SUMMARIES OF STATE AID JUDGMENTS AT NATIONAL LEVEL

JUDGMENTS SELECTED FROM THE 2009 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

I- Information on the judgment

Administrative Court ("Verwaltungsgerichtshof (VwGH)"), judgments of 20.03.2006 (leading decisions); (29.05.2006); (26.09.2006); (21.12.2006); 30.06.2007 (leading decisions); (30.01.2007); (28.08.2007); (25.01.2008), AMA-Marketingbeiträge (AMA marketing fees)

II- Brief description of the facts and legal issues

All the judgments concern appeals against decisions of the administrative authority Agrarmarkt Austria (AMA) which is responsible for assessing and collecting parafiscal charges levied on the production of certain agricultural products under the provisions of the Bundesgesetz über die Errichtung der Marktordnungsstelle Agrarmarkt Austria of 1992 (AMA-G, in the applicable version).

The judgments of 20 March 2006 (the leading judgment is 2005/17/0230, the other cases were decided in line with the reasoning therein) concern complaints by producers subject to parafiscal charges. The arguments were based on the fact that those charges were used to finance non-notified State aid. As a consequence, the producers claimed the legal basis for collecting the charges (the respective provisions of the AMA-G) should be disapplied by virtue of the primacy of the standstill obligation in Art 88 (3) EC.

AMA argued that the State aid elements contained in the AMA-G had been cleared by the Commission in 2004 insofar as they concerned the levying of fees after 1 July 2004 (the day after Decision C(2004) 2037 fin)). Therefore, AMA argued, those charges were not subject to the standstill obligation.

In respect of charges levied before September 2002, (the Commission had examined and authorized the AMA-G from September 2002 onwards in its first decision), a second Commission procedure (NN 34/2000) had been initiated, which was still ongoing at the time the administrative decisions were taken. AMA had suspended proceedings for charges levied between 1998 and 2002 awaiting the outcome of that decision.

For charges levied in the period already covered by the Commission authorization of 30 June 2004, but relating to dates before that decision was handed down, i.e. between 2002 and 2004, AMA argued that the applicability of the standstill obligation to those charges depended not only on the outcome of the aforementioned second Commission procedure, but also on the outcome of the preliminary reference in the *TAL* case (Case C-368/04, Transalpine Ölleitung in Österreich, [2006] ECR I-9957) concerning a similar question in relation to the application of the standstill obligation after Commission clearance. Procedures before the AMA for charges levied between 2002 and 2004 had therefore been suspended because the issue of retroactive applicability of the Commission authorization was still unclear. The applicants appealed the aforementioned suspensions in respect of

proceedings relating to charges levied before 2002 (i.e. charges not covered by the Commission authorization of 30 June 2004).

The judgment of 29 May 2006 is set against the same factual background, with the applicants also arguing that the AMA-system infringed Art 28 and 86 EC.

The judgment of 30.June 2006 (2006/17/0092) has been applied in a number of cases following the decisions of 20 March 2006. In all those cases, the applicants argue that the VwGH's reasoning on the issue of hypothecation was flawed. The remaining factual background is the same as that described above. The judgments of 21 December 2006 also follow on from the decisions of 20 March 2006 and are set against the same factual background. Again, the applicants argue that the VwGH's assessment of the issue of hypothecation was flawed and, this time, submit an expert opinion in support of their argument.

The judgments of 30 January 2007 and 28 August 2007 are follow-ups to the judgments of 30 June 2006 and 21 December 2006, the facts are the same.

The judgment of 25 January 2008 concerns the levying of AMA-charges against an insolvent producer. The argument revolved around whether the manager of the undertaking concerned had acted negligently by not providing for the total payment of the AMA-charges over a period of four years. The manager argued that the VwGH's earlier jurisprudence had indicated that the charges were incompatible with EC law (especially since in 2003 a payment order had been annulled by the VwGH on the grounds that the State aid question had not been examined) and, consequently, there was a valid reason for not paying the charges. The manager further argued that this jurisprudence had only changed, towards an endorsement of the EC law compatibility of the charge in 2005. But in 2005, insolvency proceedings had already begun.

The judgment is of limited relevance to State aid.

