°00-10.631; Cour de cassation, Mr Guyomarch, 23 October 2001, Case n°1813, Petition n°00-10.632, not published (B)

Facts and legal issues: the Commercial Court of Morlaix ruled that the claimants, horticulturists, had to pay their contributions to the Professional Horticulture Association ("ANIHORT") according to a law implemented by several ministerial orders ("*arrêtés interministériels*"). The Commercial Court of Morlaix considered that the claimants had not proven that these taxes had anti-competitive effects.

Decision: the *Cour de cassation* quashed the judgments of the Court of First Instance for breach of Article 88 EC because the judge had not examined the claimant's argument that taxes amounted to State aid and that the ministerial orders should have been subject to the notification requirement. Whereas in the first case, the Morlaix Court held that Mr Le Guen had not proven that the tax distorted competition, the Morlaix Court did not address the State aid question at all in the case concerning Mr Guyomarch.

Comments: according to the ruling of the *Cour de cassation* in these cases, a civil court is obliged to properly assess the parties' argument relating to the existence of a State aid measure. It is interesting that, whereas in the first case (Mr Le Guen) this obligation is based on Article 88 (3) EC itself, the *Cour de cassation* based it on Article 455 of the Code of Civil Procedure (on the legal reasoning of judgments) in the second case (Mr Guyomarch).

3.2.15 Cour de cassation, Entreprise Michel Dewailly, 30 May 2002, Case n°1911, Petition n°00-20.526, not published (B)

Facts and legal issues: a Social Security Court rejected the claim of a company that refused to pay a social contribution. The company lodged an appeal, arguing that the Court of First Instance had not examined whether this social contribution had been notified to the Commission.

Decision: the *Cour de cassation* considered this State aid procedural issue to be a new ground of appeal, mixing facts and law, which could not be invoked in a *pourvoi en cassation* since the argument had not been pleaded before.

3.3 Control of legality of acts: other alleged State aid measures

a) Administrative courts

3.3.1 Conseil d'Etat, URSSAF de la Haute-Garonne, 17 November 2000, Case n°185772, Droit matériel de l'Union européenne, Paris, Montchrestien, Coll. Précis Domat, 2ème éd. 2001, para. 25, p. 455 et para. 97, p. 476 (D)

Facts and legal issues: a Social Security Centre requested the *Conseil d'Etat* to annul a decree amending the national status of staff of the electric and gas industries and fixing the contribution basis under the general social security regime.

The amendment provided that the contributions owed to the general social security regime for services relating to social insurances and work-related accidents were based on the remunerations paid to active agents reduced by bonuses and indemnities. This provision derogated from the Social Security Code, according to which all sums paid to workers had to be considered as remuneration and must, therefore served as a basis for the calculation of social contributions.

Decision: according to the *Conseil d'Etat*, even if this derogation constitutes a State aid measure, an analogous provision had already been inserted in the interministerial order of 1960. Therefore, the *Conseil d'Etat* considered that the contested provision had not been introduced or modified by the contested decree and held that the French government, by failing to notify this decree to the Commission prior to its adoption, had not violated Article 88 (3) EC.

Comment: the *Conseil d'Etat* interpreted the notion of existing aid, without verifying whether the existing aid had been notified in the past.

3.3.2 Conseil d'Etat, M. Guiavarch, 5 September 2001, Case n°225473, not yet published in the Lebon report of cases (B)

Facts and legal issues: an individual brought an action for annulment of a decree ("*décret*") fixing the conditions according to which public universities and public research centers were entitled to provide services to private undertakings, arguing, *inter alia*, that the decree was contrary to Article 87 EC.

Decision: the *Conseil d'Etat* assessed whether the law authorising public universities and public research centers to provide services ("the Law") was compatible with the EC Treaty. It considered that Articles 81, 82 and 87 EC did not prevent a public entity from providing services on a market. It noted that public entities, when providing commercial services, are subject to the same tax rules as private undertakings and stated that, if public entities and private undertakings were sometimes subject to different regulations (for example, with regard to labour and social regulations), these differences neither have "as their object nor effect" to put public entities in a more favourable position than private undertakings, by allowing them to distort competition. The *Conseil d'Etat* concluded that the Law was compatible with the EC Treaty and that the decree adopted in application of this law was also valid.

Finally, the *Conseil d'Etat* considered that Article 87 EC did not create individual rights which may be invoked by individuals in the national courts.

Comments: see the comment above about claimants referring to Article 87 EC instead of Article 88 EC.

3.3.3 Conseil d'Etat, AFORM & others, 28 September 2001, Case n°238423, not published (D/H)

Facts and legal issues: a professional association and certain companies commenced summary proceedings for the suspension of a tender for digital channels by the Higher Audiovisual Council ("*Conseil supérieur de l'audiovisuel")*, arguing that the tender conditions included State aid elements and were subject to the notification requirement.

Decision: the *Conseil d'Etat* held that the decision to organise a tender cannot be challenged because it is only a preparatory measure.

3.3.4 Conseil d'Etat, Union Nationale des Services Publics Industriels et Commerciaux, 5 March 2003, Case n°233372, not yet published in the Lebon report of cases (H)

Facts and legal issues: a professional association filed an action for annulment of certain provisions of the Code for Public Works Contracts, arguing, *inter alia*, their incompatibility with EC State aid rules.

Decision: the *Conseil d'Etat* rejected the State aid argument because the claimant invoked Article 87 EC, which does not have direct effect.

Comments: see the comment above about claimants referring to Article 87 EC instead of Article 88 EC.

3.3.5 Conseil d'Etat, Union des industries utilisatrices d'énergie ("UNIDEN"), 21 May 2003, Case n°237466, not yet published in the Lebon report of cases (B)

Facts and legal issues: a professional association filed an action for annulment of a ministerial order ("*arrêté*") which imposed an obligation on electricity distributors to buy electricity produced by wind turbines at a higher price than the prevailing market price. The professional association argued, *inter alia*, that the order was subject to the notification requirement under Article 88 (3) EC.

Decision: quoting the *ratio decidendi* of the *Preussen Electra* case[150], the *Conseil d'Etat* pointed to the absence of State resources in the present case, and therefore of State aid.

[150] Case C-379/98, PreussenElektra AG v Scheswag AG [2001] ECR I-2099.

Comments: the *Conseil d'Etat* strictly applied established ECJ case law.

3.3.6 Conseil d'Etat, Syndicat national de l'industrie des technologies médicales, 16 January 2004, Case n°250540, not published in the Lebon report of cases (B)

Facts and legal issues: the Ministry of Health put in place a system for the reimbursement of health costs by encouraging hospitals to negotiate the cost of hospital equipment with equipment manufacturers. A professional association filed an action for annulment of the decision taken by the Minister of Health not to withdraw the order implementing this reimbursement system, arguing, *inter alia*, that this system was equivalent to State aid for hospitals and was subject to the notification requirement.

Decision: the *Conseil d'Etat* considered that this system encouraged price negotiation under normal market conditions, was financially advantageous for the social security system and did not grant an economic advantage to hospitals within the meaning of Article 87 EC. The order was therefore not subject to the notification requirement.

Comments: the *Conseil d'Etat* could have analysed each condition of State aid in more detail, in particular with regard to the nature of the activities carried out by the relevant hospitals (economic activity or not, public service obligations or not) and in respect of the advantages resulting from the system.

3.3.7 Conseil d'Etat, Syndicat des industries de matériels audiovisuels électroniques, 6 February 2004, Case n°250560, not published in the Lebon report of cases (B)

Facts and legal issues: companies which put into circulation on the French market a recording device that is used for the reproduction, for private use, of phonograms or videos must pay royalties for copyright. A professional association filed a claim for annulment of an administrative decision that provided for the payment of royalties for recording devices integrated into electronic products, whereas it exempted certain IT products.

The professional association argued that the administrative decision granted State aid to the computer industry, as the payment of royalties did not apply to recording devices integrated into certain types of computers and was therefore subject to the notification requirement.

Decision: according to the *Conseil d'Etat*, the system did not create a tax but had been created to remunerate the undertakings representing the relevant copyright owners. The fact that the decision did not provide for the payment of royalties for recording devices integrated into certain types of computers did not mean that, thereby, this system of royalties fulfilled the requirements of State aid for the computer industry and the decision was therefore not subject to the notification requirement.

Comments: the *Conseil d'Etat* did not expressly state that there could not be State aid in the absence of State resources.

b) Civil courts

No cases.

3.4 Actions by competitors

a) Administrative courts

3.4.1 Conseil d'Etat, Chambre syndicale nationale des entreprises de sécurité and others, 29 July 1998, Case n°156019, not published (E)

Facts and legal issues: certain companies and a professional association brought two actions before the *Conseil d'Etat*. One action concerned the annulment of a decision of the Ministry of Posts and Telecommunications to enter into a contract with Securipost for the transport of funds. The other action concerned a claim for damages from the State for loss caused by the decision and the grant of State aid to Securipost.

Decision: the *Conseil d'Etat* noted that, according to the law, the relationship between La Poste, France Telecom and their users, suppliers and third parties was governed by private law and that the resulting disputes should be brought before the civil courts. Therefore, the *Conseil d'Etat* held that an action for damages was beyond its jurisdiction.

However, in respect of the decision to enter into the contract, the *Conseil d'Etat* held that the conditions of tendering had not been respected and that the decision to enter into the contract should therefore be annulled.

Comment: the *Conseil d'Etat* did not have the opportunity to rule on State aid issues[151].

3.4.2 Conseil d'Etat, Société Générale & others, 18 December 1998, Case n°197175, AJDA, 1999, p. 285 (H)

Facts and legal issues: the State sold, through a tender procedure, its majority holding in a financial company ("*Crédit Industriel et Commercial*") to a subsidiary of that company ("*Banque Federative du Crédit Mutuel*"). Competitors filed a claim for annulment of the procedure, arguing, *inter alia*, that there were elements of State aid and that the tender procedure was subject to the notification requirement.

Decision: the *Conseil d'Etat* considered that the sale by the State of its majority holding in a company through a tender procedure could not constitute State aid. Therefore, the decision to sell was not subject to the notification requirement.

[151] See the Commission decision of 20 July 1999 (OJ (1999) L 274/37) concluding that there was no State aid element to the relationship between Securipost and La Poste (after both *Sytraval* cases before the CFI (see Case T-95/98) and the ECJ (see Case C-367/98 P) annulling the Commission's first decision of 31 December 1993 for violation of the rights of the complainants).

Comment: the *Conseil d'Etat* considered it irrelevant that the purchaser was a subsidiary of Crédit Mutuel which was the exclusive distributor of a savings product ("*Livret bleu*") and that the Commission had initiated a formal investigation into this issue[152].

3.4.3 Conseil d'Etat, SA Bouygues & others, 28 July 1999, Case n°206749, BJDCP, n°7, 1999, pp. 620-627 (H)

Facts and legal issues: Bouygues and other building companies commenced summary proceedings for the suspension of a tender procedure. The claimants contested the conclusion of a new concession contract between the State and Cofiroute in respect of the construction and operation of the last stretch of a circular highway around Paris. Cofiroute had already built and now operated the other stretches of the highway. The claimants argued, *inter alia*, that Cofiroute benefited from an undue financial advantage, contrary to Article 87 EC.

The Administrative Court of Paris rejected the claim on the grounds that the *Conseil d'Etat* had already, in a previous judgment, annulled certain provisions of an amendment to another concession contract between the State and Cofiroute. The amendment provided for a 15-year extension of the concession and the *Conseil d'Etat* considered that, for certain stretches of the highway, this extension constituted an undue financial advantage granted by the State to Cofiroute.

Decision: The *Conseil d'Etat* stated that the Court of First Instance should have focused on the contested, new concession contract, and, for its judgment, should not have taken into account a ruling assessing a different concession contract.

The *Conseil d'Etat* considered that the appellants could not raise, in their action against the conclusion of a new concession contract, the fact that the execution of another concession contract - the amendment concerning other stretches - gave a financial advantage to Cofiroute contrary to EC State aid rules. The *Conseil d'Etat* therefore quashed the judgment of the Court of First Instance on the grounds of an error of law in the legal reasoning but also rejected the action due to an inadmissible argument.

Comment: the *Conseil d'Etat* did not analyse whether Cofiroute had benefited from an advantage by being awarded the contract.

3.4.4 Conseil d'Etat, Fédération Nationale des syndicats d'agents généraux d'assurance, 28 March 2001, Case n°155896, D., 2002, Juris., p. 630 (B)

Facts and legal issues: the National Federation of Insurance Agents requested the Minister of the Economy to abolish the distribution on the part of the Tax Administration, of certain insurance products recommended by a private insurer ("*Caisse nationale de prévoyance*").

[152] Investigation concluded by a decision of 15 January 2002 that was annulled by the CFI in January 2005 (Case T-93/02).

The Minister rejected the request. The Federation appealed the Minister's decision, arguing, *inter alia*, its incompatibility with EC State aid rules.

Decision: first, the *Conseil d'Etat* mentioned, again, that Article 87 EC did not create individual rights which may be invoked by individuals in the national courts.

Secondly, the Minister's decision stated that compliance with competition law was a condition for the distribution of these insurance products by the Tax Administration, meaning that exact payment for the services rendered was required and that no advantage should result from the discharge of public service obligations by the Tax Administration.

Thirdly, the *Conseil d'Etat* considered that the distribution, by the Tax Administration, of insurance products recommended by a private entity did not, in itself, amount to granting State aid to this private entity.

The *Conseil d'Etat* therefore upheld the Minister's decision.

Comment: the *Conseil d'Etat* does not seem to have accurately examined the advantages granted to the insurance company by the Tax Administration (possibly, cross-subsidies) or whether the Tax Administration received indirect remuneration for its services.

3.4.5 Conseil d'Etat, Electricité de France ("EDF") - Société Nationale d'Electricité et de Thermique ("SNET"), 11 June 2003, Cases n°240512 and n°240520, not published in the Lebon report of cases (B)

Facts and legal issues: in 1996, EDF and SNET, two public undertakings producing electricity, entered into an electricity supply contract. In the context of the liberalisation of the electricity market, contracts between public undertakings, including the contract at issue, had to be renegotiated. Since the parties failed to reach an agreement, an *ad hoc* committee defined new contractual obligations that were inserted as amendments into the contract.

Both EDF and SNET brought an action against the committee's decision. EDF argued, *inter alia*, that this decision was subject to the notification requirement because the new contractual obligations included State aid elements in favour of SNET.

Decision: the *Conseil d'Etat* did not exclude the existence of State aid measures but considered that the notification requirement did not apply to the decision of the *ad hoc* committee but, rather, to the amendment to the contract itself. The notification requirement could therefore only apply to the amendment to the actual contract signed by both undertakings, and not the administrative decision to modify the contract.

Comments: this interpretation does not seem to be in line with EC State aid rules since the aid should not be implemented until the Commission has declared it compatible with the Common Market. In the present case, the aid had not been notified to the Commission. Once

the contract had been signed, implementation should have been suspended in case of doubts as to the existence of State aid.

3.4.6 Administrative Court of Strasbourg, Ryanair, 24 July 2003, Case n°0204641, 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)

Facts and legal issues: the Assembly of the Chamber of Commerce and Industry of Strasbourg and of the Bas-Rhin passed a motion authorising the president to enter into two agreements with Ryanair. According to these agreements, the Chamber would grant financial aid to Ryanair for flights from Strasbourg airport, and Ryanair committed to increasing the number of passengers and to advertising. A complaint was brought before the Administrative Court of Strasbourg by a competitor of Ryanair, Brit Air.

The Administrative Court of Strasbourg considered that the Chamber of Commerce and Industry had granted State aid to Ryanair under these agreements. The Strasbourg Court held that the aid was unlawful because it had not been notified to the Commission. The Strasbourg Court annulled the president's decisions to sign the agreements. Both the Chamber of Commerce and Industry and Ryanair appealed.

Decision: the Administrative Court of Appeal of Nancy annulled the judgment of the Strasbourg Court for procedural reasons (i.e. the Strasbourg Court was composed of an even number of judges when counting the Government Commissioner ("*commissaire du gouvernement*")). The Administrative Court of Appeal of Nancy affirmed, however, the reasoning of the Court of First Instance. The Administrative Court of Appeal of Nancy considered that the respective commitments of the parties were so unbalanced that they amounted to mere financial support for Ryanair. The Administrative Court of Appeal of Nancy noted that the State aid granted was provided for by the local authorities ("*collectivités territoriales*") and that the Chamber of Commerce and Industry therefore had to be considered as a State entity, as provided for under EC law. The Chamber of Commerce and Industry did not behave like a private investor in the market and the Administrative Court of Nancy concluded that the financial aid constituted State aid.

As the aid had not been notified to the Commission, the Administrative Court of Nancy considered it unlawful. The Administrative Court of Nancy cancelled the Assembly's motion and the president's decisions to sign the agreements and ordered the Chamber of Commerce and Industry to terminate the agreements with Ryanair within two months, either by means of contractual termination or judicial annulment.

Since the appellants had filed an action for misuse of powers ("action for annulment"), the Administrative Court of Nancy could not order suspension of the payment of the aid by the Chamber of Commerce and Industry or recovery of the aid already granted.

Comments: due to the particularities of French administrative procedure, the Administrative Court of Nancy did not order recovery of the aid. These two decisions strictly apply the rules on State aid and are good examples of the role of national courts in State aid matters. They anticipate the *Ryanair* Commission decision concerning BSCA ("*Charleroi*") airport in Belgium.

3.4.7 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 février 2005, p. 260-268, Dr. Adm., janvier 2005, n°2, p. 20-21 (D/E/I)

Facts and legal issues: from 1980 to 2002, the Ministry of Culture granted aid to CELF ("*Centre d'exportation du livre français*") for the export of French books. The Commission was informed of the aid in 1992 and considered the aid compatible with the Common Market in 1993. As the CFI annulled the Commission decision in 1995[153], a competitor requested the Minister to suspend and recover the aid. The Minister refused and its negative decision was annulled by the Administrative Court of Paris. However, the arguments relating to State liability were dismissed.

Decision: the Administrative Court of Appeal of Paris noted that the respondents had not demonstrated that the aid amounted to compensation for the cost incurred by discharging a public service obligation and that there was no established and transparent legal basis for this compensation.

The annulment of the Commission decision implied that the Minister should have suspended and recovered the aid. In the absence of a new Commission decision concerning recovery, at the time the Minister was requested 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, in the present case, there was no obstacle to recovery, although the respondents had raised the principle of legitimate expectations (with regard to the size of the organisation, its activities and the fact that the system had been in place since 1980), as well as the argument that recovery would threaten the public service mission carried out by the organisation. The Paris Court also set aside the French administrative rule according to which an administrative decision creating rights can only be annulled in case of illegality and within four months of the adoption of the decision.

The Administrative Court of Appeal of Paris upheld the decision of the Court of First Instance, ordered recovery of the aid granted from 1980 to 2002 with a penalty payment, but rejected the claim for damages and State liability. Indeed, it considered that the State aid was unlawful, but, in the absence of a definitive decision by the Commission declaring the

[153] Case T-49/93, SIDE v Commission [1995] ECR II-2501.

aid compatible or incompatible, it was impossible to establish the existence of a causal link between the alleged loss suffered by the competitor and the breach of Article 88 EC by the State.

Comments: the Administrative Court of Appeal of Paris applied Article 88 EC strictly and the case law of the ECJ and the CFI by ordering immediate recovery. Setting aside the rule concerning the conditions for annulment of administrative acts is also in compliance with the principles of supremacy of EC law. However, damages could have been awarded for not having recovered the aid earlier. Moreover, the Paris Court adopts a very restrictive interpretation of causation.

Once the first Commission decision had been annulled by the CFI, the Commission adopted a second decision, which was again annulled by the CFI[154]. The Commission adopted a third decision on 20 April 2004[155]. However, at the time of the Paris Court's decision, CELF had already brought an action for annulment against this new decision (on 15 September 2004)[156]. The Paris Court mentions the absence of a definitive Commission decision.

In any case, notwithstanding the Commission decision declaring the aid compatible, the mere fact that CELF benefited from aid that had not been notified was sufficient for the Paris Court to order recovery of the illegal aid. The question remains whether the Paris Court, even though it assessed whether the measure constituted State aid, was bound by a Commission decision that was challenged before the CFI (see comments under the *UFEX* case below).

3.4.8 Administrative Court of Pau, Ryanair, 3 May 2005, Case n°0301635, not published (D/E/I)

Facts and legal issues: the president of the Chamber of Commerce and Industry of Pau decided to sign an agreement with Ryanair. The Chamber of Commerce was under the obligation (i) to pay Euro 80,000 to its co-contractor (without receiving consideration) for the launch of the airline's services between London and Pau; and (ii) to pay to Ryanair the sum of Euro 11 per passenger leaving the Pau airport, to a maximum of Euro 400,000 a year for each daily rotation. In return for the latter payments, Ryanair agreed to advertise the city of Pau, according to its own terms and conditions, at a frequency it could in its own discretion decide and without compliance monitoring. Moreover, the landing and ground lighting fees applied to Ryanair were lower than the rate applicable at Pau airport in general.

Air Méditerrannée was in charge of air transport of travelers from London to Lourdes, operating charter flights between London and Tarbes-Lourdes airport.

Air Méditerranée requested the Administrative Court of Pau to annul the decision of the president of the Chamber of Commerce and Industry of Pau to sign the agreement at issue.

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154 OJ (1998) L 44/37 and Case T-155, SIDE v Commission [1998] ECR II-1179.
155 OJ (2005) L 85/27.
156 Case T-372/04, OJ (2004) C 300/88 removed from the Register on 31 May 2005.

Decision: the Administrative Court of Pau stated that a non-negligible number of passengers using the new service between London and Pau were likely to go to Lourdes. Consequently, Air Méditerrannée's action was admissible.

The Pau Court noted the imbalances in the reciprocal undertakings of the parties to the agreement (i) in respect of, in particular, the imprecise nature of the obligations of Ryanair; and (ii) the fact that restitution of sums paid under the agreement, even in part, was not provided for in the event of non-realisation of the objectives pursued by the parties. The Pau Court concluded that the contested decision to sign the agreement constituted financial aid in favour of Ryanair.

The Pau Court stated that the Chamber of Commerce and Industry should be regarded as a State entity and that the aid affected trade between Member States because it favoured a single airline managing an international airline. Therefore, it considered that the aid constituted State aid within the meaning of Article 87 EC.

The Pau Court observed that the aid had not been notified to the Commission and was therefore illegal. The Pau Court annulled the decision of the president of the Chamber of Commerce and Industry and ordered the Chamber of Commerce and Industry to either bring an action for annulment or terminate the agreement.

Comment: the Pau Court could not award damages because an action for misuse of powers ("action for annulment") had been brought. See the *Ryanair* cases before the Administrative Court of Strasbourg and the Administrative Court of Appeal of Nancy above.

b) Civil courts

3.4.9 Commercial Court of Paris, Sunsail International, 2 February 1998, not published (F/G)

Facts and legal issues: Stardust Marine ("Stardust") rented and sold boats. It was part of CDR and was sold after recapitalisation to FG Marine. Sunsail International ("Sunsail"), a British competitor of Stardust, contested the sale and requested the Commercial Court to order the suspension of the sale of Stardust to FG Marine, to put Stardust and FG Marine into temporary administration ("*administration judiciaire*"), to appoint new representatives and to order disclosure of documents and an expert opinion.

At the same time, Sunsail brought a complaint before the Commission against the aid measures granted to Stardust.

Decision: the Commercial Court of Paris stated that the share transfer agreement for the sale of Stardust to FG Marine was a private agreement to which Sunsail was not connected and which could not affect it. The Commercial Court of Paris pointed out that there was a contradiction between Sunsail filing an action before the Commission, requesting that the aid

to Startdust be declared unlawful[157] and Sunsail's request for a formal declaration that it remained a potential buyer of Stardust, which presupposes that the aid is maintained.

The Commercial Court of Paris admitted that the national court was under a duty to impose sanctions for violations of EC law and relief, but stated that it did not see how putting Stardust and FG Marine into administration and replacing the current corporate management would enable it to fulfil this duty. It added that ordering an expert opinion and disclosure of documents had nothing to do with this duty.

Finally, the Commercial Court of Paris stated that its decision concerning the contract of sale of Stardust to FG Marine was not relevant for the decision to be handed down by the Commission on the legality of State aid measures, since the Commission was asked to decide whether or not the aid should be recovered.

The Court therefore declared that Sunsail's action was inadmissible.

Comment: Sunsail did not request the Paris Court to rule on the unlawfulness of the aid and raising State aid issues would therefore not have been in line with Sunsail's other requests.

3.4.10 Commercial Court of Paris, UFEX, DHL & others v La Poste, SFMI, Chronopost & others, 7 December 1999, Docket n°96072418 and 96082065 (G)

Facts and legal issues: the claimants brought an action for a cease and desist order before the Commercial Court of Paris based on different arguments relating to logistic and financial assistance granted by La Poste to its subsidiaries SFMI and Chronopost (alleged cross-subsidies) and other legal and tax measures in their favour.

Decision: the Commercial Court of Paris observed that the Commission had found, in a decision of 1 October 1997, that there was no State aid in this case and considered that this decision was binding on national courts, even though the Commission decision was challenged before the CFI[158]. Indeed, actions brought before the CFI have no suspensory effect.

The Commercial Court of Paris rejected the argument raised about the breach of Article 88 (3) EC. Since the Commission had found that there was no State aid, the procedure under Article 88 (3) EC was inapplicable.

Finally, referring to established ECJ case law, the Commercial Court of Paris ruled that a recipient of State aid could not be held liable, on the basis of EC law alone, for not having

[157] The Commission adopted a decision in 1999 that was annulled in Case C-482/99, French Republic v Commission [2002] ECR I-4397.

[158] Case T-613/97, UFEX a.o. v Commission [2000] ECR II-4055. The CFI annulled the Commission decision but the CFI's judgment was later annulled by the ECJ (Joined Cases C-83/01 P, C-93/01 P and C-94/01 P, French Republic, La Poste, Chronopost v UFEX a.o. [2003] ECR I-6993). The case was referred back to the CFI (Case T-617/93 RV), which still has to rule on the legality of the Commission decision.

verified whether the aid had been notified to the Commission by a Member State[159]. The ECJ held that the beneficiary could be held liable under applicable national civil law. In the present case, however, the Commercial Court of Paris held that the claimants based their claim on EC law, which was inadmissible, because they had previously argued that the defendant was liable under Article 1382 of the French Civil Code for not having verified the legality of the aid under Article 88 EC.

Comments: the Commercial Court of Paris relied strictly on the Commission decision but refused to consider the fact that this decision was challenged. As a result, the Paris Court ran the risk of coming to a decision that would be contrary to the final decision of the CFI. This raises the issue mentioned in the *Masterfood* case[160], where the ECJ held, concerning anti-trust rules, that the national judge should avoid taking decisions that could be contrary to decisions taken by the European institutions and should therefore wait until an action for annulment of a Commission decision has been decided. In the *UFEX* case, the Commission decision was annulled by the CFI, whose decision was then annulled by the ECJ.

Moreover, the justification for rejecting civil liability of the beneficiary since the claimants had raised Article 1382 of the Civil Code seems far-fetched. The claimants had raised this national provision in the aftermath of the *SFEI* case in which the ECJ refused to find EC law a basis for a liability under EC law (as an extension of the *Francovich* case). The Commercial Court's judgment was appealed to the Court of Appeal of Paris which stayed the proceedings to await the outcome of the EC litigation[161].

3.4.11 Civil Court of Appeal of Paris, SARL Germain Environnement v Office National des Forêts ("ONF"), 27 July 2004, Official Bulletin of Competition, Consumers and Fraud Repression n°9 of 8 November 2004, p. 725, NOR: ECOC0400311X; Competition Council, 10 February 2004, Case n°04-D-02, Official Bulletin of Competition, Consumers and Fraud Repression n°5 of 4 May 2004

Facts and legal issues: a company manufacturing equipment used for the development of forests brought an action for anti-competitive conduct against the public entity protecting forests ("*Office national des forêts*" or "ONF") before the Competition Council, alleging, *inter alia*, that State aid was granted by the State to ONF.

The Competition Council ruled that the action was inadmissible as far as the State aid rules were concerned as the Competition Council is not competent in matters other than those listed in the French Commercial Code ("*Code de commerce*") and Articles 81 and 82 EC[162]. The company appealed to the Civil Court of Appeal of Paris.

[159] See Case C-39/94, SFEI a.o. v La Poste a.o. [1996[] I-3547, the preliminary ruling requested by the Commercial Court of Paris.
[160] Case C-344/98, Masterfoods v Commission [2000] ECR I-1369, para. 55 to 59.
[161] Case T-613/97 RV, to be decided in 2006.
[162] See Case n° D4-D-02 of 10 February 2004.

Decision: the Civil Court of Appeal of Paris upheld the exclusive competence of the administrative courts to assess the right of a public entity to engage in commercial activities, as well as the exclusive competence of the Commission to assess the compatibility of State aid with the Common Market.

The Civil Court of Appeal of Paris rejected arguments related to the abuse of a dominant position on the basis of a previous Commission decision and on the basis of operational accounts submitted by ONF to prove the absence of cross-subsidisation. Finally, the Paris Court considered that the mere fact that some of ONF's employees were civil servants did not constitute a competitive advantage, except in specific circumstances to be established by the appellant.

Comments: the Civil Court of Appeal of Paris could only rule on Article 82 EC. The Paris Court took, however, a clear decision on whether the civil servant status of employees constituted a competitive advantage.

c) Independent public agencies

3.4.12 Competition Council, EDF, 19 May 2004, Case n°04-D-19, Official Bulletin of Competition, Consumers and Fraud Repression, n°9 of 8 November 2004, p. 660

Facts and legal issues: in 1999, the Competition Council decided of its own motion to investigate the grant of financial aid by EDF to certain producers of electric dryers. Acting upon a complaint, the Commission also investigated the financial aid and adopted a decision on 11 April 2000 finding that there was no State aid[163].

Decision: referring to the principle of the supremacy of EC law, including EC competition law, the Competition Council adopted a decision to drop the investigation.

Comments: the Competition Council considered that it was bound by decisions of the Commission dealing with exactly the same facts. However, concerning Article 82 EC, the Competition Council did not seem to appreciate the difference between a rejection decision for lack of Community interest (precisely allowing the national competition authorities to act) and a rejection decision when there is no anti-competitive behaviour (which was not the case here as the Commission had recognised the existence of discriminatory prices).

3.5 Recovery

a) Administrative courts

[163] OJ (2001) L 95/18. On 15 March 2002, the Commission adopted another decision rejecting the aspects of the complaint based on Article 82 EC (abuse of a dominant position) for lack of Community interest, due notably to EDF's decision to put an end to its behaviour and to the fact that the effects on the market ceased (the Commission had clearly concluded that EDF had adopted abusive discriminatory practices).

3.5.1 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 (D/E/I)

See description of the case above.

3.5.2 Administrative Court of Appeal of Nancy, Ryanair, 18 December 2003, Case n°03NC00859, AJDA, 2004, p. 396-401, Case n°03NC00864 (E/D)

See description of the case above.

b) Civil courts

3.5.3 Commercial Court of Paris, SA Sojerca v Jaunet, 21 January 2003, Gazette du Palais, 4 novembre 2003 n°308, p. 28 (G/F)

Facts and legal issues: the Jaunet family sold a company ("*Manufacture de Confection l'Océane*" or "Océane") to Sojerca, another company. It provided to Sojerca both a guarantee on the net asset value and a bank guarantee.

Océane benefited from a reduction in employers' national insurance contributions, which the Commission considered to be State aid that was incompatible with the Common Market. In 2000, the State ordered recovery of the aid.

The Jaunet family indicated that they did not consider taking into account the request for recovery because of the guarantee. Sojerca asked the Jaunet family to pay jointly and severely Euro 268,000 because the decision to accept the reduction in national instance contributions had been taken by the Jaunet family. The Jaunet family refused, arguing that the decision to recover the aid had been taken once they had sold their company.

In the meantime, Sojerca was put into liquidation and Océane went into receivership.

Decision: first, the Commercial Court of Paris noted that Sojerca had not reimbursed the aid to the State and had not proven that prejudice would result from the recovery order (which could trigger payment by the Jaunet family).

Secondly, the Commercial Court of Paris noted that the State did not present the recovery order to the creditors' representative after Océane had gone into receivership. The recovery order was therefore invalid. The Commercial Court of Paris concluded that there was no basis for Sojerca's claim and that it was no longer entitled to request payment on the basis of the guarantee.

The Commercial Court of Paris rejected Sojerca's claim and ordered Sojerca to refund the bank guarantee, which had been paid out to guarantee payment to the bank. No damages were awarded to the Jaunet family in view of the fact that the company had gone bankrupt.

Comment: it seems that the Commercial Court of Paris ruled, by implication, that payment would have had to be made by Sojerca (the buyer), had the State claimed recovery from the right person. The Commercial Court of Paris did not consider the price at which the company was sold or who the beneficiary of the reduction in insurance contributions was. The Commercial Court of Paris focused on the justification for triggering the guarantee.

c) Independent public agencies

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

Facts and legal issues: a French law of 1997 determined the ownership status of a high-voltage electricity network. As a result, the reserves previously built up by EDF (free of tax) over the period from 1987 to 1996 became superfluous. Some reserves were directly incorporated into EDF's capital without increasing its taxable net assets.

The Commission considered that this tax concession granted to EDF constituted unjustified operating aid, which had the effect of strengthening its competitive position. On 16 December 2003, it adopted a final negative decision and ordered the French authorities to recover Euro 1.2 billion from EDF.

In February 2004, EDF reimbursed the sum. EDF and RTE, EDF's department in charge of the high-voltage electricity network, disagreed on the amount to be paid by EDF. RTE argued that the sum of Euro 1.2 billion should be divided between the departments according to the accounting principles applied in 2001 to split liabilities between transport, distribution and production activities in the context of the liberalisation of the electricity market. RTE would be liable for 27% of the charge and EDF's other departments for 73%. EDF argued that the charge should be split between the different departments according to their shares in the contested reserves. RTE would be liable for 48.5% of the sum and EDF's distribution department for 51.5%. RTE decided to refer the case to the Energy Regulation Commission.

Decision: first, the Energy Regulation Commission recalled that the methodology proposed by EDF, based on a chronological analysis of the accounts, had already been rejected in its decision related to the accounting principles applying in the context of the liberalisation of the electricity market.

Secondly, the Energy Regulation Commission noted that (i) EDF's proposal excluded the production department from the split of the charge, whereas it was the only liberalised market in France; and (ii) the Commission's negative decision was based on the strengthening of EDF's competitive position in the liberalised market.

Thirdly, the Energy Regulation Commission noted that the reserves were incorporated into EDF's capital and therefore benefited all activities and departments of EDF, including the production department.

The Energy Regulation Commission considered that each department of EDF should bear part of the recovery charge in proportion to its funds: 27% for RTE, 17% for the distribution department and 56% for the production department.

Comment: the Energy Regulation Commission decided that, since the aid benefited EDF, which that consolidated group accounts, all activities of EDF benefited from the aid. The aid must therefore be recovered, proportionally, from departments active in all those areas of activity where a benefit had occurred.

3.6 Liability claims

a) Administrative courts

3.6.1 Administrative Court of Grenoble, Société Stéphane Kelian, 15 October 2003, Case n°0102341, not published (A)

Facts and legal issues: a law of 1996 enabled the French government to sign agreements with undertakings in the clothing, leather, shoe and textile sectors regarding a reduction in working time, in order to avoid redundancies. In return, the French government granted an additional reduction in social charges on low salaries ("Borotra plan"). The Commission adopted a negative decision in 1997 declaring the aid scheme incompatible and ordering recovery of the illegally granted aid (the scheme had been notified but implemented prior to the Commission decision, and the Commission decided to open a formal investigation in respect of the scheme following notification). The ECJ rejected an action for annulment lodged by the French State[164].

The claimant argued that the State (both the legislator and the Administration) acted in breach of Article 88 (3) EC, since the agreement had been implemented prior to the Commission decision, so that the companies would be required to reimburse the aid.

The claimant did not refuse to reimburse the illegal aid and effectively reimbursed it. The claimant did not pretend that the loss would consist in having to reimburse the aid (this would be contrary to EC law principles). However, it claimed loss of profit, since the company would have saved funds, if it had considered relocating to lower-wage countries at an early stage (which was not carried out because of the benefits received under the aid scheme). The claimant requested the Grenoble Court to annul the administrative decision rejecting its request for damages and to order the State to pay the sum of Euro 1.3 million in compensation for the loss suffered.

The claimant relied on the liability of the State pursuant to both EC law and French administrative law, due to the violation of Article 88 (3) EC. It argued that the liability of the Member State for breach of EC law could be invoked even without proving fault and could attach to all State entities, including the legislator. The French parliament had enacted a law

implementing an aid scheme contrary to Article 88 (3) EC and the State failed to inform the companies about the relevant legal risks before signing the agreements providing for the aid measure (the Commission decision opening the formal investigation was published in the Official Journal when the agreements had been signed!). It added that the behaviour of the company was not imprudent and that the request for compensation did not relate to the reimbursement of the unlawful aid.

Decision: the Administrative Court of Genoble considered that the claimant had not demonstrated in evidence that it had formally decided to implement a relocation plan, which it would have been required to abandon when signing the agreement with the French government providing for the aid. The Grenoble Court therefore rejected the claim, stating that "*under these conditions and in any event its request for compensation against the State cannot be accepted*". This case was therefore only rejected because of lack of causation as a condition of the type of liability sought.

Comment: In the absence of proof of causation in respect of loss of profit, the Grenoble Court took the opportunity not to take a decision on State's liability. Every other condition seemed to have been met, however, in particular those conditions laid down by established ECJ case law relating to a violation of Article 88 (3) EC[165].

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

Facts and legal issues: a law of 1996 enabled the French government to sign agreements with undertakings in the clothing, leather, shoe and textile sectors regarding a reduction in working time, in order to avoid redundancies. In return, the French government granted an additional reduction in social charges on low salaries ("Borotra plan" mentioned above).

The claimant entered into an agreement with the French government. It undertook to maintain the number of its employees and only to carry out a reduction inferior or equal to 5%. In return, it was granted a reduction in its social charges amounting to Euro 199,364.90.

The aid had been notified to the Commission and, in a 1997 decision, the Commission declared the aid measures laid down by the law of 1996 incompatible with the Common Market. The decision was then upheld by the ECJ (see references mentioned in the case described above).

The claimant, considering that there was a violation of Article 88 (3) EC since the aid had been implemented prior to a Commission decision, requested the State to grant damages for the loss suffered as a result of delays when the company relocates (eventually in 2000) and as a result of a reduction in the company's gross margin due to the recovery of the aid.

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

[165] Joined Cases C-6/90 and C-9/90, Francovich and Bonifaci [1991] ECR I-5357; Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame III [1996] ECR I-1029.

Decision: the Administrative Court of Clermont-Ferrand stated that, under the terms of Article 55 of the French Constitution and Article 10 EC, the State was likely to be held liable for the adoption, by the legislator, of laws that were not compatible with the provisions of the EC Treaty. The conditions for such liability in an area where the legislator has a considerable margin of appreciation is that individuals have a right to damages only where (i) the rule of law that is violated has as its object to confer rights on individuals, (ii) the violation is sufficiently clear and precise; and (iii) there exists a causal link between the violation and the damage sustained.

Since the claimants relied on Article 87 EC which does not confer rights on individuals, the Administrative Court of Clermont-Ferrand dismissed the claim regarding the liability of the legislator.

It then noted that the Prime Minister had committed a fault likely to attract the liability of the Administration by signing a decree relating to the progressive reduction in employers' social security contributions (implementing the law before the Commission decision was adopted).

The Administrative Court of Clermont-Ferrand stated that neither the Commission decision nor Article 87 EC prevented a national court from awarding damages, on the grounds of liability due to negligence, for the loss suffered by the claimant. However, the Administrative Court of Clermont-Ferrand considered that an economic entity should, normally, when acting diligently, have been in a position to ensure that the procedure described in Article 88 (3) EC is followed. The Administrative Court of Clermont-Ferrand added that the claimant could have questioned the Minister about the status of application of the procedure provided for in Article 88 (3) EC. The Administrative Court of Clermont-Ferrand concluded that this negligent omission was likely to reduce the amount in damages awarded to the claimant by a quarter.

Regarding the award of damages, the Administrative Court of Clermont-Ferrand held that the claimant's damages could not be equivalent to the aid granted under the agreement, since the judgment of the ECJ provided for recovery of this amount by the State. However, the Administrative Court of Clermont-Ferrand stated that it could award damages for the loss suffered by the claimant and ordered an expert's opinion on the loss suffered.

The Administrative Court of Clermont-Ferrand noted that the agreement entered into in 1996 by the State and the claimant was null and void due to the violation of Article 87 EC. The Administrative Court of Clermont-Ferrand stated that the State's co-contractor, whose contract was null and void, 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 French authorities, it could, in addition, claim compensation for the resulting loss pursuant to the State's contractual liability. However, the Court considered that the claimant could not obtain an indemnity which would render EC State aid rules ineffective by conferring on the claimant a benefit similar to that illegally granted by the State.

The Administrative Court of Clermont-Ferrand finally ordered an expert to ascertain the economic causes of the reduction in the gross margin invoked by the claimant, to determine the economic consequences of the delayed relocation and to compare that with what the claimant would have obtained if it had not benefited from the State aid measures.

Comment: this case is interesting both in respect of State liability and the award of damages under Article 88 (3) EC.

In accordance with established, national case law, the administrative judge is very reluctant to hold the legislator liable for having adopted provisions violating EC law and would, in any case, not do so on the basis of EC law, but would base such liability on national law (which is contrary to established ECJ case law, which provides a legal basis for the liability of Member States violating EC law, regardless of the state entity responsible for the violation, i.e. the legislator, an administrative body or the judiciary[166]).

However, in this case, the Administrative Court of Clermont-Ferrand also misinterpreted the *Brasserie du Pêcheur* ruling with regard to the "margin of appreciation" of the legislator and the liability regime in France, according to which the legislator must be at fault in order to be liable ("*responsabilité pour faute*"). The Administrative Court of Clermont-Ferrand dismissed the claim regarding the legislator's liability because it considered that, although the legislator adopted legislation that violated Article 87 EC, Article 87 EC did not have direct effect.

The Administrative Court of Clermont-Ferrand should have found the legislator liable for violation of Article 88 (3) EC, which has direct effect and which does not, under any circumstances, give a margin of appreciation to the legislator. Article 88 (3) EC merely provides for a material obligation to notify a draft measure and/or not to implement it prior to a decision by the Commission. In the light of the *Francovich* and *Brasserie du Pêcheur* case law of the ECJ, any violation of Article 88 (3) EC clearly seems to amount to a "sufficiently serious breach" of EC law likely to trigger liability under EC law.

Moreover, regarding the rule of law conferring rights on individuals, the Administrative Court of Clermont-Ferrand confused the notion of direct effect (not Article 87 EC) with the mere conferral of rights on individuals, which is what Article 87 EC does in combination with Article 88 (3) EC.

Regarding damages, however, the judge is prepared to rely on the principle of supremacy of EC law and to safeguard the *effet utile* of both the Commission decision and the ECJ's judgment by (i) not awarding damages equivalent in amount to the unlawful aid initially granted; and (ii) holding that the claimant could not obtain an indemnity, which would render EC State aid rules ineffective by conferring on the claimant a benefit similar to that granted illegally by the State. This, however, does not seem legally correct. Indeed, the award of

[166] Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame III [1996] ECR I-1029, para. 33 to 35; see also para. 114 et 115 of the opinion of Advocate-General Léger in Case C-5/94, The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd [1996] ECR I-2553.

damages following a violation of EC law by the State is separate from the requirement imposed on the beneficiary to reimburse the aid to the State.

b) Civil courts

3.6.3 Cour de cassation, Etablissements J. Richard Ducros v. Société Métallique Finsider Sud, 15 June 1999, Case n°1236, Petition n°B 97-15.684, Contrats concurrence - consommation 1999 n°181, p. 18-19 (résumé); Gazette du Palais 1999 II Panor., p.228 (résumé); La Semaine juridique - édition générale 1999 IV 2485 (résumé); Revue de jurisprudence de droit des affaires 1999, p. 818-819; Europe 2000 Janvier Comm. n°25, p. 20; Gazette du Palais 2000 II Chron., p. 553-554; Petites affiches, 2000 n°56, p. 17; Revue trimestrielle de droit commercial et de droit économique 2000, p. 261-262 (H/G)

Facts and legal issues: in 1990, the claimant, a building company, submitted a bid for an extension to the Marseille airport, for which an Italian company was finally selected. It sued the Italian company in the commercial courts for damages for unfair competition, arguing that the Italian company had been able to make the best offer because of aid previously granted to it by the Italian Government. At the same time, the claimant filed a complaint which the Commission which initiated a formal investigation procedure.

The Court of Appeal of Aix-en-Provence concluded, on the basis of a Commission decision of 1995[167] declaring the aid compatible with the Common Market, that the aid received by the Italian company at the time of the tender was not sufficient to directly affect competition, especially in the *Marseille* case.

The claimant appealed ("*pourvoi en cassation*") and tried to show that the defendant had violated Article 1382 of the Civil Code. The appellant argued, *inter alia*, that the Court of Appeal of Aix-en-Provence had focused on direct aid without assessing the guarantees provided by the Italian government and, in particular, the take-over of the company by a public undertaking. The Court of Appeal of Aix-en-Provence had also not assessed whether the Italian company would have been able to make the best offer without receiving State aid. It was further alleged that it was sufficient to show that there was a causal link between the aid and the proposed price regardless of whether or not the aid was the *only* explanation for that price.

Decision*:* the *Cour de cassation* noted that the Court of Appeal of Aix-en-Provence had relied on evidence provided by the Commission decision and on evidence before it to conclude that the Italian company had not benefited from aid before submitting the bid. It also noted that the Court of Appeal of Aix-en-Provence had held that the causal link between the aid granted and the appellant's exclusion from the tender procedure was not obvious. The *Cour de cassation* therefore rejected the appeal.

[167] OJ (1995) C120/8.

Comments: unfortunately, this case did not allow the *Cour de cassation* to confirm the principle, well recognised at national level, established by the ECJ in the 1996 *SFEI* case[168], according to which the beneficiary of unlawful State aid is liable, under national law, for having accepted and used the aid in these circumstances (see also the 1995 *Breda* case before the President of the Brussels' Commercial Court, 1999 Report, Belgian section).

3.6.4 Commercial Court of Paris, UFEX, DHL & others v. La Poste, SFMI, Chronopost & others, 7 December 1999, Docket n°96072418 and 96082065 (see above) (G)

See description of the case above.

3.6.5 Court of Appeal of Paris, CDR v. FG Marine-Stardust, 16 January 2004, Case n° 2002/05900, not published (G)

Facts and legal issues: in June 1997, CDR sold its majority holding in Stardust Marine ("Stardust") to FG Marine. In September 1999, the Commission considered that the State aid granted to Stardust was incompatible with the Common Market and ordered reimbursement of the aid[169]. Under provisions of the purchase contract, FG Marine required CDR to repurchase the Stardust shares. Stardust went bankrupt and was purchased by another company.

FG Marine sued CDR on the basis of its extra-contractual liability and requested damages.

In November 2001, the Commercial Court of Paris ordered CDR to pay approximately Euro 4.6 million in damages to FG Marine for the following reasons: (i) lack of awareness, on the part of the co-contractor, of the breach of Article 88 (3) EC, whereas CDR declared in the purchase contract to have complied with all legal requirements; (ii) lack of awareness of State aid procedural issue which constituted a fault and caused FG Marine prejudice; (iii) that fault on the part of CDR was the main cause of the reimbursement of the unlawful State aid; and (iv) the reimbursement obligation was the main cause of Stardust's bankruptcy. CDR appealed to the Paris Court of Appeal.

In the meantime, in May 2002, the ECJ annulled the Commission decision following an action for annulment brought by the French State[170].

Notwithstanding the ECJ's judgment, FG Marine argued in its submission before the Paris Court of Appeal that CDR was liable for its extra-contractual faults, in particular due to its lack of diligence during Commission proceedings.

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[168] Case C-39/94, SFEI a.o. v La Poste a.o, ECR [1996] I-3547, para. 75 (see the 1999 Report, p. 80-81). See also *UFEX* case described in section 3.4.10 above.
[169] OJ (2000) L206/6.
[170] Case C-482/99, French Republic v Commission [2002] ECR I-4397.

Decision: the Paris Court of Appeal stated that FG Marine had failed to prove that CDR had been negligent in the way it dealt with the formal investigation before the Commission and with FG Marine.

FG Marine also argued that it should have been informed by CDR of the State's intention to challenge the Commission decision. The Paris Court of Appeal rejected this argument because (i) FG Marine had required CDR to repurchase Stardust only five days after the Commission decision, i.e. before CDR/the State could have determined their legal strategy; and because (ii) FG Marine was advised by lawyers who could have foreseen this eventuality.

Finally, the Paris Court of Appeal rejected the argument according to which CDR initiated the bankruptcy procedure too early, because FG Marine no longer had a financial interest in Stardust after CDR was under the obligation to repurchase it.

The Paris Court of Appeal annulled the judgment the Court of First Instance and rejected the claim brought by FG Marine in its entirety.

Comments: following the ECJ's judgment, the case no longer raised any State aid issues and FG Marine tried to obtain a declaration of liability on the grounds of lack of diligence, which was rejected. The circumstances of the case also raise a question that has not yet been debated or settled by case law: is the scope of application of Article 88 (3) EC wider than Article 87 (1) EC (i.e. are Member States under the obligation to notify State aid or, also, measures which are likely to amount to State aid but which, after due examination, do not qualified as State aid?).

3.7 Requests for preliminary rulings

a) Administrative courts

3.7.1 Administrative Court of Appeal of Lyon, Ministre de l'Économie, des Finances et de l'Industrie v. SA GEMO, 13 March 2001, Case n°00LY02270 (B)

Facts and legal issues (see section 1.1): in 1996, the French government set up a system for the free collection and disposal of animal carcasses and slaughterhouse waste for farmers and slaughterhouses. This system was financed by a tax payable by any person active in the retail sale of meat at the distribution level.

Gemo, a medium-sized supermarket, contested the legality of the tax. In 2000, the Administrative Court of Dijon ordered the reimbursement of the tax to Gemo. The Minister of the Economy, Finance and Industry appealed this decision.

Decision: the Administrative Court of Appeal of Lyon held that Article 87 EC, raised by the appellant, could not be invoked by individuals before the national courts since it is within the competence of the Commission to assess whether an aid is compatible with the Common

Market. However, the Lyon Court observed that, since the validity of national acts could be affected by a violation of Article 88 (3) EC, it was necessary to examine whether the measure constituted State aid.

The Lyon Court then observed that public carcass disposal services, providing meat producers and slaughterhouses with free collection and disposal of animal carcasses and of waste, might be regarded as relieving that economic sector of a burden which it would otherwise have to bear.

The Lyon Court referred the question to the ECJ asking whether the tax payable by retail sellers of meat must be regarded as constituting State aid.

In its judgment of 20 November 2003[171], the ECJ held that the system constituted State aid.

Comment: contrary to many other cases before the administrative courts, the Lyon Court did not dismiss the action on the grounds that Article 87 EC cannot be raised by individuals, but went on to assess what consequences a violation of Article 88 (3) EC could have for national measures and, therefore, to examine whether the national measure constituted State aid.

b) Civil courts

3.7.2 Social Security Court of Créteil, S.A. Ferring v. Agence Centrale des organismes de Sécurité Sociale ("ACOSS"), 11 January 2000, Case n°CR. 1260/98 (B)

Facts and legal issues: the Social Security Court of Créteil requested a preliminary ruling from the ECJ on a tax advantage enjoyed by undertakings entrusted with the operation of a public service, such as wholesale distributors supplying medicines to pharmacies. In a judgment of 11 January 2000, the Social Security Court of Créteil referred three questions to the ECJ under Article 234 EC, one of which concerned the interpretation of Article 86 (2) EC and Article 87 EC.

The questions were raised in the course of proceedings brought by Ferring SA before the Social Security Court of Créteil, requesting the reimbursement of sums it had paid to the Central Agency of Social Security Institutions ("ACOSS"), by way of a direct sales tax on medicines established by a law of 1998. Ferring argued that this contribution constituted illegal State aid in favour of certain wholesalers providing pharmacies with medicines.

Decision: Ferring emphasised the following points: (i) the wholesalers concerned were in a more favourable position; (ii) the tax was not proportional to the costs incurred by discharging the public service; and (iii) the tax was not justified by the system itself and therefore could not benefit from the exemption provided for under Article 86 (2) EC. The measure in question therefore constituted State aid which had not been notified to the Commission.

[171] Case C-126/01, Ministère de l'Economie, des Finances et de l'Industrie v GEMO SA [2003] ECR I-13769.

ACOSS (i) contested the fact that there had been a transfer of State resources; and (ii) argued that the tax was justified. In this case, the Créteil Court considered that the measure constituted State aid and argued that it should benefit from the exemption under Article 86 (2) EC. Regarding the proportionality of the tax, the Créteil Court held, however, that it was impossible to justify the amount of the tax.

Ferring requested the Créteil Court to refer the issue of the application of Article 87 EC and Article 86 EC to French legislation to the ECJ.

Comment: the ECJ distinguished between Article 86 (2) EC and Article 87 EC, ruling that "*provided that the tax on direct sales of medicines imposed by a Member State on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article 92 of the Treaty (now, after amendment, Article 87 EC). Moreover, provided there is the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purposes of Article 92 (1) of the Treaty because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing*"[172].

"*Article 86(2) EC is to be interpreted as meaning that it does not cover a tax advantage enjoyed by undertakings entrusted with the operation of a public service such as wholesale distributors supplying medicines to pharmacies in so far as that advantage exceeds the additional costs of performing the public service because the advantage, to the extent that it exceeds the additional costs, cannot be regarded as necessary to enable them to carry out the particular tasks assigned to them*" (para. 32-33 of the case cited above).

The Social Security Court of Créteil, which prompted this famous decision, clearly identified the issues involved and referred appropriate questions to the ECJ. The answer from the ECJ preceded the *Altmark* case, which went further in the delimitation of both Article 86 (2) EC and Article 87 EC.

3.7.3 Cour de cassation, Société Galeries de Lisieux, 16 November 2004, Case n°1642, Petition n°03-12.565, AJDA, 2005 Jurisprudence p. 727 (B)

Facts and legal issues: a retail store filed an action for reimbursement of a tax, which it considered to constitute State aid, because the tax was only payable by big retail stores, whereas only small retail stores were eligible to receive the retirement benefits financed by the tax.

The Court of Appeal of Caen excluded a finding of State aid, because (i) the retirement benefits at issue had a social character and were granted to individuals, not undertakings; (ii)

[172] Case C-53/00, Ferring SA v ACOSS [2001] ECR I-9067, para. 27.

small retail stores paid the usual amount of contributions to the contributory pension scheme; and (iii) the tax exemption for small retail stores was justified by the general nature of the system based on the principle of solidarity.

Decision: the *Cour de cassation* held that the Court of Appeal of Caen had erred in law by (a) deciding that individuals carrying out an economic activity did not constitute undertakings carrying out an economic activity, which, by receiving aid, could distort competition; (b) not examining whether the tax relief allowed beneficiaries to reduce their pension scheme payments; (c) not holding that all aid had to be notified to the Commission; and (d) by deciding that no indirect aid had been granted to supermarkets because the system was based on the principle of solidarity.

The Cour de cassation referred a question to the ECJ for a preliminary ruling asking whether EC law must be interpreted as meaning that a tax, paid by retail stores exceeding a certain surface or turnover, in order to finance retiring benefits granted to small traders, therefore decreasing their potential contributions to self-funded pension schemes, constitutes State aid[173].

A similar request for a preliminary ruling has been made in Joined Cases C-266/04 to C-270/04 and C-276/04 by the Social Security Court of Saint-Etienne and in Joined Cases C-321 to C-325/04 by the Court of Appeal of Lyon (see below)[174].

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

Facts and legal issues: a laboratory filed an action for the refund of a Sociàl Security contribution arguing that this contribution was unlawful State aid, because certain laboratories were exempt. Referring to the *Banks* case[175], the Court of Appeal ruled that in this context, the sanction for having granted unlawful State aid was its suspension and not the grant of a tax refund to the laboratories subject to it.

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) considering that, according to French civil procedure, an applicant filing an action for a tax refund must prove that the tax exemption of certain companies constitutes State aid, because it overcompensates them for the costs of discharging their public service obligations or does not fulfill the four criteria of the *Altmark*

[173] Case C-488/04, OJ (2005) C 31/20.
[174] Joined Cases C-266/04 to C-270/04 and C-276/04 and Joined Cases C-321 to C-325/04, OJ (2005) C 330/10.
[175] Joined Cases C-380/98, Banks & Co v The Coal Authority and Secretary of State for Trade and Industry [2001] ECR I-6117.

case, whether EC law should be interpreted as meaning that this burden of proof "makes recovery impossible or excessively difficult" within the meaning of ECJ case law[176].

Comment: a parallel can be drawn between the second question and the question asked in the *Brasserie du pêcheur* case, where the national court asked whether a national procedural provision could be considered as making it impossible or excessively difficult to obtain damages. In this case, the ECJ will address the issue of the interpretation of the notion of State aid in the context of its recovery.

3.7.5 Social Security Court of Saint-Etienne, SAS Bricorama France v. Caisse Nationale de l'Organisation Autonome d'Assurance Vieillesse des Travailleurs Non-Salariés des Professions Industrielles et Commerciales - Caisse ORGANIC, 5 April 2005; Court of Appeal of Lyon, 24 February 2004, SAS Distribution Casino France v. Organic de recouvrement, a.o. (B)

Facts and legal issues: the claimant and other parties brought an action for reimbursement of certain social security contributions for retiring craftsmen and traders, from ORGANIC which they had paid during the period from 2000 to 2002. The claimant requested the Social Security Court of Saint Etienne to make a preliminary reference to the ECJ and to suspend the proceedings until the ECJ delivered its ruling.

Decision: The Social Security Court of Saint-Etienne held, by judgment of 5 April 2004, that (i) the outcome of the case depended on whether the State's payments constituted State aid; and (ii) that the Saint-Etienne Court was not, given the nature and characteristics of the contributions, in a position to determine whether the measure fell within the Member State's regulatory autonomy or whether the measure constituted State aid. In view of this, the Saint-Etienne Court decided (iii) to make the following preliminary reference to the ECJ under Article 234 EC: "*Should Article 87 EC be interpreted as meaning that (a) State funding by France through the Fuel Distributors' Trade Committee ("Comité Professionnel de la Distribution des Carburants") and through the Intervention Fund for the Support of Crafts and Trade ("Fonds d'Intervention pour la Sauvegarde de l'Artisanat et du Commerce") by way of assistance when self-employed craftsmen and traders retire and (b) grants made to the old age insurance scheme for self-employed persons in manufacturing and trading occupations, and to the scheme for self-employed persons in the craft sector, constitute State aid?*" and (iv) to await judgment by the ECJ before ruling on the matter[177].

Comment: the Court of Appeal of Lyon had raised a similar question on 24 February 2004[178]. In all these cases, Advocate General Stix-Hackl concluded (on 14 July 2005) that there was no State aid.

[176] Case C-526/04, Reference for a preliminary ruling by the Cour de cassation (France), OJ (2005) C 69/5.
[177] Joined Cases C-266/04 to C-270/04 and C-276/04 and Joined Cases C-321 to C-325/04, OJ (2005) C 330/10.
[178] Joined Cases C-266/04 to C-270/04 and C-276/04 and Joined Cases C-321 to C-325/04, OJ (2005) C 330/10.

4. Index of Cases

4.1 Control of legality of acts

4.1.1 Tax levied on disposal of animal carcasses

a) Administrative courts

Administrative Court of Melun, Société Picard Surgelés, 11 March 1999, Cases n°97-3181, 97-3182 and 98-1392, Revue de jurisprudence fiscale 1999, n°944 (B)

Adminitrative Court of Caen, Société Uniservice Distribution and Société Honfleur Distribution, 02 December 1999, Cases n° 98-1460 and n° 99-526(B).

Administrative Court of Dijon, SA Nevers Viandes, 25 May 2000, Case n°99-1071, Revue de jurisprudence fiscale 2001, n°119 (B)

Conseil d'Etat, Confédération française de la boucherie, boucherie-charcuterie, traiteurs, 28 July 2000, Case n°206594, Lebon report of cases, Tables, p. 979 (B)

Administrative Court of Orléans, SA Sobledis, 08 August 2000, Case n° 98-2311 (B).

Administrative Court of Lille, SA Lianoudis, 21 December 2000, Case n°98-03864, Lebon report of cases, Tables, p. 979 (B)

Administrative Court of Appeal of Lyon, Ministre de l'Economie, des Finances et de l'Industrie c/ SA Gemo, 15 January 2004, Case n°00LY02270; *Conseil d'Etat*, 15 July 2004, Case n°264494, not published (B)

Conseil d'Etat, Syndicat national de l'industrie des viandes et autres, 11 February 2004, Case n°264346, not published in the Lebon report of cases (B)

Conseil d'Etat, Société Doux, 23 March 2005, Cases n°269059 and n°269060, not published (B)

b) Civil courts

4.1.2 Other taxes

a) Administrative courts

Conseil d'Etat, Union des industries chimiques and others, 5 October 1998, Case n°162562, Rec. Tables, p. 798-805-890 (B)

Conseil d'Etat, Comité national interprofessionnel de l'horticulture florale et ornementale et des pépinières ("CNIH"), 6 November 1998, Cases n°171574 and n°171576, Revue de

jurisprudence fiscale 1999, p. 70; Gazette du Palais, 1999 II Panor, p. 92; and n°178322; *Conseil d'Etat*, CNIH, 2 December 1998, Cases n°171648 et seq[179], Europe, February 1999, n° 84, p. 23, not published (B)

Administrative Court of Appeal of Paris, Comité national interprofessionnel de l'horticulture florale et ornementale et des pépinières ("CNIH"), 30 December 1998, Case n°96PA03013; Administrative Court of Appeal of Paris, CNIH, 1 April 1999, Case n°96PA01659; Administrative Court of Appeal of Paris, CNIH, 1 April 1999, Case n°96PA03012 (B)

Administrative Court of Appeal of Lyon, SA Editions Glénat, 28 April 1999, Case n°96-214; *Conseil d'Etat*, SA Editions Glénat, 23 November 2001, Case n°209974, Rec., p. 566-568 (B)

Conseil d'Etat, Syndicat de la presse périodique culturelle et scientifique et autres, 29 September 1999, Cases n°186227 and n°186356, Rec. Tables p. 680-689-930; *Conseil d'Etat*, Publishing company Documentation Organique, 29 September 1999, Case n°194317 (B)

Administrative Court of Appeal of Douai, SA HCF, 30 May 2000, Case n°96-1653, RJF, November 2000, Case n°1373 (B)

Conseil d'Etat, Société Pantochim SA, 31 May 2000, Cases n°192006 and n°196303, Revue de jurisprudence fiscale 2000 p. 729-730 (B)

Court of Appeal of Caen, Société Etablissements Friedrich c/ ANIVIT ("*Association Nationale Interprofessionnelle des Vins de Table et des Vins de Pays de France*"), 21 November 2000, Case n° RG 99/00877(B)

Administrative Court of Appeal of Paris, Comité de développement et de promotion du textile et de l'habillement, 20 September 2001, Case n°98PA01610, not published (B)

Conseil d'Etat, Syndicat national de l'industrie pharmaceutique et autres, 3 December 2001, Cases n°226514, n°226526, n°226548, n°226553, n°226554, n°226555, n°226556, n°226557, n°226558, n°226569, n°225670 and n°226571, not yet published in the Lebon report of cases (B)

1999 Report

Administrative Court of Appeal of Paris, SA Lesieur Alimentaire et autres, 27 June 1997, Cases n°89PA01466, n°89PA01469, n°89PA01468, n°89PA01467 and n°89PA01470 (B)

Administrative Court of Appeal of Bordeaux, Letierce et autres, 9 July 1991, Cases n°89BX01683, n°89BX01703, n°89BX01700, n°89BX01666, n°89BX01665, n°89BX01695 and n°8901708 (B)

[179] According to the legal review *Europe* (February 1999, p. 23), there would be a total of 280 cases dealing with horticulturists and CNIH, all based on the same reasoning.

Administrative Court of Appeal of Nantes, S.A. Tartrou, 09 October 1991, Cases n°89NT01114 and n°89NT01484 (B)

Administrative Court of Appeal of Nancy, SARL Decoster, 26 December 1991, Cases n°90NC00344, n°90NC00345 and n°90NC00469 (B)

Conseil d'Etat, Association La Vache à lait qui refuse de se laisser traire, 17 April 1992, Case n°117604 (B)

Conseil d'Etat, Fenacomex known as the *Saumon* case, 2 June 1993, Cases n°69726 and n°69727 (D)

Conseil d'Etat, SCA du Piada, 01 June 1994, Case n°129805 (B)

Conseil d'Etat, Allix c/ Directeur de l'Agence financière du bassin d'Adour Garonne, 1 June 1994, Case n°129775 (B)

Conseil d'Etat, Société Saumon Pierre Chevance, Case n°136761 (B)

b) Civil courts

Cour de cassation, Société Huttepain, 16 June 1998, Case n°1277, Petition n°96-19.109; Cour de cassation, Société Marcel Braud, 20 October 1998, Case n°1652, Petition n°96-18.682; Cour de cassation, Société Sanders, 20 October 1998, Case n°1651, Petition n°96-18.682, not published (B)

Cour de cassation, Société Guyomarch Vertou, 20 October 1998, Case n°1649, Revue de jurisprudence fiscale 1999 n°282, p. 173-174 (B)

Cour de cassation, Société des Etablissements Friedrich, 26 January 1999, Case n°289, Petition n°97-11.225, Bull. civ. , IV, n°22, p. 18 (B)

Cour de cassation, Mr Le Guen, 23 October 2001, Case n°1812, Petition n°00-10.631; Cour de cassation, Mr Guyomarch, 23 October 2001, Case n°1813, Petition n°00-10.632, not published (B)

Cour de cassation, Entreprise Michel Dewailly, 30 May 2002, Case n°1911, Petition n°00-20.526, not published (B)

1999 Report

Cour de cassation, Société anonyme Le Moulin Rouge Ponard, 23 November 1993, Case n°1840, Petition n°91-18.034 (B)

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Cour de cassation, SNC Limagne Sanders, 18 October 1994, Case n°2003, Petition n°92-15.667 (B)

Cour de cassation, SNC Bourgogne Sanders, 13 June 1995, Case n°1215, Petition n°93-21.417 (B)

Cour de cassation, Société Minoterie Joseph Nicot, 20 February 1996, Case n°360, Petition n°93-21.661 (B)

Cour de cassation, SNC Bourgogne Sanders, 20 February 1996, Case n°364, Petition n°94-11.717 (B)

Cour de cassation, SNC Sanders Aliments, 07 January 1997, Case n°60, Petition n°95-10.099 (B)

Cour de cassation, Société Normande d'alimentation animale, 27 May 1997, Case n°1357, Petition n°95-19.371 (B)

Cour de cassation, Société Rental Languedoc, 27 May 1997, Case n°1353, Petition n°95-13.053 (B)

Cour de cassation, Société Ralston Purina France, 27 May 1997, Case n°1358, Petition n°95-19.372 (B)

Cour de cassation, Société Chambre, 02 December 1997, Case n°2398, Petition n°96-10.575 (B)

Cour de cassation, Société Huttepain Maine Aliments, 16 June 1998, Case n°1277, Petition n°96-19.109 (B)

4.1.3 Other alleged State aid measures

a) Administrative courts

Conseil d'Etat, URSSAF de la Haute-Garonne, 17 November 2000, Case n°185772, Droit matériel de l'Union européenne, Paris, Montchrestien, Coll. Précis Domat, 2ème éd. 2001, note 25, p. 455, para. 97 and p. 476 (D)

Conseil d'Etat, M. Guiavarch, 5 September 2001, Case n°225473, not yet published in the Lebon report of cases (B)

Conseil d'Etat, AFORM & others, 28 September 2001, Case n°238423, not published (D/H)

Conseil d'Etat, Union Nationale des Services Publics Industriels et Commerciaux, 5 March 2003, Case n°233372, not yet published in the Lebon report of cases (H)

Conseil d'Etat, Union des industries utilisatrices d'énergie ("UNIDEN"), 21 May 2003, Case n°237466, not yet published in the Lebon report of cases (B)

Conseil d'Etat, Syndicat national de l'industrie des technologies médicales, 16 January 2004, Case n°250540, not published in the Lebon report of cases (B)

Conseil d'Etat, Syndicat des industries de matériels audiovisuels électroniques, 6 February 2004, Case n°250560, not published in the Lebon report of cases (B)

1999 Report

Conseil d'Etat, Commune de Fougerolles, 03 November 1997, Case n°169473 (C)

b) Civil courts

c) Independent public agencies

1999 Report

Competition Council, Opinion n°89-A-11 of 11 July 1989, Syndicat National des Entreprises de Drainage, BOCCRF 11 August 1989, p. 204 (D)

Competition Council, Opinion n°94-A-15 of 10 May 1994, EDF GDF, BOCCRF 20 October 1994, p. 463 (C)

4.1.4 Actions by competitors

a) Administrative courts

Conseil d'Etat, Chambre syndicale nationale des entreprises de sécurité and others, 29 July 1998, Case n°156019, not published (E)

Conseil d'Etat, Société Générale & others, 18 December 1998, Case n°197175, AJDA, 1999, p. 285 (H)

Conseil d'Etat, SA Bouygues & others, 28 July 1999, Case n°206749, BJDCP, n°7, 1999, p. 620-627 (H)

Conseil d'Etat, Fédération Nationale des syndicats d'agents généraux d'assurance, 28 March 2001, Case n°155896, D., 2002, Juris., p. 630 (B)

Conseil d'Etat, Electricité de France ("EDF") - Société Nationale d'Electricité et de Thermique ("SNET"), 11 June 2003, Case n°240512, 240520, not published in the Lebon report of cases (B)

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)

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 février 2005, p. 260-268,.Dr. Adm., janvier 2005, n°2, p. 20-21 (D/E/I)

Administrative Court of Pau, Ryanair, 3 May 2005, Case n°0301635, not published (D/E/I)

b) Civil courts

Commercial Court of Paris, Sunsail International, 2 February 1998, not published (F/G)

Commercial Court of Paris, UFEX, DHL & others c/ La Poste, SFMI, Chronopost & others, 7 December 1999, Docket n°96072418 and 96082065, not published (G)

Civil Court of Appeal of Paris, SARL Germain Environnement c/ Office National des Forêts ("ONF"), 27 July 2004, Official Bulletin of Competition, Consumers and Fraud Repression n°9 of 8 November 2004, p. 725, NOR: ECOC0400311X; Competition Council, 10 February 2004, Case n°04-D-02, Official Bulletin of Competition, Consumers and Fraud Repression n°5 of 4 May 2004

c) Independent public agencies

Competition Council, EDF, 19 May 2004, Case n°04-D-19, Official Bulletin of Competition, Consumers and Fraud Repression, n°9 of 8 November 2004, p. 660

4.2 Recovery

a) Administrative courts

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 (see above)

Administrative Court of Appeal of Nancy, Ryanair, 18 December 2003, Case n°03NC00859, AJDA, 2004, p. 396-401, Case n°03NC00864 (see above)

1999 Report

Administrative Court of Appeal of Paris, Boussac, 16 février 1994, Gaz. Pal. 1995, p. 813

b) Civil courts

Commercial Court of Paris, SA Sojerca c/ Jaunet, 21 January 2003, Gazette du Palais, 4 novembre 2003 n°308, p. 28 (G/F)

1999 Report

Commercial Court of Paris SFEI v La poste, 7 December 1999, Case n°96072418

c) Independent public agencies

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

4.3 Liability claims

a) Administrative courts

Administrative Court of Grenoble, Société Stéphane Kelian, 15 October 2003, Case n°0102341, not published (A)

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

b) Civil courts

Cour de cassation, Etablissements J. Richard Ducros c/ Société Métallique Finsider Sud, 15 June 1999, Case n°1236, Petition n°B 97-15.684, Contrats - concurrence - consommation 1999 n°181 p. 18-19 (résumé); Gazette du Palais 1999 II Panor. p. 228 (résumé); La Semaine juridique - édition générale 1999 IV 2485 (résumé); Revue de jurisprudence de droit des affaires 1999 p. 818-819; Europe 2000 Janvier Comm. n°25 p. 20; Gazette du Palais 2000 II Chron. p. 553-554; Petites affiches, 2000 n°56 p. 17; Revue trimestrielle de droit commercial et de droit économique 2000 p. 261-262 (H/G)

Commercial Court of Paris, UFEX, DHL & others c/ La Poste, SFMI, Chronopost & others, 7 December 1999, Docket n°96072418 and 96082065 (see above), not published

Court of Appeal of Paris, CDR c/ FG Marine-Stardust, 16 January 2004, Case n° 2002/05900, not published (G)

1999 Report

Cour de cassation, Société Lener Ignace, 12 May 1993, Case n°752, Petition n°89-21.840 (A)

4.4 Preliminary rulings

a) Administrative courts

Administrative Court of Appeal of Lyon, Ministre de l'Économie, des Finances et de l'Industrie c/ SA, 13 March 2001, Case n° 00LY02270 (B)

1999 Report

Conseil d'Etat, Fenacomex known as the *Saumon* case, 26 October 1990, Cases n°69726 and n°69727, Rep. Lebon p. 294 (D)

Conseil d'Etat, Société Baxter et autres, 28 March 1997, Case n°179049, n°179050 and n°179054 (B)

b) Civil courts

Social Security Court of Créteil, S.A. Ferring c/ Agence Centrale des organismes de Sécurité Sociale ("ACOSS"), 11 January 2000, Case n° CR. 1260/98

Cour de cassation, Société Galeries de Lisieux, 16 November 2004, Case n°1642, Petition n°03-12.565, AJDA 2005, Jurisprudence p. 727 (B)

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

Social Security Court of Saint-Etienne, SAS Bricorama France v Caisse Nationale de l'Organisation Autonome d'Assurance Vieillesse des Travailleurs Non-Salariés des Professions Industrielles et Commerciales - Caisse ORGANIC, 5 April 2005 (B)

Court of Appeal of Lyon, SAS Distribution Casino France v Organic de recouvrement a.o., 24 February 2004 (B)

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2. Outline of the availability of judicial relief under the German legal system

The purpose of this report is to analyse whether and to what extent judicial relief is available in State aid proceedings. For the analysis of the availability of judicial relief under the German legal system, the following types of procedures were distinguished:

- Procedures concerning the direct effect of Article 88 (3) EC (section 2.1)
- Procedures concerning the enforcement of negative Commission decisions (section 2.2)
- Procedures concerning the enforcement of positive Commission decisions (section 2.3)

A brief section (section 2.4) analyses the case law by German courts in State aid matters (described in section 3). The analysis discusses, in particular, whether and to what extent judicial relief was used and whether it can be considered satisfactory from a State aid perspective.

2.1 Procedures concerning the direct effect of Article 88 (3) EC

The infringement of Article 88 (3) EC can be contested both in public law disputes (section 2.1.1) and private law disputes (section 2.1.2).

2.1.1 Public law disputes (disputes involving a public authority)

Public law disputes ("*öffentlich-rechtliche Streitigkeiten*") are disputes where at least one of the parties is a public authority acting in its capacity as a public authority (as opposed to public authorities acting in the private market place), and where the legality of a legislative or administrative act is challenged. In the context of Article 88 (3) EC, the question is whether the legislative or administrative act involves unlawful State aid and therefore infringes Article 88 (3) EC.

Public law disputes can be further distinguished into two main categories:

- actions by a company or individual to challenge a legislative or administrative act by which allegedly unlawful State aid is granted to a third party, usually a competitor ("complaints directly targeted at competitors")
- actions, by a company or individual to challenge a legislative or administrative act which is directly addressed to the company or individual. These actions are not directly targeted at the benefits granted to third parties, for example competitors ("complaints targeted at imposition of burden").

a) Complaints directly targeted at competitors

Complaints directly targeted at competitors are actions by which a company or an individual challenges a legislative or administrative act by which allegedly unlawful State aid is granted by a public authority to a competitor. These actions can either be aimed at preventing the grant of the aid, or, if the aid has already been granted, at requiring the public authority to recover the aid[180].

The type of proceedings to be followed to bring a public law complaint targeted at a competitor depends both on the aim of the action (preventing the grant of State aid or requiring the public authority to recover State aid) and the way in which State aid was granted (by unilateral administrative decision or by means of a public contract).

Usually, the company or individual intending to challenge the grant of aid (or to require recovery) must lodge a complaint ("*Widerspruch*", "*Einspruch*") with the authority that adopted the measure. Only if the objection is rejected, can a court action be brought.

In most cases, the administrative courts will be competent. Decisions by the administrative courts can be appealed to the Courts of Appeal ("*Oberverwaltungsgerichte*"), and can be further appealed to the Federal Administrative Court ("*Bundesverwaltungsgericht*"). However, depending on the subject matter to which the aid relates, the dispute may also fall within the competence of the tax courts ("*Finanzgerichte*") or social courts ("*Sozialgerichte*").

