

## **AEA Study on the Application of EC State aid Law by Member State Courts**

### **1. Outline of cases that could occur before a national court**

#### **1.1 Procedure relating to State aids**

The Commission and the national courts have complementary and separate roles in the application of the State aid rules. While the Commission has the exclusive power to decide whether aid is compatible with the common market, national courts are responsible for the protection of rights and the enforcement of duties, usually at the behest of private parties. In its notice on cooperation in State aid matters between national courts and the Commission, the Commission points out that, while it is not always in a position to act promptly to safeguard the interests of third parties in State aid matters, national courts may be better placed to ensure that breaches of the last sentence of Article 93(3) are dealt with and remedied.<sup>1</sup>

This Report analyses the cases on EC State aid law which have been decided by Member State courts to date. The following actions can be brought before national courts:

- 1) actions by the Member State to obtain recovery from the beneficiary (or actions by the beneficiary against recovery by the Member State)
- 2) actions by a company against the Member State for the annulment of a discriminatory imposition of a financial burden (e.g. tax) from which another company is exempted
- 3) disputes between different branches of the administration as to the permissibility of State aid measures (institutional disputes)
- 4) actions by a competitor against the Member State for damages, recovery and/or injunctive measures.
- 5) actions by a competitor against the beneficiary for damages, recovery and/or injunctive measures.

In this Section, we discuss the actions which would be possible based on the case law of the European courts and the Commission. Paragraph 1.2 describes enforcement by the Commission. Paragraphs 1.3 - 1.5 set out examples of cases where a national court may be required to deal with cases relating to State aids.

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<sup>1</sup> Commission notice on cooperation between national courts and the Commission in the State aid field OJ 1995 C 312/8.

## 1.2. Enforcement by the European Commission

Articles 93(3) and 93(1) of the Treaty provide for a specific procedure under which the European Commission monitors new aid and keeps existing aid under constant review. A Member State must notify the Commission of any plans to grant or alter aid before they are put into effect. Following notification, the Commission conducts an initial review of the planned aid, during which the aid may not be put into effect. The Commission has a period of two months to submit comments. If the Commission does not take action within this two-month period, the Member State may proceed to implement its plans and the aid shall become existing aid, subject to the supervision rules of Article 93 (1). If at the end of that review the Commission deems that there are questions on the compatibility of the aid with the Common Market, it must without delay initiate the consultative examination procedure under Article 93(2). In this case the prohibition continues until the Commission reaches a decision on the compatibility of the planned aid with the Common Market.

The Article 93 (2) procedure is concluded by issuing either a negative decision prohibiting the aid, a conditional decision allowing the aid subject to certain conditions or a positive decision. Non-notification does not automatically make such aid incompatible with the Common Market. The Commission is not relieved of the duty to examine the aid and test its compatibility with Article 92.

If the Commission finds aid incompatible and the aid has already been paid, it will ask the Member State to recover the aid from the recipient with interest as from the day on which the recipient had the aid at its disposal<sup>2</sup>. A Member State is obliged to recover the aid and may not allow a rule in its domestic law to prevent recovery.<sup>3</sup> So, the Court of Justice has stated that a Member State may not plead provisions, practices or circumstances in its own legal system as a reason for not complying with EC law, while recipients of illegal aid cannot, save in exceptional circumstances<sup>4</sup>, invoke the principle of legitimate expectations. The Court of First Instance has upheld the Commission's decision to make its authorization of a new aid package subject to a suspension of the payment of that aid, until a prior aid to the same undertaking which has been declared incompatible, has been recovered<sup>5</sup>. Furthermore, in order to emphasize the importance

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<sup>2</sup> Case T 459/93, *Siemens v. Commission* (1995) ECR II-1675 Case C 24/95, *Alcan*

<sup>3</sup> Case C 74/89, *Commission v. Belgium* (1990) ECR I-492

<sup>4</sup> Case C 5/89 *Germany v. Commission* (1990) ECR 3453

<sup>5</sup> Case T 244/93 and T 486/93 *Deggendorf GmbH v. Commission*

of notification, the Commission has issued a communication on recovery of illegal aid, stipulating that it may make an interim decision requiring the beneficiary immediately to reimburse the non-notified and illegal aid to the Member State with interest, pending the Commission's decision on its compatibility<sup>6</sup>.

The Commission has also issued a notice on cooperation on State aid between national courts and the Commission<sup>7</sup>. The Commission pointed out that national courts must until the final decision of the Commission preserve the rights of individuals confronted with the potential breach by State Authorities of the prohibition in Article 93(3). National courts are encouraged to use all national remedies to freeze payment or order the return of sums illegally paid.