III- Summary of the Court's findings

In the leading case in the judgments of 20 March 2006 (2005/17/0230), the VwGH examined three major issues: 1) The need to suspend procedures before the administrative authority until the decisions of the Commission and the ECJ were handed down, 2) the consequences of the presence of State aid elements in relation to the obligation to pay the charges (hypothecation) and 3) the compatibility of the system with Art 28 EC. The latter point (3) is not discussed here.

1) On the suspension of proceedings, pt 2.1 of the leading judgment:

The VwGH held that the suspension of proceedings relating to charges levied before 2002 was justified, because the second Commission procedure, for which AMA had decided to wait, was precisely relevant to that period.
The VwGH also stressed that for periods between 2002 and 2004, the questions of retroactive applicability of the Commission authorization and of the scope of the standstill obligation were important. Furthermore, the VwGH clarified that the standstill obligation had ended at the time of the Commission decision and not, as AMA had apparently argued, at the time the Commission notified the measure.

2) On the issue of hypothecation, pt 2.2.2 of the leading judgment:

The VwGH started by referring to its earlier jurisprudence in respect of the State aid character of AMA charges (particularly 2002/17/0084 of 2003 and 2005/17/0070 of 2005). In the judgment of 20 March 2006, the VwGH however took the opportunity to substantially elaborate upon that earlier jurisprudence.
The VwGH first pointed out that the ECJ's judgments in *van Calster (*Cases C-261/01, van Calster et Cleeren, [2003] ECR I-12249), *Pearle* (C-345/02, Pearle a.o. [2004] ECR I-7139) and *SWNB* (C-174/02,Streekgewest, [2005] ECR I-85), required a direct relationship between the use of revenue for State aid purposes and the means of collection in order for the collection to be caught by the standstill obligation (hypothecation). The VwGH went on to examine whether such a relationship was present in relation to the collection and use of AMA charges.
For guidance as to the elements indicating the presence or absence of hypothecation, the VwGH referred to judgments *Nazairdis* (C-266/04, Casino France a.o. [2005] ECR I-9481) *SWNB* (cited above) and *Enirisorse* (C-34/01,Enirisorse [2003] ECR I-14243). The VwGH assessed a number of indicators, in particular the direct impact of the charge upon the amount of the aid, the exclusive or major financing of an aid measure through a particular charge and the extent to which the use of the charge as aid was pre-determined by the legal basis for the charge.
On that basis, the VwGH concluded that there was no direct relationship between the AMA charges and their use as aid for agricultural marketing. The AMA-G (in § 21a) did not require that use specifically, but instead incorporated a broad range of uses for the charges.As a result, the standstill obligation did not extend to the collection of the AMA charges.
The VwGH also concluded that there was no need to refer to the ECJ any question for a preliminary ruling on the validity of the Commission decision of 30 June 2004. Since that decision was only concerned with the State aid compatibility of using the charges for aid, the VwGH considered that the question of legality of the collection of a charge was immaterial, independently from the question of its purpose.
The VwGH also referred orbiter dictum to ECJ's jurisprudence on hypothecation to the extent that even if hypothecation was present, EC law did not always require a repayment of the charges levied.

The judgment of 29 May 2006 contains no new reasoning on the state aid issue (only an examination and refusal of a possible infringement of Art 10 and 86 EC by the AMA system, cf. pt. 2.2 of that judgment).

The leading case in the judgments of 30 June 2006 (2006/17/0092) confirms the VwGH's reasoning on hypothecation in the judgment of 20 March 2006, which had been called into question by the applicants. The applicants argued that, in particular, the VwGH had misinterpreted certain indicators for assessing hypothecation in the ECJ judgment in *Nazairdis* (cited above), such as the dependency of the aid element upon a ministerial decree.

The VwGH (no pts. or paras. given in the judgment) dismissed those arguments by pointing out that the particular passage had served to distinguish Case *Nazairdis* (cited above) from other case law such as 47/69, *France v. Commission* (Case 47/69, France v. Commission [1970] ECR 487). Moreover, the VwGH pointed out parallels between the case pending before it and the facts of *Nazairdis*. The VwGH concluded that, as had been found in the judgment of 20 March 2006, the AMA-G did not require any specific State aid relevant uses of the charges. Consequently, there was no hypothecation. The VwGH also dismissed the applicant's suggestion to request a preliminary ruling from the ECJ on the issue of hypothecation.