The appropriate action to be brought depends, again, on the aim of the action and the way in which State aid was granted. German administrative law provides for a wide variety of different actions which are used according to the circumstances ("*Anfechtungsklage*"; "*Verpflichtungsklage*"; "*Feststellungsklage*"; "*Allgemeine Leistungsklage*" or "*Folgenbeseitigungsanspruch*"). Usually, it will be necessary to dispose of the administrative act by which the aid was granted by means of an *Anfechtungsklage*. Interlocutory proceedings are available if the relevant conditions (for example, urgency) are satisfied.

A company or individual has standing to bring an action against an unlawful aid granted to a competitor if the administrative act by which the aid was granted is unlawful and, at the same time, violates the claimant's rights. In 1998, the *Verwaltungsgericht of Magdeburg* expressly stated for the first time that a violation of Article 88 (3) EC confers standing on a company that is directly affected by the grant of aid to a competitor.

b) Complaints targeted at imposition of burden

Complaints targeted at the imposition of a burden are complaints brought by a company or an individual against a legislative or administrative measure by which the company or individual is negatively affected ("*belastende Maßnahmen*"). Usually, the contested legislative or administrative measure requires the company or individual to pay a tax or other

contribution. To avoid payment of the tax or contribution, the company argues that either the request for payment itself (i.e. the administrative act) or the legislative act on which the administrative act is based are unlawful. One of the arguments that can be made is that the tax or contribution (or the interpretation of the relevant provisions which were adopted by the public authority) amounts to unlawful State aid that infringes Article 88 (3) EC and is unenforceable. It follows from the ECJ's case law[181] that the court must, if it accepts this argument, suspend the application of the legislative or administrative act that imposes the tax or other contribution.

Variations of these cases are actions by which a company or an individual challenges the decision of a public authority not to grant some form of tax benefit or other contribution. The argument that is made in these cases is that the refusal to grant the tax benefit or contribution benefits the claimant's competitors, which in turn would constitute unlawful State aid. An infringement of Article 88 (3) EC therefore requires an interpretation of the relevant legislative or administrative act establishing the tax exemption or contribution of which the claimant is the beneficiary.

An example of this category of cases is the case decided by the *Verwaltungsgericht of Würzburg* of 15 November 2004, where the claimant challenged an invoice for a participation fee ("*Teilnehmerentgelt*"), arguing that the fee constituted State aid and was therefore unenforceable.

The proceedings to be followed by the company or individual depend largely on the legislative or administrative act in question. As a general rule, the action must be brought against the administrative act, since it is usually not possible to challenge legislative acts directly. However, any court must, when assessing the legality of the administrative act, assess the legality of the legislative act on which the administrative act is based at the same time. If the legislative act infringes Article 88 (3) EC and is therefore unlawful, the administrative measure was adopted without a valid legal basis ("*Ermächtigungsgrundlage*") and is therefore automatically unlawful and unenforceable.

Since these cases relate to measures which are directly addressed to the company or individuals, both these addressees will always have standing to bring an action. In administrative proceedings the addressee is usually required to lodge a complaint ("*Widerspruch*", "*Einspruch*") with the authority that adopted the measure. Only if the objection is rejected, can a court action be brought.

Most disputes involving a private party, on the one hand, and a public authority, on the other hand, (i.e. administrative law disputes) are dealt with by administrative courts ("*Verwaltungsgerichte*"). Decisions by the administrative courts can be appealed to the Courts of Appeal ("*Oberverwaltungsgerichte*"), and can be further appealed to the Federal

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[180] Case C-39/94, SFEI and Others v La Poste [1996] ECR I-3547.
[181] Case C-354/90, FNCE v France [1991] ECR I-5505.

Administrative Court ("*Bundesverwaltungsgericht*"). In disputes involving tax matters, the tax courts ("*Finanzgerichte*") are competent, whose decisions can be appealed to the Federal Tax Court ("*Bundesfinanzgericht*"). For other matters, the social courts ("*Sozialgerichte*") or the civil courts ("*Zivilgerichte*") may be competent.

2.1.2 Private law disputes

The direct effect of Article 88 (3) EC can be an issue in disputes involving two or more private persons ("*civil law disputes*", "*zivilrechtliche Streitigkeit*"), as opposed to disputes where at least one of the parties involved is a public authority. Similarly to public law disputes, private law disputes can be further distinguished into two main categories:

- disputes, where a company or individual challenges the grant of State aid to a third party ("private law disputes directly targeted at competitors"), and

- disputes, where a company or individual challenges a payment obligation, or an obligation to provide specific services, by arguing that the legal basis of the obligation infringes Article 88 (3) EC and that the obligation is therefore unenforceable ("private law disputes targeted at imposition of burden").

a) Private law disputes directly targeted at competitors

Apart from public law complaints, which are aimed at preventing a public authority from granting State aid to a third party, it is conceivable that a company or individual may bring a complaint against the beneficiary of the State aid, arguing that the aid is unlawful and infringes Article 88 (3) EC. However, it is not entirely clear whether there is a legal basis for such complaints under German law.

A complaint could be based on Article 3 of the Act Against Unfair Competition ("*Gesetz gegen den unlauteren Wettbewerb*", "*UWG*"), which provides for cease and desist orders. The *UWG* generally prohibits competitive activities that are contrary to generally accepted business behaviour. A vast body of case law has been developed by the German courts as to what may be considered to be contrary to generally accepted business behaviour. One of the situations where German courts will often find the *UWG* applicable is where a company obtains a competitive advantage over its competitors by either breaching the law or by taking advantage of a breach of the law by a third party ("*Vorsprung durch Rechtsbruch*"). However, according to established case law, not every infringement of the law is contrary to generally accepted business behaviour. Rather, the *UWG* requires that the infringement is of a rule whose object is the protection, although not necessarily exclusively, of the fairness of competition ("*sekundärer Marktbezug*"). Accordingly, a complaint based on Article 3 *UWG* against the beneficiary of unlawful State aid can only be made if the courts accept the argument that Article 88 (3) EC is aimed at protecting the fairness of competition.

It is further conceivable to base a cease and desist order on section 823 (2) of the Civil Law Code ("*Bürgerliches Gesetzbuch*", "*BGB*"). Section 823 (2) *BGB* provides for cease and desist orders in the case of an infringement of a statute whose object is the protection of other persons ("*den Schutz eines anderen bezweckenden Gesetzes*"). A complaint based on section 823 (2) *BGB* against the beneficiary of unlawful State aid can thus only be made if the courts accept the argument that Article 88 (3) EC is aimed at protecting other persons.

A judgment of the *Oberlandesgericht of München* of 15 May 2003 suggests that a competitor cannot rely on Article 1 *UWG* (which, following an amendment of the *UWG*, is now Article 3 *UWG*) or section 823 (2) *BGB* to challenge illegal State aid. The judgment concerned the claim of an operator of a business who was in direct competition with a business operated by the City of Munich that the business of the City of Munich should not be exempt from sales tax. The *Oberlandesgericht of München* dismissed the claim based on the *UWG* and section 823 (2) *BGB* and expressly stated that Articles 87 and 88 EC were not intended to protect competitors.

b) Private law disputes targeted at imposition of burden

A different category of private law actions are disputes where a company or individual challenges a payment obligation or an obligation to provide specific services, by arguing that the legal basis for such an obligation infringes Article 88 (3) EC, and that the obligation is therefore unenforceable. One of the most prominent cases was the dispute before the *Landgericht of Kiel* which resulted in the ECJ's *Preussen Elektra* decision[182].

In a civil law dispute, a private party usually requires the other party or parties to pay a given amount of money or to provide a further defined service. Any such claim must have a legal basis ("*Anspruchsgrundlage*") that justifies the claim. The legal basis can either be a contractual legal basis ("*vertragliche Anspruchsgrundlage*") or a legal basis provided by law ("*gesetzliche Anspruchsgrundlage*"). A claim based on a legal basis provided by law can only be enforced if the legal basis is lawful and enforceable.

In the context of State aid, the party objecting to the claim may argue that the legal basis constitutes unlawful State aid, infringes Article 88 (3) EC and is therefore unenforceable. It follows from the ECJ's case law[183] that national courts may not apply legislative acts that infringe Article 88 (3) EC. Accordingly, any German court competent to decide a private law dispute will have to reject a claim based on a legal basis that infringes Article 88 (3) EC.

In the case before the *Landgericht of Kiel*, the claimant, an electricity supply company, was required by the Law on Feeding Electricity from Renewable Resources into the Public Grid ("*Stromeinspeisungsgesetz*", "*StrEG*") to purchase electricity from renewable resources and to pay a fixed price. The claimant initially paid the fixed price, but later brought a complaint against the operator of the renewable resources, requesting a refund and arguing that the

[182] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I-2099.

StrEG constituted unlawful State aid. The *Landgericht of Kiel* confirmed that the complaint would be well-founded if the *StrEG* indeed constituted State aid – which was the subject of a reference for a preliminary ruling by the *Landgericht of Kiel* to the ECJ and, accordingly, the subject of the decision by the ECJ.

2.1.3 Action for damages from a public authority

A claim for damages will normally have to be brought against the public authority that granted the unlawful State aid. Under German law, public authorities are required to indemnify private persons who suffered loss by reason of a breach of their official duties. The obligation to notify State aid is an official duty intended to protect third parties, i.e. the competitors of the beneficiary of the State aid. It is thus conceivable for damages claims to be brought under section 839 of the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*").

2.1.4 Action for damages from the beneficiary

In theory, an action for damages by the beneficiary of unlawful State aid could be based on either section 3 *UWG* or section 823 (2) *BGB*. In practice, any claimant will encounter the problem that it is not necessarily accepted that section 3 *UWG* or section 823 (2) *BGB* constitute valid legal bases for claims alleging an infringement of Article 88 (3) EC (see above). In addition, the claimant will have to show that there is a causal link between the damage and failure to notify the State aid. It is likely to be very difficult, in most cases, to show that the existence of such a causal link.

2.2 Procedures concerning the enforcement of a negative Commission decision

When a public authority has granted unlawful State aid by means of an administrative act, it can order repayment, also by means of an administrative act ("*Verwaltungsakt*").

The beneficiary of the State aid can lodge a complaint ("*Widerspruch*") with the authority requesting recovery. If the complaint is rejected, the beneficiary of the aid can bring an action before the administrative courts ("*Verwaltungsgerichte*").

It is also conceivable that a third party might bring a complaint against a public authority to require the public authority to recover the State aid that has been declared unlawful by the Commission. The third party must show that it has standing to bring the complaint by arguing that the public authority is under an obligation to recover the State aid, and that non-recovery would violate the rights of the third party.

One of the problems often encountered in proceedings concerning the repayment of unlawfully granted State aid arises from section 48 of the German Act on Administrative Procedure ("*Verwaltungsverfahrensgesetz*", "*VwVfG*"). Section 48 *VwVfG* protects private persons against the revocation of an administrative act (such as, for example, the act

[183] Case C-354/90, FNCE v France [1991] ECR I-5505.

granting State aid) if certain conditions are satisfied. Several German administrative courts referred questions concerning the compatibility of section 48 *VwVfG* with the EC State aid rules to the ECJ. In the *Alcan* case, the ECJ decided that section 48 *VwVfG* must not be interpreted in a manner that makes it impossible to recover the illegal aid.

In principle, aid granted by way of a civil law transaction must be recovered by relying on civil law rules. However, a recent case decided by the Administrative Court of Berlin suggests that, in the future, German authorities will be able to reclaim all of the unlawful aid on the basis of administrative law. The *Kvaerner* case 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 concerning 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 ("*Oberverwaltungsgericht*") 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 of Berlin, 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.

2.3 Procedures concerning the enforcement of a positive Commission decision

A potential aid beneficiary may have a claim against a public authority in relation to the provision of State aid which was authorised by the Commission. Whether such a claim arises depends on the specific legal basis and on whether that legal basis actually confers a right on the claimant to make such claims. For example, a valid claim could exist where the potential aid beneficiary has entered into a contract with a public authority about the granting of aid that was subsequently authorised by the Commission. There are, however, no published cases relating to such claims.

Competitors of an aid beneficiary may challenge the granting of aid according to the generally applicable rules. However, it is conceivable that there is no legal basis, under German law, for challenging State aid that has been authorised by the Commission.

2.4 Summary conclusions

Overall, there are 69 cases that deal with questions of State aid law. 39 of these cases were decided after the 1999 Report.

In general, the discussion of State aid concepts in German court judgment has become more detailed and sophisticated. Most of the courts are aware of the jurisprudence of the Community courts and the practice of the Commission.

The large majority of cases (41 cases, 62.1 per cent) are complaints targeted at the imposition of a burden (for example, taxes). The next largest group is procedures concerning the enforcement of negative Commission decisions (seven cases, 22.7 per cent). There are relatively few cases where the granting of State aid was directly challenged by a competitor (nine cases, 13.6 per cent). There are no reported cases at all concerning actions for damages.

In general, the availability of judicial relief can be considered to be satisfactory, although there are exceptions:

- As shown by the limited number of cases, the effectiveness of direct complaints against competitors seems to be limited. Although German courts seem to accept that competitors may have standing to bring such complaints, there seems to be uncertainty as to the appropriate legal basis (in particular with regard to civil law claims which are brought directly against the beneficiary of the aid).

- Actions for damages – either against the public authority or against the beneficiary of the aid – may not be seen as an effective means of enforcing State aid law. Part of the reason may be that it is generally difficult to make successful damages claims against public authorities. Also, in particular with regard to damages claims against the beneficiaries of State aid, it is not entirely clear whether there is a legal basis for such claims.

2.4.1 Procedures concerning the direct effect of Article 88 (3) EC

Overall, there are 50 cases (75.7 per cent) relating to procedures concerning the direct effect of Article 88 (3) EC. 22 of these cases have been added since the 1999 Report.

a) Public law disputes

A) Complaints directly targeted at competitors

Overall, there are seven published cases in this category. Three of these cases have been added since the 1999 Report, the most prominent being the decision by the *Bundesverwaltungsgericht* that led to the ECJ's *Altmark Trans* decision.

In all three cases since 1999, transport companies challenged the granting of a public transport licence to competitors, arguing that the grant of the licence involved State aid. Standing does not appear to have been an issue in any of these cases.

B) Complaints targeted at imposition of burden

Overall, there are 35 cases in this category. 16 of these cases have been added since the 1999 Report.

Published cases deal with a large variety of factual matters (for example, TV licence fees, investment grants, motor tax law, home owner allowances). The decisions by the courts discuss in some detail the question whether a legislative or administrative act constitutes State aid and usually decide either that this is not the case or that the question can be left open. Occasionally, national courts themselves assess whether a measure satisfies the conditions for an exemption according to Article 87 (2) and Article 87 (3) EC.

b) Private law disputes

A) Private law disputes directly targeted at competitors

Overall, there are two cases in this category, both added since the 1999 Report.

In the decision by the *Oberlandesgericht of Koblenz* of 21 August 2001, the *Oberlandesgericht of Koblenz* decided that no State aid was involved and therefore did not discuss the question whether the claimant actually had a legal basis for the claim against a competitor based on an infringement of Article 88 (3) EC.

The decision by the *Oberlandesgericht of München* of 15 May 2003 denies that German civil law provides for a legal basis for claims against competitors. However, it is difficult to reconcile the decision by the *Oberlandesgericht* with established case law of the Community courts regarding State aid, and it seems unlikely that the *Oberlandesgericht's* decision, and, in particular, the reasoning adopted by the *Oberlandesgericht*, will be followed by other German courts.

B) Private law disputes targeted at imposition of burden

Overall, there are six cases in this category. Four of these cases have been added since the 1999 Report, the most prominent being the decision by the *Landgericht of Kiel* that led to the ECJ's *Preussen Elektra* decision.

c) Action for damages from a public authority

There are no reported decisions in this category.

A major obstacle for private persons to bring liability claims under section 839 *BGB* is that the claimant must show and prove a causal link between the damage suffered by the private person and the non-notification of the State aid. The claimant – for example a competitor – will have to prove that the granting of unlawful State aid resulted in financial loss. Usually, it will be difficult to prove causation. This may explain why there are no published cases dealing with claims made under section 839 *BGB* for failing to notify State aid.

d) Action for damages from the beneficiary

There are no reported decisions in this category.

Actions for damages against the beneficiary of unlawful State aid are unlikely to be successful under current German law. Any claimant will encounter the problem that it is not necessarily accepted that section 3 *UWG* or section 823 (2) *BGB* are valid legal bases for claims alleging an infringement of Article 88 (3) EC. In addition, the claimant will have to show a causal link between the damage and the non-notification of the State aid. In most cases, it is likely to be very difficult to demonstrate that there is such a causal link.

2.4.2 Procedures concerning the enforcement of a negative Commission decision

Overall, there are 15 cases in this category. 11 of these cases have been added since the 1999 Report.

The most noticeable development in this category was the decision of the Federal Court of Justice ("*Bundesgerichtshof*"), the highest German court in civil law matters, of 4 April 2003 which, for the first time, established clearly that a violation of Article 88 (3) EC leads to the nullity of the underlying transaction in its entirety under German civil law. The relevant provision of the German Civil Code is section 134, which provides that any transaction that infringes a legal prohibition is null and void. It was unclear whether Article 88 (3) EC constitutes such a legal prohibition within the meaning of the German Civil Code and whether its violation leads to the nullity of the underlying transaction in its entirety. The argument for not applying section 134 of the German Civil Code to a transaction involving State aid was that Article 88 (3) EC is addressed to the Member State only and should therefore not affect a private law transaction. The Federal Court of Justice rejected that argument and found that it was necessary to find the entire contract null and void in order to remove the distortions of competition.

Another noticeable decision is the decision by the Administrative Court ("*Verwaltungsgericht*") of Berlin of 15 August 2005. The Administrative Court of Berlin confirmed that, where State aid has been granted by contract (rather than a specific unilateral administrative decision), for example in the case of loans or guarantees, the public authority that granted the State aid cannot simply (unilaterally) order repayment once the Commission has issued a negative decision imposing an obligation to recover the aid. Instead, the agency must take action before either the civil or the administrative courts by bringing an *Allgemeine Leistungsklage*.

2.4.3 Procedures concerning the enforcement of a positive Commission decision

There is one case in this category. No cases have been added since the 1999 Report.

3. List of cases with summaries

3.1 Procedures concerning the direct effect of Article 88 (3) EC

a) Public law disputes (disputes involving a public authority)

A) Complaints directly targeted at competitors

3.1.1 Higher Administrative Court ("Oberverwaltungsgericht") of Lüneburg, 16 September 2004, 7 LB 3545/01, NZBau 2005, 53 (D)

Facts and legal issues: The claimant, a transport company, challenged the licence for local public transport services granted to another transport company ("third party") by the defendant, a local public authority. The claimant argued that the third party would not be able to provide the transport services without public financial support.

Decision: The Ober*verwaltungsgericht of Lüneburg* rejected the claimant's claim. It acknowledged that public financial support granted as compensation for the supply of public transport services may constitute unlawful State aid. However, the Law on Transportation of Persons ("*Personenbeförderungsgesetz*", "*PBefG*") provides that various criteria must be taken into account when a licence for local public transport services is granted. Whether or not the owner of the licence will require public financial support to operate the licensed transport services is not among the criteria to be taken into account. The Ober*verwaltungsgericht of Lüneburg* therefore concluded that public financial support did not affect the legality of the licence itself, even if the financial support constituted unlawful State aid.

3.1.2 Administrative Court ("Verwaltungsgericht") of Freiburg, 18 December 2002, 1 K 2400/99, NJOZ 2004, 1167 (D)

Facts and legal issues: The claimant, a transport company, challenged the licence for local public transport services granted to another transport company ("third party") by the

defendant, a local public authority. The claimant argued that the third party would not be able to provide the transport services without public financial support, and that such financial support constituted unlawful State aid.

Decision: The *Verwaltungsgericht of Freiburg* rejected the claim. The evidence presented in court showed that the third party would be able to provide transport services in the foreseeable future without having to rely on public financial support. Financial support would be required only during the first years of operating the service. Such "start-up" support would also be granted by a private investor in situations where this would promote long-term profitability interests. The *Verwaltungsgericht of Freiburg* therefore concluded that, according to the private investor test, financial support to the third party would not constitute State aid.

Comment: This judgment is one of the few decisions by German courts where the private investor test was applied by a national court.

3.1.3 Federal Administrative Court ("Bundesverwaltungsgericht"), 6 April 2000, 3 C 7/99, NZBau 2001, 225 (D)

Facts and legal issues: In 1990, the transport company Altmark Trans obtained licences and State aid to operate passenger transport within the district of Stendal. The licence was renewed by the defendant, a local public authority, in 1994. The claimant, a competitor of Altmark Trans who had also applied for the licence, challenged the renewal of the licence, arguing that Altmark Trans was not financially viable because it could not have survived without public financial support.

Decision: The *Bundesverwaltungsgericht* referred the question whether public financial support to cover deficits in local public transport could amount to State aid and whether such support could affect trade between Member States to the ECJ. The ECJ held[184] that the existence of State aid did not depend on the local or regional nature of the transport services supplied or on the scale of the activity concerned. In addition, the ECJ clarified the conditions according to which public authorities may grant financial compensation to safeguard the fulfilment of public services obligations. At the time of the ECJ's decision, the licence for Altmark Trans had expired and the proceedings were terminated without a final decision.

3.1.4 Administrative Court ("Verwaltungsgericht") of Magdeburg, 2 September 1998, EuZW 1998, 669 (D)

Facts and legal issues: In Germany, the Federal Agency for Special Tasks related to German Unification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*", "BvS") and a private law company acting on behalf of BvS were responsible for allocating agricultural and forest estate formerly owned by the German Democratic Republic to individuals upon application. The relevant rules provided for different categories of eligible persons, since one

[184] Case C-280/00, Altmark Trans GmbH v Nahverkehrsgesellschaft Altmarkt GmbH [2003] ECR I-7747.

of the aims of these rules was to compensate for irreversible expropriations carried out by the Soviet authorities from 1945 to 1949 and thereafter by the authorities of the German Democratic Republic, and the land was sold to eligible applicants at less than half the market value. This land acquisition/compensation scheme was never notified by Germany to the Commission. After various third party complaints the Commission opened an investigation under Article 88 (2) EC on 18 March 1998 and informed Germany accordingly by letter dated 30 March 1998. The Commission's position was that any transfer of land that was not intended to provide or exceeded the level of compensation required for past expropriations may constitute aid incompatible with the Common Market.

The claimant (who belonged to a category of persons fully eligible for compensation) challenged the decision to transfer certain land to another applicant in interlocutory proceedings on the grounds that this applicant was not eligible and that Article 88 (3) EC prohibited the granting of aid to that applicant.

Decision: The Administrative Court of Magdeburg found in favour of the claimant and stated that the decision to transfer the land in issue to the applicant violated both the relevant legal criteria for eligibility (which had been wrongly applied in this case) and that Article 88 (3) EC prohibited the transfer.

Comment: The decision by the Administrative Court of Magdeburg was the first published decision that explicitly acknowledged that a violation of Article 88 (3) EC conferred standing on a company that was directly affected by the grant of aid to a competitor.

3.1.5 Higher Administrative Court ("Oberverwaltungsgericht") of Münster, 4 B 418/95, 19 December 1995; Administrative Court ("Verwaltungsgericht") of Aachen, 3 L 2123/94, 14 December 1994 (D)

Facts and legal issues: A waste paper collection company challenged an administrative act granting State aid to a competitor. The decision to grant State aid was not notified to the Commission.

The claimant first lodged an objection with the administrative agency responsible for the grant of the aid. As the grant of the aid was of immediate effect, the objection had no suspensory effect, i.e. it could not prevent the beneficiary from actually receiving the aid.

Decision: The complainant attempted to obtain suspensory effect of its objection in interlocutory proceedings before the Administrative Court ("*Verwaltungsgericht*") of Aachen. The Admininstative Court of Aachen, however, rejected the application. The Administrative Court of Aachen held that suspensory effect of the objection could be granted only if the administrative act granting the aid was clearly unlawful, i.e. if it clearly violated the rights of the complainant, for example under Article 88 (3) EC. The Administrative Court of Aachen held that it was not sufficiently clear whether a violation of these rights had been established in this case. The Administrative Court of Aachen, stated that, for there to be a violation of

Article 88 (3) EC the aid must be qualified as State aid within the meaning of Articles 87 and 88 EC. According to the Administrative Court of Aachen this was doubtful as it could not be denied that consideration was given for the grant of the aid. As the beneficiary was obliged under its Articles of Association to pursue certain social goals, such as educating and training unemployed teenagers, the Administrative Court of Aachen held that this amounted to consideration for the aid.

The appeal brought before the Higher Administrative Court of Münster was also dismissed. In support of its claim the appellant put forward further arguments and in particular, that the decision of the Administrative Court of Aachen was based on an erroneous interpretation of the notion of State aid. The appellant stressed that the Commission, in a letter dated 9 August 1995, appeared to have taken the view that the aid amounted to State aid.

Although the Higher Administrative Court of Münster confirmed that Article 88 (3) EC was designed to safeguard the interests of the competitors of a potential beneficiary and that it was the task of national courts to protect those interests, it reached the conclusion that it was doubtful whether the aid amounted to State aid. The Higher Administrative Court of Münster indicated that it was possible that the aid was merely intended to compensate the beneficiary for certain costs incurred as a result of the purposes it pursued. Furthermore, the Higher Administrative Court of Münster did not want to rule out the possibility that the aid amounted to an educational measure, which would mean that it could not qualify as State aid according to a decision of the Commission of 26 March 1991[185]. The letter of the Commission was interpreted as a preliminary statement. The Higher Administrative Court of Münster refused to make a reference for a preliminary ruling to the ECJ under Article 234 EC, taking the view that there was no corresponding obligation in interlocutory proceedings. Moreover, the Münster Court refused to make a reference under Article 234 EC since the Commission had previously commenced proceedings under Article 88 (2) EC and since non-compliance by the German authorities with a negative decision of the Commission (if any) could be challenged directly before the ECJ.

3.1.6 Higher Administrative Court ("Oberverwaltungsgericht") of Lower Saxony, 10 M 3142/94, 30 May 1994; Administrative Court ("Verwaltungsgericht") of Hanover, 11 B 3745/94, 27 May 1994 (D)

Facts and legal issues: The case concerned the provision of a guarantee by the Government of Lower Saxony. The guarantee amounted to DM 35 million and was granted as collateral security for bank loans granted for the purposes of the beneficiary's business. This was challenged in court by third party competitors of the beneficiary, who sought interlocutory relief.

Decision: Both the Administrative Court of Hanover and the Higher Administrative Court of Lower Saxony rejected the competitors' claim. The decisions dealt exclusively with the

[185] OJ (1991) L 215/11.

question of whether the grant of the guarantee violated the rights of the competitors under German law, which was denied. The question of whether Article 88 (3) EC had been complied with was not addressed. Only one sentence in the decision of the Administrative Court of Hanover mentioned EC law without going into any detail. The Administrative Court of Hannover merely stated that a violation of EC law had not been established by the claimant (although proceedings before the administrative courts are generally inquisitorial, requiring the Administrative Court of Hanover to investigate a violation of EC law *ex officio*).

Shortly after the case was closed, the Commission was informed of the grant of the guarantee. Having asked the German authorities on 30 June 1994 to comment in detail on the guarantee (whereupon Germany notified the guarantee by letter dated 13 October 1994) the Commission initiated proceedings under Article 88 (2) EC[186]. By decision of 29 May 1996[187], the Commission declared the aid partly incompatible with the Common Market and ordered that Germany obtain repayment of that part of the aid which was incompatible. The application for annulment brought by Germany was rejected by the ECJ[188].

3.1.7 Higher Administrative Court ("Oberverwaltungsgericht") of Münster, 22 September 1982, NVwZ 1984, 522 (D)

Facts and legal issues: The case concerned State aid granted by the defendant municipality to a large hotel chain for the construction of a hotel. The grant was by way of several agreements providing for a building lease and a loan on very favourable terms. A competitor of the beneficiary of the aid brought an action for annulment of the decision granting the aid before the administrative courts.

Decision: Both the Administrative Court and the Higher Administrative Court of Münster found that the claimant did not have standing to challenge the building lease because the lease was a private law contract that could not be challenged in the administrative courts. Both Courts did, however, find that the loan agreement constituted financial aid which was governed by public law. However, the Courts held that the claimant's rights were not directly affected by the grant of the aid. The Courts specifically stated that the entry of a new competitor to the market does not affect the rights of existing players on that market. In dismissing the action, the Courts stated that Article 87 EC was not directly applicable because the Commission could declare aid compatible with the Common Market under Article 88 (2) EC.

Comment: The case is a typical example of the traditional view held by the administrative courts in Germany, which prevents competitors from challenging decisions by which State aid was granted.

B) Complaints targeted at imposition of burden

[186] OJ (1995) C 201/16.
[187] OJ (1996) L 246/43.
[188] Case C-288/96, Germany v Commission [2000] ECR I-8237.

3.1.8 Administrative Court ("Verwaltungsgericht") of Würzburg, 15 November 2004, W 8 K 04.555 and W 8 K 4439, BeckRS 2004, 26951, 26952 (B)

Facts and legal issues: The claimant challenged an invoice for the participation fee ("*Teilnehmerentgelt*") imposed by the defendant, a public authority with special competences in the field of media. The claimant argued, *inter alia*, that the participation fee constituted unlawful State aid and, accordingly, that it could not be enforced. The Bavarian media law ("*Bayerisches Mediengesetz*", "*BayMG*") provided for the participation fee, which was imposed on operators of TV cable networks and TV cable network customers. It was imposed in addition to fees charged by the cable network operators ("*Kabelgebühr*") and TV licence fees ("*Rundfunkgebühren*"). The purpose of the participation fee was to promote local and regional TV and radio stations. The claimant argued, *inter alia*, that the participation fee constituted unlawful State aid and, accordingly, that it could not be enforced.

Decision: The Administative Court of Würzburg rejected the claim, holding that the participation fee did not involve direct or indirect State resources within the meaning of Article 87 EC. The Administative Court of Würzburg referred to the Amsterdam Protocol on Public Service Broadcasting ("the Protocol"), without discussing the Protocol's impact on the interpretation of Article 87 (1) EC. In addition, the Administative Court of Würzburg argued that, even if the participation fee amounted to State aid, it would be exempt under Article 87 (2) (iii) (d) EC.

Comment: This decision exemplifies that some German courts were still unaware of even the most basic State aid rules: the Administative Court of Würzburg fails to appreciate that an exemption according to Article 87 (2) or (3) EC can only be granted by the Commission.

3.1.9 Higher Administrative Court ("Verwaltungsgerichtshof") of Mannheim, 2. November 2004, 5 S 1063/04 (B)

Facts and legal issues: The city of Heidelberg intended to build tracks for a new tramway. The construction of the new tramway was subject to the formal approval of a plan ("*Planfeststellungsbeschluss*", "plan"), which was adopted by the defendant, the competent regional authority. To secure the financing of the project, the City of Heidelberg had applied for funds under a special aid scheme for local infrastructure projects "(*Gemeindeverkehrsfinanzierungsgesetz*", "*GVFG*"). The claimant, who owned property adjacent to the planned tracks, challenged the plan, arguing that the financing of the tramway would amount to unlawful State aid and that this would affect the legality of the plan.

Decision: The Higher Administrative Court of Mannheim rejected the complaint. It acknowledged that a plan may be void if, due to a lack of financing, it is unlikely to be realised. All parties to the procedure agreed that the tramway project could not be realised without *GVFG*-financing. The relevant question was therefore whether *GVFG*-financing

amounted to unlawful State aid. The ECJ established in its *Altmark Trans* decision[189] that State aid in the field of local public transport could affect trade between Member States since the transport market had been open to competition since 1995. However, the same is not necessarily true for the provision of infrastructure services for tramways. The claimant did not contest the defendant's assertion that there is no competition in respect of the construction of tramway infrastructure facilities. In addition, neither the ECJ nor the Commission had decided that the financing of infrastructure projects constituted unlawful State aid. This could be explained by the fact that infrastructure projects most often did not favour specific undertakings. The Higher Administrative Court of Mannheim concluded that there was no reason for the defendant to believe that the financing of the project constituted unlawful State aid, and that the plan had insofar been lawfully adopted.

3.1.10 Administrative Court ("Verwaltungsgericht") of München, 12 August 2004, M 17 K 02.1633, MMR 2005, 64 (B)

Facts and legal issues: The claimant challenged an invoice for the participation fee ("*Teilnehmerentgelt*") imposed by the defendant, a public authority with special competences in the field of media (see case 3.1).

Decision: The Administrative Court of München rejected the claim on the basis of the ECJ's *Preussen Elektra* decision[190], holding that the participation fee did not involve direct or indirect State resources within the meaning of Article 87 EC. In addition, the Administrative Court of München took the view that the Amsterdam Protocol on Public Service Broadcasting ("the Protocol") applied to the same extent to participant fees and TV licence fees. The Administrative Court of München did not further discuss the Protocol's impact on the interpretation of Article 87 (1) EC.

3.1.11 Higher Regional Court ("Oberlandesgericht") of Düsseldorf, 8 September 2004, VII-Verg 38/04, NZBau 2004, 688 (B, H)

Facts and legal issues: The defendant, a public entity, offered facility management contracts through a public procurement procedure. The complainant, a medium-sized company, complained that the tendered lot should have been subdivided to allow small and medium-sized companies to submit offers. The claimant relied on section 97 of the Act against Restraints of Competition ("*Gesetz gegen Wettbewerbsbeschränkungen*", "*GWB*"), which expressly provided that the interests of small and medium-sized undertakings "*shall primarily be taken into account in an appropriate manner by subdividing contracts into trade-specific and partial lots*". The defendant refused to do so, arguing, *inter alia*, that section 97 *GWB* amounted to unlawful State aid.

Decision: The Higher Regional Court of Düsseldorf found in favour of the claimant holding that section 97 *GWB* did not constitute State aid. The provision did not distort competition,

[189] Case C-280/00, Altmark Trans v Nahverkehrsgesellschaft Altmark GmbH [2003] ECR I-7747.

but rather increased competition by affording small and medium-sized companies the opportunity to participate in public procurement in which big companies were also allowed to participate. Since the same conditions apply to all companies, small- and medium-sized companies are not favoured over big companies.

3.1.12 Federal Tax Court ("Bundesfinanzhof"), 19 May 2004, III R 12/02, BeckRS 2004, 25006542 (B)

Facts and legal issues: The claimant, who operated a wind power plant, complained against a decision by the tax authorities according to which the claimant did not qualify for an investment grant under the law on investment grants ("*Investitionszulagengesetz*," "*InvZulG*"). One of the issues was whether the denial of the investment grant was justified on the grounds that producers of energy from renewable sources benefited from financial aid under the Law on Feeding Electricity from Renewable Energy Sources into the Public Grid ("*Stromeinspeisungsgesetz*", "*StrEG*").

Decision: The Federal Tax Court confirmed that the *StrEG* did not amount to unlawful State aid on the basis of the ECJ's *Preussen Elektra* decision[191].

3.1.13 Higher Regional Court "(Oberlandesgericht") of Brandenburg, 2 September 2003, Verg W 3/03, NZBau 2003, 688 (B)

Facts and legal issues: The defendant, a local public authority, entered into a service contract for the provision of certain regional transport services with a transport company without having carried out a public procurement procedure. The service contract required the transport company to provide rail services for which it would receive up to a certain amount in financial compensation from the defendant. The claimant, a competing transport company, complained that the defendant had not adhered to the public procurement procedure. One of the claimant's arguments was that a service contract that provided for financial compensation could not be awarded without a public procurement procedure, which would amount to unlawful State aid.

Decision: The Higher Regional Court of Brandenburg decided that the complaint was inadmissible, since the defendant was not required to respect the public procurement rules. The Higher Regional Court of Brandenburg agreed that financial compensation for discharging public service obligations may amount to State aid, referring to the criteria laid down by the ECJ in the *Altmark Trans* decision[192]. However, the ECJ did not decide that awarding financial compensation without a public procurement procedure necessarily constituted State aid. The Member States may instead determine an adequate level of compensation by carrying out a detailed cost analysis. Consequently, the *Altmark Trans* decision does not prevent Member States from entering into agreements that provide for

[190] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I-2099.
[191] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I-2099.
[192] Case C-280/00, Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH [2003] ECR I-7747.

financial compensation for discharging public service obligations without respecting the public procurement rules. Since the complaint was rejected as inadmissible, the Higher Regional Court of Brandenburg did not take a position as to whether the level of compensation agreed in the service contract actually met the criteria laid down in the *Altmark Trans* decision.

3.1.14 Higher Regional Court ("Oberlandesgericht") of Düsseldorf, 26 July 2002, Verg 22/02, NZBau 2002, 634 (B)

Facts and legal issues: The defendant, a public entity, tendered regional rail transport services by means of a public procurement procedure. The complainant, a provider of rail transport services, competed in the tendering procedure with *Deutsche Bahn AG* ("DB"), a major provider of rail transport services. The complainant argued that DB had received unlawful State aid in the past, and that competition would be distorted if the defendant did not take this aid into account during the tendering procedure. The Public Procurement Tribunal ("*Vergabekammer*") accepted the complaint and ordered the defendant to reinitiate the procedure, allowing for unlawful State aid to be taken into account when making the decision. The defendant appealed.

Decision: The Higher Regional Court of Düsseldorf annulled the decision by the Public Procurement Tribunal. The Higher Regional Court of Düsseldorf left open whether DB had actually received unlawful State aid. The fact that a company that participated in the tendering procedure had received unlawful State aid in the past was not something that had to be taken into account during the tendering procedure.

3.1.15 Federal Tax Court ("Bundesfinanzhof"), 21 February 2002,VII B 281/01, DAR 2002, 374 (B)

Facts and legal issues: Under the German Motor Vehicle Tax Law ("*Kraftfahrzeugsteuergesetz*", "*KraftStG*"), certain new cars equipped with a catalytic converter were tax privileged over old cars equipped with a catalytic converter. The claimant, the owner of a not tax privileged old car, challenged the tax assessment by the tax authority, the defendant. One of the claimant's arguments was that the distinction between new and old cars constituted unlawful State aid and was therefore unenforceable.

Decision: The Federal Tax Court rejected the claim. The Federal Tax Court agreed that, whereas the tax privilege primarily benefits consumers, it may create general market conditions in favour of the automobile industry. However, the tax privilege provided for in the *KraftStG* did not constitute State aid since it did not favour specific undertakings in the automotive sector.

3.1.16 Administrative Court ("Verwaltungsgericht") of München, 15 February 2002, M 6a K 01, ZUM-RD 2002, 564 (B)

Facts and legal issues: The claimant challenged an invoice for TV licence fees issued by the defendant, a public authority charged with collecting TV licence fees ("*Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten in der Bundesrepublik Deutschland*, "GEZ"). One of the claimant's arguments was that TV licence fees amounted to unlawful State aid.

Decision: The Administrative Court of München argued that TV licence fees did not amount to State aid, since they were aimed at compensating public service broadcasters for the discharge of public service obligations. Furthermore, even if licence fees constituted an advantage within the meaning of Article 87 (1) EC, this could be justified under Article 86 (2) EC.

3.1.17 Federal Tax Court ("Bundesfinanzhof"), 15 January 2002, IX R 55/00, NZM 2002, 1036 (B)

Facts and legal issues: The German law on home owner allowances ("*Eigenheimzulagengesetz*", "*EigZulG*") provided that individuals could apply for home owner allowance if they bought shares in a building society ("*Wohnungsbaugenossenschaft*"). The claimant, an individual, bought shares in a building society and subsequently applied for the allowance. The defendant, the tax authority, refused to accept the application, arguing that the defendant did not actually use housing space owned by a building society. One of the arguments brought forward by the defendant was that if the allowance was granted automatically upon the purchase of shares in a building society, this would constitute unlawful State aid in favour of the building societies.

Decision: The Federal Tax Court rejected the defendant's argument, holding that the claimant was entitled to obtain home owner allowance. The allowance did not constitute State aid, since it was granted to individuals, not undertakings. Admittedly, the allowance was effectively used by the individual to provide the building society with capital. However, by acquiring shares in the building society the individual obtained adequate consideration.

3.1.18 Federal Labour Court ("Bundesarbeitsgericht"), 3 April 2001, 9 AZR 301/00, NJW 2002, 1364 (B)

Facts and legal issues: Under the German Insolvency Code ("*Insolvenzordnung*", "*InsO*") and the Social Security Code ("*Sozialgesetzbuch*"), the employees of an insolvent company may request the German Federal Employment Agency ("*Bundesanstalt für Arbeit,* "BfA") to assume the insolvent company's salary obligations ("*Insolvenzgeld*"). BfA, the claimant, had paid *Insolvenzgeld* and had subsequently requested the insolvency administrator, the defendant, to treat the payment of *Insolvenzgeld* as a preferred claim ("*Masseverbindlichkeit*") during the insolvency proceedings. The defendant refused, arguing

that the payment of *Insolvenzgeld* was not one of the preferred claims listed in the *InsO*. The claimant took the position that the refusal to regard the payment of *Insolvenzgeld* as a preferred claim amounted to unlawful State aid.

Decision: The Federal Labour Court rejected the claim. The payment of *Insolvenzgeld* by the claimant afforded insolvent companies relief from the obligation to pay salaries. The fact that the payment of *Insolvenzgeld* was not regarded as a preferred claim was intended to facilitate restructuring efforts. The refusal to regard the payment of *Insolvenzgeld* as a preferred claim could only amount to unlawful State aid if it benefited specific undertakings. This was not the case since *Insolvenzgeld* was available to all companies without distinction.

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

Facts and legal issues: The Law on Investment Grants ("*Investitionszulagengesetz*", "*InvZulG*") allowed for investment grants of 12 per cent 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 per cent 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 per cent, but refused to grant 12 per cent. 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 had not been unlawfully deprived of a vested legal entitlement. The amendment of the *InvZulG* was based on a decision by the Commission that had not been challenged within the mandatory time limit laid down in Article 230 (5) EC. Germany was therefore under an obligation to amend the *InvZulG*. In addition, the claimant could not rely on the principle of good faith since, at the time the investment was made, the Commission had already initiated a formal State aid investigation. Consequently, the claimant should have been aware that the investment grant of 12 per cent provided for in the *InvZulG* amounted to unlawful State aid.

3.1.20 Higher Regional Court ("Oberlandesgericht") of Dresden, 10 December 1999, 3 W 1832/99, VIZ 2000, 430 (B)

Facts and legal issues: The complainants acquired land from a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), which was charged with 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 1999, the Commission decided that parts of the *AusglLeistG* amounted to State aid, which was incompatible with the Common Market and ordered Germany to recover the incompatible aid[193]. Following the signing of the purchase contracts, the complainants requested to

[193] OJ (1999) L 107/21.

formally register the respective transfers of property ("*Auflassung*"). The registry of deeds ("*Grundbuchamt*") refused to do so, arguing that the transfers of property infringed Article 88 (3) (3) EC and were therefore null and void. The complainants challenged the refusal.

Decision: The Higher Regional Court of Dresden ordered the registry of deeds to register the transfers of property. The Higher Regional Court of Dresden left open whether and to what extent contracts that infringe Article 88 (3) (3) EC are void. In particular, it did not decide whether an infringement merely affects the legality of the purchase contracts or whether the nullity extends to the contract by which the property was transferred. The Commission's decision in respect of the *AusglLeistG* made a distinction between different groups of land owners, some of which were entitled to receive State aid while others were not. The Higher Regional Court of Dresden found that it was not the duty of the registry of deeds to assess to which group of landowners the complainants belonged.

3.1.21 Federal Tax Court ("Bundesfinanzhof"), 23 November 1999, VII R 17/97, DStRE 2000, 261 (B)

Facts and legal issues: The claimant, an operator of a combined heat and power ("cogeneration") plant, requested permission from the defendant, a public authority, to use a specific, tax privileged heating oil. According to the Law on Petroleum Tax ("*Mineröl*steuergesetz", "*MinöStG*"), heating oil could be tax privileged if it was used in a cogeneration plant that satisfied certain criteria. The parties agreed that the plant operated by the claimant did not satisfy these criteria. However, the claimant argued that granting the tax privilege to only a limited number of cogeneration plants amounted to State aid.

Decision: The Federal Tax Court rejected the claim, arguing that the provisions in the *MinöStG* did not favour specific undertakings. In addition, even if the *MinöStG* favoured certain undertakings, this could be justified by the nature of the tax system. The Federal Tax Court referred insofar to the Commission notice on the application of the State aid rules to measures relating to direct business taxation[194].

3.1.22 Regional Court ("Landgericht") of Dresden, 17 August 1999, 2 T 422/99, VIZ 2000, 560 (B)

Facts and legal issues: The complainant acquired land from a sub-agency of the Federal Agency for Special Tasks related to German Unification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*", "BvS"), which was charged with 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 1999, the Commission decided that parts of the *AusglLeistG* amounted to State aid which was incompatible with the Common Market

[194] OJ (1998) C 384/4.

and ordered Germany to recover the incompatible aid[195]. Following the signing of the purchase contract, the complainant requested to formally register the transfer of property ("*Auflassung*"). The registry of deeds ("*Grundbuchamt*") refused, arguing that the transfer of property infringed Article 88 (3) (3) EC and was therefore null and void. The complainant challenged the refusal.

Decision: The Regional Court of Dresden ordered the registry of deeds to register the transfer of property. The Regional Court of Dresden acknowledged that, generally, contracts that infringe Article 88 (3) (3) EC are void. However, the infringement of Article 88 (3) (3) EC occurred as a consequence of the purchase contract ("*Kaufvertrag*"), in which the parties agreed on a purchase price below market value. The purchase contract required the seller to transfer the property to the buyer. Yet, according to the *Abstraktionsprinzip*, a pivotal principal of German law, the nullity of the purchase contract did not affect the legality of the contract with which the property was transferred.

Comment: The Dresden Court's decision is one of many cases dealing with questions arising from the *AusglLeistG*. However, the particularity of the decision is that it touches upon the relationship between Article 88 (3) (3) EC and the *Abstraktionsprinzip*, a pivotal principle underlying German civil law. The question is also discussed in the decision of the Higher Regional Court ("*Oberlandesgericht*") of Dresden of 10 December 1999 (see above).

3.1.23 Administrative Court ("Verwaltungsgericht") of Düsseldorf, 18 Mai 1999, 15 K 7725/97 (B)

Facts and legal issues: The claimant challenged an invoice for TV licence fees issued by the defendant, a public authority charged with collecting TV licence fees ("*Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten in der Bundesrepublik Deutschland*", "GEZ"). One of the claimant's arguments was that TV licence fees amounted to unlawful State aid.

Decision: The Administrative Court of Düsseldorf argued that TV licence fees did not amount to State aid, since they were aimed at compensating public service broadcasters for the discharging of public service obligations. The Administrative Court of Düsseldorf left open whether, if the licence fees constituted State aid, they would be exempt under Article 87 (3) (d) EC or Article 86 (2) EC.

Comment: The Administrative Court of Düsseldorf did not seem to be aware of the fact that exemptions according to Article 87 (3) EC could only be granted by the Commission.

[195] OJ (1999) L 107/21.

3.1.24 State Social Court ("Landessozialgericht") of Nordrhein-Westfalen, L 9Ar 200/94 LSG NRW, 22 March 1996 (B)

Facts and legal issues: This case involved the German rules relating to employment of disabled or handicapped persons. Companies that employed 16 employees or more were under a legal obligation to employ disabled or handicapped persons (on a defined *pro rata* basis). If they failed to do so, they were obliged to pay monetary compensation.

The claimant hairdresser in this case had a widespread network of branches in Germany. Although each individual branch employed less than 16 employees, the competent administrative authority aggregated the number of employees at the claimant's different branches and reached the conclusion that the claimant exceeded the relevant threshold. This was challenged by the claimant in court with, *inter alia*, the argument that the obligation of companies of a certain size to employ disabled or handicapped persons constituted State aid for small companies that were not under this obligation, and therefore came within the meaning of Article 87 EC.

Decision: The State Social Court rejected this argument. The State Social Court referred to the jurisprudence of the ECJ[196] according to which an advantage resulting from legal rules constituted State aid only if it contained a benefit that was granted directly or indirectly through public resources.

3.1.25 Higher Administrative Court ("Oberverwaltungsgericht") of Hamburg, OVG Bf VI 53/93, 14 February 1995; Administrative Court ("Verwaltungsgericht") of Hamburg, 7 VG 4424/92, 2 June 1993 (B)

Facts and legal issues: State aid amounting to DM 5.9 million was granted to construct a German commercial vessel. The State aid was granted under a so-called public law contract (as opposed to granting State aid pursuant to a unilateral administrative act). The public law contract imposed an obligation on the beneficiary to reimburse the aid in the event that title to the vessel was transferred to third parties within a specified period of time after completion of the vessel. The defendant in this case, a shareholder of the company that owned the vessel, accepted joint and several liability to repay the agency that had granted the aid.

When the vessel was acquired by third parties as a result of bankruptcy proceedings within the relevant time limit, the agency brought a claim against the joint and several debtor for repayment of the aid.

Decision: Both the Administrative Court of Hamburg and the Higher Administrative Court of Hamburg found in favour of the claimant and ordered the defendant to repay the money. A further appeal was not allowed by the Federal Administrative Court.

[196] Case C-189/91, Ketra Kirshammer-Hack v Hurhan Sidel [1994] ECR I-6185.

One of the arguments raised by the defendant was that the public law contract granting the aid was void as it violated Articles 87 and 88 EC, the underlying argument being that the joint and several liability of the defendant only covered contractual claims for repayment as opposed to non-contractual claims, for example unjust enrichment. It was held that the grant of the aid did not breach these provisions. The Higher Administrative Court of Hamburg stressed that aid to shipbuilding may be considered compatible with the Common Market under Article 87 (3) (c) EC (on which the applicable, older version of the EC Directive on aid to shipbuilding was based). The Higher Administrative Court of Hamburg stated that there was sufficient proof that Germany had complied with the notification obligations provided for in this directive and that there had been no objection from the Commission.

3.1.26 Federal Administrative Court ("Bundesverwaltungsgericht"), 3 C 18.93, 7 July 1994 (B)

Facts and legal issues: This case involved the imposition of an import duty on certain imported products (for example, fruit and vegetables), which was challenged by an importer.

Decision: The Federal Administrative Court held that the fund that was financed by the relevant import duties and the purpose of which was to promote sales of German goods ("*Absatzfonds*") was not incompatible State aid within the meaning of Articles 87 and 88 EC. The Federal Administrative Court referred to the ECJ's case law[197] according to which the German act underlying the relevant fund had been notified to the Commission in compliance with Article 88 EC and had not been objected to by the Commission.

3.1.27 Federal Administrative Court ("Bundesverwaltungsgericht"), 12 May 1993, NJW 1994, 337 (B)

Facts and legal issues: The case involved a claim under German tax law for the grant of a depreciation allowance on capital expenditure. The grant of the allowance depended on whether the capital expenditure served the purpose of protecting the environment. The administrative authority, which was the defendant in this case, raised the defence that the grant of a conditional depreciation allowance would constitute State aid within the meaning of Article 87 EC.

Decision: The Federal Administrative Court took the view that, even if this argument were correct, the grant of the aid would not be incompatible with the EC Treaty since it would be covered by Article 87 (3) (b) EC. This view was based on the legislative history of the rules of German tax law in issue and the fact that the Commission had intervened during the legislative proceedings in the German parliament because of a possible violation of the State aid rules of the EC Treaty. This intervention had resulted in the enactment of new rules, which had been modified in accordance with the Commission's intervention.

[197] Case C-78/76, Steinike Weinlig v Germany [1997] ECR 595.

3.1.28 Administrative Court ("Verwaltungsgericht") of Frankfurt, 11 December 1991, EuZW 1993, 69 (B)

Facts and legal issues: The case involved the German rules under which importers of foreign meat were obliged to pay a contribution into a German fund to promote the sale of German agricultural products. The claimant brought an action for annulment against the administrative act ordering payment of this contribution.

Decision: The Administrative Court of Frankfurt made a reference for a preliminary ruling to the ECJ under Article 234 EC. It asked the ECJ whether the national rules providing for the contribution could be declared compatible with EC law, in particular Article 87 EC, and whether the financing of the fund through contributions amounted to a protectionist mechanism comparable to State aid within the meaning of Article 87 EC. The Administrative Court also asked whether the contributions to the fund were incompatible with Article 87 EC.

Comment: In its judgment, the ECJ found that the contributions to the fund could constitute State aid within the meaning of Article 87 EC and that, subject to judicial review by the ECJ, the Commission had the authority to apply Article 87 EC[198].

3.1.29 Federal Social Court ("Bundesozialgericht"), 2 RU 32/90, 24 January 1991; Bavarian State Social Court ("Landessozialgericht") of Munich, L2 U 218/87, 7 February 1990 (B)

Facts and legal issues: The case concerned the social security contributions of the claimant, an agricultural company. The claimant challenged the method of calculation of these contributions based on the size of the area used for agricultural purposes by the company. One of the claimant's main arguments was that this method of calculation amounted to granting aid to smaller competitors, which was incompatible with the Common Market under Article 87 EC. Furthermore, the claimant argued that the aid had not been notified to the Commission under Article 88 (3) EC. The claimant therefore contended that the rules on the method of calculating the contributions were invalid.

Decision: These arguments were rejected by the Federal Social Court. First, the Federal Social Court stated that the question of whether an aid is incompatible with the Common Market could only be decided by the Commission and not by the national courts. The Federal Social Court added that the argument of incompatibility raised in this case might nonetheless justify a reference for a preliminary ruling under Article 234 EC. However, the Federal Social Court took the view that it was not required to make a reference for a preliminary ruling, as the rules on the method of calculation were older than the EC Treaty and had never been challenged by the Commission. The consequences of this method of calculating the contributions, i.e. that small companies enjoy the benefit of comparatively lower contributions than larger companies such as the claimant, was inherent in the German system of social

[198] Case C-72/92, Herbert Scharbatke GmbH v Federal Republic of Germany [1993] ECR I-5509.

security, so that the contributions did not amount to State aid. The Federal Social Court therefore came to the conclusion that there was no State aid in this case and therefore no violation of Article 88 (3) EC.

The lower court ("State Social Court") had adopted a similar approach. The State Social Court discussed the notion of State aid and held that, as a general rule, it can be argued that a provision of national law that violates Article 88 (3) EC is not applicable. However, the State Social Court was of the opinion that the rules challenged by the claimant did not constitute State aid, since they did not exempt certain companies from obligations that would otherwise apply, but rather laid down *ex ante* rules for calculating social security contributions. In other words, the State Social Court took the view that potential benefits for certain companies were inherent in the social security system.

3.1.30 Federal Social Court ("Bundessozialgericht"), 4/11a RLw 5/87, 4 October 1988 (B)

Facts and legal issues: The claimant was allegedly entitled to certain benefits which would reduce its social security contributions.

Decision: The Federal Social Court found that the rules on which the claimant based its claim may violate Article 87 EC and considered making a reference for a preliminary ruling to the ECJ for clarification. However, as the findings of fact of the lower court were insufficient, the Federal Social Court referred the case back to the lower court, but no further decision has been reported.

3.1.31 Federal Administrative Court ("Bundesverwaltungsgericht"), 3 CB 32.85, 19 December 1986 (B)

Facts and legal issues: The case concerned duties that were imposed on pork meat.

Decision: The Federal Administrative Court rejected the appeal against the decision of the Higher Administrative Court ("*Oberverwaltungsgericht*") of Hessen, which was based, *inter alia*, on the argument that certain duties imposed on pork meat constituted State aid within the meaning of Article 87 EC. The Federal Administrative Court stated that it was not for the national courts to decide this question unless the scope of Article 87 EC was sufficiently defined by general rules under Article 89 EC or by individual decisions of the Commission under Article 88 (2) EC. The Federal Administrative Court held that this was not the case in the present case. The question whether an order for a preliminary ruling by the ECJ should be made to clarify the notion of State aid was not addressed in the decision.

3.1.32 Federal Administrative Court ("Bundesverwaltungsgericht"), 15 May 1984, BVerwGE 69, 227 (B)

Facts and legal issues: The claimant challenged acts requiring it to pay contributions to the *Absatzfonds*.

Decision: The Federal Administrative Court referred to ECJ case law[199] and held that the German act establishing the fund had been notified to the Commission in compliance with Article 88 (3) EC and had not been objected to by the Commission.

3.1.33 Fiscal Court ("Finanzgericht") of Hamburg, of 17 April 1984, RIW 1984, 554 (B)

Facts and legal issues: The case concerned a claim by an importer of whiskey for an exemption from a duty. The claim was based on the argument that certain distillers in Germany were granted State aid and that importers should be treated similarly by exempting them from the duties imposed on them, since the prohibition in Article 91 EC would otherwise apply.

Decision: The Fiscal Court of Hamburg held, however, that the mere fact that State aid had been granted (the compatibility of which with the Common Market falls within the exclusive jurisdiction of the Commission and the ECJ according to an *obiter dictum* in the judgment) did not necessarily result in the application of the prohibition laid down in Article 91 EC to the duties imposed on importers. This would require a closer connection between the aid and the duty at issue, particularly in economic terms.

3.1.34 Fiscal Court ("Finanzgericht") of Hamburg, 31 October 1980, EFG 1981, 274 (B)

Facts and legal issues: The case concerned a claim raised by a distiller for a tax reduction, since other distillers were in receipt of financial aid.

Decision: To the extent that the financial aid constituted State aid within the meaning of Articles 87 and 88 EC, the Fiscal Court of Hamburg stated that the aid would in any event have been granted illegally, since it had not been notified pursuant to Article 88 (3) EC. As a general rule, German law does not recognise claims for equal treatment of beneficiaries of unlawful aid. Therefore, no claim could be made in this case for benefits equivalent to the aid (i.e. by means of tax reductions).

3.1.35 Fiscal Court ("Finanzgericht") of Hamburg, 31 October 1980, RIW/AWD 1981, 233 (B)

Facts and legal issues: The case concerned the reduction of duties imposed on distillers.

[199] Case C-78/76, Steinike & Weinlig v Germany [1977] ECR 595.

Decision: The Fiscal Court of Hamburg referred the case to the ECJ. The Fiscal Court of Hamburg asked the ECJ whether certain reductions in the duties imposed on distillers came within the scope of Articles 91 and 31 EC or rather within the scope of Articles 87 and 88 EC and, in case of the latter, whether the general principle of equal treatment entitled other distillers who did not yet benefit from a reduction in the amount of duty imposed to receive the same benefit.

The ECJ held that there was no need to determine whether Articles 87 and 88 EC applied. Even if this were the case, the case would have to be decided under Article 91 EC since State aid granted pursuant to an obligation that is applied in a discriminatory manner fell within its scope[200].

3.1.36 Fiscal Court ("Finanzgericht") of Hamburg, 22 March 1978, RIW/AWD 1978, 402 (B)

Facts and legal issues: The case concerned duties imposed on imported distilled alcoholic beverages.

Decision: The Fiscal Court of Hamburg referred the case to the ECJ. The Fiscal Court of Hamburg asked the ECJ whether certain increases in the duties imposed on imported, distilled, alcoholic beverages came within the scope of Article 31 EC, although these measures contained elements of State aid. In its judgment, the ECJ found that Article 31 EC was *lex specialis* to Articles 87 and 88 EC with regard to measures taken by the State in connection with the exercise of a State monopoly. The ECJ held that the case should be decided under Article 31 EC[201].

3.1.37 Fiscal Court ("Finanzgericht") of Hamburg, 24 October 1977, RIW/AWD 1978, 70 (B)

Facts and legal issues: The case concerned a reduction in the duties granted to certain domestic producers.

Decision: The Fiscal Court of Hamburg referred the case to the ECJ. The Fiscal Court of Hamburg asked the ECJ whether a reduction in the duties granted to certain domestic producers constituted State aid within the meaning of Article 87 EC or whether only Article 90 EC was applicable. The ECJ held that the case must be decided under Article 90 EC[202].

[200] Case C-17/81, Pabst & Richarz KG v Hauptzollamt Oldenburg [1982] ECR 1331.
[201] Case C-91/78, Hansen GmbH v Hauptzollamt Flensburg [1979] ECR 935.
[202] Case C-148/77, H Hansen jun. & O.C. Balle GmbH & Co. v Hauptzollamt Flensburg [1978] ECR 1787.

3.1.38 Administrative Court ("Verwaltungsgericht") of Frankfurt; Federal Constitutional Court ("Bundesverfassungsgericht"), 28 July 1977, RIW/AWD 1977, 715 (B)

Facts and legal issues: An order requiring payment of a duty levied on the importation of agricultural products was challenged by an importer before the Administrative Court of Frankfurt.

Decision: The Administrative Court of Frankfurt took the view that the German rules providing for the imposition of an import duty on certain importers of agricultural products constituted State aid that was incompatible with the Common Market under Article 87 EC. Accordingly, the Administrative Court of Frankfurt made a reference for a preliminary ruling to the ECJ. The question referred by the Administrative Court of Frankfurt was whether the procedural rules of Article 88 EC prohibited references for a preliminary ruling on Article 87 EC and subsequent decisions by the national courts on the applicability of Article 87 EC.

In its judgment of 22 March 1977[203], the ECJ found that Article 88 EC did not prohibit references for a preliminary ruling concerning the interpretation of Article 87 EC, but that national courts could not themselves determine whether State aid was compatible with the Common Market that had not been the object of a relevant decision of the Commission. The ECJ thereby required the Administrative Court of Frankfurt to find against the claimant since the relevant German rules had been duly notified to the Commission under Article 88 (3) EC and the Commission had not raised any objections.

The Administrative Court of Frankfurt subsequently asked the Federal Constitutional Court whether it had jurisdiction to declare the German rules providing for the imposition of an import duty on certain importers of agricultural products compatible with Article 87 EC. The Federal Constitutional Court rejected the reference made by the Administrative Court of Frankfurt. It stated that it had no power to interpret the provisions of the EC Treaty in a way that differed from the interpretation adopted by the ECJ as far as the applicability of these provisions in Germany was concerned.

3.1.39 Fiscal Court ("Finanzgericht") of Hessen, 12 March 1974, EFG 1974, 455 (B)

Facts and legal issues: The claimant, a German distiller, sought compensation for the export of its products from the German authority administering the monopoly in distilled alcoholic beverages. The claimant was legally entitled to this compensation.

Decision: The Fiscal Court of Hessen found that, under the rules governing the monopoly in distilled alcoholic beverages, the claimant was entitled to such compensation. The Fiscal Court of Hessen added that the claim was well-founded irrespective of the concern that the

[203] Case C-78/76, Steinike & Weinlig v Germany [1977] ECR 595.

compensation might not comply with Article 87 EC, since the purpose of the compensation was to increase the competitiveness of German distillers abroad.

The Fiscal Court of Hessen held that Article 87 EC was not directly applicable but rather required action by the Commission. Such action may, however, result in an obligation to abolish national rules which violate Article 87 EC.

3.1.40 Federal Fiscal Court ("Bundesfinanzhof"), 1 March 1974, Bundessteuerblatt 1974, II, 374 (B)

Facts and legal issues: The case concerned house-building financial aid granted by the German authorities to a German citizen who was a public servant of the EC. When the beneficiary decided to use the aid to build a house in Belgium, the German authorities demanded repayment of the funds, which was challenged by the beneficiary.

Decision: The Federal Fiscal Court found in favour of the beneficiary. The Federal Fiscal Court stated, *inter alia*, that the financial aid did not constitute State aid within the meaning of Article 87 EC since it not only promoted the German construction industry but also foreign construction companies that were active in Germany.

3.1.41 Fiscal Court ("Finanzgericht") of Baden-Wurttemberg, 29 April 1970, EFG 1970, 367 (B)

Facts and legal issues: The case concerned the imposition of a tax on road transport of goods.

Decision: The Fiscal Court of Baden-Wurttemberg referred the case to the ECJ. The Fiscal Court of Baden-Wurttemberg asked whether the imposition of a tax on the road transport of goods infringed certain EC tax rules. The Fiscal Court of Baden-Wurttemberg held that the imposition of a tax on certain companies did not amount to granting State aid to the competitors of those companies, i.e. in this case the beneficiary of the road transport companies' obligation to pay tax was the Federal German railroad company.

The decision handed down by the ECJ on 21 October 1970[204] did not deal with the EC rules on State aid.

3.1.42 Fiscal Court ("Finanzgericht") of Munich, 23 February 1970, EFG 1970, 367 (B)

Facts and legal issues: The case concerned the imposition of a tax on road transport of goods.

Decision: The Fiscal Court of Munich referred the case to the ECJ. The questions asked by the Fiscal Court of Munich mainly concerned the compatibility of the relevant German rules

[204] Case C-20/70, Lesage v Hauptzollamt Flensburg [1970] ECR 861.

with EC tax rules and, by way of precaution only, the Fiscal Court of Munich raised the question whether Articles 87 and 88 EC also applied to transport and whether they prohibited the imposition of protective measures in favour of railroad companies operated by the State. On the latter issue, the reference was based on the claimant's argument that the law imposing the tax on road transport of goods violated Article 88 (3) EC since, in the absence of a positive decision of the Commission, Member States may not grant State aid.

In its decision of 6 October 1970[205], the ECJ only addressed the tax law aspects of the case.

b) Private law disputes

A) Private law disputes directly targeted at competitors

3.1.43 Higher Regional Court ("Oberlandesgericht") of Munich, 15 May 2003, 29 U 1703/03, EuZW 2004, 125 (F)

Facts and legal issues: The claimant, an operator of a crematorium, provided its services in competition with the City of Munich, which also operated a crematorium. Whereas the services provided by the claimant were subject to sales tax, the services provided by the City of Munich were not. The claimant requested that the defendants, the City of Munich and the Federal State of Bavaria also impose sales tax on the crematorium services provided by the City of Munich.

Decision: The Higher Regional Court of Munich rejected the request.

(I) The Higher Regional Court of Munich left open whether the exemption from sales tax actually constituted State aid. It held that, even if the exemption constituted unlawful State aid, the claimant had no claim in law that could prevent the defendants from exempting the City of Munich from sales tax.

(II) The claimant could not rely on section 1 of the Law against Unfair Competition ("*Gesetz gegen den unlauteren Wettbewerb*", "*UWG*"). Section 1 *UWG* provides for cease and desist orders and damages if a person acts contrary to generally accepted business behaviour ("*gute Sitten*") in order to compete. Not every infringement of the law constitutes an action that is contrary to generally accepted business behaviour. Rather, section 1 *UWG* requires that the rule which is infringed is aimed at, although not necessarily exclusively, protecting the fairness of competition ("*sekundärer Marktbezug*"). According to the Higher Regional Court of Munich, the State aid provisions of the EC Treaty as well as the regulations implementing these provisions were not aimed at protecting the fairness of competition. Potential effects on competitors were an irrelevant consideration in the application of the prohibition of Article 87 EC, which was limited to public measures and justified by the fact that the unlawful aid was granted by a public authority. Whether the

[205] Case C-9/70, Grad v Finanzamt Traunstein [1970] ECR 825.

conditions of demand and supply were affected by the aid was of no relevance to the prohibition of State aid.

(III) The claimant could not rely on section 823 (2) of the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*"). Section 823(2) *BGB* provided for damages (including cease and desist orders) in case of an infringement of a statute that is aimed at protecting other persons ("*den Schutz eines anderen bezweckendes Gesetz*"). Referring to its findings on section 1 *UWG*, the Higher Regional Court of Munich held that the State aid provisions as well as the regulations implementing these provisions were not aimed at protecting other persons.

Comment: It is difficult to reconcile the decision by the Higher Regional Court of Munich with established case law of the ECJ and CFI in the State aid area. The whole concept of Article 88 (3) EC being directly applicable is based on the very idea that the State aid provisions are aimed at protecting competitors. It is unfortunate that the *Bundesgerichtshof* decided to dismiss the appeal[206]. However, it seems unlikely that the decision by the Higher Regional Court of Munich, and in particular its reasoning, will be followed by other national courts.

3.1.44 Higher Regional Court ("Oberlandesgericht") of Koblenz, 21 August 2001, 4 U 957/00, MMR 2001, 812 (F)

Facts and legal issues: The defendant, the public broadcasting station ZDF, intended to construct a media-related amusement park ("*the ZDF-Medienpark*", "ZDFM"). The ZDFM was supposed to be operated by a private company ("operating company"), which would also bear the investment costs. The defendant would not participate as a shareholder in the operating company, but would provide some land and allow the operating company to use certain trademarks. The operating company would pay the defendant consideration for the land provided and the right to use the trademarks. The claimants, several operators of amusement parks, challenged the defendant under unfair competition rules, and alleged, in addition, that ZDFM amounted to unlawful State aid.

Decision: The Higher Regional Court of Koblenz rejected the claim. The defendant intended to provide land and the right to use the trademarks to the operating company in return for a consideration which would satisfy the private investor test. Accordingly, the operating company would not receive a benefit within the meaning of Article 87 (1) EC. This position was confirmed by the Commission in separate proceedings[207].

Comment: Since the Higher Regional Court of Koblenz decided that no State aid was involved, it did not address the question whether an infringement of Article 88 (3) EC constituted a valid legal basis for the claimant's claim against its competitor.

B) Private law disputes targeted at imposition of burden

[206] BGH, 4 December 2003, 1 ZR 140/03.
[207] Commission, 3 April 2002, NN 2/2002, ZDF Medienpark.

3.1.45 Federal Court of Justice ("Bundesgerichtshof"), 11 June 2003, VIII ZR 160/02 and 161/02, NVwZ 2003, 1143 (B)

Facts and legal issues: The claimant, an operator of a wind power plant, requested from the defendant, an undertaking supplying electricity, to connect the wind power plant to the electricity network, to purchase the electricity produced and to pay the price laid down by the Law on Feeding Electricity from Renewable Energy Resources into the Public Grid ("*Stromeinspeisungsgesetz*", "*StrEG*"). The defendant refused, arguing, *inter alia*, that the *StrEG* amounted to State aid and was therefore unlawful.

Decision: Referring to the ECJ's *Preussen Elektra* decision, the Federal Court of Justice rejected the claim that the *StrEG* amounted to State aid[208].

3.1.46 Federal Constitutional Court ("Bundesverfassungsgericht"), 3 January 2002, 2 BvR 1827/01, NVwZ-RR 2002, 321 (B)

Facts and legal issues: The complainant, an electricity supply company, argued that the Law on Feeding Electricity from Renewable Energy Resources into the Public Grid ("*Stromeinspeisungsgesetz*", "*StrEG*"), notably the obligation to purchase energy from renewable resources at a fixed price, amounted to unlawful State aid.

Decision: Referring to the ECJ's *Preussen Elektra* decision, the Federal Constitutional Court rejected the claim that the *StrEG* amounted to State aid[209].

3.1.47 Higher Regional Court ("Oberlandesgericht") of Schleswig, 7 September 1999, 6 U Kart 87/97 (B)

Facts and legal issues: The claimant, an operator of a biomass energy plant, asked the defendant, an undertaking supplying electricity, to purchase the electricity produced by the biomass energy plant and to pay the price laid down by the Law on Feeding Electricity from Renewable Energy Resources into the Public Grid ("*Stromeinspeisungsgesetz*", "*StrEG*"). The defendant refused, arguing, *inter alia*, that the *StrEG* amounted to State aid and was therefore unlawful.

Decision: The Higher Regional Court of Schleswig rejected the claim, holding that the *StrEG* did not involve direct or indirect State resources within the meaning of Article 87 EC.

Comment: Although the Higher Regional Court of Schleswig (which is the competent court of appeals for the *Landgericht Kiel*) was aware of the preliminary reference to the ECJ by the *Landgericht Kiel* (see below) regarding the *StrEG*, the Schleswig Court did not consider it necessary to suspend the proceedings until the ECJ's final decision.

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[208] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I - 2099.
[209] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I-2099.

3.1.48 Regional Court ("Landgericht") of Kiel, 1 September 1998, 15 O 134/98, EuZW 1999, 29 (B)

Facts and legal issues: The German Law on Feeding Electricity from Renewable Energy Resources into the Public Grid ("*Stromeinspeisungsgesetz*", "*StrEG*") required electricity supply undertakings to purchase electricity from renewable sources paying a fixed price, as provided for in the *StrEG*. The claimant, an electricity supply company, accordingly paid DM 500,000 to the defendant, an operator of wind power plants. The claimant subsequently requested the defendant to refund the respective amount, arguing, *inter alia*, that the *StrEG* amounted to unlawful State aid.

Decision: The Regional Court of Kiel referred the question whether the *StrEG* amounted to State aid to the ECJ. In its decision[210], the ECJ held that provisions like those in the *StrEG* did not involve advantages granted directly or indirectly by means of State resources.

Comment: The decision by the Regional Court of Kiel to make a preliminary reference to the ECJ and the subsequent decision by the ECJ had a significant influence on numerous other proceedings involving similar questions.

3.1.49 Labour Court ("Arbeitsgericht") of Reutlingen, 4(2) Case 85/91, 3 May 1991 (B)

Facts and legal issues: The claimant brought an action to challenge the lawfulness of the termination of an employment contract. Under German law, small companies employing five or fewer employees are exempt from the fairly strict rules on the protection of employees against termination of employment contracts that would otherwise apply.

Decision: The Labour Court of Reutlingen took the view that this legal distinction between small companies and other companies, where only the latter are subject to strict employment protection rules, produced a considerable competitive advantage for small companies and must therefore be qualified as State aid. The Labour Court of Reutlingen made a preliminary reference to the EJC, asking whether this interpretation of the notion of State aid was correct.

The ECJ held that exempting small companies from certain rules of German law did not amount to State aid within the meaning of Article 87 EC, as it did not result in benefits being granted to the recipients out of State funds. In this judgment the ECJ emphasised that, when deciding whether the grant of State aid violates Article 88 (3) EC, a national court may ask the ECJ to interpret the notion of State aid within the meaning of the EC Treaty[211].

3.1.50 Labour Court ("Arbeitsgericht") of Bremen, 9 October 1990, EuZW 1991, 389 (B)

Facts and legal issues: The case concerned certain rules of German labour law under which it was possible to employ non-German staff on German vessels under exemptions

[210] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I-2099.
[211] Case C-189/91, Petra Kirshammer-Hack v Nurhan Sidel [1994] ECR I-6185.

from rules of German labour and social security law. The labour law and social security law standards set for non-German staff were substantially lower than the standards applicable to German staff.

Decision: The Labour Court of Bremen made a reference to the ECJ for a preliminary ruling under Article 234 EC. The Labour Court of Bremen was of the opinion that the resulting benefits for ship owners, such as lower social security contributions, were State aid that came within the scope of Article 87 EC (and, furthermore, amounted to a violation of Article 136 EC).

In its judgment, the ECJ found that there was no State aid in this case, as the benefits for ship owners which resulted from the different legal standards were not financed out of State funds[212].

c) Action for damages from a public authority

3.1.51 Regional Court ("Landgericht") of Magdeburg, 27 September 2002, 10 O 499/02; 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 an alleged failure of the Land of Sachsen-Anhalt to notify aid in the steel sector in a timely manner. The claim was based on a Commission decision under the ECSC Treaty allowing aid to steel producers in the German New Federal States provided that the aid was notified to the Commission by 30 June 1994. The German government notified the 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 German government abided by the notification period. Accordingly, the claimant reclaimed a certain part of the amount that had been paid as damages under German tort law.

Decision: The Regional Court of Magdeburg dismissed the action. It was somewhat unclear to what extent the Commission would have been able to approve the State aid if the notification deadline of 30 June 1994 had been met. The claimant 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 State aid in a timely manner and the declaration of incompatibility by the Commission. The Regional Court of Magdeburg also stated that, if it was to grant the claimant damages, this would amount to State aid on its own. Subsequently, the Higher Regional Court of Naumburg dismissed the claimant's appeal and the Federal Court of Justice ("*Bundesgerichtshof*") rejected the claimant's application to appeal further.

[212] Joint Cases C-72/91 and C-73/91, Sloman Neptun [1993] ECR I-887.

d) Action for damages from the beneficiary

There are no published cases regarding this category.

3.2 Procedures concerning the enforcement of negative Commission decisions

3.2.1 Administrative Court ("Verwaltungsgericht") of Berlin of 15 August 2005, 20 A 135.05 (A)

Facts and legal issues: The case concerned the implementation of a negative Commission decision of 20 October 2004 in the so-called *Kvaerner* matter[213]. The Commission had decided that Kvaerner, a shipyard, had received unlawful State aid which Germany was required to reclaim. The *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), which was charged with the recovery of the State aid, had issued an administrative act ordering recovery. Kvaerner challenged the administrative act, arguing that it was not based on a valid legal basis ("*Rechtsgrundlage*"). The BvS took the view that it was entitled to base administrative acts either on Article 14 (3) of Regulation No. 659/1999 or directly on the Commission decision itself.

Decision: The Administrative Court of Berlin decided that the recovery decision by BvS was unlawful. The German constitution stipulates that any administrative act imposing 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 No. 659/1999 and the Commission decision provide that recovery of unlawful State aid must be implemented according to national law. The case law of the ECJ and CFI[214] does not provide for an obligation to recover unlawful State aid by means of an administrative act. Similarly, current case law[215] does not indicate that recovery of unlawful State aid can only be effective if implemented by means of an administrative act.

