4. Summary and analysis of case law

The country reports have identified a **total number of 116 cases** in national courts.

In each country, the rapporteurs have used all available data bases and legal periodicals that are to identify cases before national courts in which Article 92 and/or 93 EC Treaty have been discussed. The rapporteurs have also been able to identify some cases that have not (yet) been published.

So, while, due to the different traditions on the publication of national court decisions in the Member States, it is impossible to state with certainty that there are no other national cases dealing with EC State aid law, the Report probably contains all substantial relevant cases.

In light of the total number of State aid cases before the European Commission and the European courts, the total number of cases before national courts on EC State aid issues appears to be limited. Not surprisingly, there are more cases in the original Member States than in those which joined the Community at a later stage. France, Germany, and Italy together account for 75% of the total number of cases.

One of the main aims of the Report was to identify cases that were brought by competitors of (potential) beneficiaries of aid before the national courts. The findings of the Report on the position of competitors are summarised in the two tables attached. Table I shows which remedies are available to competitors in the individual Member States according to analysis of the different country reports in Section 2. Table II contains the analysis of the decisions discussed in Section 3.

We have attempted to analyse how different legal systems work in the Member States by categorising cases according to the specific procedural situation of, and the economic goal pursued by, private parties. In determining the different categories, we have focused on an economic approach, omitting purely legal distinctions such as the distinction between administrative and ordinary civil courts which is one of the traditional features of most continental legal systems.

The categories are listed in the columns in Table II. Each case in the Report was categorised and marked accordingly (with a letter from A to H).[1]

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[1] Example: case 3.1 in the Belgian report is an "A"-case which involves a beneficiary resisting recovery by the Member State.

The first three columns in Table II show the cases that involved litigation not started by competitors. Of the total number of cases of 116, the vast majority, a total of 87 cases (75%), did not involve action by competitors. Therefore, in the following analysis of the cases discussed in the Report, we will first look at these categories turning later to those that were commenced by competitors.

4.1. Cases not involving competitor actions

4.1.1 Recovery actions by national authorities (challenges of recovery by beneficiaries) following negative decisions of the European Commission (Category A)

Actions for recovery of incompatible aid by national authorities following a negative decision of the European Commission represent an important category of cases. The total number is 16.

In a number of these cases, the beneficiaries have invoked **principles of national law to challenge the recovery action**. The principle of legitimate expectations was invoked, for example, by the plaintiff in a 1985 case before the Administrative Court of Lazio (case 3.3.1 in the Italian report). The plaintiff had taken out substantial banking loans in reliance on a subsidy that was later declared incompatible. The best known case in which a beneficiary of aid attempted to resist recovery by relying on defences under national law is the *Alcan*-case, which was decided by the German Federal Administrative Court in April 1998 (case 3.2 in the German report). In the *Boussac* case (case 3.21 in the French report), the Administrative Court of Paris found that a negative Commission decision is in itself an instrument of enforcement (*acte de recouvrement*) which does not require implementation into national French law.

There may be a particular problem in the recovery of aid where aid has been granted **via a private intermediary (often a bank) or via a contract** rather than by a straightforward cash grant. While it is clear that a Member State is under an obligation to recover the aid regardless of the form in which it was granted, Member State systems may often not be well-equipped to address all situations that may arise. Cases 3.7 and 3.21 in the German report discuss situations in which recovery may be difficult.

The Report does not identify any recent cases in which beneficiaries of aid have been able successfully to resist recovery relying on principles of national law. This **no longer** appears to be an area of concern.

4.1.2 Most frequent cases: imposition of discriminatory (tax) burdens (Category B)

The largest category of cases in which private parties have pleaded breaches of Articles 92 and 93 EC Treaty before the national courts has involved challenges of tax or similar legislation under which a financial burden was imposed on the plaintiffs. In those cases the plaintiffs identified other groups of companies which were **exempted** from the tax or levy to argue that the (allegedly discriminatory) exemption constituted State aid in breach of Articles 92 and 93 EC Treaty. While these cases often also involve competition aspects, we have not classed them as competitors' actions because they reflect a **defensive** rather than an offensive attitude of the complainants, who generally merely attempt to avoid being taxed themselves rather than actively pursuing an action against the grant of aid to a competitor.

This category amounts to 60 cases in total which represents 52% of all cases. This class of case appears to be particularly common in France.