The judgment of 21 December 2006 provided another example of assessment of the hypothecation issue by the VwGH. The applicants had advanced an expert in support of their argument. The VwGH (no pts. or paras. given in the judgment) dismissed those arguments firstly by pointing out that the applicants had not advanced any substantially new arguments and, secondly, by referring to academic literature. The VwGH therefore dismissed the appeal once again.

The judgments of 30 January 2007 and 28 August 2007 are follow-ups to the judgments of 30 June 2006 and 21 December 2006. They do not contain any new reasoning.

The judgment of 25 January 2008 concerns the levying of AMA-charges against a producer in insolvency. It does not contain any independent reasoning on the State aid issue.

I- Information on the judgment

Administrative Court ("Verwaltungsgerichtshof (VwGH)"), judgments of 20.11.2006 (8.1.2007), Energieabgabenvergütung-Transalpine (Energy tax reimbursements-Transalpine)

II- Brief description of the facts and legal issues

The EAVG (in the applicable version) provided for a reimbursement of taxes levied on the consumption of electricity on two conditions: 1) Only undertakings in the goods manufacturing sector would be eligible; and 2) electricity consumption above a minimum threshold.

From 1997 onward, several applications by two undertakings in the services sector (a pipeline-builder and a cable car operator) for the energy tax reimbursement were turned down by the tax authorities, because the reimbursement was limited to goods manufacturers.

In the first round of appeals, the applicants lodged a complaint before the Austrian constitutional court (VfGH). The VfGH was unsure about the State aid character of the energy tax reimbursement and requested a preliminary ruling from the ECJ. In *Adria-Wien*Case (C-143/99, Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke [2001] ECR I-8365) the ECJ qualified that reimbursement as State aid. The VfGH subsequently decided that the limitation of the reimbursement to goods manufacturers (in § 2 (1) EAVG) was inapplicable because of the primacy of Art 88(3) EC. This would, therefore, have allowed the applicants to be reimbursed. The cases were sent back to the tax authorities to be looked at again.

In 2002, the Commission approved the State aid element in the energy tax rebate for the period 1996 and 2001. In 2002, following the Commission authorization, the tax authorities reassessed the cases handed back to them by the VfGH are ruled against the applicants once again. The reasoning now was that with the authorization, limiting the reimbursement to goods manufacturers only was no longer unlawful. The applicants again lodged appeals, this time to the administrative court (VwGH). An appeal to the VfGH was made but was rejected for lack of infringement of a constitutional provision and the case transferred to the VwGH. In that procedure which took place in 2003, the VwGH decided to request a preliminary ruling from the ECJ. The VwGH had concerns over the significance of the standstill obligation following a positive Commission decision on an aid measure. If the standstill obligation was still in force in relation to periods before the date that the Commission decision was issued, the applicants would still be eligible to receive the reimbursement. In Case *TAL* (C-368/04,Transalpine Ölleitung in Österreich [2006] ECR I-9957) the ECJ essentially replied that the standstill obligation was still in force in relation to the periods concerned, but that it may only be used by a national court to prevent execution of an aid measure and not in order to expand its scope.

These cases represent an application by the VwGH of the ECJ's ruling in Transalpine Ölleitung in Österreich (cited above).

III- Summary of the Court's findings

The VwGH simply applied the opinion handed down by the ECJ to the facts of the case (pt. III of the judgment in the leading case of 20 November 2006 (2006/17/0157). The VwGH found that it was not competent to set any measure which had as its effect an expansion of the scope of the aid measure. The VwGH concluded that it could not allow the applications for energy tax

reimbursement by the applicants active in the services sector, as this would expand the scope of the aid measure beyond its original scope of application. The appeals were dismissed.

The leading case in the judgments of 8 January 2007 (2002/17/0356) largely refers to the judgment of 30 November 2006 and reaches the same conclusion denying the applicants' claims. There is however an additionnal point of reasoning in that judgment as the VwGH explicitly states that it interpreted the judgment in *TAL* (cited above), as stating that a decision by the Commission on the authorization of unlawful aid did not apply to past periods and that, consequently, the standstill obligation was still in force and undiminished in scope in terms of the obligations of national courts flowing from it, as if the Commssion's decision were inexistant.