Comment: The Administrative Court of Berlin confirmed that, where State aid has been granted by contract (rather than by unilateral administrative decision), for example, in the case of loans or guarantees, the public authority that granted the aid cannot simply (unilaterally) order repayment once the Commission has issued a negative decision that provides for an obligation to recover. Instead, the public authority must take action before either the civil or the administrative courts by bringing an action for repayment ("*Leistungsklage*").

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

Facts and legal issues: The claimant, the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), sued the insolvency trustee of Zemag which had been part of the

[213] OJ (2005) L 120/21.
[214] Case T-155/96 R, Stadt Mainz v Commission [1996] II-1557.

Lintra group and in respect of which insolvency proceedings were opened on 1 March 2001. The Lintra group had received State aid which the Commission had declared illegal 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 German Insolvency Act allowed for the registration of claims only if they were issued before the commencement of insolvency proceedings. In addition, the trustee claimed that BvS did not show that the amount in question had actually been paid by Lintra to Zemag. Finally, the trustee claimed that recovery of the State aid would violate the principle of good faith laid down in section 242 of the German Civil Code.

Decision: The Regional Court of Halle found in favor of the claimant. It applied the case law developed by the *Bundesgerichtshof* in 2003 pursuant to which contracts that involve the grant of illegal State 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 preclude registration of the claim. The Regional Court of Halle also rejected the argument that the principle of good faith precluded recovery during insolvency proceedings.

3.2.3 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 (A)

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 New Federal States and was privatised in January 1995. The holding company comprised eight businesses, including Saxonia Edelmetalle GmbH, which was sold to a third party in June 1997. 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 restructuring aid in 1996, but subsequently opened proceedings for misappropriation of State aid. In these proceedings, concluded by decision of 28 March 2001, the Commission ordered that an amount of DM 35 million should be repaid by the subsidiaries of Lintra. DM 3.2 million of the overall amount was allocated to Saxonia, the defendant. The defendant challenged the Commission decision before the CFI. Since the defendant was not prepared to repay the amount voluntarily, the privatisation agency sued the defendant in the Regional Court of Chemnitz.

Decision:

(I) During the proceedings before the Regional Court of Chemnitz, the defendant argued that there was no basis for the privatisation agency to reclaim any amount under the provisions concerning unjust enrichment of the German Civil Code (section 812 *Bürgerliches Gesetzbuch* ("*BGB*")). The defendant argued that, to be able to rely on section 812 *BGB*, the claimant had to show that it had actually paid the amount reclaimed to the defendant. In the

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

defendant's view, the State aid had been paid to the parent company, 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 a specific amount must be reclaimed from Saxonia. The Regional Court of Chemnitz explained that it was in no position to challenge the Commission decision on this point.

(II) The Higher Regional Court of Dresden did not follow the decision by 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 Dresden took the position that there was no basis under German law to recover the State aid from Saxonia because there was no proof that part of the State aid had actually been paid to Saxonia. The only basis for direct recovery was the Commission decision which specified that a specific amount should be reclaimed from Saxonia. The Higher Regional Court of Dresden stated that the decision by the CFI was prejudicial to the outcome of the proceedings before it. Thus, it suspended the proceedings pursuant to a section of the German Code of Civil Procedure which allows suspension in the event that prejudicial proceedings are pending in another court. In the opinion of the Higher Regional Court of Dresden, this suspension did not violate Article 242 EC (which establishes that actions against Commission decisions do not have suspensory effect). In the opinion of the Higher Regional Court of Dresden, since there were substantial doubts as to the legality of the Commission decision, the alternative to a suspension of the national proceedings would have been to refer the case to the ECJ under Article 234 EC. In the light of the proceedings pending before the CFI, the Higher Regional Court of Dresden decided to suspend its own proceedings.

Comment: The decision by the Higher Regional Court of Dresden conforms to Community law. The CFI explicitly stated that "[…] *Community law does not preclude the national court from ordering suspension of the application for recovery lodged by* [the Member State] *pending settlement of the case before the* [CFI] *or from referring a question to the Court of Justice for a preliminary ruling under Article 234 EC. Since the applicant has contested the legality of the contested decision under Article 230 EC, the national court is not bound by the definite nature of that decision*[216]."

3.2.4 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 State aid on an ongoing basis from *Treuhandanstalt*. 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. *Treuhandanstalt* 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 subordinate shareholders' loan. The decision by 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 shareholder that had been found to constitute State aid can be treated as a subordinate loan (pursuant to section 32 (1) (a) of the German Act on Companies with Limited Liability).

Decision: The Regional Court of Magdeburg found in favour of the claimant ("*Treuhandanstalt*") 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 decision on considerations of German law only. Following the defendant's appeal to the Higher Regional Court of Naumburg, the Higher Regional Court of Naumburg affirmed the decision of the lower court 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 provision of German corporate law which provides that claims for the repayment of a loan by a shareholder who had granted a loan in a situation in which a prudent shareholder would have provided capital instead cannot be applied to a situation where State aid is reclaimed pursuant to a Commission decision.

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

Facts and legal issues: The two judgments concern 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 in the sum of DM 204 million constituted restructuring aid that was incompatible with Article 4 (c) of the ECSC Treaty. It ordered Germany to recover those amounts from the aid beneficiary. 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 Hamburger Landesbank, the public bank which was wholly controlled by the City of Hamburg. Ultimately, the business of Hamburger Stahlwerke GmbH was transferred to an Indian steel manufacturing group ("ISPAT"). That group 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. Thus the loans had eventually "disappeared". In implementing the negative

[216] Case T-181/02 R, Neue Erba Lautex v Commission ECR [2002] II-5081.

Commission, the City of Hamburg filed a court action against the defendant operator of the Hamburger Stahlwerke business to recover the balance between the face value of the loans and the price paid by the ISPAT group.

Decision: The Federal Republic of Germany filed an appeal against the negative Commission decision which was still pending when the Regional Court of Hamburg had to render its decision on the court action by the City of Hamburg for the recovery of the loan amounts. In its decision, the Regional Court of Hamburg notes 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 was 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 the subsequent repayment of the loan amounts, 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 regards as compulsory 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 *Oberlandesgericht of Hamburg*, the action by the German government against the negative Commission decision was dismissed by the ECJ. The *Oberlandesgericht of Hamburg* set aside the judgment of the *Landgericht of Hamburg* and held that the new owners of the business of Hamburger Stahlwerke GmbH would have to repay the loan amounts received from Hamburger Landesbank directly to the City of Hamburg. In reaching this decision, the *Oberlandesgericht 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 was 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 *Oberlandesgericht of Hamburg* reasoned 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.

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

Facts and legal issues: The defendant, a producer of synthetic fibres and yarns, had received an investment grant ("*Investionszuschuss*") of DM 1.2 million in 1982 from the claimant, a publicly owned bank. In addition, the claimant received an investment allowance ("*Investitionszulage*") of 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 had to be recovered[217]. The Commission's decision was subsequently confirmed by the ECJ[218], 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 *Bundesgerichtshof* confirmed that contracts that infringe Article 88 (3) (3) EC are 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 *Bundesgerichtshof* held that the defendant could not refuse to repay the investment grant on the basis of the principle of good faith. In particular, the defendant could not draw any conclusions from the fact that it took eight years since the ECJ judgment for the defendant to be asked to repay the investment grant. Also, recovery was not precluded by reason of the fact that German public officials had frequently assured the defendant that the investment grant would not be recovered. As regards recovery of unlawful State aid, national authorities do not have any discretionary powers. Their role is limited to executing the Commission's decisions. Finally, the *Bundesgerichtshof* decided that the claimant was entitled to ask for payment of interest, and that the claimant was correct in calculating the level of interest on the basis of national law.

Comment: The *Bundesgerichtshof* fails to acknowledge that Article 14 (2) of Regulation No. 659/1999 provides that "*the aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission*".

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

Facts and legal issues: The claimant, a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), was charged with 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 150 acres to the defendant, some of which were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* granted State aid that was incompatible with the Common Market and ordered Germany to recover the unlawful aid[219]. 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

[217] OJ (1985) L 278/26.
[218] Case C-310/85, Deufil GmbH & Co. KG v Commission [1987] ECR 901.
[219] OJ (1999) L 107/21.

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's decision was unlawful.

Decision: The *Bundesgerichtshof* ordered the defendant to make the additional payment.

(I) The *Bundesgerichtshof* found that the question of the legality of the Commission decision was relevant to the case. However, the *Bundesgerichtshof* held, with reference to ECJ case law[220], that the defendant was precluded from questioning the lawfulness of the Commission decision before a national court. The defendant, as beneficiary of the unlawful State aid, could have challenged that decision before the CFI, but instead allowed the mandatory time limit laid down in Article 230 (5) EC to pass.

(II) The *Bundesgerichtshof* 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 the existence of such exceptional circumstances.

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

Facts and legal issues: The claimant, a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), was charged with 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* granted State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid[221]. 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 deprived him retroactively of a vested legal entitlement.

Decision: The *Bundesgerichtshof* ordered the defendant to make the additional payment.

(I) Section 3 (a) *AusglLeistG* could have deprived the defendant only 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 value infringed Article 88 (3) (3) EC. Under section 134 of

[220] Case C-188/87, TWD Textilwerke Deggendorf v Germany [1994] ECR I-833.
[221] OJ (1999) L 107/21.

the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*"), a contract that infringes a legal prohibition ("*gesetzliches Verbot*") is void. Referring to the ECJ's case law[222], the *Bundesgerichtshof* 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 State aid in question. Only the nullity of the contract succeeds in removing distortions of competition since it enables 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 *Bundesgerichtshof* 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 *Bundesgerichtshof* discussed whether the recovery of unlawful State aid could 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 did not act negligently when receiving the unlawful aid. The *Bundesgerichtshof* left open whether recovery may be excluded in exceptional cases, since the defendant did not argue that such exceptional circumstances existed in his case.

Comment: The *Bundesgerichtshof*'s decision resolves the highly debated question under German law of the nature of the legal implications for a civil law contract if that contract infringes Article 88 (3) EC. Prior to the judgment, the majority of commentators had argued that, as long as recovery of the unlawful aid is guaranteed, ECJ case law[223] did not necessarily require the nullity of a contract infringing Article 88 (3) EC, and that section 134 *BGB* could not be applied.

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

Facts and legal issues: The claimant, a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), was charged with 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 some 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* granted State aid which was incompatible

[222] Case C-120/73, Lorenz v Germany [1973] ECR 1471 and Case C-354/90, FNCE v France [1991] ECR I-5505.
[223] In particular, Case C-354/90, FNCE v France [1991] I-5505.

with the Common Market and ordered Germany to recover the unlawful aid[224]. 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 *Landgericht of Rostock* decided in favour of the defendant, rejecting the claimant's request for additional payment.

(I) The *Landgericht of Rostock* discussed in detail the ECJ's jurisprudence, in particular the *Alcan* decision[225] and subsequent decisions by German courts. The *Landgericht 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 State aid could not rely on legitimate expectations if it knew or could have known that the State aid, although notifiable, had not been notified to the Commission. These principles apply regardless of whether the State aid was granted by an administrative act or by means of a private contract.

(II) The *Landgericht 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 of the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*"). The defendant had, in reliance on the validity of the purchase contract, assumed various financial commitments, which, if it had been obliged to repay the aid, could have threatened its entire financial existence. As a local farmer, the defendant could not have known that the sale of land under the *AusglLeistG* contained elements of State aid. The situation in the *Alcan* case was different, since Alcan was a globally active company, which knew that it was in receipt of State aid. Taking into account that the effect of the unlawful State aid was regionally limited, the *Landgerich of Rostockt* held that, in this particular case, the interests of the defendant outweighed the Community interest, and that the claimant was therefore unable to recover the State aid.

Comment: The *Landgericht of Rostock* distinguished this case from the *Alcan* case on the basis that Alcan was a large company, while the defendant was only a small farmer, whose existence would have been threatened by the recovery of the State aid. It seems unlikely that these findings can be reconciled with the ECJ's case law and Commission practice. The mere fact that the beneficiary of the aid is not a large company does not prevent recovery, and the disappearance of a market player following a recovery decision is an explicitly recognised and accepted consequence of such a decision.

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[224] OJ (1999) L 107/21.
[225] Case C-24/95, Land Rheinland Pfalz v Alcan [1997] ECR I-1591.

3.2.10 Higher Regional Court ("Kammergericht") of Berlin, 31 Mai 2002, 25 U 20/02, KGR Berlin 2003, 217 (A)

Facts and legal issues: The defendant, a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), was charged with 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 defendant sold some land to the claimant. Plots of the land were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* granted State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid[226]. 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 defendant asked the claimant for an additional payment for the land sold. The claimant paid the additional amount and subsequently brought an action in the civil courts, requesting repayment.

Decision: The *Kammergericht of Berlin* decided in favour of the defendant, rejecting the claimant's request for repayment. The request for additional payment was legitimately based on section 3 (a) *AusglLeistG*.

The *Kammergerich of Berlin* held that BvS was bound by the Commission's finding that the initial purchase contract constituted State aid. The *Kammergerich of Berlin* found that, as a consequence, the contract was void according to section 134 of the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*"). However, the contract was subsequently affirmed by means of section 3 (a) *AusglLeistG*. Section 3 (a) *AusglLeistG* was found to be constitutional.

The *Kammergericht of Berlin* furthermore discussed whether the request for additional payment could be challenged according to the principle of good faith ("*Treu und Glauben*", section 242 *BGB*). However, the Community interest in restoring competition prevailed over the interests of the beneficiary of the aid, even if the beneficiary did not act negligently when receiving the unlawful aid. The *Kammergericht of Berlin* left open whether recovery may be excluded in exceptional cases, since the claimant did not argue that such exceptional circumstances existed in this case.

3.2.11 Regional Court ("Landgericht") of Meiningen, 12 Mai 2002, 4 P 362/02, ZInsO 2003, 1006 (A)

Facts and legal issues: The claimant, a public authority, granted an investment grant to the beneficiary in 1993. In 1997, the beneficiary filed for bankruptcy and insolvency proceedings were initiated. According to the then applicable law, the insolvency administrator decided that all claims by the creditors must be registered with the competent insolvency court by the end

[226] OJ (1999) L 107/21.

of August 1997 at the latest. In 2002, the Commission decided that the investment grant constituted State aid and had to be recovered. The claimant subsequently registered the recovery claim with the insolvency court. According to section 14 of the Regulation on the Execution of Insolvency Proceedings ("*Gesamtvollstreckungsordnung*", "*GesO*"), late claims cannot be admitted unless the delay can be justified. The claimant argued that it was only in the position to register the claim once the Commission had decided that the investment grant must be recovered. The insolvency court rejected the request, arguing that the Commission decision did not have an influence on the insolvency proceedings.

Decision: The *Landgericht of Meiningen* reversed the decision by the insolvency court. It held that national law could not hinder the implementation of recovery decisions. The *Landgericht of Meiningen* left open whether the delay could be justified. Instead, the *Landgericht of Meiningen* decided that section 14 *GesO* did not apply if its application prevented the implementation of recovery decisions by the Commission. The claimant's claim regarding the recovery of the investment grant was thus allowed.

3.2.12 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 (A)

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

Decisions: The *Landgerich of Amberg* held that the loans should be treated as ordinary claims in bankruptcy (not as unsecured, secondary claims, as the insolvency administrator had suggested). The *Landgericht of Amberg* reasoned that any other treatment of the loans would jeopardise the *effet utile* of the negative Commission decision. The *Oberlandesgericht of Nürnberg* rejected the appeal brought by the insolvency administrator as it was inadmissible. In particular, the *Oberlandesgericht of Nürnberg* did not feel that it was necessary to refer the question relating to the proper treatment of the loans granted by the

Land as a shareholder to the ECJ. It followed the decision of the *Landgericht of Nürnberg* which had ruled that the ECJ in *Alcan* required that illegal State aid be recovered under national law in a manner which did not render recovery of the illegal State aid practically impossible.

Comment: The decisions deal with a fairly complicated issue ("*Eigenkapitalersetzende Darlehen*") involving questions of insolvency law, the *GmbH-Gesetz* and State aid law. Interestingly, the *Landgericht of Erfurt* (see below) decided a similar case raising the same questions only a few weeks after the *Landgericht of Amberg* – and came to a very different conclusion.

3.2.13 Regional Court ("Landgericht") of Erfurt, 8 August 2001, 3 HK O 400/00, ZIP 2001, 1673 (A)

Facts and legal issues: From 1993 to 1997 the Weida Leder GmbH received various loans and guarantees from the defendant, a bank owned by the New Federal State of Thüringen ("*Freistaat Thüringen*"). From 1995 onwards, the defendant was acting as the main shareholder of Weida Leder. Occasionally, Weida Leder paid interest on loans granted by the defendant. In 1998, insolvency proceedings were initiated against Weida Leder and the claimant was appointed as insolvency administrator. In 1999, the Commission decided that Weida Leder had received about DM 30 million in unlawful State aid and requested Germany to recover the aid[227].

The claimant requested repayment of the interest paid by Weide Leder from the defendant. The claimant argued that, under the then applicable section 32 (a) (1) of the Act on Companies with Limited Liabilities ("*GmbH-Gesetz*", "*GmbHG*"), a shareholder who granted a loan to a company with limited liability in a situation where a diligent shareholder would have subscribed to equity (because the company was in a crisis), must be treated as having granted equity and would therefore not be entitled to file a claim in the insolvency case. For loans granted on or after 1 January 1999, section 32 (a) (1) *GmbHG* now provides that such claims are treated as unsecured secondary claims ("*nachrangige Insolvenzforderung*", i.e. different from equity, but a less valuable insolvency claim than ordinary insolvency claims). The defendant rejected the claimant's request, arguing that, since it was obliged to recover the unlawful State aid, section 32 (a) (1) *GmbHG* did not apply.

Decision: The *Landgericht of Erfurt* held that the loans should be recoverable as secondary claims. The *Landgericht of Erfurt* did not apply section 32 (a) (1) *GmbHG*, which provided that loans granted prior to 1 January 1999 must be treated as equity and could therefore not be reclaimed in insolvency proceedings. However, the *Landgericht of Erfurt* rejected the suggestion that the defendant's claim, since the implementation the Commission's recovery decision, should be treated as an ordinary insolvency claim.

[227] OJ (2000) L 61/4.

The *Landgericht of Erfurt* agreed that the ECJ's case law required that incompatible State aid be recovered under national law in a manner which did not render recovery practically impossible. The *Landgerich of Erfurt* took the view that the classification of the claim as a secondary insolvency claim was sufficient to satisfy these requirements. The main purpose of the State aid rules – maintaining effective and undistorted competition – had been achieved by Weida Leder being liquidated and having disappeared from the market as a consequence of the insolvency proceedings. There was therefore no need to treat the defendant's claim as an ordinary insolvency claim. In addition, the *Landgericht* of *Erfurt* held that treating the defendant's claim as an ordinary insolvency claim would unjustifiably reward the defendant who had knowingly granted unlawful State aid to Weida Leder for political reasons.

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

Facts and legal issues: In 1983, the claimant had received DM 8 million in contributions for an aluminium plant from the defendant, a public authority. Prior to the granting of the State aid, detailed negotiations had taken place between the claimant and the defendant. Although the Commission, who had become aware of the intention to grant State aid, had requested that the notification requirement be complied with, the State aid was granted without prior notification. The Commission subsequently found that the State aid was incompatible and had to be recovered. After several years of litigation between Germany and the Commission, the defendant finally ordered the claimant to repay the State aid. The claimant refused on the basis of the principle of legitimate expectations and the principle of good faith. The *Bundesverwaltungsgericht* referred the case to the ECJ, asking whether and to what extent the beneficiaries of unlawful aid could rely on the principle of legitimate expectations and the principle of good faith. The ECJ decided that recovery of unlawful aid could be excluded only in exceptional cases[228]. The *Bundesverwaltungsgericht* subsequently ordered the claimant to refund the State aid. The claimant complained to the Federal Constitutional Court, arguing that recovery of the State aid infringed its constitutional rights.

Decision: The Federal Constitutional Court rejected the constitutional complaint. The *Bundesverwaltungsgericht* had, based on the ECJ's *Alcan* decision, correctly applied the law. In particular, the *Bundesverwaltungsgericht* had taken sufficient account of the claimant's legitimate expectations and other rights derived from the principle of good faith. The fact that the Federal Constitutional Court 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 saw no reason to discuss whether the ECJ's *Alcan* decision had exceeded the limits of Community law ("*ausbrechender Rechtsakt*").

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

Comment: The Federal Constitutional Court's decision marks the end of the "*Alcan*-saga" described below.

3.2.15 Federal Administrative Court ("Bundesverwaltungsgericht"), 3 C 15.97, 23 April 1998 and 28 September 1994, EuZW 1995, 314; Higher Administrative Court ("Oberverwaltungsgericht") of Koblenz, 26 November 1991, EuZW 1992, 349; Administrative Court ("Verwaltungsgericht") of Mainz, 7 June 1990, EuZW 1990, 389 - "Alcan Case" (A)

Facts and legal issues: The case involved State aid in the amount of DM 8 million that was granted to an aluminium plant operator in order to safeguard the future operation of the plant. Before the State aid was granted detailed negotiations had taken 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 State aid through press coverage, had requested that a notification be made under Article 88 (3) EC, no notification was made. The Commission found that the aid was incompatible with the Common Market and ordered recovery[229]. However, the German authorities did not claim repayment. The Commission's order for recovery was affirmed by the ECJ[230].

Following the ECJ's decision, the administrative agency issued an order for repayment of the State aid. This order was challenged in court by the beneficiary who invoked the principle of legitimate expectations by way of defence. It further argued that the money received as State aid had been spent and that the order for repayment violated the one-year time limit under section 48 of the German *VwVfG* that was applicable to orders for repayment.

Decision: Both the Administrative Court of Mainz and the Higher Administrative Court of Koblenz found in favour of the beneficiary. The Higher Administrative Court of Koblenz stated that, in the absence of rules of Community law providing for an obligation to repay illegally granted aid that is compatible with the Common Market, any obligation to repay is governed by national law, for example, section 48 *VwVfG* in Germany. The rationale of the judgment is that the order for repayment violates the one-year time limit laid down in section 48 *VwVfG*. The Higher Administrative Court of Koblenz found that time started to run in June 1986, i.e. when the negative decision of the Commission became final and absolute. The order for repayment was issued on 26 September 1989.

On a further appeal to the Federal Administrative Court, the Federal Administrative Court referred the case to the ECJ, asking whether an order for repayment of illegally granted State aid could be issued by the national authority notwithstanding that the time limit for orders of repayment under national law had expired. The Federal Administrative Court further asked whether a positive obligation to order repayment existed despite the fact that the national authority was fully responsible for the illegal grant of the aid, and that an order for repayment

[229] OJ (1986) L 72/30.
[230] Case C-94/87, Land Rheinland-Pfalz v Alcan [1989] ECR 175.

may therefore be regarded as an act of bad faith on the part of the national authority. Finally, the Federal Administrative Court asked whether an order for repayment could be issued, even if the beneficiary has fully spent the money received in State aid and may therefore argue that it was not unjustly enriched by receiving State aid. All these issues raised corresponded to various provisions of section 48 *VwVfG* which govern, *inter alia*, orders for repayment.

In its decision[231], the ECJ answered all three questions in the affirmative. The ECJ stated, in particular, that a legitimate expectation as to the lawfulness of the granting of State aid may only exist on the part of the beneficiary if the beneficiary duly ascertains that the procedures laid down in Article 88 EC have been fully observed.

This reasoning was adopted in its entirety by the Federal Administrative Court in the national proceedings. The Federal Administrative Court emphasised that it was bound by the ECJ's judgment. The Federal Administrative Court refuted the argument of the beneficiary that the ECJ's judgment was *ultra vires*. In the aftermath of the judgment, the beneficiary took the view that the consequences for the interpretation of the German rules on recovery of illegally granted State aid, which are as far reaching as the ones that resulted from the ECJ's judgment, could be based only on a Council Regulation under Article 89 EC. The Federal Administrative Court stressed that, notwithstanding the very restrictive interpretation of the defence of legitimate expectations in the ECJ's judgment (such that legitimate expectations may be asserted only if the beneficiary duly verifies that the notification and control procedures set forth in Article 88 EC have been complied with), the beneficiary could bring an action before the ECJ against Commission decisions ordering the recovery of State aid in exceptional circumstances, such as where legitimate expectations could be established.

The judgment does not indicate when such an 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 successfully bring the argument relating to legitimate expectations, it is clear that such exceptional cases will be extremely rare.

3.2.16 Federal Constitutional Court ("Bundesverfassungsgericht"), 3 December 1997, NJW 1998, 1547 (A)

Facts and legal issues: The case concerned a constitutional complaint by, *inter alia*, an investment fund that invested in the purchase of ships. German tax rules applying until 25 April 1996 provided for a special accelerated depreciation scheme for the owners of new commercial ships. This depreciation scheme was abolished by an act adopted by the Federal parliament on 7 November 1996, which provided that the special depreciation scheme would no longer be applicable to purchase agreements for ships concluded after 24 April 1996. This cut-off date was chosen because, on 25 April 1996, the Federal government introduced a bill

[231] Case C-24/96, Land Rheinland-Pfalz v Alcan [1997] ECR I-1591.

amending the depreciation scheme. The original government bill stated that the depreciation scheme would not apply to contracts concluded after 1 May 1996. The cut-off date of 24 April 1996 was introduced by the Federal parliament at a later stage.

The claimant concluded a purchase agreement for a ship on 30 April 1996 and brought a constitutional claim against the retroactive cut-off date based, *inter alia*, on the principle of legitimate expectations ("*Vertrauensschutz*"). The Federal government argued that there was no reason for the claimant to have legitimate expectations because, when the bill was introduced in parliament, it was clear that the tax depreciation scheme would be abolished. In addition, the German government argued that, at the time of the conclusion of the relevant contract (i.e. 30 April 1996) the Commission had not yet approved the German tax depreciation scheme. Indeed, at that time the notification by the German government was still pending. It was only in October 1996 that the Commission declared the scheme compatible with the Common Market.

Decision: The Federal Constitutional Court rejected the constitutional complaint, holding that there was no reason for the claimant to rely on the tax depreciation scheme after the abolition of the scheme had been announced by the Federal government. The Federal Constitutional Court stated that it did not have to decide the question of whether the pending decision of the Commission on the notification of the tax depreciation scheme had a bearing on whether or not the claimant should have relied on the continuation of the depreciation scheme.

3.2.17 Higher Administrative Court ("Verwaltungsgerichtshof") of Baden-Württemberg, 10 December 1996, NVwZ 1998, 87 (A)

Facts and legal issues: The case concerned the grant of State aid to the receiver of a company that was subject to bankruptcy proceedings without prior notification under Article 88 (3) EC. The subsidy was granted by governmental agencies in Baden-Württemberg. The purpose of the State aid was to fund 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 Germany[232], the Commission found the financial aid to be 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 that Germany was in breach of the EC Treaty[233]. The governmental agency that had granted the State aid was informed of this

[232] OJ (1988) L 79/29.
[233] Case C-5/89, Commission v Germany [1990] ECR I-3437.

judgment (and of the negative Commission decision) by the German Federal Ministry of the Economy and then issued an order for repayment. This order was challenged by the rescue company as addressee of the order.

Decision: The judgment of the Higher Administrative Court of Baden-Württemberg mainly dealt with the issue of when the one-year time limit for orders concerning the repayment of illegally granted State aid started to run under the applicable German rules. The Higher Administrative Court held that the time limit had been complied with. It started to run when the governmental agency responsible for recovery was informed of the negative Commission decision and of the judgment of the ECJ. The Higher Administrative Court of Baden-Württemberg also emphasised that, as a general rule, the public interest in the 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 would be more inclined to consider the legitimate expectations of the beneficiary if the grant of State aid "only" violated German rules.

Comment: It is interesting to note that the Higher Administrative Court of Baden-Württemberg stated in an *obiter dictum* that an order for repayment cannot be issued if the order could be regarded as an act of bad faith on the part of the governmental agency. The ECJ clearly took a different view in its judgment in the *AIcan* case, which was delivered only a few months after the judgment of the Higher Administrative Court of Baden-Württemberg. There, the ECJ held that a governmental agency must recover illegally granted aid even if its behaviour may be attributed to bad faith.

3.2.18 Federal Administrative Court ("Bundesverwaltungsgericht"), 17 February 1993, NJW 1993, 2764; Higher Administrative Court ("Oberverwaltungsgericht") of Münster, 26 November 1991, EuZW 1992, 286; Administrative Court ("Verwaltungsgericht") of Cologne, 21 April 1988, EuZW 1990, 387 (A)

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

The beneficiary challenged the administrative act ordering recovery of the State aid (which was issued on 27 March 1986, i.e. when the Commission had handed down its decision but before the ECJ delivered judgment[234], confirming the Commission's view when the beneficiary had already challenged the decision before the ECJ). This administrative act was based on section 48 of the German Act on Administrative Proceedings ("*VwVfG*") that empowers administrative agencies to annul illegal administrative acts.

[234] Case C-310/85, Deufil v Commission [1987] ECR 901.

Decision: The Federal Administrative Court fully upheld the previous judgments in the case and dismissed the beneficiary's action. The Federal Administrative Court stated that orders for the recovery of illegally granted State aid must be based on section 48 *VwVfG*. The Federal Administrative Court further stated that, although the interest of the beneficiary in not being required to repay the State aid had to be balanced with the public interest in recovering the illegally granted State aid, as a general rule the beneficiary would have no legitimate interest worthy of protection if the State aid at issue was granted without due notification under Article 88 (3) EC. This amounted to a narrow construction of section 48 *VwVfG*, which states that, as a general rule, repayment of illegally granted payments must not be ordered if the beneficiary 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 cases where the beneficiary may not invoke a legitimate interest, i.e. if it obtained payment by fraud or by misrepresentation of fact or if it was aware of the unlawfulness of the payment, or if its ignorance of the unlawfulness was caused by gross negligence.

The Federal Administrative Court further stated that, as a general rule, a beneficiary can reasonably be required to check whether a notification pursuant to Article 88 (3) EC has been 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 after the date when the administrative authority concerned became aware that the State aid had been unlawfully granted.

Comment: It is interesting to note that the Higher Administrative Court stated in this case that the mere fact that the State aid was illegally granted due to the non-notification of the aid under Article 88 (3) EC is insufficient ground for making an order for recovery. Although this is only an *obiter dictum*, it would exclude actions by third party competitors aimed at obtaining an order for recovery, before the Commission has decided whether the State aid is compatible with the Common Market.

3.3 Procedures concerning the enforcement of a positive Commission decision

3.3.1 Federal Administrative Court ("Bundesverwaltungsgericht"), 4 August 1993, NJW 1994, 339 (B)

Facts and legal issues: The case concerned a depreciation allowance on capital expenditure in connection with production facilities under German tax law. The depreciation allowance applied only where the capital expenditure was incurred before 1 January 1975 and served the purpose of environmental protection. A relocation of the claimant's production facilities after 1 January 1975 precluded the application of the depreciation scheme. As a general rule, a relocation is considered to amount to the construction of new production facilities unless the reconstruction is necessary for the purposes of environmental protection.

Decision: The Federal Administrative Court held that the relocation could not be justified by considerations of environmental protection and that the depreciation scheme did therefore not apply. The Federal Administrative Court went on to state that the application of the limitation in the scope of the depreciation scheme to capital expenditure incurred on or before 31 December 1974 was expressly required by the Commission following its investigation of the relevant German rules under Article 88 (2) EC.

GREECE

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2. Outline on the availability of judicial relief under the legal system of Greece

2.1 General introduction to Hellenic administrative law provisions

In accordance with Article 94 of the Hellenic Constitution, in principle, civil courts judge private disputes, whereas administrative courts have competence over administrative disputes, as provided by law. Since the 2001 constitutional revision, however, the question of whether disputes are "private" or "administrative" is a legal one and is not covered by the Constitution itself.

In particular, ordinary administrative courts[235] (hereafter, "administrative courts") are, in accordance with Law 1406/83, competent to judge "substantial administrative disputes" but may also be given competence to conduct judicial review of certain enforceable administrative acts, provided that the *Hellenic Conseil d'Etat* remains the ultimate court of appeal on such cases. Moreover, the 2001 constitutional revision expressly allowed certain categories of private disputes to be judged by administrative courts, and certain categories of administrative disputes by civil courts.

The *Hellenic Conseil d'Etat* ("*Symvoulio tis Epikratia*s"), which is very similar in function to the French *Conseil d'Etat*, has powers of judicial review over enforceable regulatory or individual administrative acts (which are not subject to any judicial remedy before other courts) for excess of power, infringement of law, lack of competence or absence of essential procedural requirement.

In addition, the *Hellenic Conseil d'Etat* acts as a Supreme Court of Appeal for irrevocable decisions of administrative courts on grounds of excess of power or infringement of law, and may also judge substantial administrative disputes, if so provided by the Constitution and the relevant laws.

In many cases, an administrative complaint must first be lodged with the administrative authority which issued the act in question and which rejected such complaint, before an action is permissible before the *Hellenic Conseil d'Etat*.

Administrative courts may not only annul but may also amend the administrative act in question, and may judge not only its legality but also its constitutionality. They may not, of course, consider the expediency of the act in question.

As a result, the choice of judicial remedy and the Greek courts' competence in the case of legal action concerning State aid depends not only on the nature of the dispute and the interests and rights involved in each particular case, but also on the nature and extent of judicial review requested.

[235] Ordinary administrative courts are all first instance and appeal administrative courts, with the exception of the *Hellenic Conseil d'Etat*.

2.2 Procedures concerning the direct effect of Article 88 (3) EC

If State aid has been granted in Greece without prior notification to and approval by the Commission, and is therefore in direct infringement of Article 88 (3) EC, one has to consider first which legal form such State aid has taken, i.e. a law, a presidential decree, an administrative decision or a contract between the beneficiary undertaking(s) and the State (public authorities, a legal person belonging to the public sector or a private legal person under the control or influence of the State).

As a rule, State aid in Greece is introduced under legislative provisions adopted by Parliament, or sometimes by administrative decisions that may or may not be subsequently ratified by laws adopted by Parliament.

Examples are Law 2271/1 994 on the restructuring of Olympic Airways, Law 1386/83 on the Organisation for the Economic Restructuring of Undertakings, Law 1892/90 on Modernisation and Development and other provisions (system of regional aid) and Law 1796/88, which ratified Decision E 3789/88 of the Minister of Finance, which had excluded profits relating to exports of undertakings from a special taxation.

Alternatively, State aid may be introduced by ministerial decisions, such as Joint Decision 30512/91 of the Ministers of National Economy, Industry, Energy and Technology on the support of shipbuilding companies and works.

Laws may not be directly challenged by persons whose interests are affected by their provisions, although courts are obliged not to apply unconstitutional laws. A legislative provision endorsed by Parliament may be declared unconstitutional by a competent court only incidentally, where the legality of an administrative act stemming from such a law is challenged before it (incidental control)[236].

Individuals affected (including legal persons) may, however, take legal action against ministerial decisions or other administrative regulatory or individual acts which implement the above laws on State aid in specific cases. Examples are the decisions of the Minister of National Economy on the grant of State aid to specific undertakings (under Article 7 (2) of L 1892/90), and the decision of the Minister of Finance, specifying the debts, loans and obligations of Olympic Airways, which were taken over by the Greek State under Law 2271/94.

It is interesting to note, however, that certain aspects of the aid regime on the restructuring of Olympic Airways do not require further enactment by other enforceable administrative acts. An example is the maintenance until 31 December 1995 of the special tax regime granted earlier to Olympic Airways, which could only be incidentally challenged as being unconstitutional.

[236] An action for damages is, however, possible under certain conditions. See section 2.3 below.

If, however, State aid is granted by an enforceable administrative act (such as a ministerial decision), regardless of whether it implements a law on State aid in a specific case or is issued *ad hoc*, it may be challenged before the *Hellenic Conseil d'Etat*. The competent chamber thereof may submit the case to the Plenary Session of the *Hellenic Conseil d'Etat* if it considers it to be of general importance, and must do so if it considers a provision to be unconstitutional. Judgments of the *Hellenic Conseil d'Etat* are not subject to further appeal.

On the other hand, if State aid is granted by means of an administrative contract, or if the administrative act refers to taxation or to the collection of public income, such agreement or act may be challenged before the administrative courts, subject to review before the *Hellenic Conseil d'Etat*.

In the past, certain laws relating to State incentives on investment, such as Law Decree 2687/1953 on Investment and the Protection of Foreign Capital, and Law 4171/1961, a law (now repealed) on development and investment, provided that disputes between the State and undertakings relating to the interpretation and eventual omissions of the awarding administrative acts would be settled by arbitration. The jurisprudence of the Hellenic Supreme Court ("*Arios Pagos*") has so far accepted that arbitration could lead to the recognition of the illegality of administrative acts but not directly to their annulment.

Moreover, civil courts may adjudicate actions relating to State aid awarded by private law undertakings (for example, an action against an act of the Agricultural Bank of Greece, which is a private law bank under State control, providing for the discharge or the favourable settlement of agricultural cooperatives' debt).

On a few occasions, especially in the first few years after the accession of Greece to the EEC, the *Hellenic Conseil d'Etat* rejected claimants' arguments that Article 87 EC was applicable on the grounds that its provisions were of direct effect, without, however, examining at the same time whether the "measure" under consideration could constitute State aid which had not been notified to the Commission or authorised by it, in which case the last sentence of Article 88 (3) EC would be directly applicable (see, in particular, decisions 1093/1987 and 3910/1988, but also 220/2002 of the *Hellenic Conseil d'Etat* mentioned in section 3.3 below).

2.3 Action for damages

First instance and appeal administrative courts also have jurisdiction over actions for damages (under Articles 105-106 of the Introduction to the Civil Code) against the State and legal persons governed by public law and for illegal acts or omissions of their organs in the exercise of public power. The *Hellenic Conseil d'Etat* also acts as supreme court of cassation in this case. In accordance with decision 618/2004 of the Greek Supreme Court ("*Arios Pagos*"), both actions against the State relating to the grant of State aid to an undertaking's productive activity and the resulting actions against the State for damages constitute substantial administrative acts to be judged by administrative courts.

In order to introduce an action for damages against the State, the following special conditions apply:

- The illegal acts or omissions of State organs, against which the action for damages is lodged, must have taken place in the exercise of public power;

- Compensation is possible only if the illegal State acts or omissions in question do not infringe provisions adopted in the common interest;

- The State is not liable for compensation for damage caused by laws adopted by Parliament, unless such laws contain a provision contrary to, or are judged by the courts to infringe, the Constitution or EU law, provided that the lesser law infringes a person's right which is directly protected by the superior law;

- The deadline for bringing an action for damages against the State is five years, starting from the end of the financial year during which the relevant claim has arisen and during which it was possible to lodge an action before the courts thereon (Articles 90-94 of Law 2362/1995)[237].

An action for damages has already been brought against the National Drug Organisation and the Greek State for the infringement of Articles 87 and 88 EC (see Decision 5110/1994, Administrative Court of First Instance of Athens, reported in the Review of Social Insurance Law /1994 (621) (E)).

In this case, the Administrative Court of First Instance of Athens held that the State, legal entities of the public sector and local authorities are liable for the acts or omissions of their organs which, although in compliance with a formally adopted Greek law, contravene a law of superior force, such as the Constitution or EC law, provided that the lesser law infringes a person's right which is directly protected by the superior law. Although in this case the Court upheld the *locus standi* of the claimant, it rejected its action on the grounds of lack of evidence.

2.4 Injunction Proceedings

A person challenging an enforceable administrative act before the *Hellenic Conseil d'Etat* may request the Court to suspend its execution by issuing a reasoned decision[238]. Injunction proceedings before the *Hellenic Conseil d'Etat* are crucial in the case of State aid granted in contravention of Article 88 (3) EC because this Court may take a long time to issue a judgment.

[237] For recent case law, see decision 878/2004 of the Supreme Court ("*Arios Pagos*").
[238] Article 52 of Presidential Decree 18/1989.

Injunction proceedings are also available before an administrative court where an administrative agreement has already been challenged, or a substantial administrative dispute is pending judicial control.

The lodging of an action before an administrative court does not itself suspend the effects of an administrative act, unless otherwise provided for by law[239].

Nevertheless, the competent administrative court, acting on the claimant's specific application, may order suspension of the implementation of the challenged administrative act only if, as a result of the enforcement thereof, the claimant might suffer material or moral damage, which would be irreparable or might only be redressed with difficulty.

An injunction may not be granted by administrative courts in the case of negative administrative acts or omissions, or if public interest or the normal functioning of the Public Administration may be affected[240].

To the best of our knowledge, no interim measures have so far been ordered by the Greek courts to safeguard third parties' interests in the context of actions pending which concern State aid granted without prior notification (for example, by ordering the freezing or return of moneys illegally paid).

Nevertheless, in the case leading to Decision 89/2002 of the Suspensions Committee of the *Hellenic Conseil d'Etat*, the claimant requested the suspension of the execution of a ministerial decision, against which it had lodged an action before the *Hellenic Conseil d'Etat*. This ministerial decision had revoked the submission of the claimant company's business plan under the provisions of Law 1892/1990 and had requested the reimbursement by such company of a State grant. The claimant alleged, *inter alia*, that the Administration had infringed Article 88 (3) EC in deciding that its failure to notify the Commission of the submission of the above business plan (under the State aid system introduced by Law 1892/1990) obliged it to revoke such aid. This and the other grounds for suspension of the execution of the administrative act were rejected by the Suspensions Committee of the *Hellenic Conseil d'Etat* as being obviously unfounded.

2.5 *Locus standi* in lawsuits against decisions addressed to other parties

Under Greek law, an enforceable administrative act granting State aid to a specific recipient in contravention of Article 88 (3) EC may be challenged by a competitor of the recipient whose legal interests are directly, individually and presently affected by such act.

To be classified as a competitor, it is sufficient to prove that one is engaged in an activity similar to that of the relevant recipient.

[239] Article 31 of Presidential Decree 341/78.
[240] Article 31 of Presidential Decree 341/78.

Although a collective action by professional associations or other collective professional institutions is also possible, the *Hellenic Conseil d'Etat* may require that the administrative act which is challenged does not favour certain members of the professional institution in question[241].

Creditors of the recipient of State aid granted in contravention of Article 88 (3) EC may also challenge a relevant administrative act since it may affect their legal interests (for example, by creating an ultimately false image of the creditworthiness of the beneficiary concerned or by suspending measures of forfeiture or confiscation against an ailing beneficiary undertaking) (see Decision 3910/1988 of the 4th Chamber of the *Hellenic Conseil d'Etat*).

However, *actio popularis* is not recognised in this context.

2.6 The enforcement of negative Commission decisions

If the Commission issues a negative decision declaring aid incompatible with the EC, the Member State in question, i.e. Greece, must, as the case may be, either abolish or 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 of competent 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. They also have *locus standi* to request damages where they can establish extraordinary circumstances justifying a legitimate expectation, within the limits established by the ECJ, 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 respect[242]. In this case, 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 (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. The *Hellenic Conseil d'Etat*, however, ruled that the initial

[241] Declaration 4256/79.
[242] Decision 5024/1995, Administrative Court of First Instance of Thessaloniki, reported in Diikitiki Diki/1996 (1039) (E, G).

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 Greek undertakings which were initially exempted from it did not constitute an infringement of a constitutional provision.

2.7 The implementation of positive Commission decisions

Existing State aid was, in theory, considered to be immune from actions by interested third parties before domestic courts as being incompatible with the Treaty, unless the Commission had taken a negative decision under Article 88 (2), which never has retroactive effect.

Following *Salt Union v Commission*[243], State aid cleared by a positive decision of the Commission may be challenged by competitors and other interested parties before the competent Hellenic courts if, for instance, there is evidence that such aid has been granted in a specific case in contravention of a general aid scheme approved by the Commission.

Moreover, the relevant administrative acts may be challenged before the competent Hellenic courts[244] on other grounds unrelated to EC law, such as for infringement of the relevant domestic law or for excess of power.

No Greek case law exists so far on actions brought before Hellenic courts challenging the grant of State aid which has been authorised by the Commission.

3. List of Court Decisions and summaries

618/ 2004 of the Supreme Court ("*Arios Pagos*") ()

1916/2002, 1917/2002 & 1918/2002 of the *Hellenic Conseil d'Etat* ("*Symvoulio tis Epikratias*") (B)

1335/2002 of the *Hellenic Conseil d'Etat* (B)

220/2002 of the *Hellenic Conseil d'Etat* (H/D)

89/2002 of the Suspensions Committee of the *Hellenic Conseil d'Etat* (A)

1957/1999 of the *Hellenic Conseil d'Etat* (B)

150/1999 of the *Hellenic Conseil d'Etat* (D)

5110/1994 of the Administrative Court of First Instance of Athens (B/G/E)

3910/1988 of the *Hellenic Conseil d'Etat* (D)

[243] Case T-330/94, Salt Union v Commission [1996] ECR II-1475.
[244] See sections 2.1 and 2.2 above.

3905/1988 of the *Hellenic Conseil d'Etat* (D)

1093/1987 of the *Hellenic Conseil d'Etat* (D)

The Legal Council of State ("*Nomiko Symvoulio tou Kratous*"), which is a State advisory body giving legal advice to the State sector, has given opinions 441/1994 and 438/2003 on issues involving the EC law on State aid.

3.1 Decision 618/ 2004 of the Supreme Court ("*Arios Pagos*") ()

Facts and legal issues: A Greek firm had assigned to a Greek bank its claim for State aid relating to the production of fruit juices. The Greek State, however, paid to the assignee bank only part of the State aid and set off the remaining part with a sum equal to that due by the beneficiary firm to the Organisation of Social Security ("IKA"). The Greek bank had already lodged an appeal before the Nafplion Appeal Court, which had ordered the payment by the State of the whole amount of the assigned claim to the bank.

Decision: In this decision, the *Arios Pagos*, which is the Greek Civil Supreme Court, quashed the judgments of the inferior civil courts for lack of competence. It held that actions of undertakings against the State relating to the grant of State aid to an undertaking's productive activity, and the resulting actions against the State for damages, constitute substantial administrative acts to be judged by administrative courts because they refer to grants emanating from public bodies and have as their object the service of a public interest.

Comments: The only interest of this judgment lies in the clarification it offers on the competence of administrative courts in matters of State aid.

3.2 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* (B)

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, exempting, however, their profits from export activity. The Commission had considered that this exemption constituted illegal State aid to the undertakings with an export activity which infringed Article 88 (3) EC and was not compatible with the Common Market in accordance with Article 87 (1) EC. It therefore requested in its Decision 89/659/EEC[245] 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 1993[246], ruled that Greece did not comply with the above Commission decision without there being any valid reason of impossibility to execute such decision, and thus infringed its Treaty obligations. In view of the above developments, Greece has subsequently introduced a legislative provision which has retroactively replaced the initial

[245] Commission Decision 89/659/EEC (OJ (1989) L 394/1).
[246] Case C-183/91, Commission v Hellenic Republic [1993] ECR I-O3131.

ministerial decision and has revoked the initial exemption from the extra tax on profits relating to exports to EEC Member States.

In all of these judgments, the *Hellenic Conseil d'Etat* had to rule, as a supreme court of appeal regarding 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 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 the validity of provisions imposing the reimbursement of illegal aid as a result of the enforcement of a negative Commission decision.

3.3 Decision 220/2002 of the *Hellenic Conseil d'Etat* (H/D)

Facts and legal issues: The claimant undertaking argued that the award of a public supply tender to companies other than itself, allegedly offering the same prices as those offered by the claimant, constituted State aid contravening Article 87 EC.

Decision: The *Hellenic Conseil d'Etat* rejected the above claim on the grounds that the provisions of Article 87 EC do not have direct effect.

Comments: Irrespective of the merits of this action, the *Hellenic Conseil d'Etat* failed to examine whether such measure could constitute State aid which had not been notified (see also comments regarding case 1093/1987 in section 3.9 below).

3.4 Decision 89/2002 of the Suspensions Committee of the *Hellenic Conseil d'Etat* (injunction proceeding) (A)

Facts and legal issues: In this case, the claimant requested the suspension of the execution of a ministerial decision against which it had lodged an action before the *Hellenic Conseil d'Etat*. This decision had revoked the submission of the complainant company's business plan under the provisions of law 1892/1990 and had requested the reimbursement

by the claimant of a State grant. The claimant 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 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 obviously 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 view of the Greek State, infringed Article 88 (3) EC and thus facilitated the reimbursement thereof.

3.5 Decision 150/1999 of the *Hellenic Conseil d'Etat* (D)

Facts and legal issues: The claimant claimed that a ministerial decision authorising the capitalisation of an undertaking's debt to its creditors should be annulled as contrary to the provisions of Article 87 EC.

Decision: The *Hellenic Conseil d'Etat* did not uphold the above claim. It held that this claim could be relevant only against a previous ministerial decision[247] which, however, had been subject to the court's scrutiny, and action against it had already been rejected by its Decision 1400/1987.

Comments: See also Decision 1093/1987 of the *Hellenic Conseil d'Etat* in section 3.9 below.

3.6 Decision 5110/1994 of the Administrative Court of First Instance of Athens (B/G/E)

Facts and legal issues: An action for damages was brought against the National Drugs Organisation and the Greek State for the infringement of Articles 86 and 87 EC. The claimant was a "s*ociété anonyme*" engaged in the trade of imported drugs and was obliged to pay to the National Drugs Organisation a charge used by the National Drug Organisation to finance two State companies with business in the area of pharmaceuticals.

Decision: In this case, the Administrative Court of First Instance of Athens held that the State, legal entities of the public sector and local authorities are liable for the acts or omissions of their organs which, although in compliance with a formally adopted Greek law, contravene a law of superior force, such as the Constitution or EC law, provided that the lesser law infringes a person's right which is directly protected by the superior law. Although in this case the Court upheld the *locus standi* of the claimant, it rejected its action on the grounds of lack of evidence. In particular, the Court held that a 15% charge on the wholesale

[247] In accordance with this ministerial decision, the undertaking in question had been put under the temporary management of the Institution for the Economic Restructuring of Enterprises ("OAE").

price of drugs used by the National Drug Organisation to finance two State companies engaged in business in the area of pharmaceuticals did not infringe Articles 86 and 87 EC because no evidence had been submitted by the claimant to prove that competition and trade between Member States had been affected as a result of such measure.

Comments: It is important that the Administrative Court of First Instance of Athens recognised the liability of the State, legal entities of the public sector and local authorities to pay damages to competitors of a beneficiary of State aid if the relevant EC provisions were infringed. Moreover, it is positive that the same Court also examined the existence of State aid in the case under consideration. However, important evidence on market shares and turnovers of the beneficiary undertakings was lacking and the existence of the State aid in question was not established.

3.7 Decision 3910/1988 of the *Hellenic Conseil d'Etat* (D)

Facts and legal issues: In this case, the claimant claimed that a ministerial decision, which had authorised the provisional suspension of payment of overdue debt by an undertaking in financial difficulty, infringed the provisions of Article 87 EC.

Decision: The *Hellenic Conseil d'Etat* rejected the above claim on the grounds that the provisions of Article 87 EC were not of direct effect.

Comments: The *Hellenic Conseil d'Etat* failed to examine, however, whether such measure could constitute State aid which had not been notified. See comments in similar case 1093/1987 in section 3.9 below.

3.8 Decision 3905/1988 of the *Hellenic Conseil d'Etat* (D)

Facts and legal issues: An action on the grounds of EC State aid law provisions was brought before the *Hellenic Conseil d'Etat* against a ministerial decision refusing to license a "*société anonyme*" to operate a pharmaceutical storehouse. The relevant legislation in force (Law 517/1968 and Law 328/1976) did not allow the operation of a pharmaceutical storehouse by a "*société anonyme*", whereas this was allowed to two State companies dealing with the import, export and trade of pharmaceutical goods in order to serve general social interests. The claimant argued that the ministerial decision and the underlying legislation infringed the provisions of Articles 87 *et seq*. EC.

Decision: Such action failed to succeed because the *Conseil d'Etat* ruled that the claimant did not prove that the cross-border trade had been affected as a result of such ministerial decision.

Comments: On the whole, the Greek courts hesitate to uphold the *prima facie* existence of State aid on the basis of lack of necessary evidence.

3.9 Decision 1093/1987 of the *Hellenic Conseil d'Etat*

Facts and legal issues: An action was brought by shareholders of an important Greek paper manufacturer who, on the grounds of an infringement of Article 87 EC, requested the annulment of a ministerial decision by which an undertaking had been submitted to the special regime provided by Law 1386/83 on the Institution for the Restructuring of Enterprises (OAE).

Decision: The *Hellenic Conseil d'Etat* rejected the above action, stating that the provisions of Article 87 EC cannot be directly applied by the national court but are only applied with the procedure of Article 88 EC, which concerns the relations between the Member States.

Comments: The *Hellenic Conseil d'Etat* came to the above conclusion without first checking whether the submission of the undertaking in question to the special regime provided by Law 1386/83 on the Institution for the Restructuring of Enterprises (OAE) constituted, at least in part, State aid to this undertaking. If this was the case, the *Hellenic Conseil d'Etat* should have examined whether the aid regime provided by the above law had been notified to the Commission and had been authorised by it. Further, if it was found that the notification procedure of Article 88 (3) had not been complied with, the *Hellenic Conseil d'Etat* could then have applied the EC Treaty State aid provisions.

3.10 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.

a) 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 found to be incompatible with the Common Market by Commission Decision 2003/372/EC of 11 February 2002[248], in accordance with Article 87 EC.

b) Legal opinion 441/1994 of the Legal Council of State

The Legal Council of State provided sound legal advice on when the participation in the increase of an undertaking's share capital constitutes State aid within the meaning of Article 87 EC.

[248] 0J (2003) L132/1.

4. Assessment of the existing system

It is clear from the preceding list of case law that the Greek courts did not have many opportunities in the past to consider the application of the Community State aid legal regime on Greek State aid. In the first years after Greece's accession to the EEC mainly, but also later on, the Greek courts used to limit such examination on the grounds that the provisions of Article 87 do not have direct effect. The Greek courts did not, however, seem to examine in all cases whether the "measures" in question each time could constitute *prima facie* State aid which had not been notified to the Commission or had not been authorised by it, in which case the last sentence of Article 88 (3) EC, which has direct effect, would be applicable (Decisions 1093/1987 and 3910/1988, but also 220/2002 of the *Hellenic Conseil d'Etat*).

Nevertheless, on the positive side, the *Hellenic Conseil d'Etat* did not hesitate to uphold the constitutionality and the validity of 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).

Equally important is the recognition by Greek case law of *locus standi* for claiming damages against the State, legal entities of the public sector and local authorities in the area of State aid, when they are found liable for acts or omissions of their organs which, although in compliance with a formally adopted Greek law, contravene a law of superior force such as EC law, provided that the lesser law infringes a person's right which is directly protected by the superior law (Decision 5110/1994 of the Administrative Court of First Instance of Athens).

Finally, the legal opinions of the Legal Council of State on issues of State aid have contributed positively to the correct application of EC State aid law in Greece. However, the Greek lawyers' awareness of the procedural and substantive State aid EC law provisions remains limited and this is reflected also in the relevant court decisions.

IRELAND

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2. Outline the availability of judicial relief under the legal system of Ireland

To obtain judicial relief in the Irish legal system in respect of the State aid rules in the EC Treaty, a number of options are available:

a) judicial review proceedings;

b) summary proceedings, which are particularly suited for the recovery of a liquidated amount; and

c) proceedings based on tort law.

There is no provision in Irish law for special remedies in respect of the State aid rules. The remedies available to claimants in State aid cases are general remedies which might also be sought by claimants in a wide range of other commercial or administrative law disputes. This approach of using these general remedies for State aid cases has the advantage that the courts and the lawyers representing the parties are familiar with the procedures associated with applications for these remedies. Any disadvantages associated with this approach tend to apply to the remedies generally and are not specific to their use in State aid cases. Thus, if delay or prolixity in procedure is a problem in respect of those remedies, it is a problem that applies generally and does not arise specifically because the remedies are used to provide relief to State aid claimants. Reform of civil and administrative procedure generally, which is a topic of on-going debate in Ireland, would promote efficiency in State aid cases.

2.1 Judicial Review

Any decision by the Irish State or a public body may be challenged by way of judicial review in the High Court. A claimant may rely on the State's breach of Community law as the basis for judicial review proceedings. Proceedings could be initiated, for example, if the State failed to observe the standstill provision in Article 88 (3) EC or failed to enforce a Commission State aid decision.

Judicial review procedure is governed by Order 84 of the Rules of the Superior Court ("RSC"). Under this procedure, all of the remedies discussed in sections 2.1.1 and 2.1.2 below are available and can be pleaded in the alternative (Order 84, rule 19 RSC).

2.1.1 Certiorari, prohibition, mandamus – Order 84, rule 18(1) RSC

An order for ***certiorari*** has the effect of quashing a decision of the State or an administrative body. It is sought where a public body has reached a decision in excess of jurisdiction (for example, where the State has granted aid without adhering to Article 88 (3) EC).

An order of **prohibition** is used to restrain a public body from acting in excess of its jurisdiction (for example, where the State intends to grant aid in contravention of a

Commission decision not to allow such aid or to grant aid without following the notification procedure).

An order of ***mandamus*** obliges a public body to carry out a duty imposed on it where it has failed to act (for example, where the State has failed to follow a Commission decision to recover aid).

It should also be noted that Order 84, rule 24 RSC allows a claimant in judicial review proceedings to seek damages arising from a wrongful administrative action.

2.1.2 Declaration, injunction – Order 84, rule 18(2)

An applicant for judicial review can also seek a **declaration**, which is essentially a judicial statement clarifying the rights or legal position of the parties to an action, or an **injunction**. An injunction is a court order requiring a party to do or refrain from doing a certain act.

2.1.3 Procedure

The first step in judicial review procedure is to seek leave to apply for judicial review (Order 84, rule 20). This is done by an *ex parte* motion (i.e. a court application without notice to the other party) grounded on a notice[249] and an affidavit, which is a sworn statement confirming the facts relied on. In order to initiate the judicial review procedure, the applicant must be able to show that it has a sufficient interest in the matter to which the application relates[250]. There is no Irish case law determining the identity of parties that have sufficient interest where the judicial review procedure relates to State aid law issues. However, it is reasonable to assume that, where the State was proposing to grant (or had granted) unlawful aid, competitors would be given leave to apply for judicial review of the decision.

In granting an applicant leave to apply for judicial review, the court must be satisfied that the applicant has demonstrated an arguable case to be entitled to the reliefs sought.

The court may grant interim relief under Order 84, rule 20 (7) where leave to apply for judicial review has been granted. In a case where an applicant was seeking judicial review of a decision to grant unlawful aid, this interim relief might take the form of an order suspending the implementation of the aid decision.

Application for leave to apply for judicial review must be made promptly, and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which the application shall be made[251].

[249] Form No.13 in Appendix T of the Rules of the Superior Courts.
[250] Order 84, rule 20(4).
[251] Order 84, rule 21.

Once leave to apply for judicial review has been granted, the application for judicial review is made by originating notice of motion in accordance with Order 84, rule 22, unless the court directs that it shall be made by plenary summons.

2.2 Summary proceedings for a liquidated sum

Where recovery is sought of State aid which has been granted in breach of the State aid rules, summary proceedings for a liquidated amount (representing the amount of the aid to be recovered) may be issued. This procedure is governed by Orders 2 and 37, RSC.

Following the issuing of the summary summons, a notice of motion and grounding affidavit seeking judgment for the liquidated amount are issued before the Master of the High Court. If the defendant (which in the case of an action for the recovery of State aid would be the aid beneficiary) can demonstrate it has a defence to the claim, judgment will not be awarded immediately and the matter will be transferred to the High Court. The High Court can deal with the claim on affidavit evidence or can adjourn the proceedings to plenary hearing, in which case there will be a full hearing with oral evidence.

2.3 Tort

A party aggrieved by a decision of the State on a State aid issue could bring an action in tort (i.e. an action in respect of a civil wrong) against the State for the loss and damage caused by the State's decision.

In her judgment in *Tate v Minister for Social Welfare*[252], Carroll J. confirmed that "the word 'tort' is sufficiently wide to cover breaches of obligations of the State under Community law. There is nothing strange in describing the State's failure to fulfill its obligations under the Treaty as a tort".

For example, where a competitor to a beneficiary of unlawful State aid could show that it had suffered damage or loss as a result of the State's decision to grant the aid or of its failure to recover the aid, that competitor could initiate action in tort against the State, relying on the State's breach of its obligations under the EC Treaty.

Actions in tort may be initiated in the High Court, Circuit Court and District Court. The High Court has a general monetary jurisdiction irrespective of the amount claimed and is the most likely forum for litigation based on the State aid rules.

Proceedings based on tort are commenced in the High Court by Plenary Summons. In appropriate cases, interim relief (for example, an interim injunction) may be claimed prior to the trial. Under section 11(2)(a) of the Statute of Limitations 1957 there is a time limit of six

[252] [1995] 1 I.R. 418.

years, from the date of accrual of the cause of action, within which proceedings must be initiated.

3. Irish cases concerning the application of Articles 87 and/or 88 EC

No Irish Court has delivered any judgment of significance in respect of the State aid rules.

ITALY

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2. Availability of procedures in Italy

2.1 Introduction: Direct applicability and supremacy of EC legislation

Under Italian law, the direct applicability of EC law stems from:

(i) Article 11 of the Italian Constitution ("the European Clause"), according to which Italy agrees to limit its sovereignty to the extent necessary to adhere to international organisations aimed at ensuring peace and justice among the States, and to promote and favour the international organisations that pursue such goal;

(ii) Law No. 1203 of 14 October 1957 ("Law No. 1203/1957"), ratifying the EC Treaty; and

(iii) A series of subsequent judgments of the Constitutional Court ("*Corte Costituzionale*").

With its Judgment No. 170 of 8 June 1984, in the *Granital* case, the Constitutional Court ruled that both Article 11 of the Constitution and Law No. 1203/1957 resulted in the withdrawal of Italian sovereignty on matters entrusted to the common European institutions pursuant to the EC Treaty. The Court clarified that directly applicable EC legislation pre-empts conflicting national legislation and should be applied by the national courts.

The acceptance of the principle of supremacy of EC law over national law has not been unconditional: since its Judgment No. 183 of 27 December 1973, in the *Frontini* case, the Constitutional Court has stated that it would continue to review the exercise of power by the institutions of the EC to ensure that there is no infringement of fundamental rights or the basic principles of the Italian constitutional system. This position was confirmed and widened by the Constitutional Court in its subsequent Judgment No. 232 of 21 April 1989, in the *Fragd* case, where the Constitutional Court clarified that a Community measure could not be applied in Italy if it contravened a fundamental principle of the Italian Constitution on the protection of human rights, even if the ECJ had upheld the validity of the measure under EC law.

2.2 Application of Article 88 (3) EC by the Italian courts

As clarified by the ECJ, the power of national judges to apply EC legislation on State aid is based on Article 88 (3) EC[253]. The obligations arising under this article are directly applicable, i.e. (i) the obligation to provide the Commission with sufficient prior notice of any plans to grant or modify State aid; and (ii) the requirement to await the Commission's final decision before enacting the proposed measure.

[253] See Case C-6/64, Costa v ENEL [1964] ECR 585 and Case C-77/72, Capolongo v Azienda Agricola Maya [1973] ECR 611. Both decisions were rendered as a preliminary ruling and concern the interpretation of Articles 92 and 93 EC.

Italian judges can therefore directly apply Article 88 (3) EC[254]. Besides ascertaining whether a measure constitutes State aid, they can also order recovery and payment of damages in relation to the loss suffered as a consequence of illegally granted State aid[255].

Under Article 88 (3) EC, a violation of EC law by the State occurs whenever:

i) the State fails to notify its plans to grant or modify State aid to the Commission ("illegal aid");

ii) the State grants State aid before the end of the two-month time limit from the date of notification ("illegal aid");

iii) the State grants State aid while the Commission's procedure, pursuant to Article 88 EC, is still pending ("illegal aid");

iv) the State grants State aid irrespective of the Commission's ruling that the State aid could be incompatible with the Common Market ("unlawful aid").

In all the above circumstances, individuals showing a sufficient legal interest may commence court proceedings, before both administrative and civil courts, claiming that the State aid is illegal, request an injunction and also apply for damages.

Hereinafter are examined judgments relating to State aid issues issued by (i) the Constitutional Court (sections 3.1); (ii) the civil courts (sections 3.2); (iii) the administrative courts (sections 2.2.3 and 3.3); and (iv) the Court of Auditors (sections 2.2.4 and 3.4).

2.2.1 Constitutional Court

One of the main tasks of the Constitutional Court in Italy is to supervise the legitimacy of legislative acts in accordance with the principles set out in the Italian Constitution. The Court must, on the one hand, verify the formal legitimacy of the acts, i.e. whether the criteria established for the enactment of legislative acts have been respected, and, on the other hand, the need to comply with the Constitution.

Not only are laws subject to the jurisdiction of the Constitutional Court, but also all those legislative acts which have the same legal value as a law, such as legislative decrees, law decrees and laws issued by the regions. On the contrary, all acts which are subject to compliance with the above mentioned legislation are assessed by the national courts.

Proceedings concerning State aid can be initiated before the Constitutional Court if the measure conflicts with constitutional principles. This might be the case, for instance, with a

[254] See Case C-120/73, Gebr. Lorenz GmbH v Federal Republic of Germany [1973] (Preliminary Ruling) ECR 1471.
[255] See Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires et Syndicat National des Négociants et Transformateurs des Saumon v French Republic [1991] ECR 5505. See also Orlandi, "Sull'applicabilità da parte del giudice Italiano degli articoli 92 e 93 del Trattato istitutivo della CEE", *Giurisprudenza di merito*, I 994, 791.

legislative measure granting benefits to some undertakings or products, thus infringing the principle of the equality of all citizens under Article 3 of the Constitution.

In relation to compliance of a legislative act with the Constitution, two kinds of proceedings can be initiated before the court. They differ in respect of the legitimacy to commence proceedings:

(i) first, when the party challenging the lawfulness of a legislative act is the Italian government or a region. Only these bodies are entitled to refer an issue to the court concerning the question of whether an act complies with the Constitution notwithstanding the effective application of that act to a particular case. This kind of referral might be seen as reciprocal monitoring between the Italian government and the regions, since the former can seek a declaration of the constitutional invalidity of regional acts while the latter may raise a constitutional question in relation to national measures or laws issued by other regions.

(ii) secondly, the "incidental procedure" allows ordinary or administrative judges to refer questions to the Constitutional Court where, in their opinion, there is a doubt about the compliance with the Constitution of an act that should be applied in the proceedings pending before them. In other words, where, during the proceedings, a legislative act should be applied but the judge, at the parties' suggestion or of its own motion, considers the possibility of non-compliance of that act, the issue can be referred to the Constitutional Court. Therefore, private parties are not entitled to refer an issue of constitutional validity to the Constitutional Court without a judicial authority acting as intermediary. Once a referral to the Constitutional Court has been made, the proceedings, i.e. before an ordinary or administrative court, will be suspended until the Constitutional Court has ruled on the lawfulness of the act concerned.

Should the State aid granted by the legislative measure that is subject to the assessment of the Constitutional Court be considered unconstitutional, it can no longer be applied. The decision of the Constitutional Court is of general effect both in the case of a direct referral, from the State or a region, and in the case of a preliminary ruling.

The direct procedure, as it is shown in section 3.1 below, has been more widely used than the first one in relation to State aid. In particular, there have been eight relevant cases before the Constitutional Court, all of which were commenced by the Italian government or the regions.

Almost all of them (see sections 3.1.1 to 3.1.8) had as their object the alleged violation of Article 88 EC and, consequently, Article 11 of the Italian Constitution. One case addressed the question of the constitutionality of the legal standing of Italian public authorities to submit notifications to the Commission under Article 88 (2) EC (see sections 3.1.1 below).

2.2.1.1. Actions contesting the legality of State aid

In three cases, the claim was upheld (see sections 3.1.3; 3.1.7 and 3.1.8 below). In particular, the Constitutional Court stressed that in order for an act granting State aid to undertakings to be valid from a constitutional point of view, it must be adopted in full compliance with the procedure under Article 88 EC (see section 3.1.7) below[256].

The Constitutional Court has also analysed, on several occasions, the relationship between Italian national laws and regional laws concerning State aid. All these relevant decisions were sought by the State filing a petition against Sicily (see section 3.1 below)[257]. In one of the judgments (No. 49/1963, see section 3.1.8 below) regarding State aid to Sicily, the Constitutional Court declared that a Sicilian regional law of January 1962 enacting measures in favour of shipping companies was in breach of the Constitution. Although the Italian government had notified the regional measure to the Commission under Article 93 (3) EC, Sicily implemented the program without awaiting the Commission's decision and pending a request for information from the Commission. The Constitutional Court thus established a fundamental principle regarding conflicts between the State and the regions. The Constitutional Court stated that, although Italian regions are not bound by international treaties, such as that establishing the European Communities, nevertheless, since both State aid granted by a region or the State implies the State's sole responsibility vis-à-vis the European institutions, a regional law granting illegal aid is unlawful even though the regional statute (i.e. the regional "constitutional law") does not provide for limitations similar to those set forth in Article 88 EC. The implementation of the aid scheme by the Sicilian Regional Parliament ("*Assemblea Regionale Siciliana*") was thus declared unlawful, being in conflict with the Italian Constitution, and in particular with Article 5 which regulates the relationship between the State and the Italian regions. A similar reasoning was followed in Judgment No. 120/1969 (see section 3.1.7 below).

Judgments No. 94/1995 (see section 3.1.6 below) and No. 271/1996 (see section 3.1.4 below) concerned the violation of Article 93 EC and, consequently, of Article 11 of the Constitution ("the European clause"). However, in both cases, the relevant regional acts were declared to be in compliance with the Constitution. In its Judgment No. 94/1995, the Constitutional Court ruled that simple modifications to laws granting State aid were not subject to the formal procedure under Article 93 EC, and that an informal communication to the Commission was sufficient.

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[256] See Constitutional Court, Decision No. 120 of 8 July 1969 (see below, section 3.1.7); Constitutional Court, Judgment No. 49 of 9 April 1963 (see below, section 3.1.8). See also Supreme Court ("*Corte di Cassazione*"), Decision of 11 December 1978, No. 5839, *Diritto Comunitario e degli Scambi Internazionali*, 1979, 495. See Lenza, "Commento all'art. 93 del Trattato CEE", *Commentario CEE*, 755; Trigglani, "I poteri di controllo della Commissione sugli aiuti alle imprese pubbliche", *Rivista Europea*, 1990, 3, 500.

[257] None of the decisions originated from requests of parties or judges pending a case ("*appello incidentale*"). The Italian State is represented in each region by a State Commissioner ("*Commissario di Stato"*) entrusted with the power to monitor the compatibility of regional laws with constitutional and international principles. In the presence of evidence of violation, the Commissioner may file a petition with the Constitutional Court in order to seek a ruling on the regional laws at issue. The numerous cases concerning Sicily are due to Sicily's special status, conferring upon it a higher degree of discretion in relation to decisions concerning tax allocation (although tax revenues are managed by the Italian government). Besides Sicily, other regions with a special status include Sardinia, Valle d'Aosta, Trentino Alto Adige and Friuli Venezia Giulia.

With reference to Articles 87 and 88 EC, the Constitutional Court stated that irrespective of the fact they were entitled to interpret laws - as are judicial and administrative authorities - all judicial and administrative bodies in the Italian court system entitled to enforce laws were also legally entitled to deny enforcement of national rules which are incompatible with the provisions of the EC Treaty[258]. In Judgment No. 271/1996 (see section 3.1.4 below), the Constitutional Court held that regional laws did not necessarily have to contain specific clauses making their effect conditional upon Commission approval.

No new principles were introduced with Judgments No. 337/2001, No. 85/1999 and No. 134/1996 (see respectively sections 3.1.1; 3.1.3 and 3.1.5 below).

2.2.2 Civil courts

Proceedings between private parties are governed by the Italian Code of Civil Procedure and, in part, by the Italian Civil Code. The ultimate arbiter is the Supreme Court ("*Corte di Cassazione*"), which is only competent in respect of questions of law.

Civil courts have jurisdiction over actions brought by private parties against (i) other private parties; and (ii) the Administration, as long as proceedings are not aimed at the annulment of administrative acts.

There are several civil court decisions concerning State aid. The majority of them dealt with the compatibility of recovery actions with the Common Market under the Prodi Law (see section 2.2.2.2) below. The direct effect of EC State aid law and Commission decisions was also addressed (see section 2.2.2.1 and 2.2.2.4 below).

There have been no actions for damages from the State (see section 2.2.2.4 below), while those few cases brought by competitors against alleged beneficiaries of illegal/unlawful State aid have all been dismissed (see section 2.2.2.5 below).

2.2.2.1. Actions contesting the legality of State aid

In its Judgment No. 5241/2003 (see section 3.2.8 below), the Supreme Court recalled the principle according to which national courts cannot implement State aid unless it has been declared compatible with the Common Market by the Commission, clarifying that Commission decisions are binding on Member States and all institutions of the Member State. Should national courts doubt the validity of the decision of the Commission, they can (or must, if they are courts of last instance) refer the matter to the ECJ under Article 234 EC (see also, in this regard, Judgment No.8319/2004, section 3.2.5 below).

[258] Constitutional Court, Judgment of 4-11 July 1989, No. 389, *cit.*. See also Court of Auditors, Sec. *Contributi Stato*, judgment of 8 November 1991, No. 102; Administrative Court of Lazio ("*T.A.R. Lazio*"), Sec. III, Judgment of 11 June 1990, No. 1071, *Rivista Italiana di Diritto Pubblico Comunitario*, 1992, 981.

On a number of occasions, civil courts expressly recognised, with certain limitations, that the compatibility of a national measure with EC State aid rules could be assessed *ex officio*[259] The contrary view was taken by the Court of Appeal of Milan in a judgment of 8 January 2002 (see section 3.2.23 below). In its previous Judgment No. 5939 of 11 December 1978, (see section 3.2.18 below), the Supreme Court had held that it is the claimant's duty, when claiming a violation of Article 93 EC, to support the claim with evidence.

2.2.2.2. Actions contesting the legality of measures under the Prodi Law

A number of decisions have as their object the compatibility with the Common Market of a number of measures under the Prodi Law. The Supreme Court, in accordance with EC case law, held in its Judgment No. 18915/2004 (see section 3.2.3 below) that a system derogating from ordinary law relating to insolvency is to be regarded as resulting in the grant of State aid only to the extent that it differs from the ordinary insolvency rules.

The Supreme Court also clarified - in its Judgments No. 2534/2005, No. 13165/2004, No. 5561/2004, No. 5241/2003 and No. 9681/1999 (see sections 3.2.2, 3.2.4, 3.2.6, 3.2.8 and 3.2.13 below) - that it is not the Prodi Law in its entirety, but only specific measures adopted within its framework that amount to granting State aid.

The same conclusions were drawn by the Court of Appeal of Turin[260], by the Court of First Instance of Genoa[261], by the Court of First Instance of Milan[262], by the Court of First Instance of Trieste[263], by the Court of First Instance of Piacenza[264], and by the Court of First Instance of Trapani[265].

Conversely, the Court of Appeal of Venice[266] claimed that the Prodi Law, rather than single provisions included therein, was incompatible with EC law and should therefore not be applied by the national courts. The Court of First Instance of Genoa[267] stated that the Prodi Law did amount to State aid. In its judgment of 15 November 1999 (see section 3.2.35 below) that the Court of First Instance of Genoa also clarified that the Prodi Law could not be enforced by the national courts since it was illegal.

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[259] Supreme Court, Judgments No. 10915/2004, see section 3.2.3 below; Judgment No. 8319/2004, see section 3.2.5 below; Judgment No. 5561/2004, see section 3.2.6 below; Judgment No. 5241/2003, see section 3.2.8 below; Judgment No. 17564/2002, see section 3.2.9 below; Judgment No. 13470/2002, see section 3.2.10 below; Court of Appeal of Venice, Judgment of 26 June 1993, see section 3.2.19 below).

[260] Judgments of 26 June 2003, 4 April 2002, 12 February 2002 and 24 December 2001; see, respectively, sections 3.2.20. 3.2.21. 3.2.22 and 3.2.24 below.

[261] Judgment of 24 September 2003; see section 3.2.27 below.

[262] Judgment of 19 March 2003; see section 3.2.28 below.

[263] Judgment of 3 August 2002; see section 3.2.29 below.

[264] Judgment of 17 January 2001; see section 3.2.32 below.

[265] Judgment of 10 July 2000; see section 3.2.33 below.

[266] Judgment of 26 June 2003; see section 3.2.19 below.

[267] Judgment of 22 November 2001; see section 3.2.31 below.

Finally, the Court of First Instance of Turin[268] stated that those provisions of the Insolvency Law ("*Legge Fallimentare*") having a content similar to that of the Prodi Law must be deemed to breach the EC Treaty provisions on State aid.

