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

Court of Appeal Amsterdam ("Gerechtshof Amsterdam"), 18.01.2007, LJN AZ 6508, UPC Nederland B.V. v. Municipality of Amsterdam

II- Brief description of the facts and legal issues

Dutch Court of Appeal allows the municipality of Amsterdam to continue its investment in a local telecommunications network, although the European Commission has started an Article 88(2) EC procedure.

Parties:

The applicant: UPC Nederland B.V.;
The defendant: Municipality of Amsterdam.

Factual Background

In April 2004, the municipality of Amsterdam informed the European Commission of its intention to roll-out a telecommunications network in Amsterdam. For that purpose, a new legal entity is incorporated by the municipality of Amsterdam. The project was subsequently notified to the European Commission by the Dutch authorities in May 2005, who sought confirmation from the European Commission that the investment of the municipality of Amsterdam in the legal entity owning the network does not constitute State aid.

Following this notification, the European Commission decided to start the procedure provided for by Article 88(2) EC and to make a formal request with the Dutch authorities in order to obtain further information in relation to the project.

In December 2005, the European Commission received a complaint from UPC Nederland B.V. (a cable operator in The Netherlands) stating that the participation of the municipality in this project does in fact constitute State aid within the meaning of Article 87(1) EC.

On 3 March 2006, the European Commission sent a reminder to the Dutch authorities, referring to the statement of the Dutch authorities in November 2005 that further information would be provided once further progress had been made on the setup of the project, which was foreseen for spring 2006. The European Commission also reminded the Dutch authorities of the standstill obligation of Article 88(3) EC. The standstill obligation in Article 88(3) EC prohibits public authorities from putting the proposed measure constituting State aid in effect until a final decision has been adopted by the European Commission.

The Dutch authorities sent further information in May and June 2006. The European Commission sent an additional request for information to the Dutch authorities on 24 July 2006, in answer to which the Dutch authorities submitted several batches of information. Following an additional request of information of 29 September 2006, the authorities requested on 13 October 2006 for an extension of the deadline to reply.

In the meantime, the roll-out of the network commenced on 12 October 2006. In view of these developments, the extension of the deadline requested by the Dutch authorities has been refused. The Dutch authorities submitted part of their answers before the deadline of 26 October 2006.

III- Summary of the Court's findings

District Court procedure

UPC subsequently requests the District Court in Amsterdam in a procedure for interim measures to order the municipality of Amsterdam to respect the standstill obligation laid down in Article 88(3) EC and not to continue the project before the European Commission has finalised its assessment.

The request by UPC was dismissed by the District Court which stated in its judgment of 22 June 2006 that it is not clear that the municipality's involvement in the project does - in fact - constitute a form of State aid. According to the Court, the mere fact that the municipality has initiated the project is not to be qualified as State aid. Moreover, the Court concluded that the initial costs incurred by the municipality of Amsterdam (studies, etc.) would be reimbursed by the joint-venture Glasvezelnet Amsterdam CV and therefore did not constitute aid.

Court of Appeal procedure

UPC decided to appeal the decision by the District Court. At the Court hearing in November 2006 the municipality of Amsterdam agreed to await the European Commission's decision before a judgment by the Court of Appeal would be rendered.

In its judgment of 18 January 2007, the Court of Appeal found that - although the Commission expressed in its decision of 20 December 2006 certain doubts as to whether the investment constitutes State aid within the meaning of Article 87(1) EC - by providing the requested information to the European Commission, the municipality of Amsterdam could still prove that the investment does not constitute aid. Under these circumstances, the Court of Appeal considers it possible that the European Commission would conclude that no aid is involved.

The Court of Appeal also found that the municipality would suffer damages if it would have to stop all activities related to investment. The Court of Appeal therefore refused to order the municipality of Amsterdam to suspend its investment on the basis of the standstill obligation of Article 88(3) EC. According to the Court of Appeal, the standstill obligation of Article 88(3) EC only applies in case where the national measure under consideration does indeed constitute State aid. It does not apply when the European Commission is merely asked to confirm that the national measure does not constitute aid.

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

Court of Appeal The Hague ("Gerechtshof Den Haag"), 10.07. 2007, LJN BD 6981, Residex Capital IV C.V. v. Municipality of Rotterdam

II- Brief description of the facts and legal issues

Dutch Court of Appeal qualifies guarantees issued by the Port of Rotterdam as a form of State aid that should have been notified to the European Commission.

Parties:

The applicant: Residex Capital IV C.V.;
The defendant: Municipal of Rotterdam.

Factual Background

In August 2004, it appeared that the former director of the Port of Rotterdam - which Port is owned by the municipality of Rotterdam - had allegedly agreed to authorize a number of bank loan guarantees to a total amount of approximately EUR 100 million. The director of the Port of Rotterdam had agreed to issue these guarantees for the benefit of four subsidiaries of the Rotterdam Dry Dock Company (RDM) in order to ensure that the Port of Rotterdam gained several production contracts, but he apparently failed to inform the Port's board of directors and the commissioners of the municipality of Rotterdam. This became known to the Port's board of directors and the commissioners of the municipality of Rotterdam when the RDM subsidiaries went bankrupt and their remaining activities appeared to be insufficient to cover the loans. The banks demanded repayment of the loans from the Port of Rotterdam and the municipality of Rotterdam, however neither were willing to honour the guarantees.

III- Summary of the Court's findings

District Court procedure

As neither the Port of Rotterdam nor the municipality of Rotterdam was willing to honour the guarantees, the banks (including Barclays, Commerz and Residex) decided to initiate legal proceedings before the District Court of Rotterdam demanding repayment of their loans.

The Port Authority and the municipality argued that neither one of them is to blame that the guarantees have been issued without authorization. The banks should have taken greater care in verifying whether proper authorization had been obtained. The District Court accepted this argument and formulated an even wider duty of care on the basis of the State aid provisions.

The guarantees qualify - according to the District Court - as State aid that should have been notified with the European Commission. Since such notification had not taken place, the guarantees were to be considered as unlawful aid. Unlawful State aid is null and void. It may reasonable be expected from the banks to verify whether the State aid rules have been complied with when guarantees are issued by public authorities, especially when these are issued for such large amounts as in the present case.

Court of Appeal procedure

Residex decided to appeal the decision by the District Court. In its first submission, Residex argues that Article 88 EC was wrongly applied by the District Court because the Port Authority did not act in the capacity of a public authority within the meaning of that provision but rather as a private investor as it clearly gained advantage by means of several production contracts. The Port Authority, therefore, had no interest in invoking the State aid provisions.

The Court of Appeal dismissed this submission on the grounds that, according to settled case law, all guarantees issued by public authorities (or undertakings controlled by public authorities), may constitute State aid where the conditions set out in Article 87 EC are fulfilled. The Port of Rotterdam qualifies as such an undertaking, as it is owned by the municipality of Rotterdam. Neither the level of control that the municipality may exercise nor the actual involvement of the municipality in the day to day business of the Port of Rotterdam is relevant in this matter.

Under Community law, national courts are obliged to apply the State aid provisions *ex officio*. Residex's second submission - that the application of these provisions is disproportionate to the objectives laid down in these provisions, as it would cause serious damage to Residex and the other creditors - was also dismissed by the Court of Appeal. The Court of Appeal pointed out that it follows from settled case law that the recovery of State aid unlawfully granted for the purpose of re-establishing the previously existing situation cannot in principle be regarded as disproportionate to the objectives of the Treaty in regard to State aid.

I- Information on the judgment

District Court The Hague ("Rechtbank Den Haag"), 1.08.2007**,** LJN BB 1424, Nederlands Elektriciteit Administratiekantoor v. State

II- Brief description of the facts and legal issues

Dutch District Court holds that the reimbursement of stranded costs - qualified by the European Commission as State aid - is included in the scope of a former positive Commission's decision.

Parties:

The applicant: Dutch Government;
The defendant: Nederlands Elektriciteit Administratiekantoor.

Factual Background

In 1989, four electricity producers decided to collaborate on a demonstration project for coal gasification. The company incorporated to implement the project was named Demkolec and was a subsidiary of N.V. SEP (SEP), which company was jointly owned by the collaborating electricity producers. Construction of the power plant started in 1990 and in 1993 the first coal was gasified.

The construction and operation of the coal gasification plant required very substantial and exceptional, investment in research, development and the demonstration of environment-related technology. The project was, therefore, most likely not profitable. However, the Dutch Government agreed to build the Demkolec in order to diversify supply and for environmental reasons.

SEP managed the power plant until October 2001. In October 2001, Nuon purchased the power plant and its name was officially changed to Nuon Power Buggenum.

The reason for selling the power plant was the liberalisation of the electricity market. Before this liberalisation, SEP scheduled the production of electricity. As a result of liberalisation, free production became the standard, and the partnership agreements with SEP were cancelled in 2001. The investment had, however, not yet been written off and the stranded costs could no longer be recuperated through the national basic tariff for electricity after liberalisation.

The Dutch Government therefore agreed to organise an auction to sell Demkolec and to reimburse SEP for all stranded costs consisting of Demkolec's book value minus the purchase price following the auction. By letter of October 1998, the Dutch Government notified the European Commission of the proposed reimbursement which - according to an estimate of the Dutch Government would amount to EUR 90 to 136 million - and asked the European Commission to approve this reimbursement on the basis of Article 88(3) EC.

In its decision of 25 July 2001, the European Commission concluded that notified aid relating to the reimbursement of stranded costs was covered by Article 87(1) EC and that this reimbursement complied with the methodology for analysing State aid linked to stranded costs, which was also adopted 25 July 2001.

The legal transfer of Demkolec to Nuon took place on 2 October 2001. The economic transfer did, however, take place on 1 May 2001. The purchase price paid by Nuon to SEP amounted to EUR

102.5 million. In addition, the Dutch Government paid SEP EUR 134 million reimbursement for stranded costs.

III- Summary of the Court's findings

Arbitration procedure

In 2002, the legal successor of SEP - Nederlands Elektriciteit Administratiekantoor (NEA) - initiated an arbitration procedure with the Netherlands Arbitration Institute arguing that the amount of the reimbursement had wrongfully been calculated by the Dutch Government on the basis of the book value of Demkolec on 2 October 2001, not taking account of the operating losses and the interest charges of Demkolec during the period from 1 January 2001 to 1 October 2001.

The Arbitration Institute found that - in addition to the initial amount paid - the Dutch Government owed NEA another EUR 38 million, with interest calculated as of 1 January 2001, which aggregated amount should account for all stranded costs as of 1 May 2001, the date that the economic transfer took place.

District Court procedure

The Dutch Government decided to contest the decision of the Arbitration Institute before the District Court of The Hague. Simultaneously, the Dutch Government notified the European Commission of an additional State aid in the amount of EUR 46 million.

In its first submission, the Dutch Government argued before the District Court that the Arbitration Institute had wrongfully applied Articles 87 and 88 EC by deciding that an additional amount of State aid had to be paid by the Dutch Government, since this amount exceeded the amount of aid initially approved by the European Commission.

However, the District Court found that this amount merely constituted an estimate of the amount of the aid that was to be attributed, rather than a maximum amount. The European Commission had approved the merits of the State aid which final amount was still to be assessed on the basis of Demkolec's book value minus the purchase price following the auction (which auction was at the time not yet completed).

By approving the auction, the European Commission had clearly accepted that the amount of State aid would be higher in case the purchase price following the auction would be low, due to operating losses and interest charges incurred by Demkolec during the period from 1 January 2001 to 1 October 2001.

The argument of the Dutch Government that the European Commission had not explicitly mentioned the operating losses and interest charges and did - as such - not approve these costs was dismissed by the District Court. The District Court considered that the European Commission had clearly meant to approve the reimbursement of all Demkolec's stranded costs which include operating losses and interest charges as these could no longer be recuperated through the national basic tariff for electricity after liberalisation.

The District Court upheld the decision of the Arbitration Institute stating that the additional amount paid by the Dutch Government to NAE fell within the scope of the European Commission's decision of 25 July 2001. There was - according to the District Court - no need to await the European Commission's decision on the additional notification, since it could not be ascertained when this decision would be adopted.

I- Information on the judgment

Council of State ("Raad van State"), 11.06.2008, LJN BD 3598, Applicants v. State Secretary of Transport and Water Management and State Secretary Housing, Spatial Planning and Environment

II- Brief description of the facts and legal issues

Council of State considers the preferential treatment of GAE N.V. (company which exploits airport in Eelde) by the construction of the enlargement of the airport in Eelde to be State aid, which is covered by the provisions of Articles 87 and 88 EC.

Parties:

The applicant: Municipality of Haren and 11 others;
The defendant: State Secretary of Transport and Water Management and the State Secretary of Housing Spatial Planning and Environment.

In 2001 the Minister of Transport and Water Management had amended the decree in which the airport in Eelde is designated as an airport. The amendments concern the length of the runway and the maximum of noise pollution. As a result of these changes bigger airplanes are allowed to land at Eelde airport. These bigger airplanes cause more environmental and noise pollution. The Dutch Government contributed EUR 18.6 million to finance the extension of the runway. The goal of the extension and contribution is to improve the accessibility of the region and to improve the functionality of the air transportation system.

Applicants argued that the contribution of the Dutch Government is in conflict with the State aid provisions as it constitutes a form of State aid within the meaning of Article 87 EC that should have been notified to the European Commission. In its response, the Dutch Government argued that the Airport (as exploited by GAE N.V.) is not an undertaking within the meaning of Article 87 EC and that, therefore, the conditions of this provision are not fulfilled. GAE N.V. cannot qualify as such an undertaking, because all shares in GAE N.V. are the Dutch Government. The Dutch Government furthermore argues that the State aid was already granted in 1992 and that therefore the State aid was not new. Under the State aid rules of 1992 there was no obligation to ask the European Commission to make a final decision. Insofar the Council of State would conclude that the contribution *does* constitute a form of State aid, the Dutch Government argued that such aid is not prohibited as it is designated for developing the infrastructure.

III- Summary of the Court's findings

Council of State procedure

The Council of State is of the opinion that the mere fact that all the shares in GAE N.V. are held by the Dutch Government does not mean it is not an undertaking. The Court refers to a policy document where it is stated that regional airports are considered to be 'undertakings'.

The Council of State did not agree with the Dutch Government that the State aid already commenced in 1992 because of a letter in which the Dutch Government allegedly committed itself to the State aid. There are several conditions which have to be fulfilled for the letter from 1992 to

constitute as the moment of the commencement of the State aid. These conditions are that the commitment must be unconditional and legally binding. The commitment from 1992 can not be considered as such.