Since the VwGH assumed a total blockage effect of the standstill obligation for the period covered by it, the granting of aid for those periods would be unlawful, not only if the scope of beneficiaries is extended to the service sector, but also for the scope initially limited to manufacturers of goods.

I- Information on the judgment

Constitutional Court ("Verfassungsgerichtshof (VfGH)"), judgment of 26.06.2008, ÖkostromG

II- Brief description of the facts and legal issues

The judgment concerns a review of the constitutionality of the Austrian Ökostromgesetz of 2002 (ÖkostromG) in an appeal over reimbursement of additional cost for CHP electricity production provided for in that law. Reimbursement is subject to a number of criteria under the ÖkostromG. One of the criteria is the fulfilment of certain production efficiency thresholds. However, that efficiency criterion was only introduced upon revision of the ÖkostromG in 2006.

In 2005, an application for reimbursement was turned down by the competent authority on the basis that the CHP plants were not efficient enough. The applicant lodged a constitutional complaint against the decision, contesting the constitutionality of the ÖkostromG in several respects, including the principle of equality before the law and an infringement of the fundamental right to pursue an economic activity. In particular, the applicant claimed that the introduction of an efficiency criterion not contained in the original version of the ÖkostromG infringed his legitimate expectations as to eligibility for reimbursement. The calculations in relation to the operation of the CHP plant had been based on the availability of the reimbursement and the sudden addition of a new criterion for eligibility constituted an infringement of constitutional rights.

In addition to the claims made by the applicant, the Austrian federal government stated in the procedure before the VfGH that the reimbursement at issue had been regarded as State aid by the Commission in a positive decision of 2006 and that a preliminary rulings request of the administrative court (VwGH) was (at the time) still pending with the ECJ (Case C-384/07, Wienstrom, not yet published) on the question of the applicability of the standstill obligation to that provision of the ÖkostromG. Between 2002 and the Commission decision in 2006, the reimbursement of the costs in relation to the CHP plant had constituted unlawful aid. The federal government pointed out that this fact might require the CHP reimbursements be denied or recollected for the period concerned.

III- Summary of the Court's findings

The VfGH found the applicant's argument in relation to infringement of legitimate expectations to be sufficiently substantiated on the face of it to open a procedure for review of the legality of the ÖkostromG in relation to the measure underlying the negative decisions made by the authority concerned (see judgment pt. I.5).

A detailed assessment of the ÖkostromG however showed that such constitutional concerns were no longer supported (see pt. II.2 of the judgment). One of the reasons dispelling the VfGH's concerns over an infringement of legitimate expectations was the fact that the initial version of the ÖkostromG of 2002 had constituted unlawful State aid. The fact that those reimbursements had been granted in infringement of Art. 88(3) EC and that such grants are, in principle, repayable according to the jurisprudence of the ECJ, limits the legitimacy of any applicant's expectation as to continued reimbursement. The VfGH made particular reference to the ECJ's judgment in *Alcan* (Case C-24/95, Land Rheinland-Pfalz v. Alcan Deutschland [1997] ECR I-1591) in this regard.

I- Information on the judgment

Supreme Civil Court (Supreme Court) ("Oberster Gerichtshof (OGH)"), judgment of 15.12.2008, SLAV v. (i) Land Burgenland, (ii) GRAWE

II- Brief description of the facts and legal issues

The Supreme Court of Austria – until judgment of the CFI – suspended proceedings under the Austrian Unfair Competition Act ("the Act") on the question whether the sale of Bank Burgenland constituted State aid and thus violated the Act.

Parties:

The applicant: SLAV consortium (unsuccessful bidder in tender proceedings in the privatization of Bank Burgenland);
The defendants: Land Burgenland (seller), Grazer Wechselseitige Versicherung (successful bidder).