Regarding the so-called "second Prodi Law" (Legislative Decree No. 270/99), the Supreme Court has now clarified that actions for revocation under such a procedure are not in breach of EC State aid provisions (Judgment No. 8539/2000, see section 3.2.11 below).

2.2.2.3. Enforcement of negative Commission's decisions

In its Judgment No. 17564/2002 (see section 3.2.9 below) the Supreme Court expressly recognized, for the first time, the direct effect of a negative decision of the Commission under Article 88 (2) EC remarking that, besides the State's duty to adopt all necessary means to abrogate national legislative measures that are incompatible with the Common Market, all national authorities (including judicial ones) are bound by Commission decisions adopted under Article 88 (2) EC. Failing State intervention to abrogate the legislative measure which granted the aid, the Supreme Court stated that the Commission decision under Article 88 (2) EC had direct effect, since it was sufficiently clear and precise, unconditional, and did not confer on the Italian government discretional powers in its implementation. The Supreme Court further specified that it was not necessary for the decision to be final in order to have direct effect. Should the decision not be final and should the national court doubt its validity, then the national court can refer the matter to the ECJ under Article 234 EC. This case law was subsequently affirmed by Judgment No. 4769/2005 (see section 3.2.1 below).

2.2.2.4. Actions for liability and/or damages from the State

Competitors that suffer loss arising from the granting of illegal aid may, in principle, commence court proceedings before the civil courts under Article 2043 of the Italian Civil Code, which provides for compensation for liability in tort.

In particular, the liability of the State and, thus, the possibility for a third party to be entitled to compensation, depends on the existence of:

- damage to the claimant, that could be represented by the anti-competitive effect resulting from the aid. The fact that one or more undertakings have benefited from the aid would constitute damage to their competitors;
- "injustice" of the damage, i.e. the fact that the damage was not caused directly or indirectly by the negligence or by a voluntary act on the part of the claimant;
- wilful or negligent behaviour on the part of the State; and

[268] Judgment of 26 July 2001; see section 3.2.30 below.

- a causal link between the damage sustained by the third party and the unlawful behaviour on the part of the State.

However, no relevant cases have been found in this regard.

2.2.2.5. Competitors' actions for liability of and/or damages from the beneficiary and interim measures

There are only three published cases (see sections 3.2.12, 3.2.26 and 3.2.36 below) where competitors brought a civil action in order to stop the granting of alleged State aid to competitors, claiming unfair competition under Article 2598 of the Italian Civil Code. All claims were lodged by companies active in the sector of sea transportation.

If appropriate, interim measures can be requested before the civil courts under Articles 669 *bis et seq*. of the Italian Code of Civil Procedure (see Part II, section 7.1.3). The use of interim measures is subject to two essential conditions: (i) there must be a risk of imminent damage in respect of the contested right ("*periculum in mora*"); and (ii) there must be a *prima facie* case ("*fumus boni iuris*"). In the case set out at section 3.2.36 interim measures were also requested by the claimant.

However, all claims were dismissed by the competent courts.

In another case (see section 3.2.14 below) a company lodged an action claiming that a competitor had infringed Article 87 EC and requesting damages for loss suffered due to unfair competition. The case was brought directly before the Supreme Court pursuant to Article 41 of the Italian Code of Civil Procedure (i.e. proceedings to determine jurisdiction under Article 41 of the Italian Code of Civil procedure). The Supreme Court recognised the jurisdiction of the Italian courts but did not pronounce itself on the merits.

2.2.2.6. Legal standing

In its judgment of 13 July 1999 (see section 3.2.25 below), the Court of Appeal of Cagliari stated that any legal person or entity which is not directly affected by a Commission decision is not entitled to have standing to enforce the decision, even if that legal person or entity has a material interest that coincides with the interest underlying the Commission decision. The Court of First Instance of Genoa[269] stated, *obiter dicta*, that the grant of illegal aid constitutes a violation of the national rules on unfair competition by both the State and the beneficiary of the State aid.

Singularly, the Court of Appeal of Naples, in its judgment of 13 July 1999 (see section 3.2.26 below) stated that, (i) in the event that a claim under Article 82 is pending before the Commission, the national judge is not obliged to stay the proceedings in relation to a claim for breach of Article 88 (3) EC; (ii) in accordance with Article 15 of Law No. 287 of 10

[269] Judgment of 26 April 1993; see section 3.2.36 below.

October 1990 (i.e. the Italian Antitrust Law), the suspension of the State aid is a measure which may only be adopted by the Italian Antitrust Authority ("*Autorità Garante della Concorrenza e del Mercato*").

2.2.2.7. Recovery

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 before the competent civil court.

(1) 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 grounds, 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.

(2) 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 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".[270]

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 brought by the injured party in order to obtain compensation for the damage sustained.

2.2.3 Administrative courts

It is common practice for the Administration to grant or deny State aid by means of an administrative act ("*atto amministrativo*") in compliance with a statute. Accordingly, when State aid is denied to an individual or a company, although it believes to be entitled to it, such individual or company would usually lodge an administrative claim ("*ricorso gerarchico*") with the agency denying the aid. If the agency, or the authority supervising it, decides that the claim should be rejected, the parties may file a claim before a regional administrative court ("*tribunale amministrativo regionale*", "*TAR*") asking for the annulment of the negative act.

[270] See Supreme Court, Judgments No. 1252/00, No. 11973/95 and No. 11177/94.

Subsequently, the *TAR* judgment may be challenged by lodging an appeal with the Administrative Supreme Court ("*Consiglio di Stato*"). The claimant may claim that the administrative act is unlawful and, consequently, infringes its legitimate interests. Administrative courts may grant interim measures and may annul administrative acts, which are then declared illegal.

- Legal Standing

In order to be eligible to challenge an administrative act the claimant must have a current and specific interest in that act, i.e. it must cause prejudice to the claimant. The claimant must summon the public authority concerned (i.e. the defendant) to court as well as those parties if any, which would be directly and negatively affected by a judgment in the claimant's favour ("counter-interested parties"). The parties involved in proceedings before the administrative courts are therefore the claimant (i.e. the party challenging an administrative act), the defendant (which is the public body that enacted the administrative act which is challenged by the claimant), and the counter-interested parties (i.e. the parties that would be directly and negatively affected by a judgment in favour of the claimant). Any other person claiming to have an interest of fact in the proceedings (on the claimant's or on the defendant's side) may participate in the proceedings by filing an application to intervene in the proceedings in order to support the claimant or the defendant (by filing a defence, documents *etc*.).

- Suspension orders

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 the suspension of the effectiveness of the challenged administrative act during the course of the proceedings before TAR, the claimant must file an *ad interim*, or cautionary, application, alleging a risk of serious and irrecoverable harm which the contested administrative act could cause to the claimant's interests during the proceedings and before final judgment is given. The application is usually aimed at obtaining a stay of execution of the administrative act in order to temporarily stay its effects. The ad interim application cannot be filed prior to the main petition. It is usually filed together with the petition, or it may be filed thereafter. The administrative courts deal with ad interim applications in the ordinary case pending before them. The ad interim application for a stay of execution is discussed in a single hearing ("*camera di consiglio*"), which must be held immediately after the filing of the application (usually within 15 to 20 days from the filing of the application). The parties may file a defence and documents, and may attend the hearing (which is held privately).

Both the defendant and the other interested parties have the opportunity to contest the claimant's claim of serious imminent harm in their defence and then orally by participating in the hearing. The court's judgment issuing an order, allowing or rejecting the application is generally published the day after the hearing. The court may issue an order allowing the application where (i) there is a *prima facie* case ("*fumus boni juris*"); and (ii) if the claimant

proves that there is a risk of "imminent danger" in respect of the contested right ("*periculum in mora*"). Orders allowing ad interim applications are not easily granted, although they are not regarded as extraordinary relief. It may happen that, at the hearing of the ad interim application, the claimant and/or the other parties try to convince the administrative court that it would be better (for instance, due to the complexity of the case) to fix an urgent hearing date for the discussion of the merits of the case, instead of discussing the ad interim application. The president of the court (taking into account, for instance, the importance of the case, the reasons for the urgency and the workload of the court) will sometimes indicate a possible early date for a hearing on the merits of the case to the parties. If the claimant waives its application for ad interim measures, the president will fix a date for a hearing on the merits. The typical effect of an order allowing the application is a stay of execution ("suspension of the effect") of the contested administrative measure until a decision on the merits of the case is rendered. The order may also be a mandatory or prohibitory injunction. Sometimes, the order also sets the date for the hearing on the merits of the case. The order may be appealed to the *Consiglio di Stato*.

- Damages

Regional administrative courts have recently been granted - by Article 7 of Law No. 205 of July 2000, which amended Article 33 of Law No. 1043 of 6 December 1971 - the power to order the Public Administration to compensate the claimant for the harm suffered as a result of an illegitimate administrative act, provided that the claimant is able to prove the harm suffered and to quantify damages. This power can, however, be exercised by regional administrative courts only in the specific areas of law laid down by Article 33 of Law No. 1043/1971, which does not include State aid. It cannot be excluded, however, that an extensive interpretation of Article 33 of Law No. 1034/1971, as amended by Article 7 of Law No. 205/2000, may bring State aid within the scope of the above-mentioned power of regional administrative courts.

- Recovery

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 EU, which liaises with the presidency of the Council of Ministers, it is the duty of the authorities that have granted 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 any such 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 act declared null and void.

2.2.3.1. Actions against refusal of State aid

Most of the decisions before the administrative courts are commenced by petitions filed by companies that were denied State aid following a negative decision of the Commission (see sections 3.3.3, 3.3.5, 3.3.6, 3.3.7, 3.3.8, 3.3.11, 3.3.12, 3.3.13, 3.3.14, 3.3.18, 3.3.19, 3.3.23, 3.3.25, 3.3.26, 3.3.27 below).

Regional administrative courts have confirmed the legitimacy of the refusal of State aid even in cases where companies had concluded civil contracts in the legitimate expectation of receiving aid from the State (see Judgment No. 103/1985, section 3.3.27 below). The *Consiglio di Stato* also clarified that administrative authorities enjoy a high degree of discretion, within a scheme approved by the Commission, in calculating the amount of State aid to be granted to eligible undertakings (see Judgment No. 5549/2002, section 3.3.5 below) and that the granting of aid is not an act imposed by law but rather a prerogative of the State (see Judgment No. 360/2002, section 3.3.8 below). The *Consiglio di Stato* recently clarified that some types of State aid may be compatible with the Common Market and that it is for the European institutions to assess their compatibility under Article 93 EC (see Judgment No. 6610/2003, section 3.3.1 below).

2.2.3.2. Enforcement of negative Commission decisions

Administrative courts, and, first and foremost, the Regional Administrative Court of Lazio have expressly stated that State aid granted under a provision of national law will be permissible only if express prior authorisation of the Commission is obtained and that the proposed beneficiary cannot claim the State aid if the relevant authorisation is denied by the Commission[271]. The Regional Administrative Court of Lazio has upheld this principle since 1990, reversing an opposing view adopted in the past by the *Consiglio di Stato* and some

[271] See Judgment No. 1071/1990, see section 3.3.18 below; see also Judgments No. 2786/1999 and No. 1746/1988, respectively sections 3.2.16 and 3.3.20 below.

regional administrative courts, according to which Commission decisions on State aid were not directly applicable[272].

The *Consiglio di Stato* has changed its approach since then, having recognised the direct effect of Commission decisions. The *Consiglio di Stato* has clearly stated[273] that Commission decisions "*shall be binding in* [their] *entirety upon those to whom* [they are] *addressed*" and that these decisions are directly effective without being implemented by Italian legislation. This is confirmed, in the view of the *Consiglio di Stato*, by the fact that the EC system provides for the beneficiary's right to appeal Commission decisions. Finally, the *Consiglio di Stato* has noted that it would be inconsistent for a State to grant an aid that must then be recovered under EC law. The *Consiglio di Stato* has also expressly clarified that, in the absence of specific authorisation by the Commission, State aid cannot be granted[274].

A further issue addressed by the administrative courts concerned the type of legal act necessary to revoke a State aid once the Commission has denied approval. In 1990, the Administrative Court of Lazio (section 3.3.18) confirmed a previous decision of 1985 (section 3.3.27) stating that, should the Commission decide that aid to a specific industry pursuant to an Italian scheme is incompatible with the Common Market, all administrative bodies must halt the application of the scheme despite the existence of contrary national legislation that has not yet been repealed. It is worth noting that the *Consiglio di Stato* had adopted a different approach in its previous decision, requiring modification of the legislation prior to corresponding modification of the administrative act.[275] More recent case law by the *Consiglio di Stato* corrected this position, as explained above.

A further issue concerned the relevant date of refusal. Case law has confirmed the validity of the principles of *tempus regit actum* and non-retroactivity. In particular, administrative courts have ruled that public tender procedures reserving a certain percentage of supply to companies based in southern Italy were compatible with the Common Market if announced before the Commission decision declaring them to be in breach of Article 92 EC has been issued (see section 3.3.22 below). In this regard, it has also been stated that the act of denial takes effect as of the enactment of the new law changing the rules (see section 3.3.26 below).

2.2.3.3. Actions contesting the legality of the aid

As regards the merits, the decisions are limited to inquiries into procedural compliance by State or regional authorities granting State aid. In five cases (sections 3.3.9, 3.3.13, 3.3.14, 3.3.19 and 3.3.25) the regional administrative courts attempted to ascertain whether the behaviour of public authorities could be deemed to result in the granting of State aid under Article 92 EC. In all cases the answer was negative.

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[272] See Judgments No. 30/1989, No. 394/1987 and No. 949/1986, respectively at sections 3.3.12, 3.3.23 and 3.3.25 below.
[273] See Judgments No. 5250/2003 and No. 465/2002, respectively at sections 3.3.2 and 3.3.7 below.
[274] See Judgment No. 4946/2002 at section 3.3.6 below.
[275] See below, Case 3.3.27, footnote.

In particular, the Regional Administrative Court of Lazio has affirmed the compatibility of Legislative Decree No. 347 of 23 December 2003 with EC provisions on State aid, which introduces urgent measures for the restructuring of large insolvent undertakings (see section 3.3.13 below) and, also, the taxation regime established by the Italian law on banking foundations, i.e. Ministerial Decree No. 217 of 2 August 2002 (see section 3.3.14 below). The Regional Administrative Court of Veneto has held that regional aid granted to a hotel could be justified on the grounds that it was restricted to a particular territory and context (see section 3.3.19 below).

The *Consiglio di Stato* also addressed the issue of privatisation and took a position which is line with EC case law and Commission decisions, clarifying that the privatisation of a publicly owned company does not imply that State aid within the meaning of Article 87 (1) EC has been granted, where (i) the company is sold by a competitive tender that is open, transparent and unconditional, or an equivalent procedure; (ii) the company is sold to the highest bidder; and (iii) bidders have enough time and information to carry out a proper valuation of the assets on which to base their bids (see section 3.3.9 below).

Finally, national courts seem to be willing to refer a case to the ECJ for a preliminary ruling under Article 234 EC, if appropriate. A question was referred by the *Consiglio di Stato* in order to obtain a preliminary ruling on whether a certain regime adopted by the Electricity and Gas Authority amounted to State aid (see section 3.3.4 below). Requests for a preliminary ruling were also lodged in cases 3.2.5 on tax benefits, 3.2.13 on the interpretation of the Prodi Law as well as 3.3.21 and 3.3.24 on public procurement procedures.

2.2.3.4. Competitors' actions against Member State and interim measures

Only a limited number of decisions (see section 3.3.22 to 3.3.24 below) were the result of a complaint lodged by competitors. They all dealt with public procurement procedures reserved for companies based in Southern Italy. The claimants claimed that such procedures were in breach of Article 92 EC, since they provided State aid to their competitors. However, none of the proceedings were successful. In one case, the judge stated that individuals are not entitled to request that national courts ascertain the compatibility of State aid with EC law (see section 3.3.23 below); in another case, the competent court suspended the procedure and made a reference for a preliminary ruling to the ECJ (see section 3.3.24 below). In the third case, the judge considered that the Commission decision on the unlawfulness of the measures could not take precedence over the principle of non-retroactivity (see section 3.3.22 below).

As to the possibility of requesting interim measures, although there is no case law in this regard, it is worth noting that, should State aid be granted by an administrative act, competitors may appeal to the competent regional administrative court in order to obtain the suspension of the measure (see Part II, section 5.1.3 below).

2.2.4 Court of Auditors

Once an administrative court has declared the act granting State aid illegal, the parties can also bring a petition to the Court of Auditors ("*Corte dei Conti*") to enforce the obligation imposed on the beneficiaries to repay the illegal aid. In a number of cases (section 3.4.5 below), the Court of Auditors has pronounced itself on State aid related matters.

The Court of Auditors is a body that is independent from the State and also acts as a judicial body competent to carry out State accounting. Its competences are listed in Article 100 (2) of the Italian Constitution, according to which "*the Court of Auditors will exercise formal legal control on the Government's acts before their enactment. It will exercise control over the State budget after its adoption. It will be competent, with other bodies, to control the financial accounting books of bodies normally financed by the State. It will be obliged to present a final report to the Parliament concerning its control*". The Court of Auditors is entrusted with three main types of external audit, which can be identified as follows: (i) *a priori* compliance audit of acts; (ii) *a posteriori* audit on management as an indicator of the effectiveness, efficiency and the economic character of the administrative action; and (iii) an economic and financial audit with a view to reporting to the elective assemblies.

In addition to its auditing functions, the Court of Auditors also has jurisdictional functions in matters of public accounting and other matters laid down by law. Article 103 of the Italian Constitution gives the Court of Auditors exclusive jurisdiction in "matters of public accounting", which means that the Court of Auditors has jurisdiction over accounting agents, public administrators and executives, with regard to all issues that concern the management of public resources (in the broad sense). Jurisdiction in matters of public accounting also covers judgements on the administrative and accounting liability of executives and public administrators for damage caused in the exercise of their functions[276].

2.3 Conclusions

An examination of published case law testifies to the, overall, correct application of EC State aid rules by Italian courts, especially in more recent cases. The length of judicial proceedings before both civil and administrative courts, however, remains one of the main obstacles to effective application of EC State aid rules.

It is worth noting that both the *Consiglio di Stato* and the Supreme Court have expressly and definitely recognised that Commission decisions have direct effect. The Supreme Court has also repeatedly accepted the principles according to which (i) national courts can enforce State aid only if the aid has been declared compatible with the Common Market by the

[276] Apart from the functions identified directly by Article 100 of the Italian Constitution, other functions introduced by ordinary laws have been added. Their constitutional legal basis is Article 97 of the Constitution (principle of good performance of public office), Article 81 (equilibrium of the budget) and Article 119 (coordination of public finances). The Court of Auditors is also responsible for deciding matters relating to civil, military and war pensions. Pension judgements concern both the existence of the right to a pension and the amount of the pension.

Commission, and (ii) Commission decisions are binding on Member States as well as all national institutions.

The majority of civil court decisions relate to the interpretation of the Law No. 95 of 3 April 1979, providing for special treatment of large insolvent undertakings ("the Prodi Law"), following the judgments of the ECJ in *Ecotrade*[277] and *Piaggio*[278] and the decision of the Commission of 16 May 2000, declaring the Prodi Law incompatible with the Common Market[279].

Recourse to litigation for the enforcement of negative Commission decisions as well as actions for recovery of illegal State aid have been, on the contrary, negligible in Italy to date. Published case law shows that no actions before civil courts have been brought by public authorities to recover illegal and/or unlawful aid.

As to civil actions brought by competitors in order to stop the granting of alleged State aid, there are only three published cases. All claims were lodged by companies active in the sector of sea transportation and based on unfair competition under Article 2598 of the Italian Civil Code.

Recovery issues in proceedings before administrative courts have been marginal, too. Most decisions before the administrative courts are commenced by petitions filed by companies that were denied State aid following a negative decision of the Commission.

Finally, only a limited number of decisions were the result of a complaint lodged by competitors before administrative courts. They all dealt with public procurement procedures reserved for companies based in Southern Italy.

2.4 Research methodology

2.4.1 Sources

- CD ROM Opere Iuris Data, Giuffrè Editore S.p.A.;
- CD ROM Il Foro Italiano, Repertorio 1981-2005;
- CD ROM Infoutet, Legislazione e Giurisprudenza;
- Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a: database in French with decisions by national administrative courts applying EC law;

[277] Case C-200/97, Ecotrade v Altiforni e Ferriere di Serrola [1998] ECR I-7907.
[278] Case C-295/97, Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA [1999] ECR I-3735.
[279] Commission Decision of 16 May 2000 on the aid scheme implemented by Italy to assist large firms in difficulty (Law No. 95/1979 that became Decree No. 26/1979 on special measures for extraordinary administration of large firms in crisis), OJ (2001) L 79/29.

- http://193.191.217.21/fr/jurisprudence/jurisprudence_fr.lasso; or
- http://www.raadvst-consetat.be/Juradmin/home.html (website of the Belgian *Conseil d'Etat*).

2.4.2 Italian key words used to research cases:

- aiuto di stato
- regimi di aiuti
- articolo 87 CE
- articolo 88 CE
- articolo 92 CE
- articolo 93 CE

3. List of cases

3.1 Proceedings before the Constitutional Court ("*Corte Costituzionale*")

3.1.1 Constitutional Court ("Corte Costituzionale"), Judgment of 4 June 2003, No. 186

The Constitutional Court declared a question relating to the constitutionality of the legal standing of Italian public authorities to submit notifications to the Commission under Article 88 (3) EC inadmissible.

Facts and legal issues: The Province of Trento sought a declaration of constitutional invalidity in respect of the provision contained in Article 2 (10) of Law No. 499/1999, according to which State aid schemes granted to the agricultural and food industry and contained in the programmatic document created by the above law ("*Documento Programmatico Agroalimentare*") had to be notified by the Italian government to the Commission under Article 88 EC. The Province of Trento contended that it was competent to notify such State aid to the Commission and, thus, State filings were not required.

Decision: The Constitutional Court declared the complaint inadmissible. It did not pronounce itself on the issue concerning the necessity and/or opportunity for the State to notify State aid under Article 88 (3) EC, observing that the State's filings (i) do not frustrate possible previous filings by the Province; and (ii) in any case, do not breach any constitutional right of the Province itself.

3.1.2 Constitutional Court ("Corte Costituzionale"), Judgment of 19 October 2001, No. 337

In October 2001, the Constitutional Court dismissed a claim questioning the constitutional validity of Law No. 448 of 23 December 1998, which granted certain tax benefits to undertakings based in Southern Italy ("Law No. 448").

Facts and legal issues: The Region of Lombardia challenged the validity of a number of provisions of Law No. 448, also under Articles 92 and 93 EC and, consequently, Article 10 of the Italian Constitution.

Decision: The Constitutional Court declared the question of the compatibility of Law No. 448 with Articles 92 and 93 EC and, consequently, Article 11 of the Italian Constitution (rather than Article 10, as erroneously pointed out by the Region of Lombardia) inadmissible, as it was time-barred. The Court noted in passing that the State aid had been declared compatible with the Common Market by the Commission.

3.1.3 Constitutional Court ("Corte Costituzionale"), Judgment of 23 March 1999, No. 85

In March 1999, the Constitutional Court declared that the Regional Law of Abruzzi of 11 June 1997 ("the Abruzzi Law") infringed Article 10 of the Italian Constitution.

Facts and legal issues: The President of the Council of Ministers claimed that the Abruzzi Law, which granted aid to cooperatives active in the fishery sector, was in breach of Article 92 EC and thus of Article 10 of the Italian Constitution. In the Abruzzi Law, the aid to be granted to the fishing sector was qualified and treated as *de minimis*, therefore not triggering the notification requirement provided for by Article 93 EC.

Decision: That provision of the Abruzzi Law was found to infringe the EC Treaty, since the *de minimis* exemption did not apply to the fishing sector. Consequently, the Abruzzi Law also breached Article 11 (rather than Article 10, as erroneously pointed out by the President of the Council of Ministers) of the Italian Constitution, which permits such limitations on sovereignty as are necessary for an organisation ensuring peace and justice among nations and promoting international organisations that pursue such ends.

3.1.4 Constitutional Court ("Corte Costituzionale"), Judgment of 22 July 1996, No. 271

The Constitutional Court ruled that a regional law concerning financial aid for the promotion of employment in Sicily was compatible with the provisions of the Italian Constitution since it complied with Article 93 EC.

Facts and legal issues: Regional Law No. 85 of 21 December 1995 granted financial aid for the promotion of employment in various sectors (i.e. self-employment, agriculture and handicraft). The State Commissioner in Sicily claimed that the Regional Law No. 85 was constitutionally invalid since it infringed Article 93 EC and, consequently, Article 11 of the Constitution. He claimed that, although Regional Law No. 85 had been notified to the Commission under Article 93 EC, the entry into force of Regional Law No. 85 had not been subject to Commission approval. Not only did Regional Law No. 85 lack such a clause, but it had also been passed as an immediately enforceable "urgent law".

Decision: The Court held that a specific clause making the entry into force of Regional Law No. 85 subject to Commission approval was not necessary in order to comply with Article 93 EC and thus Article 11 of the Italian Constitution. Since Regional Law No. 85 contained a general clause subordinating the activity of the region under Regional Law No. 85 to compliance with EC law, the Constitutional Court declared that Regional Law No. 85 did not breach Article 93 EC or Article 11 of the Constitution.

3.1.5 Constitutional Court ("Corte Costituzionale"), Judgment of 29 April 1996, No. 134

The Constitutional Court dismissed a claim relating to the alleged constitutional invalidity of a regional law granting special aid to carriers which had become victims of the Mafia.

Facts and legal issues: A regional law of 4 August 1995 granted special aid to some carriers that had suffered loss caused by Mafia incendiary attacks. The State Commissioner of Sicily challenged the constitutional validity of that regional law under Article 11 of the Italian Constitution ("the European Clause"), since Article 93 EC would have been violated. The State Commissioner of Sicily claimed that the provisions of the regional law made no reference to the fact that the said measures had been authorised by the Commission under Article 93 EC.

Decision: Since the defendant filed with the Constitutional Court a formal opinion from the Commission, which confirmed that the provisions of the law did not qualify as State aid, the Constitutional Court declared that the law did not infringe the Italian Constitution.

3.1.6 Constitutional Court ("Corte Costituzionale"), Judgment of 30 March 1995, No. 94

The Constitutional Court held that two regional acts granting aid to fisheries complied with the provisions of the Italian Constitution, since they had been issued in accordance with Article 93 EC.

Facts and legal issues: The State Commissioner of Sicily challenged the validity of two legislative acts adopted by the Regional Assembly of Sicily under Article 93 EC and, consequently, Article 11 of the Italian Constitution ("the European Clause"). The two acts were:

(i) a regional deliberation of 4 March 1994 (i.e. a regional law not yet in force), passed by the Regional Assembly of Sicily and granting aid to the fishing industry; and

(ii) a regional law of 10 May 1994, based on a previous one, providing for aid to the fishing industry.

Decision: The Constitutional Court ruled that the two acts were compliant with Article 93 EC. In doing so, the Constitutional Court referred to ECJ case law. In particular, the Constitutional Court emphasised that the ECJ had clarified[280] that once a region had formally notified the regulation granting the aid to the Commission, any further and subsequent legislative acts based on the regulation could be served informally, as in this case. The Constitutional Court therefore dismissed the claim.

[280] Joint Cases C-91/83 and C-127/83 Heineken Brouwerijen BV v Inspecteurs der Vennootschapsbelasting, Amsterdam and Utrecht [1983] ECR 3435.

3.1.7 Constitutional Court ("Corte Costituzionale"), Judgment of July 1969, No. 120

The Constitutional Court ruled that a regional law, passed by the Regional Assembly during the session on 11 June 1969, which granted certain benefits to the citrus fruit market was in breach of the Italian Constitution, since the said law failed to comply with the provisions of Articles 92 and 93 EC.

Facts and legal issues: The State Commissioner of Sicily sought a declaration of the constitutional illegality of the regional law introducing "Intervention Measures in the Food and Agricultural Sector" on the grounds that it infringed the provisions of Articles 92 and 93 EC. In order to promote the citrus fruit market, the regional law authorised the Sicilian Authority for Industrial Promotion ("*Ente siciliano di promozione industriale*", "ESPI") to grant compensation to companies which had suffered loss due to the purchase of considerable amounts of citrus fruit before the above mentioned regional law came into force. Compensation was offered exclusively in connection with the products purchased by the company, provided that a threshold of 50 tons per producer was not exceeded.

Decision: The Constitutional Court ruled that the regional law was incompatible with the Italian Constitution, referring to the findings in its Judgment No. 49 of 9 April 1963 (see section 3.1.8 below). Furthermore, the Constitutional Court stated that aid relating to market intervention in the fruit and vegetable sector would only be deemed to comply with Articles 92 and 93 EC if authorised by the Commission.

3.1.8 Constitutional Court ("Corte Costituzionale"), Judgment of 9 April 1963, No. 49

The Constitutional Court ruled that a regional law on aid measures for shipping companies was in breach of the Italian Constitution as the said law failed to comply with the procedure set forth in Article 93 EC.

Facts and legal issues: On 5 November 1962, the Regional Assembly of Sicily passed a regional law providing for measures in favour of shipping companies. In July 1962, the regional law was notified to the Commission in accordance with Article 93 (3) EC. Thereafter, the Sicilian regional government did not await Commission approval before implementing the regional law. A claim was therefore brought before the Constitutional Court by the State Commissioner of Sicily, who represented the Italian government and was in charge of the approval of Sicilian regional laws prior to their implementation, in order to seek the annulment of such law for breach of Article 93 (3) EC. The Region of Sicily argued that Article 93 (3) EC was only applicable to Member States and not also to regions.

Decision: The Constitutional Court decided that the Sicilian regional government had acted in breach of the Italian Constitution, referring in its reasoning mainly to Article 5 of the Italian Constitution, which regulates the relationship between the State and the regions. The regional law concerned an area of law, i.e. an international treaty, where compliance must be

confirmed by the central government. The Constitutional Court held that it was illegal for a region to grant aid without prior approval of the Commission under Article 93 (3) EC Treaty.

3.2 Proceedings before Civil Courts

3.2.1 Supreme Court ("Corte di Cassazione"), Judgment of 4 March 2005, No. 4769, D.S. et al. v. E.S.P.I. Ente Siciliano Promozione Industriale In Liquidazione

In this judgment, the Supreme Court recognised that a negative decision of the Commission under Article 88 (2) EC had direct effect.

Facts and legal issues: A number of employees of SIRAP S.p.A., a company declared bankrupt on 1 October 1993, sued E.S.P.I. Ente Siciliano Promozione Industriale In Liquidazione ("ESPI") asking for damages for loss suffered as a result of the bankruptcy of SIRAP S.p.A.. The employees alleged that the bankruptcy of SIRAP S.p.A. had been caused by ESPI's refusal to pay certain contributions to SIRAP S.p.A., as provided for by Article 4 of the Sicilian Regional Law No. 23/1991 of 15 May 1991. The request was dismissed both by the Tribunal and the Court of Appeal of Palermo.

Decision: The Supreme Court cited the decision of the Commission of 2 February 1994, whereby the contributions provided for by Article 4 of Regional Law No. 23/1991 were declared to constitute unlawful State aid. In line with its previous case law (Judgment No. 17564/2002, see section 3.2.9 below), the Supreme Court stated that decisions of the Commission under Article 88 EC are binding both on national courts and national governments and clarified that the former comply with such decisions, whereas the latter must repeal legislative acts granting unlawful State aid. The Supreme Court ruled that, since the contributions amounted to unlawful State aid, ESPI correctly refused to grant the aid to SIRAP S.p.A.. On these grounds, the Supreme Court dismissed the claimants' request.

3.2.2 Supreme Court ("Corte di Cassazione"), Judgment of 8 February 2005, No. 2534, Banca Antoniana Popolare Veneta S.c.a.r.l. v. C. Produzione Industriale S.p.A. in amministrazione straordinaria

In this judgment, the Supreme Court addressed in detail a number of questions regarding the interpretation of Law No. 95/75 providing for the special treatment of large insolvent undertakings ("Prodi Law")[281]. In particular, the Supreme Court confirmed, referring to previous case law, that it is not the Prodi Law in its entirety, but only single provision included therein that amount to illegal State aid.

[281] The Italian Insolvency Law provides that the Commissioner ("*Commissario Straordinario"*) may propose to commence an action to recover all payments made by the insolvent company, with a view to paying as many creditors as possible before the company is liquidated. The Prodi Law, in oversimplified terms, provided for an alternative procedure for large insolvent undertakings with a view to, on the one hand, paying all creditors and, on the other, saving the insolvent company by avoiding liquidation.

Facts and legal issues: C. Produzione Industriale S.p.A., a company subject to the special administration regime provided for by the Prodi Law, sued Banca Antoniana Popolare Veneta S.c.a.r.l. by bringing an action for recovation. The request was upheld by the Tribunal of Padova and by the Court of Appeal of Venice. Banca Antoniana Popolare Veneta S.c.a.r.l. appealed to the Supreme Court, alleging that the Prodi Law was in breach of Articles 87 and 88 EC.

Decision: The Supreme Court cited its previous case law (Judgment No. 13165/2004, see section 3.2.4 below), in which it had clarified that, according to the relevant case law of the ECJ[282], it is not the Prodi Law in its entirety but only specific measures adopted within its framework that amount to the granting of (illegal) State aid. The Supreme Court also specified that, in its view, the Commission's decision of 16 May 2000 was fully compliant with the case law of the ECJ. In particular, the Supreme Court cited paragraph 50 of the Commission's decision, according to which the Prodi Law referred back to the Italian Bankruptcy Law and, in cases where the Prodi Law provided for the application without derogation of the mechanisms and procedures of that law, these mechanisms constituted general measures that were not in any way selective. Only specific provisions of the Prodi Law, including the granting of a number of special advantages involving public resources to identifiable recipients, constituted State aid within the meaning of Article 87 EC. The Supreme Court therefore stated that the Prodi Law could be enforced in all those cases where the specific measures adopted under it did not amount to State aid. A case-by-case analysis was required in order to ascertain whether a specific measure adopted under the Prodi Law amounts to State aid. On the merits, the Supreme Court observed that, since it had not been shown that the action for revocation under the Prodi Law had been commenced prior to the suspension of the company's activities, that action was not selective and did not therefore amount to State aid. The Court also clarified that, since measures which did not constitute State aid did not need to be notified to the Commission under Article 88 EC, it was irrelevant for the purposes of the case that the Prodi Law had not been notified to the EC Commission in its entirety.

3.2.3 Supreme Court ("Corte di Cassazione"), Judgment of 21 September 2004, No. 18915, Banca Fideuram S.p.A. v. F.S. S.rl. in amministrazione straordinaria

In this judgment, the Italian Supreme Court upheld a judgment of the Court of Appeal of Turin on the interpretation of Law No. 95/79 which provides for the special treatment of large insolvent undertakings ("Prodi Law").

Facts and legal issues: F.S.S.r.l. in amministrazione straordinaria, a company subject to the special administration regime provided for by the Prodi Law, sued Banca Fideuram S.p.A. before the Tribunal of Turin for an alleged infringement of Article 67 of the Italian Bankruptcy Law (i.e. Royal Decree No. 267 of 16 March 1942). The decision of the Tribunal,

which partially allowed the request of F.S.S.r.l. in Amministrazione Straordinaria, was appealed to the Court of Appeal of Turin by Banca Fideuram S.p.A.. On appeal, Banca Fideuram S.p.A. claimed that the Prodi Law was incompatible with the Common Market for violation of Article 87 EC. The appeal was unsuccessful, so Banca Fideuram S.p.A. brought this case before the Supreme Court.

Decision: The Italian Supreme Court dismissed the claim. It recalled the judgment of the ECJ in *Piaggio*[283] and the Commission decision of 16 May 2000, and stated that the application of a system derogating from ordinary rules on insolvency must be regarded as granting State aid within the meaning of Article 87 EC in situations where the undertaking (a) was permitted to continue trading in circumstances in which that would not be permitted if ordinary insolvency rules applied, or (b) enjoyed one or more advantages, such as a State guarantee, a reduced rate of taxation, an exemption from the obligation to pay fines and from other pecuniary penalties or a total or partial de facto waiver of public debts which could not have been claimed by an insolvent undertaking to which the ordinary insolvency rules applied. The Court also clarified that the compatibility of national law with EC law may be assessed *ex officio* by the national courts.

3.2.4 Supreme Court ("Corte di Cassazione"), Judgment of 16 July 2004, No. 13165, Intesa Gestione Crediti S.p.A. v. C.D.C.R. S.r.l. in amministrazione straordinaria

In this judgment, the Supreme Court addressed a number of questions regarding the interpretation of Law No. 95/75, providing for the special treatment of large insolvent undertakings ("Prodi Law"). In particular, the Supreme Court clarified that it is not the Prodi Law in its entirety, but only single provision included therein, that amount to illegal State aid.

Facts and legal issues: C.D.C.R. S.p.A., a company subject to the special administration regime provided for by the Prodi Law, sued Cassa di Risparmio di Puglia, bringing an action for revocation. The request was upheld by the Tribunal and the Court of Appeal of Bari. Intesa Gestione Crediti S.p.A., in its capacity as purchaser of Cassa di Risparmio di Puglia, appealed to the Supreme Court, alleging that the Prodi Law was in breach of Articles 87 and 88 EC.

Decision: The Supreme Court cited the relevant case law of the ECJ[284] and stated that it is not the Prodi Law in its entitrety but only specific measures adopted within its framework that amount to the granting of (illegal) State aid. The Supreme Court also specified that, in its view, the Commission's decision of 16 May 2000 was fully compliant with the ECJ case law. In particular, the Supreme Court cited paragraph 50 of the Commission's decision, according to which the Prodi Law referred back to the Italian Bankruptcy Law and, in cases where the Prodi Law provided for the application without derogation of the mechanisms and procedures

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[282] Case C-200/97, Ecotrade v Altiforni e ferriere di Serrola [1998] ECR I-7907.
[283] Case C-295/97, Piaggio v Ifitalia [1999] ECR I-3735.
[284] Case C-200/97, Ecotrade v Altifornie Ferriere di Serrola [1998], ECR I-7907 and Case C-295/97, Piaggio v Ifitalia [1999] ECR I-3735.

of that law, these mechanisms constituted general measures that were not in any way selective. Only specific provisions of the Prodi Law, including the granting of a number of special advantages involving public resources to identifiable recipients, constituted State aid within the meaning of Article 87 EC. The Supreme Court therefore stated that the Prodi Law could be enforced in all those cases where the specific measures adopted under it did not amount to State aid. A case-by-case analysis was required in order to ascertain whether a specific measure adopted under the Prodi Law amounted to State aid. On the merits, the Supreme Court declared the grounds of appeal inadmissible. Although the compatibility of the Prodi Law in its entirety with EC law may be assessed *ex officio* by the national courts, the evaluation of the compatibility of some of its provisions (rather than the Prodi Law as a whole) with Articles 87 and 88 EC would involve a new investigation of the facts, which is an activity reserved to the Supreme Court.

3.2.5 Supreme Court ("Corte di Cassazione"), Judgment of 30 April 2004, No. 8319, Ministero dell'Economia e delle Finanze v. Cassa di Risparmio di Firenze S.p.A. and Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato S.p.A.

This judgment concerned the compatibility with EC State aid rules of certain tax benefits granted to bank foundations. The Supreme Court confirmed the direct effect of Article 87 (3) EC and asked for a preliminary ruling under Article 234 EC.

Facts and legal issues: The Fondazione Cassa di Risparmio di San Miniato ("the bank") and other parties sued the Italian Ministry of Finance in the regional tax court in order to claim a tax benefit for profits from a participation held in a bank ("*Cassa di Risparmio di Firenze S.p.A.*"), according to the provisions of Presidential Decree No. 601 of 29 September 1973 and Law No. 1745 of 29 December 1962. The request of the bank was dismissed by the Court of First Instance but heard on appeal by the competent regional tax court. The Italian Ministry of Finance appealed the decision to the Supreme Court, seeking the annulment of the regional tax court's decision.

Decision: First, the Italian Supreme Court recalled Commission Decision No. C 54/B/2000 of 22 August 2002, which excludes banking foundations from the scope of the State aid rules on the grounds that they do not constitute "undertakings" under Article 87 EC. Having recalled the general principle according to which national courts cannot implement State aid measures unless these have been declared compatible with the Common Market by the Commission, the Supreme Court held that (i) the compatibility of the tax benefit with EC law, in particular with the principles of effectiveness and non-discrimination, must be verified, also *ex officio*, by national courts; (ii) decisions of the Commission assessing the compatibility of the measure with the Common Market are binding on Member States and all institutions of the Member State; and (iii) should the national courts doubt the validity of a Commission decision, they can (or as courts of last instance must) refer the matter to the ECJ under

Article 234 EC. Since the Supreme Court found that there were significant doubts as to the validity of the Commission decision, it referred the matter to the ECJ under Article 234 EC.

3.2.6 Supreme Court ("Corte di Cassazione"), Judgment of 19 March 2004, No. 5561, C. Torino S.p.A. in amministrazione straordinaria v. Banca S. Paolo Torino IMI S.p.A.

In this judgment, the Italian Supreme Court considered a number of issues regarding the interpretation of Law No. 95/79, providing for the special treatment of large insolvent undertakings ("Prodi Law"), and whether there is scope for appeal to the Supreme Court.

Facts and legal issues: C. Torino S.p.A. in amministrazione straordinaria, a company subject to the special administration regime provided for by the Prodi Law, sued Banca S. Paolo Torino S.p.A. in the Trinunal of Udine for an alleged infringement of Article 67 of the Italian Bankruptcy Law (Royal Decree No. 267 of 16 March 1942), governing actions for revocation under the Prodi Law. The action was allowed by the Tribunal of Udine and by the Court of Appeal of Trieste. Banca S. Paolo Torino S.p.A. appealed to the Supreme Court on the grounds that Law No. 95/79 was in breach of Articles 92 and 93 EC.

Decision: The Supreme Court recalled its relevant case law[285] according to which the Supreme Court cannot decide matters *ex officio* if this involves a new investigation of the facts and/or changing the legal argument underlying the dispute. Since the question of the compatibility of Law No. 95/79 with the EC State aid rules had not been brought before either the Tribunal of Udine or the Court of Appeal of Trieste, the Supreme Court dismissed this ground of appeal. The Supreme Court also specified that it is not the Prodi Law in its entirety, but only specific measures adopted within its framework that may amount to State aid, if the undertaking subject to the Prodi Law enjoys one or more advantages that cannot be claimed under general insolvency rules.

3.2.7 Supreme Court ("Corte di Cassazione"), Judgment of 17 December 2003, No. 19365, Ministero delle Finanze e Agenzia delle Entrate v. Fondazione Cassa di Risparmio della Spezia

In this judgment, the Supreme Court assessed the compatibility of certain tax benefits granted to banking foundations with the EC State aid rules.

Facts and legal issues: Fondazione Cassa di Risparmio della Spezia sued the Italian Ministry of Finance in the competent tax court in order to claim certain tax benefits under Article 6 of Presidential Decree No. 601 of 29 September 1973 and Article 10 *bis* of Law No. 1745 of 29 December 1962. The action was upheld by the Court of First Instance and affirmed on appeal. The Ministry of Finance appealed to the Supreme Court, seeking the annulment of the regional tax court's decision.

[285] Judgments No. 5241/2003, No. 13470/2002 and No. 9681/1999.

Decision: The Supreme Court rejected the appeal, recalling the Commission's decision of 22 August 2002 (C 54/b/2000), that excluded banking foundations from the scope of EC State aid rules on the grounds that the latter do not constitute "undertakings" within the meaning of Article 87 EC. The Supreme Court also clarified that it is necessary to carry out a case-by-case analysis to assess whether the relevant activities are to be considered "economic" for the purpose of the State aid assessment.

3.2.8 Supreme Court ("Corte di Cassazione"), Judgment of 4 April 2003, No. 5241, Comit S.p.A. v. Docks Siderurgici S.p.A. in Amministrazione Straordinaria

In this judgment, the Italian Supreme Court considered a number of issues regarding the interpretation of Law No. 95/79, providing for the special treatment of large insolvent undertakings ("Prodi Law").

Facts and legal issues: Docks Siderurgici S.p.A. in amministrazione straordinaria, a company subject to the special administration regime provided for by the Prodi Law, sued Banca Commerciale Italiana S.p.A. in the Tribunal of Udine for an alleged infringement of Article 67 of the Italian Bankruptcy Law (Royal Decree No. 267 of 16 March 1942), governing actions for revocation under the Prodi Law. The action was allowed by the Tribunal of Udine and by the Court of Appeal of Trieste. Banca Commerciale Italiana S.p.A. appealed to the Supreme Court on the grounds that Law No. 95/79 was in breach of Articles 92 and 93 EC.

Decision: First, the Supreme Court noted that (i) the question of the compatibility of Law No. 95/79 with the EC State aid rules was not brought before either the Tribunal of Udine or the Court of Appeal of Trieste, and that it was raised only before the Supreme Court; and that (ii) it was not the Prodi Law in its entirety, but only specific measures adopted within its framework that could amount to State aid, with reference to the judgment of the ECJ in *Ecotrade*[286].

The Supreme Court remarked that the compatibility of the Prodi Law with EC law may be assessed *ex officio* by national courts. However, it stressed that the Supreme Court cannot decide *ex officio* matters that involve a new investigation of the facts and/or change the legal argument underlying the dispute. Accordingly, the Supreme Court dismissed these grounds of appeal.

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

The Italian Supreme Court rendered this groundbreaking judgment in December 2002, in which the Supreme Court considered a number of issues regarding the relationship between EC law and national law. In this judgment, the Italian Supreme Court expressly recognised

[286] Case C-200/97, Ecotrade v Altifornie Ferriere di Derrola [1998] ECR I-7907.

the direct effect of a negative decision of the Commission under Article 88 (2) EC for the first time.

Facts and legal issues: Torrefazione Caffè Mattioni S.r.l. sued the local tax authority and the Italian Ministry of Finance in the Tax Court of Gorizia to claim certain tax benefits provided for by Law No. 26 of 29 January 1986. The action was upheld by both the local and regional tax courts. The Italian Ministry of Finance and the local tax authority appealed to the Supreme Court, claiming that the Commission had declared that the aid granted under Law No. 26/1986 was incompatible with the Common Market. The Supreme Court annulled the decision of the regional tax court on these grounds.

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

The Supreme Court stated that, if the Italian government fails to abrogate a legislative measure granting aid, which the Commission declared incompatible with the Common Market, that decision of the Commission under Article 88 (2) EC has direct effect, if it is sufficiently clear, precise and unconditional and does not give discretionary powers to the Italian government in its implementation. The Supreme Court also specified that (i) the decision must not be final to have direct effect. Should the decision not be final and should the national courts doubt its validity, the national courts can then refer the matter to the ECJ under Article 234 EC; and (ii) the compatibility of a measure with EC law may be assessed *ex officio* by national courts.

3.2.10 Supreme Court ("Corte di Cassazione"), Judgment of 16 September 2002, No. 13470, Banca Commerciale Italiana Comit S.p.A. v. Ferdofin Siderurgica S.r.l. in amministrazione straordinaria

In this judgment, the Italian Supreme Court considered a number of issues regarding the interpretation of Law No. 95/79, providing for the special treatment of large insolvent undertakings ("Prodi Law").

Facts and legal issues: Ferdofin Siderurgica S.r.l. sued Banca Commerciale Italiana S.p.A. in the Tribunal of Turin for an alleged infringement of Article 67 of the Italian Bankruptcy Law (Royal Decree No. 267 of 16 March 1942), governing actions for revocation under the Prodi Law. The action was upheld by both the Tribunal and the Court of Appeal of Turin. Banca Commerciale Italiana S.p.A. appealed to the Supreme Court claiming that Law No. 95/79 was in breach of Articles 92 and 93 EC.

Decision: First, the Supreme Court noted that the question of the compatibility of Law No. 95/79 with EC State aid rules had not been brought before either the Tribunal or the Court of Appeal of Turin but had been raised before the Supreme Court for the first time. The Supreme Court observed that it could not decide this issue *ex officio*, since a new investigation of the facts would be necessary and Italian procedural rules did not provide for this. The Supreme Court also clarified that a judgment by the ECJ assessing the incompatibility of national law with EC law is not to be regarded as a source of new law ("*jus superveniens*"), but is of a declaratory nature. On these grounds, the Supreme Court dismissed the appeal.

3.2.11 Supreme Court ("Corte di Cassazione"), Judgment of 23 June 2000, No. 8539, Ditta De Filippi Leonardo v. Mario Maraldi S.p.A. in amministrazione straordinaria

In this judgment, the Supreme Court clarified that actions for revocation under Decree No. 270/99 ("second Prodi Law") are not in breach of EC State aid rules.

Facts and legal issues: Mario Maraldi S.p.A., a company subject to the special administration regime provided for by the Prodi Law, sued Ditta De Filippi Leonardo, bringing an action for revocation. The request was upheld by the Tribunal of Forlì and by the Court of Appeal of Bologna. Ditta De Filippi Leonardo appealed to the Supreme Court.

Decision: Although the issue of the compatibility of actions for revocation with Articles 87 and 88 EC was not explicitly raised by the appellant, the Supreme Court clarified that actions for revocation under the second Prodi Law complied with EC State aid rules. The second Prodi Law clarifies that actions for revocation are admissible only once the liquidation phase has started, thereby implementing the case law developed under the (first) Prodi Law, according to which only actions for revocation brought during the liquidation phase, i.e. after attempts to continue the business activity have failed (and only after such phase has ended), are deemed to comply with EC State aid rules.

3.2.12 Supreme Court ("Corte di Cassazione"), Judgment of 19 April 2000, No. 5087, Fallimento Traghetti Mediterraneo S.p.A. v. Tirrenia di Navigazione S.p.A.

The Supreme Court upheld a decision of the Court of Appeal of Naples, rejecting a claim for unfair competition by means of State aid.

Facts and legal issues: Fallimento Traghetti Mediterraneo S.p.A. sued Tirrenia Navigazione S.p.A. in the Tribunal of Naples, claiming unfair price competition and unfair solicitation of clients. In particular, Fallimento Traghetti Mediterraneo S.p.A. argued that Tirrenia benefited from State aid granted by Law No. 684/74, which allowed Tirrenia to set tariffs below costs. The Tribunal of Naples dismissed the claim. The Court of Appeal of Naples confirmed the decision of the Tribunal. Fallimento Traghetti Mediterraneo appealed to the Supreme Court,

alleging, *inter alia*, that the financial aid granted to Tirrenia Navigazione S.p.A. amounted to unlawful State aid, which had not been notified to the Commission.

Decision: The Supreme Court dismissed the claim. The argument relating to the notification of Law No. 684/74 to the Commission was not addressed. The Supreme Court acknowledged that State aid is, in theory, generally prohibited, as long as it affects trade between Member States and distorts competition on the market. The Supreme Court, however, affirmed that the distortion of competition test is irrelevant in order to assess the compatibility of a State aid, since such a distortion is the necessary consequence of granting State aid. It stated, therefore, that a State aid can be compatible with the Common Market, even where it distorts competition, if the State aid is aimed at protecting interests that could not otherwise be satisfied (such as public transport services).

3.2.13 Supreme Court ("Corte di Cassazione"), Judgment of 11 September 1999, No. 9681, Ecotrade S.r.l. v. Altiforni Ferrieri Servola S.p.A. in amministrazione straordinaria

In the course of these proceedings, the Italian Supreme Court asked for a preliminary ruling under Article 177 EC from the ECJ concerning the interpretation of Law No. 95/79, providing for the special treatment of large insolvent undertakings ("Prodi Law"). The ECJ answered the questions raised by the Italian Supreme Court in its well-known *Ecotrade* judgment of 1 December 1998[287].

Facts and legal issues: The tribunal and the Court of Appeal of Trieste upheld the request of Altiforni Ferrieri under Article 67 of the Italian Bankruptcy Law (Royal Decree No. 267 of 16 March 1942), governing actions for revocation under the Prodi Law. Ecotrade appealed to the Supreme Court, asking for, *inter alia*, a declaration of incompatibility of the Prodi Law with Article 93 EC.

Decision: The Supreme Court complied with the decision of the ECJ and held that, in order to verify the compatibility of the Prodi Law with EC rules on State aid, it was necessary to compare the effects resulting from the application of the Prodi Law with those resulting from the application of general insolvency rules. The Supreme Court referred the case to the Court of Appeal of Trieste, the judicial authority competent to carry out this comparative analysis.

3.2.14 Supreme Court ("Corte di Cassazione"), Judgment of 23 May 1980, No. 3397, Comafrica S.p.A. v. Smo-Società Mercantile Oltremare

The Supreme Court declared that national courts have jurisdiction to interpret Article 92 EC and its direct effect on individuals.

[287] Case C-200/97, Ecotrade v Altifornie Ferriere di Serrola [1998] ECR I-7907.

Facts and legal issues: Smo-Società Mercantile Oltremare sued its competitor Comafrica S.p.A. before an Italian civil court, claiming that it had infringed Article 92 EC and requesting damages for loss suffered due to unfair competition. Comafrica imported bananas from Martinique and benefited from financial aid granted by the French government.

Comafrica appealed directly to the Supreme Court pursuant to Article 41 of the Italian Code of Civil Procedure in order to settle the question of jurisdiction.

Comafrica argued that:

a) Article 92 EC only addressed Member States and could not therefore be infringed by an individual;

b) as Smo's claim concerned the compliance by the French State with Article 92 EC, the issue could only be settled at EC level and not by an Italian judge; and

c) only administrative courts, and not civil courts, had the power to suspend or modify an administrative importation licence.

Decision: The Supreme Court held that

i.) Article 92 EC has direct effect;

ii.) Italian courts may also assess cases of unfair competition arising from State aid within the meaning of Article 92 EC ; and

iii.) The remedy ordered by a civil court does not necessarily lead to the suspension or modification of the importation licence, and, accordingly jurisdiction of the civil courts must be acknowledged in cases concerning unfair competition connected with State aid, without further inquiring into the legal meaning of the importation licences in question.

3.2.15 Supreme Court ("Corte di Cassazione"), Judgment of 15 April 1980, No. 2441, Amministrazione Finanze dello Stato v. Ditta Perricone e Leone

The Supreme Court addressed a number of questions relating to the relationship between EC law and national law. This case is a good example of the old approach adopted by the Italian courts in relation to this question, showing an inclination to subordinate EC legislation to national constitutional rules.

Facts and legal issues: Ditta Perricone e Leone was a Sicilian olive oil producer. According to Article 26 of Law No. 21/1970, which provided for special measures for Sicily after the earthquakes of 1967 and 1968, Ditta Perricone e Leone was exempt from paying of excise tax. The Italian government sued Ditta Perricone e Leone in the Tribunal of Palermo in order to obtain payment of the excise tax. The action by the Italian government was dismissed by

the Tribunal of Palermo and the Court of Appeal of Palermo. The Italian government appealed to the Supreme Court, alleging, *inter alia*, that the measures contained in Article 26 of Law No. 21/1970 amounted to illegal State aid.

Decision: The Supreme Court observed, as a matter of principle, that (i) any measure constituting State aid - including aid compatible with the Common Market under Article 92 (2) EC - must be notified to the Commission; (ii) national laws adoped in breach of EC law are unconstitutional under Article 10 of the Italian Constitution; (iii) relevant cases should therefore be referred to the Contitutional Court; and (iv) a referral to the Constitutional Court can be made without first referring the case to the ECJ.

However, the Supreme Court dismissed the claim on the grounds that the Italian government had failed to prove, in the course of the proceedings, that Law No. 21/1970 had not been notified to the Commission and that it was therefore unconstitutional.

3.2.16 Supreme Court ("Corte di Cassazione"), Judgment of 1 March 1979, No. 1317, Amministrazione Finanze dello Stato v. Isolabella e Figlio S.p.A.

In this case, the Supreme Court addressed the issue of the relationship between Article 92 EC, a decision of the Commission authorising State aid and the provisions of Article 95 EC.

Facts and legal issues: Isolabella e Figlio S.p.A., an importer of cognac, sued Amministrazione Finanze dello Stato in the Tribunal of Milan in order to obtain the reimbursement of certain customs duties, alleging that higher fiscal charges on imported products than national products amounted to a breach of Article 95 EC. The Tribunal of Milan and the Court of Appeal of Milan upheld the claim. The Supreme Court partially annulled the decision of the Court of Appeal of Milan and sent the case back to the Court of Appeal of Bologna that upheld the claim. Amministrazione Finanze dello Stato appealed to the Supreme Court, asking for the annulment of the judgment of the Court of Appeal of Bologna, alleging, *inter alia*, that lower fiscal charges on national products amounted to State aid that had been notified to and approved by the Commission.

Decision: The Supreme Court upheld the claim, stating that (i) the imposition of a lower fiscal charge on national products had been duly authorised by the Commission in its opinion to the Italian Republic of 28 February 1969; and (ii) this formal authorisation justified an exception to Article 95 EC.

3.2.17 Supreme Court ("Corte di Cassazione"), Judgment of 1 March 1979, No. 1321, Amministrazione Finanze dello Stato v. Ferraretto Giovanni F&C S.r.l.

In this case, which mirrors the case mentioned at section 3.2.16 above, the Supreme Court addressed the issue of the relationship between Article 92 EC, a decision of the Commission authorising State aid and the provisions of Article 95 EC.

Facts and legal issues: Ferraretto Giovanni F&C S.r.l., an importer of cognac, sued Amministrazione Finanze dello Stato in the Tribunal of Milan in order to obtain the reimbursement of certain custom duties, alleging that higher fiscal charges on imported products than national products amounted to a breach of Article 95 EC. The Tribunal of Milan and the Court of Appeal of Milan upheld the claim. The Supreme Court partially annulled the decision of the Court of Appeal of Milan and sent the case back to the Court of Appeal of Turin that upheld the claimant's request. Amministrazione Finanze dello Stato appealed to the Supreme Court, asking for the annulment of the judgment of the Court of Appeal of Turin, alleging, *inter alia*, that lower fiscal charges on national products amounted to State aid that had been notified to and approved by the Commission.

Decision: The Supreme Court upheld the claim, stating that (i) the imposition of a lower fiscal charge on national products had been duly authorised by the Commission in its opinion to the Italian Republic of 28 February 1969; and (ii) this formal authorisation justified an exception to Article 95 EC.

3.2.18 Supreme Court ("Corte di Cassazione"), Judgment of 11 December 1978, No. 5939, Amministrazione Finanziaria dello Stato v. Oleificio S. Leonardo

The Supreme Court upheld a decision by the Court of Appeal of Palermo of 27 February 1976 IN which the Court of Appeal authorised fiscal aid for the production of olive oil. The Supreme Court agreed with the findings of the Court of Appeal that, in cases of emergency, fiscal aid such as that granted by the Region of Sicily to areas where the standard of living is much lower than national average and which had suffered damage from earthquakes was in accordance with Articles 92 (2) (b) and 92 (3) (a) EC.

Facts and legal issues: Olive oil production tax was levied on the olive oil produced by the owner of Oleificio S. Leonardo, an olive oil producer. He filed a petition with the Court of First Instance of Palermo against the Ministry of Finance, raising the inapplicability of the olive oil production tax levied under the legislation passed by the Region of Sicily, granting tax benefits to the inhabitants of certain areas of Sicily which had been affected by an earthquake. The Court of First Istance of Palermo and the Court of Appeal of Palermo upheld the petition. The Ministry of Finance appealed to the Supreme Court.

The Ministry of Finance argued that the financial aid granted by the Region of Sicily and implemented by regional legislation infringed Article 92 EC and, consequently, the Italian Constitution, since (i) no evidence of Commission communications or authorisations addressed to the Region of Sicily had been placed before the court; and (ii) financial aid had been granted to some areas of Sicily long after the earthquake, favouring particular undertakings or products which distorted competition.

Decision: The Supreme Court affirmed the decision of the Court of Appeal of Palermo, according to which:

(i) financial aid after natural disasters, such as earthquakes, is treated by Article 92 EC as being compatible with the Common Market; and

(ii) pursuant to the provisions of Articles 92 and 93 EC, Member States may grant aid to promote the economic development of areas where the standard of living is much lower than national average or with a high rate of unemployment, provided that the Commission is formally notified thereof.

The Supreme Court decided that the compatibility of State aid with the Common Market must be assessed in accordance with the procedure provided for by Article 93 (3) EC. As the claimant had failed to prove that the Region of Sicily had not notified the aid to the Commission, the claim relating to the constitutional invalidity of the regional legislation granting fiscal aid to certain Sicilian areas could not be upheld. According to the Supreme Court:

(i) the burden of proof regarding alleged infringements of Community law is on the claimant;

(ii) the claimant's main criticism related to the factual analysis rather than legal interpretation in this case, which is beyond the jurisdiction of the Supreme Court (that is strictly limited to legal interpretation); and

(iii) the issue whether the procedure set forth in Article 93 EC should be followed for every kind of aid (i.e. under Article 92 (2) as well as Article 92 (3)) is beyond the Supreme Court's jurisdiction and had to be referred to the ECJ under Article 177 EC.

3.2.19 Court of Appeal of Venice ("Corte d'Appello di Venezia"), Judgment of 26 June 2003, Banca Intesa S.p.A. v. Cavirivest S.p.A. in a.s.

The Court of Appeal of Venice issued this judgement in June 2003, holding that Law No. 95/79, which provided for special treatment of large insolvent undertakings ("Prodi Law"), was contrary to EC law in its entirety, that it could therefore not be enforced and that the relevant exception could be raised *ex officio* by the Court.

Facts and legislation: Cavirivest S.p.A., a company subject to the special administration regime provided for by the Prodi Law, sued Banca Commerciale Italiana by bringing an action for revocation. When the Court of First Instance upheld the claim, Banca Commerciale Italiana appealed to the Court of Appeal of Venice.

Decision: The Court of Appeal of Venice stated that the issue of compatibility of the action for revocation initiated by a company under the special administration regime provided for by the Prodi Law with Community law could be raised by the Court *ex officio*.

Moreover, the Court of Appeal of Venice held that the Prodi Law provides for State aid, which is contrary to the provision of Article 87 EC. The Prodi Law itself, rather than single

provisions included therein (including that concerning the action for revocation), could not be enforced by the national courts since it was incompatible with Community law. In particular, the conclusion of the Court was based on the ECJ's judgment in *Piaggio* and the Commission decision of 16 May 2000, finding the Prodi Law incompatible with the Common Market.

3.2.20 Court of Appeal of Turin ("Corte d'Appello di Torino"), Judgment of 23 May 2002, Berutti & C. S.r.l. v. Amm. straordinaria Infos Telematica S.p.A.

In May 2002, the Court of Appeal of Turin affirmed that the action for revocation started by a company under the special administration regime provided for by Law No. 95/79 ("Prodi Law") after the suspension of the company's activities was not incompatible with EC rules on State aid, since, at that stage, insolvency proceedings would only be aimed at winding up the company.

Facts and legal issues: The case concerned an action for revocation started by a company subject to the special administration regime provided for by the Prodi Law during the course of liquidation. The appellant claimed that the Prodi Law could not be applied, since it was incompatible with Community law to the extent that it provided for the grant of State aid in favour of the companies subject to this special regime.

Decision: Having analysed the relevant ECJ judgements[288] as well as the Commission decision of 16 May 2000, the Court of Appeal of Turin excluded that they implied the obligation for national courts not to apply the Prodi Law as a whole. Instead, the Court of Appeal of Turin deemed that they implied such an obligation only for those provisions departing from ordinary insolvency rules. The regime provided for by the Prodi Law would then not be entirely inapplicable. Consequently, the Court of Appeal of Turin deemed that actions for revocation started by a company under the special administration regime provided for by the Prodi Law after suspension of the company's activity (in this case, in the course of liquidation proceedings) were not incompatible with the EC law prohibition on State aid, since no damage to the market can be caused by a company that has ceased all business activity.

3.2.21 Court of Appeal of Turin ("Corte d'Appello di Torino"), judgment of 4 April 2002, Banca Nazionale del Lavoro v. Fedorfin Siderurgica S.r.l. in amministrazione straordinaria

In April 2002, the Court of Appeal of Turin affirmed that the action for revocation started by a company under the special administration regime provided by the Law No. 95/79 ("Prodi Law") after the suspension of or absent any business activity was not incompatible with EC rules on State aid.

[288] Cases C-295/97, Piaggio v Ifitalia [1999] ELR I-3735 and C-200/97, Ecotrade v Altigornie Ferriere di Serrola [1998] ECR I-7907.

Facts and legal issues: The case concerned an action for revocation started by Fedorfin Siderurgica S.r.l. in amministrazione straordinaria, a company in liquidation and subject to the special administration regime provided, for by the Prodi Law.

Decision: Having analysed the ECJ's judgments in *Piaggio* and *Ecotrade*[289] and the Commission decision of 16 May 2000, the court of appeal in Turin excluded that they implied the obligation for national courts not to apply the Prodi Law in its entirety. Instead, the Turin Court deemed that they implied such obligation only for those provisions departing from ordinary insolvency rules. Following this approach of assessing each legal provision under the Prodi Law in relation to EC law on State aid, the Court of Appeal of Turin affirmed that actions for revocation started by a company under the special administration regime after the suspension of or absent any business activity are not incompatible with EC law, since no damage can be caused by a company that has ceased all business activity. Moreover, since the action for revocation may be started by the commissioner ("*commissario*") under the Prodi Law only in the course of insolvency proceedings, such provision is fully compatible with EC law on State aid.

3.2.22 Court of Appeal of Turin ("Corte d'Appello di Torino"), judgment of 12 February 2002, Amm. straord. Presafin S.p.A. v Banca Monte dei Paschi di Siena S.p.A.

In February 2002, the Court of Appeal of Turin stated that, in order to comply with EC law, it was not necessary for the Italian courts to disregard Law No. 95/79 ("Prodi Law") in its entirety, but only those provisions departing from ordinary insolvency rules and granting benefits that would not normally be granted to insolvent companies.

Facts and legal issues: The Court of Appeal of Turin was requested to rule on the compatibility of the Prodi Law with Community law, with a view to assessing whether the admission of Presafin S.p.A. to the special administration regime provided for by the Prodi Law and the appointment of the special administration commissioners ("*commissario*") were valid.

Decision: Having analysed the ECJ's judgments in *Piaggio* and *Ecotrade*[290], as well as the Commission decision of 16 May 2000, the Court of Appeal of Turin excluded that they implied the obligation for national courts not to apply the Prodi Law in its entirety. Indeed, these Community decisions only required national courts not to apply the Prodi Law to the extent that it differed from ordinary insolvency rules, granting benefits that would not normally be granted to insolvent companies. Therefore, the Court of Appeal of Turin concluded that the decree opening the special administration proceedings under the Prodi Law and appointing the commissioner was a due act in the event that a company was declared

[289] Cases C-295/97, Piaggio v Ifitalia [1999] ELR I-3735 and C-200/97, Ecotrade v Altifornie Ferriere di Serrola [1998] ECR I-7907 respectively.
[290] Cases C-295/97, Piaggio v Ifitalia [1999] I-3735 and C-200/97, Ecotrade v Altifornie Ferriere di Serrola [1998] ECR I-7907 respectively.

insolvent. Therefore, and without prejudice to the above, the decree must be considered to be valid under Italian law.

3.2.23 Court of Appeal of Milan ("Corte d'Appello di Milano"), judgment of 8 January 2002, Banca Nazionale dell'Agricoltura S.p.A. v Redaelli Tecnologie dell'Acciacio, Tecna in a.s. S.p.A.

In January 2002, the Court of Appeal of Milan stated that the issue of compatibility of the special administration regime provided for by Law No. 95/79 ("Prodi Law") with EC rules on State aid could not be assessed by the Court *ex officio*. Pursuant to national civil procedural rules, it could only be raised by an interested party.

Facts and legal issues: The case concerned an action for revocation brought by Redaelli Tecnologie dell'Acciacio, Tecna in a.s. S.p.A., a company subject to the special administration regime under the Prodi Law, against Banca Nazionale dell'Agricoltura S.p.A. for the reimbursement of payments made on or to the declaration of insolvency. The appellant raised the objection concerning the incompatibility of the Prodi Law with the EC law prohibition of granting State aid in its last submission, before the conclusion of the proceedings, rather than in its first submissions.

Decision: The Court of Appeal of Milan held that the issue raised by way of objection by the appellant fell outside the scope of the appeal and, since it introduced a new challenge, should have been submitted in accordance with the provisions of the civil procedure rules. Therefore, the Court of Appeal of Milan concluded that the Community decisions invoked by the appellant, which could have been the subject of an objection by an interested party (in due time), could not be considered by the Milan Court *ex officio*.

3.2.24 Court of Appeal of Turin ("Corte d'Appello di Torino"), judgment of 24 December 2001, Cordifin S.p.A. v Ferdofin Siderurgica S.r.l. in amministrazione straordinaria

In its judgment of December 2001, the Court of Appeal of Turin stated that the provisions of the Prodi Law governing the special administration procedure were not entirely and *per se* incompatible with the Community law on State aid. On the contrary, national courts had to assess on a case-by-case basis whether the application of such rules resulted in the granting of State aid.

Facts and legal issues: Ferdofin Siderurgica S.r.l. in amministrazione straordinaria, a company subject to the special administration regime under the Prodi Law brought an action for revocation against Cordifin S.p.A., claiming the reimbursement of payments made to the latter during the year preceding the commencement of the special administration procedure.

Decision: The Court of Appeal of Turin confirmed that, in the context of the special administration procedure, an action for revocation started during the liquidation phase when

attempts to continue the business had failed (and only after such phase has ended) did not give raise to State aid issues, but constituted a mere application of the general bankruptcy rules aimed at restoring the *par condicio creditorum*.

The Court of Appeal of Turin clarified that, within the framework of the Prodi Law, the possibility to start an action for revocation existed only during the liquidation phase and with express reference to the bankruptcy rules. The object of the law was therefore not the protection of the insolvent company subject to the special administration regime, but of its creditors, so that no State aid issues arose.

3.2.25 Court of Appeal of Cagliari ("Corte d'Appello di Cagliari"), Decree of 21 July 1999, Exol S.p.A. v Nuova Cartiera di Arbatax S.p.A.

In July 1999, the Court of Appeal of Cagliari dismissed the action filed by Exol S.p.A. ("Exol") against Nuova Cartiera di Arbatax S.p.A. ("NCA").

Facts and legal issues: NCA applied to the Court of First Instance of Cagliari ("*Tribunale di Cagliari*") in order to be admitted to the special administration regime provided for by Law No. 95/79 ("Prodi Law") (see section 3.2.37 below). The application was based on the assumption that NCA was required to repay State aid. In April 1992, the Court of First Instance of Cagliari declared that NCA was insolvent and ordered that its decision be notified to the Ministry of Industry and Commerce for it to enact measures subsequent to such insolvency status. In October 1998, Exol, a creditor of NCA, asked the Court of Appeal of Cagliari to set aside Law No. 80/1993 ("the second Prodi Law"), following the Commission's decision of 20 March 1996 (which declared the second Prodi Law incompatible with Articles 92 and 93 EC and Article 61 EEA and asked therefore that NCA be declared bankrupt.

Decision: The Court of Appeal of Cagliari dismissed the action by Exol and declared that natural or legal persons which were not directly affected by a Commission decision were not entitled to bring an action to directly enforce it, even if they had a material interest which coincided with the interest underlying the Commission decision. Exol was found not to have such an interest and was thus not entitled to ask the Court of Cagliari to disregard the second Prodi Law.

3.2.26 Court of Appeal of Naples ("Corte d'Appello di Napoli"), judgment of 13 July 1999, Alilauro S.p.a. v CAREMAR

In July 1999, the Court of Appeal of Naples dismissed the action filed by Alilauro S.p.A.("Alilauro"), a company, against Caremar.

Facts and legal issues: Alilauro claimed that Caremar used a high-speed motorboat for transporting people in the Gulf of Naples and sold the relevant tickets at a price below cost, such practice being subsidised by State aid. The charging of below-cost prices was allegedly driven by a predatory interest and aimed at creating a monopoly in the relevant market, in

breach of Article 3 of Law No. 287/90. Alilauro therefore asked the Court of Appeal of Naples to suspend the aid granted to Caremar.

Decision: The Court of Appeal of Naples rejected all allegations made by Alilauro stating that (i) in the event that a claim under Article 82 EC is pending before the Commission, the national judge is not obliged to suspend national proceedings relating to an alleged breach of Article 88 (3) EC; and (ii) according to Article 15 of Law No. 287/90, the suspension of State aid is a measure which only the Italian Antitrust Authority ("*Autorità Garante della Concorrenza e del Mercato*") may adopt.

3.2.27 Court of First Instance of Genova ("Tribunale di Genova"), judgment of 24 September 2003, Soc. IAM Piaggio v Soc. Ismar Chimica

Law No. 95/79 of 3 April 1979, providing for special treatment of large insolvent undertakings ("Prodi Law"), would be deemed to be in breach of Article 87 EC and therefore incompatible with the Common Market, if the commissioner ("*commissario*") entrusted with the reorganisation of the insolvent undertaking did not provide sufficient evidence that the company had not benefited from State aid. In that case, the company was not entitled to the specific action aimed at preventing fraudulent diminution of the debtor's estate ("*Azione revocatoria fallimentare*").

3.2.28 Court of First Instance of Milano ("Tribunale di Milano"), judgment of 19 March 2003, Soc. coop. Fleres v Soc. International Factors Italia

Law No. 95/79 of 3 April 1979 providing for special treatment of large insolvent undertakings ("Prodi Law"), would not to be deemed to be in breach of Article 87 EC and would therefore be compatible with the Common Market if and to the extent that it laid down normal liquidation and winding-up procedures considering that, in that case, the treatment of large undertakings was similar to that of any other insolvent undertaking.

3.2.29 Court of First Instance of Trieste ("Tribunale di Trieste"), judgment of 3 August 2002, Soc. Altiforni Ferriere Servola

Law No. 95/79 of 3 April 1979 providing for special treatment of large insolvent undertakings ("Prodi Law") should not, in its entirety, be deemed to be in breach of Article 87 EC. The Prodi Law could not therefore be set aside by the national judge in its entirety, but only the provisions granting State aid that were incompatible with the Common Market.

3.2.30 Court of First Instance of Torino ("Tribunale di Torino"), judgment of 26 July 2001, Cons. agr. prov. Varese v Ist. Bancario S. Paolo-Imi

The provisions of the Insolvency Law ("*Legge Fallimentare*") that are similar, in content and purpose, to the provisions of Law No. 95/79 of 3 April 1979, providing for special treatment of

large insolvent undertakings ("Prodi Law"), were deemed to be in violation of the EC Treaty provisions on State aid.

3.2.31 Court of First Instance of Genova ("Tribunale di Genova"), judgment of 22 November 2001, Soc. IAM Rinaldo Piaggio v Dornier Luftfarth GmbH

The Court of First Instance of Genoa held that, in accordance with the decision of the ECJ in *Piaggio*[291], Law No. 95/79 of 3 April 1979, providing for special treatment of large insolvent undertakings ("Prodi Law"), constituted State aid. If new aid is not notified to the Commission under Article 93 (2) EC, national courts can assess the compatibility of the aid with relevant EC legislation. On the merits, the Court of First Instance of Genoa decided that the Prodi Law was in breach of Articles 92 and 93 EC since it (i) authorised insolvent undertakings to continue their business activities in circumstances where this would not have been permitted if ordinary rules on insolvency had been applied; and (ii) allowed those undertakings to enjoy a number of advantages that could not be claimed by an insolvent undertaking subject to the application of ordinary insolvency rules.

3.2.32 Court of First Instance of Piacenza ("Tribunale di Piacenza"), judgment of 17 January 2001, Soc. ind. Mandelli v Rolo Banca 1473

Law No. 95/75 of 3 April 1979, providing for special treatment of large insolvent undertakings ("Prodi Law") should not be deemed to be in breach of Article 87 EC and is therefore compatible with the Common Market to the extent that it provides for actions to prevent the fraudulent diminution of the debtor's estate ("*azione revocatoria fallimentare*") during the undertaking's liquidation process.

3.2.33 Court of First Instance of Trapani ("Tribunale di Trapani"), judgment of 10 July 2000 Soc. off. meccanica navale Drepanum v Soc. cantiere navale Trapani

Law No. 95/75 of 3 April 1979, providing for special treatment of large insolvent undertakings ("Prodi Law") should not be deemed to be in breach of Article 87 EC and is therefore compatible with the Common Market to the extent that it lays down usual procedures for the liquidation of assets.

3.2.34 Court of First Instance of Turin ("Tribunale di Torino"), judgment of 7 July 2000, Soc. Ferdofin siderurgica v Soc. Cordofin

An undertaking that obtained financial contributions both from the EC and the Italian State under a fishery program in order to avail itself of a fishing boat lifting facility was not found to have infringed EC rules on State aid just because it used the lifting facility for lifting other types of boats, unless evidence was gathered that the entrepreneur, before obtaining the aid, already engaged in the activity o lifting other types of boats or that the facility is mainly used for lifting boats other than fishing boats.

3.2.35 Court of First Intance of Genoa ("Tribunale di Genova"), judgment of 15 November 1999, Soc. Piaggio Industrie Aeronautiche v Less Costruzioni S.r.l.