The Council of State agreed with the Dutch Government argument that State aid is not prohibited if it is designated for developing the infrastructure within a country. Nevertheless, the Council of State held that this argument only applies when the Government develops the infrastructure and not if this is done by the undertaking.

The Council of State concluded that the contribution from the Dutch Government can be considered as a form of State aid within the meaning of Article 87 EC which should have been notified to the European Commission. By failing to do so the Dutch Government is in breach of the EC treaty.

I- Information on the judgment

Court of Appeal Amsterdam ("Gerechtshof Amsterdam"), 29.06. 2006, LJN AZ 1425, Baby Dan A/S v. Werkvoorziening Weert en Omstreken (De Risse) and Werkvoorziening De Kanaalstreek (WeDeKa)

II- Brief description of the facts and legal issues

Dutch Court of Appeal finds that failure to notify a State aid measure to the European Commission does not constitute a tortuous act of the beneficiary of such aid.

Parties:

The applicant: Baby Dan A/S;
Defendant: Werkvoorziening Weert en Omstreken (De Risse) and Werkvoorziening De Kanaalstreek (WeDeKa).

Factual Background

Baby Dan A/S (Baby Dan) develops, produces and sells safety equipment for children in the age of 0-5 years. One of the products produced by Baby Dan is a safety stair gate under the name 'Danamic'. Baby Dan's competitors, De Risse and WeDeKa, produce a similar stair gate under the name 'Lotus'. The production of the Lotus' stair gates by De Risse and WeDeKa is part of an unemployment relief programme sponsored by the Dutch Government.

In May 2001, Baby Dan initiated legal proceedings against its competitors before the District Court in Utrecht stating that the unemployment relief programme qualifies as an unlawful form of State aid which enables De Risse and WeDeKa to sell the Lotus stair gates below cost price and thus effectively distorts competition. By accepting the unlawful form of State aid, De Risse and WeDeKa have - according to Baby Dan - committed a tortuous act.

III- Summary of the Court's findings

District Court procedure

The District Court concluded in its decision of 23 October 2002 that Baby Dan could not derive any rights from Articles 87(1) and 88(3) EC nor from Commission Regulation n° 2204/2002 of 12 December 2002 on the application of Article 87 and 88 EC for employment.

The District Court did not elaborate on the question whether the acceptance of unlawful State aid is to be considered as a tortious act - as insufficient evidence was provided by Baby Dan to answer this question.

Court of Appeal procedure

Baby Dan decided to appeal the decision by the District Court. In its first submission, Baby Dan argued that Articles 87 and 88 EC had been wrongfully applied by the District Court. The unemployment relief programme *did* qualify as a form of State aid, as both De Risse and WeDeKa received substantial financial advantages from the Dutch Government that are not available to any

other parties within the market. Accordingly, the unemployment relief programme should have been notified with and approved by the European Commission.

The Court of Appeals agreed with Baby Dan's argument that the unemployment relief programme qualifies as a form of State aid that should have been notified with the European Commission. The obligation to notify the European Commission lies, however, with the public authority granting the State aid, not with the receiver of the aid. As such, failure to notify does not constitute a tortious act of De Risse or WeDeKa.

This would have been different if the programme had been notified to the European Commission and the European Commission had found that the programme qualified as a form of State aid that is incompatible with the common market. Under those circumstances, the acceptance by De Risse and WeDeKa of the unlawful State aid would have constituted a tortious act.

I- Information on the selected judgment

District Court Rotterdam ("Rechtbank Rotterdam"), 12.03.2007, LJN BA 5115, Vereniging van Commerciële Radio v. Minister of Economic Affairs

II- Brief description of the facts and legal issues

Dutch Court considers that granting radio frequencies to the public radio broadcasting company for no consideration is not a form of unlawful State aid.

Parties:

The applicant: Vereniging van Commerciële radio;
The defendant: Minister of Economic Affairs.

In January 2003, the Minister of Economic Affairs granted four local public service broadcasting organisations (together named: "*G4 Radio/FunX*") a licence to broadcast on the radio frequency bands 96.1 and 98.4 Mhz. Normally, broadcasting organisations obtain these licenses by application and payment of a fee. However, the policy of the State Secretary of the Ministry of Education, Culture and Science allows a licence to be issued without payment of a fee under certain conditions. Public broadcasting organizations can obtain these licenses without a payment of a fee if they significantly contribute to the reciprocal integration process in the Dutch multicultural society.

Vereniging van Commerciële Radio decided to initiate legal proceedings before the District Court of Rotterdam stating that granting radio frequencies to the public radio broadcasting organisations for no consideration does in fact constitute State aid within the meaning of Article 87(1) EC which should have been notified with the European Commission.

III- Summary of the Court's findings

The District Court found the concerned issue of licences without consideration not in violation Article 87(1) EC. The District Court found the assignment of frequencies to public broadcasting organisations not in violation of the State aid provisions, because of the nature of these organisations. The District Court agreed with the Minister of Economic Affairs that a public broadcasting organisation has to fulfil a statutory public task. The fact that a public broadcasting organisation reaches the same listeners and advertisers does not infringe with that public task.

I- Information on the judgment

District Court Maastricht ("Rechtbank Maastricht"), 8.10.2008, LJN BF 7031, P1 Holding B.V. v. Municipality of Maastricht

II- Brief description of the facts and legal issues

Dutch Court rules that the agreement between the municipality of Maastricht and Q-Park is not contrary to Article 87 EC.

Parties:

The applicant: P1 Holding B.V.;
The defendant: Municipality of Maastricht.

Factual Background

The municipality of Maastricht has entered into an intention agreement with Q-Park N.V. on 27 November 2002 by which Q-Park N.V. has been granted the right to exploit a number of Car Park for a period of thirty years. The municipality of Maastricht and Q-Park N.V. have entered into this agreement without giving other market parties the possibility to tender.

P1 Holding B.V., a competitor of Q-Park N.V., stated that the municipality of Maastricht has acted contrary to the tendering rules which derive from European rules (in particular the principles of equal treatment, non-discrimination and transparency which derive from the EC Treaty) by granting the exploitation rights to Q-Park N.V. by ways of a private tender. In addition, P1 Holding B.V. argued that the agreement is contrary to the prohibition of granting State aid as set out in Article 87 EC Treaty, whereas the trade between Member States has been adversely affected.

P1 Holding B.V. claimed, amongst others, that the agreement should be terminated and that Q-Park NV should refund all the State aid so far received under the agreement.

III- Summary of the Court's findings

District Court proceeding

The Court dismissed the arguments brought forward by P1 Holding B.V. stating that the agreement between the municipality of Maastricht and Q-Park N.V. is in conflict with Article 87 EC.

The Court considered that the prohibition for a Member State to provide State aid as set out in Article 87 EC, only applies if the State aid adversely affects the trade between Member States. Therefore the claim of P1 Holding can only succeed if the agreement between the municipality of Maastricht and Q-Park N.V. adversely affects the trade between Member States. It is up to P1 Holding B.V. to provide evidence hereof.

P1 Holding B.V. argued that from the geographical location of Maastricht it follows that it is likely that market parties from other Member States are interested in the assignment of the municipality of Maastricht and that there are various foreign companies that are active in the Car Park business that

would be capable to carry out this assignment. To substantiate this, P1 Holding B.V. provided four attendance lists of public tenders in the Netherlands, showing the presence of foreign market parties. However, the Court considers that P1 Holding B.V. failed to provide facts to prove a distortion of the trade between Member States.

The argument that it follows from the geographical location of Maastricht that it is likely that market parties from other Member States are likely to be interested in the assignment is, despite the fact that the municipality of Maastricht is proud of its international location and presents itself as the 'balcony of Europe' (*balkon van Europa*), not sufficient to substantiate distortion of trade between Member States. Furthermore, the attendance lists of public tenders dated from the years 2005, 2006 and 2007, whereas the agreement between municipality of Maastricht and Q-Park N.V. was dated 27 November 2002. P1 Holding B.V. did also not provide evidence of the activities of the foreign parties mentioned in the four public tenders in other Member States at the time of the agreement.

The District Court finally ruled that the agreement between the municipality of Maastricht and Q-Park N.V. does not affect the trade between Member States and is therefore not in conflict with Article 87 EC.

I- Information on the judgment

Supreme Court ("Hoge Raad"), 21.04.2006, LJN AU 3125, X B.V. v. Secretary of Finance

II- Brief description of the facts and legal issues

Supreme Court finds that applicant may not rely on the direct effect of Article 88(3) EC as the taxes contested by the applicant do not form an integral part of a State aid measure.

Parties:
The applicant: X B.V.;
The defendant: Secretary of Finance.

Factual Background

X B.V. exploits a waste water treatment plant. In 1997, X B.V. is levied with a retrospective collection of taxes on the basis of the act introducing taxes for the protection of the environment (*Wet belastingen op milieugrondslag* - 'Wbm') over the period 1 January 1995 until 3 July 1995.

X B.V. sought the reimbursement by State Secretary of Finance of these taxes on the grounds they were levied in breach of the protection on the implementation referred to in the last sentence of Article 88(3) EC. According to X B.V., the various uses to which the revenue from the Wbm taxes was put, all constitute State aid within the meaning of Article 87(1) EC, which had been granted in breach of Article 88(3) EC. This request is, however, rejected by a decision of the tax inspector. X B.V. submits an appeal against this decision before the Court of Appeal in the Hague, which also rejects X B.V.'s request for reimbursement.

X B.V., subsequently, submits an appeal before the Supreme Court. Simultaneously, a similar appeal procedure is held with the Supreme Court in which also the interpretation of Article 88(3) EC is at stake. In this appeal procedure, the Supreme Court made a request for preliminary ruling to the ECJ on the interpretation of Article 88(3) EC.

By its first question, the Supreme Court asked whether an individual who is not affected by distortion of cross-border competition arising from a State aid measure can rely on the provisions of the last sentence of Article 88(3) EC. With its second question, the Supreme Court asked whether the prohibition on implementation referred to in the last sentence of Article 88(3) EC applies to tax if an aid measure consists of an exemption from that tax. And - by its third question - the Supreme Court wishes to know in what circumstances an increase in the tax as compensation for the loss of revenue due to the exemption creates a sufficient link between the State aid and the tax in such a way that the prohibition on implementation referred to in that provision extends to the tax.

Taking the view that the outcome of this preliminary ruling may be of relevance in this particular procedure, the Supreme Court decides to stay the proceedings in the present case and to give both X B.V. and the State Secretary of Finance the opportunity to comment on the outcome of this ruling.

III- Summary of the Court's findings

Ruling of the ECJ

It follows from the Court's ruling (Case C-174/02, Streekgewest, [2005] ECR I-85) that an individual may have an interest in relying before the national court on the direct effect of the prohibition on implementation referred to in the last sentence of Article 88(3) EC not only in order to erase the negative effects of the distortion of competition created by the grant of unlawful aid, but also in order to obtain a refund of a tax levied in breach of that provision. In the latter case, the question whether an individual has been affected by the distortion of competition arising from the aid measure is irrelevant to the assessment of his interest in bringing proceedings. The only fact to be taken into consideration is - according to the ECJ - that the individual is subject to a tax which is an integral part of a measure implemented in breach of the prohibition referred to in that provision.

For a tax, or part of a tax, to be regarded as forming an integral part of a State aid measure, it must be related to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid. In the event of such relation, the revenue from the tax has a direct impact on the amount of the State aid and, consequently, on the compatibility of the State aid with the common market. The Court thus held that, where these is such a link between the State aid measure and its financing, the notification of the aid provided for in Article 88(3) EC must also cover the method of financing.

Supreme Court procedure

The Supreme Court follows the European Court's ruling in its judgment of 21 April 2006. It acknowledges that X B.V. may rely on the direct effect of the prohibition on implementation referred to in the last sentence of Article 88(3) EC, but only insofar the taxes levied under the Wbm form an integral part of a State aid measure.

In this particular case, the State aid measure takes the form of an exemption from taxes levied under the Wbm. The provisions of the Wbm, however, do not relate to the tax on waste to the financing of the tax exemption. The fact that the loss of revenue due to that exemption is offset by an increase in the tax is not in itself sufficient to amount to such relation.

Therefore, X B.V. cannot rely on the direct effect of the prohibition on implementation referred to in the last sentence of Article 88(3) EC.

I- Information on the judgment

Supreme Court ("Hoge Raad"), 30.06.2006, LJN AV 9441, Appellant v. Municipality of The Hague

II- Brief description of the facts and legal issues

The Supreme Court rules that the provisions of Article 87 and 88 EC do not aim to protect private property. Therefore, in the event that a construction project - resulting in the expropriation of private property - is incompatible with article 87 and 88 EC such does not affect the validity of an expropriation order.

Parties:

The applicant: Appellant;
The defendant: Municipality of The Hague.

Factual Background

The municipality of The Hague has for many years renovated certain districts in the city. In order to renovate the district Schilderswijk-west, expropriation of certain houses was necessary and the municipality of The Hague adopted a decree accordingly.

At 26 April 2004, a Royal Decree confirmed the decree of the municipality of The Hague for the expropriation of houses in the Schilderwijk-west in The Hague. The municipality of The Hague submitted a transcript of the Royal Decree at the District Court in The Hague.

The municipality of The Hague subsequently submitted at 10 December 2004 a writ of summons at the District Court in order to get an anticipated judgment on the expropriation of the real estate of the appellant. The appellant (appellant in the proceedings before the Supreme Court) defended himself at the proceedings before the District Court stating - *inter alia* - that the municipality of The Hague has granted unlawful State aid incompatible with article 87 and 88 EC.

The reason the appellant argues that the municipality of The Hague has granted unlawful State aid, is because the negative balance of EUR 1,700,000 for the action plan for the district was covered by investment budget for renovation of the city. The realisation of the project will be carried out by a housing association or property developer. As the conditions for the realisation of the project are unclear, the appellant believes that this must be considered as unlawful regulation of the market by way of State aid and therefore is incompatible with Articles 87 and 88 EC.

III- Summary of the Court's findings

District Court procedure

The District Court dismissed the arguments of the appellant, because the appellant failed to present this argument in an earlier stage, i.e. the decision-making process.

Supreme Court procedure

The appellant appeals the decision of the District Court at the Supreme Court. The Supreme Court considers that the District Court failed to give a motivated judgment. However the Supreme Court dismissed the appeal of the appellant on different grounds.

