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

Council of State (Administrative supreme court) – CoS ("Conseil d'Etat"), 19.12.2008, N°274923 and 274967, Centre d'exportation du livre français v. Ministre de la culture et de la communication (CELF II)

II- Brief description of the facts and legal issues

The Council of State orders stay in proceedings regarding the recovery of unlawful aid in the *CELF* case and refer to the ECJ the question of the extent of the national courts obligation in such "exceptional circumstances".

Parties:

The applicant: Centre d'exportation du livre français (CELF);
The defendant: Ministre de la culture et de la communication.

Factual background:

CELF is a cooperative society in public limited company form and is engaged in the activity of export agent. It aims to process directly orders for abroad and the French overseas territories and departments for books, brochures and any communication media and, more generally, to perform operations aimed at increasing the promotion of French culture throughout the world.

Between 1980 to 2002, CELF benefited from aid granted by the French State for the promotion of exportation of books. This support measure was designed to compensate for the extra costs incurred by bookstores established abroad when ordering small quantities of books. The Commission took three negative decisions regarding the compatibility of the measure with article 87(1) EC (18 May 1993, 10 June 1998 and 20 April 2004). However, these decisions were annulled by the CFI in three different cases (respectively Case T-49/94 SIDE v. Commission [1993] ECR II-2501; Case T-155/98 SIDE v. Commission [1998] ECR II-1179 and Case T-348/04 SIDE v. Commission, not yet published).

In parallel, several proceedings were introduced before national courts. In the wake of the CFI judgement of 18 September 1995, SIDE (société internationale de diffusion et d'édition), who is the main competitor of CELF, requested the Minister of Culture and Communication to put an end to the granting of aid and to recover the amount already paid to CELF. The demand was rejected by the Minister in a decision of 9 October 1996.

SIDE challenged the ministerial decision before the Administrative tribunal of Paris, who annulled the decision in a judgment of 26 April 2001 and ordered the recovery of the unlawful aid. CELF

lodged an appeal against the judgment before the Paris Court of Appeal. In its judgment of 5 October 2004, the Court of Appeal confirmed the solution retained by the Administrative Tribunal and ordered the recovery of the aid granted to CELF. CELF finally lodged an appeal before the CoS (Supreme Administrative Court) against the judgment of the Court of Appeal claiming its annulment, as well as the annulment of the judgment of the Administrative Tribunal. The CoS made a reference to the ECJ for a preliminary ruling, asking to what extent an unlawful aid subsequently declared compatible by the Commission could be recovered. The ECJ rendered its case on 12 February 2008 (Case C-199/06, CELF and ministre de la Culture et de la Communication [2008] ECR I-469).

In the wake of the ECJ judgment, in the present case, the CoS judged the substance of the case (annulment of the judgment ordering the recovery of the unlawful aid granted to CELF). However, due to the fact that the positive Commission was annulled by the CFI (case of 15 April 2008), and therefore is now inexistent, the CoS raised difficulties to settle the case and to apply the ECJ's findings. In these circumstances, the CoS refers for a second time to the ECJ for preliminary ruling.

The following questions were referred to the ECJ:

1. Can the national court stay proceedings concerning the obligation to recover State aid until the Commission of the European Communities has ruled, by way of a final decision, on the compatibility of the aid with the rules of the common market, where a first decision of the Commission declaring that aid to be compatible has been annulled by the Community judicature?

2. Where the Commission has on three occasions declared the aid to be compatible with the common market, before those decisions were annulled by the Court of First Instance of the European Communities, is such a situation capable of being an exceptional circumstance which may lead the national court to limit the obligation to recover the aid?

III- Summary of the Court's findings

In this second part of the CELF litigation, the CoS referred again to the ECJ for preliminary ruling.

In the light of the circumstances of the case, the CoS asked the ECJ to rule on the extent to which it has to order recovery of the unlawful aid pursuant Article 88(3) EC and Article 14 of Regulation 659/1999. The CoS asked whether the fact that the positive decision was annulled by the CFI constitutes an "*exceptional circumstance*", enabling the national judge to order stay in the proceeding on the question of the recovery until the definitive Commission's decision.

The CoS draws conclusions about the payment of illegality interests in the light of the ECJ judgment. According to this case law, a national court has the possibility to order the payment of illegality interests for the period covering the unlawfulness of the aid, instead of ordering its full recovery. The CoS rejects the Ministry and CELF's claim and judges that the first period of unlawfulness is to be seen between 1980 (ie when the unlawful aid was first granted) and the date of the present case (19 December 2008) and orders the recovery of illegality interest for this timeframe.

The CoS however envisages the situation occurring after the date of the current decision. It distinguishes two situations:

- the aid is definitively declared compatible by the Commission and it is not necessary to recover illegality interests for that period; or

- the aid is declared incompatible and illegality interests must be recovered.

The CoS judges that the period for the payment of illegality interests can be extended to the period between the positive Commission decision and the judgment annulling it. The CoS set aside the claim of the Minister consisting in invoking a national rule according to which recovery is time barred after 4 years time.

I- Information on the judgment

Council of State (Administrative supreme court) – CoS ("Conseil d'Etat"), 29.03.2006, N°274923 and 274967, Centre d'exportation du livre français v. Ministre de la culture et de la communication (CELF I)

II- Brief description of the facts and legal issues

The Council of State refers to the ECJ for preliminary ruling on the extent of the recovery obligation of an unlawful aid later declared compatible by the Commission.

Parties:

The applicant: Centre d'exportation du livre français (CELF);
The defendant: Ministre de la culture et de la communication.

Factual background:

CELF is a cooperative society in public limited company form and carries on the activity of export agent. Its aims are to process directly orders for abroad and the French overseas territories and departments for books, brochures and any communication media and, more generally, to perform operations aimed at increasing the promotion of French culture throughout the world.

Between 1980 and 2002, CELF benefited from aid granted by the French State for promotion of exportation of books. This support measure was designed to compensate extra costs incurred by bookstores established abroad when ordering small quantities of books.

The Commission took negative decisions regarding the compatibility of the measure with article 87(1) EC (18 May 1993, 10 June 1998 and 20 April 2004). However, these decisions were annulled by the CFI in three different cases (respectively Case T-49/94 SIDE v. Commission [1993] ECR II-2501. Following that annulment, the Commission again declared the aid compatible with the common market by Decision 2005/262/EC of 20 April 2004 on the aid implemented by France in favour of the Coopérative d'exportation du livre français (CELF) (OJ 2005 L 85/27) (NB - the decision was annulled for a third time after the facts of this case, see CELF II).

In parallel, several proceedings were introduced before national courts. In the light of the CFI case of 18 September 1995, SIDE (Société internationale de Diffusion et d'Edition), who is the competitor of CELF, requested the Minister of Culture and Communication to put an end to the granting of aid and to recover the amount already paid to CELF. The demand was rejected by the Minister in a decision dated 9 October 1996.

SIDE brought an action for annulment of that decision before the Tribunal administratif de Paris (Administrative Court of Paris). By judgment of 26 April 2001, the court annulled the contested decision. The Minister for Culture and Communication and CELF appealed against that judgment to the Cour administrative d'appel de Paris (Paris Administrative Court of Appeal). By judgment of 5 October 2004, the Paris Administrative Court of Appeal upheld the judgment appealed against and ordered the French State to recover, within three months of the date of notification of the judgment, the sums paid to CELF for handling small orders for books placed by booksellers established abroad and to pay a penalty of EUR 1,000 per day for delay.

CELF and the Minister for Culture and Communication appealed to the Conseil d'État (Council of State) to set aside that judgment and the judgment of the Tribunal administratif de Paris.

III- Summary of the Court's findings

The appellant argued, among other claims, that the Cour administrative d'appel had made an error of law and an error of legal characterisation by not holding that the fact that the Commission had recognised the aid's compatibility with the common market precluded the obligation to repay the aid which follows, as a rule, from unlawfulness in the implementation of measures of State aid, contrary to Article 88(3) EC, by the Member State.