Law No. 95/79, providing for special treatment of large insolvent undertakings ("Prodi Law") could not be enforced by the national courts since it had not been notified to and authorised by the Commission. Therefore, the request under Article 67 of the Italian Bankruptcy Law ("Royal Decree No. 267 of 16 March 1942"), governing actions for revocation under the Prodi Law, could not be upheld.

3.2.36 Court of First Instance of Genova ("Tribunale di Genova"), ordinance of 26 April 1993, Grandi traghetti di navigazione S.p.A. v. Viamare di navigazione S.p.a. and Finmare S.p.A.

The Court of First Instance of Genoa dismissed the action filed by Grandi Traghetti di Navigazione S.p.A. ("GTN"), a maritime corporation, against Viamare di Navigazione S.p.A. ("VDN"), a maritime corporation owned by Finmare S.p.A., which is a competitor of GTN in the market of cargo ferry transportation.

Facts and legal issues: In July 1992, VDN began running a cargo ferry service between Genoa and Termini Imerese (Sicily). Over the following months, VDN added two further vessels to the service and started scheduled coasting trade. GTA filed a petition against VDN for unfair competition based on price cuts and unfair solicitation of clients. GTA argued that the price cuts could only have been implemented by means of financial aid granted by the Italian government, which had injected funds in Finmare, VDN's parent company. In particular, GTA requested the Court:

a) to grant an injunction against VDN pursuant to Article 700 of the Italian Civil Procedure Code ("*Codice di Procedura Civile*"); and

(b) to request a preliminary ruling from the ECJ on whether such behaviour could be considered to constitute State aid under Articles 92 and 93 EC.

Decision: The Genoa Court held that granting State aid in breach of Articles 92 and 93 EC qualified as an act of unfair competition, not only for the State, but also for the beneficiary which may be the subject of an injunction granted by the civil judge.

In this particular case, however, the Genoa Court dismissed the action finding that:

(i) Article 92 EC was not applicable to shipping services, since until 1 January 1999 only Italian ships could provide such services pursuant to Article 6 of Regulation EC No. 3577/92;

(ii) financial aid granted to VDN by Finmare should not to be considered to amount to State aid, since it was channelled through the financial market, and the State had not granted

[291] Case C-295/97, Piaggio v Ifitalia [1999] I-3735.

any kind of guarantee to Finmare, which was owned by the State and 3,138 minority shareholders; and

(iii) accordingly, the State was not obliged to make a notification under Article 93 EC.

3.2.37 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 in order to be admitted to the special administration regime under Law No. 95/1979 ("Prodi Law"). The request was based, *inter alia*, on the assumption that NCA should repay ITL 67.529 billion of 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. 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.

3.2.38 Court of First Instance of Trento ("Tribunale di Trento"), judgment of 15 November 1980, Denkavit Italiana S.r.l. v Ministero delle Finanze

The Court of First Instance of Trento acknowledged that taxes and other contributions collected by the State as a result of an infringement of EC legislation and returned thereafter to private citizens should not be considered as State aid. The Trento Court based its decision on case law of the ECJ[292] and rejected the claim brought by the Ministry of Finance ("*Ministero delle Finanze*") that the repayment of taxes pursuant to Article 2033 of the Italian Civil Code qualified as State aid and was therefore incompatible with the provisions of Article 92 EC.

3.3 Proceedings before administrative courts

3.3.1 Administrative Supreme Court ("Consiglio di Stato"), judgment of 27 October 2003, No. 6610, Soc. Coop. ASTER v Camera di Commercio di Gorizia

The Administrative Supreme Court addressed a number of issues, including issues relating to (i) the different areas of jurisdiction of the European institutions and the national courts on State aid matters; and (ii) the different rationale behind actions for annulment under Article 230 EC and preliminary rulings under Article 234 EC.

[292] Case C-61/79, Amministrazione delle finanze dello Stato v Denkavit Italiana S.r.l. [1980] ECR 1205.

Facts and legal issues: Aster and a number of other companies active in the transport sector appealed against a decision of the Administrative Court of Friuli Venezia Giulia. Aster alleged that fiscal incentives for mineral oils allowed by the Chamber of Commerce of Gorizia to undertakings with head offices in the province of Gorizia amounted to unlawful State aid and asked the Administrative Court of Friuli Venezia Giulia to make a reference for a preliminary ruling in that regard to the ECJ. The Administrative Court of Friuli Venezia Giulia rejected the claim and Aster appealed to the Administrative Supreme Court.

Decision: The Administrative Supreme Court stated that, under Article 92 EC some forms of State aid may be compatible with the Common Market. The Court stated that it is, in principle, the duty of the European institutions (European Council and Commission) to assess compatibility under Article 93 EC and clarified that the national measures in question had been duly authorised at European level[293]. The Administrative Supreme Court also explained that a review of the legality of acts adopted by the European institutions is to be carried out under Article 230 EC and that references for preliminary rulings under Article 234 EC cannot serve as an instrument for contesting the validity of an act, where that act does not give rise to doubts concerning its interpretation.

3.3.2 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, see section 3.3.7 below), confirming that Commission decisions declaring State aid incompatible with the Common Market are directly applicable and all subsequent national measures must therefore comply with them.

Facts and legal issues: The Ministry of Industry did not implement an aid scheme for the steel industry provided for under Law No. 183/1976 and Decree No. 902/1976 of the President of the Republic, since it was incompatible with Community rules on 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*"), which upheld its request to receive the aid. The Ministry of Industry appealed to the Administrative Supreme Court.

Decision: The Administrative Supreme Court upheld the appeal by the Ministry of Industry and quashed the decision of the Regional Administrative Court of Lazio. It 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 not compliant with a Commission decision cannot be enforced, even if it had not been abrogated and would, therefore, still be in force. Allowing a company to benefit from the aid would also

[293] In particular, the Administrative Supreme Court referred to Council directives No. 92/81/EEC, No. 92/82/EEC and No. 94/74/EEC and Council decisions of 31 October 1992 and 30 June 1997.

be in breach of the recovery obligation imposed on Member States. The Administrative Supreme Court also specified that the only way to challenge a Commission decision is to bring an action for annulment before the ECJ under Article 230 EC, or, at most, a request for a preliminary ruling under Article 234 EC.

3.3.3 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*") stating that the Ministry of Industry, Trade and Craftsmanship ("*Ministero dell'Industria, del Commercio e dell'Artigianato*") unlawfully suspended a procedure for granting aid provided for under Italian law, on the grounds that the aid had been declared incompatible with the Common Market by ECSC decisions.

Facts and legal issues: the Ministry of Industry, Commerce and Craftsmanship did not implement an aid scheme provided for under national law in favour of Società Industrie Cantieri Metallurgici Italiani S.p.A., a company. The aid at issue was declared incompatible with the Common Market by the Commission, but 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 petition against the decision of the Regional Administrative Court of Lazio, confirming 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 needing to be implemented by Italian legislation. This was confirmed, in the view of the Administrative Supreme Court, by the fact that the EC system provides for a beneficiary's right of appeal against Commission decisions.

3.3.4 Administrative Supreme Court ("Consiglio di Stato"), judgment of 25 February 2003, No. 1029, AEM S.p.A. v Autorità Energia Elettrica e Gas

The Administrative Supreme Court made a request for a preliminary ruling under Article 234 EC to the ECJ in order to clarify, *inter alia*, whether an administrative measure, which imposed an increased charge for access to and use of the electricity transmission system on certain undertakings in order to finance general revenue charges incurred by the electricity system, can be regarded as a State aid for the purposes of Article 87 EC.

Facts and legal issues: AEM S.p.A. and AEM Torino S.p.A. appealed against a decision of the Regional Administrative Court of Milan ("*Tribunale Amministrativo Regionale della Lombardia*") and contested two decisions (No. 231/2000 and No. 232/2000) of the Electricity

and Gas Authority ("*Autorità per l'Energia Elettrica e per il Gas*") as well as a ministerial decree of 26 January 2000 which increased the charge imposed on certain hydroelectric and geothermal power stations for access to and use of the national electricity transmission system. AEM and AEM Torino claimed that the increased charge fell entirely within the regime of aid for the functioning of certain undertakings which is financed by levies on the supplies by other undertakings in that sector, which amounted to State aid within the meaning of Article 87 EC, granted contrary to the procedure laid down in the EC Treaty.

Decision: The Administrative Supreme Court deemed it necessary to clarify, first, whether the regime adopted by the contested decisions of the Electricity and Gas Authority amounted to State aid within the meaning of the rules laid down in Article 87 EC. Therefore, it decided to stay the proceedings and request a preliminary ruling from the ECJ on the following question: "*Can an administrative measure which imposes on certain undertakings using the electricity transmission system an increased charge for access to and use of that system, intended to finance general revenue charges of the electricity system, be regarded as a State aid for the purposes of Article 87* et seq. *of the* [EC] *Treaty*?". The ECJ rendered its judgment on 14 April 2005[294].

3.3.5 Administrative Supreme Court ("Consiglio di Stato"), Judgment of 10 October 2002, No. 5449, Pincieri Umberto v Ministero dell'Economia e delle Finanze et a.

Facts and legal issues: In 2000, Mr Pincieri won a public bid and qualified for an aid under an Italian aid scheme for agriculture authorised by a Commission decision of 6 September 1999. However, whereas the costs of Mr Pincieri's project were equal to ITL 3.186 billion (approximately EUR 1.5 million), only ITL 2.7909 billion (approximately EUR 1.3 million) had been granted in aid.

On 1 October 2001, Mr Pincieri lodged a claim before the Administrative Court of Molise ("*TAR Molise*"), which dismissed the claim. Mr Pincieri then appealed to the Administrative Supreme Court.

Decision: The Administrative Supreme Court dismissed the appeal on the grounds that the Commission decision of 6 September 1999, approving the scheme, granted a high degree of discretion to the administrative authorities when calculating the eligible amount.

3.3.6 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 State aid on the basis of Commission

[294] Joined Cases C-128/03 and C-129/03, AEM S.p.A., AEM Torino S.p.A. v Autorità per l'energia elettrica e per il gas.

decisions No. 2320/81/CECA and No. 3484/85/CECA. Diano appealed against the notice claiming that the Ministry had failed to give reasons for the rejection 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 holding that, without specific authorisation by the Commission, the aid could not be granted and that the notice from the Ministry of Productive Activities was, thus, in accordance with Commission decisions No. 2320/81/CECA and No. 3484/85, which were both directly applicable.

3.3.7 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 did not grant certain benefits provided for by a law on investment plans in Southern Italy, since that law had been declared incompatible with EC rules on State aid by the Commission.

Facts and legal issues: The Ministry of Industry, Trade and Craftsmanship ("*Ministero dell'Industria, del Commercio e dell'Artigianato*") did not assign certain benefits for investments in Southern Italy provided for by Law No. 120/1987 to Del Verde S.p.A., a pasta manufacturer. Del Verde petitioned to the Administrative Court of Abruzzo asserting its legal right to receive the aid and claiming that, even though the Commission had declared such 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 since that Italian law was still in force.

Decision: The Administrative Supreme Court dismissed the petition, expressly departing from its findings in its previous Judgment No. 30/1989 (see section 3.3.12 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 effective without having to be implemented by an act of 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. Finally, the Administrative Supreme Court noted that it would be inconsistent for a State to grant aid that is to be recovered under EC law.

3.3.8 Administrative Supreme 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 a decision of the Regional Administrative Court of Lazio, in which that Court refused to quash a notice 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 its Decision No. 2320 of 1981[295], the ECSC laid down general rules for aid granted within the framework of restructuring programmes concerning the steel industry, requiring that such programmes be notified to the Commission by the Member States. Pursuant to later decisions, 31 May 1985 was indicated to be the ultimate deadline for such notification.

On 28 May 1985, the Italian government notified the aid schemes which it intended to implement for the restructuring of the Italian steel industry. In doing so, it provided for a relatively small aid in favour of privately owned steel industries, including Falck. Upon Falck's complaint, the Italian government notified an amended aid scheme providing for an increased aid package to privately owned steel industries on 22 July 1985. The ECSC dismissed the request as it was time-barred, and the Italian State refused to grant the increased aid package.

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

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

The Administrative Supreme Court stated that the Italian government's discretion in granting the aid depended on political choices and was not an act due by law. It was therefore not possible to claim that any rights would be violated if the State did not exercise its discretion or exercised it in an unsatisfactory manner. Hence, the State's denial of further aid could not be challenged before the Court.

[295] Commission Decision No. 2320/81/ECSC of 7 August 1981 establishing Community rules for aid to the steel industry, OJ (1981) L 228/14.

3.3.9 Administrative Supreme Court ("Consiglio di Stato"), judgment of 1 April 2000, No. 1885, S.E.A. Aeroporti di Milano S.p.A. v Presidenza del Consiglio dei Ministri and others

In April 2000, the Administrative Supreme Court dismissed an appeal brought by S.E.A. Aeroporti di Milano S.p.A. ("SEA") against the decision of the Regional Administrative Court of Lazio not to quash part of the Decree of the President of the Council of Ministers ("*Decreto del Presidente del Consiglio dei Ministri*") of 25 February 1999 ("the Decree"), concerning the State's divestment of its shareholding in the company Aeroporti di Roma S.p.A. ("ADR"). Among other grounds of appeal, SEA argued that there was an infringement of Article 88 EC.

Facts and legal issues: SEA is the company that runs Milan Airport. The President of the Council of Ministers ("*Presidente del Consiglio dei Ministri*") is the head of the Italian government. ADR is the company holding the exclusive concession to run Fiumicino Airport and Ciampino Airport, in Rome. At the time of the case, a shareholding equal to 54.2% in ADR's capital was held by I.R.I. S.p.A., a company that was wholly owned by the Italian Ministry of the Treasury ("*Ministero del Tesoro*"). ADR was therefore indirectly controlled by the Italian State.

Under the Decree, a public invitation to tender for the sale of the 54.2% shareholding was launched. Among other provisions, the Decree provided that companies whose publicly owned shares represented more than 2% of the company's total share capital were not eligible as purchasers of shares in ADR. SEA brought an unsuccessful appeal for the annulment of such provision before the Regional Administrative Court of Lazio ("*TAR Lazio*"). SEA then filed an appeal with the Administrative Supreme Court against the judgment of the Regional Administrative Court of Lazio.

Among other grounds of appeal, SEA claimed that when a privatisation is implemented other than through an open tender procedure it may be found that State aid has been granted for the benefit of the purchaser. The procedure should, therefore, be preliminarily notified to the Commission under EC rules on State aid and, pending its assessment, the procedure should be suspended.

Decision: The Administrative Supreme Court dismissed the appeal, since, *inter alia*, it found that the procedure for the privatisation of the public ADR shareholding did not give rise to State aid issues.

In this respect the Administrative Supreme Court acknowledged that the Commission, in its decision in the *Italstrade* case[296], had clarified that - as a general rule - the privatisation of public companies may result in a State aid being granted to (i) the acquirer if the purchase price is lower than the shares' market value, or (ii) to the privatised company if particular

[296] Decision of 16 September 1998, OJ (1999) L 109/1.

burdens are imposed on the acquirer in respect of the continuation of non-profitable activities.

The Administrative Supreme Court also noted that, on another occasion[297], the Commission had clarified that the privatisation of a publicly owned company does not involve State aid within the meaning of Article 87 (1) EC where (i) the company is sold by a competitive tender that is transparent and unconditional or an equivalent procedure; (ii) the company is sold to the highest bidder; and (iii) bidders have enough time and information to carry out a proper valuation of the assets on which to base their bids. In that case, however, the Commission also specified that it is not mandatory to use the open procedure for privatisations. Therefore, the possibility that the imposition of a restriction on the eligibility of a purchaser amounts to State aid should be demonstrated by showing that the price paid by the purchaser was lower than the market value of the company. The Administrative Supreme Court deemed that this had not been demonstrated nor did it seem likely in the case at issue.

3.3.10 Administrative Supreme Court ("Consiglio di Stato"), judgment of 15 October 1996, No. 1331, Presidente del Consiglio dei Ministri et a. v. Istituto di Vigilanza Città di Pescara et a.

The interrelationship between an interministerial decree ("*Decreto Interministeriale*") of 5 August 1994 providing for cuts in employers' social security and Article 92 EC was addressed by the Administrative Supreme Court in this decision. The Administrative Supreme Court confirmed the decision of the Regional Administrative Court of Abruzzo ("*Tribunale Amministrativo Regionale dell'Abruzzo*") on 23 February 1995.

3.3.11 Administrative Supreme Court ("Consiglio di Stato"), judgment of 31 July 1991, No. 1074, Industria Farmaceutica Lucana et a. v. U.S.L. No. 11 of Pordenone

In this judgment, the Administrative Supreme Court upheld an appeal brought against Judgment No. 394 of the Administrative Court of Friuli Venezia Giulia of 31 December 1987 (see section 3.3.23) and affirmed that EC rules, including their interpretation by the ECJ, were immediately applicable in the Member States when sufficiently clear and precise.

Facts and legal issues: According to Law No. 64/1986, 30% of the supplies contracted under public procurement procedures were to be awarded to companies based in Southern Italy. U.S.L. No. 11 of Pordenone ("USL"), a local administrative unit of the Department of Health, did not apply Law No. 64/1986 to a public tender it had called. USL had deemed Law No. 64/1986 unlawful as it conflicted with Articles 30, 31, 92, 93 and 94 EEC (28, 87, 88 and 89 EC; Article 31 EEC was repealed by the Amsterdam Treaty).

The pharmaceutical company Industria Farmaceutica Lucana, based in Southern Italy, sued USL in the Regional Administrative Court of Friuli Venezia Giulia claiming that it was not

[297] Decision of 11 April 2000, OJ (2000) L 265/15.

within USL's powers to disregard the national law. Since the claim was upheld by the Regional Administrative Court of Friuli Venezia Giulia, USL filed an appeal against the judgment with the Administrative Supreme Court.

Decision: The Administrative Supreme Court quashed the judgment of the Regional Administrative Court of Friuli Venezia Giulia, clarifying that any national law that conflicts with EC law could not be applied by national judges. Furthermore, USL had correctly disregarded the national law in order to comply with EC rules (i.e. in particular, Article 30 EC). The judgment's reasoning is that national legislation in breach of Article 30 EC could not be justified on the grounds that it granted State aid under Article 92 EC.

3.3.12 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. Carettieri La Rinascita against the decision of the Ministry of Transport ("*Ministero dei Trasporti*") to repeal two previous notices ("the Notices") by which it had implemented Law No. 815 of 27 November 1980 ("the Law No. 815") 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. Carettieri 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 capable of distorting competition and thus infringed Article 92 (1) EC, ordered that Italy revoke 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 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 aid are not directly applicable. The Commission decision at issue 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 the Notices, whereby it would comply with the Commission decision but infringe the Law.

3.3.13 Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment 16 July 2004, No. 6998, Liquidatore di Eurofood Ifsc Ltd and Bank of America N.A.

In July 2004, the Regional Administrative Court of Lazio dismissed an action filed by the Irish liquidator of Eurofood Ifsc Ltd, an Irish company belonging to the Parmalat group, and Bank of America N.A, requesting annulment of a decree of the Ministry for Productive Activities which made Eurofood Ifsc subject to the special administration regime provided for by Article 3 of Legislative Decree ("*Decreto legislativo*") No. 347 of 23 December 2003 ("Decree No. 347").

Facts and legal issues: the appellants appealed to the Regional Administrative Court of Lazio on the grounds that, *inter alia*, Decree No. 347/03 was in breach of Regulation (EC) No. 1346/2000 and the Community provisions on State aid.

Decision: the Administrative Court at Lazio dismissed the appeal, including the above-mentioned ground of appeal, and stated, in particular, that Decree No. 347/03 did not conflict with the Community provisions on State aid for the following reasons:

(i) first, because (as stated by the Italian Supreme Court in its Judgment No. 5561 of 19 March 2004) the special administration regime may not be applied, should authorisation to operate the undertaking have the specific effect of treating it differently from the way it would be treated under an ordinary insolvency procedure, granting benefits to that undertaking that had been considered unlawful under EC Treaty provisions (as clarified by the ECJ in *Ecotrade*[298]);

(ii) secondly, since the procedural amendments provided for by Decree No. 347/03 were not *per se* in conflict with EC rules on State aid, provided that the grant of guarantees to the undertaking subject to the special administration regime was notified to the Commission, as already laid down by Article 55 of Decree No. 270/99.

[298] Case C-200/97, Ecotrade v Altiforni Ferrieri di Servola [1998] ECR I-7907.

3.3.14 Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment of 8 February 2003, No. 805, Fondazione Monte dei Paschi di Siena v. Ministero dell'Economia e delle Finanze

In February 2003, the Regional Administrative Court of Lazio delivered this judgment that confirmed that the taxation regime provided for by the Italian law on banking foundations ("Fondazioni bancarie") is compatible with EC rules on State aid.

Facts and legal issues: the Fondazione Monte dei Paschi di Siena claimed that Ministerial Decree ("*Decreto Ministeriale*") No. 217 of 2 August 2002 ("the Decree No. 217"), regulating banking foundations was void. The claim was based on the alleged constitutional illegality of Article 11 of Law No. 448 of 28 December 2001, on the basis of which the Decree had been adopted. In particular, Fondazione Monte dei Paschi based its claim on the fact that banking foundations did not constitute commercial undertakings.

Decision: having analysed the specific claims raised against Decree No. 217, the Regional Administrative Court of Lazio held that one of the contested provisions had been introduced by the Italian government in order to comply with a Commission decision of 11 December 2001. In that decision, the Commission declared the beneficial taxation regime for restructurings and mergers between banks incompatible with EC legislation. The Regional Administrative Court of Lazio recalled that, whereas the Italian government had suspended the beneficial taxation regime for banks, it had maintained an analogous beneficial taxation regime introduced for banking foundations. According to the Regional Administrative Court of Lazio, this solution was in accordance with the Commission decision, given that banking foundations were non-commercial undertakings and unable, as a result, to distort competition within the Common Market.

3.3.15 Regional Administrative Court of Sicily, Catania ("Tribunale Amministrativo Regionale della Sicilia, Catania"), judgment of 5 July 2000, No. 1389, C.A. and others v. Assessorato Regionale Agricoltura

Applications for funding of projects concerning the improvement and development of the structural efficiency of undertakings in the citrus fruit sector, Article 5 of Sicilian Regional Law of 4 April 1995 ("the Regional Law"), according to which the provision of aid thereunder was subject to the scrutiny of and authorisation by the Commission under Article 92 EC could not be applied "*tout court*". The principle laid down by the ECJ in its judgment in *Italy v Commission*[299] must be applied instead. The commencement by the Commission of proceedings under Article 93 (2) EC did not therefore imply that payment of the aid should be suspended if it was already being granted.

[299] Case C-47/91, Italy v Commission [1992] ECR I-4145.

3.3.16 Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment No. 2786 of 23 September 1999, 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 a State aid incompatible with the Common Market, even if the aid is granted pursuant to a law that has 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 pursuant to which the Ministry refused to grant Iris Biomedica aid provided for by Article 6 of Law Decree No. 8 of 26 January 1987 (which became Law No. 120 of 27 March 1987). The Ministry's refusal was based on the grounds that the Commission and the ECJ had declared the aid incompatible with the Common Market.

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 of 26 January 1987. The Administrative Court of Lazio stated that, although the legislative measure granting the aid was still in force, the Ministry was bound by Commission No. 91/175/EEC of 25 July 1990 that had been upheld by the ECJ[300], since negative Commission decisions had direct effect.

3.3.17 Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment No. 2155 of 14 July 1999, Aeroporti di Milano v. Presidenza del Consiglio dei Ministri

The Administrative Court of Lazio refused to assess a possible violation by the State of Article 88 (3) EC, considering that the grounds of appeal were inadmissible as they were time-barred.

Facts and legal issues: The appellant appealed to the Administrative Court of Lazio. In the course of the proceedings, the appellant alleged that the Decree of the President of the Council of Ministers of 25 February 1999 on the Privatisation of Aeroporti di Roma S.p.A. breached Articles 87 and 88 EC.

Decision: The Administrative Court of Lazio dismissed the appeal. It observed that the appellant had not alleged a violation of Article 88 (3) EC in its opening submissions of the claim, but only in its final statement. This allegation as well as the request to make a reference to the ECJ for a preliminary ruling were therefore declared inadmissible.

[300] Case C-364/1990, Italian Republic v Commission [1993] ECR I-02097, judgment of 28 April 1993.

3.3.18 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 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 of electricity costs pursuant to Law No. 627/1981, which had been declared incompatible with the Common Market by the Commission in Decision No. 396/1983. SFA then appealed to the Administrative Court of Lazio asserting its legal right to receive the reimbursement.

Decision: The 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 State aid only if the aid was authorised by the Commission. In the absence of authorisation, SFA's claim for reimbursement could not be upheld[301].

3.3.19 Regional Administrative Court of Veneto ("Tribunale Amministrativo Regionale del Veneto"), Judgment of 26 July 1989, No. 1102, Compagnia Oasi di Malcesine v. Region of Veneto et a.

The Administrative Court of Veneto ruled that loans guaranteed by the State constituted regional aid that was compatible with the Common Market if the grant of the loans was justified by certain regional characteristics, and therefore did not conflict with Article 92 EC.

Facts and legal issues: Compagnia OASI di Malcesine ("COM"), an Italian hotel chain, was granted an ITL 2.2 billion loan by the Council of Europe which had been guaranteed by the Italian State against risks of alteration. The Veneto Region then refused to grant regional aid to COM claiming that granting aid twice (i.e. aid from the region and the State) violated (i) a regional law of Veneto (i.e. Law No. 28/1997); and (ii) Article 92 EC. COM appealed the decision refusing to grant regional aid to the Regional Administrative Court of Veneto.

Decision: The Regional Administrative Court of Veneto held that

(i) the regional aid is compatible with the Common Market; and

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[301] For the appeal, see Administrative Supreme Court, Judgment of 16 March 1992, No. 167, *Società Fondiaria Assicurazioni v. Cassa Conguaglio Settore Elettrico* on appeal to the Administrative Court of Lazio ("*T.A.R. Lazio*"), Sec. III, Decision of 11 June 1990, No. 1071, asking for a preliminary ruling from the ECJ. For similar conclusions, see also Administrative Supreme Court, Judgment of 16 March 1992, No. 168, *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 of 29 March 1995, No. 312, *Società Terni Spa et a. v. Cassa Conguaglio Settore*

(ii) the regional aid to a hotel was justified because "i*t refer*[red] *to services offered in a given place, strictly connected to a particular regional area*".

3.3.20 Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment No. 1746 of 6 December 1988, 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, although 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 converting Law Decree No. 495 of 4 September 1981. Cassa also asked Terni to repay any reimbursements previously made. Cassa observed that ECSC Decision No. 87/396 of 29 June 1983 clarified that (i) these 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 regarded as a public undertaking in this case and recalled ECSC Decision No. 2320 of 7 May 1981 establishing Community rules for aid to the steel industry and ECSC Decision No. 87/396 of 29 June 1983. The Administrative Court of Lazio held that Cassa had correctly asked for 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 that was still in force.

3.3.21 Regional Administrative Court of Lazio ("Tribunale Amministrativo Regionale del Lazio"), Judgment of 17 November 1988, No. 1582, Soc. Laboratori Bruneau v. Unità Sanitaria Locale RM/24

Facts and legal issues: Unità Sanitaria Locale RM/24 ("USL") announced a public tender procedure under Article 17 of Law No. 64/1986, according to which the supply of products was reserved to companies based in Southern Italy. Laboratori Bruneau, a company that was not based in Southern Italy, appealed to the Administrative Court of Lazio, claiming that the public tender procedure reserved to companies from Southern Italy was unlawful, *inter alia,* on the basis of Articles 92 and 93 EC.

Elettrico; Administrative Supreme Court; Sec. VI; Judgment of 20 May 1995, No. 483, *Fonderia S.p.a. v. Cassa Conguaglio Settore Elettrico*.

Decision: The Administrative Court of Lazio filed a request for a preliminary ruling from the ECJ in order to ascertain whether the said measures amounted to State aid or whether these were “measures having equivalent effect” under Article 30 EC.

3.3.22 Regional Administrative Court of Puglia, Bari ("Tribunale Amministrativo Regionale della Puglia, Bari"), Judgment of 26 October 1988, No. 255, Società Roussel Maestretti v. U.S.L. No. 12 di Bari et a.

The Administrative Court of Puglia rejected the claimant's claim and confirmed the lawfulness of the public tender procedure reserving 30% of the supply of goods under the contract to companies based in Southern Italy which had been announced prior to a Commission communication denying its compatibility with the Common Market.

Facts and legal issues: Roussel Maestretti ("RM") is a pharmaceutical company based in Northern Italy and U.S.L., No. 12 di Bari ("USL") is a local administrative unit of the Department of Health.

USL announced two separate public tender procedures under Article 17 of Law No. 64/1986. The first procedure concerned 70% of the supply of goods and was open to all companies, whereas the second procedure reserved the remaining 30% of the supply of goods to companies based in Southern Italy. RM appealed to the Regional Administrative Court of Puglia, claiming that the public tender procedure reserved to companies from Southern Italy was unlawful, *inter alia,* on the basis of Articles 92 and 93 EC.

Decision: The Administrative Court of Puglia referred to a principle already established by the Administrative Court of Veneto, confirming the compatibility of Article 17 of Law No. 64/86 with the Common Market[302]. However, the Administrative Court of Puglia acknowledged that the Commission had taken a different view, considering the aid granted pursuant to Law No. 64/86 incompatible with Community legislation. In 1987, the Commission had published a Commission communication declaring Article 17 of Law No. 64/86 incompatible with Article 93 (3) EC and had initiated the procedure under Article 93 (2) EC in relation to the aid granted in the area of the city of L’Aquila.

The Administrative Court of Puglia based its decision on the principles of *tempus regit actum* and non-retroactivity and ruled that public tender procedures reserving 30% of the supply to companies based in Southern Italy were compatible with the Common Market, if announced prior to the Commission communication declaring them incompatible with the Common Market under Article 93 (2) EC.

[302] See Administrative Court of Veneto ("*T.A.R. del Veneto*"), Judgment of 10 June 1987, No. 616, according to which Article 17 of Law No. 64/86 "*is a regulation which, although granting privileges, is aimed at promoting Constitutional social goals. For the same reason, it cannot be deemed in violation of the EC Treaty, as it considers as compatible with the Common Market those aids which "promote the economic development of areas where the standard of living is much lower than the national average or where there is a high rate of unemployment".*

3.3.23 Regional Administrative Court of Friuli Venezia Giulia ("Tribunale Amministrativo Regionale del Friuli-Venezia-Giulia"), Judgment of 31 December 1987, No. 394, Industria farmaceutica lucana et a. v. U.S.L. No. 11 of Pordenone

The Regional Administrative Court of Friuli Venezia Giulia affirmed that public bodies are under the obligation to comply with the requirements of Law No. 64/1986, namely to reserve 30% of their supplies contracted within the framework of public procurement procedures for companies based in Southern Italy.

Facts and legal issues: U.S.L. No. 11 of Pordenone ("USL"), a local administrative unit of the Department of Health, did not apply Law No. 64/1986 to its public tender and, consequently, did not reserve the stipulated share of contracted supply for companies based in Southern Italy. Industria farmaceutica lucana ("IFL"), a pharmaceutical company based in Southern Italy, therefore brought an action before the Administrative Court of Friuli Venezia Giulia.

USL claimed that Law No. 64/1986 was unlawful as it conflicted with Articles 30, 31, 92, 93 and 94 EEC.

Decision: The Administrative Court of Friuli Venezia Giulia rejected USL's claims, clarifying that

(i) according to Article 92 (3) EC "*aids to promote the economic development of areas where the standard of living is much lower than the national average or where there is a high rate of unemployment*" were considered to be compatible with the Common Market;

(ii) only Member States were obliged to inform the Commission of their plans to grant or alter aid pursuant to Article 93 (3) EC, whereas, according to established case law of the ECJ[303], individuals could not request the national courts to ascertain the compatibility of State aid with Community law (with some exceptions which are not relevant to this case); and

(iii) no evidence had been filed in support of the alleged violation of Article 92 (3) EC[304].

3.3.24 Regional Administrative Court of Tuscany ("Tribunale Amministrativo Regionale della Toscana"), Judgment of 23 October 1987, No. 1166 and Ordinance No. 1167 of 23 October 1987, Società Du Pont de Nemours Italiana v. U.S.L. No. 2 of Carrara et a.

Facts and legal issues: In 1986, U.S.L. No. 2 of Carrara ("USL"), a local administrative unit of the Department of Health, issued a decision regulating a public procurement procedure,

[303] See ECJ, Case C-77/72, Carmine Capdango v. Azienda Agricole Maya [1973] ECR 611, and Case C-73/76, Iannelli & Volpi SpA v Ditta Paolo Merani [1977] ECR 557 and Case C-78/76, Steinike & Weinlig v Federal Republic of Germany [1977] ECR 595.

[304] A similar reasoning is also used in relation to the aids provided for by Article 10 of Law No. 60/1963, which reserved 70% of the contracts for areas of Southern Italy. See Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*"), Sec. III, Ordinance of 23 October 1992, No. 1329, *Lombardia v. C.I.P.E. et a.*

stating that 30% of the contracted supplies must be reserved to industries based in Southern Italy. USL's decision was issued in compliance with Law No. 64/1986, which made it compulsory for public bodies, such as USL, to obtain a part of their supplies of goods from industrial, agricultural and handicraft businesses based in Southern Italy.

Società Du Pont de Nemours Italiana ("SDPNI"), an Italian company producing medical equipment, participated in the tender but was excluded because it did not meet the requirements specified under Law No. 64/1986. SDPNI appealed to the Administrative Court of Tuscany, alleging unlawful application of the supply limit, as it conflicted with the EEC rules on the free movement of goods and services within the Community. As a result, it filed a petition in order to obtain a preliminary ruling from the ECJ[305].

Decision: The Regional Administrative Court of Tuscany applied for a preliminary ruling pursuant to Article 177 (now Article 234) EC to the ECJ.

3.3.25 Regional Administrative Court of Lombardia, Milan ("Tribunale Amministrativo Regionale della Lombardia, Milano"), Judgment of 2 December 1986, No. 949, Bozzi et a. v. Ente Ferrovie dello Stato - FF.SS. et a.

The Administrative Court of Lombardia ruled that it was not competent to annul a law allowing FF.SS. (i.e. the Italian Railways) to be represented in court by the State Attorney, on the grounds that representation in court by the State Attorney amounted to State aid.

Facts and legal issues: FF.SS. claimed that the appeal should be dismissed. In particular, the claimant claimed that FF.SS's representation in court by the State Attorney was illegal because it amounted to State aid prohibited under Article 92 EEC.

Decision: The Administrative Court of Lombardia rejected the claimant's claim on the grounds that:

(i) the rules on State aid were not legally binding and directly applicable; and

(ii) the competence of the Administrative Court of Lombardia was limited to ruling on the non-application of national laws that conflict with legally binding Community laws, and consequently, the Lombardia Court could not set aside national laws that conflict with EEC rules on State aid.

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[305] Similarly, Regional Administrative Court of Lombardia, Brescia ("*Tribunale Amministrativo Regionale della Lombardia, Brescia*"), Judgment of 12 August 1988, No. 634, *Istituto Behring v. U.S.L. No. 34 of Chiari et a.*; Regional Administrative Court of Lazio ("*Tribunale Amministrativo Regionale del Lazio*"), Sec. I, Judgment of 17 November 1988, No. 1582, *Laboratori Bruneau v. U.S.L. RM-24*. To the contrary, Regional Administrative Court of Campania, Naples ("*Tribunale Amministrativo Regionale della Campania*", *Napoli*), Judgement of 22 October 1990, No. 545, *B. Braun v. U.S.L. No. 40 of Naples*, according to which "*the national judge is entitled to ascertain if domestic law provisions are in contrast with Community regulations* […]*; furthermore the Regional Administrative Court is entitled to provide its interpretation of Community regulation, as* […] *the request for a preliminary ruling from the Court of Justice is mandatory only for the Courts of last instance*". According to this judgement, "*pursuant to Art.*[88 (3)] *EC Treaty, States are under the obligation not to carry out plans to grant or alter aids timely notified to the Commission only if the Commission has started the procedure set forth in Art.*[88 (2)]*; if the Commission has not yet started the procedure, the Member States can implement their plans if a two-month time-span has expired. The two-month time-span is set forth by Articles 173 and 175 EC Treaty and is applicable by analogy to the cases of the* [ECJ]".

3.3.26 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 the annulment of an administrative order issued by Istituto Regionale Vite e Vino ("IRVV") that withdrew a regional aid for wine producers.

Facts and legal issues: SE and CPVSC were both 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 State 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, inviting Italy to comply with the provisions of the 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 State 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 the 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*.

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.

3.3.27 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 serious loss; and

(ii) it had obtained significant bank loans which it intended to repay using the aid.

Decision: The Administrative Court of Lazio ruled that the Decree was lawful. Furthermore, the Administrative Court of Lazio stated that, when 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 have decided to annul the relevant ministerial decree immediately, without having to commence a formal procedure to revoke the legislative instrument[306].

[306] 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 [now 88] EC have the same effect as Community Directives and, therefore, are not directly applicable. Consequently, when the Commission issued a decision requesting the annulment of State aid that was 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.*.

3.4 Procedures before the Italian Court of Auditors ("*Corte dei Conti*")

3.4.1 Court of Auditors ("Corte dei Conti"), Sec. controllo, Decision of 14 June 1996, No. 88, ("Ministero del Tesoro")

The Court of Auditors clarified that, since RAI is an undertaking of general economic interest, the Italian government could adopt measures under Article 90 (2) EEC in its favour, and a reduction in the licence fee payable by RAI to the State did not infringe EC rules on State aid. The decision of the Court of Auditors was also based on the grounds that the said measure could, in any case, not distort competition, since the reduction was aimed at bringing RAI's licence fees in line with fees paid by private undertakings.

3.4.2 Court of Auditors (Corte dei Conti), Sec. controllo, Decision of 23 Mrch 1994, No. 43, Ministero del Tesoro

The Court of Auditors clarified that the State cannot, in any case, itself assess the compatibility of State aid with the Common Market, as the Commission is the only competent authority in that regard. Only notification under Article 88(3) EC and a positive Commission decision can ensure that the aid must not be recovered and that an action for failure to act will not be brought against the State.

3.4.3 Court of Auditors (Corte dei Conti), Sec. controllo, Decision of 23 March 1994, No. 18, Ministero del Tesoro

The Court of Auditors confirmed that it had jurisdiction to request a preliminary ruling from the ECJ based on Article 177 (now Article 234) EC.

The Court of Auditors was asked to assess whether it was possible to amend a decree in order to finance a revenue-producing State monopoly (“Azienda Tabacchi Italiani S.p.A.”).

However, the Court of Auditors held that, in this particular case, a preliminary ruling was not necessary because the undertaking came within the scope of Article 90 EC, concerning undertakings providing services of general economic interest or that are of a revenue-producing monopoly nature[307].

3.4.4 Court of Auditors ("Corte dei Conti"), Sec. controllo, Decision of 16 March 1993, No. 3, Ministry of the Treasury, Unione Nazionale Incremento Razze Equine (UNIRE) ed Enti Ippici

The Court of Auditors issued a report to the Italian parliament on the management of UNIRE, a public body. The Court of Auditors stated that "*the cut in State aid due to Community*

[307] For similar conclusions, see Court of Auditors, Sec. Contributi Stato, 14 June 1996, No. 88, Department of Treasury. According to this decision "*derogations from competition allowed in the Treaty of Rome concerning revenue-producing monopolies or administrations of 'general economic interest' (Articles* [86 and 87] *EC), apply not only to absolute monopolies but a/so to 'mixed ownership' businesses, that is businesses in which both monopolies or general economic interest companies and profit-earning private companies operate.*"

legislation makes it necessary to completely revise aid policies and adopt distribution criteria based on effective selection and quality systems".

3.4.5 Court of Auditors ("Corte dei Conti"), Sec. controllo, Decision of 5 November 1991, No. 105, Ministry of Defence

The Court of Auditors issued this decision concerning public tender procedures reserved by law to undertakings based in Southern Italy and ruled that "*a declarative judgment of the ECJ concerning rules* [having] *direct effect has the same legal status as the rules subject to interpretation*". In March 1990, the ECJ ruled that public tender procedures reserved exclusively for businesses located in areas of central or Southern Italy, such as those provided for under Article 17 of Law No. 64/1986, were in breach of Articles 30, 92 and 93 EEC[308].

The Court of Auditors therefore declared that the public tender procedures were invalid.

[308] See ECJ, Case C-21/88, Du Pont de Nemours Italiana v Unità Sanitaria Locale No 2 di Carrara [1990] ECR 889.

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2. Outline on the availability of judicial relief under the legal system of Luxembourg

2.1 Procedures concerning the direct effect of Article 88 (3) EC

Articles 87 to 89 EC governing State aid are not recognised as having direct effect. The exception is the last sentence of Article 88 (3) EC, which forbids Member States from implementing aid before the preliminary examination procedure has resulted in a final ruling[309].

Whilst the Commission has exclusive jurisdiction in determining whether State aid is compatible with the Common Market, national courts are required, due to the direct effect of Article 88 (3) EC, to declare unlawful State aid which has been granted prematurely, without following the procedure of Article 88 (3) EC.

A final decision of the Commission stating that a particular State aid is compatible with the Common Market does not *a posteriori* regularise acts where aid was granted in infringement of Article 88 (3) EC. Such acts remain invalid and unlawful[310].

To the best of our knowledge, no Luxembourg case law exists dealing with the direct effect of Article 88 (3) EC. The following comments are therefore based upon Luxembourg experience in other areas of litigation.

Actions concerning infringements of Article 88 (3) EC are available before both administrative and civil courts.

2.2 Procedure before administrative courts

The Luxembourg administrative courts ("*Tribunal administratif*" and "*Cour administrative*") have jurisdiction to rule on administrative actions in relation to State aid.

The implementation of State aid by public authorities without complying with the procedure foreseen by Article 88 (3) EC is open to challenge before these courts.

If the aid has been granted by an individual administrative act, a competitor or any other interested party may initiate proceedings before the Administrative Court ("*Tribunal administratif*") to seek the annulment of the contested decision. An application for annulment should be introduced within a period of three months from the notification of the decision to the claimant or from the date on which the claimant was considered to have knowledge of this decision (Act dated 7 November 1996 relating to the organisation of the administrative

[309] Case C-120/73, Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland/Pfalz [1973] ECR-I-1483, para. 8; Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic [1991] ECR I-5505, para. 11.

[310] Case C-354/90, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic [1991] ECR I-5505, para. 16.

courts ("1996 Act") and Act of 21 June 1999 setting out the rules of procedure before the administrative courts ("1999 Act")).

Annulment proceedings against administrative regulations (i.e. with a general scope of application) must be initiated before the Administrative Court within a period of three months from the day of publication or, where the regulation is not published, from the day of notification or the day on which the claimant has knowledge of the regulation. Annulment proceedings against administrative regulations are open only to those parties that have sustained personal, direct, actual and certain damage, as well as to certain legally recognised associations.

The Administrative Court may only judge a public authority's decision or regulation in the event of incompetence, excess or abuse of power, infringement of the law or of formalities established to protect private interests. The only available remedy is the annulment of the decision or regulation. No damages can be obtained before the administrative courts[311].

Appeals against rulings of the Administrative Court can be lodged before the Higher Administrative Court ("*Cour Administrative*"). The judgment of the Higher Administrative Court is final.

The administrative actions described above do not have a suspensory effect unless expressly ordered by the President of the Administrative Court. A stay of enforcement may only be granted if enforcement of the contested decision risks causing serious and irreparable harm to the claimant and if the grounds invoked for the action appear serious.

Notwithstanding certain exceptions, summary proceedings are, in general, not available in administrative matters.

2.3 Procedure before civil courts

2.3.1 Proceedings against the public authority which granted the aid

a) Liability in tort

As mentioned above, administrative courts have no jurisdiction to award damages to the claimant. Thus, the victim of an illegal administrative decision or regulation (i.e. one which has granted State aid in breach of Article 88 (3) EC) who wishes to obtain damages has to sue the public authority in tort before the civil courts.

According to the general rules laid down in Articles 1382 et seq. of the Luxembourg Civil Code, the claimant must establish the fault of the public authority, the existence of the damage and the causal link between the fault and the damage. A specific law was adopted dated 1 September 1988 relating to the civil liability of the State and other public bodies,

311 G. RAVARANI, "La responsabilité civile de l'Etat", Pas. 28, p. 144.

largely based upon the general principles of civil liability mentioned above. To a certain extent, general rules of civil liability have also been amended or completed[312], including relating to the possibility of invoking, under certain circumstances, the State's liability, even if the latter has not committed a fault.

The majority of cases state that the annulment by the administrative courts of a decision rendered by a public authority (i.e. an individual administrative act) is a sufficient condition to establish a fault in the conduct of the public authority, which may entail its civil liability[313].

It nevertheless remains unclear whether the annulment of an administrative act is also a **necessary condition** to establish a fault on behalf of the public authority concerned. The Luxembourg Court of Appeal ruled in various cases that civil courts are not competent to examine the lawfulness of an individual administrative act[314]. The right to determine whether public authorities have committed a fault by adopting an administrative act is thus, in general, denied to civil courts. However, this principle is not unanimously followed by the lower courts[315], or even by the Court of Appeal itself[316]. It has been criticised because it does not take into account the fundamental differences between an action for annulment before the administrative courts and an action for tortious liability aiming to obtain damages[317] before the civil courts.

Where State aid has been granted in infringement of Article 88 (3) EC by way of a regulation, civil courts have the constitutional duty not to apply these (illegal) regulations (Article 95 of the Constitution). Prior to the administrative reform of 1996[318], this rule was justified by the fact that the State Council had no jurisdiction to declare regulations void. Hence, Luxembourg civil courts tended to declare public authorities liable for their (illegal) regulatory activities[319].

Nowadays, regulations can be declared void by the Administrative Court. Future case law will have to determine whether regulations which have not been contested in time before the Administrative Court may still be declared illegal by the civil courts, entailing the civil liability of the public authority[320] responsible.

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312 G. RAVARANI, "La responsabilité civile des personnes privées et publiques", Pas., 2000, Saint-Paul, Luxembourg, p. 192.

313 Luxembourg Court of Appeal, 13 December 1983, Etat v Nilles; Luxembourg Court of Appeal, 30 October 1986, Pas. 27, p. 266; Luxembourg Court of Appeal, 20 April 1989, n°10271; Luxembourg Court of Appeal, 10 July 1991, n°12508; Luxembourg District Court, 3 July 1986, n°408/86; Luxembourg District Court, 19 December 1984, Pas. 26, p. 285.

314 Luxembourg Court of Appeal, 13 December 1983, Etat v Nilles; Luxembourg Court of Appeal, 21 November 1985, Editpress Lux. v Etat; Court of Appeal, 22 May 1996, n°17096.

315 Luxembourg District Court, 19 December 1984, Pas., 1986, p. 285; Luxembourg District Court, 15 December 1999, n°1164/99; Luxembourg District Court, 5 April 2000, n° 119/2000.

316 Luxembourg Court of Appeal, 17 March 1998, n°19151.

317 G. RAVARANI, "La responsabilité civile des personnes privées et publiques", Pas., 2000, Saint-Paul, Luxembourg, p. 113.

318 In 1996, jurisdiction formerly held by the State Council was transferred to the newly created administrative courts.

319 Luxembourg District Court, 16 November 1994, n°924/94, confirmed by Luxembourg Court of Appeal, 9 July 1996, n°17751; Luxembourg Court of Appeal, 22 November 1995, n°16525.

320 G. RAVARANI, "La responsabilité civile des personnes privées et publiques", Pas., 2000, Saint-Paul, Luxembourg, p. 91.

Strong arguments have nevertheless always been raised to render it possible to sue public authorities in a tort action for the infringement of Community law[321].

Also, the case law of the ECJ requires Member States to indemnify private individuals for damage caused by an infringement of Community law[322]. National substantive and procedural requirements must not render the obtaining of damages impossible or excessively difficult[323]. In our view, there are grounds for applying this case law should civil courts refuse to declare a decision or regulation illegal and to award damages because the decision/regulation has not been previously declared void by the administrative courts.

This case law, and particularly the *Brasserie du Pêcheur* case, should also incite the Luxembourg courts to accept the State's liability for an infringement of Community law by the legislator[324]. In the same manner (although, to our knowledge, no case law exists on this issue), it should be possible to invoke the State's liability for damages sustained as a result of the fact that the State has granted aid in breach of Article 88 (3) EC through means of a contract. In accordance with the general rules of Luxembourg civil law, such contract (in which the parties' obligations are based on an illegal cause) could furthermore be declared null and void (Articles 1131 and 1133 Luxembourg Civil Code).

2.3.2 Summary proceedings

In the case of urgency, the President of the District Court can order any measure not subject to serious dispute or which may be justified by the existence of a disagreement (Article 932, first paragraph, of the New Luxembourg Code of Civil Proceedings).

Two main conditions (i.e. the absence of a serious dispute and the existence of urgency) must be fulfilled.

A serious dispute exists when the judge cannot reject an argument without hesitation, i.e. when a means of defence to a claim is not manifestly unfounded, so that the outcome of the case in a procedure on the merits is uncertain[325].

The case is considered urgent if the slowness of the legal system would not allow the claimant to obtain the requested measures in due time before the ordinary courts[326]. The adoption of a provisional measure must be required urgently in order to prevent certain damage.

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321 F. SCHOCKWEILER, "Le dommage causé par suite d'une violation du droit communautaire par l'autorité publique et sa réparation en droit Luxembourgeois", Pas. 28, p. 38.

322 Cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic [1991] ECRI-5357, para. 37.

323 Cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic [1991] ECRI-5357, para. 43; Cases C-46/93 and C-48/93, Brasserie du Pêcheur S.A. and Factortame Ltd v Bundesrepublik Deutschland and United Kingdom [1996] ECR 1-1029, para. 99.

324 In the past, Luxembourg courts have consistently refused to recognise the State's liability in such circumstances.

325 Luxembourg Court of Appeal, 20 January 1986, Micheley et Bidasio v Englaro, n°8349; Luxembourg Court of Appeal, 30 January 1989, Keipes v Sicolus, n°11069.

326 Luxembourg Court of Appeal, 1 July 1970, Pas.21, p. 378; Luxembourg Court of Appeal, 13 March 1989, Krancher v Bodson et consorts, n°11106

The President of the District Court may also order any kind of conservatory measure, or a measure tending to restore a situation to its former state, either to prevent imminent damage, or to stop any obviously illegal disturbance (Article 933, first paragraph, of the Luxembourg Code of Civil Proceedings).

To file such proceedings, the claimant has to prove that the defendant has committed or is committing an obviously illegal act. Such an act is generally defined by Luxembourg case law as a clear, illegal and intolerable infringement of a person's rights[327].

The judge, sitting in summary proceedings, may exclusively order provisional measures which affect neither the basic rights of the parties nor the outcome of the proceedings on the merits[328]. The judge sitting in summary proceedings may not sentence the defendant to the payment of damages. He may neither settle a dispute nor definitively rule on the parties' respective rights and obligations.

2.3.3 Proceedings against the recipient of State aid

a) Liability in tort

Where a competitor of a recipient of State aid infringing Article 88 (3) EC successfully proves the recipient's fault, as well as the existence of damage and a causal link between this fault and the damage, the recipient can be sued for damages before the civil courts. However, proof of such fault (consisting of an infringement of either a legal provision or of the general duty of care) seems rather difficult to establish.

b) Action for discontinuance

Another ground possibly exists for legal action by the competitors of a recipient of State aid. Pursuant to Article 14 of the Act dated 30 July 2002, regulating certain commercial practices and sanctioning unfair competition, any merchant, industrialist, craftsman or person exercising a liberal profession is deemed to commit an act of unfair competition if, by an action contrary to honest commercial and industrial practices or to contractual commitments, he diverts or attempts to divert from his competitors part of their customers or attempts to cause prejudice to their competitive power. A recipient of State aid could be accused of infringing this act if it could be demonstrated that he has knowingly accepted State aid which infringes Article 88 (3) EC.

The Act provides a specific action for discontinuance as well as, under certain circumstances, criminal sanctions. An action for discontinuance of the act of unfair competition may be introduced by anyone having an interest, although case law requires evidence of a competitive situation. The action is introduced by an application filed with the President of the District Court, sitting in commercial matters. It will be judged in the same

[327] Luxembourg Court of Appeal, 21 January 1997, Pas. 30, p. 247; Luxembourg Court of Appeal, 9 November 1983, n°6768; Summary proceedings Luxembourg, 31 October 1985, n°1105/85.

way as summary proceedings. If the conditions for an act of unfair competition are satisfied, the President will order the discontinuance of such act. The order may be accompanied, at the request of the claimant, by a penalty ("*astreinte*") imposed on a daily basis for non-compliance with the presidential order. Additional sanctions, such as the advertisement of the order or its publication in one or more newspapers at the expense of the offender, may also be ordered.

The Act does not provide for damages to be granted by the President of the District Court. To obtain damages, the claimant will have to bring a separate civil action (based on Articles 1382 *et seq*. of the Civil Code).

To the best of our knowledge, no action for discontinuance has been filed with the Luxembourg courts by a competitor of a recipient of State aid.

2.3.4 Summary proceedings

Theoretically, a competitor of a recipient of State aid could also file for summary proceedings as described above. This possibility nevertheless seems difficult to put into practice.

2.4 The enforcement of negative Commission decisions

When ordering the discontinuance of incompatible State aid, the Commission also orders the public authority to recover the funds from the recipient[329].

In such cases, 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 contentious proceedings themselves. The withdrawal of such a decision is only permitted for the same reasons as those that would have justified its annulment[330].

This provision has to be viewed in the context of European case law, according to which the recovery of aid is 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 legitimately have confidence in the regularity of this State aid if it has been granted to him in accordance with Article 88 EC[331]. In relation to national provisions regarding the period of time during which a withdrawal of administrative acts is possible, the ECJ has stated that these provisions are,

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328 Luxembourg Court of Appeal, 18 February 1992, Anciens Etablissements Cloos et Kraus v BatiConcept, n°13564.

329 Unless such recovery would be contrary to a general principle of Community law.

330 I.e. in the event that the public authority is guilty of incompetence, excess or abuse of power, infringement of the law or of the formalities established to protect private interests.

like any other national provisions, to be applied in a way which does not render the recovery practically impossible[332].

Although, to our knowledge, no case law exists on this issue, it should also be possible to declare a contract which has granted State aid in breach of Article 88 EC null and void[333].

In the event that the recipient refuses to refund the aid, the public authority will have to initiate ordinary proceedings before the civil courts in accordance with the general rules of civil law.

2.5 The implementation of position Commission decisions

As mentioned above, a positive Commission decision does not *a posteriori* regularise the infringement of Article 88 (3) EC. This means that the rulings and judgments rendered or to be rendered on the basis of the direct effect of Article 88 (3) EC are valid and can be enforced.

If, prior to the approval of the Commission, State aid has not been granted, public authorities may legally start to implement the aid to the beneficiaries upon such approval.

Such implementation decisions can be challenged by the recipient's competitors in the administrative courts by arguing that the Commission wrongfully came to the conclusion that the aid was compatible with the Common Market. Such procedure will, of course, tend to obtain a court ruling referring the relevant question to the ECJ under Article 234 EC.

One should nevertheless note that the instigation of such a procedure may not have the effect of circumventing the delay of two months foreseen by Article 230 EC to challenge the Commission decision before the ECJ.[334]

3. List of cases with summaries

3.1 Decision of the State Council dated 11 April 1989 (A)

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 under the scope of application of Article 39, paragraph 1 of the Act, which lists the potential beneficiaries of such a subsidy, stating that such beneficiaries may, *inter alia*, be those undertakings whose main purpose is to increase the income of farmers in general.

The claimant instituted an administrative action against this decision before the Sate Council by arguing, first that the Act had not been correctly applied by the Ministry and, secondly,

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331 Case C-5/89, Commission v Federal Republic of Germany [1990] ECR I-3437, para. 14 and 17.
332 Case C-5/89, Commission v Federal Republic of Germany [1990] ECR I-3437, para. 12 and 19.
333 Due to the fact that the parties' obligations are based on an illegal cause: Articles 1131 and 1133 Luxembourg Civil Code.
334 If legal action is possible under Article 230 EC, priority should thus be given to this possibility.

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 fell 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 Articles 87 (2) and (3) EC. The State Council also stated that the claimant could not reasonably assert that there was a risk of disturbing the balance of the Common Market by the mere fact that Luxembourg had granted structural aid to the agricultural sector by means of the Act.

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2. Report on the availability of judicial remedies before the Dutch courts in the field of State aid

2.1 Introduction

In the Netherlands, both administrative and civil courts deal with issues of State aid. A list of cases with summaries of the relevant decisions is provided in section 3 of this report. The following actions can be lodged before the Dutch courts:

1. request for an injunction by a competitor or other third party claiming injury due to an aid measure, against the agency granting the allegedly unlawful aid; see the following cases: 3.1.2; 3.1.3; 3.1.4; 3.1.6;

2. action by a competitor or other third party against the agency that granted aid for annulment of the decision to grant aid; see the following cases: 3.1.7; 3.2.6; 3.5.3; 3.5.5;

3. action for damages brought by a competitor against the beneficiary of the aid and/or the agency that granted the aid for losses as a result of the unlawful grant of the aid; no cases can be reported;

4. action by the agency that granted aid against the recipient to recover aid either granted contrary to Article 88 (3) EC or that, on the basis of a Commission decision, is not compatible with the Common Market; see the following cases: 3.1.5; 3.1.8; 3.3.1; 3.3.2;

5. action against the agency that granted aid for annulment of the decision to collect a levy, or other financial burden, imposed on an undertaking where the levy was used to finance the unlawful aid; see the following cases: 3.4.1; 3.4.4; 3.4.5; 3.4.6; 3.4.7; 3.4.8; 3.4.9; 3.4.10; 3.6.2; 3.6.1; 3.6.2; 3.6.5.

Before discussing the most relevant of the above-mentioned actions, the handling of the "direct effect" of Article 88 (3) EC and the interpretation of the State aid concept by the Dutch courts will briefly be discussed. In addition, the differences between civil and administrative proceedings and the number of requests for a preliminary ruling will be touched upon. Note that, with the exception of case 3.1.3 and to some extent case 3.2.2, there have been no cases involving the relationship between (unlawful) aid and public procurement.

2.2 General comments

2.2.1 Article 88 (3) EC

The power to determine the compatibility of State aid has been exclusively assigned to the Commission. As a result, national courts have no jurisdiction in this regard. National courts do, however, have the power to enforce the direct effect of the procedural obligations of the

Member States as contained in Article 88 (3) EC, last sentence. This provision states that "*the Member State concerned shall not put its proposed measure into effect until this procedure has resulted in a final decision*". This clause extends to aid granted during the Commission's preliminary examination and, in particular, to aid granted before any notification is made to the Commission.

As can be derived from the examined case law, the Dutch courts apply the direct effect of Article 88 (3) EC conscientiously. In case 3.4.9 the court ruled that, in the absence of a final decision by the Commission, the imposition of the levy under the Commission's investigation under Article 88 (2) EC had to be suspended. The direct effect of Article 88 (3) EC was also noted in case 3.4.12 in which the rejection of a request for compensation with regard to disability insurance contributions was annulled due to the fact that the Commission had not yet concluded its investigation of these compensatory measures under Article 88 (2) EC.

However, the Supreme Court recently held in case 3.5.7, which started as summary proceedings, that if the Commission decides to investigate a certain measure, this will not automatically mean that the measure constitutes State aid within the meaning of Article 87 (1) EC. The Article 88 (3) EC prohibition is only applicable if there is a State aid measure within the meaning of Article 87 (1) EC. In case 3.5.7 the Commission only initiated the investigation because it could not exclude that the measure in question constituted State aid. According to the Supreme Court, this statement of the Commission could not be interpreted as a provisional judgment that there was indeed State aid. Therefore, there was no need to prohibit the implementation of the measures until the investigation under Article 88 (2) EC had resulted in a final decision.

An odd one out appears to be case 3.4.4, in which the interested party claimed that the contested levy constituted illegal State aid contrary to Articles 87 and 88 EC. The court ruled that such qualification would require it to test the legality of the law, which it was prohibited from doing by Article 120 of the Constitution. In addition, the court concluded that the levy could not be considered to be contrary to European law by reasoning that the State aid prohibition as laid down in Article 87 (1) EC is not directly effective and the Commission had not at any point in time acted against the State under Article 88 (1) EC.

2.2.2 Differences between civil and administrative proceedings

In Dutch law, different time limits apply to filing objections in civil and administrative proceedings. In case 3.1.6, where a civil injunction proceedings were brought before the President of the District Court, the issue of these differing time limits was raised. The Municipal Council of Appingedam decided to grant guarantees and funding to a project providing its residents with broadband internet access. The municipality contended that, due to the fact that such decision qualified as a decision under the General Act on Administrative law ("*Algemene wet bestuursrecht*", "*Awb*"), objections should have been raised within the six weeks period as laid down in this Act. The action should therefore be declared

inadmissible since the six week term for raising objections had expired. The claimant argued that Community law prevails over any expiry of the period under national law. The court ruled it unnecessary to decide on this issue. It considered that the validity of the Municipal Council's decision was not the subject under discussion, but the implementation of this decision prior to notification to and approval by the Commission under Article 88 (3) EC. The court stated that, due to the direct effect of the notification obligation, non-notification leaves undertakings such as the claimant free to turn to the national civil court to have the illegal aid blocked or prohibited.

Case 3.2.8 concerned an appeal against the Broadcasting Commission's approved continuation of the classical concert channel by the NOS, a public body, with the aid of public funds. The Administrative Court found that, in order to assess whether the Broadcasting Commission had rightly granted approval, it had to interpret and apply the concept of "State aid" as per Article 87 EC, particularly now that the channel was subsisting, without having undergone the procedure laid down in Article 88 (3) EC. However, it considered that the Dutch administrative law system was such that the Broadcasting Commission would first have to determine whether the continuance of the channel constituted State aid and, if so, whether an exemption regulation would apply. The appeal for lack of reasoning was upheld by the court, stating that it was for the Broadcasting Commission to ensure compliance with Community law rules within its field of competence.

2.2.3 Interpretation of "State aid"

Dutch courts appear to scrutinise the ECJ's case law on the interpretation of State aid closely.

Case 3.4.13 concerned the "*Wet waardering onroerende zaken*" (Act on the Valuation of Real Estate), applicable to the valuation of real estate for the purpose of taxation. Pursuant to Article 18 (3) of this Act and Article 2 of its implementing regulation, certain real estate objects were exempt from this valuation. The court was unconvinced by the affected party's argument that this exemption should be regarded as non-notified State aid. It stated that the relevant provisions did not constitute a tax exemption and therefore were unlikely to be considered State aid. Even if these provisions did indeed constitute State aid, this would only lead to the inapplicability of those provisions, instead of the entire Act, thus resulting in the exempted objects being valued, rather than other realty not being valued. The court concluded that the valuation of the object at issue was not contrary to the EC State aid provisions. A similar reasoning was followed in case 3.4.14.

The Supreme Court ("*Hoge Raad*") ruled in case 3.4.6 that Article 87 EC aims to prevent trade between Member States from being affected by benefits granted by the public authorities which, in their various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. Article 87 EC does not therefore distinguish between measures of State intervention by reference to their rationale or purpose

but defines them in relation to their effects, so that the social aim of a measure cannot suffice to exclude it from the ambit of Article 87 EC (see. Case 173/73[336]). Consequently, the Supreme Court concluded that the social aim of the measure at issue was insufficient to bring it outside the scope of Article 87 EC. It reiterated that, for advantages to be capable of being categorised as aid within the meaning of Article 87 (1) EC, they must be granted directly or indirectly through State resources. These include both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State. Due to the fact that the foundation at hand was not designated or established by the State, the Supreme Court ruled that no State resources were involved.

In case 3.4.7 the court referred to Article 87 (1) EC ("*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market*") to rule on the question of whether the grant of compensation for offal destruction charges to cattle breeding undertakings but not to the meat-packing industry could constitute State aid. It considered that, since cattle farms and meat-packing companies are not in competition with each other, no State measure distorting or threatening to distort competition could exist.

In case 3.4.3 the court referred to CFI's ruling in *Weyl*[337] to elaborate on the link between Articles 87 and 88 EC with other provisions of the Treaty. The claimants had argued that any anti-competitive agreement aimed to implement an approved State aid measure would fall outside the scope of Article 81 (1) EC. The court considered that the case at hand did not fulfill the criteria laid down in *Weyl*, in which the CFI had ruled that measures that may fall within the scope of Article 81 EC, but are inextricably linked to the purpose of the aid, cannot be evaluated separately. In this context the court considered it of importance to determine whether the potential anti-competitive effects of the measures were attributable to the aid at issue and should be regarded as necessary to implement it and to achieve its purpose.

2.3 Possible actions before Dutch courts

2.3.1 Request for an interim injunction

Under Dutch law, there are essentially two distinct ways to prevent agencies from granting illegal aid. Parties can either initiate summary proceedings and obtain an injunction before the President of the competent civil district court or initiate proceedings for administrative preliminary relief before the administrative district courts.

Summary proceedings before a civil court can only be initiated in case of urgency. The President of the civil court cannot give a judgment which is binding on the parties. As a result, the order will have a provisional character. It is not required that there be a principal

[336] Case 173/73, Italian Republic v Commission [1974] ECR 709.
[337] Joined cases T-197/97 and T-198/97, Weyl Beef Products BV, Exportslachterij Chris Hogeslag BV and Groninger Vleeshandel BV v Commission [2001] ECR II-303.

claim pending before the civil court in order for an action for interim relief to be admissible. According to case law of the Supreme Court ("*Hoge Raad*"), a civil court is obliged to abstain from ruling on an administrative dispute if the parties are able to bring their case before an administrative court[338].

Interested parties can initiate proceedings for administrative preliminary relief before an administrative court on the basis of Article 8:81 of the *Awb*. Interim measures will only be granted if the claimant has an interest[339] and the following conditions are met:

- an administrative decision (to grant aid) must be involved;
- a principal claim must be pending before the same administrative court, or the interested party must have raised its objections against the administrative decision in a compulsory review procedure before the competent administrative authority; and
- it must be a matter of urgency.

In case 3.1.6 the claimant initiated summary proceedings before the President of the Civil Court in Groningen. The Municipal Council of Appingedam had decided to construct and exploit a glass fibre network together with a network operator, a private undertaking. For that purpose, a private law legal entity was to be established, in which the Municipality of Appingedam would participate. Although this does not follow explicitly from the judgment, the exception of Article 8:3 of the *Awb* applies. This article provides that no appeal can be lodged with the administrative court against an administrative decision which concerns (the preparation of) typically private (i.e. non-public) conduct, such as the establishment of a private undertaking. Hence, the civil court was competent in this case.

Initiating summary proceedings can be an effective remedy to suspend the execution of agreements until the procedure of Article 88 (2) EC has led to a final decision by the Commission. However, case 3.1.7 demonstrates that this is not always the case. The claimant requested suspension of a zoning plan by the Municipal Council before the administrative court, i.e. the Council of State ("*Afdeling Bestuursrechtspraak van de Raad van State*"). The possibility of (incompatible) State aid was brought forward by the claimant as a subsidiary argument. The Council of State held in its judgment that it was not convinced that the financial investment by the Municipality would constitute a form of State aid which had to be notified to the Commission. It therefore rejected the request for interim measures.

In case 3.1.4 orders were sought from the President of the Civil District Court of Leeuwarden against the municipality that granted aid. The purpose of the action was to require the beneficiary to repay the aid and to prevent the grant of any further aid. The Supreme Court in this case applied the "market investor" test to determine whether the favourable payment

[338] HR 12-12-1986, NJ 1987, 381.

conditions and a loan guarantee constituted State aid. The request for interim measures was rejected on the basis of the market investor principle.

2.3.2 Action for annulment of the decision to grant aid

The grant (or the refusal or withdrawal) of subsidies to private undertakings by an administrative authority is an administrative decision within the meaning of the *Awb*, even if the aid concerned is drawn from general public funds and executed by contract under civil law. Title 4.2 (Subsidies) of the *Awb* provides a legal framework for all subsidies by all (central, regional, local etc.) governmental bodies. The provisions on financial aid do not cover agreements dealing with the actual payment of the aid. Such agreements may be enforced by the civil courts. It should furthermore be noted that actions against aid measures granted through non-administrative acts (such as aid in the form of a participation in the share capital of a private company) should be lodged at civil courts.

Actions for annulment against decisions of an administrative authority must, under the *Awb*, be lodged at the administrative chamber of the District Court. However, these courts are only competent where no other special administrative court is designated by the relevant legislation. In the legislation on subsidies, for example, the Court of Appeal for Trade and Industry ("*College van Beroep voor het Bedrijfsleven*") is frequently the relevant administrative court for an appeal against a decision of an agency that grants aid.

In general, administrative law actions are only admissible after a compulsory review procedure within the administration has been completed. A request for such a review should be directed to the administrative body which took the decision. Re-examination may also be carried out by a higher administrative body ("*administratief beroep*"). Subsequent judgments of the District Court can be appealed to the Council of State.

On 1 September 2004, the Act on Direct Appeal ("*Wet Rechtstreeks beroep*") entered into force[340]. In filing its objections against the decision concerned, an interested party may request the administrative authority to leave out the compulsory review procedure and agree to a direct appeal at the administrative district court. The administrative authority will verify whether the action is suitable for direct appeal. This will depend largely on the circumstances of the case.

Administrative authorities always have to take account of the so-called general principles of proper administration ("*algemene beginselen van behoorlijk bestuur*") when taking an administrative decision. In requesting annulment of the decision before the administrative court, interested parties can base their grounds of appeal on these principles. The administrative court - but also, where appropriate, the civil court[341] - will assess whether the

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[339] The Council of State ("*Afdeling Bestuursrechtspraak Raad van State*") held in cases ABRvS 17 May 2001, AB 2002, 58, ABRvS 6 November 2002, AB 2003, 115 and ABRvS 17 December 2003, AB 2004, 262 that a competitor can be regarded as an interested party within the meaning of Article 1:2 *Awb*.

[340] Act of 13 May 2004, Stb. 220; coming into force by Royal Decree of 7 June 2004, Stb. 270.

[341] Supreme Court (HR), 27 June 1986, NJ 1987, 726.

decision-making process and the (final) decision comply with the principles. In Dutch State aid cases the following principles/requirements can be invoked:

- the requirement of adequate reasoning (for example, case 3.5.1;)
- the principles of good faith and legal certainty (for example, 3.1.5; 3.3.1; 3.3.2); and
- the requirement of due care (for example, cases 3.2.6 and 3.5.3).

In case 3.5.1 the interested party successfully invoked the principle of adequate reasoning under Article 7:12 of the *Awb*. The Administrative Court of Roermond found that the Secretary of the Treasury could not rightfully reach his decision to refuse the aid because the decision did not meet the requirements regarding sufficient motivation. On this basis, the court annulled the decision.

In several actions initiated by competitors (for example, cases 3.2.6 and 3.5.3) the court held that the principle of due care entails an obligation for an administrative authority to take account of the rules on State aid in its decision-making process. By not doing so, the decision violates the requirement of due care and must be annulled.

Case 3.2.9, similar to case 3.1.4, deals with aid related to the establishment of a salt-producing company in the town of Harlingen. It concerns an appeal lodged by competitors against a refusal by the administrative authority that granted a subsidy (i.e. the State Secretary for Economic Affairs) to review its decision to grant the subsidy. The administrative authority was ordered to reconsider the review request as it had failed to handle the request adequately.

2.3.3 Action for damages

Civil courts have jurisdiction over actions for damages related to the unlawful implementation of aid. Competitors who have suffered loss as a result of illegal aid may bring actions for damages before a civil court against the agency that granted the aid. It could be argued that such action for damages may be brought against the beneficiary, although there have been no precedents in national case law in this respect.

Under Dutch law there is no explicit statutory basis for introducing an action for damages. Actions for damages for breach of the State aid rules are brought under the same rules and principles as actions for damages based on tort. Parties must refer to Article 162 of Book 6 (unlawful act) of the Dutch Civil Code ("*Burgerlijk Wetboek*" ("CC") or Article 6:212 CC (unjust enrichment). For Article 6:162 CC to be applicable, the claimant must prove, among other things (i) that there is an unlawful act, (ii) damage and (iii) causation, in the sense that the damage must still be (iv) attributable to the infringement by the defendant.

The court has to interpret and apply the concept of State aid contained in Article 87 EC to determine whether aid granted in neglect of the preliminary examination procedure contained in Article 88 (3) EC should be subject to the procedure of Article 88 (3) EC.

Cases 3.2.1 and 3.2.2 are examples of such an action taken by a competitor. One of the complaints of the claimant in these proceedings was for cross-subsidisation of the municipal press by the town of Amsterdam. This cross-subsidisation, however, was assumed to have started before the date the EC Treaty came into force. The District Court of Amsterdam therefore decided that the aid was not subject to the procedure of Article 88 (3) EC. It is interesting to note that the competitor started proceedings both against the awarding agency and against the public undertaking which took advantage of the subsidised tender made by the beneficiary of the cross-subsidisation. The competitor argued that the public undertaking that took advantage of the subsidised tender should have protected it against the illegal State aid and should not have accepted the tender of the beneficiary.

2.3.4 Action for recovery

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 require repayment of the aid from the recipient.

Under Dutch law there are – depending on the nature of the State aid – three legal possibilities to recover the aid: (i) a recovery procedure based on administrative law (for example, subsidies); (ii) a civil law procedure (for example, 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*").

- Administrative law

A decision by an agency to recover State aid is governed by the *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 were administrative in nature if they were applied in a case concerning administrative law. An appeal against such a decision by a beneficiary of the aid, ordered to repay the aid, could therefore be lodged at the competent administrative court.

Special provisions on recovery in regard of subsidies have been laid down in the *Awb* and in certain subsidy Framework Acts. 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

Commission[342]) 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 case 3.3.2 the court held that the negative Commission decision has direct effect). It is assumed that the Central Government does not have the power to impose 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 declaring unlawfully introduced aid compatible with the Common Market, a court has to declare that measures adopted before such finding are unlawful. A beneficiary is therefore not protected against actions to order an agency to recover aid.

Cases 3.3.1 and 3.3.2 demonstrate the obstacles for the beneficiary to request an annulment of the decision on the basis of the principles of good faith and legal certainty. The court found that the claimant had failed to show facts or circumstances that would enable it to argue successfully that it could legitimately presume that the aid would not be recovered. The court reiterated the continuous line of jurisprudence in which the ECJ had determined that there could only be a legitimate expectation 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 case 3.1.5 successfully relied on the principles of proper administration in their defence against an action for recovery.

In case 3.1.8, the claimant obtained a judgment that, pending the Council of State's appeal procedure, there would be no obligation for the company to reimburse the subsidy, on the condition that the company issued a bank guarantee.

- 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 respect of void legal transactions. Presumably, private law transactions in violation of Article 88 EC can be considered as void[343].

[342] EC Regulation 659/1999, Article 15.

[343] 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.

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.

- Tax law

The General Tax Act contains explicit statutory provisions in 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.

2.3.5 Action against levies

The Supreme Court has requested preliminary rulings in three cases regarding levies (please see cases 3.6.2, 3.6.3 and 3.6.4), whereas the Trade and Industry Appeals Tribunal has requested a preliminary ruling in case 3.6.5. Cases 3.4.5, 3.4.8, 3.4.9 and 3.4.11 related to notified aid. The claimants were unsuccessful in their claim in the majority of these cases as the notification had resulted in a positive decision by the Commission. A change of the public body levying the charge did not lead to a different conclusion in this regard (see case 3.4.11). It was only in case 3.4.9 that the court ruled that the levy could not be imposed, as the Commission had not yet concluded its investigation under Article 88 (3) EC.

In case 3.4.1, the Administrative Court for Trade and Industry ruled that both the contested levy for an incompatible aid measure and the contested "demand note" were illegal. While the Commission had decided that a particular aid was incompatible as a result of its being financed by levies on imported products, and had prohibited future aid, "demand notes" relating to the period before the Commission decision were, according to the court, valid.

2.4 Summary conclusions drawn from the cases below

The cases listed below have been divided into several headings and the main conclusions have been drawn for each heading.

2.4.1 Request for an interim injunction

As follows from cases 3.1.1 to 3.1.8, State aid issues came up in several interim injunctions. Of these interim injunctions, four cases were initiated by a competitor and four of these interim injunctions were successful.

2.4.2 Other actions by competitors

Competitors brought nine actions (other than summary proceedings) concerning State aid before the administrative and civil courts since the last report. They were (partly) successful in only three cases.

2.4.3 Recovery cases

There have been four recovery cases before the national courts. Recovery was refused in only one of them because of procedural rules (case 3.1.5). The President of the court 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.

2.4.4 Cases relating to taxes

Around 12 different tax measures, mostly concerning the agricultural sector, were contested before both the administrative and civil courts. The Administrative Court for Trade and Industry dealt with eight (out of 14) cases.

