2. Report on the availability of judicial remedies at Dutch courts in the field of State aids

2.1 Introduction

In the Netherlands both administrative and civil courts deal with issues of State aid. A list of cases with summaries of the relevant decisions is provided in the second part of this report. The following actions can be lodged at Dutch courts.

1) action for damages brought by a competitor against the beneficiary of the aid and/or the agency that granted the aid for losses as a result of the unlawful grant of the aid

2) request for an injunction made by a competitor threatened with injury by such aid against the agency that granted the unlawful aid (for example an order prohibiting the grant of any further aid and the recovery of support given) ;

3) action by a competitor against the agency that granted unlawful aid for annulment of the act implementing the aid;

4) action against the agency that granted aid for annulment of the decision to collect a levy imposed on an undertaking where the levy is used to finance unlawful aid.

5) action by the agency that granted aid against the recipient to recover aid granted contrary to Article 93(3) of the EC Treaty or that, on the basis of a Commission decision, is not compatible with the Common Market

2.2 Actions for damages

Civil courts have jurisdiction over actions for damages related to the unlawful implementation of aid. Competitors who have suffered loss as a result of illegal aid can bring actions for damages before a civil court against the agency that granted the aid, and against the beneficiary. The court has to interpret and apply the concept of State aid contained in Article 92 EC Treaty, to determine whether aid given, without observance of the preliminary examination procedure laid down by Article 93(3) of the EC Treaty should be subject to the procedure of Article 93(3) of the EC Treaty.

Loss of profit can be claimed from an awarding entity, or from the recipient, by a competitor which has offered the second-best tender.

Cases 3.1 and 3.2 are examples of such an action for damages taken by a competitor. One of the complaints of the claimant in these proceedings was for cross-subsidization of the municipal press by the town of Amsterdam. This cross-subsidization, however,

was assumed to have started before the date the EC Treaty came into force. The District Court of Amsterdam therefore decided that the aid was not subject to the procedure in Article 93(3) of the EC Treaty.

It is interesting to note that the competitor started proceedings both against the agency that granted aid and against the public undertaking which took advantage of the subsidized tender made by the beneficiary of the cross-subsidisation. The competitor argued that the public undertaking that took advantage of the subsidized tender should have protected it against the illegal State aid and should not have accepted the tender of the beneficiary.

2.3 Request for an injunction

Summary proceedings before the presidents of civil district courts are initiated to obtain interim orders preventing agencies granting illegal aid or against the beneficiary of such aid. Since the General Act on Administrative law (Algemene wet bestuursrecht, hereinafter: "Awb") entered into force on 1 January 1994, proceedings for administrative preliminary relief should be initiated before the presidents of administrative district courts where an administrative decision to grant aid is involved.

Interim measures will be granted if the following conditions are met:

urgency

fumus boni juris

balance of interest in favour of the applicant

In Case 3.3 orders were sought from the President of the civil district court of Leeuwarden against the municipality that granted aid. The purpose of the action was to require the beneficiary to repay the aid and to prevent the grant of any further aid. The Supreme Court in this case applied the "market investor" rule to determine whether favourable payment conditions and a loan guarantee constituted State aid. The request for interim measures was rejected on the basis of the market investor principle.

2.4 Action for annulment of the decision to grant aid

The grant, refusal or withdrawal of subsidies to private undertakings is an administrative decision, even if the aid concerned is drawn from general public funds and executed by contract under civil law. A new chapter is being introduced into the Awb relating to the grant or refusal of financial aid to private undertakings. The proposed provisions on financial aid do not cover agreements dealing with the actual payment of the aid. Such letter agreements may be enforced by the civil courts.

Actions against aid granted through non-administrative acts (such as aid granted through participation in the share capital of a private company) should be lodged at civil courts.

Appeals against decisions of a public body must, under the Awb, be lodged at the administrative chamber of the district court. The Council of State has jurisdiction in an appeal against the decision of the district court. However, district courts are only competent where no other administrative court is designated by the relevant legislation. In legislation on subsidies, for example, the Court of Appeal for Trade and Industry (College van Beroep voor het Bedrijfsleven) is frequently the relevant administrative court for an appeal against a decision of an agency that grants a subsidy.