The Conseil d'État decided to stay proceedings and referred the following questions to the Court for a preliminary ruling:

"1. Is it permissible under Article 88 [EC] for a State which has granted to an undertaking aid which is unlawful, and which the courts of that State have found to be unlawful on the ground that it had not previously been notified to the Commission as required under Article 88(3) EC, not to recover that aid from the economic operator which received it on the ground that, after receiving a complaint from a third party, the Commission declared that aid to be compatible with the rules of the common market, thus effectively exercising its exclusive right to determine such compatibility?

2. If that obligation to repay the aid is confirmed, must the periods during which the aid in question was declared by the Commission to be compatible with the rules of the common market, before those decisions were annulled by the Court of First Instance of the European Communities, be taken into account for the purpose of calculating the sums to be repaid?"

I- Information on the judgment

Council of State (Administrative supreme court) – CoS ("Conseil d'Etat"), 7.11.2008, N°282920, Comité national des interprofessions à appellations d'origine et autres

II- Brief description of the facts and legal issues

The CoS assesses the claim of interprofessional organisation requesting the annulment of a ministerial decision refusing the notification of a provision instituting compulsory contribution.

Parties:

The applicant: Comité National des Interprofessions des Vins à Appellations d'Origine a.o.;
The defendant: Premier Ministre and Ministre de l'Agriculture et de la Pêche.

Factual background:

Twelve interprofessional organisations lodged a series of action in annulment against a ministerial decision before the administrative jurisdictions, rejecting their demand to notify to the European Commission a provision of the French rural code (Code rural) allowing interprofessional organisations to set up compulsory contributions for all the members composing these organisations.

The claimants introduced several requests asking the government to notify to the European Commission, pursuant Article 88(3) EC, the provision allowing professional organisations to set out the payment of contributions.

The claimants requested the CoS to annul the decision refusing to notify the provision. In addition, the claimants asked the CoS to order a stay in proceeding and to refer a question to the ECJ for preliminary ruling on the question whether the financing of the actions led by the interprofessional organisations constitutes State aid within the meaning of Art. 87(1) EC.

III- Summary of the Court's findings

Referring to Article 88(3) EC, the CoS judges that the Government has the obligation to notify any project instituting or modifying any State aid. The CoS also held that the Government is also bound by this obligation when it receives a request to notify an aid, which has not been notified before its implementation.

More generally, the decision to refuse to notify State aid measures belongs to a power that the government has to ensure the correct application of Community law at national level. This type of decisions has to respect the hierarchy of norms. Therefore, a decision to refuse to notify an aid project is an act which can be contested before a national court on the basis of EC law. This remains true even if the contested measure is instituted by a legislative act. The CoS interpreted the role of national courts as determining whether the contested measure constitutes State aid and therefore should have been notified.

On the contrary, the CoS makes it clear that the administrative judge cannot declare admissible a claim contesting the validity of a decision to notify an aid. The CoS rules out that this type of decision is part of the assessment carried out by the Commission. The assessment of the legitimacy of the decision to notify remains in the field of competences of the Commission.

The CoS assessed whether the contested provision constitutes State aid and for this purpose it analysed the nature of the compulsory contributions which are contested by the appellant. The CoS quotes the provision of the rural code to emphasise the fact that it is explicitly stipulated that even if these contributions are rendered compulsory by the law, they remain contributions of private nature.

The next step in the reasoning of the CoS consists in assessing whether the contested provision should have been notified to the European Commission. The CoS held that the provision has the sole effect of allowing authorised interprofessional organisations to set up compulsory contributions to finance measures defined by the organisations themselves.

The objectives of these actions are defined in the rural code and are implemented by agreements concluded within the organisations. By a ministerial decision, the scope of these agreements has been extended to the members of the professions composing these associations (this extension is the source of the claim of the associations).

The CoS judges that only that decision should have been notified by the Government in the event that they constituted State aid within the meaning of Article 87 EC and therefore dismisses the claim.

I- Information on the judgment

Council of State (Administrative supreme court) – CoS ("Conseil d'Etat"), 21.12.2006, N°290045, Ministre de l'économie des finances et de l'industrie v. SA Atac France

II- Brief description of the facts and legal issues

The CoS upholds the judgment of the Court of Appeal of Douai on the existence of an alleged unlawful State aid concerning a tax perceived on publicity expenses and necessarily allocated for the financing of support measures to the press sector.

Parties:

The applicant: Ministre de l'économie des finances et de l'industrie;
The defendant: SA Atac France.

Factual background:

Atac is an undertaking diffusing advertising spaces inside free newspapers. The claimant requested the recovery of a tax imposed on certain commercial expenses as set out by Article 302 bis of the Tax code.

In first instance, the administrative tribunal of Lille held that the relevant tax constituted State aid within the meaning of Article 87 EC. As the tax was not notified to the Commission pursuant Article 88(3) EC, the tribunal ordered its recovery. The Minster of Economy and Finance lodged an appeal before the Administrative Court of Appeal of Douai against the judgment of the first instance tribunal. The Court dismissed the appeal.

In the present case, the Minister appealed to the Conseil d'État (Council of State) to set aside the judgment of the Court of Appeal.

III- Summary of the Court's findings

The CoS upheld the judgment of the Court of Appeal and rejected the appeal lodged by the Minister. It confirmed the approach of the judges of lower instances who decided that the tax imposed on certain commercial expenses set out by Article 302 bis of the Tax code constituted unlawful aid.

Firstly, the CoS reviewed the role of national courts in the field of State aid. It is settled case law that the Commission has the exclusive competence to assess, under the control of community courts, whether a State measure constitutes State aid. National courts have the duty to sanction the unlawfulness of national provisions, setting out or modifying State aid which has not been notified to the Commission. The exercise of this competence requires the national court to assess whether the contested provisions constitute State aid.

Secondly, the CoS assessed the State aid nature of the contested provision.

The CoS relies on the fact that the contested tax is entirely allocated to the financing of a fund instituted by law (Article 62 of finance law of 30 December 1997). This fund is designed to support measures intending to modernise daily press. A ministerial decree, which applies the law, sets out a

procedure in which projects financed by the fund are presented by authorised press agencies and defines the conditions of their eligibility.

Moreover, the product of the tax imposed is allocated to a special line in the budget ("compte d'affectation spéciale"). The CoS held that the tax forms an integral part of the measure and therefore falls into the scope of State aid rules.

Thirdly, the CoS assessed whether the aid allocated confers an economic advantage to the press agencies and other enterprises benefiting from it. The CoS analyses whether the support measures would be likely to affect trade between Member States and distort competition, especially in relation to enterprises established in other Member States and competing on the French market with free newspapers.

The Minister claimed that there was no transnational market due to the geographical, cultural and linguistic specificities of that market. Therefore the measure was not likely to affect trade or distort competition by conferring an economic advantage to certain undertakings. The CoS relied on elements which were communicated by the parties in the proceedings and highlighted that in fact the diffusion of national press extends, even in a limited way, to the territory of other Member States.

Notwithstanding the differences between national daily press and free press, the aid measures which are only granted to undertaking established in France, are likely to affect trade between Member States, especially regarding the sale of advertising spaces. The CoS concluded that the Court of Appeal did not err in law when judging that the imposition of the tax code constituted State aid and confirm its judgment.

I- Information on the judgment

Council of State (Administrative supreme court) – CoS ("Conseil d'Etat"), 27.02.2006, N°264406 and 264545, Companies Ryanair Limited v. Chambre de Commerce et d'Industrie du Bas-Rhin

II- Brief description of the facts and legal issues

The CoS upholds the annulment of the deliberation of the Trade chamber of Strasbourg judging that the support measures granted to Ryanair constituted unlawful State aid in application of the private investor test

Parties:

The applicant: Chambre de commerce et de l'industrie du Bas-Rhin;
The defendant: Compagnie Ryanair Limited.