The Supreme Court considered that Article 87 EC does not aim to protect private property, but aims to support fair competition on the common European market. The fact that there might be unlawful State aid in relation to the realisation of the renovation of the Schilderswijk-West within which framework expropriation has taken place, has no meaning in the expropriation process and therefore does not affect the expropriation decree. Accordingly, the Court that will decide on the expropriation must not consider the State aid defence.

I- Information on the judgment

Council of State ("Raad van State"), 26.07.2007, LJN AY 5061, Stichting Actiegroep 'Het Vergeten Dorp' v. Provincial Executive Zuid Holland

II- Brief description of the facts and legal issues

Council of State rules that the transfer of the building site to housing corporation Vestia for no consideration may constitute a form of State aid that should have been notified to the European Commission.

Parties:

The applicant: "Stichting Actiegroep Het Vergeten Dorp" and "Stichting Bewonersorganisatie Schipperskwartier";
The defendant: Provincial Executive Zuid-Holland.

Factual Background:
On 16 December 2004, the Municipality of The Hague approved a zoning plan in which the development of a large housing complex for, *inter alia*, 300 student housing units was approved. The construction of the housing complex required a very substantial investment from housing corporation Vestia, yet it was doubtful whether the project would prove to be profitable for Vestia.

The Municipality agreed to invest in the construction of the housing complex by way of selling the building site to Vestia for no consideration and by contributing to the construction costs of the housing complex.

Stichting Actiegroep Het Vergeten Dorp and Stichting Bewonersorganisatie Schipperskwartier (the "*Applicants*") challenged the grant of approval for the zoning plan, as well as the investment made by the Municipality stating that on the facts such investment constituted State aid within the meaning of Article 87(1) EC Treaty and therefore should have been notified to the European Commission.

III- Summary of the Court's findings

Council of State Procedure:
The Council of State held that the European Commission should have been given the opportunity to rule on whether the investment made by the Municipality constituted a form of unlawful State aid. As such the transfer of the building site for no consideration should have been notified to the European Commission.

The Municipality and Vestia stated, in their response, that there was no duty to notify to the Commission. Even without financial support from the Municipality the project would still have gone ahead since its execution was dependant on the availability of financial support from the Municipality. Compliance with the provisions of Article 87 EC would therefore have no effect on the execution of the project.

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

I- Information on the judgment

President of the District Court, The Hague, no. 83/927, 30 November 1983, Vereniging van Exploitanten van Gasbedrijven in Nederland (VEGIN) and Veluwse Nutsbedrijven NV v The Dutch State and NV Nederlandse Gasunie

II- Brief description of the facts and legal issues

Application for an interim injunction (civil law), gas sector.
On 2 October 1984, the Minister of Economic Affairs fixed the minimum price for natural gas distribution companies to pay to suppliers. VEGIN and Veluwse Nutsbedrijven requested the President to annul or suspend this decision and to order NV Nederlandse Gasunie, at that time the sole supplier of gas, to supply the distribution companies at current prices.

VEGIN and Veluwse Nutsbedrijven claimed that this decision resulted in State aid being granted to the benefit of several large Dutch industrial purchasers of gas. The benefit was a decrease in their prices compared to export gas prices. Because export prices for gas were based on average (national) Dutch prices, price increase for the distribution companies' customers as a result of the minimum prices would result in export prices rising above the prices of large industrial consumers.

III- Summary of the Court's findings

The President rejected the argument made by VEGIN and Veluwse Nutsbedrijven. His view was that an annulment or suspension of the Minister of Economic Affairs, decision would not result in purchase price changes for other consumers in the Netherlands.

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

President of the District Court, The Hague, AB 2005/395, 200405506/1, 5 July 1991, De Vereniging van Nederlandse Luchtvaartondernemingen (VNLO) v the State (Ministry of Transport and Water Management)

II- Brief description of the facts and legal issues

Application for an interim injunction (civil) law, aviation sector.
After filing a complaint with the Commission, the association of Dutch aviation companies ("de Vereniging van Nederlandse Luchtvaartondernemingen" ("VNLO") initiated summary proceedings against the Dutch State (Ministry of Transport and Water Management) to obtain an injunction in order to prevent RLS, the State Aviation School (part of the Ministry of Transport and Water Management), from executing the contract with the airline KLM concerning the privatisation of RLS until the Commission had reached a judgment on the compatibility of the (possible) State aid measures with the Common Market. VNLO was of the opinion that the financial obligations resulting from the contract between RLS and KLM constituted State aid. On the basis of the contract, RLS was obliged to transfer the (im)movable goods and the registrable property to KLM for the amount of one Dutch guilder. Furthermore, RLS was obliged to pay KLM NLG 23,000, carry the cost of a specific provision, and contribute to a guarantee fund.

III- Summary of the Court's findings

The president of the civil court had to judge whether the financial obligations resulting from the contract between RLS and KLM constituted State aid. The Ministry argued that the cash value of RLS amounted to [minus] NLG 42.7 million. Moreover, KLM was obliged on the basis of the same contract to guarantee the continuation and quality of RLS, the employment and the terms of employment. The President ruled that these obligations on KLM were in proportion to the financial obligations of RLS. Therefore, the financial obligations did not constitute State aid and there was no obligation for RLS to notify the aid to the Commission.

IV- Comment of the authors of the 2006 study

On the basis of the complaint which was filed by the VNLO on 17 May 1991, the Commission decided in October 1993 to start a formal investigation procedure (Article 88 (2) EC). It concluded that the payment of NLG 17 million as a contribution to the exploitation deficits of the school and the price of one guilder paid for the assets of the school constituted illegal State aid. However, the Commission held that the State aid was in conformity with the Common Market on the basis of the (old) Article 92 (3) (c) EC. The maintenance of efficient high level training programmes for pilots contributes to a high safety level which is important for the mobility of pilots within the EC. Stimulating the development of training programmes for pilots within the EC can change the ongoing trend of obtaining training outside the EC. As a consequence of these new training possibilities, the development of economic activities will be simplified.

I- Information on the judgment

President of the District Court, The Hague, no. 93/146, 26 February 1993, Construcciones Aeronauticas SA ("Casa") v The State of the Netherlands

II- Brief description of the facts and legal issues

Application for an interim injunction (civil law), air transport sector.
The Dutch Ministry of Defence intended to purchase air transport planes from Fokker. Casa asked the President to order the Ministry to annul the procurement procedure and to prohibit any acts by the Ministry contrary to Article 87 EC. The award of the contract to Fokker, would, they claimed, be State aid because the Fokker air planes were each NLG 10 million more expensive than similar Casa air planes and because the Ministry of Defence would pay Fokker's development costs. The State of the Netherlands argued that Article 223 EC precluded the applicability of Article 87 EC.

III- Summary of the Court's findings

The President noted that the air transport planes had to be significantly adapted for military use. The applicability of Article 223 EC was therefore (according to the list provided by the EC Council on 15 April 1958 based on Article 223 of the EC Treaty) accepted and the request by Casa rejected.

I- Information on the judgment

Supreme Court ("Hoge Raad"), The Hague, no. 16148, NJ 1997/303, 3 January 1997, Le Comité des Salines de France and La Compagnie des Salins du Midi et des Saline d'Est v The Municipality of Harlingen

II- Brief description of the facts and legal issues

Appeal of interlocutory proceedings (civil law), agricultural sector.
Le Comité des Salines and La Compagnie des Salins alleged that State aid for the establishment of a salt mine and salt factory in Harlingen had been granted not only by the Secretary of State for Economic Affairs but also by the Municipality of Harlingen. The aid given by the municipality related to its sale of a site to Aliss. More specifically, the Municipality allowed deferment of payment of the purchase price and it gave guarantees regarding a loan.

The French competitors asked the President of the District Court of Leeuwarden:

- to prohibit the municipality's support to Frima BV or Aliss BV without the approval of the Commission;
- to order the municipality to claim repayment of the aid granted; and
- to take such measures necessary to achieve annulment of the guarantee.

The court was further requested to impose a penalty of NLG 10,000 for each violation of the President's judgment.

III- Summary of the Court's findings

According to the Court of Appeal, the municipality had not acted in a manner different from that in which a private party, such as a development company, would have sold its land under normal market conditions. Therefore, there was no State aid granted by the municipality. This Court of Appeal judgment was confirmed by the Supreme Court.

I- Information on the judgment

President of the Administrative Court, Assen, LJN: AA7472, 00/718 WET P01 G01, 2 October 2000, X v Y

II- Brief description of the facts and legal issues

Application for an interim injunction (administrative law), petrol sector.

X operated petrol stations along the Dutch-German border. According to a specific Act, ("Tijdelijke regeling subsidie tankstations grensstreek Duitsland") such petrol stations were eligible for a maximum of €100,000 (NLG 223,250) worth of aid over a three-year period to compensate for the negative competition effects arising from excise differences in the Netherlands and Germany. X was granted aid in the amount of €95,556 (NLG 210,600) under the condition of possible amendments or recovery of the aid. Before and after the aid grant there had been extensive written contact between the claimant and the defendant. Because of the fact that the claimant did not respond to several requests by the defendant for information, the defendant decided to recover the aid. The claimant was of the opinion that by ordering recovery of the aid and interest within a period of four weeks of publishing the relevant decision, the defendant had acted in violation of several administrative principles, most notably the principles of proportionality, legitimate expectations and reasonable consideration of the interests involved. The defendant argued that it was confronted with a Commission decision declaring the aid illegal and thus with an incontrovertible obligation to recover the aid granted, which in turn led it to demand repayment within the contested period.

III- Summary of the Court's findings

The President of the court firstly considered that injunction proceedings were not suitable for the case at hand as several proceedings had been commenced at the Community Courts which could potentially result in overturning prior national court rulings. The scope of the present proceedings was thus limited to the recovery order for the entire subsidy sum within a four-week period. Pursuant to the Commission decision[1], the aid should be recovered in accordance with the relevant national rules. The President found that, with regard to the recovery, the principles of proper administration ("algemene beginselen van behoorlijk bestuur") should apply. As the total sum granted was spread over several years and the defendant had not indicated from the outset that there was a possibility of recovery due to issues at European level, this could have created expectations. The President found that the defendant could have offered a longer repayment schedule than the four-week period and annulled the decision in so far as it referred to a four-week period for repayment.

1 1999/705/EC (OJ (1999) L280/87).

I- Information on the judgment

President of the District Court, Groningen, LJN: AQ8920, 73785 KGZA 04-271, 3 September 2004, Essent Kabelcom BV v Gemeente Appingedam (Municipality of Appingedam)

II- Brief description of the facts and legal issues

Application for an interim injunction (civil law), telecommunications sector.
The municipality intended to provide broadband internet access to residents living in its outskirts. Due to the project costs, the municipality contributed to the funding of the project through guarantees and by granting €5 million. The central issue was whether the contributions required notification to the Commission.

III- Summary of the Court's findings

The court rejected the municipality's argument that contribution made by government bodies could never constitute State aid if they were made in the general public interest. According to the court, this argument was based on a misinterpretation of the "Commission Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications". Moreover, the court was not convinced that the municipality was, through its public task, forced to construct a new infrastructure since there were already two competing internet networks in the area in which the new network was to be built. Regardless of the relevance to the general public interest, it would have to be examined whether the granted State aid was compatible with the Common Market. The court emphasised in particular that, in light of the conclusion in Belgium v Commission[2], notification to the Commission was appropriate if there was doubt as to the compatibility of the intended measure with the EC State aid provisions. Therefore, the municipality should notify the Commission of the intended measures. The application was thus granted.
Comment: On 20 October 2005, the Commission started its investigation on "Broadband development Appingedam[3]".

2 Case 40/85, Belgium v Commission [1986] ECR 2321.
3 C 35/2005.

I- Information on the judgment

Council of State, The Hague, LJN: AR7937, 200407291/2, 14 December 2004, X v College van Gedeputeerde Staten van de Provincie Gelderland (Provincial Executive of Gelderland)

II- Brief description of the facts and legal issues

Application for an interim injunction (administrative law), real estate sector.
The claimant sought an injunction for the construction plan of a new apartment complex. X alleged, inter alia, that the decision did not deal with whether the financial support by the municipality was in accordance with European law.

III- Summary of the Court's findings

The court was unconvinced that the financial support by the municipality was without a return and would thus qualify as State aid to be notified under Article 88 EC. In this regard, the court found of significance that it was sufficiently likely that the municipality's financial support related to the renovation of existing and construction of future areas, which was likely to be at the municipality's expense. Therefore, the municipality's financial support could not qualify as State aid. The application for annulment was dismissed.

I- Information on the judgment

President of the Council of State, The Hague, AB 2005/361, 200410578/2, 10 May 2005, Ferm-O-Feed B.V. v the Minister of Agriculture, Nature and Food quality

II- Brief description of the facts and legal issues

Provisional relief (administrative law), agricultural sector.
The "Bijdrageregeling proefprojecten mestverwerking" (contribution scheme for pilot manure processing projects) was approved by the Commission for a given period, expiring on 1 January 1995. However, subsidies were granted on the basis of this scheme even after this date. Consequently, the Commission ordered the Dutch State to recover these subsidies. By a decision dated 3 August 2001, the Minister of Agriculture, Nature and Food Quality requested the repayment of the subsidy granted to Ferm-O-Feed B.V.. Ferm-O-Feed B.V. lodged a notice of objection to this decision and, after dismissal of its objections, appealed to the District Court Den Bosch and, ultimately, the Council of State. Before the latter, Ferm-O-Feed B.V. filed a request for provisional relief entailing suspension of the Minister's decision. The Minister had indicated that he could not suspend the subsidy's reclamation, because this would violate Community law.

III- Summary of the Court's findings

The President of the Council of State considered that in this procedure for provisional relief he would not deal with complex questions such as the relationship between Community and national administrative law. However, considering that Ferm-O-Feed B.V. declared itself willing to issue a bank guarantee, the President ruled that the company, pending the Council of State's appeal judgment, would not be under an obligation to reimburse the subsidy.

I- Information on the judgment

District court, Amsterdam, no. 93/3937, 5 November 1995, Security Print Vianen B.V. v Vervoerbewijzen Nederland B.V.