2.4.5 Cases relating to State measures other than taxes per se

Because of the diversity of the cases in this category, no general comments can be made.

2.4.6 Request for preliminary ruling

The Supreme Court ("*Hoge Raad*") has requested preliminary rulings in three cases (cases 3.6.2, 3.6.3 and 3.6.4), whereas the Administrative Court for Trade and Industry requested a preliminary ruling in case 3.6.5. There is only one case (3.6.1) known in which the Council of State requested a preliminary ruling. By way of exception, the District Court of Groningen requested a preliminary ruling in case 3.6.6. In most cases, the ECJ only recently provided a ruling. No comments as to the final outcome of the cases can yet be made.

3. List of cases and summaries

3.1 Request for an interim injunction

3.1.1 President of the District Court, The Hague, no. 83/927, 30 November 1983, Vereniging van Exploitanten van Gasbedrijven in Nederland (VEGIN) and Veluwse Nutsbedrijven NV v The Dutch State and NV Nederlandse Gasunie (D)

Facts and legal issues: Application for an interim injunction (civil law), gas sector.

On 2 October 1984, the Minister of Economic Affairs fixed the minimum price for natural gas distribution companies to pay to suppliers. VEGIN and Veluwse Nutsbedrijven requested the President to annul or suspend this decision and to order NV Nederlandse Gasunie, at that time the sole supplier of gas, to supply the distribution companies at current prices.

VEGIN and Veluwse Nutsbedrijven claimed that this decision resulted in State aid being granted to the benefit of several large Dutch industrial purchasers of gas. The benefit was a decrease in their prices compared to export gas prices. Because export prices for gas were based on average (national) Dutch prices, price increase for the distribution companies' customers as a result of the minimum prices would result in export prices rising above the prices of large industrial consumers.

Decision: The President rejected the argument made by VEGIN and Veluwse Nutsbedrijven. His view was that an annulment or suspension of the Minister of Economic Affairs, decision would not result in purchase price changes for other consumers in the Netherlands.

3.1.2 President of the District Court, The Hague, AB 2005/395, 200405506/1, 5 July 1991, De Vereniging van Nederlandse Luchtvaartondernemingen (VNLO) v the State (Ministry of Transport and Water Management) (D)

Facts and legal issues: Application for an interim injunction (civil) law, aviation sector.

After filing a complaint with the Commission, the association of Dutch aviation companies ("*de Vereniging van Nederlandse Luchtvaartondernemingen*" ("VNLO") initiated summary proceedings against the Dutch State (Ministry of Transport and Water Management) to obtain an injunction in order to prevent RLS, the State Aviation School (part of the Ministry of Transport and Water Management), from executing the contract with the airline KLM concerning the privatisation of RLS until the Commission had reached a judgment on the compatibility of the (possible) State aid measures with the Common Market. VNLO was of the opinion that the financial obligations resulting from the contract between RLS and KLM constituted State aid. On the basis of the contract, RLS was obliged to transfer the (im)movable goods and the registrable property to KLM for the amount of one Dutch guilder. Furthermore, RLS was obliged to pay KLM NLG 23,000, carry the cost of a specific provision, and contribute to a guarantee fund.

Decision: The president of the civil court had to judge whether the financial obligations resulting from the contract between RLS and KLM constituted State aid. The Ministry argued that the cash value of RLS amounted to [minus] NLG 42.7 million. Moreover, KLM was obliged on the basis of the same contract to guarantee the continuation and quality of RLS, the employment and the terms of employment. The President ruled that these obligations on KLM were in proportion to the financial obligations of RLS. Therefore, the financial obligations did not constitute State aid and there was no obligation for RLS to notify the aid to the Commission.

Comment: On the basis of the complaint which was filed by the VNLO on 17 May 1991, the Commission decided in October 1993 to start a formal investigation procedure (Article 88 (2) EC). It concluded that the payment of NLG 17 million as a contribution to the exploitation deficits of the school and the price of one guilder paid for the assets of the school constituted

illegal State aid. However, the Commission held that the State aid was in conformity with the Common Market on the basis of the (old) Article 92 (3) (c) EC. The maintenance of efficient high level training programmes for pilots contributes to a high safety level which is important for the mobility of pilots within the EC. Stimulating the development of training programmes for pilots within the EC can change the ongoing trend of obtaining training outside the EC. As a consequence of these new training possibilities, the development of economic activities will be simplified.

3.1.3 President of the District Court, The Hague, no. 93/146, 26 February 1993, Construcciones Aeronauticas SA ("Casa") v The State of the Netherlands (H)

Facts and legal issues: Application for an interim injunction (civil law), air transport sector.

The Dutch Ministry of Defence intended to purchase air transport planes from Fokker. Casa asked the President to order the Ministry to annul the procurement procedure and to prohibit any acts by the Ministry contrary to Article 87 EC. The award of the contract to Fokker, would, they claimed, be State aid because the Fokker air planes were each NLG 10 million more expensive than similar Casa air planes and because the Ministry of Defence would pay Fokker's development costs. The State of the Netherlands argued that Article 223 EC precluded the applicability of Article 87 EC.

Decision: The President noted that the air transport planes had to be significantly adapted for military use. The applicability of Article 223 EC was therefore (according to the list provided by the EC Council on 15 April 1958 based on Article 223 of the EC Treaty) accepted and the request by Casa rejected.

3.1.4 Supreme Court ("Hoge Raad"), The Hague, no. 16148, NJ 1997/303, 3 January 1997, Le Comité des Salines de France and La Compagnie des Salins du Midi et des Saline d'Est v The Municipality of Harlingen (D)

Facts and legal issues: Appeal of interlocutory proceedings (civil law), agricultural sector.

Le Comité des Salines and La Compagnie des Salins alleged that State aid for the establishment of a salt mine and salt factory in Harlingen had been granted not only by the Secretary of State for Economic Affairs but also by the Municipality of Harlingen. The aid given by the municipality related to its sale of a site to Aliss. More specifically, the Municipality allowed deferment of payment of the purchase price and it gave guarantees regarding a loan.

The French competitors asked the President of the District Court of Leeuwarden:

- to prohibit the municipality's support to Frima BV or Aliss BV without the approval of the Commission;

- to order the municipality to claim repayment of the aid granted; and
- to take such measures necessary to achieve annulment of the guarantee.

The court was further requested to impose a penalty of NLG 10,000 for each violation of the President's judgment.

Decision: according to the Court of Appeal, the municipality had not acted in a manner different from that in which a private party, such as a development company, would have sold its land under normal market conditions. Therefore, there was no State aid granted by the municipality. This Court of Appeal judgment was confirmed by the Supreme Court.

3.1.5 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 sector.

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 for 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 grant 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 of 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 Community Courts which could potentially result in overturning prior national court rulings. The scope of the present proceedings was thus limited to the recovery order for the entire subsidy sum within a four-week period. Pursuant to the Commission decision[344], the aid should be recovered in accordance with the relevant national rules. The President found that,

with regard to the recovery, the principles of proper administration ("*algemene beginselen van behoorlijk bestuur*") should apply. 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.

3.1.6 President of the District Court, Groningen, LJN: AQ8920, 73785 KGZA 04-271, 3 September 2004, Essent Kabelcom BV v Gemeente Appingedam (Municipality of Appingedam) (D)

Facts and legal issues: Application for an interim injunction (civil law), telecommunications sector.

The municipality intended to provide broadband internet access to residents living in its outskirts. Due to the project costs, the municipality contributed to the funding of the project through guarantees and by granting €5 million. The central issue was whether the contributions required notification to the Commission.

Decision: The court rejected the municipality's argument that contribution made by government bodies could never constitute State aid if they were made in the general public interest. According to the court, this argument was based on a misinterpretation of the "*Commission Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications*". Moreover, the court was not convinced that the municipality was, through its public task, forced to construct a new infrastructure since there were already two competing internet networks in the area in which the new network was to be built. Regardless of the relevance to the general public interest, it would have to be examined whether the granted State aid was compatible with the Common Market. The court emphasised in particular that, in light of the conclusion in *Belgium v Commission*[345], notification to the Commission was appropriate if there was doubt as to the compatibility of the intended measure with the EC State aid provisions. Therefore, the municipality should notify the Commission of the intended measures. The application was thus granted.

Comment: On 20 October 2005, the Commission started its investigation on "*Broadband development Appingedam*[346]".

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[344] 1999/705/EC (OJ (1999) L280/87).
[345] Case 40/85, Belgium v Commission [1986] ECR 2321.
[346] C 35/2005.

3.1.7 Council of State, The Hague, LJN: AR7937, 200407291/2, 14 December 2004, X v College van Gedeputeerde Staten van de Provincie Gelderland (Provincial Executive of Gelderland) (D)

Facts and legal issues: Application for an interim injunction (administrative law), real estate sector.

The claimant sought an injunction for the construction plan of a new apartment complex. X alleged, inter alia, that the decision did not deal with whether the financial support by the municipality was in accordance with European law.

Decision: The court was unconvinced that the financial support by the municipality was without a return and would thus qualify as State aid to be notified under Article 88 EC. In this regard, the court found of significance that it was sufficiently likely that the municipality's financial support related to the renovation of existing and construction of future areas, which was likely to be at the municipality's expense. Therefore, the municipality's financial support could not qualify as State aid. The application for annulment was dismissed.

3.1.8 President of the Council of State, The Hague, AB 2005/361, 200410578/2, 10 May 2005, Ferm-O-Feed B.V. v the Minister of Agriculture, Nature and Food quality (A)

Facts and legal issues: Provisional relief (administrative law), agricultural sector.

The "*Bijdrageregeling proefprojecten mestverwerking*" (contribution scheme for pilot manure processing projects) was approved by the Commission for a given period, expiring on 1 January 1995. However, subsidies were granted on the basis of this scheme even after this date. Consequently, the Commission ordered the Dutch State to recover these subsidies. By a decision dated 3 August 2001, the Minister of Agriculture, Nature and Food Quality requested the repayment of the subsidy granted to Ferm-O-Feed B.V.. Ferm-O-Feed B.V. lodged a notice of objection to this decision and, after dismissal of its objections, appealed to the District Court Den Bosch and, ultimately, the Council of State. Before the latter, Ferm-O-Feed B.V. filed a request for provisional relief entailing suspension of the Minister's decision. The Minister had indicated that he could not suspend the subsidy's reclamation, because this would violate Community law.

Decision: The President of the Council of State considered that in this procedure for provisional relief he would not deal with complex questions such as the relationship between Community and national administrative law. However, considering that Ferm-O-Feed B.V. declared itself willing to issue a bank guarantee, the President ruled that the company, pending the Council of State's appeal judgment, would not be under an obligation to reimburse the subsidy.

3.2 Other actions by competitors

3.2.1 District court, Amsterdam, no. 93/3937, 5 November 1995, Security Print Vianen B.V. v Vervoerbewijzen Nederland B.V. (E)

Facts and legal issues: Appeal, interlocutory injunction (civil law), transport ticket printing.

The facts of this case have been indicated in case 3.2.2, in which Security Print claimed damages from the Municipality of Amsterdam, the grantor of the aid. In this case, Security Print also claimed damages form Vervoerbewijzen Nederland B.V.. According to Security Print, Vervoerbewijzen Nederland B.V. knew, or should have known, when awarding the contract that Security Print had an advantage as a result of illegal State aid. Vervoerbewijzen Nederland B.V. should, claimed Security Print, have protected them against the unfair competition from the Municipal Press of Amsterdam ("MPA").

Decision: The court did not come to a conclusive decision on the State aid issue in its judgment.

3.2.2 Court of Appeal, Amsterdam, NJ 2000/592, 18 February 1999, Security Print Vianen B.V. v the Municipality of Amsterdam (H)/(E)

Facts and legal issues: Appeal (civil law), transport ticket printing.

Vervoerbewijzen Nederland B.V. awarded a contract for printing public transport tickets to the Municipal Press of Amsterdam ("MPA"). MPA is a company without legal personality which forms part of the Municipality of Amsterdam. Security Print Vianen B.V., whose tender was rejected, claimed compensation from the Municipality of Amsterdam, believing the tender by MPA was unlawful because MPA had several unfair advantages granted to it by the municipality, namely:

- availability of capital provided by the municipality
- profitable loans provided by the municipality
- contract awarded by the municipality
- guarantee of continuity by the municipality
- covering of all losses by the municipality
- no writing-off on goodwill
- no subjection of MPA's profits to company taxes

Security Print alleged that these advantages were contrary to Article 88 (3) EC. The court considered that, where a State aid measure existed before 1 January 1958, this did not have

to be notified to the Commission. Since MPA had formed part of the municipality since 1735, the Commission did not have to be informed of the advantages afforded by the municipality.

Decision: The court did not have to determine whether the profits of MPA were exempt from company taxes and whether such an exemption would amount to a State aid measure. The court decided that if MPA did not have to pay company taxes, the Municipality would commit a tort by breaching the principle of fair competition by making use of the tax advantages in a public tender.

3.2.3 District court, The Hague, LJN: AB2893, 109653 / HA ZA 98-4115, 25 July 2001, Dutchtone v Kingdom of the Netherlands (D)

Facts and legal issues: Proceedings in first instance (civil law), telecommunications sector. KPN intervening

Within the framework of the implementation of the Mobile Telecommunications Services Act ("*Wet mobiele telecommunicatievoorzieningen*"), a legislative proposal to auction the available licences was introduced. KPN and Libertel already held licences for the frequencies involved. Part of the frequencies were, however, used to operate an analogue public telephone service, which was gradually replaced with the GSM network. Dutchtone complained that KPN and Libertel enjoyed unfair advantages since they did not have to purchase the remainder of their allotted frequency ranges, whereas Dutchtone did. Dutchtone argued that this constituted State aid and, since it had not been notified to the Commission, its implementation constituted a wrongful act toward Dutchtone.

Decision: Before adjudicating this matter, the court noted that it could only rule insofar as the actions were directed against the incompatibility of a national law with superseding provisions of international law, such as Community law, since Article 120 of the Dutch Constitution prohibited national courts from ruling on the legality of national laws as such. With regard to the alleged violation of Article 88 (3) EC, the court noted that it would first have to interpret and apply the concept of aid as defined in Article 87 EC. As the action, i.e. the creation of the law entailing the auction, and the position of KPN and Libertel within that auction, was not liable to distort competition, not all of the conditions of Article 87 had been fulfilled. As an underlying reason for this conclusion, the court adduced that, by initiating the auction and enabling third parties to obtain licences, the State had fulfilled its obligation to promote competition on the markets involved. The mere fact that KPN and Libertel did not have to pay for acquiring the remainder of their licences did not alter this.

3.2.4 Administrative Court for Trade and Industry, The Hague, LJN: AD9969, AWB 00/794, 30 January 2002, Dutchtone NV, legal successor to Federa NV v Staatssecretaris van het Ministerie van Verkeer en Waterstaat (State Secretary of the Ministry of Transport and Public Works) (D)

Also see section 3.2.3 above for the decision in the civil matter.

Facts and legal issues: Appeal (administrative law), telecommunications sector.

In light of the implementation of the "*Wet mobiele telecommunicatievoorzieningen*" (Mobile Telecommunications Act), KPN and Libertel acquired licences to operate GSM networks. Part of the frequency range intended for GSM Networks was not yet included in the licence due to the fact that KPN used those frequencies to operate an analogue public telephone service. Upon its replacement with the GSM network system, that frequency range was also awarded to KPN and Libertel. Dutchtone filed an appeal against the allocation of this part of the frequency range. Dutchtone's appeal *in primo* was dismissed, as was its subsequent appeal with the District Court of The Hague. In this case, among other things, Dutchtone argued that its obligation to pay for the frequencies through an auction, when such payments were not required by KPN and Libertel with regard to the second part of the obtained frequencies, constituted State aid for the benefit of KPN and Libertel.

Decision: The Administrative Court for Trade and Industry reached the same conclusion as was handed down by the District Court of The Hague[347]) that the allocation of the frequencies to Libertel and KPN did not constitute State aid within the meaning of Article 87 EC and therefore was not in violation of Article 88 (3) EC. The reasoning behind this conclusion was that, because the Kingdom of the Netherlands was in no way obliged to demand payment for the allocation of the frequencies, the fact that KPN and Libertel did not have to pay to acquire the second part of the frequencies did not mean that they avoided a financial cost which would have otherwise placed a burden on their available budget. The appeal was dismissed.

3.2.5 Administrative Court, Rotterdam, LJN: AF2577, TELEC 01/418-SIMO / TELEC/814-SIMO, 29 November 2002, Versatel 3G NV v Staatssecretaris voor Economische Zaken (State Secretary of the Ministry of Economic Affairs) (D)

Facts and legal issues: Proceedings in first instance (administrative law), telecommunications sector.

Based on the requirements for creating national licensing schemes for the roll-out of third generation mobile phones (UMTS), the State Secretary decided to auction off licences enabling the operation of such services. Although only five licences could be auctioned off, given the capacity of the frequency spectrum, six mobile network operators participated in the auction. Versatel did not obtain a licence and initiated proceedings seeking the annulment of the decision to hold an auction as well as the decisions awarding the licences to its competitors. Versatel alleged, inter alia, that operators who already had licences to operate second-generation mobile phone networks were favoured during the auction over those who had no such licences, resulting in a below market sale price for the licences, thus constituting a selective advantage for those undertakings, which amounted to non-notified State aid.

[347] LJN: AB 2893, 109653/HA ZA 98-4115.

Decision: The court found that Versatel had failed to substantiate its allegations that the licences were sold at below market value and that the choice for an auction as the method of transfer of the licences favoured the operators with second generation licences over those who had no such licences. Therefore the court, although it did not explicitly say so, concluded that no State aid was involved. The court denied all applications for annulment of the decisions.

3.2.6 Council of State, The Hague, AB 2004/262, 200202737/1, 17 December 2003, Samenwerkingsverband Noord Nederland and the College van Burgemeester en Wethouders van de Gemeente Groningen (Municipal Executive of the city of Groningen against a judgment by the district court Groningen in the matter between Stichting Prins Bernhardhoeve v the Governing Body of the Samenwerkingsverband Noord Nederland) (D)

Facts and legal issues: Appeal (administrative law), services sector.

The Samenwerkingsverband Noord Nederland ("SNN") granted a subsidy of approximately €1.8 million to the Municipal Executive of Groningen ("The Municipal Executive") for the expansion of an exhibition and conference centre named "Martinihal". The Stichting Prins Bernhardhoeve ("SPB") ran a conference centre nearby the Martinihal and competed with the Martinihal. SPB's application for annulment of the grant was rejected by the SNN. This decision was overturned in appeal. The Municipal Executive and the SNN subsequently lodged these appeal proceedings. Meanwhile, the expansion had been completed. The claimants alleged that the subsidy did not constitute State aid and in any event fell within the scope of the Block Exemption regarding aid to Small and Medium Sized Enterprise ("the Block Exemption").

Decision: The Council of State stated that it could not be excluded that trade between Member States had been affected by the subsidy. As a result, it should have been for SNN to ascertain whether Article 88 (3) EC did not apply in respect of the grant. In addition, in so far as the grant could be considered to fall under the Block Exemption, the requirements laid down in Articles 3 (1) and 9 (1) of the Block Exemption had not been fulfilled. The Council of State also found that the fact that the subsidy was part of the European Regional Development Fund did not exempt SNN from ascertaining the possible applicability of Article 88 (3) EC. The Council of State concluded, as did the administrative court in first instance, that the (administrative) decision to grant a subsidy was made without the requisite level of due care and was consequently annulled.

3.2.7 Council of State, The Hague, LJN: AO7997, 200307666/1, 21 April 2004, Bedrijvenvereniging Huiswaard/Overstad c.s. Municipal Executive of Alkmaar and AZ Real Estate BV, applicants against the decision in the case of Bedrijvenvereniging Huiswaar/Overstad c.s. v College van Burgemeester en Wethouders van de Gemeente Alkmaar (Municipal Executive of Alkmaar) (D)

Also see section 3.5.7 for the decision in the civil matter.

Facts and legal issues: Appeal (administrative law), real estate sector.

The Municipality of Alkmaar and Stichting AZ (Foundation AZ) and AZ Onroerend Goed BV (AZ Real Estate BV), together "AZ", concluded four agreements concerning the construction of a new soccer stadium with retail opportunities, the construction of homes on the present soccer stadium's site and the transfer of the related land plot. Overstad notified the Commission of the existence of the agreements and requested an examination of their compatibility with the EC State aid provisions because the transfer of the relevant land plots was supposedly at below market value prices. The Commission concluded that the agreements might constitute State aid and continued to investigate under Article 88 (2) EC. Overstad filed this appeal to prevent the further implementation of the agreements based on the basis of Article 88 (3) EC.

Decision: The court found that the transfer of the land plots was not inextricably linked to the grant of a construction licence for real estate on those land plots. The fact that the Commission had initiated proceedings under Article 88 (2) EC regarding the compatibility of the land transfer did not mean that the construction would not be possible under any circumstances since it has not been demonstrated that the construction could only take place on the basis of the agreed land transfers. The appeal was granted.

3.2.8 Administrative court, Amsterdam, LJN: AQ6500, AWB 02/5306, 5 August 2004, Classic FM Plc, Sky Radio Ltd., Jazz Radio BV, Wegener Radio en Televisie, Vrije Radio Omroep Nederland BV v Commissariaat voor de Media (Broadcasting Commission) (D)

Facts and legal issues: Proceedings in first instance (administrative law), television and radio sector.

The Nederlandse Omroepstichting, ("NOS") (Netherlands Broadcasting Foundation), a public body, notified the Broadcasting Commission of its intention to continue the Stichting Concertzender Nederland ("SCN") (Concert Broadcasting Foundation Netherlands), a private body, as an ancillary activity within the meaning of the Media Act ("*Mediawet*"). SCN was not commercially viable and such continuation would ensure its existence for the foreseeable future. To prevent any distortion of competition, the Media Act prohibited public broadcasting bodies from assisting private broadcasting bodies. The central issues here were whether the Broadcasting Commission had rightly determined that the affiliation between the NOS and

SCN was ancillary in nature; whether it was in line with the Media Act; and, specifically, whether such ancillary affiliation was likely to affect competition negatively given that, in this particular case, the financing received by SCN originated from public resources of the State Secretary of Education, Culture and Science.

Decision: The court found that the Commission had already, unrelated to this matter, initiated an investigation under Article 88 (2) EC with regard to the compatibility of the financing schemes of public broadcasting in the Netherlands, including the extent to which ancillary activities were allowed. The court moreover noted that for a decision concerning the validity of the ancillary affiliation of SCN with NOS, it would have to determine whether the provision of public funds by the State Secretary of Education, Culture and Science constituted State aid and whether such aid fell within the scope of any exemption. The fact that the Broadcasting Commission had failed to examine these issues led to the conclusion that the decision approving the subsidiary affiliation between the NOS and SCN lacked sufficient grounds. The case was thus referred back to the Broadcasting Commission.

Comment: According to the Dutch administrative law system, the court did not conclude on the issue of whether the continuation of SCN through public funds constituted State aid. It is first for the Broadcasting Commission to decide upon the application once again, taking account of the case law of the ECJ and Commission notices.

3.2.9 Administrative Court for Trade and Industry, The Hague, no. 94/2940/062/230, 4 September 1996, Le Comité des Salines de France and La Compagnie des Salins du Midi et des Salines d'Est v the Secretary of State for Economic (Staatssecretaris van Economische Zaken) and Frima BV (D)

Facts and legal issues: Appeal (administrative law), agricultural sector.

Le Comité des Salines and La Compagnie des Salins du Midi requested a review of a decision of the Secretary of State Economic Affairs of 14 March 1994, to support the establishment of a salt works in the town of Harlingen with a subsidy of up to NLG 11,338,500. This subsidy was granted under the Regulation of Subsidies for Regional Investment Projects. On 11 October 1994, the Secretary of State refused to conduct a review on the grounds that the request had not been lodged within the applicable time limit of six weeks.

Decision: The Court of Appeal for Trade and Industry annulled the decision of the Secretary of State. The ground for annulment was that the principles of fairness and due process had been breached because the Secretary of State had not adequately responded to the claimant's request to be given a copy of the decision granting the subsidy. This request had been made within the six-week period. The Secretary of State only decided not to give a copy of the decision to grant a subsidy after the six-week period had lapsed. The Secretary

of State was ordered by the court to reconsider the request for review (the final decision found that there was no incompatible State aid).

3.3 Recovery cases

3.3.1 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: Proceeding in first instance (administrative law), petrol sector.

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 any interest. The Secretary denied the application for annulment of the recovery decision upon which Demarol BV initiated these proceedings.

Decision: The court found that the Secretary was justified to order the recovery of part of the granted aid based on Commission decisions[348] declaring the aid incompatible in combination with Article 88 (2) EC. Moreover, Article 4:49(1) and sub (b) of the "*Algemene wet bestuursrecht*" (General Administrative Act) and the identical Article 13(1) and sub (b) of the Act in question enabled 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 reaching a definite conclusion yet, and any aid granted pending such proceedings would fall under the prohibition of Article 87 (1) EC. The court moreover found that Demarol BV could not invoke the principle of legitimate expectations or legal certainty because ECJ case law clearly states that reliance on those principles could only be successful if the aid in question was 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.

3.3.2 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.

[348] 1999/705/EC (OJ (1999) L280/87).

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 claimant contrary to the EC State aid provisions[349], the Secretary ordered recovery of the granted subsidies, 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 subsidy 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 the Secretary could not be expected 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.

3.4 Cases relating to taxes

3.4.1 Administrative Court for Trade and Industry, The Hague, no. 89/2275/47/003, 90/022/47/0003, 90/2708/003, 26 November 1991 Gebroeders Bakker Zaadteelt en Zaadhandel BV v the Public Organisation for Trade in Horticultural seed (Bedrijfschap voor de Handel in Tuinbouwzaden) (B)

Fact and Legal issues: Appeal (administrative law), agricultural sector.

The Commission decided on 11 October 1989 on the basis of Article 88 (2) EC that the aid to a foundation for research into seed technology was incompatible with the Common Market. Its reasoning was that the foundation financed its activities with levies raised by the Public Organisation for Trade in Agricultural Seed on the growers of the seeds (unless, for example, the financing was changed so that products imported from other Member States were no longer subject to the levy). The Commission prohibited the Dutch Government from granting any further such State aid through the Public Organisation for Trade in Agricultural Seeds ("POAS").

The claimant (a grower), on the basis of this decision, refused to pay the levy to the Public Organisation for Horticultural Seed ("POHS") and asked the court to annul the POHS demand to pay the outstanding levies.

[349] 2001/521/EC (OJ (2001) L189/13).

Decision: The court noted that the Commission had not been informed of the POHS intent to grant the aid. These measures were thus contrary to Article 88 (3) EC. This fact on its own, however, was insufficient to result in the aid measure being illegal[350]. Neither the Commission nor any other body had ordered a suspension of the payment of the aid of POHS, other than by way of Decision 90/189. The decision prohibited the grant of further aid and was addressed to the Dutch Government. It therefore applied not only to POAS but also to POHS.

The court found both the aid measures and the contested levy illegal because Decision 90/189 makes the unlawfulness of the aid measure dependent on its financing (levies on imported products). The final issue decided by the court was whether not only the levy itself but also the demand note of the POHS was illegal. Decision 90/189 was received by the State of the Netherlands on 7 November 1989 and therefore (on the basis of Article 254 EC) entered into force on that day. The content and purpose of the decision, according to the court, precluded any retroactive effect. As the State aid was illegal since 7 November 1989, the demand note against the claimant grower of 14 December 1984 was, according to the court, valid. The demand note made on 4 January 1990, however, was annulled.

3.4.2 Administrative Court for Trade and Industry, The Hague, AB 1995/483, 8 November 1994, Fokbedrijf Vloet Oploo B.V. v Landbouwschap (B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

Het Landbouwschap, the Agricultural board, imposed a levy on Fokbedrijf Vloet Oploo B.V., a breeding establishment, on the basis of the 1992 Regulation on manure levies (in Dutch: "*Heffingsverordening Mest 1992*"). The levy was aimed at stimulating an efficient process of manure surplus. Fokbedrijf Vloet Oploo lodged a notice of objection to the decision of the Agricultural board, because it was of the opinion that undertakings, which take initiative and make investments for the processing of manure, did not have to pay the levy.

Decision: The 1992 Regulation on manure levies was approved by the Commission. In its decision, the Commission considered that aid to cattle breeding establishments, which process the manure themselves, could be considered exploitation aid. The Administrative Court for Trade and Industry held that there was no possibility under the 1992 Regulation on manure levies of making an exception for undertakings which have invested in the stimulation of an efficient process of manure surplus. Furthermore, the court ruled that the Regulation was not contrary to EC law. It dismissed the appeal.

3.4.3 Administrative court, Rotterdam, LJN: AD9026, MEDED 00/933-SIMO and MEDED 00/955-SIMO (joined cases) Stichting Saneringsfonds Varkensslachterijen ("SSV") and U-Vlees BV, Exportslachterij J. Gotschalk & Zonen BV, Slachthuis Nijmegen BV, Houbensteyn Porkhof BV, Het Rotterdams

[350] Case C-301/87, France v Commision [1990] ECR I-307, recitals 9, 11 and 19.

Varkensslachthuis CV v Directeur-Generaal van de Nederlandse Mededingingsautoriteit (Director-General of the Dutch Competition Authority) (D)

Facts and legal issues: Proceedings in first instance (administrative law), agricultural sector. SturkoMeat Group BV intervening in both cases.

SSV was a foundation established to reorganise the overcapacity in the pig slaughter sector. To finance the reorganisation, levies were imposed on all pig slaughterhouses. This scheme was notified to and approved by the Commission. Sturkomeat complained that several of the agreements concluded between SSV and other parties violated Article 81 (1) EC. SSV argued that, because the agreements in question were part of an approved aid scheme, they could not be in violation of Article 81 (1) EC.

Decision: The court did not agree with SSV's argument that the agreements were exempt simply because they related to an approved aid scheme, as the Commission had not been able to consider these agreements when it approved the aid scheme. Therefore, it could not take their effects into account when reaching its definitive conclusion. As a result, there were insufficient grounds to automatically assume that the agreements were inextricably linked to the approved aid scheme. Moreover, with regard to the reliance by SSV on the *Weyl* judgment, the court noted that, in that particular case, the agreements were exempt from Article 81 (1) EC because they formed an integral part of an approved aid scheme and did not restrict competition beyond what was necessary for the attainment of the desired objectives. In the case at hand, the agreements were not inextricably linked to the object of the approved aid scheme and the court dismissed the application.

3.4.4 Court, Leeuwarden, LJN: AD8994, Bk 3231/96 1 February 2002 Inspecteur van het Bureau Heffingen van het Ministerie van Landbouw, Natuurbeheer en Visserij (Inspector of the Ministry of Agriculture, Nature Management and Fisheries Levies Office) (B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

The Inspector imposed a levy on X for a manure surplus. X contended, inter alia, that the basis of the levy was unlawful and that it entailed State aid.

Decision: The court did not follow X's arguments and found that Article 120 of the Dutch Constitution prohibited it from examining whether the levy qualified as State aid since that would entail a review of the law. In addition, the prohibition of Article 87 (1) EC did not have direct effect on the national legal order. Furthermore, the Commission had not initiated any proceedings against the Netherlands under Article 88 EC. Therefore, the court concluded that no State aid was involved.

3.4.5 Administrative Court for Trade and Industry, The Hague, LJN AD 9818, AWB 99/7, 13 February 2002, A v Productschap voor Tuinbouw (Horticultural Commodity Board for Horticulture) (B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

The Commodity Board for Horticulture imposed a levy on A, consisting of a percentage of its income generated through the sale of horticultural products as well as a fixed amount for all members of the Horticultural Commodity Board. The levy's proceeds were (in part) destined for research and promotional activities, as well as quality and environmental projects. A argued that the activities paid for with these proceeds constituted incompatible State aid.

Decision: The Administrative Court for Trade and Industry ruled that, as the levies had been notified to and approved by the Commission in accordance with the required procedures, no violation of Article 88 (3) EC had occured. Therefore, the levies did not constitute incompatible State aid and the appeal was dismissed.

3.4.6 Supreme Court (Hoge Raad), The Hague, NJ 2004/59, 7 March 2003, Compaxo BV, Internationale Groothandel Vlees BV, Compaxo Vlees Zevenaar BV v Stichting Vormingsfonds voor de Opleiding van Werknemers in de Vleeswarenindustrie (Foundation for the Educational Fund of the Education of Employees in the Meat Industry) (B)

Facts and legal issues: Appeal in cassation (civil law), agricultural sector.

A levy was imposed on Compaxo a.o., active in the meat industry, for the financing of three funds managed by the Stichting Vormingsfonds, established during the implementation of the Collective Labour Agreement for the meat industry. These funds included the Fund for Youth Employment in the Meat Industry, the Fund for Industry Education and the Social Fund. Compaxo a.o., however, refused to pay the levies, arguing that the payments constituted State aid and that the scheme, contrary to Article 88 (3) EC, had not been notified to the Commission. At first instance and on appeal, the courts found that the levies constituted State measures and could therefore, at least theoretically, constitute State aid. However, no State aid was involved in the case at hand because the Collective Agreement was reached after collective negotiations had taken place between employers and employees to the benefit of all employees and the entire industry (i.e. there was no selective advantage). Compaxo a.o. argued that the interpretation of selective advantage was incorrect and reiterated its argument used in the previous instances, as described above.

Decision: The Supreme Court found that whether or not a measure qualifies as State aid depends on the effects of the measure concerned and not its reasons or intended purposes. Therefore, the fact that the measure at hand was created through collective negotiations and was applicable to all employees and undertakings in the sector, did not preclude the applicability of Article 87 (1) EC, nor could the social purposes of the funds lead to such a

conclusion. The court went on to investigate whether the advantages were (directly or indirectly) granted through State resources and therefore whether the measure actually fell within the scope of Article 87 (1) EC. The Stichting Vormingsfonds was a private foundation that was not created by the State and the proceeds of the levies were for the benefit of the Stichting and the funds it managed. The advantages of the undertakings were thus not funded through State resources. This was not altered by the fact that the levy had been imposed within the framework of a compulsorily applicable Collective Agreement, as this compulsory applicability did not provide the State with any power of disposal of the Stichting's proceeds.

3.4.7 Council of State, The Hague, LJN: AF8316, 200201196/1, 7 May 2004, Centrale Organisatie voor de Vleesgroothandel v Minister van Landbouw, Natuur en Visserij (Secretary of Agriculture, Nature Management and Fisheries), (B)

Fact and legal issues: Proceedings in first instance (administrative law), agricultural sector.

Under the "*Destructiewet*" (Destruction Act) the Secretary of Agriculture, Nature Management and Fisheries could determine the levies to be imposed on undertakings that provided services as described in the Destruction Act, including the removal of dead animals from farms and slaughter waste from slaughter houses. The claimant's request for annulment of the decision establishing the levies for 2000 was dismissed by the Secretary, whereupon these proceedings were initiated. The claimant alleged, inter alia, that the levies discriminated between undertakings operating in the slaughter industry and cattle-breeding undertakings, as the latter received a non-recurring compensation for those charges from the Ministry of Public Health, Education and Sport (the legal predecessor to the Secretary of Agriculture). These compensations thus constituted State aid and were in violation of Article 87 EC.

Decision: The court circumvented the question of whether the levies qualified as State aid by concluding that undertakings in the slaughter industry were part of a distinctly different market than the cattle-breeding undertakings. Because they could not reasonably be considered competitors, the court found that no State aid could exist that distorted or threatened to distort competition.

3.4.8 Administrative Court for Trade and Industry, The Hague, LJN: AO1786, AWB 01/830, 19 December 2003, A v Productschap voor Vee, Vlees en Eieren (Commodity Board for Cattle, Meat and Eggs) (B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

In 1998, the Commodity Board's legal predecessor notified the Commission of several intended aid schemes in accordance with Article 88 EC, which the Commission subsequently approved. A unsuccessfully initiated proceedings against the decision requiring it to pay the levies imposed under one of the schemes, upon which it filed the current appeal. A alleged

that the levies were imposed on the basis of an un-notified scheme or, if notified, the scheme did not contain the legal basis on which the levies were imposed.

Decision: The Administrative Court for Trade and Industry found that, although the levies concerned constituted State aid within the meaning of Article 87 EC, the aid scheme had been duly notified and approved by the Commission in accordance with Article 88 EC. Moreover, the approved scheme included the basis on which the levies were imposed. Therefore the application was dismissed.

3.4.9 Administrative Court for Trade and Industry, The Hague, LJN: AO7843, AWB 98/422, 7 April 2004, A v Productschap voor Tuinbouw (Horticultural Commodity Board) (B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

A initiated proceedings against a decision by the Horticultural Commodity Board denying its application for annulment of the primary decision. The underlying point of contention was the refusal of A to pay the levies imposed by a decree issued by the Horticultural Commodity Board. A alleged that the levies constituted State aid, which had not been notified to the Commission.

Decision: The court found that the various aid schemes drawn up by the Horticultural Commodity Board had been notified to the Commission but that the Commission had not yet concluded its investigation. Because there had been no definitive decision, Article 88 (3) EC applied. As a result, the Horticultural Commodity Board was not allowed to impose the levies concerned. Therefore, the application was successful and the decisions by which A was confronted with a demand for payment of the levies were annulled.

3.4.10 Administrative Court for Trade and Industry, The Hague, LJN: AO7804, AWB 97/1115 7 April 2004, A v Productschap voor Tuinbouw (Horticultural Commodity Board) (B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

Similar to those mentioned in case 3.4.9 above due to joint adjudication.

Decision: *Ibid*.

3.4.11 Administrative Court for Trade and Industry, The Hague, LJN: AQ5558, AWB 02/1985, 15 June 2004, Dutch Wine Traders BV v Productschap voor Wijn (Wine Commodity Board) (B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

The Wine Commodity Board imposed a levy on its members which, according to Dutch Wine Traders BV, amounted to un-notified State aid because the Wine Commodity Board did not exist at the time that these levies, calculated by the Wine Commodity Board's legal predecessor, were notified to the Commission.

Decision: The Administrative Court for Trade and Industry found that the levies had been notified to the Commission. The fact that the organisation responsible for calculating the initial levies differed from the organisation imposing them did not alter this. Therefore the imposition of the levies was not considered to be in violation of Article 88 (3) EC.

3.4.12 Administrative Court for Trade and Industry, The Hague, LJN: AR6472, AWB 02/1512, 02/1513, 12 November 2004, A and B v Productschap voor Vis (Fish Commodity Board) (B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

The Netherlands notified a subsidy for fishermen to reduce their financial burden as regards disability insurance premium charges. The Commission informed the Netherlands that it would initiate proceedings under Article 88 (2) EC. Meanwhile, the Fish Commodity Board rejected A's and B's subsidy request, upon which A and B started proceedings for the annulment of that decision. When those proceedings proved unsuccessful this court action was initiated.

Decision: The Administrative Court for Trade and Industry found that refusing the subsidy requests was in violation of Article 88 (3) EC now that such decision was made without the Commission having reached a final conclusion under Article 88 (3) EC. The decision was to be annulled and the Fish Commodity Board was to make a new decision as soon as the Commission had concluded its investigation.

3.4.13 Court, Amsterdam, LJN: AS4899, 00/03621, 14 January 2005, Stadion Amsterdam NV v Directeur van de Gemeentebelastingen Amsterdam (Director of the Municipal Taxes Amsterdam) (B)

Facts and legal issues: Appeal (administrative law), real estate sector.

Stadium Amsterdam NV appealed the Director of the Amsterdam Municipal Taxes' decision determining the value of its stadium. One of the issues was whether Article 18 (3) of the "*Wet waardering onroerende zaken*" ("WOZ"; Act on the Valuation of Real Estate) and Article 2 of the implementing regulation constituted State aid.

Decision: The court stated that, even if the application of the WOZ qualified as State aid, which it considered not to be the case here, it would only lead to the inapplicability of the particular provision constituting State aid instead of the entire law, as was argued by Stadium Amsterdam NV. As a result, the property involved would still need to be valued in order to

enable taxes to be levied over the value of the property. Therefore, the provisions concerned were not incompatible with Articles 87 and 88 EC since they did not confer a benefit upon the owner of the property concerned. The appeal, however, was awarded on different grounds.

3.4.14 Court, Amsterdam, LJN: AS5058, 00/03881, 21 January 2005, Stadion Amsterdam CV v Directeur van de Gemeentebelastingen Amsterdam (Director of the Municipal Taxes Amsterdam (B)

Facts and legal issues: Appeal (administrative law), real estate sector.

Stadium Amsterdam CV appealed the Director of the Amsterdam Municipal Taxes' decision determining the value of the stadium in question. One of the issues was whether Article 220c j° 220d "*Gemeentewet*" (Municipality Act) constituted State aid and therefore whether failure to notify these provisions to the Commission constituted a violation of Article 88 EC. It was argued that, by not determining a value for a property, it would become impossible to tax that property for the purposes of the WOZ and, as a result, the owner of the property obtained a benefit, i.e. would not be confronted with a burden it would normally have faced.

Decision: The court found that labelling the aforementioned provisions as State aid would not preclude the applicability of the entire WOZ, but only the particular provisions concerned. As a result, the property involved would still have to be valued, thereby enabling taxes to be levied over the value of the property. Therefore, there was no benefit for the owner of the property and the provisions concerned were not in violation of the State aid provisions.

3.5 Cases relating to State measures other than taxes *per se*

3.5.1 Administrative court, Roermond, LJN: AA6940, 99/1117 WET K, 30 June 2000, Rijmar Spoorlaan BV + Rijmar de Bond BV v Minister van Financiën (Secretary of the Treasury) (A)

Facts and legal issues: Proceedings in first instance

Rijmar BV operated petrol stations along the border between the Netherlands and Germany. According to a specific Act ("*Tijdelijke regeling subsidie tankstations grensstreek Duitsland*"), such petrol stations were eligible for a maximum of €100,000 in aid over a three-year period to compensate the negative effects on competition due to excise differences in the Netherlands and Germany. Rijmar BV created the subsidiaries Rijmar Spoorlaan BV and Rijmar de Bong BV in order to obtain multiple aid grants. No such multiple aid was granted, however, since the Secretary considered the undertakings as a single entity for the purposes of Community competition law (more specifically State aid) and Rijmar BV had received the maximum amount of aid. The Secretary based his decision on a Commission decision[351] declaring the aid granted under the law incompatible with the Common Market with respect

[351] 1999/705 1EC (OJ (1999) L280/87).

to the majority of aids granted. The central issue in this case was whether the defendant rightfully refused to grant the aid to Rijmar Spoorlaan BV and Rijmar de Bong BV.

Decision: The court found that the Secretary's decision should be annulled as it violated the justification principle as laid down in Article 7:12 of the "*Algemene wet bestuursrecht*" (General Administrative Act) for several reasons. First, the Commission decision forming the basis of the Secretary's decision did not specifically relate to the situation of Rijman Spoorlaan BV and Rijman de Bong BV since their requests had not been notified to the Commission and therefore were not part of the Commission's decision-making process. Secondly, the Secretary had failed to demonstrate why the undertakings involved constituted a single undertaking for the purpose of Community competition law. The court also found that the Secretary's mere reference to the Commission's initiation of an investigation under Article 88 (2) EC rather than to the Commission's decision did not constitute a sufficient justification as required Article 7:12 of the General Administrative Act. The court further held that the claimants could not justifiably rely on the expectation that the aid would be approved, given the communication between the claimants and their representative association and the fact that the latter was aware of potential difficulties. The decision was annulled for lack of justification.

3.5.2 Administrative Court for Trade and Industry, The Hague, LJN: AF8582, AWB 02/05, 29 April 2004, Happy Radio Netherlands BV v Staatssecretaris van het Ministerie van Verkeer en Waterstaat (State Secretary of the Ministry of Transport and Public Works) (B)

Facts and legal issues: Appeal (administrative law), television and radio sector.

Happy Radio had to pay the State Secretary a sum, the level of which was determined by a yearly revised Ordinance under the "*Wet op de telecommunicatievoorzieningen*" (Act on Telecommunications Facilities). This sum was to cover the costs concerned for the grant of an operating licence and for supervision services. Article 16 of the "*Telecommunicatiewet*" (Telecommunications Act) facilitated the promulgation of Ordinances regarding reimbursement of costs made in connection with matters specified under the Telecommunications Act. Happy Radio refused to pay the determined sum and, after having lodged a complaint with the State Secretary, which was denied, filed an appeal, which was also denied. It subsequently initiated these proceedings. It submitted that the Ordinance discriminated between (local) public radio stations and commercial stations with regard to the sums payable and therefore with regard to the amount of correlated reimbursements received, without there being any justification for such differential treatment. Happy Radio claimed that, as a result, the State Secretary illegally granted State aid to (local) public radio stations.

Decision: The Administrative Court for Trade and Industry found that the Ordinance stated with sufficient clarity why and how the different allocation norms, which determined which

station got what and why, had been formulated. It went on to state that the payments were essentially reimbursements, requiring a legal basis, which could not exceed the actual costs of the services provided. In addition, the relationship legally required between the service and the costs was present. Therefore the differential payments determined by the allocative norms were neither unreasonable nor arbitrary. As a result, no selective reduction in burdens otherwise borne by the public stations existed and hence there could be no State aid. The appeal was dismissed.

3.5.3 Council of State, The Hague, LJN: AO8853, AB 2004/225, 200303711/1, 6 May 2004, X v College van Gedeputeerde Staten van de Provincie Overijssel (Provincial Executive of Overijssel) (C)

Facts and legal issues: Appeal (administrative law), real estate sector.

The Provincial Executive approved the Haaksbergen City Council's zoning plan for retail area development. After the Provincial Executive's denial of X's application for annulment of that decision, these proceedings were initiated. Within the context of the zoning plan, the City Council would donate land free of charge and grant partial financing of the construction project.

Decision: The Council of State found that the Provincial Executive had not taken account of the city council's notification of the use of public funds, and donating land free of charge would have to be notified to the Commission. Moreover, the Provincial Executive had failed to determine in what other ways the zoning plan could be realised, should the Commission deem the use of public funds and the transfer of the land incompatible with the EC Treaty. In light of these considerations, the Council of State was of the opinion that the Provincial Executive denied the application without the proper level of due care. As a result, the appeal for annulment of the administrative decision was successful.

3.5.4 Administrative Court for Trade and Industry, The Hague, LJN: AQ5097, AWB 03/722 and 27 other cases, 28 May 2004, Interrose BV and 27 others v Minister van Economische Zaken (Secretary of Economic Affairs)(B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

Interrose BV c.s. initiated proceedings in reaction to the Secretary's refusal to annul his initial decision denying Interrose BV c.s. an R&D declaration pursuant to the "*Wet vermindering afdracht loonbelasting en premie voor de volksverzekeringen*" (Act Concerning the Payment of Income Tax and Premium for Social Insurances). This Act had been amended to exclude undertakings active in the conventional refinement of flowers from obtaining such declarations. Previous R&D declarations had enabled Interrose BV c.s. to claim tax benefits in relation to its R&D activities, which essentially meant that Interrose BV c.s. obtained subsidies. Although such subsidies had been declared compatible by the Commission, Interrose BV c.s. submitted that such a finding of compatibility only applied to the scheme in

the format as notified (i.e. including conventional refinement activities). Any changes to this format, such as the exclusion of conventional refinement, would lead to the scheme no longer corresponding to the notified scheme, thus necessitating notification to the Commission. Failure to do so would be a violation of Article 88 EC.

Decision: Based on what was submitted during the oral stages of the proceedings, the Administrative Court for Trade and Industry was of the opinion that the sole reason that Interrose BV c.s. had invoked incompatibility of the scheme with the EC State aid provisions was to cause conventional refinement to once again be included within the definition of R&D. The court ruled that, since the argument as to whether or not the amended scheme would constitute State aid could not result in the grant of the R&D declaration to Interrose c.s., there was no need to rule further on the matter of whether the R&D scheme constituted a scheme that was so substantially different from the notified scheme that it had to be notified to the Commission.

3.5.5 Council of State, The Hague, AB 2004/343, 11 August 2004, X v State Council of Zuid-Holland (D)

Facts and legal issues: review of former judgment (administrative law), real estate sector.

X initiated proceedings for review of a zoning plan approval which had already been considered at the highest instance. The central issue was whether new facts had arisen since the decision at highest instance which, if known, could haven led to a different conclusion. X alleged that during the time leading up to the zoning plan decision it had become clear that the fund from which the project was to be financed would be discontinued and therefore other sources would have to be used to maintain the project's financial solvability. X alleged that the decision had been taken without the requisite investigation and certainty regarding the financial solvency of the project and alleged that the State council had been inadequately informed in this regard.

Decision: The Council of State agreed that the information provided regarding the project's financing had been inadequate. It found that the fact that at the time the zoning plan decision had been taken, the project's financial details had not yet been decided upon, was no reason for the State council to withhold its approval, since this was unlikely to prevent the project's realisation within the set time frame.

3.5.6 Council of State, The Hague, AB 2005/395, 200405506/1, 4 May 2005, The Minister of the Interior and Kingdom Relations, applicant, the court judgment in the case between respondent and the Minister of the Interior and Kingdom Relations (A)

Facts and legal issues: Appeal (administrative law), agricultural sector.

On the basis of the "*Wet tegemoetkoming schade bij rampen en zware ongevallen*" (Act on allowance in case of damage resulting from disasters and severe accidents), the "*Regeling tegemoetkoming schade bij extreem zware regenval 1998*" (Regulation on allowance in case of damage from extremely severe rainfall 1998) was adopted. The defendant in this case (a commercial partnership) was granted an allowance on the basis of this regulation of over €400,000. During the procedure for lodging an objection, initiated by the defendant, the "*Algemene Inspectiedienst*" (General Inspection service) started an investigation into the accuracy of the information provided by the defendant while applying for the allowance. It appeared that the defendant had committed fraud. As a consequence, the Minister decided to recover the amount granted in excess, increased by the interest payable by law.

The District Court had ruled amongst other things that in this case there was no public law basis for claiming statutory interest. The Minister argued before the Council of State that this ruling was unjustifiable and that he could derive his competence in this respect from Article 87 (1) EC. He asserted that, because it had appeared that the defendant had unjustifiably been granted an allowance, this allowance had gained the character of an illegal aid. Since recovery was meant to restore the situation to what it was before the grant of the aid, it would also have to extend to the statutory interest.

Decision: The Council of State did not agree. It held that, contrary to what the Minister argued, Article 87(1) EC does not furnish a public law basis for claiming statutory interest. The article was not intended to stretch so far as to provide the Minister with a direct competence to claim statutory interest when recovering unjustifiably granted allowances on the basis of the Regulation.

3.5.7 Supreme Court (Hoge Raad), The Hague, LJN: AT6370, C04/183 HR, 7 October 2005, Bedrijvenvereniging Huiswaard/Overstad, X, Hein Jong Projectontwikkeling BV v Gemeente Alkmaar (Municipality of Alkmaar) (D)

Facts and legal issues: Appeal in cassation (civil law), real estate sector.

Stichting AZ (Foundation AZ) and AZ Onroerend Goed BV (AZ Real Estate BV), together "AZ", and the Municipality of Alkmaar concluded four agreements concerning the construction of a new soccer stadium in combination with retail opportunities, the construction of homes on the site of the present soccer stadium and the transfer of the related plots of land. Overstad pointed the Commission to the existence of the agreements and requested an examination of their compatibility with the State aid provisions because the relevant plots of land were supposedly transferred at prices below market value. The Commission concluded that the agreements potentially constituted State aid and continued to investigate as provided for in Article 88 (2) EC. Overstad filed an application to obtain an interim injunction based on Article 88 (3) EC to prevent the further implementation of the agreements. The interim injunction was rejected by the court. Overstad lodged an appeal against this ruling.

Decision: In the appeal procedure, the President of the court rejected the argument of the municipality that Article 88 (3) EC did not have any direct effect due to the fact that no definite conclusion on State aid had yet been reached. The President also found that lower-level governmental bodies were bound by the direct applicability of Article 88 (3) EC as well and therefore ordered to hold the further implementation of the agreements until the Commission concluded its investigation under Article 88 (2) EC. The municipality lodged an appeal. The Supreme Court had to rule on the legal consequence of an investigation initiated by the Commission on a new State aid measure, which had not been notified to the Commission. The stand-still obligation of Article 88 (3) EC is only applicable if there is a state aid measure in the meaning of Article 87 (1) EC. Contrary to the earlier judgment of the civil court, the Supreme Court held that if the Commission decided to investigate a certain measure, this would not automatically mean that the measure constituted State aid in the meaning of Article 87 (1) EC. The Commission only initiated the investigation because it could not exclude that the measure in question constituted State aid. According to the Supreme Court, the Commission' statement could not be interpreted as a provisional judgment that there was indeed State aid. The judgment of the civil court was set aside. The Supreme Court referred the case to the Civil Court in The Hague for further consideration.

3.6 Preliminary rulings

3.6.1 Council of State, The Hague, AB 1995/437, 1 November 1994, Ijssel-Vliet Combinatie B.V. v State (Minister of Economic Affairs) (B)

Facts and legal issues: Appeal (administrative law), shipbuilding and fisheries sectors.

The undertaking IJssel-Vliet was building a fishing vessel. Its request for subsidy, based on the Regulation concerning generic aid for the construction of new sea ships 1988 ("*Regeling generieke steun zeescheepsnieuwbouw 1988*"), was denied by the Minister of Economic Affairs. The Minister explained in his decision that the aid could not be granted because of the Commission's policy on aid to the fisheries and shipbuilding sector, which was laid down in guidelines and a circular.

Decision: On appeal, the question was raised of whether the Commission had the authority to assess a State aid measure, not only on criteria relating to competition policy (Article 87 (1) EC), but also on criteria which the Commission derived from the European common fisheries policy and which are laid down in guidelines. The legal effect of these guidelines could be questioned, because the European Council had the exclusive authority on the European fishery policy. Therefore, it was also unclear whether Member States were obliged to apply the guidelines as basic principles when deciding on an application for aid for the building of a fishing vessel.

The Council of State decided to request a preliminary ruling to the ECJ on the following questions:

"*1. In the absence of an express authorization from the Council of the European Communities, is the Commission of the European Communities, having regard to Article 42 of the Treaty establishing the European Community in conjunction with Article 49 of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector, empowered under the competence given to it by Article 93 of the EC Treaty to investigate aid granted by Member States, to draw up, publish and apply as basic principles for the assessment of State aid measures, Guidelines for the Examination of State aids in the Fisheries Sector (88/C 313/09) in order to coordinate Council Regulation (EEC) No 4028/86 and the Council Directive of 26 January 1987 on aid to shipbuilding (87/167/EEC), where those Guidelines lay down not only criteria pertaining exclusively to competition policy but also criteria derived from the Community fisheries policy?*

2. If Question 1 is answered in the affirmative:

Are the Member States obliged to apply the abovementioned Guidelines as basic principles when deciding on an application for aid for the building of a vessel intended for fishing? If so, what is the basis for that obligation?

Does that obligation only apply where the vessel in question is wholly or partly intended for fishing in waters under the sovereignty or jurisdiction of the Member States of the Community or waters to which the Communities' external fisheries policy relates?"

In answer to the questions referred to it by the Council of State, the ECJ ruled that[352]:

1. The Commission, in exercising its powers under Articles 87 and 88 EC could adopt the guidelines for the examination of State aid in the fisheries sector (88/C 313/09), which required compliance, not only with criteria pertaining exclusively to competition policy, but also with those applicable in relation to the common fisheries policy, even if the Council had not expressly authorised it to do so.

2. A Member State, such as the Netherlands, which is subject to the obligation of cooperation under Article 88 (1) EC and which has accepted the rules laid down in the Guidelines must apply those Guidelines when deciding on an application for aid for the construction of a fishing vessel intended to form part of one of the Community fleets, irrespective of the area in which it fishes.

[352] Case C-311/94, Ijssel-Vliet Combinatie B.V. v Minister van Economische Zaken [1996] ECR I-5023.

3.6.2 Supreme Court, The Hague, BNB 2002/253 and case C-175/02 (F.J. Pape v. Minister van Landbouw, Natuurbeheer en Visserij), 13 January 2005, 8 March 2002, X v Inspecteur van het Bureau Heffingen van het Ministerie van Landbouw, Natuurbeheer en Visserij (Inspector of the Ministry of Agriculture, Nature Management and Fisheries) Levies Office (B)

Facts and legal issues: Appeal in cassation, agricultural sector.

The Inspector imposed a levy on X pursuant to the "*Meststoffenwet*" (Fertiliser Act). The proceeds of the levies were partly used to finance a "*kwaliteitspremiëringssysteem*", a system designed to finance the transportation of high quality manure or other organic fertilisers to areas where only lower quality levels were available. Although this measure constituted State aid, the Commission informed the Netherlands that it would not object to its implementation until the end of 1989. X alleged that the levies during 1987 and 1988 were imposed in violation of the stand still provision of Article 88 (3) EC.

Decision: The Supreme Court requested a preliminary ruling from the ECJ on the following questions:

1. *"For so long as the implementation of an aid measure is not permitted under the last sentence of Article 88 (3) EC, does the prohibition laid down in that provision also apply to the introduction of a levy, the revenue from which is, under the relevant law, earmarked in part for the financing of that measure, regardless of whether there has been any disturbance of trade between Member States which can (partly) be attributed to the levy as the method of financing the aid measure? If the answer to this question depends on the closeness of the connection between the levy and the aid measure, or on the time when the revenue from the levy is actually used for the aid measure, or on other circumstances, what circumstances are relevant in that regard?"*

The ECJ determined that it was necessary to answer only the third part of this preliminary question (i.e. whether Article 88 (3) EC applies regardless of the closeness of the connection between the financing tax and the aid measure in question). It found that the prohibition of implementation under Article 88 (3) EC could not apply to a tax, if that tax, or a certain part of the revenue from it, is not hypothecated to the financing of an aid measure.

2. "*If the prohibition on implementing the aid measure also applies to the earmarked levy, can the person on whom the levy is imposed then, by relying on the direct effect of Article 88 (3) EC, oppose in legal proceedings the full amount levied on him or only that portion which corresponds to the part of the revenue which is expected to be spent or has actually been spent during the period in which the implementation of the aid measure is or was prohibited under that provision?"*

In light of the answer to the first preliminary question, the ECJ considered there was no need to answer the other questions.

3. "*Do specific requirements arise from Community law with regard to the method of determining what portion of a levy falls under the prohibition laid down in the last sentence of Article 88 (3) EC in the case of a levy the revenue from which is earmarked for various purposes for which there are also other sources of financing in addition to the levy and which are not all covered by Article 88 EC, where no apportionment formula is specified in the national provision instituting the levy? In such case, must the portion of the levy which can be allocated to financing the aid measure falling under Article 88 EC be determined or an estimated basis according to the time when the levy was imposed or must it be based on subsequently available data relating to the total revenue from the levy and to the actual expenditure for each of the various purposes?*"

In light of the answer to the preliminary question, the ECJ determined that there was no need to answer the other questions.

At the time of writing, the Supreme Court had not yet issued a ruling based on the ECJ judgment.

3.6.3 Supreme Court, The Hague, LJN: AB2884, 35525 and case C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën, 15 January 2005, 8 March 2002, Streekgewest Westelijk Noord-Brabant and Staatssecretaris van Financiën (State Secretary of the Treasury) v a judgment given by the court of Appeal of The Hague case nr. BK-96/03827, 15 July 1999 (A)

Facts and legal issues: Appeal in cassation, agricultural sector.

The Netherlands Government notified the Commission of the draft "*Wet heffingen op milieugrondslag*" (Law introducing taxes for the protection of the environment). The Commission informed the Netherlands of its decision not to raise any objections to the aid measures included in the draft. The Netherlands subsequently amended the Act to include various other aid schemes. The Commission considered the amended schemes as non-notified aid since they had been adopted before the Commission had confirmed its position in respect of them. Streekgewest Westelijk Noord-Brabant argued that, because the schemes were not notified, the levies were imposed without a proper legal basis and were therefore illegal. Moreover, the levies imposed on the basis of the Act were incontrovertibly linked to exemptions, reduced tariffs and other benefits for other parties subject to the Act, i.e. the proceeds of the levies were used to provide others with exemptions. As a result, the Act was unwarrantedly selective in its application and this, in combination with the benefits enjoyed by some, constituted State aid in the view of the Streekgewest Westelijk Noord-Brabant.

Decision: To resolve the issues before it, the Supreme Court turned to the ECJ for a preliminary ruling. With regard to the State aid issue the court asked the following questions:

1. "*May only an individual who is affected by a distortion of cross-border competition as a result of an aid measure rely on the last sentence of Article 88 (3) EC?"*

The ECJ found that the last sentence of Article 88 (3) EC should be interpreted as meaning that it may be relied upon by a person liable to a tax forming an integral part of an aid measure levied in breach of the prohibition on implementation referred to in that provision, whether or not the person is affected by the distortion of competition resulting from that aid measure.

2. "*Where an aid measure within the meaning of the last sentence of Article 88 (3) EC consists of an exemption from tax (which is to be construed as also meaning a reduction in or relief on such tax) whose proceeds are paid into the public coffers, and no provision in that respect is made for suspending the exemption pending the notification procedure, must that tax be regarded as part of that aid measure, by virtue of the very fact that the levying of the tax on persons who do not enjoy an exemption is the means whereby a favourable effect is produced, so that as long as the implementation of that aid measure is not permitted under the abovementioned provision, the prohibitions laid down therein is also applicable to (the levying of) that tax?"*

3. *In the event that the answer to the pervious question is in the negative: where a connection [such as the fact that a small part of the tax (NLG 0.70 per tonne of waste) serves to compensate for the reimbursement schemes referred to in paragraph 6 of this judgment] must be established between the increase in a particular tax whose proceeds are paid into the public coffers and a proposed aid measure within the meaning of the last sentence of Article 88 (3) EC, must the introduction of that increase be regarded as a (start on the) putting into effect of that aid measure within the meaning of this provision? If the answer to this question turns on the intensity of that connection, what circumstances are relevant in this respect?*"

Due to the similarity between the subjects of preliminary questions two and three, the ECJ found it appropriate to deal with those questions together. The ECJ concluded that with preliminary questions two and three, the court essentially wanted to establish the circumstances under which there was sufficient link between a tax and an aid measure which consisted of an exemption from that tax, with the result that the prohibition on implementation referred to in the last sentence of Article 88 (3) EC would apply not only to the aid measure. The answer to the second and third question according to the ECJ was that the last sentence of Article 88 (3) EC should be interpreted as meaning that the prohibition in it applies to a tax only if the revenue from it is hypothecated to the aid measure at issue. The fact that the aid is granted in the form of a tax exemption or that the loss of revenue due to that exemption is,

for the purposes of the budget estimates of the Member State in question, offset by an increase in the tax is not in itself sufficient to amount to such hypothecation.

4. *If the prohibition on implementation of the aid measure also relates to the tax, does a final decision by the Commission declaring the aid measure compatible with the common market not mean that the unlawfulness of the tax is retroactively corrected?*

The ECJ was of the opinion that in light of the answers given to question one to three, questions four to six did not need to be answered.

5. *If the prohibition on implementation also relates to the tax, can persons on whom the tax is levied oppose such tax in legal proceedings by relying on the direct effect of Article 88 (3) EC in respect of the total amount of the tax or only effect of Article 88 (3) in respect of the total amount of the tax or only in respect of part thereof?*

Ibid.

6. *In the latter case, do specific requirements stem from Community law as regards the manner in which it must be determined which part of the tax is covered by the prohibition in the last sentence of Article 88 (3) EC?*

Ibid.

At the time of writing, the Supreme Court has not yet issued a ruling based on the ECJ judgment.

3.6.4 Supreme Court, The Hague, LJN: AE2143, C00/308HR and case C-345/02, Pearle BV, Hans Prijs Optiek Franchise BV, Rinck Opticiens BV and Hoofdbedrijfschap Ambachten, 15 July 2005, 27 September 2002 Pearle BV, Hans Prijs Optiek Franchise BV, Rink Opticiens BV v Hoofdbedrijfschap Ambachten (Trades Council for Trade) (B)

Facts and legal issues: Appeal in cassation, services sector.

The Central Industry Board for Skilled Trade imposed a charge on its members with a view to funding a collective advertising campaign for the benefit of the undertakings in the field of optical services. Neither this campaign nor its funding was notified to the Commission. Pearle c.s. submitted that the payments constituted State aid which had not been notified pursuant to Article 88 (3) EC, and the levies were therefore unlawful.

Decision: The Supreme Court deemed it necessary to request the ECJ for a preliminary ruling with regard to the following questions:

1. *Is a scheme, such as that under consideration, in which levies are imposed to finance collective advertising campaigns, to be regarded as (part of a measure of)*

aid within the meaning of Article 87 (1) EC, and must the plans to implement it be notified to the Commission under Article 88 (3) EC? Does that apply only to the benefit derived from the scheme, in the form of the organisation and provision of collective advertising campaigns, or does it also apply to the method of financing it, such as a bye-law instituting levies and/or the decisions imposing levies based thereon? Does it make any difference whether the collective advertising campaigns are offered to (undertakings in) the same business sector as that on which the levy decisions in question are imposed? If so, what difference does it make? Is it relevant in that connection whether the costs incurred by the public body are offset in full by the earmarked levies payable by the undertakings benefiting from the service, so that the benefit derived costs the public authorities, on balance, nothing? Is it relevant in that connection whether the benefit from the collective advertising campaigns is distributed more or less evenly across the field of activity concerned and whether the individual establishments within the branch are also deemed, on balance, to have derived a more or less equal benefit or profit from those campaigns?

2. *Does the obligation to notify under Article 88 (3) EC apply to any aid or only to aid which satisfies the definition in Article 87 (1) EC? In order to avoid its obligation to notify, does a Member State have free discretion to determine whether aid satisfies the definition of Article 87 (1) EC? If so, how much discretion? And to what extent can such free discretion affect the obligation to notify under Article 88 (3) EC? Or is it the case that the obligation to notify ceases to apply only if it is beyond reasonable doubt that no aid is involved?*

3. *If the national court concludes that aid within the meaning of Article 87 (1) EC is involved, must it then consider the "de minimis" rule, as formulated by the Commission in the de minimis notice, when assessing whether the measure in question is to be regarded as aid which ought to have been notified to the Commission under Article 88 (3) EC? If so, must that "de minimis" rule also be applied with retroactive effect to aid which was granted before the publication of the rule, and how must that "de minimis" rule be applied to aid such s annual collective advertising campaigns which benefit an entire branch of industry?*

The ECJ considered the first three questions together and found that bye-laws adopted by a trade association governed by public law for the purpose of funding an advertising campaign organised for the benefit of its members and decided on by them, through resources levied from those members and compulsorily earmarked for the funding of that campaign, did not constitute an integral part of an aid measure within the meaning of Article 87 (1) and 88 (3) EC and it was not necessary for prior notification of them to be given to the Commission since it had been established that that funding was carried out by means of resources which that trade association, governed by public law, never had the power to dispose of freely.

4. *Does it follow from the grounds of the judgments in Case C-39/94 SFEI and Others [1996] ECR I-3547, for the purposes of the practical effect of Article 88(3) EC, that the national court must annul both the bye-laws and the levy decisions imposed under those bye-laws and that that court must order the public body to repay the levies, even if that is precluded by the rule developed in the Netherlands case-law concerning the formal legal force of the levy decisions? Is it relevant in that regard that repayment of the levies does not in practice eliminate the advantage which the field of activity and the individual undertakings in the branch obtained through the collective advertising campaigns? Does Community law allow repayment of the earmarked levy not to take place, either wholly or in part, if, in the opinion of the national court, the field of activity or the individual undertakings would be placed at an unfair advantage in connection with the circumstance that the advantage obtained as a result of the advertising campaign cannot be returned in kind?*

5. *In case of failure to notify as laid down in Article 88 (3) EC, can a public body rely, in order to avoid an obligation to refund the aid, on the abovementioned rule of formal legal force of the levy decision if the person to whom that decision was addressed was not aware, at the time of the adoption of that decision and during the period within which it could have been challenged in administrative proceedings, that the aid of which the levy forms part had not been notified? May an individual assume in this connection that the authorities have fulfilled their obligations to notify aid under Article 88 (3) EC?*

Given that the answer to questions one to three makes it clear that the Board's decision imposing the charges for the purpose of funding the advertising campaign at issue do not form an integral part of an aid measure within the meaning of Article 87 (1) EC and that they did not have to be notified in advance to the Commission, the ECJ declared that the premise on which these questions were predicated was not, in the circumstances of this case, fulfilled.

The ECJ found therefore no need to answer these questions.

At the time of writing the Supreme Court has not yet issued a ruling based on the above ECJ judgment.

3.6.5 Administrative Court for Trade and Industry, The Hague, LJN: AH9722 and case C-283/03, A.H. Kuipers v Productschap Zuivel, 26 June 2003, A v Productschap voor Zuivel (Dairy Commodity Board) (B)

Facts and legal issues: Appeal (administrative law), agricultural sector.

A was a dairy producer who sold milk to a local dairy. Due to the presence of an anti-bacterium in his milk, the payout for that particular shipment of milk was reduced by NLG 0.50. A contended that the reduction of payments constituted State aid because of the

selective application, i.e. those dairy producers who were not confronted with the reduction of payments were awarded a benefit over those who were. Moreover, since this alleged aid had not been notified, it was contrary to Article 88 (3) EC.

Decision: The Administrative Court for Trade and Industry requested a preliminary ruling from the ECJ on the following questions:

1. *"Is a national system of deductions and supplements based on the quality of raw milk delivered to the dairy, such as that at issue, consistent with Regulation 804/68 on the common organisation of the market in milk and milk products and in particular with the prohibition of equalisation between the prices in Article 24 (2)?" (now, after consolidation of amendments to the text, Article 38 (2) of Regulation 1255/99)*

2. *Is a national system of supplements based on the quality of raw milk delivered to the dairy, such as that at issue, consistent with the prohibition of aid in Article 24 (1) of Regulation 804/68?*

3. *If Question 2 is answered in the affirmative, is such a national system to be regarded as aid the grant of which must be notified beforehand to the Commission under Article 88 (3) EC?*

The ECJ ruled on these questions as follows. It stated that the common pricing system which forms the basis of the common organisation of the market in milk and milk products instituted by Regulation No 804/68 of the Council of 27 June 1968 as amended by Council Regulation (EC) No 1538/95 of 29 June 1995, prohibits Member States from unilaterally adopting provisions affecting the machinery of price formation at the production and marketing stages established under the common organisation. That is the case with regard to a system such as that at issue in the main proceedings, which, whatever its alleged or stated objective may be, instituted a mechanism under which:

- on the one hand, dairies were required to withhold deductions from the price of milk delivered to them when that milk did not meet certain quality criteria; and

- on the other hand, the amount thus withheld over a given period by all the dairies was aggregated before being redistributed, after possible financial adjustments between the dairies, in the form of supplements identical in amount paid by each dairy, per 100 kilogrammes of milk delivered to it during that period, to those diary farmers alone who had delivered milk meeting those quality criteria.

At the time of writing, the Administrative Court for Trade and Industry had not yet issued a ruling based on the ECJ's judgment.

3.6.6 District court, Groningen, LJN: AT8973, 22 June 2005, Essent Netwerk Noord B.V. and B.V. Nederlands Elektriciteit Administratiekantoor (formerly SEP) v

Aluminium Delfzijl B.V. (Aldel) (main action); Aluminium Delfzijl B.V. and the state of the Netherlands (third-party action); Essent Netwerk Noord B.V. and B.V. Nederlands Elektriciteit Administratiekantoor, Saranne B.V. (third-party action) (F)

Facts and legal issues: Proceedings in first instance, energy sector.

Under the closed system of the Electricity Act 1989, the production, import and distribution of electricity in the Netherlands was in the hands of four electricity production companies ("EPC"s) and their mutual subsidiary, SEP. (Partly) at the instigation of the Dutch Government, these five companies made investments in the area of environmental policy/experiments that would not have been profitable, and consequently would not have been made, in a liberalised market. These investments led to so-called non market-conform ("NMC") costs or stranded costs ("bricks").

In anticipation of the Dutch electricity market's liberalisation, SEP, the four EPCs and the distribution companies concluded a Protocol agreement relating to the period 1997-2000, in order to free the EPCs from their stranded costs. Under this agreement, the distribution companies would pay SEP an annual amount of NLG 400 million in contribution to the total stranded costs. Payment by the distribution companies was financed by an increase in the electricity tariff for small, medium and (regular) business consumers.

As a consequence of the energy market's liberalisation, the distribution companies were obliged to unbundle. Essent Netwerk Noord B.V., a network manager having thus ensued from one of the distribution companies, secured the transport of electricity to Aldel from 1 January 2000. Execution of the Protocol agreement in this year was not allowed because the applicable legislation prohibited an integrated tariff. In order to free SEP and the four EPCs from their stranded costs and to enable them to compete effectively, the "*Overgangswet Elektriciteitsproductiesector*" (Interim Act Electricity production sector) ("OEPS") was enacted. This Act provided for a raise per kWh for every consumer (not being a protected consumer), payable to the network manager and calculated on the basis of the total amount of electricity transported to its connection in the period 1 August 2000 - 31 December 2000. The amounts thus obtained would have to be paid to SEP. SEP, in turn, was obliged to make a statement to the Minister responsible of the total amount obtained. If the amount exceeded NLG 400 million, SEP was under an obligation to pay the excess to the Minister, who would use the money to reimburse the costs made for one of the environmental experiments carried out in the past.

On the basis of this scheme, Essent invoiced an amount of NLG 9,862,646.25 to Aldel. Aldel did not pay. Essent initiated proceedings before the District Court.

Aldel (among others) claimed that the scheme as laid down in the OEPS constituted illegal State aid because SEP was accountable to the Minister, the excess amount was payable to

the Treasury and, if the contribution scheme had not been in place, the State would have had to have contributed to the stranded costs.

Decision: The District Court ruled that in this case it would have to be ascertained whether the applicable provisions in the OEPS (Article 9) violated EC law. It decided to stay the proceedings and request a preliminary ruling from the ECJ on (among others) the following question: Is the scheme as laid down in Article 9 of the OEPS compatible with Article 87 (1) EC Treaty?

At the time of writing, the ECJ had not yet delivered a judgment in this case.

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2. Report on the availability of judicial remedies (updated since 1999 Report)

2.1 Procedures concerning the direct effect of Article 88 (3)

2.1.1 General principles

The obligations provided for in Article 88 (3) EC, as amended, are part of the Portuguese legal system, under to the principle set out in Article 8 (2) of the Constitution of the Portuguese Republic[353] (the "CRP"). The Article determines the system of automatic incorporation of the provisions of adequately ratified or approved International Conventions. It further states that EU Treaties and the acts of the EU institutions apply internally as provided in EU law. There exist, therefore, no obstacles under national law to the application of Article 88 (3) EC with direct effect, as recognised by the ECJ in, notably, *Capolongo*[354] and *Lorenz*[355]. It is up to national courts to establish all of the consequences arising from the application of Article 88 (3) as part of Portuguese law regarding the relationship between the State and individuals, as well as between individuals, in accordance with the rules and judicial remedies available.

According to the established case law of the ECJ, the prohibition in the last sentence of Article 88 (3) extends to aid granted during the Commission's preliminary examination and, in particular, to aid granted before any notification is made to the Commission[356]. Therefore, despite the fact that the prohibition has a preventative or interim function, its violation constitutes a material or substantive breach of the law, as opposed to a mere formal or procedural one, for all the relevant effects in Portuguese law. The notion that the prohibition is independent from the procedural obligation to notify, neither starting nor terminating with such notification, its breach being substantive in nature, is in line with the ECJ position that a favourable decision of the Commission on the compatibility of the aid with the Common Market does not have the retrospective effect of legalising the illegal granting of the aid before such a final decision, in violation of Article 88 (3)[357].

2.1.2 Judicial review

Aid granted in Portugal by means of an administrative decision, in breach of Article 88 (3) EC, may be subject to judicial review through a "special administrative action" before the competent administrative court. The administrative courts – which are independent from the Administration itself – are a separate jurisdiction from the ordinary courts, and have as their highest instance the Supreme Administrative Court ("*Supremo Tribunal Administrativo*") ("STA").

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[353] As amended by Constitutional Law 1/82 of 30 September 1982, Constitutional Law 1/89 of 8 July 1989, Constitutional Law 1/92 of 25 November 1992, Constitutional Law 1/97 of 20 September 1997, Constitutional Law 1/2001, of 12 December 2001 and Constitutional Law 1/2004 of 24 July 2004.

[354] Case 77/72, Capolongo [1973] ECR 611.

[355] Case 120/73, Lorenz, [1973] ECR 1471.

The action referred to above is not restricted to the purpose of the annulment of an administrative decision. The claimant can also ask for a judicial order aimed at compelling the appropriate administrative body to take a decision that is legally due, as well as a decision regarding the recovery of damages arising from administrative acts or a failure to act. This means that, after the reform of the administrative jurisdiction in 2004[358], the judicial remedies available to challenge the Administration's behaviour are no longer confined to the traditional "action for annulment" inspired by the French concept of "*recours pour excès de pouvoir*". Furthermore, court actions are no longer subject to the rule that only "final acts" ("*actos definitivos*") – i.e. final decisions adopted in the corresponding proceedings by the highest body in the hierarchy concerned – can be challenged. Accordingly, a prior appeal filed with the Administration, in order to obtain a final decision, is no longer a prerequisite for judicial action under Portuguese law[359].