Factual background:

The claimant, a low cost airline established in Ireland, sought the annulment of the deliberation of the chamber of commerce of Strasbourg and the decisions of its president to sign, in execution of this deliberation, two agreements (principal agreement and supplemental agreement) with Ryanair. With the agreements signed, the chamber committed itself to financially participate, in cooperation with the local authorities, to the financing of actions initiated by the company for the promotion of the region. The purpose of this agreement consisted giving incentives, by means of subventions, to the low cost company to operate from the airport of Strasbourg-Entzheim and to increase air traffic from there. The chamber was the owner of the concession of the airport.

These actions were realised by the company itself in the context of the start-up of a new route between London and Strasbourg.

The litigation was brought by third parties, which were competitors of the claimant (Brit Air). They sought the annulment of the deliberation of the chamber of commerce before the administrative courts, invoking the existence of an alleged State aid.

The Nancy court of appeal annulled the judgement of the administrative tribunal of Strasbourg and annulled the deliberation at stake. The court of appeal judges that the chamber of commerce did not behave like a private investor in the market and concluded that the aid constituted unlawful aid. The court of appeal cancelled the deliberation and the president's decisions to sign the agreements and ordered the chamber to terminate the agreements 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 appeal court of Nancy could not order suspension of the payment of the aid or recovery of the aid already granted.

In the present case, Ryanair is seeking review of the judgment of the Court of Appeal.

III- Summary of the Court's findings

The CoS recalls the principle of Articles 87(1) EC and 88(2) and (3) EC and the allocation of competences between the Commission and national courts. National courts have the duty to sanction the illegality of provisions of national law which would have instituted or modified an aid in violation to Article 88(3) EC.

The CoS assessed whether the measure (deliberation of the Trade Chamber of Strasbourg) constituted State aid. The Court of Appeal had decided that the financial support granted to Ryanair broadly exceeded the cost of promoting local tourism estimated by Ryanair and that they could not be regarded as a normal remuneration for the provision of a service, as could have done a private investor operating under market conditions.

The fact that the Court of Appeal assessed the existence of State aid in the light of the actions actually realised by the company was contested and the CoS confirms that the Court could rely on these elements. The CoS confirms the reasoning of the Court by judging that the measures constituted State aid within Article 87(1) EC as the financial support would not have been granted by a private investor operating under normal market conditions. The CoS stated that the fact that the airport has seen an increase in air traffic due to Ryanair is irrelevant in this assessment. The CoS concluded that the measure should have been notified and confirmed the judgment of the Court of Appeal.

I- Information on the judgment

Administrative court of Bordeaux (Administrative appeal Court) – CAA ("Cour administrative d'appel de Bordeaux"), 15.07.2008, N°07BX00373, Société Merceron TP

II- Brief description of the facts and legal issues

The Court of Appeal rejects the State aid law pleas invoked by an unsuccessful bidder in a public tender won by a regional public body, judging that Article 87 EC is not direct effective

Parties:

The applicant: Société Merceron TP;
The defendant: Regional local authority.

Factual background:
This case is an appeal lodged against a judgment of first instance in which the claimant saw its request dismissed. It claimed the annulment of a local authority (city) decision attributing a concession contract for the dredging of the port of a commune. The contract was awarded to the department of Charente-Maritime, which is a regional public authority.

The appellant contened that the department benefited from State aid prohibited under Article 87(1) EC. In its view, the department, which has the status of a local public authority, already have a competence for the maintenance of certain types of ports and, by nature, have a specific fiscal and social status. The personal working for department belongs to the public service and, due to the decentralisation, it benefits for this specific activity from material and financial support from the central state.

The defendant argued that a public body is not *per se* prohibited to bid in a public tender proceeding. It points out that the specific situation of the department regarding the activity of dredging is justified, as no private undertakings had been carrying out this activity since a recent period. The resources granted by the central state were granted to the general budget of the department and not to a specific budget dedicated to this activity. The personnel employed for that activity is therefore indirectly financed by this grant.

III- Summary of the Court's findings

The two first pleas are based on national law.

The third plea is based on State aid law. The Court noted that there was no rule prohibiting a public body participating in a public tender procedure, the Court judged that this participation supposes that the price offered takes into account direct and indirect costs necessary for the service rendered.

The service of port dredging carried out by the department is made on the basis of a specific section of the budget, annexed to the general budget of the regional authority. Moreover, this activity is subject to fiscal and accountancy obligations which are similar to those supported by private undertakings.

The Court of appeal rejected the plea brought by the appellants stating that Article 87(EC) has no direct effect and cannot be invoked by an unsuccessful bidder to seek the annulment of the decision of the granting authority.

The Court of Appeal however held that the department had not underestimated the costs of the service carried out and therefore had not benefited from undue advantage in violation of the principles of free trade, free competition and equality of access to public tenders. The Court judges that there are no elements in the accounts of the regional authority showing that the cost of the services had been underestimated, especially by omitting the integration of certain expenses (ie. expenses linked to the personal and premises).

The Court held that general information issued by the administration on the contribution of State funding to the works in port infrastructures, does not prove that the department benefited from a specific funding for the acquisition of material for the dredging of the ports, enabling it to make a more competitive offer. Concerning the employment of personal belonging to the public service, the Court judges that the differences with the applicable legislation on labour and social security does not have the object or the effect to make those employees more competitive in comparison to employees of the private sector.

I- Information on the judgment

Administrative court of Lyon (Administrative appeal Court) – CAA ("Cour administrative d'appel de Lyon"), 12.07.2007, N°06LY01447, Société Régie Networks

II- Brief description of the facts and legal issues

An Administrative Court of Appeal rules that a claim calling into question the validity of a decision of the Commission not to raise objection raised serious difficulties necessary to request a preliminary ruling from the Court of Justice

Parties:

The applicant: Socitété Régie Networks;
The defendant: Direction du contrôle fiscal Rhône-Alpes Bourgogne.

Factual background:

Régie Networks, an undertaking selling advertising space for the NRJ Group's local radio stations, paid EUR 152,524 by way of charge on advertising companies for 2001. It claimed reimbursement of that sum from the local tax authorities. The authorities failed to give a decision on the claim within the statutory time limit and the claim was rejected. The claimant issued proceedings before the Tribunal administratif de Lyon (Administrative Court of Lyon).

In a judgment dated 25 April 2006, Régie Networks' application was rejected. The company appealed against the decision before the Cour administrative d'appel de Lyon (Administrative Court of Appeal of Lyon).

The tax is a parafiscal tax instituted by a decree and had been prolonged several times by other decrees. Pursuant the decree instituting the tax, its product is affected to a fund supporting expression on radio and allowing the grant of aid to operators authorised to diffuse radio services and whose resources are drawn from commercial advertisements diffused on air and representing less than 20% of their total turnover. The operators subject to the tax are the ones managing the control of messages diffused in direction to the French territory.

The decree prolonging the disputed tax for a longer period was notified by the French government and approved by the Commission (Decision of the Commission of the European Communities of 10 November 1997 not to raise any objections to the new version of an aid scheme to support local radio stations (State aid No N 679/97 – France)). The Commission approved the prolongation of the fiscal regime on the basis that (i) its resources were not increased by the measure, (ii) that the scope of the beneficiaries was not extended in a way that the common interest would be affected and (iii) that the measure could be declared compatible in the light of its objectives of common interest.

The appellant claimed before the Court of Appeal to refer to the ECJ for a preliminary ruling on the validity of the Commission decision approving the State measure at stake.

III- Summary of the Court's findings

The Court held that Articles 87 and 88 EC give the Commission the exclusive competence to assess, under the review of Community courts, whether a measure constituting State aid is compatible with

the common market. The role of national courts is to sanction the unlawfulness of national measures which institutes or modifies State aid, contrary to infringement of Article 88 EC (Standstill obligation). The Court held that national courts are confronted with serious difficulties, when seized for the recovery of a tax allegedly unlawful and the pleas are drawn from the formal irregularities or mistakes done by the Commission. In those circumstances; it must refer to the ECJ for preliminary ruling.

