

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

2.1 Procedures concerning the direct effect of Article 93(3)

Actions relating to infringements of Article 93(3) are available in Belgium both against the recipient and the Agency that granted the aid.

2.1.1 Procedure against the recipient of the aid

Any competitor of a company that has received an aid may initiate private law proceedings in the Commercial Courts (*Tribunaux de Commerce*) directly against the recipient of the aid. Such an action could be based on Article 93 of the 1991 Law Against Unfair Competition (*Loi sur les Pratiques de Commerce et la Protection du Consommateur*). In such a case, even if national courts have no jurisdiction to rule on the compatibility of the aid with the Common market, they will be obliged to interpret and apply the concept of aid contained in Article 92 of the EC Treaty in order to determine whether State aids introduced without observance of the preliminary examination procedure provided for in Article 93(3) of the Treaty ought to have been subject to that procedure.

The 1991 Law also provides the competitor with the possibility of introducing an action requesting an urgent termination order from the President of the Commercial Court (*Tribunal de Commerce*) which would order the immediate cessation of an unfair practice but with no provision for any kind of damages for the plaintiff.

2.1.2 Procedures against the Agency which granted the Aid

If a company learns that a competitor has been granted an aid from public authorities and it appears furthermore that the State has granted the aid without regard to Article 93(3) of the EC Treaty, the company can choose to initiate proceedings before the State Council, the highest administrative jurisdiction and advisory body to the Government in matters of legislation. Such an action would be based upon Article 14 of the 12 January 1973 Co-ordinated laws, which provide that the State Council may declare void a public authority's decision in case of substantial flaw¹.

An action before civil courts is also open to individuals. In fact, the object of an action before the State Council according to Article 14 of the Co-ordinated law and that of an action before civil courts are totally different. An action before the State Council can achieve only the legal nullity of an administrative decision² and private citizens cannot

¹ See below the Decision of May 18, 1982

² Conseil d'Etat, 3^{ème} Chambre, 15 January 1986, RACE 1986, n°26061.

obtain damages by way of such an action³. However they will be able to obtain damages before civil courts based on a decision taken by the State Council, whose effects are *erga omnes*.

According to a general principle of Belgian law, the State is obliged to repair damages caused by its fault, and civil courts are qualified to direct the State to repair them⁴. Thus, private citizens may initiate proceedings directly before a civil court in order to obtain damages for loss caused by a breach of Article 93(3) of the EC Treaty without needing a prior decision of the State Council⁵.

The Competitor of the recipient of an aid will be able to bring proceedings according to general rules of civil proceeding contained in the Judiciary Code. Such an action will be based on Article 1382 of the Civil Code (*Code Civil*), which states that any act which causes a damage obliges the author of the fault to repair the damage.

Where the case is urgent and there is a risk of serious and irreparable damage, the competitor of the recipient of an aid may also bring interlocutory and urgent proceedings applying for interim measures. However, the competitor will not, in this case, be able to apply for damages.

2.2 Procedures concerning the enforcement of negative Commission decisions

In cases where repayment has been ordered by the Commission, the Authority which had originally granted the aid may initiate ordinary proceedings before a civil court in order to recover that aid. This action will be subject to the general rules of civil proceedings contained in the Judiciary Code.

Belgian courts have decided that when the Commission does not approve an aid and the State decides to recover it, recipients of the aid are not allowed to invoke the general principle of legitimate expectations in order to withhold the aid.

Furthermore, after a negative Commission decision, an action for damages by a third party can also be initiated before a civil court. That third party can be a competitor but can also be a creditor of the beneficiary who suffers as a result of repayment and may thus have an action for damages.

3. List of cases with summaries

³ Conseil d'Etat, 6^{ème} Chambre, 25 June 1981, RACE 1981, p. 1005.

⁴ Namur, 2 December 1986, Revue Générale de Droit, 1987, p. 199.

⁵ Bruxelles, 2^{ème} Chambre, 5 June 1986, RGAR, 1987, 11261.

3.1 Decision of the Supreme Court (*Cour de Cassation*) of Belgium of 18th June 1992 (A)⁶

Facts: This case concerns the implementation of a negative Commission decision. The aid granted by the Belgian State took the form of a subscription for shares in the capital of a private company. In its decision the Commission ordered the recovery of the aid because procedure of Article 93(3) had been ignored by Belgian authorities.

Decision: The Supreme Court (*Cour de Cassation*) stated that Articles 92 and 93 of EEC Treaty have to be considered as imperative rules. The Supreme court stated that as Article 93 was not respected, the subscription to the capital of the company had to be declared null because of illegal basis. The Belgian State was entitled to recover its contribution.

The company which received the aid entered into a composition with creditors, and the Belgian State deemed the enrolment of its contribution to be a debt of the company. When the Belgian State attempted to recover the aid, the Court of Appeal (*Cour d'appel*) of Liege said that the Commission negative decision cannot turn shares held by the State into a simple unsecured debt⁷. The Supreme Court (*Cour de cassation*) ruled that the Court of Appeal (*Cour d'appel*) of Liege had wrongly decided that shareholders of a company cannot be considered as creditors of its registered capital.

3.2 Decision of the Commercial Court (*Tribunal de Commerce*) of Brussels of 3rd December 1981 (C)

This decision was taken in the framework of a composition with creditors. The action was introduced by a private company in order to obtain an authorisation for opening a restructuring process in which the State would participate. The Court stated that if a public authority proposes to become a shareholder of a private company in difficulties, the procedures of Article 93(3) would have to be observed beforehand.