Appeals are only admissible after a compulsory review procedure within the administration has been completed. A request for such a review should be directed to the administrative body which took the decision. Re-examination may also be carried out by a higher administrative body (administratief beroep). Subsequent judgments of the district court can be appealed to the Council of State (Afdeling Bestuursrechtspraak van de Raad van State).

Case 3.5[1] deals with aid related to the establishment of a salt-producing company in the town of Harlingen. It concerns an appeal lodged by competitors against a decision of the agency that granted a subsidy (the Secretary of State for Economic Affairs) not to review its decision to grant the subsidy. The agency was ordered to reconsider the request for review as it had failed adequately to handle the request.

2.5 Action against levies

An appeal can be lodged against decisions of public bodies to levy charges for the financing of illegal State aid at the Court of Appeal for Trade and Industry (College van Beroep voor het Bedrijfsleven).

An interesting decision was given by the Court of Appeal for Trade and Industry in Case 3.6. The Court decided that both the contested levy for an illegal aid measure and the contested “demand note” were illegal. While the Commission had decided that a certain aid was illegal as a result of its being financed by levies, and had prohibited future aid, “demand notes” for the period before the Commission decision were, according to the Court, valid.

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[1] like case 3.3

2.6 Action by agency to recover aid / enforcement of Commission decisions

A Commission decision in which aid is declared incompatible with the common market can be enforced by the agency that granted the aid. The agency can require repayment of the aid from the recipient. The legal basis for such a decision is the civil law doctrine of undue payment (onverschuldigde betaling) and of unjustified enrichement (ongerechtvaardigde verrijking).

A decision by an agency to recover State aid is governed by the Awb. This was established for undue payment by the Council of State in its decision of 21 October 1996 in the case Nanne vs Secretary of State[2] and for unjustified enrichment in its decision of 26 August 1997 in the case between "Noord Kennemerland" and the Ministry of Housing, Planning and Environment[3]. According to the Council of State these principles are administrative in nature if they are applied in a case which is in the field of administrative law. An appeal against such a decision by a beneficiary of the aid, ordered to repay the aid, can therefore be lodged at the competent administrative Court. Again, most cases (again) this will be the Court of Appeal for Trade and Industry.

A difficulty arises when the agency is a local public body that does not intend to enforce a negative Commission decision. It is assumed that the Government does not have the legal powers to impose recovery by such agencies. However, competitors may request a review and lodge an appeal at the competent administrative court against a written refusal by an agency to recover illegal aid. Even if the Commission would take a positive decision declaring unlawfully introduced aid compatible with the common market, a court has to declare measures adopted before such finding unlawful. A beneficiary is therefore not protected against actions to order an agency to recover aid.

3. List of cases and summaries

3.1 District Court Amsterdam

15-11- 1995, Security Print Vianen B.V. against the Municipality of Amsterdam, nr. 93/3410 **(H)**

Facts: 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

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2 Afdeling Bestuursrechtspraak Raad van State, nr H01.96.0142, AB 1996/496

3 Afdeling Bestuursrechtspraak Raad van State, nr. E04.96.0236, AB 1997/461

personality that 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 :

1. availability of capital provided by the Municipality
2. profitable loans provided by the Municipality
3. contracts awarded by the Municipality
4. guarantee of continuity by the Municipality
5. covering of all losses by the Municipality
6. no writing-off on goodwill
7. no subjection of MPA's profits to company taxes

Security Print alleged these advantages contrary to Article 92(3) of the EC Treaty. The Court considered that where a State aid Measure existed as at 1 January 1956, this did not have to be notified to the European Commission. Since MPA has formed part of the Municipality since 1735 the Commission did not have to be informed of the advantages accorded to it by the Municipality.

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

3.2 District Court The Hague

5-11- 1995, Security Print Vianen B.V. against Vervoerbewijzen Nederland BV, nr. 93/3937 **(E)**

Facts: The facts of this case have been indicated in case 1 in which Security Print claimed damages from the Municipality of Amsterdam, the grantor of the aid. In this second case, Security Print also claimed damages from Vervoerbewijzen Nederland BV. According to Security Print, Vervoerbewijzen Nederland BV knew or should have known, when awarding the contract, that Security Print had an advantage as a result of illegal State aid. Vervoerbewijzen Nederland should, claimed Security Print, have protected them against the unfair competition from MPA.