In the vast majority of these cases, the argument based on Article 92(1) EC Treaty was rejected by the courts. There has been, however, a recent case in the U.K. (case 3.2 in the U.K. report) in which a specialist travel insurer successfully claimed that a higher premium tax rate imposed on travel-related risks violated Article 92(1) EC Treaty. The argument that certain classes of unfair taxation amount to a breach of State aid rules has also been raised before the courts in the Netherlands and Spain.

This category of cases does **not** give rise to concerns or suggestions.

4.1.3 Cases involving institutional disputes (Category C)

In some Member States, aid can be granted by the central government, the regions, or the municipalities. In addition, there are normally several governmental bodies which have the power to grant aid. This can give rise to litigation between different levels of administrative bodies.

In Italy, there have been five cases involving action by the central government against legislation of the region of Sicily (cases 3.1.1. to 3.1.5 in the Italian report). In each the central government alleged that Sicily had violated Article 92(1) EC Treaty. In two of these cases, the regional law was declared to be in breach of EC and/or national constitutional law. A similar class of case is that where different governmental bodies disagree on issues raised on the privatisation of companies (case 3.8. in the French report deals with issues raised by the "*diversification*" of Electricité de France and Gaz de France).

It is worth noting that no such case law appears to exist in other Member States with a federal structure (such as Germany).

In Spain, there is a special national procedure under the Defence of Competition Act (see Section 2.4 of the Spanish Report) which is designed to control grants of aid. However, that procedure has not yet been used.

Again, this category of cases does **not** give rise to concerns or suggestions.

4.2. Actions by competitors

According to the Commission notice and the case law of the European courts, actions by competitors of beneficiaries of State aid against the grant of such aid are by far the most important instances in which a dispute should be brought before national courts. However, the actual number of cases brought by competitors is limited (28 cases or 24% of all cases). There are only three cases in which competitors have been able to achieve their economic goal (case 3.3 in the Belgian report; case 3.1 in the German report - this case is still under appeal; and case 3.2 in the UK report). This is somewhat surprising in the context of the remedies that, according to the findings of the report, are available to competitors in the individual Member States.

4.2.1. Actions for annulment of aid decisions (recovery of aid) against Member States (Category D)

The Report discusses 20 cases in which competitors have brought an action against the Member States which granted the aid for an annulment of the aid decision (leading to a cessation of recovery). This is not surprising because, according to Table I, each Member State offers a suitable remedy to the competitor of the beneficiary of an aid. In each Member State a competitor will normally be able to bring an action to stop the grant, for recovery of aid, or for damages against the Member State itself. In the civil law Member States these actions will normally be brought before the administrative courts.

Locus standi of competitors in administrative court proceedings does not appear to be a problem. Most national courts recognise that a plaintiff's rights will generally be affected by a grant of illegal or incompatible aid to a competitor. With the exception of a 1982 German case (case 3.21 in the German report), the report does not reveal any decisions in which a plaintiff that was the competitor of the beneficiary was denied *locus standi.* In a case of 2 September 1998, a German administrative court, for the first time, expressly took the view that Article 93(3)(3) is designed to protect competitors and can therefore be the basis for an injunction in administrative court proceedings (case 3.1 of the German report).

Some Member State courts have applied a broad test in determining *locus standi,* permitting even a challenge by plaintiffs that were not active on the domestic markets in the relevant Member State. The most striking example is the decision of the Dutch Court for Appeal for Trade and Industry (*College van Beroep voor het Bedrijfsleven*) (case 3.5 in the Dutch report) which allowed an action by French salt producers against the grant of a regional subsidy to a producer located in Friesland without establishing that the French producers were actually active on Dutch markets. The court thus recognized that the EC State aid rules are designed to safeguard a Europe-wide level playing field and require national courts to **look beyond their borders** when assessing the possible adverse effects of illegal or incompatible aid.

It should be noted that out of the 20 cases discussed in the Report only one (case 3.1 in the German report - which is still under appeal) has ended in a successful result for the plaintiff competitor. While every case must be judged on its merits, the relatively high number of unsuccessful actions, and the lack of successful actions, reflects an uneasiness of national courts when dealing with EC State aid matters. In our view this

is mainly due to **the lack of transparency of substantive and procedural rules at EC level** and the limited knowledge of these rules at lower and mid-level courts in the Member States. Further efforts should be made to clarify the rules and to spell out clearly for courts and lawyers what can be done further at national level. Training of national judges and lawyers in applying these rules may be a way to improve private enforcement at Member State level.