⁶ Etat Belge, Ministère des Affaires Economiques c/ SA Tubemeuse et crts., 18 June 1992 (RG 9152), Pass. 1992, p. 917, n°546.

⁷ Liège, 15 février 1990 (RG 20612/87, unpublished).

3.3 Decision of the Commercial Court (*Tribunal de Commerce*) of Brussels dated February 13th 1995 (H)⁸

Facts: The Belgian National Railways Company made an invitation to tender to which Manoir and Breda, two private companies, submitted tenders. Prices of Breda were 40% lower than those offered by Manoir. Manoir argued that Breda was able to offer its services at a lower price because it received an illegal aid from the Italian State. It started judicial proceedings against Breda on the basis of unfair competition law.

Decision: The Court noted that Breda received an aid which had not previously been notified to the European Commission. The Court stated that in order to determine whether the procedure under Article 93(3) has been respected, national courts must apply the notion of aid contained in Article 92.

The court stated that Breda could not argue that a national court cannot decide on its own whether aid is present, in the absence of a Commission decision. The Commercial Court said that a final decision of the Commission stating that the aid is valid will not render the aid legal from the beginning. In fact, as the Commercial Court stated, the subsequent decision by the Commission that an aid is compatible with the Common market does not render valid a posteriori the acts granting aid in infringement of Article 93(3), which remain invalid.

The Court reminded that the role of national courts is to safeguard rights which individuals enjoy as a result of the direct effect of the prohibition laid down in the last sentence of Article 93(3). As national courts should use all appropriate remedies and apply all relevant provisions of national law to implement the direct effect of this obligation, the Commercial Court declared the procedure incompatible with Article 93 and stated that Breda had committed an act of unfair competition in the submission of tenders. Thus, the Court decided that Breda should be excluded from the bidding process.

3.4 Decision of the Commercial Court (*Tribunal de Commerce*) of Gent of February the 25th 1994 (A)⁹

Facts: This case concerned an aid granted by the Belgian state to the private company Kunststoffen NV on July 28, 1983. The Commission declared the aid incompatible with the common market on November 30, 1983¹⁰, and ordered the Belgian state to recover the aid. As the Belgian state did not commence proceedings to recover the aid, the Commission sued the Belgian State before the ECJ under

⁸ Journal des Tribunaux, 1995, p. 72.

⁹ Rev. Dr. Comm. Belge, 1995, p. 51.

¹⁰ OJ 1984 L 62/18.

Article 169. The ECJ issued its decision on February 21, 1990¹¹. Kunststoffen NV refused to reimburse the aid and the Belgian State brought an action against it before the Commercial Court (*Tribunal de Commerce*) of Gent in September 1991.

Decision: The Commercial Court (*Tribunal de Commerce*) of Gent stated that a definitive decision taken by the Commission according to Article 189 of the EC Treaty is binding on national courts: a national court could not subsequently examine the legality of such a decision and any prior proceedings taken under Article 93(3). Only the ECJ could decide on the legality of the proceedings following an action for annulment under Article 173¹². Thus, Kunststoffen should have brought an action under Article 173 of the EC Treaty against the Commission decision of November 30, 1983. The Commercial Court (*Tribunal de Commerce*) of Gent also stated that, even if the addressee of that decision was the Belgian State, Kunststoffen was directly concerned by the decision and the ECJ would have declared its action admissible¹³. In the same way, the Commercial Court said that a Member State which does not appeal under Article 173 cannot challenge the validity of a Commission decision through infringement procedures under Article 93(3).

Kunststoffen also argued that reimbursement of the aid was against the principle of confidence. The Commercial Court (*Tribunal de Commerce*) of Gent declared that an aid granted by the State without respecting Article 93(3) of the EC Treaty cannot create any confidence for its beneficiary.

3.5 Decision of the State Council of 18th May 1982 (D)¹⁴

Facts: In 1979, the Belgian State decided to develop a new industrial area. The State entrusted the development of the project to a commercial company called SDBL (*Société de Diversification Belgo Luxembourgeoise*). The project created work for 142 unemployed steelworkers. The steel industry was in crisis, and the State paid the 142 workers directly.

The non-profit making association *Chambre Syndicale du Bâtiment et des Travaux Publics du Luxembourg*, which represents several private companies in the building industry, brought an action against the Belgian Authorities before the State Council. The Chambre argued that, as the Belgian State paid some of the workers who participated in the project, SDBL was receiving an aid incompatible with Article 92. The Chambre asked the State Council to declare the decisions taken by Belgian Authorities void, stating that those workers were paid by the State.

¹¹ Commission/Belgium, C-74/89, ECJ, 21 February 1990, [1990] ECR I-492

¹² ECJ, 22 October 1987, [1987] ECR 4231.

¹³ ECJ, 17 September 1980, [1980] ECR 2671; 13 March 1985, [1985] ECR 809 and 4 February 1992, [1992] ECR 518.

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Decision: The State Council declared that a project whose object was to grant work to unemployed steel workers had a social character. Furthermore, their work had a public purpose. For these reasons, it considered that there was no competition with the private sector and therefore no question of State aid under Article 92 of the EC Treaty. The measure was declared legal.

¹⁴ RDCE, 1982, n. 22.253, p. 833.