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

3.3 Supreme Court (Hoge Raad)

3 January 1997,

Le Comité des Salines de France and La Compagnie des Salins du Midi et des Salines d'Est against The municipality of Harlingen, nr 16148, NJ 1997/303 **(D)**

Facts: The Le Comité des Salines and La Compagnie des Salins alleged that State aid for the establishment of a salt works in Harlingen was not only granted by the Secretary of State for Economic Affairs[4] but also by the Municipality of Harlingen. The aid given by the Municipality related to the sale of a site by the Municipality to Aliss. More specifically the Municipality allowed deferment of payment of the purchase price and it gave guarantees with regard to a loan.

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

to prohibit the Municipality's support of Frima BV or Aliss BV without the approval by the European 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 DGL 10.000 for each infringement of the judgment of the President.

Decision: 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 under normal market conditions have have sold its land. Therefore there was no State aid granted by the Municipality. This judgment of the Court of Appeal was confirmed by the Supreme Court.

3.4 President of the District Court of The Hague (H)

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4 *See* case 5

February 26, 1993, Construcciones Aeronautics SA ("Casa") against The State of the Netherlands, nr 93/146

Fact: The Dutch Ministry of Defense 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 92 EC. The award of the contract to Fokker, would, they claimed, be State aid because the Fokker air planes are each 10 million NLG more expensive than similar Casa air planes and because the Ministry of Defense would pay Fokker's development costs. The State of the Netherlands argued that Article 223 of the EC Treaty precluded the applicability of Article 92 of the EC Treaty.

Decision: 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.

3.5 Court of Appeal for Trade and Industry (College van Beroep voor het Bedrijfsleven)

Le Comité des Salines de France and La Compagnie des Salins du Midi et des Salines d'Est against The Secretary of State for Economic Affairs (Staatssecretaris van Economische Zaken) and Frima BV, nr. 94/2940/062/230 **(D)**

Facts: Le Comité des Salines and La Compagnie des Salins du Midi requested review of a decision of the Secretary of State of 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 DGL 11,338,500. This subsidy was granted under the Regulation of Subsidies for Regional Investment Projects[5]. 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.

Decision: 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 were breached, because the Secretary of State had not adequately responded to the complainant'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

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[5] Subsidieregeling regionale investeringsprojecten, Stcrt. 1991, 81

reconsider the request for review (the final decision found that there was no illegal State aid).

3.6 Court of Appeal for Trade and Industry (B)

(College van Beroep van het Bedrijfsleven)

26 November 1991, Gebroeders Bakker Zaadteelt en Zaadhandel B.V. against The Public Organisation for Trade in Horticultural seed (Bedrijfschap voor de Handel in Tuinbouwzaden), Nr 89/2275/47/003, 90/0221/47/003, 90/2708/47/003

The European Commission decided on 11 October 1989[6] on the basis of Article 93(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 e.g. 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 the grant of any further such State aid through the Public Organisation for Trade in Agricultural Seeds (hereinafter: "POAS").

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

The Court noted that the European Commission had not been informed of the POHS intent to grant the aid. These measures were thus contrary to Article 93(3) of the EC Treaty. 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 prohibits the grant of further aid and is addressed to the Dutch government. It therefore applies 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 191 of the EC Treaty) 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

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6 Decision 90/189 EEG

7 Court of Justice, 14 February 1990, C-301/87, considerations 9,11 and 19

against the claimant grower of 14/12/1984 was according to the Court, valid. The demand made on 04/01/1990, however, was annulled.

3.7 President of the District court of The Hague (B)

30 November 1983, Vereniging van Exploitanten van Gasbedrijven in Nederland (VEGIN) and Veluwse Nutsbedrijven NV against The Dutch state and NV Nederlandse Gasunie, nr 83/927

Facts: On 2 October 1984[8] the Minister of Economic Affairs fixed the minimum price for natural gas to be paid by gas distribution companies to suppliers. VEGIN and Veluwse Nutsbedrijven petitioned 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 benefit 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 internal Dutch prices, an increase in the prices for the customers of the distribution companies as a result of the minimum prices would result in export prices rising above the prices of large industrial consumers.

Decision: The President rejected the argument made by VEGIN and Veluwse Nutsbedrijven. His view was that an annulment or suspension of the decision of the Minister of Economic Affairs would not lead to a change of the purchase prices for other consumers in the Netherlands.

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[8] Stcrt. October 24 1984