On the serious doubts concerning the validity of the Commission decision, the Court of Appeal held that, pursuant to Article 230(4), an action can be brought before the CFI by any individuals, as far as they are directly and individually concerned. The appellant pointed out that it is not individually concerned by the Commission decision and therefore was not able to lodge an appeal before the Community courts. The Court held that the Minister could not oppose the fact that the claimant had not attacked the decision before the CFI.

The appellant claimed that the Commission decision is not sufficiently motivated pursuant Article 253 EC. The Commission had not classified the aid in a specific category and had not properly assessed its mode of financing. The appellant also claimed that the Commission erred in law in considering that all imported services and products were exempted from the payment of the parafiscal tax which was designed to only finance undertakings settled on the French territory. Finally, Régie Networks argued that the contested decision is vitiated by an error in the assessment of the facts, since the Commission stated, contrary to the facts that the budgetary resources for the aid scheme in question had not increased.

The Cour Administrative d'Appel de Lyon considered that the arguments raised by Régie Networks raised serious difficulties which call into question the validity of the contested decision and decided to stay the proceedings and to request a preliminary ruling from the ECJ on the following question:

"*Is the [contested decision] valid in respect of the statement of reasons, the assessment made as to the compatibility with the EC Treaty of the funding of the radio broadcasting aid scheme for the period 1998 to 2002 and in respect of the contention that there was no increase in the budgetary resources for the aid scheme at issue?*".

I- Information on the judgment

Administrative court of Paris (Administrative appeal Court) – CAA ("Cour administrative d'appel de Paris"), 21.01.2006, N°04PA01092, Société Groupe Salmon Arc-en-Ciel

II- Brief description of the facts and legal issues

The Administrative court of appeal of Paris rejects claim for damages introduced by the beneficiary of an unlawful aid

Parties:

The applicant: Société Groupe Salmon Arc-en-Ciel;
The defendant: Ministre de l'économie, des finances et de l'industrie.

Factual background:

A Law of 12 April 1996 gives the State the ability to conclude framework agreements with professional branches in the sector of textile, clothing, leather and shoes in order to maintain or develop employment in these sectors ("Borotra plan"). The agreements enable the undertakings which signed the agreements to benefit from an exemption of the payment of social security contributions for a certain tranche of salaries.

In implementation of this system, the applicant signed an agreement with the French government and benefited from these exemptions in compensation of several commitments.

In parallel, the scheme was notified to the Commission on 26 March 1996 and on 21 May 1996, the European Commission initiated a formal investigation proceeding pursuant Article 88(2) EC. In a decision of 9 April 1997 the Commission declared the measure as being unlawful and incompatible aid. The Commission ordered the French State recover the aid. The French government contested the Commission decision before the ECJ, which confirmed the unlawfulness of the measure.

The French government ordered the recovery of the aid from the beneficiary, which introduced an action in responsibility against the State for fault. The Administrative Tribunal held that the French government was liable for the infringement of EC law, but maintained that the claimant was responsible for a quarter of the fault and dismissed its demand for compensation.

The claimant appealed the judgment before the Administrative Court of Appeal of Paris contesting its fault and claiming for damages for the harm incurred. In defence, the Ministry, though not contesting the fact that liability is not shared, holds that no harm was supported by the claimant or that there is no causal link with the fault committed by the State.

III- Summary of the Court's findings

The Court of Appeal annulled the judgment of the Tribunal of first instance, stating that the appellant did not show a causal link between the fault of the State and an alleged harm.

On the State's liability

The Court held that in implementing the law in violation of the standstill obligation set out in application of Article 88(3) EC, the French government committed a fault likely to engage its liability. The law, which is unlawful, enabled the government concluding convention at the time the law was published. The Court of Appeal confirms the State liability.

On the appellant's liability

The Court held that the fault would have been deprived of any effect if the appellant would not have signed the agreements at stake. The Court highlighted the fact that as the decision to open an in-depth proceeding pursuant Article 88(2) EC was officially published in the OJ, the appellant had the capacity to have the necessary information, either directly by the European or National authorities or by the professional bodies, to avoid the risks resulting from the unlawfulness of the measure at stake. Therefore, the existence of doubts raised by the Commission could not be ignored by economic operators.

By signing the convention with the State, the appellant committed an imprudence act which was likely to exempt the State from one quarter of its liability.

On the compensation for damages

The Court recalled that only harm which would not have occurred if the State had not signed the agreement with the appellant or if it had informed it that it would have to reimburse the aid granted could be regarded as having a causal link with the fault engaging the state's liability.

The appellant seeks the compensation in respect of an alleged harm resulting from the decrease of its results and of its profits resulting from the termination of the agreement. The Court held that the termination of the scheme was initially planned in the law, which is the legal basis for the agreement. Therefore, the termination of the effects of the agreement has no direct link with the fault engaging the State liability.

The Court also held that the appellant has not sufficiently showed that the measures adopted, which allegedly incurred additional costs, were incurred by the implementation of the agreement signed with the State. The termination of the agreement is without direct link with the fault engaging the state liability. Similarly, the Court ruled that the appellant did not bring any proof of the occurrence of a moral harm and did not precisely show to what extent the termination of the unlawful aid would harm the image of the profession in general and its own image in particular. The Court rejected the claim.

Finally, it was judged that the appellant could not seek compensation amounting to the sum of the unlawful aid it had to restitute in application of ECJ case and rejected the claim.

However, the Court ruled that the appellant brings elements justifying it had to support costs resulting from a loan contracted in view to reimburse the aid. The Court judges that the harm resulting from it is evaluated at EUR 3,334 and which is subject to the principle of share of liability.

The appellant claimed that in view of its commitment with the State, it had to employ nine persons and seven young employees which incurred additional costs. The Court held that the appellant committed itself to maintain or create new jobs and therefore the harm claimed has a direct link with

the fault committed by the State. However, the Court ruled that the appellant did not sufficiently establish the existence of a harm, as it did not show in the light of the evolution of the recruitments that it had effectively fulfilled the commitment in application of the agreements and that the personal recruited did not brought an added value which is equivalent or superior to the costs incurred.

I- Information on the judgment

Civil supreme court - 2nd civil chamber ("Cour de Cassation (CC) - Chambre civile 2"), 14.03.2007, N°Z-04-30.053, Société Laboratoire Glaxosmithkline v. Agence centrale des organismes de sécurité sociale (ACOSS)

II- Brief description of the facts and legal issues

The Civil Supreme Court applies the principles of the Boiron case law on burden of proof and annuls the judgment of the Versailles Court of Appeal dismissing the application of a pharmaceutical producer.

Parties:

The applicant: Glaxosmithkline (GSK);
The defendants: Union pour le recouvrement des cotisations de sécurité sociale et d'allocations familiales (URSSAF) of Paris supporting Agence centrale des organismes de sécurité sociale (ACOSS) and directeur régional des affaires sanitaires et sociales de Paris.

Factual background:

This case is one in a series of cases opposing pharmaceutical producers and wholesale distributors concerning a provision of the French Code de la santé publique (Public Health Code). The relevant provision obliges pharmaceuticals wholesalers to stock enough medical products sufficient to ensure a month's supply to the pharmacies in its distribution area which it regularly serves as customers and to be able to guarantee delivery of every medicine sold on the market to the pharmacies in its distribution area which it regularly serves as customers and, in the case of medicines in their "range", within 24 hours of receipt of the relevant order. This obligation is defined as a public service obligation in the Public Health code.

Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 (JORF of 23 December 1997, p. 18635), which inserted inter alia Article L. 245-6-1 into the Social Security Code, introduced a tax contribution of 2.5% of pre-tax turnover achieved in France by pharmaceutical laboratories from wholesale sales of medicinal products to dispensing pharmacies, mutual pharmacies and pharmacies belonging to mining friendly societies. The tax is not levied on sales of medicines by wholesale distributors.