4.2.2 Injunctive relief against Member States (Category D)

In all Member States except France and Portugal, it appears that injunctive relief would in principle be available in a case against the Member State to prevent the grant of illegal aid.

While the Report does mention a few cases in which complainants sought injunctive relief against grants of aid to their competitors, courts appear to be hesitant in granting such relief. The main reason may be that national courts are reluctant to decide, in interlocutory proceedings, on a violation of complex EC-law rules by national governments, and in particular, where a finding in favour of the complainant could have serious economic effects for the potential beneficiary. Again, the lack of clarity and transparency of the substantive and procedural rules governing the application of Articles 92 and 93 EC Treaty by the European Commission and the European courts does not encourage national courts to apply these rules in interlocutory proceedings. These proceedings in most national systems require the establishment of a ***prima facie*** case by the plaintiff. It can be expected that the situation will improve somewhat once the block exemptions under consideration by the European Commission and a procedural regulation have been adopted.

Sometimes courts that are faced with a request for injunctive relief are not fully clear as to whether the measure in question actually qualifies as “aid“ and whether the aid may or may not be declared compatible with the common market by the European Commission. A typical case was decided by the Higher Administrative Court (*Oberverwaltungsgericht*) of Northrhine-Westphalia on 19 December 1995 involving a waste paper collection company in Aachen (case 3.6. in the German report) which had received a cash grant. The beneficiary of the aid made a commitment to pursue certain social goals such as the education and training of unemployed teenagers. Both the Administrative Court and the Higher Administrative Court held that it is not clear whether the cash grant actually constituted aid or whether it was simply designed to compensate the beneficiary for additional costs incurred in the pursuit of its social

goals. Both courts took the position that it was for the European Commission to decide whether the grant was to be classed as aid and whether that aid would be compatible with the EC Treaty, and therefore rejected a motion for injunctive relief. The position of the High Administrative Court of Northrhine-Westphalia is to be contrasted with the recent decision of the Administrative Court (*Verwaltungsgericht*) Magdeburg which did issue an injunction against a governmental agency based on an infringement of Article 93(3) EC Treaty in a privatisation matter (case 3.1 in the German report).

4.2.3 Damage actions against Member States or beneficiaries (Categories E and G)

Some form of action for damages against the Member State for the grant of illegal aid appears to be available in all Member States. The legal systems of most Member State legal systems contemplate some form of action for damages based on breaches of legal provisions designed to protect competitors. The core issue in bringing damage actions appears to be the high standard of proof which applies in proving the causal link between a breach of the law and actual losses incurred. In some Member States such actions would be based directly on community law (under the *Francovich*-doctrine).

The Report does not mention any successful action for damages although there have been a few attempts by competitors to bring actions both against Member States and the beneficiaries (a total of four cases).

We do not think that this category of cases should deserve special attention because the **problem of causation** which is common to all legal systems makes successful actions virtually impossible.

4.2.4 Action/injunction by competitor against aid beneficiary (Category F)

In most Member States it is not clear whether a competitor has a direct action against the beneficiary of the aid. Such an action must be based the national law of the respective Member State rather than on EC law. In some Member States unfair competition rules may serve as a basis to bring an action against the beneficiary of the illegal aid. However, these waters still need to be tested.

Except for government procurement cases, complainants before national courts that wish to obtain relief against the grant of an aid to a competitor face the problem that

there are no express remedies under national law designed to support an action by a competitor against the beneficiary.

There are **three cases** - one from Austria, one from France (case 3.23 of the French report), and one from Italy (case 3.2.5 of the Italian report) - where competitors attempted to use their domestic law of unfair competition to block the grant of aid. Most legal systems include in their unfair competition laws a provision containing a general prohibition on companies engaging in unfair acts. There is no convincing answer to the question whether the mere acceptance of illegal or incompatible aid constitutes an act of unfair competition. In some of the continental legal systems taking advantage of a breach of the law by a third party can constitute an act of unfair competition (in Germany and Austria: "*Vorsprung durch Rechtsbruch*"). However, normally this requires proof of at least **some degree of active participation** in the breach of the law by the party accused of unfair competition. It is not clear whether this test will be satisfied by a party that merely applies for aid which is subsequently granted without being notified to the European Commission; it could well be argued that it is for the Member State to ensure that Article 93(3) EC Treaty must be complied with and that a beneficiary that does not actively seek to convince a Member State to notify the grant of the aid does not commit an act of unfair competition. This may differ in cases where the beneficiary **colludes** with the authorities of the Member States in concealing the aid.

