

## 2009 update of the 2006 Study on the enforcement of State aid rules at national level

### FINAL REPORT

This report summarises the trends drawn from the national court cases that were analysed and compares them to the findings of the 2006 Study<sup>1</sup>.

#### 1. SCOPE OF THE ANALYSIS

The objectives of the 2006 Study were a two-fold: (i) to study the application of State aid rules by national courts (in 15 Member States only) and (ii) to assess the enforcement of negative Commission decisions by the Member States (out of a sample of 5 representative Member States).

The objectives of the 2009 update are different:

- first, an update until 2009 of the data on the application of State aid rules by national courts and their extension to the 27 Member States;
- second, although not providing further comments or analysis, the 2009 update aims at allowing the European Commission to launch its transparency initiatives (portal for national courts, information for other interested stakeholders, database with State aid judgments, details for assistance in pending cases, information on training, conferences, studies) on the basis of a selection of representative national State aid judgments with case summaries.

In addition, the 2009 update serves as a basis for the *State Aid Thesaurus* project launched on the site *e-Competitions* ([www.concurrences.com](http://www.concurrences.com)), which intends to provide more comprehensive information, with summaries and comment on nearly all national cases and includes 27 national reports embedding hyperlinks to these cases in the database of e-Competitions.

To this end, Lovells' State aid lawyers<sup>2</sup> coordinated a far-reaching analysis covering the 27 Member States (11 Member States covered by Lovells directly<sup>3</sup> and other Member States through a network of local counsel or academics/officials specialised in State aid<sup>4</sup>). The analysis deals with national court cases, as well as cases of other bodies (NCAs) having jurisdiction over the implementation of State aid rules at national level. Approximately 305<sup>5</sup> cases were selected, from the period 1 January 2006 to around mid 2009, on the basis of publicly available information.

<sup>1</sup> <http://bookshop.europa.eu/eubookshop/bookmarks.action?target=EUB:NOTICE:KD7506493:EN:HTML>

<sup>2</sup> Jacques Derenne, partner, Lovells LLP Brussels, directed the study, which was co-ordinated and supervised on a daily basis by Cédric Kaczmarek and Jonathan Clovin, lawyers at Lovells LLP Brussels.

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<sup>4</sup> National rapporteurs in countries where Lovells does not have an office were: Thomas Jaeger and Peter Thiry (Austria), Plamen Vassilev (Bulgaria), Constantinos Lycourgos and Antigoni Lykotrafiti (Cyprus), Michael Honoré (Denmark), Vaido Põldoja (Estonia), Mikko Eerola (Finland), Ioannis Koimtzoglou (Greece), Damian Collins (Ireland), Andris Vitols, Martinš Tarlaps and Sandija Novicka (Latvia), Irmantas Norkus and Ilona Janciauskaite (Lithuania), Emmanuelle Ragot (Luxembourg), Franco Vassallo (Malta), Manuel Porto and João Nogueira de Almeida (Portugal), Dragos Dumitru (Romania), Andrea Oršulová, Erika Csekcs (Slovakia), and Juraj Corba (Slovenia), Ulf Öberg and Ida Otken Eriksson (Sweden).

<sup>5</sup> Some cases were regrouped according to their similarities (same national court and issues concerned, but with different parties).

## 2. INCREASE OF NATIONAL CASES

The first observation that needs to be made is that, during the period concerned, there has been a reasonably large increase in the number of court cases in this field.

### Increase of cases not equally shared between Member States

The main reason for this increase is not the recent enlargement of the EU, as only a few cases were identified in the "new" Member States, which joined the EU in 2004 and 2007. Two possible explanations for why there are so few cases from "new" Member States are that: (i) national judges (and practitioners) have only limited experience in this field, which is complex and diffused in national law; and (ii) a precondition to the new Member States' accession to the EU was the existence of *ex ante* control mechanisms.

As was the case in the previous study, the largest number of cases came from France, Italy and Germany, followed by the Netherlands, Spain, Sweden and Austria. The number of cases in Belgium and the United Kingdom has decreased significantly.