The appellant claims that wholesale distributors received unlawful State aid within the meaning of EC law. GSK seeks the annulment of the judgment of the Court of Appeal of Versailles of 18 November 2003 in which the Court rejected the recovery of a sum paid to ACOSS on the basis of the turnover realised between 1998 and 2001 pursuant the application of a provision of the Social security Code.

GSK claims that the contribution paid pursuant to this provision is unlawful in view of the State aid rules.

III- Summary of the Court's findings

1) The applicant claims that the Court of Appeal wrongly concluded that the contribution could not be viewed as State aid and therefore wrongly rejected its request of reimbursement. GSK claimed

that the Court of Appeal wrongly applied the test set out by the ECJ in the *Altmark* case (as well as the *Ferring* and *Enirisorse* cases) to assess whether the tax exemption that the wholesale distributor benefited from, did not exceed the additional costs that they bore in discharging the public service obligations imposed on them by national law.

In respect of the *Altmark* case law, GSK claimed that the Court of Appeal only considered that the obligations were "formally" qualified as obligation of public service and refused to assess the provision of the Social Security Code which set these obligations. The appellant claimed that the tax was not instituted to finance activities of public service.

The CC rejected the claims, stating that the Court of Appeal had correctly characterised the content of the obligations by recalling the provision (R. 5115-13) of the of the Public Health Code stating that pharmaceuticals wholesalers must keep a permanent stock of medicinal products sufficient to ensure the supply to the pharmacies in their distribution area which they regularly serve as customers and must be able to guarantee delivery of every medicine sold on the market to the pharmacies in their distribution area which they regularly serve as customers and, in the case of medicines in their "range", within 24 hours of receipt of the relevant order.

2) However, the CC relied on the interpretation given by the ECJ in the *Boiron* case according to which Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 constitutes State aid if it is shown that the absence of liability to the tax on direct sales leads to an overcompensation of the wholesale distributors, to the extent that the advantage in not being likely to exceed the additional costs that they bear in discharging the public service obligations imposed on them.

The CC held that the Court of Appeal had to verify whether the conditions set out in the *Altmark* case were fulfilled.

The Court recalled the answer given by the ECJ in *Boiron* and held that in order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring a pharmaceutical laboratory to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since *inter alia* that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.

The CC held that the Court of Appeal had deprived its judgement of legal basis by not verifying, on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided for so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations. The Court of Appeal should have instructed a research on the basis of past data established on an objective and transparent manner to determine whether the tax did not exceed what was necessary to cover the additional costs that they bear in discharging the public service obligations.

The CC sanctioned the Court of Appeal by annulling it judgment, as it had rejected the demand of GSK by ruling that the evidence adduced by GSK was not sufficient to prove the existence of an overcompensation for the provision of an obligation of public service.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

Civil court of Appeal of Basse-Terre ("Cour d'appel de Basse-Terre (CA)"), 18.06.2008, N°05/00673, Administration des douanes et des droits indirects de la Guyane and Société civile immobilière et de services Boëtie "SISB" v. SA Primistères Reynoird

II- Brief description of the facts and legal issues

A civil court of appeal holds that third parties cannot request a national court to statute on the alleged incompatibility of a measure but confirms national courts' jurisdiction for claims for damages

Parties:

The applicant: Administration régionale des douanes et des droits indirects de la Guyane;
The defendants: SA Primistères Reynoird.

Factual background:

The society Primistères Reynoird imports goods from the continental part of France and other Member States of the European Union to Guyana and paid the levies in application of the dock dues and an additional tax for the period between 1 October 1991 and 31 December 1992.

In two cases, the ECJ ruled that the dock due infringed EC law, in particular provisions on free movements: Case C-163/90, Administration des Douanes et Droits Indirects v Léopold Legros and others, [1992] ECR I-4625 and Joined cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93, René Lancry SA v Direction Générale des Souanes and Société Dindar Confort, Christian Ah-Son, Paul Chevassus-Marche, Société Conforéunion and Société Dindar Autos v Conseil Régional de la Réunion and Direction Régionale des Douanes de la Réunion, [1994] ECR I-3957.

Relying on these judgments, the society introduced three claims to the fiscal administration of Guyana for the restitution of the levies paid. The fiscal administration first dismissed these demands and the claimant introduced several claims in first instance. The first instance tribunal of Cayenne on 19 June 1998 declared partly admissible the demand (for the period after 17 July 1992) of the claimant and ordered the restitution of the tax unduly paid.

The fiscal administration lodged an appeal against the judgement of the court of first instance, contesting the recovery order. Primistère Reynoird also lodged an appeal against the judgement on the inadmissibility of the claim for the taxes paid before 16 July 1992 and claimed for damages for this period.

On 20 January 2003, the Court of Appeal of Cayenne upheld the judgment of the Court of Appeal and rejected the claim for damages, on the ground of its lack of jurisdiction. The case was referred before the Civil supreme court (Cour de Cassation) which overruled the judgment to the extent that the Court of Appeal judged that it had no jurisdiction to declare admissible the claim for damages.

The present case is the enforcement of the decision of the Supreme Court: the appellant asked the court to order the fiscal administration to reimburse the levy paid in application of the dock due and claim for damages.

III- Summary of the Court's findings

The Court of appeal rejects the claims brought by the appellant.

Amongst the claims invoked by the appellant, Primistère Reynoird alleges that the tax at stake (the dock due and additional tax) was incompatible with Articles 87 and 88 EC (former Articles 92 and 93 EC).

The Court judges that the society has not the quality to invoke before a national court the provisions set out in these Articles. The assessment of aid measures and State aid control is a competence which belongs exclusively to the European Commission. State aid control is subject to an appropriate procedure, initiated by the Commission and subject to the control of Community courts.

Therefore third parties cannot request a national court to statute on the alleged incompatibility of a measure. The Court held that the claim, based on the incompatibility of the measure with EC law, is irrelevant as the taxes at stake were already declared incompatible with the EC Treaty for the period before 31 December 1992.

I- Information on the judgment

Civil court of Appeal of Paris -18th chamber B ("Cour d'appel de Paris - 18ème chambre B"), 11.09.2006, N°05/00673, S.A.R.L. TOYS'R'US v. Caisse nationale régime social des indépendants, supporting Caisse organic recouvrement

II- Brief description of the facts and legal issues

The Paris Civil Court of Appeal applies a judgment of the ECJ to dismiss the application of a party seeking the restitution of a tax allegedly perceived in violation of State aid rules

Parties:

The applicant: SARL Toys'R'US;
The defendants: Caisse Nationale Régime Social des Indépendants supporting Caisse Organic recouvrement; Directeur Régional des Affaires Sanitaires et Sociales.

Factual background:

The appellant sought the restitution of a tax for the support of trade and craft industry ("TACA") paid between 2003 and 2005. Toys'R'US introduced a claim before the tribunal for social security of Evry, which dismissed the demand.

The TACA is a progressive tax borne directly by retail stores in France which have a sales area exceeding 400 m2 and an annual turnover in excess of EUR 460,000. The tax rates progress in step with annual turnover per m2. The TACA was collected by the Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (National Independent Old-Age Insurance Fund for Self-Employed Persons in Manufacturing and Trading Occupations (hereinafter 'Organic').

The tax, initially designed to finance a special compensatory aid, was replaced with a cessation payment established by a law of December 1981.

The applicant appealed the judgment of the first instance tribunal and asked the restitution of the tax and the payment of interests. The appellant claimed that the tax falls within the scope of Article 87 EC and that pursuant Article 88(3) EC, the Commission should have been notified of the aid project and the French authorities should have suspended the implementation of the measure until the Commission had adopted a final decision.