II- Brief description of the facts and legal issues

Appeal, interlocutory injunction (civil law), transport ticket printing.
The facts of this case have been indicated in case 3.2.2, in which Security Print claimed damages from the Municipality of Amsterdam, the grantor of the aid. In this case, Security Print also claimed damages form Vervoerbewijzen Nederland B.V.. According to Security Print, Vervoerbewijzen Nederland B.V. knew, or should have known, when awarding the contract that Security Print had an advantage as a result of illegal State aid. Vervoerbewijzen Nederland B.V. should, claimed Security Print, have protected them against the unfair competition from the Municipal Press of Amsterdam ("MPA").

III- Summary of the Court's findings

The court did not come to a conclusive decision on the State aid issue in its judgment.

I- Information on the judgment

Court of Appeal, Amsterdam, NJ 2000/592, 18 February 1999, Security Print Vianen B.V. v the Municipality of Amsterdam

II- Brief description of the facts and legal issues

Appeal (civil law), transport ticket printing.

Vervoerbewijzen Nederland B.V. awarded a contract for printing public transport tickets to the Municipal Press of Amsterdam ("MPA"). MPA is a company without legal personality which forms part of the Municipality of Amsterdam. Security Print Vianen B.V., whose tender was rejected, claimed compensation from the Municipality of Amsterdam, believing the tender by MPA was unlawful because MPA had several unfair advantages granted to it by the municipality, namely:

- availability of capital provided by the municipality
- profitable loans provided by the municipality
- contract awarded by the municipality
- guarantee of continuity by the municipality
- covering of all losses by the municipality
- no writing-off on goodwill
- no subjection of MPA's profits to company taxes

Security Print alleged that these advantages were contrary to Article 88 (3) EC. The court considered that, where a State aid measure existed before 1 January 1958, this did not have to be notified to the Commission. Since MPA had formed part of the municipality since 1735, the Commission did not have to be informed of the advantages afforded by the municipality.

III- Summary of the Court's findings

The court did not have to determine whether the profits of MPA were exempt from company taxes and whether such an exemption would amount to a State aid measure. The court decided that if MPA did not have to pay company taxes, the Municipality would commit a tort by breaching the principle of fair competition by making use of the tax advantages in a public tender.

I- Information on the judgment

District court, The Hague, LJN: AB2893, 109653 / HA ZA 98-4115, 25 July 2001, Dutchtone v Kingdom of the Netherlands

II- Brief description of the facts and legal issues

Proceedings in first instance (civil law), telecommunications sector. KPN intervening

Within the framework of the implementation of the Mobile Telecommunications Services Act ("Wet mobiele telecommunicatievoorzieningen"), a legislative proposal to auction the available licences was introduced. KPN and Libertel already held licences for the frequencies involved. Part of the frequencies were, however, used to operate an analogue public telephone service, which was gradually replaced with the GSM network. Dutchtone complained that KPN and Libertel enjoyed unfair advantages since they did not have to purchase the remainder of their allotted frequency ranges, whereas Dutchtone did. Dutchtone argued that this constituted State aid and, since it had not been notified to the Commission, its implementation constituted a wrongful act toward Dutchtone.

III- Summary of the Court's findings

Before adjudicating this matter, the court noted that it could only rule insofar as the actions were directed against the incompatibility of a national law with superseding provisions of international law, such as Community law, since Article 120 of the Dutch Constitution prohibited national courts from ruling on the legality of national laws as such. With regard to the alleged violation of Article 88 (3) EC, the court noted that it would first have to interpret and apply the concept of aid as defined in Article 87 EC. As the action, i.e. the creation of the law entailing the auction, and the position of KPN and Libertel within that auction, was not liable to distort competition, not all of the conditions of Article 87 had been fulfilled. As an underlying reason for this conclusion, the court adduced that, by initiating the auction and enabling third parties to obtain licences, the State had fulfilled its obligation to promote competition on the markets involved. The mere fact that KPN and Libertel did not have to pay for acquiring the remainder of their licences did not alter this.

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, LJN: AD9969, AWB 00/794, 30 January 2002, Dutchtone NV, legal successor to Federa NV v Staatssecretaris van het Ministerie van Verkeer en Waterstaat (State Secretary of the Ministry of Transport and Public Works)

II- Brief description of the facts and legal issues

Appeal (administrative law), telecommunications sector.

In light of the implementation of the "Wet mobiele telecommunicatievoorzieningen" (Mobile Telecommunications Act), KPN and Libertel acquired licences to operate GSM networks. Part of the frequency range intended for GSM Networks was not yet included in the licence due to the fact that KPN used those frequencies to operate an analogue public telephone service. Upon its replacement with the GSM network system, that frequency range was also awarded to KPN and Libertel. Dutchtone filed an appeal against the allocation of this part of the frequency range. Dutchtone's appeal in primo was dismissed, as was its subsequent appeal with the District Court of The Hague. In this case, among other things, Dutchtone argued that its obligation to pay for the frequencies through an auction, when such payments were not required by KPN and Libertel with regard to the second part of the obtained frequencies, constituted State aid for the benefit of KPN and Libertel.

III- Summary of the Court's findings

The Administrative Court for Trade and Industry reached the same conclusion as was handed down by the District Court of The Hague[4]) that the allocation of the frequencies to Libertel and KPN did not constitute State aid within the meaning of Article 87 EC and therefore was not in violation of Article 88 (3) EC. The reasoning behind this conclusion was that, because the Kingdom of the Netherlands was in no way obliged to demand payment for the allocation of the frequencies, the fact that KPN and Libertel did not have to pay to acquire the second part of the frequencies did not mean that they avoided a financial cost which would have otherwise placed a burden on their available budget. The appeal was dismissed.

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.

4 LJN: AB 2893, 109653/HA ZA 98-4115.

I- Information on the judgment

Administrative Court, Rotterdam, LJN: AF2577, TELEC 01/418-SIMO / TELEC/814-SIMO, 29 November 2002, Versatel 3G NV v Staatssecretaris voor Economische Zaken (State Secretary of the Ministry of Economic Affairs)

II- Brief description of the facts and legal issues

Proceedings in first instance (administrative law), telecommunications sector.

Based on the requirements for creating national licensing schemes for the roll-out of third generation mobile phones (UMTS), the State Secretary decided to auction off licences enabling the operation of such services. Although only five licences could be auctioned off, given the capacity of the frequency spectrum, six mobile network operators participated in the auction. Versatel did not obtain a licence and initiated proceedings seeking the annulment of the decision to hold an auction as well as the decisions awarding the licences to its competitors. Versatel alleged, inter alia, that operators who already had licences to operate second-generation mobile phone networks were favoured during the auction over those who had no such licences, resulting in a below market sale price for the licences, thus constituting a selective advantage for those undertakings, which amounted to non-notified State aid.

III- Summary of the Court's findings

The court found that Versatel had failed to substantiate its allegations that the licences were sold at below market value and that the choice for an auction as the method of transfer of the licences favoured the operators with second generation licences over those who had no such licences. Therefore the court, although it did not explicitly say so, concluded that no State aid was involved. The court denied all applications for annulment of the decisions.

I- Information on the judgment

Council of State, The Hague, AB 2004/262, 200202737/1, 17 December 2003, Samenwerkingsverband Noord Nederland and the College van Burgemeester en Wethouders van de Gemeente Groningen (Municipal Executive of the city of Groningen against a judgment by the district court Groningen in the matter between Stichting Prins Bernhardhoeve v the Governing Body of the Samenwerkingsverband Noord Nederland)

II- Brief description of the facts and legal issues

Appeal (administrative law), services sector.

The Samenwerkingsverband Noord Nederland ("SNN") granted a subsidy of approximately €1.8 million to the Municipal Executive of Groningen ("The Municipal Executive") for the expansion of an exhibition and conference centre named "Martinihal". The Stichting Prins Bernhardhoeve ("SPB") ran a conference centre nearby the Martinihal and competed with the Martinihal. SPB's application for annulment of the grant was rejected by the SNN. This decision was overturned in appeal. The Municipal Executive and the SNN subsequently lodged these appeal proceedings. Meanwhile, the expansion had been completed. The claimants alleged that the subsidy did not constitute State aid and in any event fell within the scope of the Block Exemption regarding aid to Small and Medium Sized Enterprise ("the Block Exemption").

III- Summary of the Court's findings

The Council of State stated that it could not be excluded that trade between Member States had been affected by the subsidy. As a result, it should have been for SNN to ascertain whether Article 88 (3) EC did not apply in respect of the grant. In addition, in so far as the grant could be considered to fall under the Block Exemption, the requirements laid down in Articles 3 (1) and 9 (1) of the Block Exemption had not been fulfilled. The Council of State also found that the fact that the subsidy was part of the European Regional Development Fund did not exempt SNN from ascertaining the possible applicability of Article 88 (3) EC. The Council of State concluded, as did the administrative court in first instance, that the (administrative) decision to grant a subsidy was made without the requisite level of due care and was consequently annulled.

I- Information on the judgment

Council of State, The Hague, LJN: AO7997, 200307666/1, 21 April 2004, Bedrijvenvereniging Huiswaard/Overstad c.s. Municipal Executive of Alkmaar and AZ Real Estate BV, applicants against the decision in the case of Bedrijvenvereniging Huiswaar/Overstad c.s. v College van Burgemeester en Wethouders van de Gemeente Alkmaar (Municipal Executive of Alkmaar)

II- Brief description of the facts and legal issues

Appeal (administrative law), real estate sector.

The Municipality of Alkmaar and Stichting AZ (Foundation AZ) and AZ Onroerend Goed BV (AZ Real Estate BV), together "AZ", concluded four agreements concerning the construction of a new soccer stadium with retail opportunities, the construction of homes on the present soccer stadium's site and the transfer of the related land plot. Overstad notified the Commission of the existence of the agreements and requested an examination of their compatibility with the EC State aid provisions because the transfer of the relevant land plots was supposedly at below market value prices. The Commission concluded that the agreements might constitute State aid and continued to investigate under Article 88 (2) EC. Overstad filed this appeal to prevent the further implementation of the agreements based on the basis of Article 88 (3) EC.

III- Summary of the Court's findings

The court found that the transfer of the land plots was not inextricably linked to the grant of a construction licence for real estate on those land plots. The fact that the Commission had initiated proceedings under Article 88 (2) EC regarding the compatibility of the land transfer did not mean that the construction would not be possible under any circumstances since it has not been demonstrated that the construction could only take place on the basis of the agreed land transfers. The appeal was granted.

I- Information on the judgment

Administrative court, Amsterdam, LJN: AQ6500, AWB 02/5306, 5 August 2004, Classic FM Plc, Sky Radio Ltd., Jazz Radio BV, Wegener Radio en Televisie, Vrije Radio Omroep Nederland BV v Commissariaat voor de Media (Broadcasting Commission)

II- Brief description of the facts and legal issues

Proceedings in first instance (administrative law), television and radio sector.

The Nederlandse Omroepstichting, ("NOS") (Netherlands Broadcasting Foundation), a public body, notified the Broadcasting Commission of its intention to continue the Stichting Concertzender Nederland ("SCN") (Concert Broadcasting Foundation Netherlands), a private body, as an ancillary activity within the meaning of the Media Act ("Mediawet"). SCN was not commercially viable and such continuation would ensure its existence for the foreseeable future. To prevent any distortion of competition, the Media Act prohibited public broadcasting bodies from assisting private broadcasting bodies. The central issues here were whether the Broadcasting Commission had rightly determined that the affiliation between the NOS and SCN was ancillary in nature; whether it was in line with the Media Act; and, specifically, whether such ancillary affiliation was likely to affect competition negatively given that, in this particular case, the financing received by SCN originated from public resources of the State Secretary of Education, Culture and Science.

III- Summary of the Court's findings

The court found that the Commission had already, unrelated to this matter, initiated an investigation under Article 88 (2) EC with regard to the compatibility of the financing schemes of public broadcasting in the Netherlands, including the extent to which ancillary activities were allowed. The court moreover noted that for a decision concerning the validity of the ancillary affiliation of SCN with NOS, it would have to determine whether the provision of public funds by the State Secretary of Education, Culture and Science constituted State aid and whether such aid fell within the scope of any exemption. The fact that the Broadcasting Commission had failed to examine these issues led to the conclusion that the decision approving the subsidiary affiliation between the NOS and SCN lacked sufficient grounds. The case was thus referred back to the Broadcasting Commission.

IV- Comment of the authors of the 2006 study

According to the Dutch administrative law system, the court did not conclude on the issue of whether the continuation of SCN through public funds constituted State aid. It is first for the Broadcasting Commission to decide upon the application once again, taking account of the case law of the ECJ and Commission notices.

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, no. 94/2940/062/230, 4 September 1996, Le Comité des Salines de France and La Compagnie des Salins du Midi et des Salines d'Est v the Secretary of State for Economic (Staatssecretaris van Economische Zaken) and Frima BV

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

Le Comité des Salines and La Compagnie des Salins du Midi requested a review of a decision of the Secretary of State Economic Affairs of 14 March 1994, to support the establishment of a salt works in the town of Harlingen with a subsidy of up to NLG 11,338,500. This subsidy was granted under the Regulation of Subsidies for Regional Investment Projects. On 11 October 1994, the Secretary of State refused to conduct a review on the grounds that the request had not been lodged within the applicable time limit of six weeks.

III- Summary of the Court's findings

The Court of Appeal for Trade and Industry annulled the decision of the Secretary of State. The ground for annulment was that the principles of fairness and due process had been breached because the Secretary of State had not adequately responded to the claimant's request to be given a copy of the decision granting the subsidy. This request had been made within the six-week period. The Secretary of State only decided not to give a copy of the decision to grant a subsidy after the six-week period had lapsed. The Secretary of State was ordered by the court to reconsider the request for review (the final decision found that there was no incompatible State aid).

I- Information on the judgment

Administrative court, Zutphen, LJN: AF9788, 02/551 WET, 20 May 2003, Demarol BV v Minister van Financiën (Secretary of the Treasury)

II- Brief description of the facts and legal issues

Proceeding in first instance (administrative law), petrol sector.

Demarol BV operated a number of petrol stations along the Dutch-German border. According to a specific Act, such petrol stations were eligible for a maximum of €100,000 worth of aid over a three-year period to compensate the negative competition effects arising from excise differences in the Netherlands and Germany. Demarol BV applied for, and subsequently received, aid under the Act. Since the Commission deemed the aid granted under the Act incompatible with EC State aid provisions, the Secretary notified Demarol BV that the aid received was to be repaid, including any interest. The Secretary denied the application for annulment of the recovery decision upon which Demarol BV initiated these proceedings.