### Recovery actions rather than action for damages

In general, private enforcement in the area of State aid appears to be evolving positively with the number of direct actions against unlawful aid having increased globally, and a number of competitors having been successful in their claims, especially where they were seeking the suspension or the recovery of unlawful aid. Despite claims having been brought in a few cases, national courts remain reluctant to award monetary damages to competitors of the beneficiary of unlawful State aid. In some cases, however, national courts have recognised that they have jurisdiction to grant damages on the basis of Article 88(3) EC, without actually giving judgment in favour of the claimants.

### Tax cases

As was also the case in the previous study, the most frequent cases dealt with tax measures. Taxpayers often rely on State aid rules to contest the payment of taxes, alleging that the taxes are being used to finance unlawful State aid. Parties also sometimes rely on these rules to claim that a tax exemption, that they could not benefit from, granted an unlawful selective advantage to the beneficiaries of that exemption. A large number of cases also concern the imposition of, or changes to, compulsory charges on members of a professional organisation or of a specific sector. In these cases, claimants are, most of the time, unsuccessful, as the ECJ's case law on the State resources criteria, and imputation to the State, is now clear. However, several cases have provided the occasion for national courts to clarify their jurisdiction in the field of State aid rules (see *Comité National des Interprofessions des Vins à Appellations* case, where the French Council of State held that a refusal to notify was an act subject to judicial review).

## 3. WHO ARE THE NATIONAL JUDGES INVOLVED IN STATE AID CASES?

State aid cases are often appealed to appellate and Supreme courts, as they raise fundamental questions of law. Supreme courts are also keen to ask for support from the ECJ on these delicate questions (see, *CELF, Saumon*). Many judges facing questions on State aid therefore tend to sit at the Supreme Court level.

National courts often play the role of "*juges de droit commun*" and guarantee the implementation of ECJ case law in cases that have been referred to the judges in Luxembourg. In some cases, it can be observed that this dialogue with the ECJ can be useful to avoid unhelpful consequences, in particular when Commission decisions are challenged before the CFI. The second *CELF* case of the Council of State is a case in point, in particular on the question of national courts' jurisdiction to stay national proceedings. The High Court of Ireland in the *Belgium v. Ryanair* case

was confronted with a similar issue but applied the standard rule that application for annulment does not have suspensory effect.

There are also examples showing that judges of lower instance courts play an important role in the enforcement of State aid rules, especially in public procurement cases and in the context of local public services.

#### 4. DIALOGUE WITH THE COMMISSION

Cases where the Commission intervened as *amicus curiae* in national proceedings are still quite rare. This situation is likely to change as a result of the recent *Enforcement* notice, but as of yet national courts have not made full use of the possibility to ask the Commission for its opinion or for information.

One case which should be mentioned however, is the *Haren-Airport Eelde* case (NL - grant of €18 million to the company operating this regional airport), where the Dutch Council of State referred (under the 1995 Notice) eight detailed questions to the Commission in July 2007. The Legal Service of the Commission, in connection with DG TREN, responded in due course, and the Council of State delivered its final judgment in June 2008 (the whole procedure of referral to the Commission took no more than four months).

In other cases, the lack of communication has raised some issues, especially in cases where the Commission initiated an investigation in parallel to the national court proceedings.

In the *UPC* case (NL), the court of appeal of Amsterdam refused to order the Municipality of Amsterdam to suspend an investment that was liable to constitute State aid, even though the Commission had initiated an investigation pursuant to Article 88(2) EC. Similarly, in the *AirOne v. Ryanair* case (IT), the court of first instance in Sassari held that the opening of an Article 88(2) EC procedure did not constitute an obvious breach of law, which was necessary to grant an interlocutory injunction suspending the granting of the aid, pending the outcome of the Commission investigation.

In respect of the recovery procedure, national courts have recognised that a negative Commission decision constitutes an appropriate legal basis on which to grant a recovery order and that this is required under the principle of primacy of EC law over national law (see *Brandt Italia* case).

#### 5. POWERS HELD BY THE NATIONAL COURTS

State aid rules grant extensive powers to national judges in the event of an infringement of Article 88(3) EC. National courts' competences are not subject to discussion with the parties. The ECJ's case law has always been very clear in that respect. However, a certain line of case law in Germany seems to be at odds with the fundamental principles enshrined in the *Costa v Enel*, *SFEI*, and *Streekgewest* cases<sup>6</sup>.