The standing of competitors to bring the action for annulment does not depend on the grounds invoked. As long as the party bringing the action demonstrates that it has a direct and individual interest in such annulment, it may allege the violation of any rule or legal principle or the mere existence of a material error of fact. Portuguese administrative courts have admitted for some time[360] that being a competitor is sufficient to entitle a company to challenge the Administration's acts capable of illegally benefiting another company. Thus the claimant is not required, under Portuguese law, to demonstrate that the granting of aid has violated its specifically protected rights or interests.

The administrative courts' jurisdiction being now unrestricted, its decisions can include any injunctions or other measures aimed at prescribing the action to be taken by the Administration as a consequence of the annulment in order to redress the situation of the claimant and constrain the Administration to comply with its unfulfilled obligations. Until 2004, these measures (or some of them) could only be adopted, in the event that the administrative authority failed to take the appropriate initiatives, in the context of judicial enforcement proceedings subsequent to the annulment, and after several intermediary steps and delays.

The annulled act can be renewed (with *ex nunc* effects) only if the existing irregularity may be remedied. It is generally understood that formal irregularities, such as the lack of

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356 Case 84/82, Germany v Commission, [1984] ECR 1451, para.11; Case C-301/87, France v Commission *("Boussac")* [1990] ECR 307, para. 17-19; , Case C-354/90, Fenacomex [1991] ECR 5505 para. 11-13; Joined Cases C-261 and C-262/01, Van Calster [2003] not yet published; and Joined Cases C-34/01 and C-38/01, Enirisorse [2003] not yet published.

357 Such position is expressly set out in cases *Fenacomex*, para. 16, and in *Van Calster* [2003], para. 63.

358 The reform was enacted by Law 13/2002 of 19 February 2002 (Statute of the Administrative and Tax Courts), and by Law 15/2002 of 22 February 2002 (Code of Procedure in the Administrative Courts). It came into force on 1 January 2004, as provided for in Law 4-A/2003 of 19 February 2003.

359 The requirement of a "final act", as stated in Article 25(1) of the Administrative Courts Procedure Act (approved by Decree-Law 267/85 of 16 July 1985), became the subject of controversy over its constitutionality after 1989, when Constitutional Law 1/89 amended Article 268(4) of the Constitution in order to guarantee the right of the individuals to bring an action against every administrative act affecting their rights or interests. Until December 2003, however, administrative courts have held that Article 25(1) was, in principle, consistent with the Constitution, although their case law has shown some flexibility as regards preliminary or preparatory decisions. Some examples of the latter can be seen in the STA decision of 22 September 1994, published in "*Acórdãos Doutrinais do Supremo Tribunal Administrativo*" (hereafter "AD") n. 399,March 1995, p. 272.

360 At least since the 50's: see STA decisions of 9 January 1953 and of 6 December 1957; more recently, see decision of 1 March 1990 (AD n. 347, November 1990, p. 1345).

notification, are capable of remedy[361]. However, it is not likely that a Portuguese court will accept, on the basis of an *ex-post* notification, the renewal of the decision granting the aid, since the fulfillment of the notification requirement at a later stage is not sufficient to overcome the prohibition in the last sentence of Article 88 (3) EC.

2.1.3 Interim measures

With regard to interim measures, the administrative jurisdiction's reform of January 2004 was the culmination of the changes initiated by a constitutional amendment of 1997. With the purpose of reinforcing the system of judicial remedies and the guarantees of individuals, the 1997 constitutional amendment added to these guarantees the granting of "appropriate interim measures" by administrative courts. Accordingly, Portuguese law now allows the claimant to apply for a wide range of preventative or anticipatory orders found necessary to preserve the effectiveness of the court's final ruling, which go far beyond the single measure traditionally admitted (the suspension of the effects of an administrative act). The new interim remedies include admission in ongoing proceedings, permission to initiate an action the provisional payment of a sum, and the order to act or to abstain from acting in a given situation.

Despite the importance of this reform, it may not prove to be a crucial one for companies seeking relief against an aid-granting administrative decision that unlawfully benefits a competitor. In these cases, the chosen interim remedy will probably still be the suspension of the effects of the contested decision. That suspension can be requested of the court at any time – before, together with or after the filing of the action. But it may be granted only when the company bringing the action demonstrates that (i) the action is *prima facie* admissible and not groundless, (ii) the immediate enforcement of the contested act causes damage not easily capable of repair and (iii) the suspension, in turn, does not cause damage to a public interest which is deemed greater than the interests of the claimant.

The condition identified under (ii) depends on the reasons for granting the aid. Portuguese courts tend to consider that loss of market share, because it is difficult to evaluate, is a difficult loss to make good[362]. Losses, however, are traditionally required to be a direct, immediate and necessary consequence of the act under review. This has led the courts to exclude those losses suffered by competitors of the beneficiary. In our view, such understanding is no longer acceptable, given the constitutional guarantee of an effective judicial protection of individuals' rights and interests against administrative offences. In fact, this guarantee requires an interpretation that allows those seeking the annulment of an act to apply for its interim suspension. No judicial decision, however, can yet be cited to confirm this understanding.

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[361] See, among others, STA decision of 21 March 1991 (AD n. 370, October 1992, p. 1114).

[362] See, for example, STA decisions of 12 June 1986 and 14 July 1988 (published in "*Apêndices ao Diário da República*", of 31 May 1991, p. 2530 and of 30 October 1993, p. 4105 respectively).

2.1.4 Remedies against civil or commercial acts

The remedies referred to above are no longer applicable when the aid is granted through acts not qualified as administrative acts. This happens, for example, with aid granted through the participation in the share capital of companies, the subscription of bonds, financial operations by State-owned credit or financial institutions, civil law contracts or similar acts. In these cases, the remedies available before the administrative courts are scarce, because the jurisdiction of these courts does not cover the review of acts governed by civil or commercial law.

Therefore, despite the fact that the administrative courts have now powers of injunction that enable them to impose specific measures on the Administration (outside the narrowly defined context of judicial enforcement of annulment decisions), it would be difficult, and anyhow not supported by existing case law, to persuade the administrative courts to find themselves competent in cases where aid has been granted through civil law or commercial law mechanisms. Administrative courts can only rule on matters that involve administrative law or the protection of rights emerging directly from administrative law.

This scarcity of effective guarantees before administrative courts can hardly be overcome by having recourse to ordinary courts and civil actions. Ordinary courts, for their part, will also not find themselves, in principle, competent to rule on rights infringed through the violation of public law rules, as is the case in the prohibition set out in Article 88 (3) EC. The separation of public law and private law jurisdictions can therefore lead to situations where none of them recognises itself as the competent jurisdiction.

Supposedly in order to avoid these situations, the statute enacting the 2004 reform established that it would be within the administrative courts' jurisdiction to "*verify the invalidity of any contracts resulting directly from the invalidity of the administrative act upon which the contract has been entered into*"[363]. However, no case law is available as yet to clarify the actual reach of this provision. Only time can clarify the ambiguities of the new regime, such as the meaning of the word "verify", or of the expression "any contracts", as well as the criteria for establishing the existence of an administrative act, especially when no proceedings or formalities are applicable.

2.1.5 Claim for damages

The infringement of the prohibition in Article 88 (3) EC may be invoked as a ground for an action for damages by the competitors of the company benefiting from the aid. Portuguese courts do not accept such claims when based on the disregard of merely procedural or formal requirements, unless they are specifically aimed at protecting the claimant's interest[364]. However, this type of restriction does not affect the liability of public authorities for

[363] Article 4(1)(b) of Statute of the Administrative and Tax Courts, *supra,* note 7.
[364] See STA decision of 1 July 1997 (published in "*Cadernos de Justiça Administrativa*", n. 7, January/February 1998, p. 32).

the violation of Article 88 (3) EC, since that violation must be considered as a substantive breach of the law and will therefore always be seen as an administrative tort.

In principle, the action should be brought against the administrative entity granting the aid and not against the company benefiting from it, since it was the Administration that caused the damage through its own action. The possibility of claiming damages from the beneficiary, instead of from the Administration, could be envisaged only where the former caused the breach of the law, and was at fault by misleading the Administration with regard to any relevant factual element for the application of Article 88 (3) EC. Even then, however, the Portuguese courts would not easily admit an action brought directly against the beneficiary of the aid, given that there is no immediate link between the behaviour of the latter and the damage suffered by the third party.

Actions for damages against administrative entities are tried by administrative courts when the damage is a consequence of public law acts. The notion of a public law act is wider than that of an administrative act and the limits are not always clear. Some hesitation may be expected when the aid results from civil and commercial contracts because they must be analysed simultaneously under both public and private regimes. The clarification of these issues could be brought about only by a wider use of the notion of "separable acts", in order to make it possible to consider individually the contract and the decision (explicit or implicit) to grant a particular aid.

2.2 Procedures concerning the enforcement of negative Commission decisions

The enforcement, by national authorities, of Commission decisions declaring the incompatibility of State aid may be effected by non-judicial means, under the provisions concerning 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 basis in Portuguese law because of the accepted principle that time eliminates the consequences of invalidity, unless the law exceptionally considers an act as being null and void as opposed to merely voidable[365].

The ECJ has considered, in the *Alcan*[366] 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 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

[365] 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 the STA of 24 May 1994 (AD n. 395, November 1994, p. 1250).

[366] Case C-24/95, Alcan Deutschland [1997] ECR I-1591, para. 1510.

non-challenged administrative acts. This general principle has been consistently applied by the administrative courts, but cases cannot be found where it was confronted with the obligation to recover aid granted in violation of Article 88 (3) EC. The protection of individuals in such situations is not a constitutional guarantee and if that conflict ever arises, it seems reasonable to expect the EC law obligation of recovery to prevail without great difficulty.

An obstacle which may have to be faced in the enforcement of negative Commission decisions concerns the aid granted by independent public administration 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 to impose on these local or regional entities the enforcement of the reimbursement of aid granted in violation of last sentence of Article 88 (3). The government's supervisory powers over municipalities are restricted to inspections and other investigative procedures. The results of these inspections can lead to the dismissal of the responsible authority 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). As to the "*regiões autónomas*" (Azores and Madeira), they are not subject to any control by government.

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, may not by itself apply to the courts for any kind of orders or injunctions against individuals or lower authorities. The 2004 reform allowed public bodies to apply in court for injunctions against other authorities in vertain situations, but the scope of this new form of action is far from clear and only future case-law will determine whether it can be used to obtain the recovery of illegal aid.

Judicial remedies may be sought on behalf of the government by special magistrates acting as public attorneys ("*Ministério Público*" agents). However, *Ministério Público* magistrates are seen as part of the judiciary rather than an executive body, and enjoy an accordingly 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. Moreover, *Ministério Público* have *locus standi* to seek injunctions in administrative courts only when fundamental rights or an "especially relevant public interest" are involved. In our view, the enforcement of law obligations should fall within this general concept. However, so far no case law exists to support this understanding.

The possibility for competitors to apply for 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 ask, not only for the annulment of an administrative decision granting aid declared incompatible with the Common Market, but also for an order constraining the Administration to act as necessary to redress the situation. Some difficulties may arise from the *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.

2.3 Procedures concerning the implementation of positive Commission decisions

Positive Commission decisions are mandatory as far as the assessment of the compatibility of the aid with the Common Market is concerned. Such decisions must be complied with by both, national administrative authorities and national courts of any kind. The act granting the aid may, nevertheless, be judicially challenged by a competitor of the beneficiary, under the general procedures in an action for annulment. However, if the ground for annulment is the incorrect application of Article 87 EC by the Commission, the Portuguese courts may refer the issue to the ECJ under Article 234 EC Treaty. The same would apply where the competitor brings an action for damages against the authority granting the aid.

2.4 General assessment

The rules and principles described above allow for the conclusion that Portuguese national law, as a whole, provides a reasonably efficient set of judicial remedies against administrative decisions granting aid without observance of the examination procedure of Article 88 (3) EC. Especially after the 2004 reform, which reinforced the administrative courts' jurisdiction, no legal difficulty should in theory prevent competitors from obtaining the appropriate decisions in order to suppress illegal aid. Under standing rules, an individualised direct interest in challenging the unlawful act shall be sufficient, therefore allowing competitors to invoke public policy rules, like those in Article 88 (3) EC, to their own advantage.

Interim measures, including the suspension of the effects of the administrative decision, are available in broad terms and are no longer subject to the priority of public interest (as was the case before 2004). The annulment can be complemented or followed by injunctions aimed at restoring the plaintiff's situation, as well as by awarding damages. To a large extent, damages can also be sought in a separate action, at least when losses could not be effectively avoided through the diligent use of interim suspension and annulment remedies.

The assessment is less positive when it comes to aid granted by means of civil or commercial acts, given the difficulties usually connected with the system of separate jurisdictions. Neither can we be optimistic about the enforcement of negative Commission decisions, whenever aid has been granted by local or regional authorities independent from

government, against which an administrative action is not possible and judicial remedies are still unproven.

These obstacles do not fully explain the near absence of cases decided by Portuguese courts in connection with Article 88 (3) EC. Remedies are largely available to competitors wanting to challenge administrative acts, but even there the same scarcity can be observed. The lack of litigation in this field should not be attributed only to the length and cost of judicial proceedings. It may also be the consequence of a relative unawareness of EC rules, along with a policy of self-restraint of competitors who think of themselves as potential beneficiaries of State aid. The fact is that Article 88 (3) EC is yet to make its entrance in Portuguese courts.

3. Cases

As underlined above, we are not aware of any cases in which the Portuguese courts have applied Articles 87 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 damage, as a result of 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 (i) on an issue different from the legality of the act granting the aid, or (ii) decided that there was no illegal State aid at all.

3.1 Decision by the Supreme Administrative Court ("STA") of 10 October 2002 (case n. 1385/02)

The first situation (i.e. that where the court did not rule directly on the legality of the aid) was the subject of the STA decision of 10 October 2002, which discussed the awarding of a contract under a procurement procedure for the transportation of patients. The awarding authority was the Oliveira de Azeméis Hospital and the selected contractor was the Portuguese Red Cross, beneficiary of several public subsidies.

One of the tenderers, a private company, claimed that a subsidised entity could not, under State aid law, compete against non-subsidised entities. The awarding decision was first annulled by the Coimbra Circle Administrative Court, but this ruling was reversed by the STA on appeal.

According to the STA, the contract could be awarded to such a candidate as the Red Cross. More precisely, the STA decided that State aid rules "*are not part of the legal set of rules governing the awarding act*" in procurement procedures. The STA decision dealt with national law, but its reasoning is arguably applicable as regards EC Treaty provisions as well.

3.2 Decisions by the Supreme Administrative Court (STA) of 15 March 2000 (case n. 12666) and of 13 November 2002 (case n. 26724)

The second type of ruling (i.e. that where the court decided that there was no illegal State aid) can be found in a series of STA decisions that had to deal with a specific situation concerning a State-owned savings bank, the Caixa Geral de Depósitos ("CGD").

CGD was, until some years ago, legally entitled to claim the collection of debts before the same courts and under the same enforcement rules as the State itself. This advantage was linked to the legal status of CGD as a public entity since its creation in 1876. Until 1993, CGD was entitled to claim its credits under the procedure of "*execução fiscal*", an enforcement procedure designed, notably, for the collection of taxes. In some occasions, the proceedings were challenged by the debtor(s) as contrary to both national and EC competition and State aid rules.

The Tax Courts[367] and, following appeal, the STA, consistently rejected the claimant's view, refusing to consider such legal provision as the State aid rules. The most recent of these rulings, according to the available data, were the STA decisions of 15 March 2000 and of 13 November 2002. The former of these decisions – whose grounds were followed in the latter decision – ruled that CGD could not be seen as a "mere competitor" of the other credit institutions, given its duties and responsibilities, as a public body, in the implementation of the government's credit policy. In addition, the STA raised doubts about the real impact of the disputed provisions, which, being creditor-friendly, could discourage rather than attract new clients.

3.3 Opinion 41/2002 by the Attorney General's Advisory Council, of 14 August 2002

Mention should also be made of Opinion 41/2002 by the Attorney General's Advisory Council[368], on the awarding procedure of a highway concession contract. The question submitted to the Advisory Council concerned one of the candidates, a company partially owned by the State, which was the beneficiary of certain public assistance (remission of debts, subsidising of costs, tax exemptions). The Advisory Council stated that the special link between the candidate and the State did not affect the competition between tenderers. The Portuguese Courts' decisions and the opinion cited can be searched on www.dgsi.pt.

[367] Tax courts are a special branch of the administrative courts.

[368] The Attorney General's Advisory Council is a consultative body for the Attorney General, the Government and the Parliament (*"Assembleia da República"*). When approved by the entity that requested it, the Advisory Council's opinion is published in the Official Journal (*"Diário da República"*) and becomes "official interpretation", i.e. an interpretation binding on the services and public bodies subordinated to it. Opinion 41/2002 was approved by the Ministry of Public Works and published in the Diário da República of 28 September 2002.

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2. Outline on the availability of judicial relief under the legal system of Spain

This chapter sets out the procedures made available by Spanish law in connection with enforcement of the EC law on State aid. Some of those procedures have not been used in the past. However, if cases on suspension or on recovery are brought before Spanish courts, the outlined procedures would apply.

A particular problem arises in Spain due to its quasi-federal structure: the regional entities may also grant State aid but the competence to notify these plans to the Commission remains in the hands of the Central Administration. Therefore, regional organs are obliged by Royal Decree 1755/1987 of 23 December to notify to the competent central organ ("*Comisión interministerial para asuntos de la Union Europea*") of their plans to grant or to alter aid. They must do so at least three months prior to executing the aid.

The *Comisión interministerial para asuntos de la Union Europea* was created by Royal Decree 1567/1985 of 2 September and its generic powers include the coordination of the State administration acts in economic matters relating to the European Union and the right to be informed of the decisions adopted by the Ministries relating to the European Union. Nonetheless, the practical role played by the *Comisión interministerial* is not entirely clear. It is likely that the procedures could benefit from a clear allocation by a centralised, coordinating power, to this or other office or organ.

Generally speaking, any company or entity with a competitive interest is afforded standing to appear in the administrative procedures (Article 31 of Law 30/1992, of 26 November 1992, on administrative procedure) or to appear in judicial proceedings (Article 19 of Law 29/1998, of 13 July 1998, regulating access to the administrative courts). Likewise, as discussed in this section, the laws applicable both to the administrative procedure and to the judicial review of administrative action foresee the possibility, which is often used, of affording interim relief (see also the relevant discussion under part II of this report). It may also be theoretically possible to obtain compensation for damages from the State, although such legal action in State aid cases seems to be rare to date.

Finally, it may be worthwhile to point out, as way of preliminary remark, how litigation in some cases seems to on and on without any specific results. A good example for this is provided by the Basque tax schemes. Subsequent to the action at Community level, substantial litigation took place before the highest instances at national level, but full recovery has apparently not yet taken place. This has resulted in press reports noting that Spain had not taken specific measures against those aid schemes, in spite of the both the Commission and the ECJ's decisions against such schemes[369]. Litigation in connection with the Basque tax schemes is discussed below.

[369] El Pais, 22 December 2005.

Below, we provide an outline of remedies available under Spanish law in connection with enforcement of EC law on State aid. To date, there are reported legal actions brought under administrative law before administrative courts. As will be discussed, private litigation may take place under some circumstances under the law on unfair trade for instance. However, such actions seem rare to date. This may be due to the fact that the source of State aid is, by definition, a public entity and that the competent courts are normally perceived to be the administrative courts, although the laws on unfair trade may certainly provide for a sound legal basis for private litigation. Regarding actions before the competition authorities, as is pointed out below, the Spanish competition laws give these authorities very limited powers in connection with enforcement of State aid law.

2.1 Procedures concerning the direct effect of Article 88 (3) EC

2.1.1 Action for annulment or contesting the legality of the act

- By competitors

The proper procedure to challenge subsidies paid to competitors in breach of the EC Treaty (such as aid which has been paid prior to completion of an investigation by the Commission) is an appeal before the administrative body of superior hierarchy to the body which took the decision to grant the aid. If the appeal is rejected, an action could be brought before an administrative court ("*Juzgado de lo Contencioso-administrativo*", although the actual court may vary depending on the organ granting the aid). The resulting decision would be subject to appeal before the administrative division of a regional court of appeals ("*Sala de lo Contencioso administrativo del Tribunal de Justicia*", again, depending on which was the competent *ad quem* judicial organ). The latter decision would also be subject to appeal, on grounds of law only, before the Administrative division of the Supreme Court ("*Tribunal Supremo*").

Competitors can also bring an action before a commercial court and request it to order the beneficiary to reimburse the aid to the relevant public Administration. Under Spanish law, such a legal action may be taken under Article 22 of the Unfair Trade Act (Law 3/1991 of 10 January, regarding unfair competition).

The Unfair Trade Act considers as unfair competition certain categories of acts/behaviour (foreseen by the Act), fulfilling the following generic conditions:

- performed by economic operators;
- taking place within the market;
- having anticompetitive purposes.

The infringement of rules intended to regulate competition is foreseen as one of the categories of acts/behaviour which may constitute unfair competition if the above conditions

are fulfilled. Therefore, this legal action against the beneficiaries of State aid could be based on the Unfair Trade Law rules, combined with the infringement of Article 88 (3) EC, which has direct effect.

- By the Public Administration

Annulment of the administrative act may also be declared by the Public Administration itself, of its own initiative, under the procedure of "*revision de actos de ofício*" (revision of administrative acts), foreseen in Article 102 of Law on Administrative Procedure ("*Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*"). This procedure requires an opinion of the Council of State and it is rarely used.

2.1.2 Action for liability and damages from the State

In cases where the administrative decision is declared void but the payment of State aid is not suspended, it is possible to assert the State's liability on the basis that all of the requirements of Article 139 of the Law on Administrative Procedure which regulates claims for damages against the State, have been fulfilled, depending on the particular circumstances of the case.

The requirements are the following:

- damage to the goods or rights of the claimant;

- effective, economically appreciable, and individualised damage regarding one person or group of persons; and

- damage as a consequence of the normal or abnormal functioning of the public services.

The individuals/entities whose interests have been damaged may claim their right to be compensated within one year of the damaging event or of the manifestation of it. They must submit the complaint before the relevant Ministry or the Council of Ministries if provided for by law, the competent bodies of the regional authorities, or the competent bodies of the Public Law Entities, in the event that is provided for by the regulations creating such entities.

The Law on Administrative Procedure has attempted to unify the State's liability under the administrative jurisdiction (as opposed to the pre-existing regime, where the State could be liable under both civil and administrative law) and has therefore eliminated the civil procedure which existed prior to its adoption.

Such a claim to enforce liability against the State could also be brought under the procedure in place for obtaining the nullity of the aid (i.e. prior to applying for judicial review), under Articles 31, 34 and 35 of the Spanish Act on Administrative Jurisdiction ("*Ley de la Jurisdicción Contencioso-Administrativa*"), which allows the accumulation of claims within the

same judicial proceedings. The claimant may ask to be put back in the same legal situation as it would have been in if there had been no infringement. This includes compensation for damages.

2.1.3 Action for suspension of the implementation (interim measures)

In the context of an action for annulment, an interim measure against the aid illegally granted could be requested by invoking Article 129 of the Spanish Act governing judicial review of administrative action ("*Ley reguladora de la Jurisdicción Contencioso-Administrativa*").

Article 129 allows the suspension of the administrative act (which is the most commonly granted measure). Any other measures deemed necessary to ensure effectiveness may also be granted, although it should 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 are:

- the existence of a *prima facie* case (case where there is a high probability of 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 put at peril if there is not an immediate judicial decision ensuring preservation (*periculum in mora*).

Audience must be granted within ten days from 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 at first instance and, ultimately, before the Supreme Court, administrative division.

2.1.4 Procedures concerning the enforcement of negative Commission decisions

- Proceedings before administrative bodies

Individuals may seek the enforcement of a negative Commission decision by requesting an order for repayment to the competent administrative bodies, which would differ depending on the nature of the public authority that granted the unlawful aid (i.e. local, regional, central authority, etc.). Where those authorities reject the application, an action before the administrative law courts is necessary.

- Proceedings before commercial courts under Unfair Trade Act

See section 2.1.1 above.

2.2 Procedures concerning the enforcement of positive Commission decisions

One could envisage an action brought before an administrative court by a competitor of the beneficiary of aid which had been cleared by the Commission, aiming to prevent the granting of the aid by the State. However, the administrative court would need to refer the case for preliminary ruling to the ECJ under Article 234 EC. Nonetheless, some of the cases analysed show a degree of reluctance on the part of national courts to request preliminary rulings under these circumstances (See case 3.1.11 below). Therefore, it seems that it would be more appropriate and effective to bring an action directly before the European Courts under Article 230 EC.

2.3 Special Procedure under Spanish Competition Act

Historically, Article 19 of the Competition Act (Law 16/1989 of 17 July) provided that the Tribunal for the Defence of Competition, upon request from the Minister of Economy and Finance, could examine the effects on competition of publicly funded aid granted to an undertaking.

Depending on the report of the Tribunal, the Minister could propose that the public authorities should cease or modify the aid, as well as propose other appropriate measures, if applicable, to maintain or re-establish competition.

It is clear from this provision that the regime initially set up by the Spanish Competition Act differed from the one instituted under the EC Treaty. Whereas the Commission has the power to launch investigations of its own motion and, if applicable, to decide that a Member State must abolish aid which is deemed contrary to Article 87 EC, the Tribunal for the Defence of Competition was only entitled to examine the aid granted to undertakings upon request of the Minister. Furthermore, the functions of the Tribunal for the Defence of Competition were merely consultative, its decision being advisory and having no binding effect over the Minister.

The substantive scope of application of Article 19 of the Spanish Competition Act was also more limited than that of Article 87 EC. Article 19 referred to aid granted to undertakings which was derived from public funds, whereas the concept of aid under Article 87 EC is much wider, and refers to aid granted by a Member State or through State resources. This means that the concept of aid under Article 19 of the Spanish Competition Act (Lay 16/1989 of 17 July 1989 or "*LDC*") did not include all types of aid entailing a burden on the public finances either in the form of expenditure or of reduced revenue.

Furthermore, the Tribunal for the Defence of Competition was not obliged to examine the aid, even if that examination had been duly proposed by the Minister. Under the EC law

provisions on State aid, the Commission has the duty to declare contrary to Article 87 EC aid which distorts or threatens to distort competition.

Article 19 of the *LDC* has been amended by an Act of the Spanish Parliament of 28 December 1999. The second paragraph of Article 19 states a definition of State aid that narrows the gap between Spanish and EC Competition law by referring to a rather wide notion of 'State aid'.

Its new third paragraph provides that the Tribunal for the Defence of Competition, of its own motion or upon request from the Minister of Economy and Finance, may examine the effects on competition of aid granted to an undertaking.

Depending on the report of the Tribunal, the Spanish Council of Ministers may propose that the public authorities cease or modify the aid, as well as propose other appropriate measures, if applicable, to maintain or re-establish competition.

So far, Article 19 of the Spanish Competition Act has not been applied and has often been the object of criticism, even after its reform. It is clear that the regime set up by Article 19 is still unsatisfactory and requires reforms to raise domestic law to EC standards. This seems to be the will of the new Spanish Government, as stated in its recent "White Book on the Reform of Spanish Competition Law" where, nevertheless, no specific measures have been proposed on this regard.

Even after the 1999 reform, if the Minister considers that aid distorts or may distort competition, the only measure he may adopt is to propose to the public authorities concerned the suppression or modification of the aid, as well as, if applicable, other measures to maintain or re-establish competition. This means that, even if the Tribunal determines in its decision that the aid is restrictive of competition, the Minister may not propose the cessation of the aid to the public authorities concerned.

It has been proposed that Article 19 could be reworded to mirror the EC law provisions. Moreover, it could allow the initiation of proceedings either at the initiative of the national competition authority or at the request of interested third parties. Notwithstanding the Commission's exercise of its competences, the tasks of the Tribunal for the Defence of Competition could be made similar to those of the Commission (to the extent allowed by the distribution of powers between the Community and the Member States). Should that be carried out, the Tribunal should be informed of all plans to grant, alter or extend aid and have the duty to take binding decisions on its cessation.

2.4 Summary conclusions drawn form the cases below

The cases analysed in section 3 below have been divided into several categories. Below are some conclusions for each heading.

2.4.1 Cases relating to the 1988 Basque tax regulations

Regional Laws 28/1988 of Alava, 8/19888 of Vizcaya and 6/1988 of Guipuzcoa (all territories within the Basque Country) introduced tax incentives in the form of deductions and benefits regarding several taxes, in particular the corporate income tax, personal income tax, transfer tax, and stamp duty. Those incentives were applicable to individuals or legal persons operating and resident in the Basque Country. The measures were not notified to the Commission.

The Commission initiated proceedings regarding those laws, and issued Decision 1993/337 EEC of 10 May 1993, establishing that the above-mentioned regional laws constituted illegal aid and were contrary to the principle of free competition.

The Spanish Central Government issued Law 42/1994 of 30 December, which included an additional clause adapting the tax system in the Basque Country to the requirements set out in the Commission decision, so that the group of companies to be granted the tax benefits would include EU companies non-resident in Spain but operating in the Basque Country. The Commission accepted this solution.

However, in several judgments (3.1.2. to 3.1.4.), the Spanish Supreme Court found that the challenged regional laws should be rendered null since they infringed the principle of equality, because the Spanish companies operating in the Basque Country but established in other Spanish territories, would not be caught by such amendment, and would therefore face a competitive disadvantage.

Later, in 2002, this additional clause was declared unconstitutional by the Constitutional Court, as it was considered discriminatory to all those Spanish companies non-resident in the Basque territory (3.1.1).

Other similar tax schemes in the Basque Country have also been challenged. The Spanish courts recalled the principle of the supremacy of EC Law, the findings of Commission decision 1993/337 EEC, and the Spanish case law on the principles of equality, unity and solidarity, the tax schemes (3.1.5, 3.1.6, 3.1.7 and 3.1.8).

On July 11 2001, the Commission issued Decision 2003/27/EC, finding that some tax incentives granted in the Basque Country had been unlawfully put into effect and were incompatible with the Common Market, and requiring Spain to abolish the aid scheme and recover the aid. 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 (Cases C-485-490/03), which are still pending.

2.4.2 Cases relating to other tax measures

Two cases concerned appeals before the Constitutional Court. In one of them, the Constitutional Court refused to maintain the suspension of a regional law, as requested by the Spanish Government. The arguments raised by the Attorney General (that the measures could amount to positive discrimination and be contrary to EC State aid provisions) were considered independent issues which should not be analysed together with the question of lifting of the suspension (3.2.1). In the other case, the Constitutional Court ruled that the measure infringed EC State aid law (3.2.2), considering that tax measures favoring some tax payers over others were illegal State aid.

In another case, the Superior Tribunal of Justice of the Canary Islands considered that the tax exemption in question was not covered by a previous decision of the Commission declaring the State aid granted by the relevant legislative provision (Law 19/1994) as being compatible with the EC regime (3.2.3).

In the last case, the Superior Tribunal of Justice of Valencia considered the tax measure as existing aid, thus being legal (3.2.4).

2.4.3 Cases relating to measures other than taxes

Nine cases were found where measures other than taxes were challenged. The national courts dismissed most of the appeals, concluding on either the existence of duly notified and approved State aid or the inexistence of State aid.

The Spanish Tribunals interpreted the notion of State aid as not including: aid granted to non-economic operators in the sector at issue 3.3.1; payments made directly from consumers to producers 3.3.4; rules on the allocation of costs between economic operators 3.3.6; or subsidies for the functioning of entities as collaborating entities of the General Administration 3.3.7.

In one of the cases, 3.3.8, although the Superior Tribunal of Justice held that any aid granted to the company in question should be notified to the Commission, it declared that a measure modifying the urban plan in order to allow the establishment of such company was not itself contrary to State aid rules, even if it the request for land had been influenced by the possibility of obtaining certain aid.

The Tribunal's conclusions in case 3.3.3 are somewhat intriguing. It related to subsidies to cinematography, and the national court dismissed the appeal, alleging, amongst other things, that a previous Commission decision had recognised that such measures might fall under Article 87 (3) (c) EC. This seems strange, as national courts may not declare measures as compatible with the Common Market under Article 87 (2) EC.

The national courts have declared national measures as infringing State aid rules in two cases only. In case 3.3.2, the Supreme Court considered the measure as new aid, therefore being illegal, since it had not been notified to the Commission. In 3.3.9, the Superior Tribunal of Justice found that a modification to previously approved State aid should also be notified to and approved by the Commission, and confirmed the direct effect of Article 88 (3) EC.

2.4.4 Cases relating to division of competence

Two cases were found regarding the division of competence between the State and the regional authorities to grant aid. In the first case (3.4.1) the Constitutional Court recognised the powers of the regional authorities to grant aid in environmental matters, although it also recognised the general power of the State to coordinate such measures. In the second case (3.4.2), the Constitutional Court held that, although the regional authorities had competence for executing industry matters, the Central Government would keep that competence with respect to granting aid.

2.4.5 Cases brought by competitors

Five cases brought by competitors have been analysed.

In case 3.5.3, the appellant was partially successful, the national court ruling on the existence of illegal aid but declaring that the beneficiary was not bound to return the aid since it had been found by the Commission to be justified under Article 86 (2) EC.

In another case (3.5.5), the Tribunal for the Defence of Competition ordered the Service for the Defence of Competition to re-open proceedings. This order came further to a judgment from the *Audiencia Nacional*, which had: (i) annulled the Tribunal for the Defence of Competition's previous ruling; (ii) considered that a measure benefiting State-owned companies could be subject to State aid rules; and (iii) therefore ordered the Tribunal for the Defence of Competition to consider Articles 86 and 87 in its decision.

In the other cases, the national courts dismissed the appeals, either not qualifying the measure as State aid (3.5.1); holding that there was not a presumption of illegality because Commission proceedings relative to those measures were pending (3.5.2); or not even dealing with EC provisions on State aid (3.5.4).

2.4.6 Recovery cases

The cases regarding recovery of aid concern appeals by the beneficiaries against the decisions ordering the devolution. In those two cases, the national courts dismissed the appeals, therefore upholding the recovery orders. The national courts used the following arguments in order to dismiss the appeals: the fact that an appeal before the ECJ against a Commission decision ordering recovery did not suspend the execution of such decision, unless the ECJ expressly determined such suspension; the enforceable nature of the

Commission decisions; the national authorities having no possibility of further revising the national measures granting aid; the fact that the principle of legal certainty must be alleged before the Commission, and not before the national authorities; and the existence of a unique limitation period of ten years, from the date of the granting of the aid, foreseen by EC law, and the subsequent inapplicability of all other limitation periods provided for by national laws (claimants had argued that a national limitation period of four years should apply, but the court said that the longer period foreseen under Article 15 of EC Regulation 659/99 should apply).

By reading the above judgments, it becomes apparent that the Spanish courts are reluctant to overrule national measures ordering recovery, mostly because they consider the Commission decisions to be immediately enforceable, and because they consider that it is up to the Commission to evaluate certain criteria as fulfilling the requirements of 'legal certainty' of the parties.

Case 3.6.2 concerned tax incentives granted to several companies of Navarra. Following the Commission decision ordering recovery, the Navarra Government issued several decisions addressed to the companies which had benefited from such incentives, ordering repayment. Only Paneles Eléctricos appealed against these decisions. During the course of the proceedings, the national authorities supervised the tax behavior of the company and examined on a periodic basis its financial situation. This judgment has not, to our knowledge, been appealed.

2.4.7 Preliminary rulings

In case 3.7.1, the Supreme Court requested a preliminary ruling of the ECJ, since a conclusion on the existence of an obligation to notify the regional decree granting State aid to the shipbuilding sector was dependent on the interpretation of Directive 90/684/EEC.

The national courts seem reluctant to request preliminary rulings, and have refused to do so on several occasions, considering that: only national law was at stake (3.1.9); there was no State aid meriting a preliminary ruling (3.3.6); or that the preliminary ruling was not necessary for the resolution of the appeal, since the measures complied with the Spanish legal regime and the Commission was the sole competent entity to decide on the compatibility of the measures with the EC regime, and was already investigating them (3.5.2).

2.5 Research Methodology

2.5.1 Sources

- Westlaw.es (Editorial Thomson-Aranzadi) – internet website database compiling decisions of the Spanish Courts;

- Nexus (Editorial La Ley) - internet website database compiling decisions of the Spanish Courts;
- Summa (Editorial La Ley) - internet website database compiling decisions of the Spanish Courts;
- Database of the Spanish Tribunal for the Defence of Competition, containing a collection of its decisions;
- Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a (database in French of national administrative courts decisions applying EC law :
  - http://193.191.217.21/fr/jurisprudence/jurisprudence_fr.lasso , or
  - http://www.raadvst-consetat.be/Juradmin/home.html (link from the Belgian Council of State's site)

2.5.2 Key words used for the research of cases

In the fields relative to "Text" we inserted the following generic search terms:

- ayuda de estado
- ayudas de estado
- ayudas estatales
- aide* d'état*

In the fields relative to "Subject":

- "subvenciones" (in Westlaw)
- "ayudas y subvenciones" (in Nexus)

From the decisions displayed as a result of the search, we selected those that were relevant to this report

2.5.3 List of cases and summaries

2.6 Control of legality of Acts (the Basque tax regulations)

a) Constitutional Court

2.6.1 Judgment number 96/2002, 25 April 2002, Annulment of a regulation, Tax/regional aid

Facts and legal issues: As a consequence of Commission decision 1993/337, which declared some Basque tax regulations illegal State aid following proceedings under Article 88 (2) EC, the Spanish Legislature enacted Law 42/1994 to conform those tax regulations with Commission decision 1993/337.

Law 42/1994 included a clause which granted EU nationals non-resident in Spain, but operating in the Basque Country, the same tax benefits as those afforded to residents in the Basque Country. The region of La Rioja challenged this clause in 1995, requesting the Constitutional Court to decide on its constitutionality.

Decision: The judgment focused on the analysis of the Spanish law and declared the challenged clause unconstitutional because it generated a sizeable disadvantage for EU nationals based in other Spanish territories, and also those based in the Basque Country, who would not be granted benefits such as freedom of establishment, residence and circulation, in breach of certain constitutional principles.

The Constitutional Court recognised that, although a different tax regime could be established based on the status of "non-resident", this could not be used to release a group from the constitutional responsibility of contributing to the general expenses.

The judgment also referred to the disproportionality of the measure adopted by the government to conform with the Commission decision and considered that the amendment required by the Commission decision should be carried out by the Basque Authorities following the Commission's instructions, as these Authorities were empowered to legislate on tax matters. The Constitutional Court declared the challenged clause unconstitutional and, therefore, void.

b) Supreme Court (Administrative Division)

2.6.2 Appeal number 12703/1991, 7 February 1998, Appeal in cassation, Tax sector

Facts and legal issues: By regional law 14/1987 of 7 July 1988, the Region of Vizcaya granted tax incentives for investment. The contested law introduced tax incentives to corporate income tax, personal income tax, transfer tax and stamp duty. The Spanish Central Government brought an action before the Supreme Court against such regional law, alleging that it infringed the constitutional principle of equality, since the established tax regime was more favorable than the general regime, therefore benefiting the people and entities to which it applied.

Decision: Prior to this judgment, the Commission had initiated proceedings under Article 88 (2) EC regarding regional laws 28/1988 of Alava, 8/1988 of Vizcaya and 6/1988 of

Guipuzcoa, all territories within the Basque Country. Consequently, it issued Decision 1993/337/EEC of 10 May 1993, establishing that the above-mentioned regional laws constituted illegal aid in breach of Article 52 EC and were contrary to the principle of free competition. The Spanish Central Government issued Law 42/1994 of 30 December, which included an additional clause, adapting the tax system in the Basque Country to the requirements set out in the decision, so that the group of companies granted the tax benefits would include EU companies non-resident in Spain but operating in the Basque Country (note that this additional clause was, nevertheless, declared unconstitutional by the Constitutional Court as it was considered discriminatory to all those Spanish companies non-resident in the Basque territory; see judgment of 25 April 2002 of the Constitutional Court, above).

The Supreme Court found that the challenged regional law, even after the amendment provided in Law 42/1994 would infringe the principle of equality, since the Spanish companies operating in the Basque Country, but established outside it, would not be caught by such amendment, and therefore face a competitive disadvantage.

2.6.3 Appeal number 7484/1990, 13 October 1998, Appeal in cassation, Tax sector

Facts and legal issues: On April 1987, the Region of Guipuzcoa published regional law number 14/1987, granting tax incentives for investment. The Spanish Central Government brought an action before the Supreme Court against such regional law, alleging that it introduced subsidies that may be considered State aid of a tax nature, having the effect that the effective tax burden for Guipuzcoa was lower than that of other territories of Spain. The contested law introduced tax incentives to corporate income tax, personal income tax, transfer tax, capital duty, stamp duty and local taxes.

Decision: In the judgment, the Supreme Court referred to the proceedings initiated by the Commission under Article 88 (2) EC regarding regional laws 28/1988 of Alava, 8/1988 of Vizcaya and 6/1988 of Guipuzcoa, all territories within the Basque Country.

During the course of these proceedings, the Commission issued decision 1993/337/EEC of 10 May 1993. Such decision established that the above-mentioned regional laws constituted illegal aid in breach of Article 52 EC, and were contrary to the principle of free competition.

As a consequence of this decision, the Spanish Central Government issued Law 42/1994 of 30 December, which included an additional clause adapting the tax system in the Basque Country to the requirements set out in the decision, so that the group of companies granted the tax benefits would include EU companies non-resident in Spain but operating in the Basque Country (please note that this additional clause was, nevertheless, declared unconstitutional by the Constitutional Court as it was considered discriminatory to all those Spanish companies non-resident in the Basque territory; see judgment of 25 April 2002 of the Constitutional Court, above).

The Supreme Court found that the challenged regional law should be rendered null since the creation of subsidies established by it reduced free competition between companies and led to discrimination, consisting of an effective lower tax pressure in a specific territory in relation to other territories of Spain, which was contrary to Spanish tax law. The Supreme Court considered as evidence of such discrimination the findings of the Commission in the decision mentioned. In addition, the Supreme Court explained that its judgment was based on the criteria settled by the European authorities, which stated that such laws were discriminatory and that the internal regulations of the Member States should prohibit the creation of incentives promoting the incorporation of companies in a specific territory of the EU, in prejudice of those resident in other territories.

After this decision, the Supreme Court considered that any regional regulation granting tax privileges or benefits, excluding any EU resident operating in a territory under a similar situation, must be considered discriminatory and contrary to free competition in the market.

2.6.4 Appeal number 7565/1992, 22 October 1998, Appeal in cassation, Tax sector

Facts and legal issues: This appeal referred to regional law 28/1988 issued by the territory of Alava, in the Basque Country, granting only companies operating in the Basque Country under the status of resident for tax purposes certain tax incentives for investment under certain conditions, in the form of reductions/tax relief on income tax..

The Attorney General alleged that these incentives infringed the principle of equality, and also infringed Spanish legislation against the distortion of competition and discrimination because they resulted in a lower tax burden for that particular territory. The Basque Authorities referred essentially to their constitutional autonomy in tax matters to establish differences with the national regime, and the lack of evidence for the Attorney General's allegations.

Decision: The judgment is based on the precedent set by the judgment of this court of 13 October 1998 (see above). Based on that precedent, the Supreme Court considered that a regional regulation granting tax benefits only to some companies operating in the same territory must be considered discriminatory and, as a consequence, annulled it in its entirety. The provision of incentives, promoting the establishment of companies to the prejudice of others in a particular territory in the EU, and distorting free competition between them, must be rejected.

2.6.5 Appeal number 2580/1995, 22 January 2000, Appeal in cassation, Tax sector

Facts and legal issues: The Spanish Central Government challenged a Decree issued by the Autonomous Region ("*Comunidad Autónoma*") of the Basque Country, providing for certain tax measures such as tax relief on different taxes (in some cases, over 95 per cent tax relief). These tax benefits were granted to preferred industries and zones within a preferred industrial location based in the Basque territory.

Decision: The judgment referred to precedents set by the Supreme Court, annulling other Basque tax regulations (see judgments of 13/10/1998 and 22/10/98 above).

Following its precedent, the Supreme Court found that the challenged tax measures were contrary to free competition in the market, and also to the free movement of capital and labour, prejudicing other companies based in other EU territories and in breach of Spanish tax laws.

The Supreme Court considered, again, as evidence of such discrimination the findings of the Commission in its decision 1993/337, which had declared other tax regulations in the Basque country to be illegal aid (see judgment of 13/10/1998 above) and referred to the principle of the supremacy of EC Law over national law. While the Spanish Central Government had amended the law to conform to the Commission decision (see judgment of 13/10/1998 above) and converted the tax benefit into non-illegal aid under EC Law, the new regime was discriminatory under the national legislation. The Supreme Court declared the relevant provision of the Basque Decree null.

2.6.6 Appeal number 8648/1999, 3 November 1999, Appeal in cassation

Facts and legal issues: In a previous judgment, the Superior Tribunal of Justice ("STJ") of the Basque country had annulled certain corporate tax reductions established by the corporate tax regulations of each of the three Basque provinces. This case concerned the appeal against that judgment, filed by the legislative and executive bodies of the Vizcaya and Guipúzcoa Provinces and the Chambers of Commerce ("*Cámaras de Comercio*") of Álava and Bilbao. They all sought the annulment of the previous judgment.

Decision: The Supreme Court found that the Rioja region had *locus standi* and then considered that the question had already been dealt with in its case law (in particular in its judgments of 7 February 1998, 13 October 1998 and 22 January 2000). Those judgments annulled tax reductions similar to the one established by the Guipúzcoa region on the grounds that they had been declared in breach of Article 87 EC by Commission decisions that had direct effect.

2.6.7 Appeal number 3806/1999, 17 November 2004, Appeal in cassation, Tax/regional aid

Facts and legal issues: In a previous judgment, the STJ of the Basque country had refused to analyse the validity of certain corporate tax quota reductions established by the Guipúzcoa provincial budget. The STJ had considered that the claimant, the Rioja Region, lacked *locus standi*. This case concerned the appeal against the STJ's judgment, filed by the Rioja Region, seeking annulment of the previous judgment.

Decision: The Supreme Court found that the Rioja region had *locus standi* and then considered that the question had already been dealt with in its case law (in particular in its

judgments of 7 February 1998, 13 October 1998 and 22 January 2000). Those judgments annulled tax reductions similar to the one established by the Guipúzcoa Region on the grounds that they had been declared in breach of Article 87 EC by prior Commission decisions. This judgment follows a previous judgment by the Administrative Division of the Spanish Supreme Court of 3 November 2004 (see above).

2.6.8 Appeal number 7893/1999. 9 December 2004, Appeal in cassation, Tax/regional aid

Facts and legal issues: In a previous judgment, the STJ of the Basque country had annulled Article 26 of the Basque tax regulation on corporate income. Pursuant to that provision, certain tax based reductions had been granted for new companies created in the Basque country. This case concerned the appeal against that judgment filed by (i) the three territorial entities of the Basque country, which sought annulment of the previous judgment, and (ii) the Federation of Entrepreneurs of the region of La Rioja, which sought the annulment of the entire tax regulations.

Decision: The Supreme Court stated that any citizen of the EU may claim the application of EC law on State aid (Article 88 (3) EC) before national courts and that it may not be held that, in the absence of any specific preliminary ruling by the ECJ on the matter, Spanish citizens were excluded from that benefit.

The Supreme Court recognised that the territorial entities of the Basque country had some legislative autonomy in relation to tax. However, that autonomy should not conflict with (i) recognised constitutional principles (equality, unity and solidarity) or (ii) EC State aid law.

The Supreme Court found that some of the provisions of the Basque tax rules, apart from the annulled Article 26, may be initially considered State aid according to the case law of the ECJ, and that they had not been notified to the Commission. Following the principle that national courts may not rule on the compatibility of national measures constituting State aid under EC law, but may, for the application of Article 88 (3) EC, decide whether those measures may qualify as State aid, the Supreme Court annulled certain provisions of the tax rules on the grounds that the State aid had not been notified to the Commission.

a) Superior Tribunal of Justice (Administrative Division) of the Basque Country

2.6.9 Appeal number 500/2002, 28 June 2002, Annulment of a regulation, Tax sector

Facts and legal issues: The region of La Rioja (a region bordering the Basque Country) disputed several tax regulations issued by the Basque regional authorities that provided for several tax advantages for companies based in the Basque country. Those tax advantages included a number of benefits which improved the company tax conditions that applied in the rest of Spain. The decision lists the following tax benefits as amounting to an improvement in the tax conditions commonly applicable in Spain: deduction for investments in fixed assets;

special financial reserve for investments; capitalisation of small companies; venture capital firms; special tax breaks.

The region of La Rioja considered that the tax regulations were contrary *inter alia* to the EC law on State aid.

Decision: The Tribunal addressed the issue of EC State aid law and discussed the possibility of requesting a preliminary ruling on whether or not the tax regime should have been notified to the Commission. On that particular point, the Tribunal noted the direct effect of Article 88 (3) EC. The judgment concluded that it would not be of use to request such preliminary ruling, given that what must be at stake in the application of the Community rules on State aid is inter-State trade. In this case, there was no effect on inter-State trade; the economic effect of the relevant regulations had its impact on trade within Spain, and therefore it was an internal matter to be resolved under national law.

The judgment concluded by annulling the relevant tax provisions for being contrary to a number of Spanish constitutional law principles: the measure was deemed not proportionate and liable to impact on the free circulation of persons and goods.

2.7 Control of Legality of Acts (other tax measures)

a) Constitutional Court

2.7.1 Court Order number 172/2002, Appeal number 1894/2002, 1 October 2002, Ratification of suspension of law, Tax/Financial Institutions

Facts and legal issues: The Constitutional Court considered whether the suspension of a law on tax on deposits of credit entities (the Law) passed by the Autonomous Region ("*Comunidad Autónoma*") of Extremadura should continue. The Law had been suspended by the Spanish Government before coming into force.

Under Article 161 of the Spanish Constitution, the Spanish Government has the power to suspend laws of the Autonomous Regions of Spain, preventing the laws from coming into force, on the basis that the courts must decide whether to either ratify or lift such suspension within a period of five months.

At the end of this five-month period in relation to the law, the case was considered by the Constitutional Court. The Attorney General argued that the suspension should continue. One of the Attorney General's arguments was that the Commission was at that time considering whether the law was prohibited by EC State aid law. In particular, the Attorney General argued that the tax deductions set out in the law could amount to positive discrimination and thus be contrary to EC State aid provisions. He further argued that continuation of the suspension might avoid the Commission later finding the law contrary to EC State aid law.

Decision: The Constitutional Court held that the alleged positive discrimination and breach of EC State aid law related to the basic question of constitutionality of the law. This was an independent issue which should be considered separately from that of whether or not the suspension should be lifted. The Constitutional Court therefore did not take the Attorney General's argument into account.

The action of the Attorney General was dismissed; suspension of the law was lifted.

The Constitutional Court did not consider the requirement under Article 88 (3) EC which has direct effect, that no Member State should put its proposed measures to grant or alter aid into effect until the Commission has been notified and come to a final decision.

2.7.2 Judgment number 10/2005, 20 January 2005, Annulment of a regulation Tax / Financial Institutions

Facts and legal issues: The STJ of Cataluña requested that the Constitutional Court decide on the legality of an exemption from the tax on economic activities granted to saving banks ("*Cajas de Ahorro*").

The background to the proceedings was that the Spanish tax authorities had refused to accept that the savings banks were exempt from the tax. The savings banks who had been refused the exemption then appealed before the STJ of Cataluña against the decision of the tax authorities.

Decision: The Constitutional Court ruled that the exemption, as far as it concerned the commercial activity of the savings banks (as opposed to charity and social activities), infringed the constitutional principle of equal contribution to public expenses. The Constitutional Court further stated (without this having been alleged by any of the parties) that this conclusion was also reached under EC law, pursuant to Article 88 EC. For this purpose, the Constitutional Court quoted the ECJ's judgment of 15 March 1994[370] concerning tax exemptions in favour of public financial institutions in Spain, where tax exemptions in favour of public or private entities that place them in a more favourable situation in relation to other tax payers, were considered State aid, contrary to EC law.

b) Superior Tribunal of Justice (Administrative Division) of the Canary Islands

2.7.3 Judgment number 465/2003, 29 May 2003, Annulment of administrative act, Tax sector

Facts and legal issues: The regional government of the Canary Islands brought an action against the State General Administration and the entity Cumbre Nueva SL, complaining that a property bought by this entity should be treated as an "investment good" under the Law 19/1994 on Modification of the Fiscal and Economic Regime in the Canary Islands and

[370] Case C-387/92, Banco Exterior de España [1994] ECR I-877.

should not therefore be subject to exemption from certain taxes. It was alleged that the State General Administration had therefore misapplied Law 19/1994 in relation to this entity.

Decision: The Tribunal noted that Law 19/1994 had been considered by the Commission. The Commission had held that the Law contained provisions for "State aid for regional purposes" which was only compatible with the EC regime on State aid to the extent that such aid was for an "initial investment" (i.e. an "initial investment into the total capital in relation to the creation of a new establishment, the development of an existing establishment or the initiation of a activity which entails a fundamental change in the products or methods of production of an existing establishment").

The Tribunal found that this "initial aid" exception did not apply to the property bought by Cumbre Nueva SL as it considered that the Commission had intended that this should only apply in exceptional cases. The Tribunal therefore found that the Spanish Government had misapplied Law 19/1994 and that the entity was not eligible for the tax exemption.

c) Superior Tribunal of Justice (Administrative Division) of Valencia

2.7.4 Appeal number 1178/1989, 9 June 1994, Annulment of a regulation, Tax sector

Facts and legal issues: The question concerned a Resolution of the Municipality of Valencia on the partial liquidation of a municipal establishment tax for the financial years of 1983 to 1986. Banco de Crédito Industrial, S.A. challenged that resolution, arguing that it was contrary to Article 29 of Law 13/71 of 19 June 1971 on the Organisation and Regime of the Official Credit, which established an exemption from taxes payable to the State, regions, municipalities and other entities of public law, applicable to public credit institutions.

Regarding the tax liquidation of 1986, the question of the compatibility of the above mentioned provision with Articles 81 to 90 EC was raised.

Decision: The Tribunal recalled the Ruling of the ECJ of 15 March 1994[371], issued in a preliminary ruling addressed to the STJ of Valencia on June 24 1991, according to which *"a measure through which a Member State grants a tax exemption to public companies is State aid under article* [88] *(1); when such aid is an existing aid, it can continue being executed until the moment the Commission declares its incompatibility with the Common Market.*"

Therefore, the tax exemption provided in Article 29 of Law 13/71 of 19 June 1971 was legal State aid.

2.8 Control of Legality of Acts (measures other than taxes)

a) Supreme Court (Administrative Division)

[371] Case C-387/92, Banco Exterior de España [1994] ECR I-877.

2.8.1 Appeal number 241/1996,18 February 1998, Annulment of regulation, Construction/Housing

Facts and legal issues: The National Association of House Builders ("*Associación Nacional de Promotores Constructores de Edificios*") requested the annulment of Royal Decree 2028/1995 of 22 December 1995, regulating the conditions of access to the State-qualified financing of the works promoted by housing cooperatives and owners' communities under the national housing plans. The appellant argued that such Royal Decree infringed, amongst other national provisions, Articles 87(1) and 87(2) a EC.

Decision: The Supreme Court held that the Royal Decree only intended to establish protection for the benefit of members of communities or cooperatives in relation to the correspondent entities, and with regard to the latter in relation to the entities charged with the actual building of the houses. Therefore, the appeal intended to combat the existence of the State-qualified financing regime itself, which had not been established by that Royal Decree.

The Supreme Court recalled previous decisions on this matter, according to which Article 87 was not considered to be infringed by such a financing regime, since the State aid did not hinder competition. It decided that this was the case because promoters of buildings aimed at self-use could not be considered to be economic operators in the building sector (i.e. they were not putting the buildings on the market for sale, but rather constructing). The fact that professional constructors faced a restriction on the housing market was a mere consequence of the economic policy choices made by the State.

2.8.2 Appeal number 930/1998, 24 November 1998, Appeal in cassation, Fishing sector

Facts and legal issues: The Order of 19 November 1990 of the Galicia Assembly ("*Junta de Galicia*") approved aids for the modernisation and renovation of the fishing fleet for the year 1991. This Order was challenged before the Superior Tribunal of Justice of Galícia ("*Tribunal Superior de Justicia de Galicia*"). This Tribunal held that such order was (i) null, since it infringed Regulation EEC 4028/1986, modified by Regulation 3944/1990; (ii) illegal, as the aid, being new (since the order modified the Autonomic Decree 191/1987 of 2 July), should have been notified to the Commission. The Galicia Assembly appealed to the Supreme Court.

Decision: The Supreme Court upheld the decision of the Superior Tribunal of Justice of Galícia regarding the nullity of the order and its illegality. It considered that the Order, establishing a system of new aids, should have been notified to the Commission, so that the latter could examine its compatibility with the Common Market.

2.8.3 Appeal number 7001/1991, 20 April 1999, Appeal in Cassation, Cinematographic Industry

Facts and legal issues: The Region of Cataluña decided to revoke aid granted to Ganesh, S.A., a cinematographic company, due to of the non-fulfillment of one of the obligations underlying the granting of the aid – the exploitation of the movie in its Catalan version only, within the Catalan territory. The appellant argued that the decision infringed Community law, in particular Articles 7, 48, 52, 56, 59 and 92 EC, such infringement resulting from the considerations of the Commission decision of 21 December 1988, relative to the granting of aid by the Greek Government to the cinematographic industry for the production of Greek movies.

Decision: The Supreme Court considered that the decision did not infringe Community law, stating that: (i) contrary to the facts in the mentioned Commission decision, in the present case there was no discrimination by reason of nationality; (ii) the Commission decision itself recognised that aid to cinematography may fall under Article 87 (3) (c) EC, provided that all the conditions of the Treaty were observed, especially those relating to the free movement of people and services; (iii) evidence of the infringement of such freedoms had not been found; (iv) the consequence of the legal arguments of the appellant would be the annulment of the provisions relative to the granting of aid, and not the annulment of the revocation decision; and (v) the obligation to exploit the film in its Catalan version should be understood as the expression of the intention of stimulating both cinematographic production in Cataluña and the diffusion of the knowledge and use of the Catalan language within Catalan territory.

2.8.4 Appeal number 117/2000, 11 June 2001, Annulment of regulation, Electricity sector (payments of stranded costs)

Facts and legal issues: The facts are identical to those of Appeal number 51/2001, below. The main difference with regard to that case is that the Commission State Aid decision of 25 July 2001, cited, had not yet been issued at the time of the judgment.

Decision: Given that Commission decision of 25 July 2001, declaring the compatibility with EC law of the Spanish stranded costs regime, had not yet been issued, the Supreme Court was faced with the issue of whether it should apply Article 88 (3) EC. The Supreme Court noted that the scheme had been notified to the Commission. The Supreme Court also noted that, pursuant to the *Preussen Elektra* case law, the type of payment in the case at hand (which was made directly from consumers to producers) did not qualify as State aid; likewise, the Supreme Court noted the *Lorenz* case law, and given that two years had gone by since notification had been made to the Commission, the Supreme Court considered that it could not stop application of the compensation system.

2.8.5 Appeal number 51/2001, 21 November 2001, Annulment of regulation, Electricity sector (payments for stranded costs)

Facts and legal issues: The claimants, private individuals, challenged the regulation for the electricity tariff that includes, as part of that tariff, an amount as compensation for stranded costs. The claimants argued that the system for compensation of the stranded costs was State aid, granted in breach of the EC Treaty.

Decision: Regarding the matter of State aid, the Supreme Court recalled that the Commission had dealt with the matter of the Spanish compensation payments for stranded costs in its Decision of 25 July 2001 (NN49/1999), approving the stranded costs system in its existing status at the time of the judgment. Therefore, the claimant's request was dismissed.

2.8.6 Appeal number 154/2001, 25 November 2002 Annulment of a regulation, Energy sector (distribution of electricity)

Facts and legal issues: The claimant, the Spanish Association of Builders, filed an appeal against the provisions of Royal Decree 1955/2000 of 1 December, regulating the activities of transmission, distribution, commercialisation and supply, and authorisation procedures for electrical power installations.

Royal Decree 1955/2000 established a system for the allocation of costs of the power distribution installations between distribution companies and the landowner. In some instances, the landowner was to bear the cost for the distribution installation. The claimant argued, *inter alia*, that this was an unjustified benefit given to distribution companies and constituted State aid contrary to Community law.

Decision: The Supreme Court considered that Royal Decree 1955/2000 only had the purpose of establishing a just allocation of costs between distribution companies and landowners; distribution companies were not receiving any benefit since they were taking care of the functioning costs, while landowners' costs were being compensated through capital gains in the value of land and landowners were being released from paying the running costs of the distribution grid.

The Supreme Court dealt with the claimant's argument that the regulation was contrary to EC law by declaring that there was no State aid which merited a request to the ECJ for a preliminary ruling (as was requested by the claimant). The Supreme Court did not enter into any analysis of the formal requirements of State aid as set out under Community law (although it did declare that, under Spanish law, there had not been unjust enrichment).

b) National Tribunal ("*Audiencia Nacional*") (Administrative Division)

2.8.7 Appeal number 899/1998, 19 December 2001, Proceedings in first instance, Agricultural sector

Facts and legal issues: The Association of wine makers of La Rioja ("*Agrupación de Artesanos Bodegueros de La Rioja*") brought an action against the Spanish Central Government, alleging that the Order issued by the Minister of Economy on 4 March 1998 granting subsidies to exporters' associations contravened Article 87 EC.

Decision: The Tribunal considered that the prohibition of Article 87 EC deals with aid to companies or manufacturers, provided that they operate in the market and the aid may distort competition. It found that the Order did not contravene that provision of the EC Treaty. The Order specifically determined that the aid was directed at exporters' associations due to the important role these associations played in export activities. The purpose of the subsidies was the functioning of the exporters' associations as collaborating entities of the General Administration. In addition, the Tribunal noted that the costs that may be financed were: staff expenses, offices, fees of international entities, processing and transmission of information, legal advice to solve conflicts in multilateral fora and any other expenses that were not considered a subsidy for the export activity. The Tribunal noted that the Order financed an association activity, especially in the international context, and expressly prohibited that this may imply subsidies to companies. Therefore, the Tribunal concluded that the Order did not amount to State aid, and therefore did not infringe EC law.

c) Superior Tribunal of Justice (Administrative Division) of the Basque Country

2.8.8 Appeal number 729/1998, 4 January 2001, Ordinary Proceedings for the annulment of a regulation

Facts and legal issues: On 3 December 1997, the regional authority of Alava, in the Basque Country, issued Administrative Order 932/97. The Order approved the creation of a new sector in the industrial area of Lantarón by the zoning reclassification of land for residential development to land for industrial use.

The Order was challenged by the local authority of the town of Leciñana del Camino and two individuals. The claimants alleged that the reason behind the modification of the land was to favour the installation of Transpapel, a paper manufacturing company, and that this company would receive land at a price much lower than the market price (nearly free). The claimants alleged that this would constitute illegal aid in breach of Article 87 (1) EC. The regional authority of Alava alleged that when the granting of land at that price took place, the question should be raised before the competent authorities.

Decision: The Tribunal recognised that, according to the system established under in Articles 87 and 88 EC, any project for granting or amending aid should be notified to the Commission and that such projects should not be implemented until the Commission had decided on their compatibility. The Tribunal also declared that national courts could not

decide on the compatibility of the aid and that the prohibition of Article 88 (3) EC had direct effect. In relation to the challenged Order, the Tribunal found that, even if the request for land from Transpapel had been influenced by the possibility of obtaining certain aid, and that any eventual decision from the Commission on the compatibility of the aid could lead to the withdrawal of the installation of that company and a finding of no justification for the reclassification of the land, it was not for the Tribunal to decide on the principles for controlling the discretionary powers of the Administration in the present case. The Tribunal dismissed the appeal.

2.8.9 Appeal number 756/2003, 7 February 2005, Annulment of a regulation, Energy sector

Facts and legal issues: The private company Eolica Navarra S.L. ("ENSL") requested the annulment of an addendum to Decree 91/2003. The addendum had been passed by the defendant, the Autonomous Region of Navarre ("ACN"). The addendum sought to establish a new regime of aid and investment in relation to solar and biomass projects in Navarre. The addendum also purported to have retrospective effect from 2001. ENSL argued that this was a breach of EC law on State aid as the new regime had not been notified to nor considered by, the Commission.

The ACN argued that, on the basis that the original decree had been notified to and approved by the Commission under Article 88 EC, the addendum should be considered approved since it was part of the same decree.

Decision: The Tribunal found that the addendum was in clear breach of Article 88 (3) EC as it had not been informed to or considered by the Commission. The Tribunal noted that Article 88 (3) EC applied equally to grants or modifications of State aid. The Tribunal further noted that Article 88 (3) EC had direct effect, despite any internal laws purporting to override its provisions. The Tribunal declared that the addendum should be annulled.

2.9 Division of Competence

a) Constitutional Court

2.9.1 Judgment number 126/2002, 23 May 2002 Annulment of a regulation, Environment

Facts and legal issues: This case related to a dispute between the Autonomous Region ("*Comunidad Autónoma*") of Cataluña and the Spanish Central Government regarding distribution of legislative powers. The distribution of legislative powers in environmental issues between the State and the different regions established in the Spanish Constitution grants the basic regulatory powers to the State and allows the regions to create additional regulation. In the ministerial order challenged by the Spanish region of Catalonia, the Spanish Central Government had established a plan for granting aid and concessions to

those companies concerned with waste management. The region of Catalonia believed that the plan exceeded that constitutional distribution of legislative powers.

Decision: The Constitutional Court recognised the Autonomous Region's powers to grant aid in environmental matters in accordance with the constitutional distribution of powers, and attributed the disputed legislative power to those authorities. In spite of this statement, the Constitutional Court recognised the State the general power to coordinate and assure the homogeneity of the aid granted.

2.9.2 Judgment number 175/2003, 30 September 2003, Positive conflict of competences before the Constitutional Court, Industry

Facts and legal issues: The Constitutional Court was asked by the Catalan Government to adjudicate on the division of competences between the Autonomous Region of Cataluña and the Spanish Central Government. The case concerned certain aid in the industry sector for the grant of which both parties considered themselves competent.

Decision: The Constitutional Court's judgment was based mainly on Spanish constitutional law and will be referred to here only inasmuch as EC law is concerned. The Constitutional Court stated *inter alia* that, although the competence for executing "industry" matters would normally belong to the Autonomous Region of Cataluña, that was not the case regarding State aid. The Constitutional Court held that in the case of State aid, account should be taken of the fact that all aid granted by a given State, regardless of whether this is granted by national, regional or local entities, will be considered by the EU when appraising whether that aid is or not legal under EC law. Hence, the Constitutional Court held that the competence for executing industrial policy, including the granting of aid, would exceptionally remain with the Central Government.

2.10 Actions by Competitors

b) Supreme Court (Administrative Division)

2.10.1 Appeal number 7349/1992, 22 February 1999, Annulment of regulation, Civil Aviation

Facts and legal issues: The Association of Aeronautic Training Schools ("*Agrupación de Escuelas de Formación Aeronáutica*") requested the annulment of Article 3 of Royal Decree 990/1992 of 31 July 1992, granting the State Society for the Civil Aeronautic Formation ("*Sociedad Estatal para las Enseñanzas Aeronauticas Civiles, S.A.*") ("SENASA") the increase of its capital with the revenue of the transfer of movable assets, and the use of real estate and facilities, with access from third parties under conditions to be determined by SENASA. According to the appellant, this would affect the principles relative to free competition and infringe Articles 87 and 88 EC.

Decision: The Supreme Court considered that the measures did not have the characteristics of a decision adopted with the object or effect of favouring a certain company; rather, those measures were logical in view of: the reorganisation of the Directorate General of Civil Aviation; the assumption by SENASA of the performance of the activities previously carried out by the Directorate General; and its obligation of teaching courses of general interest.

c) National Tribunal ("*Audiencia Nacional*") (Administrative Division)

2.10.2 Appeal number 1251/1997, 11 April 2000, Annulment of administrative act, Transport

Facts and legal issues: Fred Olsen, S.A. and the Professional Association of Naval Companies for Regular Lines ("*Asociación Profesional de Empresas Navieras de Líneas Regulares*") ("ANALIR") brought two separate actions against the Central Administration. These actions challenged the decision issued by the Secretary of State for Infrastructure and Transport on 16 December 1997, opening a tender for sea transportation services for passengers and vehicles. Following the tender procedure, the company Transmediterranea, S.A. was awarded the contract. Under that contract, Transmediterranea, S.A. would receive subsidies of up to €40 million approximately. At the time of these proceedings, the Commission was investigating the subsidies received by Transmediterranea, S.A. under Article 88 (2) EC. The claimants alleged, *inter alia*, that because of the Commission's proceedings there was a presumption of breach of the EC law on State aid.

Decision: In the judgment, the Tribunal did not focus much on the question of infringement of EC State aid rules. It found that the infringement alleged by the claimants was only a presumption and that it was for the Commission to establish whether the subsidies granted to Transmediterranea, S.A. were compatible with EC law or not and if such subsidies should be deemed an obligation of public service under Article 86 (2) EC, or State aid, subject to the EC legal regime. The Tribunal also found that it was not necessary to submit a preliminary ruling to the ECJ regarding the interpretation of EC law on State aid for maritime transport as the case could be solved under Spanish law. The Tribunal dismissed the appeal on the basis that the tender was not in breach of the applicable national administrative regulations, and recognised that its findings were subject to the conclusion of the Commission proceedings.

2.10.3 Appeal number 174/1998, 21 May 2002, Annulment of administrative act, Transport

Facts and legal issues: This case regards the same measure as case 3.5.2. above. Fletamentos de Baleares, S.A. brought an action against the Central General Administration. The action challenged the resolution issued by the Secretary of State for Infrastructure and Transport on 16 December 1997, establishing a request for tenders for contracting sea transportation services for passengers and vehicles. Following the tender procedure, the company Transmediterranea, S.A. was awarded the contract.

Decision: The Tribunal found that the challenged resolution was in breach of certain procedural rules for this type of tender. The contract with Trasmediterranea, S.A. meant for this company the receipt of subsidies to compensate the low tariffs paid by end-users (political prices). The Tribunal declared that political prices covered by aid must be authorised by the Commission under Article 88 (3) EC. The Tribunal annulled the bid for tenders on the basis, among others, that there was not a previous authorising decision from the Commission. It concluded that this understanding was confirmed by a Commission decision of 27 February 2001, which declared that Transmediterranea, S.A. had received illegal aid.

The claimant had requested the return of the aid by Transmediterranea, S.A. and to be indemnified for damages resulting from the breach by the State of EC law. The Tribunal referred, in relation to the first request, to the Commission decision mentioned above and declared that Transmediterranea, S.A. was not bound to return the aid because the Commission had found that such aid was justified for public interest reasons under Article 86 (2) EC. Regarding the second request, the Tribunal found that the conditions required under Spanish administrative law on administrative responsibility, consisting mainly of an effective damage, were not met. The Tribunal based this conclusion on the findings of the Commission decision mentioned above, where the Commission declared that the aid granted to Transmediterranea, S.A. compensated unfavorable conditions resulting from public interest concerns. The Tribunal declared that such conditions were not present in the activities carried out by the claimant, and therefore it was not possible to conclude that Transmediterranea, S.A. enjoyed a privileged position.

d) Tribunal for the Defence of Competition ("TDC")

2.10.4 Exp. R 340/98, 7 May 1999, Administrative proceedings before the Competition Authority – appeal against the decision by the Service for the Defence of Competition (SDC) to close proceedings against RENFE, Railways sector

Facts and legal issues: The National Association of Bus Transportation ("FENEBUS") filed a complaint with the Spanish SDC against the National Railway Company ("RENFE"), accusing the latter of unfair prices affecting competition in the passenger transportation business.

FENEBUS made the subsidiary argument that RENFE funded its deficit with public subsidies, and that this public finance constituted unfair competition. However, FENEBUS did not (according to the information available in the decision) rely on any Community law reasoning such as that flowing from Article 88 (3) EC.

Decision: The Tribunal for the Defence of Competition ("TDC") made a brief reference to the issue of State aid, but did not deal with the issue of notification of the subsidy to the Commission, nor did it deal with the EC Treaty provisions on State aid in any other way.

The TDC dealt with the issue on subsidies only by stating that the Spanish Legislature has decided on the financing on RENFE in view of its public interest and universal service obligations.

2.10.5 Exp. R.311/98, 21 March 2002, Resolution in execution of the judgment of the National Court dated 29 June 2001, Real Estate sector

Facts and legal issues: On 20 July 1998, this Tribunal had rejected the appeal filed by the Trade Association ("*Asociación de Empresarios*") against the Service for the Defence of Competition's ("SDC") rejection of a claim against several city councils of Gran Canaria for conduct contrary to Articles 1, 6 and 7 of Law 16/1989 of 17 July on the Defence of Competition. Such conduct consisted of the free assignment of land to a company wholly owned by the Government of Gran Canaria to build State-subsidised houses. The SDC had found that this conduct did not infringe national law, but did amount to State aid, which was only forbidden if it infringed Article 87 EC and which could only be assessed by the Commission.

The TDC decision was appealed before the *Audiencia Nacional* and annulled by the latter, which ordered re-opening of the proceedings and completion of all the information necessary for the TDC to issue a new resolution. The *Audiencia Nacional* found that there existed reasonable evidence of infringement of national law and that the TDC should also consider in its decision Articles 86 EC and 87 EC because it could be the case that the company owned by the Government of Gran Canaria was subject to competition rules, including those on State aid. The *Audiencia Nacional* agreed with the SDC that only the Commission was competent to decide on the compatibility of State aid with the Common Market.

Decision: The Tribunal ordered the SDC to re-open proceedings and gather enough evidence for the Tribunal to issue a new resolution.

2.11 Recovery Cases

a) Central Economic-Administrative Tribunal

2.11.1 Appeal number 2824/1999, 24 May 2001

Facts and legal issues: As part of an arrangement with creditors within a temporary receivership process, the Spanish Central Government cancelled a debt against a company which was subject to such process. The Commission declared such cancellation of debt as illegal State aid and ordered the Spanish State to recover the aid. This case consisted of the appeal filed by the beneficiary of the aid against the decision issued by the National Tax Authority ("*Agencia Estatal de Administración Tributaria*"), ordering recovery of the cancelled debt.

Decision: The Tribunal found that the beneficiary could not oppose the execution of the Commission decision on the basis that an appeal against this decision had been filed before the ECJ and that a 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 the cancellation of the debt was an act which was covered by the national legislation on temporary receivership. The tribunal held that actions for recovery would infringe the national principle under 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 was the National Tax Authority (Article 8.4 of Royal Decree 225/1993, Articles 4 and 7 of General Regulation on Tax Collection and Article 103.1 of Law 31/1990)

b) Superior Tribunal of Justice (Administrative Division) of Navarra

2.11.2 Appeal number 1260/2003, 4 May 2005, Appeal in cassation, Tax

Facts and legal issues: As referred to above, this case refers to illegal aid granted by the regional government of Navarra and consisting of a tax benefit of a 50% deduction in the total tax due for those companies active in and complying with several requirements related to investment and the creation of jobs. The illegality of such aid was declared by the Commission in Decision 11/07/01. Although this decision affected different companies located in the region of Navarra, Paneles Eléctricos, S.A. was the only company who appealed against the recovery order, ordered by virtue of a Regional Decree issued by 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 the Decree 53/03 of 26 February relating to recovery of the aid, in order to exhaust the available administrative procedures, as is obligatory under Spanish law ("*recurso de alzada*").

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 suspension of the execution of the contested decree. The Tribunal in this case consented to stay the execution, but required a bank security, in order to guarantee the purpose of proceeding.

Paneles Eléctricos appealed again, this time against the order for a bank security. Given that the Government of Navarra did not oppose this appeal, the Tribunal decided to continue with the proceeding.

Decision: Decision 446/2005, issued by the Tribunal on 4 May 2005, finally solved the judicial proceeding initiated by Paneles Eléctricos, S.A. against the order of recovery held in Decree 53/03. The Tribunal decided to reject this appeal, based on different arguments.

Once the jurisdiction of the Tribunal had been affirmed, the Tribunal considered the General Decree an appropriate measure to enforce the Commission decision. Although under Spanish law there was not a common procedure established for the recovery of illegal aid, the decision had to be considered as an executory order, compulsory for the State.

The appellant applied for 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 incentives the company had renounced in order to obtain the aid). The Tribunal stated that this argument was not valid and that Paneles Eléctricos, S.A. would be able to claim for the other incentives should the granting of the State aid have 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 application to the case of the statute of limitations, declared by Paneles Eléctricos, S.A. for the fiscal years of 1998 and 1999, the Tribunal 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 of granting of the aid, and not the four-year period established under Spanish law for this kind of proceedings.