III- Summary of the Court's findings

The court found that the Secretary was justified to order the recovery of part of the granted aid based on Commission decisions[5] declaring the aid incompatible in combination with Article 88 (2) EC. Moreover, Article 4:49(1) and sub (b) of the "*Algemene wet bestuursrecht*" (General Administrative Act) and the identical Article 13(1) and sub (b) of the Act in question enabled the Secretary to recover or amend the amount of aid granted if the decisions by which the aid was granted were flawed and the recipient was or should have been aware of such flaw. Through the correspondence between the State and Demarol BV, Demarol BV was or should have been aware that the Commission had initiated proceedings at the time of the aid grant without reaching a definite conclusion yet, and any aid granted pending such proceedings would fall under the prohibition of Article 87 (1) EC. The court moreover found that Demarol BV could not invoke the principle of legitimate expectations or legal certainty because ECJ case law clearly states that reliance on those principles could only be successful if the aid in question was granted in accordance with Article 88 EC, something that a normal, cautious undertaking could be expected to determine without too much difficulty. In light of the above the Secretary was justified in making this decision and therefore the application for annulment was dismissed.

5 1999/705/EC (OJ (1999) L280/87).

I- Information on the judgment

Administrative Court, 's-Hertogenbosch, LJN: AR6630, Awb 03/2581 BELEI, 26 November 2004, X v Minister van Landbouw, Natuur en Visserij (Secretary of Agriculture, Nature Management and Fisheries)

II- Brief description of the facts and legal issues

Proceedings in first instance (administrative law), agricultural sector.

X applied for subsidies under the "*Bijdrageregeling proefprojecten mestverwerking*" (contribution scheme for a pilot manure processing project), which were initially granted by the Secretary. As a result of a Commission decision declaring the subsidy granted to the claimant contrary to the EC State aid provisions[6], the Secretary ordered recovery of the granted subsidies, including interest. The central issue was whether the decision revoking the aid was unjustified.

III- Summary of the Court's findings

The court found that the recovery decision was justified as it had been based on a directly effective Commission decision. Since the Commission decision had not been appealed within the time limits, it had become definitive. Moreover, X failed to substantiate that it could rely on a legitimate presumption that the aid would not be recovered. The court reiterated the ECJ's case law, stating that legitimate expectations only exist if aid is granted in accordance with Article 88 EC, something that a normal, cautious undertaking could be expected to determine without too much difficulty. Since the subsidy had not been granted in accordance with the Article 88 EC procedure the claimant could not rely on the principle of legitimate expectations. Finally, the court found that the Secretary could not be expected to act in defiance of a Commission decision and that this Commission decision did not provide the Secretary with any leeway to test the recovery decision against the principle of reasonableness. The action was dismissed.

6 2001/521/EC (OJ (2001) L189/13).

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, no. 89/2275/47/003, 90/022/47/0003, 90/2708/003, 26 November 1991 Gebroeders Bakker Zaadteelt en Zaadhandel BV v the Public Organisation for Trade in Horticultural seed (Bedrijfschap voor de Handel in Tuinbouwzaden)

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

The Commission decided on 11 October 1989 on the basis of Article 88 (2) EC that the aid to a foundation for research into seed technology was incompatible with the Common Market. Its reasoning was that the foundation financed its activities with levies raised by the Public Organisation for Trade in Agricultural Seed on the growers of the seeds (unless, for example, the financing was changed so that products imported from other Member States were no longer subject to the levy). The Commission prohibited the Dutch Government from granting any further such State aid through the Public Organisation for Trade in Agricultural Seeds ("POAS").

The claimant (a grower), on the basis of this decision, refused to pay the levy to the Public Organisation for Horticultural Seed ("POHS") and asked the court to annul the POHS demand to pay the outstanding levies.

III- Summary of the Court's findings

The court noted that the Commission had not been informed of the POHS intent to grant the aid. These measures were thus contrary to Article 88 (3) EC. This fact on its own, however, was insufficient to result in the aid measure being illegal[7]. Neither the Commission nor any other body had ordered a suspension of the payment of the aid of POHS, other than by way of Decision 90/189. The decision prohibited the grant of further aid and was addressed to the Dutch Government. It therefore applied not only to POAS but also to POHS.

The court found both the aid measures and the contested levy illegal because Decision 90/189 makes the unlawfulness of the aid measure dependent on its financing (levies on imported products). The final issue decided by the court was whether not only the levy itself but also the demand note of the POHS was illegal. Decision 90/189 was received by the State of the Netherlands on 7 November 1989 and therefore (on the basis of Article 254 EC) entered into force on that day. The content and purpose of the decision, according to the court, precluded any retroactive effect. As the State aid was illegal since 7 November 1989, the demand note against the claimant grower of 14 December 1984 was, according to the court, valid. The demand note made on 4 January 1990, however, was annulled.

[7] Case C-301/87, France v Commision [1990] ECR I-307, recitals 9, 11 and 19.

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, AB 1995/483, 8 November 1994, Fokbedrijf Vloet Oploo B.V. v Landbouwschap

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

Het Landbouwschap, the Agricultural board, imposed a levy on Fokbedrijf Vloet Oploo B.V., a breeding establishment, on the basis of the 1992 Regulation on manure levies (in Dutch: "*Heffingsverordening Mest 1992*"). The levy was aimed at stimulating an efficient process of manure surplus. Fokbedrijf Vloet Oploo lodged a notice of objection to the decision of the Agricultural board, because it was of the opinion that undertakings, which take initiative and make investments for the processing of manure, did not have to pay the levy.

III- Summary of the Court's findings

The 1992 Regulation on manure levies was approved by the Commission. In its decision, the Commission considered that aid to cattle breeding establishments, which process the manure themselves, could be considered exploitation aid. The Administrative Court for Trade and Industry held that there was no possibility under the 1992 Regulation on manure levies of making an exception for undertakings which have invested in the stimulation of an efficient process of manure surplus. Furthermore, the court ruled that the Regulation was not contrary to EC law. It dismissed the appeal.

I- Information on the judgment

Administrative court, Rotterdam, LJN: AD9026, MEDED 00/933-SIMO and MEDED 00/955-SIMO (joined cases) Stichting Saneringsfonds Varkensslachterijen ("SSV") and U-Vlees BV, Exportslachterij J. Gotschalk & Zonen BV, Slachthuis Nijmegen BV, Houbensteyn Porkhof BV, Het Rotterdams Varkensslachthuis CV v Directeur-Generaal van de Nederlandse Mededingingsautoriteit (Director-General of the Dutch Competition Authority)

II- Brief description of the facts and legal issues

Proceedings in first instance (administrative law), agricultural sector. SturkoMeat Group BV intervening in both cases.

SSV was a foundation established to reorganise the overcapacity in the pig slaughter sector. To finance the reorganisation, levies were imposed on all pig slaughterhouses. This scheme was notified to and approved by the Commission. Sturkomeat complained that several of the agreements concluded between SSV and other parties violated Article 81 (1) EC. SSV argued that, because the agreements in question were part of an approved aid scheme, they could not be in violation of Article 81 (1) EC.

III- Summary of the Court's findings

The court did not agree with SSV's argument that the agreements were exempt simply because they related to an approved aid scheme, as the Commission had not been able to consider these agreements when it approved the aid scheme. Therefore, it could not take their effects into account when reaching its definitive conclusion. As a result, there were insufficient grounds to automatically assume that the agreements were inextricably linked to the approved aid scheme. Moreover, with regard to the reliance by SSV on the *Weyl* judgment, the court noted that, in that particular case, the agreements were exempt from Article 81 (1) EC because they formed an integral part of an approved aid scheme and did not restrict competition beyond what was necessary for the attainment of the desired objectives. In the case at hand, the agreements were not inextricably linked to the object of the approved aid scheme and the court dismissed the application.

I- Information on the judgment

Court, Leeuwarden, LJN: AD8994, Bk 3231/96 1 February 2002 Inspecteur van het Bureau Heffingen van het Ministerie van Landbouw, Natuurbeheer en Visserij (Inspector of the Ministry of Agriculture, Nature Management and Fisheries Levies Office)

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

The Inspector imposed a levy on X for a manure surplus. X contended, inter alia, that the basis of the levy was unlawful and that it entailed State aid.

III- Summary of the Court's findings

The court did not follow X's arguments and found that Article 120 of the Dutch Constitution prohibited it from examining whether the levy qualified as State aid since that would entail a review of the law. In addition, the prohibition of Article 87 (1) EC did not have direct effect on the national legal order. Furthermore, the Commission had not initiated any proceedings against the Netherlands under Article 88 EC. Therefore, the court concluded that no State aid was involved.

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, LJN AD 9818, AWB 99/7, 13 February 2002, A v Productschap voor Tuinbouw (Horticultural Commodity Board for Horticulture)

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

The Commodity Board for Horticulture imposed a levy on A, consisting of a percentage of its income generated through the sale of horticultural products as well as a fixed amount for all members of the Horticultural Commodity Board. The levy's proceeds were (in part) destined for research and promotional activities, as well as quality and environmental projects. A argued that the activities paid for with these proceeds constituted incompatible State aid.

III- Summary of the Court's findings

The Administrative Court for Trade and Industry ruled that, as the levies had been notified to and approved by the Commission in accordance with the required procedures, no violation of Article 88 (3) EC had occured. Therefore, the levies did not constitute incompatible State aid and the appeal was dismissed.

I- Information on the judgment

Supreme Court (Hoge Raad), The Hague, NJ 2004/59, 7 March 2003, Compaxo BV, Internationale Groothandel Vlees BV, Compaxo Vlees Zevenaar BV v Stichting Vormingsfonds voor de Opleiding van Werknemers in de Vleeswarenindustrie (Foundation for the Educational Fund of the Education of Employees in the Meat Industry)

II- Brief description of the facts and legal issues

Appeal in cassation (civil law), agricultural sector.

A levy was imposed on Compaxo a.o., active in the meat industry, for the financing of three funds managed by the Stichting Vormingsfonds, established during the implementation of the Collective Labour Agreement for the meat industry. These funds included the Fund for Youth Employment in the Meat Industry, the Fund for Industry Education and the Social Fund. Compaxo a.o., however, refused to pay the levies, arguing that the payments constituted State aid and that the scheme, contrary to Article 88 (3) EC, had not been notified to the Commission. At first instance and on appeal, the courts found that the levies constituted State measures and could therefore, at least theoretically, constitute State aid. However, no State aid was involved in the case at hand because the Collective Agreement was reached after collective negotiations had taken place between employers and employees to the benefit of all employees and the entire industry (i.e. there was no selective advantage). Compaxo a.o. argued that the interpretation of selective advantage was incorrect and reiterated its argument used in the previous instances, as described above.

III- Summary of the Court's findings

The Supreme Court found that whether or not a measure qualifies as State aid depends on the effects of the measure concerned and not its reasons or intended purposes. Therefore, the fact that the measure at hand was created through collective negotiations and was applicable to all employees and undertakings in the sector, did not preclude the applicability of Article 87 (1) EC, nor could the social purposes of the funds lead to such a conclusion. The court went on to investigate whether the advantages were (directly or indirectly) granted through State resources and therefore whether the measure actually fell within the scope of Article 87 (1) EC. The Stichting Vormingsfonds was a private foundation that was not created by the State and the proceeds of the levies were for the benefit of the Stichting and the funds it managed. The advantages of the undertakings were thus not funded through State resources. This was not altered by the fact that the levy had been imposed within the framework of a compulsorily applicable Collective Agreement, as this compulsory applicability did not provide the State with any power of disposal of the Stichting's proceeds.

I- Information on the judgment

Council of State, The Hague, LJN: AF8316, 200201196/1, 7 May 2004, Centrale Organisatie voor de Vleesgroothandel v Minister van Landbouw, Natuur en Visserij (Secretary of Agriculture, Nature Management and Fisheries)

II- Brief description of the facts and legal issues

Proceedings in first instance (administrative law), agricultural sector.

Under the "*Destructiewet*" (Destruction Act) the Secretary of Agriculture, Nature Management and Fisheries could determine the levies to be imposed on undertakings that provided services as described in the Destruction Act, including the removal of dead animals from farms and slaughter waste from slaughter houses. The claimant's request for annulment of the decision establishing the levies for 2000 was dismissed by the Secretary, whereupon these proceedings were initiated. The claimant alleged, inter alia, that the levies discriminated between undertakings operating in the slaughter industry and cattle-breeding undertakings, as the latter received a non-recurring compensation for those charges from the Ministry of Public Health, Education and Sport (the legal predecessor to the Secretary of Agriculture). These compensations thus constituted State aid and were in violation of Article 87 EC.

III- Summary of the Court's findings

The court circumvented the question of whether the levies qualified as State aid by concluding that undertakings in the slaughter industry were part of a distinctly different market than the cattle-breeding undertakings. Because they could not reasonably be considered competitors, the court found that no State aid could exist that distorted or threatened to distort competition.

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, LJN: AO1786, AWB 01/830, 19 December 2003, A v Productschap voor Vee, Vlees en Eieren (Commodity Board for Cattle, Meat and Eggs)

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

In 1998, the Commodity Board's legal predecessor notified the Commission of several intended aid schemes in accordance with Article 88 EC, which the Commission subsequently approved. A unsuccessfully initiated proceedings against the decision requiring it to pay the levies imposed under one of the schemes, upon which it filed the current appeal. A alleged that the levies were imposed on the basis of an un-notified scheme or, if notified, the scheme did not contain the legal basis on which the levies were imposed.

III- Summary of the Court's findings

The Administrative Court for Trade and Industry found that, although the levies concerned constituted State aid within the meaning of Article 87 EC, the aid scheme had been duly notified and approved by the Commission in accordance with Article 88 EC. Moreover, the approved scheme included the basis on which the levies were imposed. Therefore the application was dismissed.

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, LJN: AO7843, AWB 98/422, 7 April 2004, A v Productschap voor Tuinbouw (Horticultural Commodity Board)

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.
A initiated proceedings against a decision by the Horticultural Commodity Board denying its application for annulment of the primary decision. The underlying point of contention was the refusal of A to pay the levies imposed by a decree issued by the Horticultural Commodity Board. A alleged that the levies constituted State aid, which had not been notified to the Commission.

III- Summary of the Court's findings

The court found that the various aid schemes drawn up by the Horticultural Commodity Board had been notified to the Commission but that the Commission had not yet concluded its investigation. Because there had been no definitive decision, Article 88 (3) EC applied. As a result, the Horticultural Commodity Board was not allowed to impose the levies concerned. Therefore, the application was successful and the decisions by which A was confronted with a demand for payment of the levies were annulled.