National courts have a duty to ensure that the *effet utile* of Article 88(3) EC is respected, especially by ensuring that State aid rules have primacy over national procedural rules (see *Scott* and *Mineralölsteuer* cases where the financial court of Hamburg ruled that Regulation No 659/1999 supersedes German tax law).

On the whole, national courts' powers of inquiry remain limited as far as State aid matters are concerned. A national court has to judge a case on the basis of the facts presented before it by the parties. State aid cases are often complex and involve economic considerations (in particular

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<sup>6</sup> See Landesgericht Potsdam, 23 November 2006; Oberlandesgericht Schleswig Holstein, 20 May 2008; Landgericht Bad Kreuznach, 16 May 2007; Oberlandesgericht Koblenz, 25 February 2009.

for the qualification of aid in the event of an application of the market investor test or of the *Altmark* principles) for which national courts often lack the appropriate means to establish the factual information necessary for their decision. The burden of proof, therefore, is often a hurdle that leads to the claimant being unsuccessful. Claimants are often unable to present sufficient evidence to support the view that the State aid criteria have been fulfilled. In the *AirOne* case (IT), the court of first instance in Sassari rejected the applicant's request on the ground that AirOne had not proved that the alleged State aid met the criteria of selectivity and that the disputed measures constituted an undue advantage. In the *P1 Holding* case (NL), the district court of Maastricht held that the claimant had failed to provide sufficient evidence to prove an effect on trade between Member States (see also *Thomas Svensson* case (SWE)).

The *Boiron* case, however, simplified the situation for claimants, in particular in complex cases, where the question involved verifying whether the *Altmark* criteria had been fulfilled. The French Civil Supreme Court applied the ECJ's case law, according to which, the principle of effectiveness requires national courts to set aside national requirements rendering the production of evidence impossible or excessively difficult.

In that respect, national courts have found it easier to identify elements of State aid in public procurement cases, and this has led to a number of judgments in which the national court has ruled in favour of the claimants and found the existence of unlawful State aid.

National courts also have the possibility, and are often obliged, to assess *ex officio* whether the State aid rules have been infringed, even if the argument has not been brought by the parties themselves. This principle has been welcomed by the national courts concerned. In the *Residex* case (NL), the district court accepted the principle that State aid rules could be applied *ex officio* (even if *in casu* the public authorities had raised the issue themselves) and ordered recovery of unlawfully granted State aid (the court of appeal of The Hague did not rule on the *ex officio* point explicitly). In liability cases in France, courts have not taken that line, rejecting arguments based on "Article 87(1) EC" whilst, further to a Commission decision (as was the case in the *Borotra* case), it was obvious that the State had infringed Article 87(3) EC and not only Article 88(3) EC.

## 6. THE RIGHTS OF COMPETITORS/THIRD PARTIES

There have been an increasing number of cases where competitors have claimed for the recovery of unlawfully granted State aid or for the national judge to order injunctive measures to prevent or suspend the granting of unlawful aid. National courts have ordered interim measures in several cases (see *Federchemica* case in Italy).

For third parties and competitors, however, the path to private enforcement of the State aid rules remains difficult. As was pointed out in the 1999 and 2006 Studies, *locus standi* remains an important hurdle for private enforcement. The (in)famous cases of the German courts (referred to at section 5 above), relating to aid measures granted to Ryanair from German airports, which were contested by Ryanair's competitors, are good examples of instances where the ECJ's case law (*SFEI*, *Streekgewest* and *Pape* cases) continues to be incorrectly applied by national courts.

Damages actions remain limited and there have not been any cases in which competitors have actually been awarded monetary compensation. The same conclusion was drawn from the 2006 Study. The main obstacle to damages actions brought by private parties, based on a violation of State aid law, is the lack of a clear legal basis under national law. Member States differ in their treatment of this question. Moreover, the requirement to prove causation between a breach of Article 88(3) EC and the economic loss sustained by the claimant remains a major problem, as this requires the claimants to show how its market share would have developed had the aid not been granted to its competitor. However, this does not appear to be different from the classical issue of the counterfactual in damages cases, which raises issues generally in antitrust matters.