Factual background:

The privatisation of Bank Burgenland ("BB") was a condition imposed by the Commission in 2004 for the approval of a restructuring aid for Bank Burgenland. In March 2006, following a third and finally successful public tender, Land Burgenland finally sold Bank Burgenland to GRAWE for EUR 100.3 million. However, a consortium of Austrian companies SLAV AG and SLAV Finanzbeteiligung GmbH and Ukrainian joint stock companies Ukrpodshipnik and Ilyich ("the consortium"), the only other bidder at the final stage, had offered EUR 155 million. SLAV GmbH was a financial investment vehicle founded purely to acquire the shares in BB; SLAV AG was active in trading steel, steel products, other metals and coal and gas. One of SLAV AG's subsidiaries operates a bank in Ukraine. The applicants applied for an Austrian banking concession which has yet to be granted.

Following a complaint by the Consortium, the Commission opened a formal investigation (see IP/06/1849) to examine whether a private market operator would have considered GRAWE's lower offer to be the best bid. If that was not the case, Austria would have missed out on State revenues of around EUR 55 million and GRAWE would have received an economic advantage of the same value. The Commission decided that in order to remedy the distortion of competition and eliminate the aid, Austria must recover the advantage from GRAWE, that being the difference between the price offered by the Austro-Ukrainian consortium and the price paid by GRAWE, i.e. around EUR 55 million.

Austria, Land Burgenland and Grazer Wechselseitige Versicherung brought actions for annullment before the Court of First Instance against the Commission decision (T-268/08, action brought on 11 July 2008 - Land Burgenland v. Commission, pending; T-281/08, action brought on 15 July 2008 - Austria v. Commission, pending; T-282/08, Action brought on 17 July 2008 - Grazer Wechselseitige Versicherung v. Commission).

III- Summary of the Court's findings

The Supreme court examined the following issues:

whether Austrian civil enforcement of the prohibition to implement was available under the Austrian Act against unfair competition ("UWG") at all, ie. whether a "competitive relationship" (Wettbewerbsverhältnis) existed between the parties;
whether the national proceedings could be suspended pending a preliminary ruling proceedure before the ECJ.

The OGH declared this extraordinary revision admissible in principle, since the courts of lower instance had wrongly concluded no competitive relationship between the parties. It is a fundamental condition for claims under Section 1 of the Austrian Act Against Unfair Competition (Gesetz gegen unlauteren Wettbewerb, UWG) that the parties be engaged in a competitive relationship with one another. The Court held that competition had to be assessed on the basis of the circumstances of the actual case combined with generally accepted business standards. Taking this into account, the Court stated – contrary to the courts of lower instance – that there was a competitive relationship between the parties in question because both hold, or intend to hold, shares in financial institutes. Moreover, settled case law does not require that there be any actual competition between the parties – it is sufficient that there be potential competition.

The Court then turned to the procedural principles of EC State aid law which underline the exclusive competence of the Commission to assess notified State aid. The Court reaffirmed that national authorities are not competent to decide whether State aid is compatible with the Common Market. Member States have to notify any potential State aid measures to the Commission. They must not implement those aid measures before the Commission has come to a decision, otherwise they may be forced to recover the aid from the recipient. Recovery is not necessarily based on a binding decision by an EC authority that the State aid is incompatible with the common market.

The Court thus confirmed that recovery of aid could potentially be required under EC State aid law, however, the plaintiffs' claim for rescission of the transaction was, according to the Court, unfounded. While the Court considered itself bound by the Commissions findings regarding recovery of the State aid granted, it held that it could not rule on rescission of the transaction without ruling on the material question of whether the transaction actually constituted State aid at all and – if so – whether it was compatible with the common market. That material question was however subject to three proceedings before the CFI at the time of the Supreme Court's ruling.

The Court finally decided that the national proceedings should be suspended until the CFI had closed the proceedings on the appeals pending against the Commission's decision.

I- Information on the judgment

Supreme Civil Court (Supreme Court) ("Oberster Gerichtshof (OGH)"), judgment of 10.06.2008, Die Presse v. (i) Republic of Austria, (ii) Wiener Zeitung

II- Brief description of the facts and legal issues

The Austrian Supreme Court ruled that a system of official inserts from the Official Gazette in a newspaper did not violate the Austrian Act Against Unfair Competition as it did constitute merely existing State aid and was thus not subject to the prohibition to implement.