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, LJN: AQ5558, AWB 02/1985, 15 June 2004, Dutch Wine Traders BV v Productschap voor Wijn (Wine Commodity Board)

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.
The Wine Commodity Board imposed a levy on its members which, according to Dutch Wine Traders BV, amounted to un-notified State aid because the Wine Commodity Board did not exist at the time that these levies, calculated by the Wine Commodity Board's legal predecessor, were notified to the Commission.

III- Summary of the Court's findings

The Administrative Court for Trade and Industry found that the levies had been notified to the Commission. The fact that the organisation responsible for calculating the initial levies differed from the organisation imposing them did not alter this. Therefore the imposition of the levies was not considered to be in violation of Article 88 (3) EC.

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, LJN: AR6472, AWB 02/1512, 02/1513, 12 November 2004, A and B v Productschap voor Vis (Fish Commodity Board)

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

The Netherlands notified a subsidy for fishermen to reduce their financial burden as regards disability insurance premium charges. The Commission informed the Netherlands that it would initiate proceedings under Article 88 (2) EC. Meanwhile, the Fish Commodity Board rejected A's and B's subsidy request, upon which A and B started proceedings for the annulment of that decision. When those proceedings proved unsuccessful this court action was initiated.

III- Summary of the Court's findings

The Administrative Court for Trade and Industry found that refusing the subsidy requests was in violation of Article 88 (3) EC now that such decision was made without the Commission having reached a final conclusion under Article 88 (3) EC. The decision was to be annulled and the Fish Commodity Board was to make a new decision as soon as the Commission had concluded its investigation.

I- Information on the judgment

Court, Amsterdam, LJN: AS4899, 00/03621, 14 January 2005, Stadion Amsterdam NV v Directeur van de Gemeentebelastingen Amsterdam (Director of the Municipal Taxes Amsterdam)

II- Brief description of the facts and legal issues

Appeal (administrative law), real estate sector.

Stadium Amsterdam NV appealed the Director of the Amsterdam Municipal Taxes' decision determining the value of its stadium. One of the issues was whether Article 18 (3) of the "*Wet waardering onroerende zaken*" ("WOZ"; Act on the Valuation of Real Estate) and Article 2 of the implementing regulation constituted State aid.

III- Summary of the Court's findings

The court stated that, even if the application of the WOZ qualified as State aid, which it considered not to be the case here, it would only lead to the inapplicability of the particular provision constituting State aid instead of the entire law, as was argued by Stadium Amsterdam NV. As a result, the property involved would still need to be valued in order to enable taxes to be levied over the value of the property. Therefore, the provisions concerned were not incompatible with Articles 87 and 88 EC since they did not confer a benefit upon the owner of the property concerned. The appeal, however, was awarded on different grounds.

I- Information on the judgment

Court, Amsterdam, LJN: AS5058, 00/03881, 21 January 2005, Stadion Amsterdam CV v Directeur van de Gemeentebelastingen Amsterdam (Director of the Municipal Taxes Amsterdam

II- Brief description of the facts and legal issues

Appeal (administrative law), real estate sector.

Stadium Amsterdam CV appealed the Director of the Amsterdam Municipal Taxes' decision determining the value of the stadium in question. One of the issues was whether Article 220c j° 220d "*Gemeentewet*" (Municipality Act) constituted State aid and therefore whether failure to notify these provisions to the Commission constituted a violation of Article 88 EC. It was argued that, by not determining a value for a property, it would become impossible to tax that property for the purposes of the WOZ and, as a result, the owner of the property obtained a benefit, i.e. would not be confronted with a burden it would normally have faced.

III- Summary of the Court's findings

The court found that labelling the aforementioned provisions as State aid would not preclude the applicability of the entire WOZ, but only the particular provisions concerned. As a result, the property involved would still have to be valued, thereby enabling taxes to be levied over the value of the property. Therefore, there was no benefit for the owner of the property and the provisions concerned were not in violation of the State aid provisions.

I- Information on the judgment

Administrative court, Roermond, LJN: AA6940, 99/1117 WET K, 30 June 2000, Rijmar Spoorlaan BV + Rijmar de Bond BV v Minister van Financiën (Secretary of the Treasury)

II- Brief description of the facts and legal issues

Proceedings in first instance

Rijmar BV operated petrol stations along the border between the Netherlands and Germany. According to a specific Act ("*Tijdelijke regeling subsidie tankstations grensstreek Duitsland*"), such petrol stations were eligible for a maximum of €100,000 in aid over a three-year period to compensate the negative effects on competition due to excise differences in the Netherlands and Germany. Rijmar BV created the subsidiaries Rijmar Spoorlaan BV and Rijmar de Bong BV in order to obtain multiple aid grants. No such multiple aid was granted, however, since the Secretary considered the undertakings as a single entity for the purposes of Community competition law (more specifically State aid) and Rijmar BV had received the maximum amount of aid. The Secretary based his decision on a Commission decision[8] declaring the aid granted under the law incompatible with the Common Market with respect to the majority of aids granted. The central issue in this case was whether the defendant rightfully refused to grant the aid to Rijmar Spoorlaan BV and Rijmar de Bong BV.

III- Summary of the Court's findings

The court found that the Secretary's decision should be annulled as it violated the justification principle as laid down in Article 7:12 of the "*Algemene wet bestuursrecht*" (General Administrative Act) for several reasons. First, the Commission decision forming the basis of the Secretary's decision did not specifically relate to the situation of Rijman Spoorlaan BV and Rijman de Bong BV since their requests had not been notified to the Commission and therefore were not part of the Commission's decision-making process. Secondly, the Secretary had failed to demonstrate why the undertakings involved constituted a single undertaking for the purpose of Community competition law. The court also found that the Secretary's mere reference to the Commission's initiation of an investigation under Article 88 (2) EC rather than to the Commission's decision did not constitute a sufficient justification as required Article 7:12 of the General Administrative Act. The court further held that the claimants could not justifiably rely on the expectation that the aid would be approved, given the communication between the claimants and their representative association and the fact that the latter was aware of potential difficulties. The decision was annulled for lack of justification.

[8] 1999/705 1EC (OJ (1999) L280/87).

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, LJN: AF8582, AWB 02/05, 29 April 2004, Happy Radio Netherlands BV v Staatssecretaris van het Ministerie van Verkeer en Waterstaat (State Secretary of the Ministry of Transport and Public Works)

II- Brief description of the facts and legal issues

Appeal (administrative law), television and radio sector.

Happy Radio had to pay the State Secretary a sum, the level of which was determined by a yearly revised Ordinance under the "*Wet op de telecommunicatievoorzieningen*" (Act on Telecommunications Facilities). This sum was to cover the costs concerned for the grant of an operating licence and for supervision services. Article 16 of the "*Telecommunicatiewet*" (Telecommunications Act) facilitated the promulgation of Ordinances regarding reimbursement of costs made in connection with matters specified under the Telecommunications Act. Happy Radio refused to pay the determined sum and, after having lodged a complaint with the State Secretary, which was denied, filed an appeal, which was also denied. It subsequently initiated these proceedings. It submitted that the Ordinance discriminated between (local) public radio stations and commercial stations with regard to the sums payable and therefore with regard to the amount of correlated reimbursements received, without there being any justification for such differential treatment. Happy Radio claimed that, as a result, the State Secretary illegally granted State aid to (local) public radio stations.

III- Summary of the Court's findings

The Administrative Court for Trade and Industry found that the Ordinance stated with sufficient clarity why and how the different allocation norms, which determined which station got what and why, had been formulated. It went on to state that the payments were essentially reimbursements, requiring a legal basis, which could not exceed the actual costs of the services provided. In addition, the relationship legally required between the service and the costs was present. Therefore the differential payments determined by the allocative norms were neither unreasonable nor arbitrary. As a result, no selective reduction in burdens otherwise borne by the public stations existed and hence there could be no State aid. The appeal was dismissed.

I- Information on the judgment

Council of State, The Hague, LJN: AO8853, AB 2004/225, 200303711/1, 6 May 2004, X v College van Gedeputeerde Staten van de Provincie Overijssel (Provincial Executive of Overijssel)

II- Brief description of the facts and legal issues

Appeal (administrative law), real estate sector.

The Provincial Executive approved the Haaksbergen City Council's zoning plan for retail area development. After the Provincial Executive's denial of X's application for annulment of that decision, these proceedings were initiated. Within the context of the zoning plan, the City Council would donate land free of charge and grant partial financing of the construction project.

III- Summary of the Court's findings

The Council of State found that the Provincial Executive had not taken account of the city council's notification of the use of public funds, and donating land free of charge would have to be notified to the Commission. Moreover, the Provincial Executive had failed to determine in what other ways the zoning plan could be realised, should the Commission deem the use of public funds and the transfer of the land incompatible with the EC Treaty. In light of these considerations, the Council of State was of the opinion that the Provincial Executive denied the application without the proper level of due care. As a result, the appeal for annulment of the administrative decision was successful.

I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, LJN: AQ5097, AWB 03/722 and 27 other cases, 28 May 2004, Interrose BV and 27 others v Minister van Economische Zaken (Secretary of Economic Affairs)

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

Interrose BV c.s. initiated proceedings in reaction to the Secretary's refusal to annul his initial decision denying Interrose BV c.s. an R&D declaration pursuant to the "*Wet vermindering afdracht loonbelasting en premie voor de volksverzekeringen*" (Act Concerning the Payment of Income Tax and Premium for Social Insurances). This Act had been amended to exclude undertakings active in the conventional refinement of flowers from obtaining such declarations. Previous R&D declarations had enabled Interrose BV c.s. to claim tax benefits in relation to its R&D activities, which essentially meant that Interrose BV c.s. obtained subsidies. Although such subsidies had been declared compatible by the Commission, Interrose BV c.s. submitted that such a finding of compatibility only applied to the scheme in the format as notified (i.e. including conventional refinement activities). Any changes to this format, such as the exclusion of conventional refinement, would lead to the scheme no longer corresponding to the notified scheme, thus necessitating notification to the Commission. Failure to do so would be a violation of Article 88 EC.

III- Summary of the Court's findings

Based on what was submitted during the oral stages of the proceedings, the Administrative Court for Trade and Industry was of the opinion that the sole reason that Interrose BV c.s. had invoked incompatibility of the scheme with the EC State aid provisions was to cause conventional refinement to once again be included within the definition of R&D. The court ruled that, since the argument as to whether or not the amended scheme would constitute State aid could not result in the grant of the R&D declaration to Interrose c.s., there was no need to rule further on the matter of whether the R&D scheme constituted a scheme that was so substantially different from the notified scheme that it had to be notified to the Commission.

I- Information on the judgment

Council of State, The Hague, AB 2004/343, 11 August 2004, X v State Council of Zuid-Holland

II- Brief description of the facts and legal issues

Review of former judgment (administrative law), real estate sector.

X initiated proceedings for review of a zoning plan approval which had already been considered at the highest instance. The central issue was whether new facts had arisen since the decision at highest instance which, if known, could haven led to a different conclusion. X alleged that during the time leading up to the zoning plan decision it had become clear that the fund from which the project was to be financed would be discontinued and therefore other sources would have to be used to maintain the project's financial solvability. X alleged that the decision had been taken without the requisite investigation and certainty regarding the financial solvency of the project and alleged that the State council had been inadequately informed in this regard.

III- Summary of the Court's findings

The Council of State agreed that the information provided regarding the project's financing had been inadequate. It found that the fact that at the time the zoning plan decision had been taken, the project's financial details had not yet been decided upon, was no reason for the State council to withhold its approval, since this was unlikely to prevent the project's realisation within the set time frame.

I- Information on the judgment

Council of State, The Hague, AB 2005/395, 200405506/1, 4 May 2005, The Minister of the Interior and Kingdom Relations, applicant, the court judgment in the case between respondent and the Minister of the Interior and Kingdom Relations

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

On the basis of the "*Wet tegemoetkoming schade bij rampen en zware ongevallen*" (Act on allowance in case of damage resulting from disasters and severe accidents), the "*Regeling tegemoetkoming schade bij extreem zware regenval 1998*" (Regulation on allowance in case of damage from extremely severe rainfall 1998) was adopted. The defendant in this case (a commercial partnership) was granted an allowance on the basis of this regulation of over €400,000. During the procedure for lodging an objection, initiated by the defendant, the "*Algemene Inspectiedienst*" (General Inspection service) started an investigation into the accuracy of the information provided by the defendant while applying for the allowance. It appeared that the defendant had committed fraud. As a consequence, the Minister decided to recover the amount granted in excess, increased by the interest payable by law.

The District Court had ruled amongst other things that in this case there was no public law basis for claiming statutory interest. The Minister argued before the Council of State that this ruling was unjustifiable and that he could derive his competence in this respect from Article 87 (1) EC. He asserted that, because it had appeared that the defendant had unjustifiably been granted an allowance, this allowance had gained the character of an illegal aid. Since recovery was meant to restore the situation to what it was before the grant of the aid, it would also have to extend to the statutory interest.

III- Summary of the Court's findings

The Council of State did not agree. It held that, contrary to what the Minister argued, Article 87(1) EC does not furnish a public law basis for claiming statutory interest. The article was not intended to stretch so far as to provide the Minister with a direct competence to claim statutory interest when recovering unjustifiably granted allowances on the basis of the Regulation.

I- Information on the judgment

Supreme Court (Hoge Raad), The Hague, LJN: AT6370, C04/183 HR, 7 October 2005, Bedrijvenvereniging Huiswaard/Overstad, X, Hein Jong Projectontwikkeling BV v Gemeente Alkmaar (Municipality of Alkmaar)

II- Brief description of the facts and legal issues

Appeal in cassation (civil law), real estate sector.

Stichting AZ (Foundation AZ) and AZ Onroerend Goed BV (AZ Real Estate BV), together "AZ", and the Municipality of Alkmaar concluded four agreements concerning the construction of a new soccer stadium in combination with retail opportunities, the construction of homes on the site of the present soccer stadium and the transfer of the related plots of land. Overstad pointed the Commission to the existence of the agreements and requested an examination of their compatibility with the State aid provisions because the relevant plots of land were supposedly transferred at prices below market value. The Commission concluded that the agreements potentially constituted State aid and continued to investigate as provided for in Article 88 (2) EC. Overstad filed an application to obtain an interim injunction based on Article 88 (3) EC to prevent the further implementation of the agreements. The interim injunction was rejected by the court. Overstad lodged an appeal against this ruling.