The fiscal authority claims that the tax has been incorporated in the overall budget since 2002 and claims that the plea invoked by the appellant is irrelevant as the ECJ has ruled on 27 October 2005, in answer to question referred by the Court of Appeal of Lyon, that Articles 87(1) EC and 88 EC are to be interpreted as not precluding the levy of a tax such as the French tax to support the trade and craft sectors (Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C□ 325/04, Casino v. Caisse nationale de l'organisation autonome d'assurance vieillesse des travailleurs non salariés des professions industrielles et commerciales (Organic), [2005] ECR I-9481).

III- Summary of the Court's findings

The Court of Appeal dismissed the appeal.

The Court relied on the judgement of the ECJ of 27 October 2005 in which the Court held that Articles 87(1) EC and 88(3) EC are to be interpreted as not precluding the levy of a tax such as the French tax to support the trade and craft sectors.

The court then quoted paragraph 43 of the ECJ judgment where the Court held that "*even if the tax exemption for small retail outlets constitutes an aid measure within the meaning of Article 87(1) EC, the possible illegality of that aid is not such as to affect the legality of the TACA.*"

The Court stated that there is no connection between the revenue from the TACA and the amount of the cessation payment granted to traders and craftsmen who permanently cease working or the financing of basic old-age insurance schemes for self-employed persons in the craft sector and for self-employed persons in manufacturing and trading occupations. In the absence of such a causal link, the tax is to be analysed as a tax allocated to the Treasury.

The Court also relied on Article 234 EC and interpreted this provision as having the object to harmonise the interpretation of EC law given by Member States, including national courts. Therefore, this provision imposes on national courts an obligation to take into account the interpretation given by the ECJ on the disputed tax.

I- Information on the judgment

Civil court of Appeal of Versailles -5th chamber A ("Cour d'appel de Versailles - 5th chambre A"), 13.05.2006, N°05/05183, Laboratoires Bristol Myers Squibb v. Agence centrale des affaires sanitaires et sociales de Paris

II- Brief description of the facts and legal issues

Applying the Boiron case law relating to the burden of proof, the Versailles Court of Appeal dismissed a claim by a pharmaceutical producer on the ground that it failed to show the existence of an advantage drawn from the exemption enjoyed by the wholesale distributors imposed by the national regulation

Parties:

The applicant: Laboratoires Bristol Myers Squibb;
The defendants: Agence centrale des organismes de securité sociale et direction régionale des affaires sanitaires et sociales de Paris.

Factual background:

This case belongs to a series of cases opposing pharmaceutical producers and wholesale distributors concerning a provision of the French Code de la santé publique (Public Health Code). This provision obliges pharmaceuticals wholesaler to keep a permanent stock of medicinal products sufficient to ensure a month's supply to the pharmacies in its distribution area which it regularly serves as customers and to be able to guarantee delivery of every medicine sold on the market to the pharmacies in its distribution area which it regularly serves as customers and, in the case of medicines in their "range", within 24 hours of receipt of the relevant order. This obligation is defined as a public service obligation.

Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 (JORF of 23 December 1997, p. 18635), which inserted *inter alia* Article L. 245-6-1 into the Social Security Code, introduced a tax contribution of 2.5% of pre-tax turnover achieved in France by pharmaceutical laboratories from wholesale sales of medicinal products to dispensing pharmacies, mutual pharmacies and pharmacies belonging to mining friendly societies. The tax is not levied on sales of medicines by wholesale distributors.

The appellant claimed that wholesale distributors received unlawful State aid within the meaning of EC law. Bristol Myers Squibb (BMS) introduced an action in first instance and its demand was declared inadmissible. The claimant appealed the judgment.

The appellant sought a Court order for the repayment of the sum which it had paid to the Agence centrale des organismes de sécurité sociale (Central Agency for Social Security Bodies) ('ACOSS') by way of the tax on direct sales of medicines and to order a stay in the proceed until the ECJ rules on the question referred by the French Civil Supreme Court in the case C-526/04 Laboratoire Boiron v ACOSS, [2006] ECR I-7529 (pending at that time).

The fiscal authority argues that the appellant's claim, based on the unlawfulness of the payment injunction, is not funded, as the measure instituting the tax at stake does not constitute State aid within the meaning of Article 87 EC.

III- Summary of the Court's findings

1) On the question of the burden of proof, the judge of first instance dismissed the action of the claimant and rejected the claim brought by BMS. Recalling the ruling given by the ECJ in the *Boiron* case, the Court of Appeal held that the laboratory had to prove the existence of a overcompensation for the public service obligation carried out by the wholesale distributors, contrary to what the appellant was pleading (on the basis of the *Ferring* and *Altmark* cases). The Court of Appeal held that the question is in fact irrelevant as both parties have submitted the same report to support their claim.

Though, the Court confirmed the allegations of the appellant stating that the ECJ has set out strict conditions in order for public subsidies to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations and therefore to escape the qualification of State aid within the meaning of Article 87 EC and to escape the obligation of notification set out in Article 88(3) EC.

However, the Court held that the disputed tax constitutes an aid to the wholesale distributors if it is shown that the advantage drawn from the exemption enjoyed by the wholesale distributors exceeds the costs necessary for the accomplishment of the public service obligation imposed by the national regulation. The Court of Appeal held that BMS had to demonstrate that the advantage drawn by the wholesale distributors overcompensates the costs they have to support for their public service obligation. It is for the appellant to precise the scope of this overcompensation.

2) On the absence of State aid, the appellant did not bring any factual element contradicting the argument of the fiscal administration according to which the tax only represented a quarter of the profit margin made by the wholesale distributors. It did not bring any element showing the quarter of this profit margin exceeded the costs for logistic, personal, stocks, transport, vehicles necessary to fulfil its public service obligations.

The Court of Appeal judges that the Court of first instance had rightly held that the appellant had not satisfied the burden of proof, taking into account that according to the *Boiron* case, the appellant has not the capacity to rely on particular difficulties to research such proofs.

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

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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 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.

IV- Comment of the authors of the 2006 study

The Administrative Court of Melun applied the approach of the Commission at the time (see the *FFSA* decision of 8 February 1995[1]), 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[2] 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.

1 OJ (1995) C 262/11.
2 Case T-106/95, FFSA v Commission [1997] ECR II-229.

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I- Information on the judgment

Administrative Court of Caen, Société Uniservice Distribution and Société Honfleur Distribution, 2 December 1999, Cases n° 98-1460 and n° 99-526

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

The Caen Court confirmed the decision of the Administrative Court of Melun in its decision *Société Picard Surgelés*.

I- Information on the judgment

Administrative Court of Dijon, SA Nevers Viandes, 25 May 2000, Case n°99-1071, Revue de jurisprudence fiscale 2001, n°119

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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[3]. This is one of the few cases where an administrative court actually ordered restitution of the contested tax.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[3] Case T-46/97, SIC v Commission [2000] ECR II-2125.

I- Information on the judgment

Conseil d'Etat, Confédération française de la boucherie, boucherie-charcuterie, traiteurs, 28 July 2000, Case n°206594, Lebon report of cases, Tables, p. 979

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Administrative Court of Orléans, SA Sobledis, 8 August 2000, Case n° 98-2311

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Administrative Court of Lille, SA Lianoudis, 21 December 2000, Case n°9803864, Lebon report of cases, Tables, p. 979

II- Brief description of the facts and legal issues

The claimant contested the legality of the tax.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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. In a judgment of 20 November 2003[4], the ECJ declared that the system constituted a State aid scheme.

III- Summary of the Court's findings

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 courts should have assessed the negative effects of the tax on the taxpayer's economic situation.
The Conseil d'Etat rejected the appeal.

[4] Case C-126/01, Ministère de l'Économie, des Finances et de l'Industrie v GEMO SA [2003] ECR I-13769.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

I- Information on the judgment

Conseil d'Etat, Société Doux, 23 March 2005, Case's n°269059 and n° 269060, not published

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Conseil d'Etat, Union des industries chimiques and others, 5 October 1998, Case n°162562, Rec. Tables, p. 798-805-890

II- Brief description of the 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.

