2. Outline on the availability of judicial relief under the legal system of Austria

Austria is one of the new Member States which only joined the European Union on 1 January 1995. It is therefore not surprising that hardly any case law has developed to date on the enforcement of European State aid rules by Austrian courts. In fact, there is no reported judgment of either the Austrian Supreme Court (*Oberster Gerichtshof*) or the Austrian Administrative Court (*Verwaltungsgerichtshof*) on that issue, and only one decision (in summary proceedings) of a court of first instance (Vienna Trade Court; *Handelsgericht Wien*). Apart from the novelty of European State aid rules for Austrian companies and lawyers, the silence of the Austrian courts on State aid may to some extent be due to the fact that many measures in Austria (in particular general aid schemes) falling under Article 92 of the EC Treaty have already been in existence before 1 January 1994, the date of Austria's accession to the European Economic Area. Qualifying as "existing aid" under Article 93(1), these measures are not subject to the duty of notification under the last sentence of Article 93(3).

From an EC Law-perspective, the present study is based on the assumption that the national courts are required to use all appropriate devices and remedies and to apply all relevant provisions of national law to protect the rights which individuals enjoy as a consequence of the direct effect of Art 93 para 3. As there are no Community rules governing this aspect, it is for each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules[1]. The objective of this report is to define the courses of action which might be available in Austria in State aid proceedings. Due to the lack of judicial authority, we may only point out some general principles in this respect. Many details still wait to be developed by court decisions and legal writing. If it should turn out that Austrian law does not provide an efficient basis for the enforcement of Community State aid rules, we believe that the Austrian courts would be required to set aside any provision of national law which renders virtually impossible or excessively difficult the exercise of rights conferred by Art 93 para 3[2].

Basically, there are two types of actions which may come before an Austrian court in State aid matters:

Actions by competitors who either seek to prevent the granting of unlawful State aid (cease and desist) and/or who claim damages; such actions may be brought either

1 *See*, for instance, *van Schijndel* [1995] ECR I-4705
2 See *van Schijndel*, as above, and *Factortame* [1990] ECR I-2433

against the Austrian government (or the government agency having granted the aid), or against the recipient of the aid;

Actions by the government or by the government agency having granted the aid for recovery.

Both types of action may either arise in cases concerning the direct effect of Article 93(3) EC Treaty or in the course of enforcement of a negative Commission decision.

2.1 Actions taken by competitors

2.1.1 Cease and desist

a) Preventive Action

In the *Mayreder*-case[3] the Vienna Trade Court indicated (without giving any particular reasoning) that an action for cease and desist in State aid matters could be directly based on Community law. Austrian law acknowledges (either expressly or implicitly) in some fields (eg avoidance of personal injuries) that preventative action may be taken in cases where the defendant is legally obliged to refrain from some kind of behaviour and where the applicant can show that such an obligation is likely to be dishonoured to his detriment in the immediate future (*vorbeugende Unterlassungsklage*). According to many legal writers, the availability of such action should be extended – by way of analogy – to all fields where the law provides for obligations to refrain from certain behaviour[4].

The last sentence of Article 93(3) EC Treaty contains a prohibition of the implementation of new State aid measures or amendment of existing State aid prior to clearance by the EC-Commission. Pursuant to the established case law of the European Court of Justice[5], this provision is capable of creating individual rights and obligations and has direct effect in the Member States. Based on these principles and the above idea of generally available preventative action, it is arguable that competitors may refer directly to Community law when challenging the validity of State aid measures before Austrian courts. It should be noted, however, that – contrary to the above mentioned legal writing - prevailing case law still grants preventative action only where such an obligation to cease and desist results from contract, or where the protection of an absolute right (personal integrity, property etc) is at stake, but not in situations where the law (as in the case of State aid rules) only protects economic

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3 *See* case summary below
4 *See* Reischauer in Rummel, AGBG II☒, § 1294 No 23
5 *See* in particular Case C 120-73, Lorenz, [1973] ECR 1471 or Case C-44/93, Namur, [1994] ECR I-3829

interests of third parties. Therefore, it remains to be seen whether the rather broad concept embraced by the court in *Mayreder* will be followed by higher courts in the future. With regard to the ECJ-judgment in *Factorame* it is to be expected that the broad concept will be applied at least in those cases where no other legal bases for a cease-and-desist order exists.

If preventative action is possible, it may also be pursued by requesting interim relief. Here, the applicant has to show (a) the *fumus boni iuris* and (b) that he is in immediate danger of suffering irretrievable damages[6].