### **1.3 Direct effect of Article 93(3)**

While national courts have no jurisdiction to rule on the compatibility of aid with the Common Market, they must ensure that Member States comply with their procedural obligations. The role of the national courts is to safeguard rights which individuals enjoy due to the direct effect of the prohibition in the last sentence of Article 93(3). The court should use all appropriate means and remedies and apply all relevant provisions of national law to implement the direct effect of this obligation.<sup>8</sup> The initiation of a procedure by the Commission under either Article 93(3) or 93(2) does not relieve national courts of their duty to safeguard rights of individuals in the event of a breach of the requirement to give prior notification.<sup>9</sup>

Firstly, a national court may have cause to interpret and apply the concept of aid in Article 92 to determine whether State aid introduced without observance of the preliminary examination procedure in Article 93(3) ought to have been subject to this procedure.<sup>10</sup>

Secondly, third parties, such as competitors who stand to suffer loss due to the grant of illegal aid (i.e. aid implemented prior to notification or during the contentious procedure) can obtain an injunction from a national court, thus preventing the actual granting of the aid.

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<sup>6</sup> Communication to the Member State on the recovery of illegal aid, OJ 1995, C 156/5

<sup>7</sup> See n. 1

<sup>8</sup> See n. 1.

<sup>9</sup> Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others*.

<sup>10</sup> Case C-354/90, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v France* (1991) ECR I-5505.

Moreover, a national court may be required to declare prematurely granted aid, unlawful and order the recovery of such aid, without ruling on its compatibility. Even if the Commission finds the unlawfully introduced aid compatible with the common market, the national court should declare measures adopted before such finding unlawful and order the State to recover the aid, with interest.

Finally, third parties who can prove that they have suffered loss caused by the unlawful implementation of aid may have an action for damages in a national court against the Member State that granted the aid. In *SFEI v La Poste*<sup>11</sup> the Court of Justice addressed the question of whether the recipient of aid who does not verify that the aid has been notified to the Commission in accordance with Article 93(3) may incur liability on the basis of Community law. The Court held that Article 93 does not impose any specific obligation on the recipient of aid, and that Community law does not provide a sufficient basis for the recipient to incur liability in such a case. Nevertheless, that does not prejudice the possible application of national law to the grant of aid in breach of Article 93(3) where the acceptance by an economic operator of unlawful assistance causing damage to other economic operators creates a cause of action under the national law.

#### **1.4 The enforcement of negative Commission decisions**

A national court can enforce a Commission decision made under Article 93(2) which holds that a particular aid is contrary to Article 92. In *Carmino Capolongo v. Azienda Agricola Maya*<sup>12</sup>, the Court of Justice clarified that for aid declared incompatible with the common market, "*the provisions of Article 92(1) are intended to take effect in the legal systems of Member States, so that they may be invoked before national courts, where they have been put in concrete form by acts having general application provided for by Article 94 or by decisions in particular cases envisaged by Article 93(2).*"

Where recovery of aid is sought following a negative decision of the Commission, the recovery must take place in accordance with the relevant procedural provisions of national law. The provisions are not to be applied in such a way that the recovery required by community law is rendered practically impossible.

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<sup>11</sup> See n. 3.

<sup>12</sup> Case C-77/72 (1973) ECR 611.

Following a negative Commission decision, an action to obtain an injunction to prevent the actual granting of the aid, or an action for damages by a third party (e.g. a competitor, or a creditor of the beneficiary who suffer as a result of recovery) may be initiated in a national court.

### **1.5 The implementation of positive Commission decisions**

A competitor of a beneficiary of aid cleared by the Commission may want to challenge the Commission decisions concerning the aid. In *Salt Union v Commission*, which involved a challenge by a competitor of the granting of aid to a specific company under a general aid scheme approved by the Commission, the Court of Justice stated that it is open to competitors to contest, before the national courts, the decision of national authorities to grant State aid to an undertaking competing with them. If the aid forms part of a general aid scheme, undertakings may call into question in such national proceedings the validity of the Commission's decision to approve that scheme. The Court further stated that if this kind of action is brought in a national court, the latter may, (and, indeed, in certain circumstances must) refer a question to the Court of Justice for a preliminary ruling under Article 177 of the Treaty.<sup>13</sup>

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<sup>13</sup> Case T-330/94, *Salt Union Ltd v Commission* f