III- Summary of the Court's findings

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* […]."[5]

Therefore, the *Conseil d'Etat* rejected the argument based on a breach of Article 88 (3) EC.

IV- Comment of the authors of the 2006 study

The *Conseil d'Etat* referred to an ECJ case without having to further interpret the notion of State aid.

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[5] Case 240/83**,** Procureur de la République v Association de défense des brûleurs d'huiles usagées ("ADBHU") [1985] ECR 531, para. 18.

I- Information on the judgment

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) Case n° 178322; Conseil d'Etat, CNIH, 2 December 1998, Cases n°171648 et seq. p. 6, Europe, February 1999, n° 84, p. 23, not published

II- Brief description of the 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*.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

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[6] 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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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*.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Administrative Court of Appeal of Douai, SA HCF, 30 May 2000, Case n°96-1653, RJF, November 2000, Case n°1373

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Conseil d'Etat, Société Pantochim SA, 31 May 2000, Cases n°192006 and n°196303, Revue de jurisprudence fiscale 2000 p. 729-730

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the facts and legal issues

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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

See Société des Etablissements Friedrich case by the Cour de cassation[7].

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[7] *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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

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I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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*.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Cour de cassation, Société Guyomarch Vertou, 20 October 1998, Case n°1649, Revue de jurisprudence fiscale 1999 n°282, p. 173-174

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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).

I- Information on the judgment

Cour de cassation, Entreprise Michel Dewailly, 30 May 2002, Case n°1911, Petition n°00-20.526, not published

II- Brief description of the 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.

III- Summary of the Court's findings

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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

The *Conseil d'Etat* interpreted the notion of existing aid, without verifying whether the existing aid had been notified in the past.

I- Information on the judgment

Conseil d'Etat, M. Guiavarch, 5 September 2001, Case n°225473, not yet published in the Lebon report of cases

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

See the comment above about claimants referring to Article 87 EC instead of Article 88 EC.

I- Information on the judgment

Conseil d'Etat, AFORM & others, 28 September 2001, Case n°238423, not published

II- Brief description of the 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.

III- Summary of the Court's findings

The *Conseil d'Etat* held that the decision to organise a tender cannot be challenged because it is only a preparatory measure.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

The *Conseil d'Etat* rejected the State aid argument because the claimant invoked Article 87 EC, which does not have direct effect.

IV- Comment of the authors of the 2006 study

See the comment above about claimants referring to Article 87 EC instead of Article 88 EC.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

Quoting the *ratio decidendi* of the *Preussen Electra* case[8], the *Conseil d'Etat* pointed to the absence of State resources in the present case, and therefore of State aid.

IV- Comment of the authors of the 2006 study

The *Conseil d'Etat* strictly applied established ECJ case law.

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[8] Case C-379/98, PreussenElektra AG v Scheswag AG [2001] ECR I-2099.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Conseil d'Etat, Syndicat des industries de matériels audiovisuels électroniques, 6 February 2004, Case n°250560, not published in the Lebon report of cases

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

The *Conseil d'Etat* did not expressly state that there could not be State aid in the absence of State resources.

I- Information on the judgment

Conseil d'Etat, Chambre syndicale nationale des entreprises de sécurité and others, 29 July 1998, Case n°156019, not published

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

The *Conseil d'Etat* did not have the opportunity to rule on State aid issues[9].

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[9] 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).

I- Information on the judgment

Conseil d'Etat, Société Générale & others, 18 December 1998, Case n°197175, AJDA, 1999, p. 285

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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[10].

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[10] Investigation concluded by a decision of 15 January 2002 that was annulled by the CFI in January 2005 (Case T-93/02).

I- Information on the judgment

Conseil d'Etat, SA Bouygues & others, 28 July 1999, Case n°206749, BJDCP, n°7, 1999, pp. 620-627

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

The Conseil d'Etat did not analyse whether Cofiroute had benefited from an advantage by being awarded the contract.

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I- Information on the judgment

Conseil d'Etat, Fédération Nationale des syndicats d'agents généraux d'assurance, 28 March 2001, Case n°155896, D., 2002, Juris., p. 630

II- Brief description of the 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*"). The Minister rejected the request. The Federation appealed the Minister's decision, arguing, *inter alia*, its incompatibility with EC State aid rules.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

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I- Information on the judgment

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

II- Brief description of the 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[11], 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.

III- Summary of the Court's findings

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 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.

IV- Comment of the authors of the 2006 study

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.

[11] Case T-49/93, SIDE v Commission [1995] ECR II-2501.

Once the first Commission decision had been annulled by the CFI, the Commission adopted a second decision, which was again annulled by the CFI[12]. The Commission adopted a third decision on 20 April 2004[13]. 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)[14]. 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).

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12 OJ (1998) L 44/37 and Case T-155, SIDE v Commission [1998] ECR II-1179.
13 OJ (2005) L 85/27.
14 Case T-372/04, OJ (2004) C 300/88 removed from the Register on 31 May 2005.

I- Information on the judgment

Administrative Court of Pau, Ryanair, 3 May 2005, Case n°0301635, not published

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Commercial Court of Paris, Sunsail International, 2 February 1998, not published

II- Brief description of the 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.

III- Summary of the Court's findings

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[15] 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.

IV- Comment of the authors of the 2006 study

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.

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[15] The Commission adopted a decision in 1999 that was annulled in Case C-482/99, French Republic v Commission [2002] ECR I-4397.

I- Information on the judgment

Commercial Court of Paris, UFEX, DHL & others v La Poste, SFMI, Chronopost & others, 7 December 1999, Docket n°96072418 and 96082065

II- Brief description of the 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.

III- Summary of the Court's findings

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[16]. 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 verified whether the aid had been notified to the Commission by a Member State[17]. 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.

IV- Comment of the authors of the 2006 study

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[18], 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

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16 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.

17 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.

18 Case C-344/98, Masterfoods v Commission [2000] ECR I-1369, para. 55 to 59.

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[19].

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[19] Case T-613/97 RV, to be decided in 2006.

I- Information on the judgment

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

II- Brief description of the 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[20]. The company appealed to the Civil Court of Appeal of Paris.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

[20] See Case n° D4-D-02 of 10 February 2004.

I- Information on the judgment

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

II- Brief description of the 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[21].

III- Summary of the Court's findings

Referring to the principle of the supremacy of EC law, including EC competition law, the Competition Council adopted a decision to drop the investigation.

IV- Comment of the authors of the 2006 study

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).

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[21] 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).

I- Information on the judgment

Commercial Court of Paris, SA Sojerca v Jaunet, 21 January 2003, Gazette du Palais, 4 novembre 2003 n°308, p. 28

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Energy Regulation Commission, State aid recovery, 26 February 2004, not published

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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.

I- Information on the judgment

Administrative Court of Grenoble, Société Stéphane Kelian, 15 October 2003, Case n°0102341, not published

II- Brief description of the 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[22].

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.

III- Summary of the Court's findings

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.

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

IV- Comment of the authors of the 2006 study

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[23].

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[23] 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.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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[24]).

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

[24] 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.

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 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.

I- Information on the judgment

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

II- Brief description of the 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[25] 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.

III- Summary of the Court's findings

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.

IV- Comment of the authors of the 2006 study

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[26], 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).

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25 OJ (1995) C120/8.

26 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.

I- Information on the judgment

Commercial Court of Paris, UFEX, DHL & others v. La Poste, SFMI, Chronopost & others, 7 December 1999, Docket n°96072418 and 96082065 (see above) (G)

II- Brief description of the facts and legal issues

See description of the case above.

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I- Information on the judgment

Court of Appeal of Paris, CDR v. FG Marine-Stardust, 16 January 2004, Case n° 2002/05900, not published

II- Brief description of the 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[27]. 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[28].

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.

III- Summary of the Court's findings

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.

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27 OJ (2000) L206/6.