Art 93 EC Treaty is addressed only to Member States. It does not impose any specific obligation on private undertakings, such as to investigate the lawfulness of an aid measure and/or to refuse its receipt prior to clearance by the Commission. Consequently, a direct preventative action for cease and desist against the recipient of aid is (in our opinion) not available. This is in line with the *SFEI*-ruling[7], where the ECJ stated that a recipient of aid who does not verify that the aid has been notified to the Commission in accordance with Article 93(3) EC Treaty cannot incur liability solely on the basis of Community law.

b) Law against Unfair Competition

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

In a case which took place well before Austria's accession to the European Union[8], the Austrian Supreme Court held that the state contravenes s.1 UWG if it employs means received through its *imperium* to promote a specific undertaking. *In concreto*, the Court enjoined the Austrian postal service to give one particular bank (*Postsparkasse*, which is also a public sector body) the opportunity to use the network of post offices to distribute certain financial services without adequate financial contribution. It was held that such a measure would put all other banking institutions at a competitive disadvantage, as it would be practically impossible for them to establish a comparable distribution system.

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6 *See* s..381 of the Austrian Enforcement Act (*Exekutionsordnung*)
7 Case C-39/94, SFEI v La Poste, [1996] ECR I-3577, 72-75
8 *PSK* – ÖBl 1990,55

Legal commentators have rightly pointed out that the *PSK*-decision effectively amounts to a prohibition on the state against the grant of unfair subsidies. Article 92 EC Treaty may well be seen as a specific expression of that principle. Consequently, Article 92 et seq in conjunction with s.1 UWG could be used by competitors to prevent the granting of State aid which has not been cleared by the Commission. In fact, the Trade Court in the *Mayreder*-case had no doubts whatsoever on the availability of this remedy.

It should be noted that, based on the above, s.1 UWG is not only applicable in State aid cases because the government is in breach of Community law, thus acting against good morals (*Vorsprung durch Rechtsbruch*). Rather, the granting of aid as such is considered unfair. The main consequence of this concept is that reasonable doubts as to whether the measure in question actually constitutes aid are not a valid defence.

Claims based on s.1 UWG may not only be brought against the public authority granting the aid but also against the beneficiary. Even if the beneficiary does not breach Community law itself, it will usually have to be regarded as an accomplice. The ECJ has continuously held that undertakings to which an aid has been granted (or who have even applied for such aid) may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in Article 93 of the EC Treaty. According to the ECJ, a diligent businessman should normally be able to determine whether that procedure has been followed or not[9]. One may argue that if the recipient of aid fails to consider the lawfulness of the measure in question, he already participates in the unlawful conduct.

Under the UWG, competitors may apply for injunctive relief without having to show that there is immediate danger of suffering irretrievable damages (s.14 UWG). They may further request the defendant to remove the illegal situation (s.15 UWG; this may amount to an obligation to recover the illegal aid), and they are entitled to claim damages (only if negligence or intention can be shown; s.16 UWG).

c) Administrative Proceedings

The UWG only applies to cases where the state acts in the private economic sector. Sovereign acts (e.g. individual administrative acts, ordinances or laws) do not fall within the scope of s.1 UWG. The above remedies are therefore not available if aid is granted by way of a government bill or by way of an administrative order (*Bescheid*). Here, it is very doubtful whether competitors are able to prevent the measure in question at all. In particular, Austrian administrative law does not include the concept of third party objections (*Widerspruch*), which we understand is available in other jurisdictions, e.g. Germany.

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[9] *See* for example Case C-24/95, *Rheinland-Pfalz v Alcan*, [1997] ECR I-1591, p. 24

Under Austrian law, the decisive question is whether competitors of a beneficiary which may be affected by a subsidy decision are ”parties” to the respective administrative proceedings within the meaning of s.8 of the Austrian Act on Administrative Procedure (*Allgemeines Verwaltungsverfahrensgesetz*; AVG) and may therefore raise objections in the proceedings or even appeal against an order which is (in their opinion) in conflict with Community law. Although the definition of a "party" in s.8 AVG is fairly broad, it does not usually encompass persons or undertakings who merely have an economic interest in the decision of the administrative authority. However, based on *Factortame*, the Austrian Supreme Administrative Court might be prepared to set this restriction aside in cases where the competitor of the company receiving aid might otherwise not have any possibility to put his position forward.

2.1.2 Damages

S. 1295 et seq. of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch* - ABGB) provides that a person who negligently or intentionally acts in breach of law shall be liable for the damages resulting thereof. This general rule may be invoked against the state who, acting in the private economy (i.e. like a private party), breaches Community State aid rules. Of course, as is frequently the case in competition matters, it may be extremely difficult for the applicant to quantify the precise amount of damages and to prove the causal link between the aid granted and the damage for which recovery is sought. The beneficiary of aid may only be able to bring a claim for damages if it can be shown that it promoted and thus participated in the breach of law.

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

In cases where aid was granted by means of an administrative order (*Bescheid*), a competitor of the beneficiary may bring an action for damages against the state on the basis of the Official Liability Act (*Amtshaftungsgesetz - AmtshaftungsG*). Pursuant to s.1 *AmtshaftungsG* the state shall be liable for the damages which its agents have caused, through unlawful and culpable behaviour, in the exercise of sovereign powers. To such illegal sovereign acts, the relevant provisions of the ABGB (s.1295 et seq.) apply *mutatis mutandis*.