III- Summary of the Court's findings

In the appeal procedure, the President of the court rejected the argument of the municipality that Article 88 (3) EC did not have any direct effect due to the fact that no definite conclusion on State aid had yet been reached. The President also found that lower-level governmental bodies were bound by the direct applicability of Article 88 (3) EC as well and therefore ordered to hold the further implementation of the agreements until the Commission concluded its investigation under Article 88 (2) EC. The municipality lodged an appeal. The Supreme Court had to rule on the legal consequence of an investigation initiated by the Commission on a new State aid measure, which had not been notified to the Commission. The stand-still obligation of Article 88 (3) EC is only applicable if there is a state aid measure in the meaning of Article 87 (1) EC. Contrary to the earlier judgment of the civil court, the Supreme Court held that if the Commission decided to investigate a certain measure, this would not automatically mean that the measure constituted State aid in the meaning of Article 87 (1) EC. The Commission only initiated the investigation because it could not exclude that the measure in question constituted State aid. According to the Supreme Court, the Commission' statement could not be interpreted as a provisional judgment that there was indeed State aid. The judgment of the civil court was set aside. The Supreme Court referred the case to the Civil Court in The Hague for further consideration.

I- Information on the judgment

Council of State, The Hague, AB 1995/437, 1 November 1994, Ijssel-Vliet Combinatie B.V. v State (Minister of Economic Affairs)

II- Brief description of the facts and legal issues

Appeal (administrative law), shipbuilding and fisheries sectors.

The undertaking IJssel-Vliet was building a fishing vessel. Its request for subsidy, based on the Regulation concerning generic aid for the construction of new sea ships 1988 ("*Regeling generieke steun zeescheepsnieuwbouw 1988*"), was denied by the Minister of Economic Affairs. The Minister explained in his decision that the aid could not be granted because of the Commission's policy on aid to the fisheries and shipbuilding sector, which was laid down in guidelines and a circular.

III- Summary of the Court's findings

On appeal, the question was raised of whether the Commission had the authority to assess a State aid measure, not only on criteria relating to competition policy (Article 87 (1) EC), but also on criteria which the Commission derived from the European common fisheries policy and which are laid down in guidelines. The legal effect of these guidelines could be questioned, because the European Council had the exclusive authority on the European fishery policy. Therefore, it was also unclear whether Member States were obliged to apply the guidelines as basic principles when deciding on an application for aid for the building of a fishing vessel.

The Council of State decided to request a preliminary ruling to the ECJ on the following questions:
"*1. In the absence of an express authorization from the Council of the European Communities, is the Commission of the European Communities, having regard to Article 42 of the Treaty establishing the European Community in conjunction with Article 49 of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector, empowered under the competence given to it by Article 93 of the EC Treaty to investigate aid granted by Member States, to draw up, publish and apply as basic principles for the assessment of State aid measures, Guidelines for the Examination of State aids in the Fisheries Sector (88/C 313/09) in order to coordinate Council Regulation (EEC) No 4028/86 and the Council Directive of 26 January 1987 on aid to shipbuilding (87/167/EEC), where those Guidelines lay down not only criteria pertaining exclusively to competition policy but also criteria derived from the Community fisheries policy?*
2. If Question 1 is answered in the affirmative:
Are the Member States obliged to apply the abovementioned Guidelines as basic principles when deciding on an application for aid for the building of a vessel intended for fishing? If so, what is the basis for that obligation?
Does that obligation only apply where the vessel in question is wholly or partly intended for fishing in waters under the sovereignty or jurisdiction of the Member States of the Community or waters to which the Communities' external fisheries policy relates?"

In answer to the questions referred to it by the Council of State, the ECJ ruled that[9]:
1. The Commission, in exercising its powers under Articles 87 and 88 EC could adopt the guidelines for the examination of State aid in the fisheries sector (88/C 313/09), which required compliance, not only with criteria pertaining exclusively to competition policy, but also with those applicable in relation to the common fisheries policy, even if the Council had not expressly authorised it to do so.
2. A Member State, such as the Netherlands, which is subject to the obligation of cooperation under Article 88 (1) EC and which has accepted the rules laid down in the Guidelines must apply those

[9] Case C-311/94, Ijssel-Vliet Combinatie B.V. v Minister van Economische Zaken [1996] ECR I-5023.

Guidelines when deciding on an application for aid for the construction of a fishing vessel intended to form part of one of the Community fleets, irrespective of the area in which it fishes.

I- Information on the judgment

Supreme Court, The Hague, BNB 2002/253 and case C-175/02 (F.J. Pape v. Minister van Landbouw, Natuurbeheer en Visserij), 13 January 2005, 8 March 2002, X v Inspecteur van het Bureau Heffingen van het Ministerie van Landbouw, Natuurbeheer en Visserij (Inspector of the Ministry of Agriculture, Nature Management and Fisheries) Levies Office

II- Brief description of the facts and legal issues

Appeal in cassation, agricultural sector.

The Inspector imposed a levy on X pursuant to the "Meststoffenwet" (Fertiliser Act). The proceeds of the levies were partly used to finance a "kwaliteitspremiëringssysteem", a system designed to finance the transportation of high quality manure or other organic fertilisers to areas where only lower quality levels were available. Although this measure constituted State aid, the Commission informed the Netherlands that it would not object to its implementation until the end of 1989. X alleged that the levies during 1987 and 1988 were imposed in violation of the stand still provision of Article 88 (3) EC.

III- Summary of the Court's findings

The Supreme Court requested a preliminary ruling from the ECJ on the following questions:

1. *"For so long as the implementation of an aid measure is not permitted under the last sentence of Article 88 (3) EC, does the prohibition laid down in that provision also apply to the introduction of a levy, the revenue from which is, under the relevant law, earmarked in part for the financing of that measure, regardless of whether there has been any disturbance of trade between Member States which can (partly) be attributed to the levy as the method of financing the aid measure? If the answer to this question depends on the closeness of the connection between the levy and the aid measure, or on the time when the revenue from the levy is actually used for the aid measure, or on other circumstances, what circumstances are relevant in that regard?"*

The ECJ determined that it was necessary to answer only the third part of this preliminary question (i.e. whether Article 88 (3) EC applies regardless of the closeness of the connection between the financing tax and the aid measure in question). It found that the prohibition of implementation under Article 88 (3) EC could not apply to a tax, if that tax, or a certain part of the revenue from it, is not hypothecated to the financing of an aid measure.

2. *"If the prohibition on implementing the aid measure also applies to the earmarked levy, can the person on whom the levy is imposed then, by relying on the direct effect of Article 88 (3) EC, oppose in legal proceedings the full amount levied on him or only that portion which corresponds to the part of the revenue which is expected to be spent or has actually been spent during the period in which the implementation of the aid measure is or was prohibited under that provision?"*

In light of the answer to the first preliminary question, the ECJ considered there was no need to answer the other questions.

3. *"Do specific requirements arise from Community law with regard to the method of determining what portion of a levy falls under the prohibition laid down in the last sentence of Article 88 (3) EC in the case of a levy the revenue from which is earmarked for various purposes for which there are also other sources of financing in addition to the levy and which are not all covered by Article 88 EC, where no apportionment formula is specified in the national provision instituting the levy? In such case, must the portion of the levy which can be allocated to financing the aid measure falling under Article 88 EC be determined or an estimated basis according to the time when the levy was imposed or must it be based on subsequently available data relating to the total revenue from the levy and to the actual expenditure for each of the various purposes?"*

In light of the answer to the preliminary question, the ECJ determined that there was no need to answer the other questions.
At the time of writing, the Supreme Court had not yet issued a ruling based on the ECJ judgment.

I- Information on the judgment

Supreme Court, The Hague, LJN: AB2884, 35525 and case C-174/02, Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën, 15 January 2005, 8 March 2002, Streekgewest Westelijk Noord-Brabant and Staatssecretaris van Financiën (State Secretary of the Treasury) v a judgment given by the court of Appeal of The Hague case nr. BK-96/03827, 15 July 1999

II- Brief description of the facts and legal issues

Appeal in cassation, agricultural sector.

The Netherlands Government notified the Commission of the draft "*Wet heffingen op milieugrondslag*" (Law introducing taxes for the protection of the environment). The Commission informed the Netherlands of its decision not to raise any objections to the aid measures included in the draft. The Netherlands subsequently amended the Act to include various other aid schemes. The Commission considered the amended schemes as non-notified aid since they had been adopted before the Commission had confirmed its position in respect of them. Streekgewest Westelijk Noord-Brabant argued that, because the schemes were not notified, the levies were imposed without a proper legal basis and were therefore illegal. Moreover, the levies imposed on the basis of the Act were incontrovertibly linked to exemptions, reduced tariffs and other benefits for other parties subject to the Act, i.e. the proceeds of the levies were used to provide others with exemptions. As a result, the Act was unwarrantedly selective in its application and this, in combination with the benefits enjoyed by some, constituted State aid in the view of the Streekgewest Westelijk Noord-Brabant.

III- Summary of the Court's findings

To resolve the issues before it, the Supreme Court turned to the ECJ for a preliminary ruling. With regard to the State aid issue the court asked the following questions:

> 1. "*May only an individual who is affected by a distortion of cross-border competition as a result of an aid measure rely on the last sentence of Article 88 (3) EC?*"

The ECJ found that the last sentence of Article 88 (3) EC should be interpreted as meaning that it may be relied upon by a person liable to a tax forming an integral part of an aid measure levied in breach of the prohibition on implementation referred to in that provision, whether or not the person is affected by the distortion of competition resulting from that aid measure.

> 2. "*Where an aid measure within the meaning of the last sentence of Article 88 (3) EC consists of an exemption from tax (which is to be construed as also meaning a reduction in or relief on such tax) whose proceeds are paid into the public coffers, and no provision in that respect is made for suspending the exemption pending the notification procedure, must that tax be regarded as part of that aid measure, by virtue of the very fact that the levying of the tax on persons who do not enjoy an exemption is the means whereby a favourable effect is produced, so that as long as the implementation of that aid measure is not permitted under the abovementioned provision, the prohibitions laid down therein is also applicable to (the levying of) that tax?*"
>
> *3. In the event that the answer to the pervious question is in the negative: where a connection [such as the fact that a small part of the tax (NLG 0.70 per tonne of waste) serves to compensate for the reimbursement schemes referred to in paragraph 6 of this judgment] must be established between the increase in a particular tax whose proceeds are paid into the public coffers and a proposed aid measure within the meaning of the last sentence of Article 88 (3) EC, must the introduction of that increase be regarded as a (start on the) putting into effect of that aid measure within the meaning of this provision? If the answer to this question turns on the intensity of that connection, what circumstances are relevant in this respect?*"

Due to the similarity between the subjects of preliminary questions two and three, the ECJ found it appropriate to deal with those questions together. The ECJ concluded that with preliminary

questions two and three, the court essentially wanted to establish the circumstances under which there was sufficient link between a tax and an aid measure which consisted of an exemption from that tax, with the result that the prohibition on implementation referred to in the last sentence of Article 88 (3) EC would apply not only to the aid measure. The answer to the second and third question according to the ECJ was that the last sentence of Article 88 (3) EC should be interpreted as meaning that the prohibition in it applies to a tax only if the revenue from it is hypothecated to the aid measure at issue. The fact that the aid is granted in the form of a tax exemption or that the loss of revenue due to that exemption is, for the purposes of the budget estimates of the Member State in question, offset by an increase in the tax is not in itself sufficient to amount to such hypothecation.

> *4. If the prohibition on implementation of the aid measure also relates to the tax, does a final decision by the Commission declaring the aid measure compatible with the common market not mean that the unlawfulness of the tax is retroactively corrected?*

The ECJ was of the opinion that in light of the answers given to question one to three, questions four to six did not need to be answered.

> *5. If the prohibition on implementation also relates to the tax, can persons on whom the tax is levied oppose such tax in legal proceedings by relying on the direct effect of Article 88 (3) EC in respect of the total amount of the tax or only effect of Article 88 (3) in respect of the total amount of the tax or only in respect of part thereof?*

Ibid.

> *6. In the latter case, do specific requirements stem from Community law as regards the manner in which it must be determined which part of the tax is covered by the prohibition in the last sentence of Article 88 (3) EC?*

Ibid.

At the time of writing, the Supreme Court has not yet issued a ruling based on the ECJ judgment.

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I- Information on the judgment

Supreme Court, The Hague, LJN: AE2143, C00/308HR and case C-345/02, Pearle BV, Hans Prijs Optiek Franchise BV, Rinck Opticiens BV and Hoofdbedrijfschap Ambachten, 15 July 2005, 27 September 2002 Pearle BV, Hans Prijs Optiek Franchise BV, Rink Opticiens BV v Hoofdbedrijfschap Ambachten (Trades Council for Trade)

II- Brief description of the facts and legal issues

Appeal in cassation, services sector.

The Central Industry Board for Skilled Trade imposed a charge on its members with a view to funding a collective advertising campaign for the benefit of the undertakings in the field of optical services. Neither this campaign nor its funding was notified to the Commission. Pearle c.s. submitted that the payments constituted State aid which had not been notified pursuant to Article 88 (3) EC, and the levies were therefore unlawful.

III- Summary of the Court's findings

The Supreme Court deemed it necessary to request the ECJ for a preliminary ruling with regard to the following questions:

1. Is a scheme, such as that under consideration, in which levies are imposed to finance collective advertising campaigns, to be regarded as (part of a measure of) aid within the meaning of Article 87 (1) EC, and must the plans to implement it be notified to the Commission under Article 88 (3) EC? Does that apply only to the benefit derived from the scheme, in the form of the organisation and provision of collective advertising campaigns, or does it also apply to the method of financing it, such as a bye-law instituting levies and/or the decisions imposing levies based thereon? Does it make any difference whether the collective advertising campaigns are offered to (undertakings in) the same business sector as that on which the levy decisions in question are imposed? If so, what difference does it make? Is it relevant in that connection whether the costs incurred by the public body are offset in full by the earmarked levies payable by the undertakings benefiting from the service, so that the benefit derived costs the public authorities, on balance, nothing? Is it relevant in that connection whether the benefit from the collective advertising campaigns is distributed more or less evenly across the field of activity concerned and whether the individual establishments within the branch are also deemed, on balance, to have derived a more or less equal benefit or profit from those campaigns?