28 Case C-482/99, French Republic v Commission [2002] ECR I-4397.

IV- Comment of the authors of the 2006 study

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?).

I- Information on the judgment

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

II- Brief description of the facts and legal issues

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.

III- Summary of the Court's findings

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[29], the ECJ held that the system constituted State aid.

IV- Comment of the authors of the 2006 study

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.

[29] Case C-126/01, Ministère de l'Economie, des Finances et de l'Industrie v GEMO SA [2003] ECR I-13769.

I- Information on the judgment

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

II- Brief description of the 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.

III- Summary of the Court's findings

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.

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.

IV- Comment of the authors of the 2006 study

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"[30].

[30] Case C-53/00, Ferring SA v ACOSS [2001] ECR I-9067, para. 27.

"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.

I- Information on the judgment

Cour de cassation, Société Galeries de Lisieux, 16 November 2004, Case n°1642, Petition n°03-12.565, AJDA, 2005 Jurisprudence p. 727

II- Brief description of the 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) 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.

III- Summary of the Court's findings

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[31].

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)[32].

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[31] Case C-488/04, OJ (2005) C 31/20.

[32] 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.

I- Information on the judgment

Cour de cassation, Laboratoires Boiron, 14 December 2004, Case n°1837, Petition n°02-31.241, not published

II- Brief description of the 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[33], 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.

III- Summary of the Court's findings

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 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[34].

IV- Comment of the authors of the 2006 study

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.

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[33] Joined Cases C-380/98, Banks & Co v The Coal Authority and Secretary of State for Trade and Industry [2001] ECR I-6117.

[34] Case C-526/04, Reference for a preliminary ruling by the Cour de cassation (France), OJ (2005) C 69/5.

I- Information on the judgment

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.

II- Brief description of the 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.

III- Summary of the Court's findings

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[35].

IV- Comment of the authors of the 2006 study

The Court of Appeal of Lyon had raised a similar question on 24 February 2004[36]. In all these cases, Advocate General Stix-Hackl concluded (on 14 July 2005) that there was no State aid.

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[35] 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.
[36] 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.

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

I- Information on the judgment

Administrative Court of Appeal of Paris, Centre d'exportation du livre français, 5 October 2004, Cases n°01PA02717, n°01PA02761, n°01PA02777 and n°03PA04060, AJDA, 7 February 2005, p. 260-268, Dr. Adm., February 2005, n°2, p. 20-21 (D/E/I)37

II- Brief description of the facts and legal issues

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

III- Summary of the Court's findings

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

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

IV- Comment of the authors of the 2006 study

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

After the annulment of the first Commission decision by the CFI, the Commission adopted a second decision, which was again annulled by the CFI38. The Commission adopted a third decision on 20 April 200439. However, at the time of the decision of the Paris Court, CELF had already introduced an action for annulment against this new decision (on 15 September 2004), disputing the finding that the measure constituted State aid (whether compatible with the Common Market or not, since this meant that it was required to recover the illegal aid)40. The Paris Court mentioned the absence of a definitive Commission decision.

In any case, despite the positive Commission decision declaring the aid compatible, the mere fact that CELF had benefited from State aid was sufficient for the Paris Court to order recovery. It is

[37] The letters refer to the relevant tables of classification of actions at the end of the study.
[38] OJ (1998) L44/37 and Case T-155, SIDE v Commission [1998] ECR II-1179.
[39] OJ (2005) L85/27.
[40] Case T-372/04, removed from the Register by order of 31 January 2005.

noteworthy that the Paris Court also imposed a daily fine in case of non-compliance by the State, pursuant to powers granted to the administrative judge in 1995.

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I- Information on the judgment

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

II- Brief description of the facts and legal issues

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

I- Information on the judgment

Cour de Cassation, Laboratoires Boiron, 14 December 2004, Case n°1837, Petition n°02-31.241, not published

II- Brief description of the facts and legal issues

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

III- Summary of the Court's findings

The Cour de Cassation referred the following questions to the ECJ for a preliminary ruling: (i) whether EC law must be interpreted as meaning that a company may file a claim for a tax refund because certain companies are exempted from paying the tax and whether this exemption constitutes State aid; and (ii) whether EC law must be interpreted as meaning that the burden of proof on the claimant filing an action for a tax refund (who must prove, according to French civil procedural rules, that this tax exemption for certain companies constitutes State aid on the basis that it over-compensates these companies for the costs incurred by discharging public service obligations or because it does not fulfill the four criteria of the Altmark case) "makes it impossible or excessively difficult to exercise the right to recovery of the aid" within the meaning of established ECJ case law41.

IV- Comment of the authors of the 2006 study

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

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[41] Case C-526/04, OJ (2005) C 69/11.

I- Information on the judgment

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

II- Brief description of the facts and legal issues

In this case, a company ("target") that had benefited from aid was sold to another company ("purchaser") with the net asset value of target being guaranteed. Following a negative Commission decision in 1997, the State ordered recovery of the aid from the purchaser in 2000. The purchaser went into liquidation but the State did not register its claim with the creditors' representative.

III- Summary of the Court's findings

The Commercial Court of Paris therefore concluded that the purchaser had no grounds for claiming damages from target on the basis that target had not reimbursed the aid.

IV- Comment of the authors of the 2006 study

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

I- Information on the judgment

Energy Regulation Commission, State aid recovery, 26 February 2004, not published

II- Brief description of the facts and legal issues

Following the EDF decision by the Commission of 16 December 200342, the State ordered recovery of the aid from EDF. EDF sought reimbursement of part of the aid from RTE, EDF's department in charge of the high-voltage electricity network. Since the parties could not agree on the amount to be paid by RTE to EDF, RTE decided to refer the case to the Energy Regulation Commission.

III- Summary of the Court's findings

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

IV- Comment of the authors of the 2006 study

It is interesting that EDF and RTE raised the issue of how recovery of the aid should be apportioned between the two entities before the Energy Regulation Commission. EDF had already paid the amount due to the State on 16 February 2004 when the above-mentioned apportionment was decided. EDF nevertheless challenged Articles 3 and 4 of the decision of the Commission (relating to the tax treatment of certain provisions)43.

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[42] OJ (*2005*) L 49/9.
[43] Case T-156/04, EDF v. Commission, pending.

I- Information on the judgment

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

II- Brief description of the facts and legal issues

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

The aid had been notified to the Commission and in a 1997 decision, the Commission declared the aid granted under the 1996 law incompatible with the Common Market. The decision was upheld by the ECJ44.

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

III- Summary of the Court's findings

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

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

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

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

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

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

IV- Comment of the authors of the 2006 study

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

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

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

Although the principle of legitimate expectations is a general principle of EC law, it is not part of the French "public policy" ("ordre public")45. Moreover, the Conseil d'Etat held that the principle can only be applied in the French legal system if EC law applied to the case before the national court46 or if the contested decision was taken in order to implement EC law47.

Courts of first instance48 have held, however, that the Administration could be liable if the principle of legitimate expectations inherent in legal rules and administrative actions that are clear and foreseeable is not respected.

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

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

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

[47] *Conseil d'Etat*, 13 May 2001, Société TF1, published in Recueil Lebon, req. n°247353; *Conseil d'Etat*, Assemblée, 5 mars 1999, published in Recueil Lebon, req. n°194658; *Conseil d'Etat* section, 30 Décembre 1998, Entreprise Chagnaud SA, published in Recueil Lebon, n°189315; *Conseil d'Etat*, 16 Mars 1998, Association des élèves et Mlle Poujol, Dr. adm. 1997, n°149; *Conseil d'Etat*, 28 Juillet 2000, published in Recueil Lebon, req. n°205710; *Conseil d'Etat*, 9 Mai 2001, Transports Freymuth, published in Recueil Lebon, req. n°210944; *Conseil d'Etat*, 11 avril 2003, Centre école régionale de parachutisme de Picardie, published in Recueil Lebon, req. n°221140.

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