The civil court hearing a claim under the *AmtshaftungsG* may not establish the illegality of the administrative order (*Bescheid*) on which the aid is based itself. Rather, the court has to apply to the Administrative Court (*Verwaltungsgerichtshof*) to declare the administrative order (*Bescheid*) void[10].

[10] *See* § 11 *AmtshaftungsG* and Article°131(2) of the Austrian Constitution

Public procurement

S. 52 of the Austrian Federal Act on Public Procurement (*Bundesvergabegesetz*) provides in para 1 subpara 3 that an undertaking may be excluded from the bidding process if the pricing in its bid is not "plausible". In at least one case known to us (not yet decided), a competitor of a recipient of State aid has attempted to invoke this provision to have the beneficiary of State aid excluded from a public tender, arguing that a price which is cross-subsidised from State aid is implausible within the meaning of the Procurement Act. It remains to be seen whether this line of argumentation will be upheld by the Federal Administration of Public Procurement (*Bundesvergabeamt*).

2.2 Actions for recovery

Once the Commission has ascertained the illegality of a particular aid measure, it will order its repayment. Abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful[11]. Undoubtedly, the technique of recovery (and the applicable rules) will depend on the legal basis on which the aid was granted. For instance, whether aid consists of a tax incentive or of a capital increase in a public undertaking will make a major difference for recovery proceedings. In the following, we consider only the straightforward case of aid in the form of a direct monetary transfer. Even here, one has to distinguish between two different types of cases :

- aid granted by contract under civil law; and
- aid granted by an administrative order.

2.2.1 Aid granted by way of contract

If the aid was awarded by contract, the rules of the Austrian General Civil Code (ABGB) apply. Pursuant to s.879 ABGB, a contract is void (and may be revoked with retroactive effect) if it infringes bonos mores or a statutory prohibition. Based on the ECJ's case law in *Lorenz*[12] and cases following it, it is hardly disputable that the Community State aid rules contain statutory prohibitions in the meaning of s.879 ABGB.

Consequently, a subsidy contract which infringes Article 92(1) EC Treaty is void and can be subject to restitution pursuant to the ABGB provisions on unjust enrichment[13].

2.2.2 Aid granted by way of an individual administrative act (Bescheid)

11 Case C-169/95, *Spain v Commission "Province of Teruel",* [1997] ECR I-135, P. 47
12 Case C 120-73, Lorenz, [1973] ECR 1471

Under Austrian law, an individual administrative act (*Bescheid*) can be revoked only under exceptional circumstances. In particular, it can be declared void by a higher instance if it suffers from a defect explicitly threatened by nullity under applicable law[14]. As for aid granted by way of civil law contracts, the main question is whether the provisions of the EC Treaty relating to State aids are statutory prohibitions in the meaning of section 68 (U) (4) AVG. For the same reasons (i.e. in particular with regard to the unconditional obligation of the Member States to give effect to Community law) we believe that this is the case. However, many details still need to be tested. For instance, it is unclear whether the order with which an individual administrative act (*Bescheid*) is revoked for failure to meet Article 92 EC Treaty may also provide details of the restructuring of repayment (interest etc.).

Please note that s 68 para 4 AVG does not allow the possibility of having orders avoided which were issued by the highest administrative authority. With regard to such measures, Austria could find itself in a position not to be able to comply, on the basis of the law as it stands, with Community rules requiring recovery of illegal State aid. Here again, the Supreme Administrative Court might be forced to set aside those provisions in the AVG which would render recovery of aid impossible.

3. Case summary

The only case known to us in which questions of State aid were raised before an Austrian court concerns a decision by the Vienna Trade Court (*Handelsgericht Wien*) dated *29 February 1996* (**D**). The facts of the case were as follows:

Facts: The Austrian construction firm *Mayreder Bau GmbH* incurred operative losses since about 1991 and was - at the end of 1995 - at the brink of bankruptcy. Another Austrian construction group (*Alpine*) offered to take over *Mayreder* at a price of ATS 100 Mio provided that *Mayreder's* creditors (suppliers and - in particular - creditor banks) waived accounts receivable in an amount of ATS 350 Mio. Some of these ecrditor banks (namely *Girocredit, Creditanstalt, Bank Austria*) are state owned.

A competitor of *Alpine*, *Ilbau*, which also wanted to acquire *Mayreder*, argued that such waiver of claims would constitute illegal State aid under Article 92 of the EC Treaty. *Ilbau* did not only submit a complaint to that effect to the EC Commission but also applied for a cease and desist order (also by way of preliminary injunction) in front of the *Handelsgericht Wien*.

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13 *See* s.877 ABGB)

14 s.68 para°4 subpara 4 AVG; special rules apply in tax matters

Decision: The court applied the *market economy rule* to the case in question. It held that, *prima facie,* a waiver of claims of creditor banks in order to rescue an insolvent enterprise and such to avoid even greater losses is entirely customary in the private sector. Therefore, in the court's opinion, *Ilbau* failed to show that a private investment bank would not have granted the same assistance to *Mayreder/Alpine* as the state owned banks did in the present case. On these grounds, the claim for cease and desist was dismissed. This decision has become final.