For all these reasons, the Tribunal decided in Resolution 446/2005 to reject the appeal of Paneles Electricos, S.A. and considered the agreement adopted by the government to be in accordance with law.

2.12 Preliminary Rulings

a) Supreme Court (Administrative Division)

2.12.1 Appeal number 2250/1997, 22 December 2003, Appeal in cassation, Shipbuilding

Facts and legal issues: The Spanish Central Government contested the passing of Decree 217/1994 of 23 June to the STJ of Galicia by which the Council of the Government of Galicia regulated aid to the shipbuilding sector, because it considered that (i) the Decree should have been notified to the Commission and (ii) the Government of Galicia was not competent to adopt the Decree. The STJ of Galicia considered that the Decree was not incompatible with EC law as Article 88 (3) EC does not impose a notification obligation for each project involving State aid to small and medium shipbuilders. The Spanish Central Administration appealed to the Supreme Court.

Decision: The Supreme Court stated that according to Article 87 EC, any aid granted by a Member State or through State resources that distorts competition is incompatible with the Common Market. However, paragraph 3 of Article 87 states that some categories of aid may be compatible if they are specified by the Council, acting by a qualified majority. Therefore,

the Supreme Court examined Council Directive 90/684/CEE of 21 December 1990 (hereinafter the Directive), on aid to shipbuilding, which established that State aid also includes aid granted by regional or local authorities and any aid elements contained in the financing measures taken by Member States in respect of the shipbuilding or ship repair undertakings which they directly or indirectly control and which do not represent the provision of risk capital according to standard company practice in a market economy.

The Directive also states that the following types of aid to the shipbuilding sector shall be notified to the Commission in advance and authorised by the Commission before they are put into effect: (i) any aid scheme - new or existing - or any amendment of an existing scheme covered by the Directive; (ii) any decision to apply any general or regional aid scheme to the undertakings covered by the Directive; and (iii) any individual application of aid schemes in the cases referred to in the Directive or when specifically provided for by the Commission in its approval of the aid scheme concerned. As the present case dealt with the possibility of a regional Decree regarding State aid to shipbuilding being incompatible with EC law without previous notification to the Commission, the Supreme Court considered that it was the ECJ who should take the decision. Therefore, the Supreme Court submitted a preliminary ruling to the ECJ about the possibility of approving a Decree by a regional authority concerning State aid to the shipbuilding sector without previous notification to the Commission.

SWEDEN

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2. Member State's legal system (update from the 1999 Report)

There are no rules that apply specifically to national procedures concerning EC State aid law, except for those regarding certain aspects of the implementation of negative Commission decisions. Therefore, such national procedures are governed by general procedural principles and rules. Actions may be initiated before both administrative courts and civil courts, depending on the object of the procedure. Moreover the possibility of such an action being brought before a special court or tribunal cannot be excluded.

It should be noted that the following analysis includes only explicit legal remedies available in Swedish law or recognised by the Swedish courts. To date, no Swedish court has granted an individual party (for instance a competitor) *locus standi* based directly on Article 88 (3) EC and the principle of effective protection of Community rights. It should be possible, at least theoretically, for an individual who does not have *locus standi* according to any explicit Swedish procedural rule to bring such an action before a Swedish court. However, in practice this would, of course, depend on a case-by-case analysis, and perhaps could even be for the EC to ultimately decide. However, taking into account the difficulty with which Swedish courts deal with questions of *locus standi* based on the principle of effective protection of Community rights in other areas of law[372], the reluctance of the Swedish courts to admit such a case cannot be excluded.

2.1 Procedures concerning the direct effect of Article 88 (3) EC

2.1.1 Procedures before administrative courts

An action by a private party questioning the legality of a decision granting State aid without prior notification to the Commission may be brought before an administrative county court ("*Länsrätt*").

In general, if the decision to grant the alleged State aid has been taken by a municipality ("*Kommun*" or "*Landstingskommun*"), any resident of the municipality has *locus standi*, regardless of whether or not the resident is affected by the alleged State aid decision. However, non-residents do not have the right to appeal such a decision, even if the decision affects their legal position.

If the decision to grant the alleged State aid has been taken by an authority other than a municipality, the relevant legislation empowering the authority to take the decision must be analysed in order to determine whether or not it may be appealed to only an administrative court. In other words, there is no "automatic jurisdiction" for an administrative county court to examine a decision made by an authority. The administrative county courts only have

[372] See, for example, decision *Svea Hovrätts* of 8 October 2004 in Case Ö 5769 and the decision of 26 January 2005 in Case Ö 9251-04, where the argument of *locus standi* based on the principle of effective protection of Community rights was rejected by the first two instances. The case is under review by the Supreme Court which referred the question of *locus standi* to the ECJ for a preliminary ruling.

jurisdiction where there is such a specific rule[373]. In general, the claimant must be able to show that the alleged State aid decision affects the claimant's legal position in order to have *locus standi*. However, there are several rather complicated exceptions to this general rule.

It should also be noted that Swedish law does not have an equivalent to the English action for a declaration.

Finally, in cases where the legislation does not envisage the possibility of trying the legality of an alleged State aid decision before a court, the claimant may request that the decision is tried by a higher authority.

In cases where an administrative court finds that a decision taken by a municipality is unlawful, the decision will be annulled. The competent court has no right to change the content of the decision, but the municipality is obliged to annul the effects of the decision as far as possible. In this respect, it should be noted that there is no immediate legal remedy available if the municipality refuses to comply with its obligation to annul the effects of the unlawful decision.

In cases where an administrative court finds that a decision taken by an authority other than a municipality is unlawful ("*Fförvaltningsbesvär*"), the competent court may change the substance of the decision in question as well as annulling it. In other words, the administrative court has the same powers as the deciding authority.

A decision by an administrative county court may be appealed to an administrative court of appeal ("*Kammarrätt*") and to the Administrative Supreme Court ("*Regeringsrätten*") if leave to appeal is granted.

2.1.2 Procedures before civil courts

A private party may initiate an action for damages against the State or another authority for granting State aid without prior notification to the Commission based on the Swedish Tort Liability Act ("*Skadeståndslagen 1972:207*"), chapter 3, section 2[374]. In the context of this procedure, a civil court may decide whether or not an authority has unlawfully granted State aid to an undertaking. However, the court is not competent to annul the enforcement of the authority's decision.

If a procedure of this type is aimed at the State, the claimant may request that the question of damages be dealt with by the Office of the Chancellor of Justice ("*Justitiekanslern*") in

[373] The Act on Judicial Review of Certain Administrative Decisions 1988:205 is only applicable as regards the exercise of public authority in relation to the claimant. Therefore, it seems probable that a claimant willing to take action against an alleged decision to grant State aid would not be able to rely on these rules.

[374] "*The State, or a municipality, shall be liable to pay compensation for* [...] *personal injury, or loss of or damage to property, as well as for financial loss, where such loss, injury, or damage has been caused by a wrongful act or omission done in the course of, or in connection with the exercise of public authority in carrying out functions for the performance of which the State, or the municipality, is responsible* […]."

accordance with the law on *Förordning om handläggning av skadeståndsanspråk mot staten 1995:1301*.

2.2 Enforcement of negative Commission decisions

According to the Act on the Implementation of the European Communities' Competition and State Aid Rules ("*Lag 1994:1845 om tillämpningen av Europeiska gemenskapernas konkurrensoch statsstödsregler*"), the Swedish government may annul a decision by a municipality or a county council granting aid, if the Commission or the ECJ has declared the aid to be in breach of Article 87 EC. The government is competent to annul such a decision *ex officio*.

The courts are also competent to annul such a decision if a private complaint is lodged before a court, prior to an annulment action by the Swedish government.

There are no explicit rules on recovery under Swedish law. This means that the process of implementing a recovery decision is far from clear. As there has only been one Swedish case dealing with recovery (see below), it is also difficult to say how this will work in practice. However, it seems that the Swedish government will have to act *ad hoc* in these situations. In the case described in section 3.1 below, the Swedish government (without any prior court decision) entrusted the Swedish National Tax Board ("*Skatteverket*") with the task to execute recovery in accordance with Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 EC. The National Tax Board successfully ordered recovery from the beneficiaries by means of a formal letter.

2.3 Procedures concerning the implementation of positive Commission decisions

In theory, it would also be possible to challenge a decision granting State aid based on a positive Commission decision in the same way as any other decision taken by a Swedish national authority. For instance, such a decision could be revoked if it was not taken in accordance with the relevant Swedish procedural requirements. However, such a legal challenge could, of course, trigger a review of the decision taken by the national authority and not of the underlying Commission decision.

3. Member State's cases and summaries

In order to obtain information regarding such procedures, we have, *inter alia*, consulted available databases. We have also contacted the legal services of the Ministry of Industry to enquire whether there are any cases pending against the Swedish government regarding State aid. As far as we have been able to ascertain, the following judgments are the only cases where Article 88 (3) EC has been applied. However, it should be noted that there are no available databases that cover decisions taken by the courts of first instance.

3.1 Procedures concerning the direct effect of Article 88 (3) EC[375]

Administrative Court of Appeal of Sundsvall, Case 1965/97, Anderberg a.o/Säters Kommun

Facts and legal issues: Kommuninvest, an investment group, was founded in 1986. A large number of municipalities and other authorities are members of this group. The group's actual business is carried out by a limited liability company that takes up loans for the benefit of its members (the municipalities and other authorities). The members of the investment company contribute share capital and guarantee commitments. The guarantee commitments improve the credit rating of the company, and the members therefore pay lower rates of interest than they would if they took out loans individually.

In 1995, the Municipality of Säter ("the Municipality") decided to apply for membership of the investment group and to contribute to the required guarantee commitments. One resident of the Municipality, the appellant Anderberg, and other residents decided to appeal this decision. It should also be noted that the residents also filed a further complaint with the Commission regarding the alleged State aid decision.

Decision: The Administrative Court of Appeal of Sundsvall was asked to analyse whether the guarantee commitment violated Article 88 (3) EC. It should be noted that the Administrative County Court stated in its judgment that Article 93 (3) EC had direct effect and should therefore be enforced by the national courts if invoked by a party. However, the Administrative County Court found that the Commission had informed the Swedish Permanent Representative to the EU that it had closed the file on the complaint filed by the appellant. According to the Administrative County Court, the letter proved that the Commission did not intend to initiate formal proceedings under Article 93 (3) EC. The Administrative County Court did not find it necessary to examine whether or not the duty of notification had been breached.

On appeal, the Administrative Court of Appeal of Sundsvall stated, first, that the Municipality's guarantee commitment amounted to State aid, regardless of whether or not the commitment had been fulfilled and that this State aid was capable of distorting competition on the relevant financial markets. However, the Administrative Court of Appeal of Sundsvall concluded that the State aid in question must be regarded as existing aid, since the group was founded before Sweden became a member of the EU. Although the Municipality became a member of the group after Sweden's accession to the EU, its participation must be seen as a part of the existing aid. The Administrative Court of Appeal of Sundsvall therefore rejected the appeal and, also, request for a preliminary ruling by the EJC.

[375] It should be noted that the Market Court has dismissed legal actions based on the State aid rules on two occasions due to procedural difficulties (*see MD 2001:25, NN ./. Sävsjö kommun and MD 2002:1 EJK ./. Ljung Park Konferenshotell AB a.o.*).

3.2 Enforcement of negative Commission decisions

To the best of our knowledge, no decision by a Swedish national authority implementing a negative Commission decision has been challenged before a Swedish court to date. However, it should be noted that according to the information received from the Ministry of Industry, the Swedish government recently dealt with its first case concerning recovery of illegal State aid concerning tax benefits granted to companies active in the electricity sector.

In a letter dated 12 July 2005 the Swedish government informed the Commission that recovery had been completed[376].

3.3 Enforcement of positive Commission decisions

To the best of our knowledge, no decision granting State aid based on a positive Commission decision has yet been challenged before a Swedish court.

4. Assessment of the existing system

It is very difficult to access the Swedish system in the light of the limited number of court cases. However, the fact that only a few cases have been brought before the Swedish courts indicates that a party intending to challenge the legality of an alleged State aid decision is more likely to turn directly to the Commission than to bring a court action. This may be explained, at lease to some extent, by the procedural limitations described above, in particular regarding *locus standi*.

[376] N2005/5064/NL.

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2. Outline of the availability of judicial relief under the UK legal system

The procedures available in the UK to deal with (i) the direct effect of Article 88 (3) EC, (ii) the enforcement of negative Commission decisions and (iii) the implementation of positive Commission decisions are judicial review, private law actions brought by individuals and actions brought by the government to recover illegally paid State aid.

This chapter consolidates the contribution previously made by Lovells to the 1999 Report, and updates all relevant case law in the field.

2.1 Judicial Review

Judicial review lies against any person or body which performs public duties or public functions, such as the State and local authorities. A decision by a public authority in relation to State aid may be judicially reviewed by the High Court in England and Wales under section 31 of the Supreme Court Act 1981 ("Section 31") in accordance with Part 54 of the Civil Procedure Rules ("CPR"). In such cases, the challenge by way of judicial review is typically based on the ground that the action or inaction of the public authority is incompatible with Community law and therefore unlawful. In order to be able to apply for judicial review, the claimant must show a sufficient interest in the matter (or "*locus standi*").

The principal remedies available in judicial review proceedings under Section 31 are the prerogative remedies of quashing orders, prohibiting orders and mandatory orders. Claimants may also seek, in addition to or instead of these remedies, a declaration and/or injunction. A claim for damages may be included, but only in addition to a claim for one or more of the remedies set out above.

Quashing order (CPR 54.2(c)): this is the appropriate order where the High Court concludes that a decision which has been made by a public authority should be set aside. Where the High Court quashes a decision in this way, it has the power to remit the matter to the public authority concerned, with a direction to reconsider it and to reach a decision in accordance with a judgment given by the High Court in the judicial review proceedings (CPR 54.19). Quashing orders could be used to quash a decision already taken by a public authority to grant State aid, either without Commission approval, or before the Commission has reached a final decision on whether the aid is compatible with the Common Market. An application for a quashing order could also be made to challenge the implementation by the government of a positive Commission decision on State aid on the grounds that the Commission decision, and therefore government action, are incompatible with Community law (however, the High Court would not grant such a declaration unless it had referred the case to the ECJ under Article 234 EC and had received an appropriate response[377] (in addition, a reference to the ECJ would be inadmissible if the claimant before the national

[377] Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost [1987] ECR 4199.

court was manifestly admissible in challenging directly before the CFI the Commission decision and had not done so within the prescribed time limits[378]).

Prohibiting order (CPR 54.2(b)): this is an order restraining a public authority from acting outside its powers. Thus, for example, where a public authority has not yet done so but is proposing to grant State aid contrary to a Commission decision that such aid is incompatible with the Common Market or is proposing to grant aid without informing the Commission of that proposal, then the High Court can make a prohibiting order. Again, a prohibiting order could be sought to prevent the implementation by a public authority of a positive Commission decision approving an "aid" (subject to the same limitation as described above).

Mandatory order (CPR 54.2(a)): this is an order requiring a person or body charged with a public duty to carry out that duty. Section 40 of the Crown Proceedings Act 1947 states that a mandatory order cannot be made against the Crown but can be made against an officer of the Crown who is obliged by statute to do some ministerial or administrative act which affects the rights or interests of the claimant. It is likely that, in the light of *Factortame II*[379], a mandatory order could be made against the Crown where the State has failed to implement a Commission decision to recover aid.

Declaration (CPR 54.3(1)(a)): a declaration that a measure adopted or proposed by a public authority is incompatible with Community law (and thus unlawful) is often sought in judicial review proceedings by a claimant challenging a public body, on the basis that such bodies will act in accordance with declarations of the High Court without the need for more draconian measures, such as a quashing order or a mandatory order. The claimant could, for instance, ask the High Court to declare that a particular measure infringes the obligation imposed on Member States in the last sentence of Article 88 (3) EC where the measure has not been notified to the Commission or, if notified, where the Commission has not issued a final decision on the measure. Even where the Commission has issued a final decision approving an aid and a public authority then grants it, a claimant could seek a declaration that the Commission decision, and subsequent action by the public authority, are incompatible with Community law (subject to the same limitation as described above).

Injunction (CPR 54.3(1)(b)): a claimant can also seek an injunction within judicial review proceedings, restraining a public authority from acting in a particular way. Under Section 31(2), the court may grant an injunction where it is just and reasonable so to do, having regard to: the nature of the matters in respect of which prerogative remedies may be granted; the nature of the defendant body; and all the circumstances of the case. In the context of the judicial review proceedings in *Factortame II*, it was held that an interlocutory injunction could be granted, preventing a minister of the Crown from implementing legislation alleged to be contrary to Community law, pending final determination of that issue. The ECJ ruled that, where a national court is seized of a case involving issues of Community law and it is

[378] Case 188/92, TWD v Bundesrepublik Deutschland [1994] ECR I-833.
[379] [1991] A.C. 603.

necessary to grant interim relief in order to ensure the full effectiveness of rights claimed under directly applicable Community law, any rule of national law preventing the grant of such interim relief must be set aside. The question of whether interim relief should be granted is a matter for the national courts. The case therefore came back before the House of Lords for a decision on whether an injunction should be granted and, if so, on what terms. The House of Lords held:

(a) that the balance of convenience was likely to be the determining factor, because it was unlikely, in such cases, that there would be an adequate remedy in damages available to either side;

(b) that generally, the national court should not restrain a public authority from enforcing an apparently authentic law, unless the national court were satisfied, having regard to all of the circumstances, that the challenge to the validity of that law was, prima facie, so firmly based as to justify so exceptional a course being taken; but it would always be a matter of discretion; and

(c) that, on the facts of the instant case, the applicants' challenge was, *prima facie*, a strong one, and the balance of convenience came down in favour of the grant of the interim injunction sought.

It is important to note that, in certain circumstances, the requirement for the claimant to give a cross-undertaking in damages is a major disincentive to the seeking of an injunction.

Damages (CPR 54.3(2)): the High Court also has the power to award damages to a claimant in an application for judicial review, provided that the claimant has in his application included a claim for damages alongside a claim for one of the other remedies set out above and provided that the High Court is satisfied that damages could have been awarded in a private law action (or a claim for damages under the Human Rights Act) begun by the claimant.

Procedure: in all judicial review cases, a claim may only be brought with the permission of the High Court (CPR 54.4) and an application for permission must be made promptly and, in any event, within three months of the grounds for bringing the claim arising (CPR 54.5). The application (in the prescribed form (CPR 54.6 and 8.2), Form N461) should include a statement of the relief sought and of the grounds, and must be accompanied by supporting evidence. The applicant for permission to apply for judicial review is required to serve the claim form on the defendant to the proposed judicial review proceedings and any interested parties within seven days of its being filed with the Administrative Court of the Queen's Bench Division of the High Court. The application for leave is normally dealt with on the papers by a single judge, without a hearing, although the applicant has a right to request an oral hearing if permission is refused. If permission is granted, the matter will proceed to a substantive oral hearing, following the submission of reply evidence by the defendant and any interested parties and detailed grounds (legal argument) by all parties.

2.2 Private law actions brought by individuals

In the light of the case law of the ECJ which establishes firmly that Member States can be liable to individuals in damages for infringement of Community law obligations, it has been held by the English Court of Appeal in *Secretary of State for Employment v Mann*[380] that a "*Francovich* claim" for damages can be pursued in the High Court or in the County Court, in the ordinary way, if the conditions set out in *R v Secretary of State for Transport, ex parte Factortame*[381] are met.

Thus, it is envisaged by the English courts that an individual could bring an ordinary, free-standing action for damages against a public authority in a State aid case in the High Court or in the County Court. Indeed, where the primary relief sought is damages, such an action may well be the preferred route for recovery, even though judicial review is better established as a means for challenging the actions of public authorities which are incompatible with Commission decisions or Community rules concerning State aid.

2.3 Recovery of illegal State aid by the government

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.

[380] Judgment of 30 September 1996, [1997] ICR 209.
[381] [1996] 1 CMLR 889.

2.4 Assessment of the existing system

The most immediate distinguishing feature of the State aid field in UK jurisprudence is the relative lack of cases as compared to other major jurisdictions.

It is also noticeable that many of the cases that do exist are in the field of tax. Further, even where the UK courts have, in a number of tax cases, been inclined to find unlawful State aid, subsequent jurisprudence of the ECJ has determined that no State aid existed in these cases[382].

Another striking factor is that there are relatively few "pure" State aid cases. For the most part, State aid arguments seem to be employed as catch-all or sweep-up arguments in the context of other disputes.

The lack of cases may, in part, result from the particular features of the UK legal system. The requirement to seek judicial review in the adversarial system of the High Court places a burden on claimants - for instance, the claimants must first make an application for leave to apply for judicial review, before the case itself is even heard. This may discourage claimants. There is also a limited time frame in which to bring claims - an application for permission to apply for judicial review must be made promptly and, in any event, within three months from the date when the grounds for the application first arose.

As to whether there are potential deficiencies in the UK legal system in enforcing State aid law, it is difficult to come to firm conclusions, given the relative lack of cases in this area. This may be as a result of the legal system serving to discourage potential claimants, as suggested above. It may be that potential claimants consider the procedure so cumbersome that it may not be in their interests to pursue their complaints before the UK courts within their own commercial time-frames. If one looks at the recovery action involving British Aerospace plc and Rover Group Holdings plc in 1991, this involved proceedings before the High Court in London, a stay of those proceedings whilst the ECJ examined the case, and the ECJ finding for British Aerospace on procedural grounds. Repayment only occurred once the Commission had followed the procedure under Article 88 (2) EC in respect of the aid of £44.4 million, and found that it was incompatible and illegal State aid which required repayment. The initial High Court proceedings for recovery brought by the Department of Trade and Industry were not continued.

Mr Justice Silber of the High Court has published a short note[383] based on his experiences as the judge hearing the applications of BT and One-2-One for permission to obtain judicial review of the decisions of the UK Secretary of State for Trade and Industry[384] made during

[382] See, for instance, Case C-308/01, GIL Insurance Ltd and Others v Commissioners of Customs & Excise [2004] ECR I-4777.
[383] "The Experience of an English Judge in Handling State Aid Cases," in "*The Law Of State Aid In The European Union*", pages 359 - 362, Edited By Biondi, Eeckhout, Flynn, OUP 2004.
[384] On the application of BT3G Ltd, R v Secretary of State for Trade and Industry [2001] EuLR 325 upheld on appeal [2001] EuLR 822.

the course of the auction of the third-generation licences for mobile phones. In his note, Mr. Justice Silber identified three chief problems in handling State aid cases:

- first, is the problem of the uncertainty as to the appropriate principles to be used in identifying State aid; Mr. Justice Silber highlighted the five different criteria which have been suggested by the courts over the years to determine whether State aid has been given in a particular case; however, he pointed out, "*no authority (…) said which of those tests was overriding or what happened if different criteria produced conflicting decisions in respect of a particular factual situation*"; Mr. Justice Silber hoped that the ECJ would "*adopt a single comprehensive principle for identifying State aid, perhaps incorporating more than one of the tests*" mentioned above;

- second, is the problem of overruling old European case law; Mr. Justice Silber suggested that the uncertainty of the law on identifying State aid "*might be a consequence of the failure of the European Court to state when some of its own decisions were no longer valid*"; instead, he detected a "*surprising coyness in stating that a decision of the European Court is no longer good law*"; he believed that "*it is of vital importance that litigants know what their rights are and States know what they cannot do*"; he could not see "any cogent reason" for the ECJ not fulfilling this "inescapable duty";

- third, is the problem of understanding the economic factors; at the outset of the case, Mr. Justice Silber was concerned about how he would be able to resolve the economic issues before him; in actual fact, he did not find this task any more difficult than resolving many other areas in which there was conflicting evidence, and certainly less difficult than very complex medical issues; he described the terminology and calculations raised within the economic issues as "easily comprehensible", though this may have reflected the facts of the case; he did not believe he would have benefited from or required assistance from the Commission.

As regards the direction of English State aid jurisprudence, in line with the ECJ's decision in *SFEI v La Poste*[385], one of the most interesting recent cases in the English courts reveals an opposition to creating a Community law tort as a cause of action in the UK courts (for further discussion see 3.3(a) below). *Betws Anthracite*[386] followed a Commission decision finding that the recipient of State aid from the German Government had misused that aid, that the aid was incompatible with the Common Market, and ordering Germany to require the recipient to repay the aid. The UK claimant sought damages from the beneficiary of the aid for loss and damage suffered as a result of the alleged anti-competitive conduct of the beneficiary which had been carried out using the State aid granted. Following the ECJ's decision in *SFEI*, the High Court concluded that there was no cause of action in Community law for such a claim. The High Court noted that any other decision would potentially open the

[385] Case C-39/94, Syndicat Francais de L'Express International (SFEI) & Others v La Poste & others [1996] ECR 3547.
[386] Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH [2003] EWHC 2403 (Comm).

floodgates for claims as the scope of application of the tort would be unclear. The High Court believed that, before such new grounds of action could be created, these issues would need to be considered by the ECJ.

2.5 Research methodology

2.5.1 Electronic sources

- Casetrack: a UK website offering judgments from the higher English courts from 1998 onwards;
- Casesearch: a UK website provided by Lexis/Nexis Butterworths;
- The Practical Law Company: a UK website offering a comprehensive competition law service, including State aid law;
- Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union i.n.p.a (database in French of national administrative courts decisions applying EC law :
    - http://193.191.217.21/fr/jurisprudence/jurisprudence_fr.lasso , or
    - http://www.raadvst-consetat.be/Juradmin/home.html (link from the Belgian Council of State's site);
- Current Legal Information (UK): a UK website offering a comprehensive database of current cases and of legal and financial journals.

2.5.2 Printed sources

- Kelyn Bacon: "The Concept of State Aid: The Developing Jurisprudence in the European and UK courts", [2003] E.C.L.R. 24(2), 54-61;
- Kelyn Bacon: "State Aids In English Courts: Definition And Other Problems", in "*The Law Of State Aid In The European Union*", Edited By Biondi, Eeckhout, Flynn, OUP 2004;
- UK Civil Procedure Rules.

2.5.3 English key words used for the research of cases:

- State* aid* and (Article 87 or Article 88) or (Article 92 or Article 93)

2.5.4 Abbreviations used:

- All ER: All England Law Reports;

- CFI: Court of First Instance;
- CMLR: Common Market Law Report;
- ECJ: European Court of Justice;
- EuLR: European Law Reports;
- EWCA: England & Wales Court of Appeal;
- EWHC: England & Wales High Court;
- STC: Simon's Tax Cases, published by Butterworths;
- VAT: Value Added Tax.

2.5.5 List of cases with summaries

2.6 Cases concerning the direct effect of Article 88 (3) EC

This section is divided between those cases involving tax and revenue issues, and those of a wider, non-tax nature.

2.6.1 Cases of a wider, non-tax nature

a) Actions instituted by beneficiaries: R v The Secretary of State for Trade and Industry (and others) ex parte The Isle of Wight Council CO/4077/1999 (C)

Facts and legal issues: The Isle of Wight Council sought judicial review of two measures taken to classify areas within the UK. This classification was for the purpose of the grant by the UK Government of regional selective assistance ("RSA") and the grant by the Commission of assistance similarly made available on a regional basis from the structural funds of the EC, more particularly in relation to Objective 2 areas.

Grants of RSA generally constitute State aid falling within Article 87 EC. The Commission's guidelines on regional aid set population ceilings for areas qualifying under Article 87 (3) (a) and (c) EC. Member States must send the Commission their draft regional aid map, setting out the regions they propose for approval under Article 87 (3) (c) EC.

In response to the government's public consultation process on the Assisted Areas map in March 1998, the Isle of Wight based its case for inclusion on (i) poor GDP per head, (ii) very high unemployment and (iii) exceptional problems of insularity. However, in the final analysis, the Isle of Wight was not proposed as an Assisted Area because it was not suitable for the kind of large scale industrial aid that the revised RSA would cover.

Similarly, with regard to the structural funds, there is a population ceiling for each Member State, and the aggregate population of the Objectives 1 and 2 regions in a Member State must not exceed that population ceiling. Article 4 of the Structural Funds Regulation (Council Regulation (EC) No 1260/1999 (the "Regulation")) sets out the basis on which geographic areas can qualify for Objective 2. It is the Member State that proposes Objective 2 areas, but the Commission that takes the final decision. After consultation, the UK Government did not include the Isle of Wight within the proposed areas on the basis, *inter alia*, that it failed to meet many of the Article 4 criteria.

The applicants accepted that the Isle of Wight was not entitled as of right to be an Objective 2 region: their argument was essentially that the government ought to have made a special case for the Isle of Wight and that it could be criticised for not doing so on the basis that it failed to understand the extent of its discretionary powers.

Decision: the application in respect of both proposals was dismissed.

With regard to RSA, the High Court concluded that neither Article 158 EC nor Article 159 EC gave guidance as to how the "complex balancing exercise" Member States must engage in to formulate their economic regional aid policy should be carried out. In the circumstances "*it cannot be irrational to exercise their powers so as to carry out a comparison between areas to reach a conclusion*." As a matter of fact, it found that the government had paid sufficient attention to the fact that the Isle of Wight is an island and to issues connected with its insularity.

With regard to the structural fund, the issue was not that the government could not make a special case for the Isle of Wight (i.e. that there was no basis on which a case could be made), as the applicants' arguments seemed to suggest. The High Court found that because, despite the wide discretion permitted to government, the making of a case for the inclusion of the Isle of Wight would constitute such a departure from the permitted degree of discretion as to amount to the making of a special case, the government could not be said to be so wrong in its view that its conclusion should be treated upon a perceived incapability to present the case, but as a discretionary decision not to present it. The applicants' arguments thus went to questions of 'overall balance and not to the integrity of the decision'. The wide powers of the government in this case were discretionary and the individual integrity of the discretion had not been subjected to attack.

b) Actions instituted by competitors: British Telecommunications plc v Director General of Telecommunications CO/1560/2000 (D)

Facts and legal issues: by Directive 97/33/EC, the Interconnection Directive, and a decision of the Commission dated 22 December 1999, the UK Government had to require BT to introduce carrier pre-selection technology (which allowed customers to choose Other Licensed Operators' ("OLO") networks for certain telecommunications messages) by 1 April

2000. It was not possible to upgrade BT's network by this deadline so, as an interim solution, the Director General of the Office of Telecommunications ("Oftel") decided that autodialler boxes should be installed in customers' houses (which would route the relevant calls to the pre-selected OLO). Oftel decided that BT should pay half of the costs of this interim solution, given that it was BT's system which was not ready by the due date.

BT appealed against that decision on various grounds, including that the decision on cost allocation amounted to illegal State aid.

Decision: Mr Justice Moses ruled that the determination was not a measure constituting State aid. There was no advantage conferred exclusively on the OLOs. This was because, while BT had to pay 50% of the OLOs' costs of the autodiallers, the obligation originally imposed in the relevant directive meant that BT should provide carrier pre-selection facilities, and this obligation was now being met by the installation of autodialler boxes by the OLOs, pending BT's full compliance with its obligations under the relevant directive. The obligation could equally have been met by the provision of autodialler boxes by BT, in which case the OLOs might have been required to contribute to the costs. There was merely a division of the burden of costs resulting from the new system. Thus the determination did not represent aid at all.

Although it was not necessary for the High Court to determine the issue, it flagged the main area of dispute between the parties in relation to State aid. This was on the question of whether the measure involved a transfer of State resources. Oftel contended that the determination entailed no financial burden on the UK, either directly (in the form of any grant paid by the State), or indirectly (in the form of revenue foregone)[387]. BT contended that the authorities upon which, in the main, Oftel relied were no longer good law. BT cited a 1996 case concerning a preferential tariff system applied in the Netherlands for supplies of natural gas to a Dutch nitrate fertiliser producer[388].

In Mr Justice Moses' view, Oftel's position was the more correct one. However, had it been necessary to determine the issue, he would have referred the matter to the ECJ.

c) Actions instituted by competitors: R v Ministry of Agriculture Fisheries & Food *ex parte* 1. British Pig Industry Support Group and 2. Meryl Suzanne Ward CO/0608/2000 (D/E)

Facts and legal issues: the applicants (an association of pig producers and persons in allied trades, and its treasurer) sought judicial review of the decision of the Ministry, of 30 November 1999, not to apply for authorisation for aid to compensate the pig industry for the

[387] Oftel cited Case 82/77, Openbaar Ministerie v Van Tiggele [1978] ECR 25 para 25. The ECJ concluded that a Dutch measure fixing minimum retail prices did not amount to a grant of aid by a Member State or through State resources (see paragraph 25 and the opinion of the Advocate General at paragraph 66). See also Joined Cases C-72 and C-73/91, Sloman Neptun v Bodo Ziesemer [1993] ECR I-887; Case C-189/91, Petra Kirsammer-Hack v Nurhan Sidal [1993] ECR I-6185; and Case T-358/94, Air France v Commission [1996] ECR II-2109 para. 58.

[388] Case C-56/93, Belgium v Commission [1996] ECR I-723.

costs incurred as a result of the ban on mammalian meat and bone meal in animal feed (the "MBM ban"), and the Ministry's continuing failure to seek authorisation to grant adequate aid to the pig industry.

The applicants contended that they had been discriminated against in comparison to the beef and sheep industries in respect of compensation sought by the government for the hardship suffered by farmers as a result of BSE. The ban affected all red meats, even though the cause of it, BSE, had not affected pigs. The applicants submitted that their exclusion from compensation was discriminatory and unlawful. They submitted that they had been discriminated against in two ways: first, by the lack of compensation and, secondly, by reason of the ban imposing higher costs on the pig industry. The applicants further submitted that there was no objective justification for such discrimination.

Thus the applicants were not attacking the lawfulness of the measures said to have given rise to the situation of discrimination. They did not contend that the MBM ban was unlawful by reason of its discriminatory impact; nor did they contend that the various means of financial assistance[389] up to that point had been unlawful by reason of their discriminatory impact. The applicants were claiming that those measures had resulted, by way of 'side-effects', in (unintended) discrimination, and that the government had a duty to rectify that situation by granting adequate aid to the pig industry.

Decision: the application for judicial review was dismissed.

Mr Justice Richards held that there was no realistic prospect of the Commission approving aid of the kind that the applicants sought, nor was there a legal basis for compelling the Ministry to seek approval for such aid. The adverse reaction of Commission officials to proposals originally put forward by the UK pig industry for aid in respect of the MBM ban meant that continued efforts were futile, as they would not be approved by the Commission. The fact that the UK Government had made these initial efforts meant that it had complied with any purported duty. There was no real possibility of persuading the Commission to grant exceptional occurrence aid, so again there was no breach of any purported duty. This was because, in approving TRISS, the Commission had stressed its acceptance of a vital short term measure in the immediate aftermath of the BSE crisis, whereas the reality of the situation at hand was that the passing of time had created a different situation, no longer concerned with the immediate aftermath of the crisis but with a longer term public health issue and a range of longer term problems affecting the profitability of the UK pig industry.

The High Court assumed that the applicants were able, in principle, to benefit from the non-discrimination principle. However, the difference in treatment between the beef and sheep sectors on the one hand and the pig sector on the other did not amount to a prima facie

[389] These included the Temporary Rendering Industry Support Scheme, ("TRISS"), intended to compensate abattoirs and renderers of carcasses into MBM for the loss of their markets. Abattoirs had to pay to dispose of their waste, rather than receive a fee for it from the renderers. The immediate viability of abattoirs and renderers was threatened by the MBM ban,

breach of the principle of non-discrimination, because the applicants sought a response to the special circumstances of the pig industry and did not seek the removal of a difference of treatment between producers in a similar situation. If a *prima facie* breach of the principle of non-discrimination was to be found, the difference in treatment which gave rise to that discrimination was objectively justified because of the different regime for pig meat. The government did not breach its duty towards the applicants because it had acted lawfully throughout, because no rectification duty fell on a Member State alone, and because Article 10 of the European Convention on Human Rights and Fundamental Freedoms 1950 did not have direct effect in domestic law.

d) Actions instituted by competitors: Re an application by Peninsula Securities Ltd for judicial review, the High Court of Justice in Northern Ireland, Queens Bench Division (Crown Side), judgment of 11 June 1998 (D)

Facts and legal issues: the applicant owned a shopping centre in Londonderry, Northern Ireland and had received no grant or subsidy for the construction of the centre or the purchase of the land on which it stood.

The Department of the Environment for Northern Ireland adopted a development scheme for a semi-derelict site in Foyle Street, Londonderry, which involved the construction of a rival shopping centre on the site. A joint venture, Foyleside, came forward to implement the development scheme and build the rival shopping centre.

The Department made an urban development grant of £7.5 million to Foyleside. Such grants have been the main urban regeneration measure for Londonderry since 1982 and their function is to stimulate private investment which either would not have been made or which would have led to development at a pace that was slower or on a scale or standard that was less than satisfactory. Foyleside had applied for an urban development grant and the Department had concluded that the projected cost of the development was £7.5 million greater than the market value of the completed development. £7.5 million was the minimum that would trigger the scheme, and so a grant for that amount was made.

The Department transferred the land comprised in the development scheme to Foyleside for £1 (one pound). The Department spent £2.3 million in acquiring the land in the scheme area which it did not already own (43% of the total). The Department also carried out road and environmental improvement works near the development without charge to Foyleside.

The applicant challenged the Department's decision to:

- pay the £7.5 million urban development grant;

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which would have threatened a collapse of the meat supply and disposal chain. TRISS allowed renderers to maintain pre-crisis prices to slaughter houses for the waste removed by them.

- incur site assembly costs and to transfer the land in the development scheme for £1; and

- execute road access and environmental improvement works next to the site without charge

on the grounds that:

- these measures constituted the granting of State aid to Foyleside, which distorted competition by favouring Foyleside in breach of Article 87 (1) EC; and

- in breach of Article 88 (3) EC, the Commission had not been notified of the Department's plans to grant new aid.

Pursuant to the Commission's Communication concerning co-operation between the Commission and national courts in the field of State aid[390], the Northern Irish courts wrote to the Commission seeking guidance. In its reply to the Northern Irish High Court, the Commission stated that the approval of the Single Regeneration Budget (a UK State aid (N 31/95) approved by the Commission on 4 May 1995) reflected the Commission's view that measures which are aimed at the construction of infrastructure for general public use and do not provide a subsidy to the final user are not State aid in the Articles 87 and 88 EC sense. The Commission stated that it did not intend to prejudge an analysis on the effect on trade at the level of intermediaries as opposed to final users. The Commission drew a distinction between general infrastructure measures and aid favouring certain companies. If aid strengthened the intra-Community trade position of some undertakings compared with others, it would fall under Article 87 (1) EC.

Decision: the judge considered the wording of Article 87 (1) EC and concluded that four cumulative criteria had to be met before it would apply: aid had to be granted by a Member State, the aid had to distort or threaten to distort competition, the distortion had to occur because an undertaking was favoured, and there had to be a distortion (sic) of inter-state trade.

The judge ruled that the first of these criteria was met; the urban development grant and the transfer of the land for the nominal figure of £1 did amount to the granting of State aid.

As for the distortion of competition, the judge found that the applicant had failed to demonstrate that the measures adopted had created such distortion. It was accepted by all parties that only a "small potential distortion" needed to be shown. Rules on State aid were not subject to the same requirement of "appreciability" which must be present for Articles 81 and 82 EC to apply. The judge identified two possible markets on which the distortion might

[390] OJ (1995) C 312/8.

occur: that for the development of shopping centres and that for landlords of shopping centres. In the former market, the urban development grant and the site assembly costs did not confer an economic advantage on Foyleside. They merely ensured that development which might have happened elsewhere occurred at a particular site; they favoured a particular site, they did not improve Foyleside's competitive position. The judge said:

"… the measures taken by the Department may be said to have enabled the development to proceed and competition to take place with other shopping centres but that is not the same as bringing about a distortion of competition. As a prudent developer, Foyleside would not have proceeded with a development on a site [with a negative value of] £7.5 million… The removal of the negative value does not give Foyleside a competitive edge; it merely places it in the position that it would have occupied had it [been] located on a site where it would not have been saddled with such an unacceptable encumbrance".

The judge rejected, for lack of evidence, the claim that Foyleside obtained any advantage over its competitors in its role as landlord.

As for the third criterion, the favouring of an undertaking, the judge relied on the judgment in *SFEI v La Poste*[391], and stated that a grant of aid should confer on an undertaking an economic advantage which it would not have enjoyed under normal market conditions. The judge held:

"…in normal market conditions, no sensible developer would contemplate constructing a shopping centre on that site. [The aid] did not confer an economic advantage which would not have been available in normal market conditions. Without the measures, development of the site would not have been considered. An economic advantage could only be said to have accrued to the developer if it would have proceeded without the grant. There is no reason to believe it would have done so".

The removal of a disabling negative value did not place Foyleside in a better position than competing shopping centres such as that of the applicant, which the judge assumed had not suffered from negative value difficulties.

As for the road and environmental works, the judge thought it could not be the case that a State authority was forbidden to carry out road improvements for the benefit of the public lest any incidental benefit accrue to a developer.

As for the fourth and final criterion, trade between Member States, the judge found that trade between the Republic of Ireland and Northern Ireland had not been affected. The judge recognised that shoppers in the Republic had been attracted to the new shopping development at Foyleside, but that alone did not establish that the pattern of cross-border shopping had been affected or was liable to be affected. It might have been true that

[391] Case C-39/94, Syndicat Francais de L'Express International (SFEI) & Others v La Poste & others [1996] ECR 3547, para. 60.

shoppers from the Republic were more likely to shop at Foyleside than at other shopping centres in Londonderry. However, the judge did not consider that such a change of shopping pattern within Northern Ireland could be said to affect trade between Member States. According to the judge:

"Article [87 EC] is designed to maintain an equilibrium of competition between Member States on a Community wide level. It is not designed to ensure that trade attracted from one Member State to another is distributed evenly between undertakings within the latter Member State".

e) Actions instituted by competitors: R v Secretary of State for National Heritage and another, *ex parte* John Paul Getty Trust (Court of Appeal) 27 October 1994 (unreported) (D)

Facts and legal issues: on 30 August 1994, the John Paul Getty Trust (the "Trust") applied for leave to seek judicial review of the decision of 9 August 1995 of the Secretary of State for National Heritage to defer for a further period of three months (commencing on 5 August 1994) the decision on the application for the grant of an export licence in respect of the sculpture known as the "Three Graces" by Antonio Canova. The Trust sought, amongst other things, a declaration that a payment of £3.6 million by the National Heritage Memorial Fund (the "Fund") to the Victoria and Albert Museum and the loan by the Fund to the National Galleries of Scotland to enable them to buy the statue were or would be unlawful because they were contrary to Articles 87 and 88 EC.

This was an appeal against a refusal by the judge at first instance to allow the initial application for leave to move for judicial review. Accordingly, it was sufficient for the Trust to be able to show that any one or more of the grounds relied on was arguable.

By an agreement of 23 September 1988 the Trust had agreed to buy the sculpture from a company called "Fine Art" for £7.6 million. The agreement provided for Fine Art to deliver the statue to the Trust in the United States and was conditional on obtaining an export licence. The agreement also provided that if a licence were refused or not granted within 18 months from 23 September 1988, the agreement would be null and void. On 24 September 1988, Fine Art made an application for an export licence.

On 16 February 1994, the Secretary of State for National Heritage announced that he was deferring a decision on the export licence for the Three Graces until 5 August 1994. The system whereby the consideration of applications for export licences is deferred has been in existence for many years and was instituted so that museums and art galleries in the UK could have an opportunity of trying to raise funds to purchase the work of art concerned and ensure that the work remained in the UK.

On 15 July 1994, the Victoria and Albert Museum announced that it had secured pledges amounting to £4.7 million (including £3.6 million from the Fund) and needed another £2.9

million to match the £7.6 million which the Trust had agreed to pay for the Three Graces. At about the same time, the Museum wrote to the Secretary of State for National Heritage, asking for an extension of the deferral period for a further three months beyond 5 August 1994. Subsequently, the National Galleries of Scotland agreed to join in a partnership with the Victoria and Albert Museum and to make a £1.1 million contribution towards the money required to purchase the Three Graces. On 9 August 1994, the Secretary of State for National Heritage decided to make a final deferral of up to three months.

One of the grounds advanced by the Trust to challenge the Secretary of State's decision of 9 August was that the sum of £3.6 million amounted to State aid and should have been notified to the Commission pursuant to Articles 87 and 88 EC. The Trust drew a distinction between "general grants in aid", such as the sum which was paid by the government to enable the Victoria and Albert museum to operate, and specific grants, such as that which was given by the Fund, which was arguably State aid within the meanings of Articles 87 and 88 EC.

The Court of Appeal noted that one of the types of discretionary aid which may be considered to be compatible with the Common Market is the type of aid set out in paragraph 3(d) of Article 87 EC, which is aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

The Trust claimed that the £3.6 million provided by the Fund was unlawful and contrary to the EC Treaty because it had not been notified. The Trust claimed that the "legality" of that aid could only be determined by the Commission, and national courts had a very limited role in this area in that they were constrained only to decide, first, whether there had been aid provided or an offer of aid made and, secondly, whether or not notification had been made in accordance with paragraph 3 of Article 88 EC. Apart from that, any other questions under Articles 87 and 88 EC were matters for the Commission and not for the national courts.

Decision: the Court of Appeal was prepared to assume, in favour of the Trust, that the Trust had a sufficient interest to challenge the grant of unnotified aid. The Court of Appeal was also prepared to assume in the Trust's favour that the Trust was an undertaking within the meaning of Article 87 EC. The question remained as to the role the Court of Appeal could play in determining whether the payment of £3.6 million was State aid which ought to have been notified under Article 87 EC. The Court of Appeal held that there had to be a threshold which had to be crossed by any aid before it could be considered as State aid to which Article 87 EC applied. If it were not so, an impossible burden would be placed on the Commission to determine all of these matters. The Court of Appeal had to be in a position to consider whether the aid which it was proposed should be given was capable of affecting trade between Member States. The contract in question between the Trust and Fine Art was a conditional contract. If the aid were given, the effect of it would be that the sale of the statue to a museum in California would be replaced by the sale of the statue to the Victoria and Albert Museum and the Scottish National Galleries. In those circumstances, it seemed

impossible to argue that such aid was capable of affecting trade between Member States. The Court of Appeal thought that it was right that it should determine this point at that stage. The Court of Appeal did not agree that this was an arguable point and therefore refused leave to move for judicial review.

2.6.2 Cases involving tax and revenue issues

a) Actions instituted by beneficiaries: R (on the application of Professional Contractors' Group and others) v Inland Revenue Commissioners [2001] EWCA Civ 1945 (B)

Facts and legal issues: IR 35 ("Inland Revenue 35" is a shorthand for measures enacted in the Finance Act 2000, the Welfare Reform Pensions Act 1999, and the Social Security Contributions (Intermediaries) Regulations 2000) set out the changes to be introduced in order to counter tax-avoidance in the area of personal service provision, in particular with regard to individuals providing their services through their own service companies so as to avail themselves of corporate, as opposed to personal, taxes.

Employees are liable to income tax on their earnings and they must also pay social security contributions. These taxes are imposed at source and there is little ability for an employee to deduct expenses. By contrast, if someone who was formerly an employee set up a service company, became the controlling shareholder of that company and provided his services to his former employer, he would pay corporation tax on the service company's profits (as opposed to income tax) and could distribute the company's revenue to himself without paying social security. The new IR 35 regime would apply only where the worker had a material interest in the company or received a "traceable dividend" (i.e. it would not apply to all arrangements whereby individuals offered their services through companies).

Thus, the people who would be adversely affected by the new regime would be those who, in effect, provide employee services, as opposed to the services of self-employed independent contractors. The tax would only bite on those who therefore "ought" to be paying employee tax and were not.

The appellants sought judicial review of the lawfulness of IR 35, claiming, *inter alia*, that it was incompatible with EC law as it was an unnotified State aid contrary to Articles 87 and 88 EC.

Decision: the appeal was dismissed.

The judge upheld the conclusion that IR 35 was a general measure whose aim was to ensure that all those supplying employee-like services should pay income tax and social security as employees, and should not be able to avoid that obligation by means of providing services through an intermediary company.

b) Actions instituted by competitors: John Page/Empowerment Enterprises Ltd v Commissioners of Customs and Excise (2004) EDN/04/22 (B)

Facts and legal issues: The appellant company provided private tuition services. The Commissioners ruled that this was not an exempt supply and, as such, VAT should be charged on these services. One of the grounds of appeal was that the imposition on the appellant of VAT for such services constituted State aid as defined in Article 87 EC.

Decision: it was decided that the State aid ground of appeal was irrelevant because this was not a matter which could be appealed under section 83 of the Value Added Taxes Act 1994, from which the Tribunal, a statutory body, derived its jurisdiction.

c) Actions instituted by competitors: R (on the application of British Aggregates Association and others) v Customs and Excise Commissioners [2002] EWHC Admin 926 (B)

Facts and legal issues: this was an application for permission to apply for judicial review and, if granted, an application for judicial review concerning the aggregates levy introduced by the Finance Act 2001.

The aim of the government in imposing the levy was to make sure that the market price paid for the aggregates covered the environmental costs of extracting aggregate from natural rock. The legislation thus distinguished between aggregate sourced direct from natural rock ("primary" or "virgin" aggregate), and that derived from other material which can be used as aggregate, such as certain mineral and industrial waste ("secondary" or "recycled" aggregate).

While secondary or recycled aggregate was exempt from the levy, primary or virgin aggregate was subject to it. The government was thus hoping to promote the use of secondary or recycled aggregate.

Exported aggregate was also exempt from the levy.

The claimants, all companies or associations engaged in the production of aggregate through quarrying and related businesses, claimed that the system of exemptions constituted State aid which had not been notified to the Commission, contrary to Articles 87 (1) and 88 (3) EC.

Decision: the measures did not infringe Article 87 (1) EC.

Moses J. considered first of all general principles applicable to tax measures. He confirmed:

"the mere fact that some undertakings benefit from the tax regime and others do not does not necessarily mean that the tax measures infringe the rules against State aid. It is thus necessary to consider and apply the selectivity principle: that is the principle by which the

courts distinguish between those tax systems which provide for exemptions which constitute State aid and those which do not".

Thus, to determine whether the selectivity requirement was met, it was necessary first to determine the common system applicable and then determine whether the exception to the system derives directly from the guiding principles of the system.

Export exemption: in an earlier part of the judgment, Moses J. had found that the aggregates levy was an indirect tax. It was intended that the tax be passed on to the consumer, who would thus be influenced in making its aggregate purchasing decision and may be persuaded to seek aggregate from alternative sources. He considered point 91 of the Commission's Communication on Environmental Taxes (OJ (1997) C 224/4), which states:

"where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly".

He thus held, with regard to the export exemption, that, provided the levy did not infringe points 90 and 92 of that Communication (it had already been determined that it did not), then the levy would be permitted, unless it exceeded the amount imposed by the internal tax. It did not therefore constitute State aid.

Although it was unnecessary, Moses J. went on to consider whether the payment could be said to distort trade between Member States. He concluded it could not. He pointed out that those who export aggregate will compete in a market where the levy is not imposed. Conversely, if they sought to compete within the UK market, the aggregate would be subject to the levy. The function of the repayment was therefore to enable those producing aggregate within the UK but exporting it to compete on an equal basis with producers outside the UK.

Exemption of secondary or recycled aggregate: the claimant argued that the levy favoured certain sectors, such as those producing china clay or ball clay, since those products were not aggregate and thus the process by which they are extracted is exempt from the levy, whereas the extraction of limestone is not an exempt process.

It was found that the essence of the aggregate levy was to make a distinction between materials quarried for use as aggregate, and waste, capable of being used as aggregate. The intention was to move demand from one product to the other. The efficient use of virgin aggregates should thereby be promoted and there should be a reduction in the waste materials which could be used as aggregate, but which would otherwise be used as landfill. The effect of the exemptions to the levy should be to increase incentives to use this material, which is not subject to the levy, as aggregate.

It was relevant that the waste produced in the extraction of primary aggregate may also be used as aggregate and is, as such, taxable. Conversely, the production of clay was not a process concerned with primary aggregate (and as such not taxable) and it produces waste which may be used as aggregate (but which is not taxable under the regime).

The judge found that the distinction made between these two types of waste stemmed from the objective of discouraging the extraction of limestone for aggregate whilst not discouraging the production of non-aggregate material.

A system which taxes the extraction of virgin aggregate so as to reduce demand for it and, as part of the process of reducing demand for it, taxes also the waste derived from that extraction has as its aim the desire to reduce environmental damage caused by particular processes, not by every process which might cause environmental damage.

He therefore concluded that the differentiation between virgin aggregate and its waste, and non-aggregate and its waste did not constitute State aid.

d) Actions instituted by competitors: CGNU, Airtours et al v Commrs of Customs & Excise, VAT and Duties, IPT 00007 Tribunal Decision 8.10.01, Case References LON/00/9000; 9001; 9002; 9003; 9004; 9019 (B)

Facts and legal issues: this case concerned the liability of the Commissioners for Customs & Excise to repay higher rate Insurance Premium Tax ("IPT"), paid in respect of certain travel insurance provided by CGNU. In the *Lunn Poly* case, (see below at points (i) and (j)), differential IPT rates for travel insurance were found to be unlawful State aid, contrary to Article 87 EC.

Decision: the appeal was dismissed as a result of issues not connected with State aid.

However, the Tribunal ruled that section 3(1) of the European Communities Act 1972[392] did not abrogate the doctrine of precedent and therefore, had the Tribunal to rule on the issue, it would have found that the ruling of the Court of Appeal in the *Lunn Poly* case bound it, and that the differential rate of IPT satisfied all the criteria of Article 87 (1) EC and was an unlawful State aid. In that regard, the position of CGNU as a taxpayer, potentially affected by distortions of competition by the favouring of those undertakings which paid tax at the standard rate, and the fact that the trade between Member States of insurers was the relevant market were important considerations. The Tribunal stated that it would also have inclined to the view that repayment of the tax overpaid would be an appropriate remedy but, like the Tribunal in the *GIL* case, (see below at points [(e) and (f))], it would have requested the ECJ to give a preliminary ruling on the issue.

[392] "*For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court or any court attached thereto)*".

The Tribunal went on to find that, if repayment were the appropriate remedy, the appellant could not have benefited from it anyway. Although CGNU, which was the only insurer amongst the appellants, had paid the tax, it had been reimbursed by the 'retail' sellers of the travel insurance. As it had not in fact had to bear the costs of the tax, the Tribunal therefore held that CGNU would be 'unjustly enriched' by any repayment of the tax differential. Although CGNU had made arrangements to repay the tax to the travel agents or tour operators, this was not considered sufficient because the reimbursement must be to those people who have, for all practical purposes, borne the cost of the original payment. In this case, it was the ultimate customers who bore the cost, whereas the reimbursement arrangements only related to repaying the tour operators and travel agents who had not borne any part of the cost of the original payment.

The Tribunal also found that none of the other appellants were entitled to a repayment, as their role had merely been to collect the insurance premiums and insurance premium tax from their customers and pass them to the insurers.

e) Actions instituted by competitors: GIL Insurance Ltd v Customs and Excise Commissioners [2001] EuLR 401; [2001] V. & D.R. 97 (B)

Facts and legal issues: GIL, a supplier of insurance for domestic appliances sold or rented to consumers by its parent, appealed against the rejection of its claim for the repayment of higher rate Insurance Premium Tax ("IPT"). The goods supplied were standard-rated for VAT purposes. The higher rate of IPT was introduced only for insurance supplied by connected insurers in the same position as GIL in 1997, based on a belief that VAT was being avoided by suppliers increasing exempt charges and reducing standard rate charges on the supply of domestic appliances (a practice known as 'value shifting').

The higher rate of tax therefore applied to domestic appliance insurance where the insurer was connected with the supplier of the appliances, arranged through the supplier, or where commission was paid to the supplier.

By contrast, where the insurer was independent and insurance was not arranged through the supplier and instead came from a direct insurer, standard rate tax was applied. GIL claimed, *inter alia*, that the imposition of the higher rate was illegal State aid contrary to Articles 76 and 88 EC.

Decision: The Tribunal stayed the proceedings pending a preliminary ruling from the ECJ[393]. In its judgment of 2 March 2001, the Tribunal held, first, that the differential between the higher and standard rates of IPT was a State aid granted through State resources within the meaning of Article 87 EC. It was bound in this by the Court of Appeal ruling in the *Lunn Poly* case although, in any event, it agreed that the aid was granted directly by the State. It found that the State was thereby foregoing revenue from those taxed at the lower rate. Secondly,

[393] Case C-308/01, GIL Insurance Ltd and Others v Commissioners of Customs & Excise [2004] ECR I-4777.

the Tribunal held that it favoured certain undertakings over others because the higher rate IPT placed direct insurance companies in a more favourable position than connected insurers. Thirdly, the Tribunal held that this distorted competition between different insurance providers in a way that was not objectively justifiable[394].

However, the Tribunal found itself unable to resolve the question of whether the higher rate IPT affected trade between Member States (although it inclined to the view that it did not) and therefore requested a preliminary ruling from the ECJ on this point.

The final issue for the Tribunal to decide was the question of whether repayment of the difference in the tax rates would be the right remedy for the appellants. Again the Tribunal found itself unable to resolve the issue and requested a preliminary ruling from the ECJ on this point. The proceedings were then stayed pending the reference.

In its 2004 ruling, the ECJ, however, found that the application of the higher rate of VAT to a specific part of insurance contracts previously subject to the standard rate "*must be regarded as justified by the nature and the general scheme of the national system of taxation of insurance. The IPT scheme cannot therefore be regarded as constituting an aid measure within the meaning of Article 87 (1) EC*".

f) Actions instituted by Competitors: Customs and Excise Commissioners v GIL Insurance Limited others [2000] STC 204 (B)

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

[394] R. v Customs and Excise Commissioners Ex p. Lunn Poly Ltd [1999] S.T.C. 350

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.

g) Actions instituted by competitors: R (on the application of BT3G Ltd and others) v Secretary of State for Trade and Industry [2001] EWCA Civ 1448 (B)

Facts and legal issues: this case arose out of the auction process for the five universal mobile telecommunications (UMTS) licences offered by the UK Government. The auction took place in March to April 2000. BT and One 2 One (the "appellants") were appealing against a judgment of Silber J. of 21 December 2000[395].

Their appeal related to the rules of the auction which provided that licences had to be paid for when they were granted.

The appellants had successfully bid for two of the five licences and paid for these shortly after the auction process had terminated. Two of the other successful bidders, Vodafone Ltd and Orange Personal Communication Services Ltd were also successful bidders. They were not granted their licences immediately because they were associated companies. Under the terms of the auction a pre-condition of obtaining a licence required that the companies cease to be associated. Vodafone therefore had to divest itself of Orange. This was done on 22 August 2000 and Vodafone and Orange were thus granted their licences. They paid for them on 1 September 2000.

The appellants alleged that the effect of the auction rules meant that because Vodafone and Orange had paid for their licence some 15 to 16 weeks after the appellants they had received a "financial holiday". This meant that their savings in interest on the licence cost were in the

region of £85 million. Thus the interest cost that the appellants had to bear was irrational, unfair, disproportionate, discriminatory and in breach of the State aid rules.

Silber J. found that, although the benefit enjoyed by Vodafone and Orange was, in principle, capable of constituting State aid, it did not in fact do so.

Decision: the appeal was dismissed.

Although the Court of Appeal was not "wholly persuaded" that the benefit received by Vodafone and Orange by not having to pay for their licence until a later date was "capable" of being State aid, they were content to proceed on the basis that the judge's conclusion was correct. The basis on which Silber J. had found that State aid could exist was as follows:

"To my mind, the use of the words in Article 87 (1) [EC] of 'any aid…in any form whatsoever' are sufficiently wide to cover the failure by a government to crystallize or accelerate a potential liability where it had a power to do so. By the same reasoning, a failure to invoke powers under the Auction Rules to delay the obligations of the applicants to pay for their licences until Vodafone and Orange were obliged to pay is capable of amounting to State aid".

The Court of Appeal upheld the finding of objective justification for the aid and the absence of discrimination, notably because the relevant rules were transparent and had been known by all parties from the beginning of the auction process, they were not discriminatory (as they were potentially applicable to all bidders (on the basis that any bidder might become "associated" at any time during the auction process), and because the Secretary of State could not reasonably have requested a payment from Vodafone and Orange before the divestment was made (on the basis that there was no certainty that the divestment would occur). For this reason, Vodafone and Orange were in a different position to the applicants.

The Court of Appeal, although finding that it was an "academic issue", considered what any remedy would be. It took the view that if Vodafone and Orange's "payment holiday" constituted State aid, then to waive the extra costs incurred by BT and One 2 One would also amount to State aid. There would thus have been four beneficiaries of State aid rather than two.

The Court of Appeal endorsed the findings of Silber J. and dismissed the appeal.

The importance of using open, non-discriminatory and transparent procedures, in compliance with objective, non-discriminatory and transparent criteria, was again stressed in the French *UMTS* case. The Commission held there was no State aid where the French Government

[395] [2001] EuLR 325.

charged operators different amounts for similar licences[396]. This case is now pending before the CFI[397].

h) Actions instituted by competitors: University of Sussex v Customs and Excise Commissioners [2001] STC 1495 (B)

Facts and legal issues: the University of Sussex (the "university") appealed to the High Court against a decision of the London Value Added Tax and Duties Tribunal released on 26 May 2000[398], dismissing the university's appeal against the rejection by the Commissioners of Customs and Excise of the university's claim for repayment of input tax previously unclaimed. This claim was made following guidance issued by the Commissioners covering the adjustment and correcting of errors in VAT returns.

The State aid issue raised by the appeal was whether the difference in time limits for late claims for input tax between so-called 'payment traders' (i.e. those whose output tax exceeded their input tax in their returns and who had to account to the Commissioners for VAT) (the university's situation) and 'repayment traders' (those whose input tax exceeded their output tax in their returns and who were entitled to a credit or a payment from the Commissioners) amounted to unlawful State aid.

The judge held that if a late claim for input tax is subject to a strict three-year time limit for payment traders but is not subject to any specific time limit for repayment traders, then that would be capable of representing a differential between competing entities in the same line of trade. The judge conceded that this differential could represent State aid to repayment traders as it may give them some form of competitive edge.

However, the university failed to make its case: it produced no evidence to show that the aid distorted or threatened to distort competition nor that it affected trade between Member States. The judge stated that:

"…in order to make out a case under Article 87 EC, there must, at least normally, be some positive evidence of distortion or of a threat of distortion of competition, and indeed evidence of an effect on trade between Member States. However, I would accept that in some cases it would be self-evident that it is more likely than not that there is distortion (or a threat of distortion) and/or effect on trade so that the onus shifts to the person denying infringement of Article 87 EC".

However, in this instance the onus had not so shifted.

Finally, the judge found that the university's State aid argument could not be raised in order to justify a tax repayment. Where there is unlawful State aid, the appropriate remedy is an order against the State ordering that the aid be discontinued and maybe that the beneficiary

[396] Decision of 20 July 2004, State aid Case NN 42/2004, France.
[397] Case T-475/04, Bouygues and Bouyges Télécom v Commission, not yet decided.

of the aid repay it. The judge found that the unlawfulness of the aid would be compounded by seeking to extend it to payment traders.

Decision: the appeal was allowed but the university's State aid argument was rejected.

i) Actions instituted by competitors: R v Customs and Excise Commissioners, *ex parte* Lunn Poly Limited and another [1999] STC 350 (B)

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.

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

[398] (2000) VAT Decision 16656.

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.

j) Actions instituted by competitors: R v Customs and Excise Commissioners, *ex parte* Lunn Poly Limited and another, Queen's Bench Division (Divisional Court) [1998] STC 649, judgment of 2 April 1998 (B)

Facts and legal issues: Lunn Poly Limited and Bishopsgate Insurance Limited sought judicial review of the differential rates of Insurance Premium Tax ("IPT") imposed by sections 21 and 22 of the Finance Act 1997 on the grounds that they were incompatible with Community Law, including Treaty provisions on State aid, and could not lawfully be applied.

IPT was introduced in the UK by the Finance Act 1994. Section 21 of the Finance Act 1997 amended the 1994 Act by replacing the previous uniform rate for insurance contracts (which included contracts of travel insurance) with two rates, a standard rate and a higher rate. The higher rate applied to a premium under a taxable insurance contract relating to travel risks if the contract was arranged through, *inter alia*, a tour operator or travel agent. Lunn Poly was a travel agent and part of the Thomson Travel Group, which included a tour operator. Bishopsgate was a specialist travel insurer, most of whose policies were sold through travel agents.

Lunn Poly and Bishopsgate claimed to be placed at a disadvantage by the differential rates of IPT and by the fact that they were subject to the higher rate. They sought a declaration that the statutory provisions giving effect to the differential rates of IPT were incompatible with Community Law and could not be applied lawfully. They claimed, amongst other things, that the differential rates of IPT ought to have been notified to the Commission under Article 88 EC on the grounds that they conferred a State aid, within the meaning of Article 87 EC, on competing insurers and intermediaries offering travel insurance, who had no links with a tour operator or travel agent and so were liable at the lower rate, and distorted or threatened to distort competition and affected trade between Member States.

Decision: the High Court granted the declaration sought on the following grounds. The concept of State aid within the meaning of Article 87 EC was wide. Where a Member State legislated for significantly differential tax rates to be applied to competitors in relation to the supply of the same commodity or service, the terms of Article 87 (1) EC and the relevant jurisprudence made it clear that the measures amounted to a State aid.

Whether or not that involved a breach of Article 87 (1) EC depended on whether the introduction of the differential rates distorted or threatened to distort competition by favouring certain undertakings and whether it affected trade between Member States.

On the available material in the instant cases, it was highly probable that the introduction of the differential rates both distorted and threatened to distort competition by favouring those to whom the lower rate applied. Further, in determining whether such rates affect trade between Member States, the relevant market was the Community travel insurance market, and potential and indirect effects, whether or not appreciable, were relevant. The facts in the

instant case pointed to the clear conclusion that the differential rates of IPT were bound to affect trade between Member States. Accordingly, the differential rates of IPT constituted State aid within the meaning of Article 87 EC and, since the Commission had not been notified and had not given its approval as required by Article 88 (3) EC, the differential rates were therefore illegal. The declaratory relief claimed was therefore granted.

k) Actions instituted by competitors: R v Attorney General, *ex parte* ICI plc ([1987] 1 CMLR 72 (Court of Appeal)) (D)

Facts and legal issues: this was an application for judicial review in which Imperial Chemical Industries Plc ("ICI") sought a declaration that the UK Government, by enacting, and by the manner in which it gave or proposed to give effect to section 134 and Schedule 18 of the Finance Act 1982, was acting or was proposing to act, unlawfully in contravention of Article 88 (3) EC.

At the relevant time, Esso were building a large ethylene plant in Scotland. The costs of the project were being shared with Shell who would also share the output of the plant. The Esso/Shell ethylene plant would be in competition with ICI's ethylene production facilities and with BP's ethylene plant. There were no other UK ethylene producers. ICI used naphtha as a feedstock for its ethylene; BP used dry gas (predominantly methane and ethane); and the Esso/Shell plant was to use ethane as a feedstock for ethylene. It is cheaper to produce ethylene using ethane than it is to do so using naphtha.

Demand for ethylene declined rapidly, with the result that there was excess ethylene supply capacity in Western Europe. In this context, ICI was concerned about the consequences of additional capacity from the Esso/Shell ethylene plant coming on stream. Moreover, ICI would have been at a disadvantage vis-à-vis both BP and Esso/Shell because of the natural advantages of ethane. ICI complained that, in addition, the government had added an additional advantage by providing for Esso, Shell and BP an artificially favourable fiscal regime. ICI maintained that the 1982 Finance Act required the ethane, which was to be used as the feedstock at BP's and Esso/Shell's plants, to be undervalued for petroleum revenue tax purposes or, if this was not what the Act required, the Revenue intended to undervalue the ethane nonetheless. The undervaluing of the ethane would have resulted in less petroleum revenue tax being paid, because the lower the value of the ethane, the lower the profit and therefore the smaller the amount of petroleum revenue tax payable. The 1982 Finance Act therefore resulted in an aid being conferred upon BP and Esso/Shell which should have been referred to the Commission under Article 88 (3) EC before it was put into effect.

Decision: the Court of Appeal held that it was clear that a fiscal measure such as the 1982 Finance Act could amount to State aid. It was equally clear that if legislation provided for a valuation for fiscal purposes which reflected a true current arm’s length valuation, such a provision would not normally amount to aid, the reason being that a valuation on this basis

did not confer any benefit and was in the normal course as it adopted the standard approach to valuation for fiscal purposes.

The Court of Appeal held that, on the facts, the provisions of the 1982 Act did not amount to the granting of aid. The Court of Appeal also considered whether aid would be granted if, in administering the 1982 Act, the Revenue either accepted a price formula which produced too low a value, or applied the price formula so as to produce a below market price. The Court of Appeal concluded that, even if the Revenue were to benefit BP and Esso/Shell by adopting a wrong valuation, this would not be a matter which could be remedied by reliance upon Article 88 (3) EC because no aid would be involved. In expressing this view, the Court of Appeal implied that it was empowered to decide whether or not a particular measure amounted to an aid and was not trespassing upon the proper province of the Commission. The Court of Appeal quoted from *Steinike*[399], "*a national court may have cause to interpret and apply the concept of aid contained in Article* [87] *EC in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article* [88(3)] *EC ought to have been subject to this procedure*". However, the Court of Appeal also held that a persistent misapplication or wrong valuation under the 1982 Act could have amounted to a State aid.

The Court of Appeal also held that if Article 88 (3) EC had been infringed in a manner which gave ICI rights under the directly applicable final sentence, the Court of Appeal had no doubts that ICI had sufficient standing to bring proceedings on the basis of Article 88 (3) EC.

2.7 Cases concerning the enforcement of negative Commission decisions

a) Actions instituted by Member States: Department of Trade and Industry v British Aerospace plc and Rover Group Holdings plc [1991] 1 CMLR 165 (A)

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 British 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 British Government duly instituted proceedings in the High Court for recovery of the money. On 24 September 1990, British Aerospace and Rover brought proceedings in the ECJ 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 High Court held that it was appropriate to exercise its inherent jurisdiction and grant a stay until delivery of judgment by the ECJ.

[399] Case 78/76, Steinike & Weinlig v Federal Republic of Germany [1977] ECR 595.

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 would invite the High Court to strike them out.

Following the stay of the High Court proceedings, the ECJ held on 4 February 1992 in Case C-294/90[400] that the 1990 decision be annulled insofar as that decision required the United Kingdom Government to recover from British Aerospace State aid of £44.4 million. The ECJ 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.

2.8 Cases concerning the implementation of positive Commission decisions

No relevant UK cases clearly fall under this heading, whether they involve actions instituted by Member States, by beneficiaries or by competitors.

a) Actions instituted by competitors: Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH [2003] EWHC 2403 (Comm) (G)

Facts and legal issues: the claimant, Betws (the owner of an anthracite colliery in South Wales) claimed that the defendant (Preussag, a German anthracite producer who sold anthracite into the UK) had unlawfully used State aid given to it by Germany. It alleged that this followed from Commission decision 1999/184/ECSC, which it characterised as evidence that the defendant had misused State aid given to it from the German State in 1996 and 1997 so as to operate a predatory and discriminatory pricing policy, thus distorting competition between Preussag and the British producers of anthracite.

In its decision, the Commission had found that the aid was permitted for use in relation to "fines" (used in power production) but that it had in fact been used to subsidise other production costs, not only fines. This enabled Preussag to sell anthracite at prices which did

not cover the costs of production. The Commission therefore found that part of the aid could not be considered compatible with the Common Market and ordered Germany to recover DEM 9.8 million. A further part of the aid found incompatible had been granted to Preussag in anticipation of a Commission decision. The Commission therefore ordered Germany to require Preussag to repay this element of the aid (a sum of DEM 6.8 million). The Decision was addressed to the Federal Republic of Germany.

The claimant, who had complained to the Commission about the actions of Preussag (albeit too late for its complaint to be taken into account by the Commission in reaching its decision) brought proceedings in the English courts claiming that, as a result of the misuse of the State aid by the defendant, it had suffered loss and damage of approximately £4.5 million.

The main issue in the case was whether the claimant had a cause of action.

Decision: there was no cause of action against Preussag and the claim was therefore dismissed.

It was accepted that the claimant might have a cause of action against Germany as the Commission's Decision was addressed to Germany. The claimant, however, argued that in addition to a claim against Germany, it should also have a claim against Preussag. This was on the basis that the recipient of the aid had committed a wrong independently of the State, thus "*both the aid itself, and the way it was used in practice were wrong*".

The High Court noted first that Articles 65 and 66 (7) ECSC, the counterparts of Articles 81 and 82 EC do not have direct effect. Thus in the absence of a Commission decision, these Articles do not afford undertakings a cause of action against other undertakings. A Commission decision is a pre-requisite to there being a viable course of action.

The High Court was persuaded by the reasoning in the *SFEI* case[401] which dealt with the question of the right to compensation of a competitor damaged by the grant of illegal aid, where Advocate General Jacobs had stated that "*…the Court's existing case law does not impose on recipients of aid the obligations to make good loss or damage incurred by competitors as a result of unlawful implementation… Moreover, I do not think that the Court should extend its case law so as to confer on competitors a remedy in damages against recipients of aid … various remedies … including where appropriate, an order for recovery and possibly an award of damages against the Member State are capable of providing an effective response to a breach of that* [the prohibition in Article 88 (3) EC]."

The Advocate General went on to conclude that:

"While Community Law may make a Member State or public body which unlawfully grants aid liable in damages, it does not oblige the recipient of such aid to make good the loss or

[400] Case C-294/90, British Aerospace and Rover Group Holdings v Commission [1992] ECR I 493.
[401] Case C-39/94, Syndicat Francais de L'Express International (SFEI) & Others v La Poste & others [1996] ECR 3547.

damage sustained by competitors as a result of the unlawful grant of aid, unless the receipt of such an unlawful payment in corresponding circumstances gives rise under national law to liability in damages to third parties".

In the *SFEI* case, the ECJ concluded that the recipient of illegal aid who had not checked to find out whether the aid had been notified did not incur any liability vis-à-vis a competitor who had suffered damage as a result of the illegal aid solely on the basis of Community law. However, the ECJ in *SFEI* recognised that national law might afford the possibility of an action against the recipient on the basis of non-contractual liability. The claimant, however, did not submit that, as a matter of English law, the recipient of an unlawful aid who damages a competitor's business is liable to the competitor for the damage caused under UK tort law. Rather, its claim was based on a Community law tort. The High Court rejected the view that there was a cause of action in Community law against Preussag. The Judge stated that "*the position seems to me to be* acte clair *in the light of the* SFEI *case*".

Another issue which concerned the High Court in relation to the creation of a Community Law tort which would enable a competitor to sue the recipient of unlawful aid, was the scope of application of such a tort: would it be available to all those indirectly affected by it? The High Court noted that this could open a potential floodgate for claims. Because of this, Mr Justice Morrison suggested that "*these issues would need to be considered by the ECJ before it created a new Community tort of the kind suggested*".

The reasoning of the High Court in the *Betws Anthracite* case refers to another UK coal industry case[402], in which HJ Banks & Co. Ltd complained that it had to pay royalties for its open-cast mines whereas the privatised successor companies to British Coal did not pay such royalties.

HJ Banks did not initially allege before the UK courts that the differential treatment of these royalties constituted unlawful State aid. HJ Banks alleged discriminatory treatment between producers and that the royalties constituted 'special charges' - both of which were prohibited by the ECSC Treaty. The UK Court of Appeal referred four questions to the ECJ. The first question asked whether the difference in treatment was 'discrimination between producers,' a 'special charge,' and/or 'aid' within the meaning of Article 4 of the ECSC Treaty. The ECJ responded that, prior to their sale to private companies, the State-owned successor companies received licences and leases for coal mining for no consideration, whereas other operators had to pay royalties. The ECJ found that this amounted to aid and that the aid element was the amount of royalties that would 'normally' have been claimed for such rights.

The case was then remitted back to the Court of Appeal, which did not rule on the issue of aid as HJ Banks had not initially pleaded this point. HJ Banks then tried to re-amend its counter-claim and defence to allege that the exoneration from paying royalties by British Coal

and the State companies was unnotified State aid. However, the Court of Appeal found that amending the claim in such a way meant that HJ Banks was advancing a whole new case. Citing the limitation rules on advancing new claims based on a new set of facts, the Court of Appeal did not allow HJ Banks to re-amend the case.

The Court of Appeal can arguably be criticised in the *HJ Banks* case for not taking a decision on the aid issue at the national level where it should have done. It might have considered setting aside the rules on limitation periods based on the supremacy of EC law and hearing the claims of unnotified State aid or, simply, raising this issue of its own motion in view of the public policy character of State aid rules, in particular following a ruling made in this case by the ECJ.

[402] See the judgment of the Court of Appeal in H.J. Banks & Co. Ltd v. The Coal Authority; The Secretary Of State, [2002] EuLR 483 ([2002] EWCA Civ 841) and the judgment of the ECJ in Case C-390/98 H.J. Banks & Co. Ltd v The Coal Authority; Secretary of State for Trade and Industry [2001] ECR I-6117.