2. Does the obligation to notify under Article 88 (3) EC apply to any aid or only to aid which satisfies the definition in Article 87 (1) EC? In order to avoid its obligation to notify, does a Member State have free discretion to determine whether aid satisfies the definition of Article 87 (1) EC? If so, how much discretion? And to what extent can such free discretion affect the obligation to notify under Article 88 (3) EC? Or is it the case that the obligation to notify ceases to apply only if it is beyond reasonable doubt that no aid is involved?

3. If the national court concludes that aid within the meaning of Article 87 (1) EC is involved, must it then consider the "de minimis" rule, as formulated by the Commission in the de minimis notice, when assessing whether the measure in question is to be regarded as aid which ought to have been notified to the Commission under Article 88 (3) EC? If so, must that "de minimis" rule also be applied with retroactive effect to aid which was granted before the publication of the rule, and how must that "de minimis" rule be applied to aid such s annual collective advertising campaigns which benefit an entire branch of industry?

The ECJ considered the first three questions together and found that bye-laws adopted by a trade association governed by public law for the purpose of funding an advertising campaign organised for the benefit of its members and decided on by them, through resources levied from those members and compulsorily earmarked for the funding of that campaign, did not constitute an integral part of an aid measure within the meaning of Article 87 (1) and 88 (3) EC and it was not necessary for prior notification of them to be given to the Commission since it had been established that that funding was carried out by means of resources which that trade association, governed by public law, never had the power to dispose of freely.

> *4. Does it follow from the grounds of the judgments in Case C-39/94 SFEI and Others [1996] ECR I-3547, for the purposes of the practical effect of Article 88(3) EC, that the national court must annul both the bye-laws and the levy decisions imposed under those bye-laws and that that court must order the public body to repay the levies, even if that is precluded by the rule developed in the Netherlands case-law concerning the formal legal force of the levy decisions? Is it relevant in that regard that repayment of the levies does not in practice eliminate the advantage which the field of activity and the individual undertakings in the branch obtained through the collective advertising campaigns? Does Community law allow repayment of the earmarked levy not to take place, either wholly or in part, if, in the opinion of the national court, the field of activity or the individual undertakings would be placed at an unfair advantage in connection with the circumstance that the advantage obtained as a result of the advertising campaign cannot be returned in kind?*
>
> *5. In case of failure to notify as laid down in Article 88 (3) EC, can a public body rely, in order to avoid an obligation to refund the aid, on the abovementioned rule of formal legal force of the levy decision if the person to whom that decision was addressed was not aware, at the time of the adoption of that decision and during the period within which it could have been challenged in administrative proceedings, that the aid of which the levy forms part had not been notified? May an individual assume in this connection that the authorities have fulfilled their obligations to notify aid under Article 88 (3) EC?*

Given that the answer to questions one to three makes it clear that the Board's decision imposing the charges for the purpose of funding the advertising campaign at issue do not form an integral part of an aid measure within the meaning of Article 87 (1) EC and that they did not have to be notified in advance to the Commission, the ECJ declared that the premise on which these questions were predicated was not, in the circumstances of this case, fulfilled.

The ECJ found therefore no need to answer these questions.

At the time of writing the Supreme Court has not yet issued a ruling based on the above ECJ judgment.

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I- Information on the judgment

Administrative Court for Trade and Industry, The Hague, LJN: AH9722 and case C-283/03, A.H. Kuipers v Productschap Zuivel, 26 June 2003, A v Productschap voor Zuivel (Dairy Commodity Board)

II- Brief description of the facts and legal issues

Appeal (administrative law), agricultural sector.

A was a dairy producer who sold milk to a local dairy. Due to the presence of an anti-bacterium in his milk, the payout for that particular shipment of milk was reduced by NLG 0.50. A contended that the reduction of payments constituted State aid because of the selective application, i.e. those dairy producers who were not confronted with the reduction of payments were awarded a benefit over those who were. Moreover, since this alleged aid had not been notified, it was contrary to Article 88 (3) EC.

III- Summary of the Court's findings

The Administrative Court for Trade and Industry requested a preliminary ruling from the ECJ on the following questions:

> *1. "Is a national system of deductions and supplements based on the quality of raw milk delivered to the dairy, such as that at issue, consistent with Regulation 804/68 on the common organisation of the market in milk and milk products and in particular with the prohibition of equalisation between the prices in Article 24 (2)?" (now, after consolidation of amendments to the text, Article 38 (2) of Regulation 1255/99)*
>
> *2. Is a national system of supplements based on the quality of raw milk delivered to the dairy, such as that at issue, consistent with the prohibition of aid in Article 24 (1) of Regulation 804/68?*
>
> *3. If Question 2 is answered in the affirmative, is such a national system to be regarded as aid the grant of which must be notified beforehand to the Commission under Article 88 (3) EC?*

The ECJ ruled on these questions as follows. It stated that the common pricing system which forms the basis of the common organisation of the market in milk and milk products instituted by Regulation No 804/68 of the Council of 27 June 1968 as amended by Council Regulation (EC) No 1538/95 of 29 June 1995, prohibits Member States from unilaterally adopting provisions affecting the machinery of price formation at the production and marketing stages established under the common organisation. That is the case with regard to a system such as that at issue in the main proceedings, which, whatever its alleged or stated objective may be, instituted a mechanism under which:

- on the one hand, dairies were required to withhold deductions from the price of milk delivered to them when that milk did not meet certain quality criteria; and
- on the other hand, the amount thus withheld over a given period by all the dairies was aggregated before being redistributed, after possible financial adjustments between the dairies, in the form of supplements identical in amount paid by each dairy, per 100 kilogrammes of milk delivered to it during that period, to those diary farmers alone who had delivered milk meeting those quality criteria.

At the time of writing, the Administrative Court for Trade and Industry had not yet issued a ruling based on the ECJ's judgment.

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

District court, Groningen, LJN: AT8973, 22 June 2005, Essent Netwerk Noord B.V. and B.V. Nederlands Elektriciteit Administratiekantoor (formerly SEP) v Aluminium Delfzijl B.V. (Aldel) (main action); Aluminium Delfzijl B.V. and the state of the Netherlands (third-party action); Essent Netwerk Noord B.V. and B.V. Nederlands Elektriciteit Administratiekantoor, Saranne B.V. (third-party action)

II- Brief description of the facts and legal issues

Proceedings in first instance, energy sector.

Under the closed system of the Electricity Act 1989, the production, import and distribution of electricity in the Netherlands was in the hands of four electricity production companies ("EPC"s) and their mutual subsidiary, SEP. (Partly) at the instigation of the Dutch Government, these five companies made investments in the area of environmental policy/experiments that would not have been profitable, and consequently would not have been made, in a liberalised market. These investments led to so-called non market-conform ("NMC") costs or stranded costs ("bricks").

In anticipation of the Dutch electricity market's liberalisation, SEP, the four EPCs and the distribution companies concluded a Protocol agreement relating to the period 1997-2000, in order to free the EPCs from their stranded costs. Under this agreement, the distribution companies would pay SEP an annual amount of NLG 400 million in contribution to the total stranded costs. Payment by the distribution companies was financed by an increase in the electricity tariff for small, medium and (regular) business consumers.

As a consequence of the energy market's liberalisation, the distribution companies were obliged to unbundle. Essent Netwerk Noord B.V., a network manager having thus ensued from one of the distribution companies, secured the transport of electricity to Aldel from 1 January 2000. Execution of the Protocol agreement in this year was not allowed because the applicable legislation prohibited an integrated tariff. In order to free SEP and the four EPCs from their stranded costs and to enable them to compete effectively, the "*Overgangswet Elektriciteitsproductiesector*" (Interim Act Electricity production sector) ("OEPS") was enacted. This Act provided for a raise per kWh for every consumer (not being a protected consumer), payable to the network manager and calculated on the basis of the total amount of electricity transported to its connection in the period 1 August 2000 - 31 December 2000. The amounts thus obtained would have to be paid to SEP. SEP, in turn, was obliged to make a statement to the Minister responsible of the total amount obtained. If the amount exceeded NLG 400 million, SEP was under an obligation to pay the excess to the Minister, who would use the money to reimburse the costs made for one of the environmental experiments carried out in the past.

On the basis of this scheme, Essent invoiced an amount of NLG 9,862,646.25 to Aldel. Aldel did not pay. Essent initiated proceedings before the District Court.
Aldel (among others) claimed that the scheme as laid down in the OEPS constituted illegal State aid because SEP was accountable to the Minister, the excess amount was payable to the Treasury and, if the contribution scheme had not been in place, the State would have had to have contributed to the stranded costs.

III- Summary of the Court's findings

The District Court ruled that in this case it would have to be ascertained whether the applicable provisions in the OEPS (Article 9) violated EC law. It decided to stay the proceedings and request a preliminary ruling from the ECJ on (among others) the following question: Is the scheme as laid down in Article 9 of the OEPS compatible with Article 87 (1) EC Treaty?[10]

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.

[10] See ECJ 17 July 2008, Case C-206/06, Essent Newerk Noord BV e.a.

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, 's-Hertogenbosch, LJN: AR6630, Awb 03/2581 BELEI, 26 November 2004, X v Minister van Landbouw, Natuur en Visserij (Secretary of Agriculture, Nature Management and Fisheries)

II- Brief description of the facts and legal issues

Proceedings in first instance (administrative law), agricultural sector.

X applied for subsidies under the "*Bijdrageregeling proefprojecten mestverwerking*" (contribution scheme for a pilot manure processing project), which were initially granted by the Secretary. As a result of a Commission decision declaring the subsidy granted to the applicant contrary to the EC provisions on State aid[11], the Secretary ordered recovery of the subsidies granted, including interest. The central issue was whether the decision revoking the aid was unjustified.

III- Summary of the Court's findings

The Court found that the recovery decision was justified as it had been based on a directly effective Commission decision. Since the Commission decision had not been appealed within the time limits, it had become definitive. Moreover, X failed to substantiate that it could rely on a legitimate presumption that the aid would not be recovered. The court reiterated the ECJ's case law, stating that legitimate expectations only exist if aid is granted in accordance with Article 88 EC, something that a normal, cautious undertaking could be expected to determine without too much difficulty. Since the aid had not been granted in accordance with the Article 88 EC procedure, the claimant could not rely on the principle of legitimate expectations. Finally, the court found that it could not be expected of the Secretary to act in defiance of a Commission decision and that this Commission decision did not provide the Secretary with any leeway to test the recovery decision against the principle of reasonableness. The action was dismissed.

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.

[11] 2001/521/EC, 13 December 2000 (OJ (2001) L189/13).

I- Information on the judgment

Administrative court, Zutphen, LJN: AF9788, 02/551 WET, 20 May 2003, Demarol BV v Minister van Financiën (Secretary of the Treasury)

II- Brief description of the facts and legal issues

Proceedings in first instance (administrative law), petrol.

Demarol BV operated a number of petrol stations along the Dutch-German border. According to a specific Act, such petrol stations were eligible for a maximum of €100,000 worth of aid over a three-year period to compensate the negative competition effects arising from excise differences in the Netherlands and Germany. Demarol BV applied for, and subsequently received, aid under the Act. Since the Commission deemed the aid granted under the Act incompatible with EC State aid provisions, the Secretary notified Demarol BV that the aid received was to be repaid, including interest. The Secretary denied the application for annulment of the recovery decision upon which Demarol BV initiated these proceedings.

III- Summary of the Court's findings

The Court found that the Secretary was justified in ordering the recovery of part of the aid based on the Commission's decisions[12] declaring the aid incompatible with Article 88 (2) EC. Moreover, Article 4:49(1) and sub (b) of the *Awb* (General Administrative Act) and the identical Article 13 (1) and sub (b) of the Act in question enable the Secretary to recover or amend the amount of aid granted if the decisions by which the aid was granted were flawed and the recipient was or should have been aware of such flaw. Through the correspondence between the State and Demarol BV, Demarol BV was, or should have been, aware that the Commission had initiated proceedings at the time of the aid grant without having reached a definite conclusion, and that any aid granted pending such proceedings would fall under the prohibition of Article 87 (1) EC. The Court found, moreover, that Demarol BV could not invoke the principle of legitimate expectations or legal certainty because ECJ case law clearly states that those principles may be relied on only if the aid in question is granted in accordance with Article 88 EC, something that a normal, cautious undertaking could be expected to determine without too much difficulty. In light of the above, the Secretary was justified in making this decision and therefore the application for annulment was dismissed.

[12] 1999/705/EC, 20 July 1000 (OJ (1999) L280/87).

I- Information on the judgment

President of the Administrative Court, Assen, LJN: AA7472, 00/718 WET P01 G01, 2 October 2000, X v Y

II- Brief description of the facts and legal issues

Application for an interim injunction (administrative law), petrol.

X operated petrol stations along the Dutch-German border. According to a specific Act ("*Tijdelijke regeling subsidie tankstations grensstreek Duitsland*") such petrol stations were eligible for a maximum of €100,000 (NLG 223,250) worth of aid over a three-year period to compensate the negative competition effects arising from excise differences in the Netherlands and Germany. X was granted aid in the amount of €95,556 (NLG 210,600) under the condition of possible amendments or recovery of the aid. Before and after the aid was granted there had been extensive written contact between the claimant and the defendant. Because of the fact that the claimant did not respond to several requests by the defendant for information, the defendant decided to recover the aid. The claimant was of the opinion that by ordering recovery of the aid and interest within a period of four weeks after publishing the relevant decision, the defendant had acted in violation of several administrative principles, most notably the principles of proportionality, legitimate expectations and reasonable consideration of the interests involved. The defendant argued that it was confronted with a Commission decision declaring the aid illegal and, thus, with an incontrovertible obligation to recover the aid granted, which in turn led it to demand repayment within the contested period.

III- Summary of the Court's findings

The President of the Court firstly considered that injunction proceedings were not suitable for the case at hand as several proceedings had been commenced at the European Courts which could potentially result in overturning prior national court rulings. The scope of the present proceedings was thus limited to the recovery order for the entire subsidy sum within a four-week period. Pursuant to a Commission decision[13], the aid should be recovered in accordance with the relevant national rules. The President thus found that the recovery the principles of proper administration ("*algemene beginselen van behoorlijk bestuur*") applied. As the total sum granted was spread over several years and the defendant had not indicated from the outset that there was a possibility of recovery due to issues at European level, this could have created expectations. The President found that the defendant could have offered a longer repayment schedule than the four-week period and annulled the decision in so far as it referred to a four-week period for repayment.

[13] 1999/705/EC, 20 July 1999 (OJ (1999) L280/87).