Parties:

The applicant: "Die Presse" daily newspaper;
The defendant: Republic of Austria, Wiener Zeitung.

Factual Background:

"Die Presse" is a privately owned Austrian daily newspaper. "Wiener Zeitung" (WZ), a private company owned by the Austrian Government, publishes a daily newspaper with an official insert used by the Austrian Government to publish formal announcements such as newly passed laws, civil service vacancies and changes in the commercial register. These are printed in the WZ's Official Gazette insert, which is not to be confused with the Federal Law Journal. Both are available online, free of charge. While "Die Presse" is supported by the state-financed "Presseförderung" which provides general support for print media, WZ obtains no such benefit and, thus, no budget is provided to it by the Austria. WZ covers its costs through sales revenues such as insertion fees and subscription fees etc, under commercial transactions principles.

Legal Issues

"Die Presse" brought proceedings pursuant to the Austrian Act Against Unfair Competition ("UWG") in order to bar WZ from publishing the Official Gazette insert as part of the daily newspaper. Furthermore, it claimed that WZ should not be allowed to finance either the publication or the distribution directly or indirectly from revenues received in relation to official insertions, this being an unlawful cross-subsidy. "Die Presse" argued that WZ would not be able to compete without this cross-subsidy. WZ claimed, however, that they were acting in line with the Austrian legal order, which meant that there was no breach of Unfair competition law. Establishing a central publication organ was justified and the revenues received were in accordance with the law. Nonetheless "Die Presse" argued that Austria would be abusing its position as legislator by permitting WZ to finance the editorial part of the newspaper by means of the aforementioned revenues.

Finally, and most significantly for this set of cases, "Die Presse" claimed that there had been a violation of Article 87 EC and breach of the Austrian codes of fair competition. On this point, the State of Austria argued that these measures did not constitute State aid because the State had no influence on either the revenues of official insertions or their disposition. Furthermore, the lack of intergovernmentalism prevents the application of Article 87 EC. Another argument brought forward was that the aid was not being granted through State resources.

The Supreme court therefore examined the following issues:

whether the publication of the official insert with WZ violated the Act against Unfair Competition directly (prohibition to bundle add-ons, Section 9a UWG);
whether the Austrian prohibition on abuse of a dominant position (Section 5 para 1/4 Cartel Act) was violated; and
whether publication of the official insert with WZ constituted State aid under Article 87 EC.

III- Summary of the Court's findings

The Austrian Supreme Civil Court (Oberster Gerichtshof, OGH) did not accept the plaintiffs' arguments and rejected the case on the basis it lacked sufficient legal arguments.

On the alleged violation of the Unfair Competition Act, the Court found that §8 (3) of the Stately Printing Agency Law forbids the financing of "other divisions". But this could not be enforced against WZ because the intention of the Austrian legislator was to have the daily newspaper and the Official Gazette constitute a single unit. The OGH eventually ruled in support of that argument and held that WZ and the State of Austria were acting in conformity with the law. No violation of Unfair competition law could be found.

On the alleged abuse of a dominant position, the OGH stated that since the Official Gazette could also be downloaded from the internet free of charge, nobody was forced to buy the WZ to access it. The claim as to an abuse of a dominant position could thus not be upheld.

On the State aid argument, the OGH held that the "Presseförderung" could be seen as compensation for lost profits triggered by cross-subsidising the WZ through paid revenues for official insertions. According to the OGH however, this measure was already in existence before Austria joined the European Union. That fact qualifies the measure as so-called "existing State aid", meaning that it is deemed compatible with the Common Market unless the Commission decides otherwise.

JUDGMENTS SELECTED FROM THE 2006 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL – PART I

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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".

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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 in the 2006 Study where a cease and desist order under section 1 *UWG* was actually granted.

I- Information on the judgment

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

II- Brief description of the 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*.

III- Summary of the Court's findings

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[1] 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 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.

IV- Comment of the authors of the 2006 study

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.

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

I- Information on the judgment

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

II- Brief description of the facts and legal issues

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.

III- Summary of the Court's findings

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 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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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. At the time of writing, the decision of the Administrative Supreme Court was still pending.

IV- Comment of the authors of the 2006 study

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.