In the Italian case (3.2.5), the Court of First Instance of Genoa stated that acceptance of unnotified aid does constitute an act of unfair competition by the beneficiary, and may potentially be grounds for an injunction. However, in the case before it, the court did not find aid to be present.

A further open issue under unfair competition law, is whether a plaintiff under these rules can seek **recovery** of aid already paid out. Some Member State systems may limit the remedy to an injunction against the intended beneficiary prohibiting it from accepting the aid. Once the aid has been paid out, the plaintiff may be limited to an action for damages.

In our view, the question of whether the acceptance of aid that has been granted contrary to Articles 92 and 93 EC Treaty constitutes an act of unfair competition under the domestic legal systems of the Member States is an issue deserving further study. Such study would, however, go beyond the scope of this Report. The empirical evidence found by the national rapporteurs on this question is too anecdotal to reach a conclu-

sion as to whether the domestic legal systems of the Member States share a common approach on this question.

4.2.5 Injunctive relief against beneficiaries in public procurement cases (Category H)

One of the prominent cases in which a plaintiff obtained injunctive relief is the Belgian Railways case (case 3.3 in the Belgian report) where, in a public tender, one of the tenderers was able to prevent a competitor from participating in a bid, because that competitor had received illegal aid. The Brussels Commercial Court issued an injunction against the beneficiary of the aid. This particular remedy, which is available in public procurement cases, appears to be effective in national courts because it has been expressly provided for in EC public procurement directives implemented by the Member States. Thus, a national court, when faced with a motion for injunctive relief in a public procurement case, can apply its own domestic law without having to resort to the somewhat more uncertain direct application of EC law rules. There are also two Dutch cases (3.1 and 3.4 in the Dutch report) in which tenderers in procurement cases (unsuccessfully) raised State aid arguments.

Implementation of a State aid element in the public procurement directives has thus proven to be an efficient means to secure the enforcement of State aid rules by private parties.

4.3 Summary and recommendations

4.3.1 The AEA Report discusses all cases that have been reported in the Member States.

4.3.2 The AEA Report identifies a limited number of cases (116) in which national courts have applied Articles 92, 93 EC Treaty.

4.3.3 More than half of the cases discussed concern situations in which a company sought to avoid the imposition of a tax (or other financial burden) by arguing that some of its competitors were exempt from that tax (or burden).

4.3.4 In all Member States, companies have the possibility to challenge the grant of aid to a competitor by resorting to the courts. However, not all types of actions are available in all Member States. The AEA Report discusses a total of 29 cases in

which competitors sought judicial relief against the grant of subsidies. Only three competitors were successful in their actions. The lack of successful actions by competitors is due probably not to deficiencies of the national legal systems, but rather to the limited knowledge of national judges and lawyers, and the traditional intransparency of the rules, of EC State aid law. National judges normally will be reluctant to apply complex EC rules to a national set of facts in a manner which may have far-reaching consequences for private companies. We therefore recommend a continuation of the efforts to make these rules more transparent and better known throughout the Community.

4.3.5 A further clarification of EC State aid rules, combined with efforts to make them better known at the level of the national courts, may in particular be desirable to improve the application of these rules in interlocutory proceedings. These proceedings are an important part of the competition law enforcement in Member States. They require courts to reach legal conclusions rapidly. The rules to be applied by the courts in these proceedings must therefore be clear and transparent.

4.3.6 The question of whether a competitor can directly sue a recipient of illegal or incompatible aid is an open issue in most Member States. The AEA Report identifies only four cases in which actions have been brought directly against recipients. We recommend that the question of whether acceptance of illegal aid constitutes an act of unfair competition under the domestic legal systems of the Member States be studied in more detail than has been possible in this Report. This may lead to a proposal for the harmonization of Member State law in this area.

4.3.7 Generally, most rapporteurs felt that the legal system of their home country works satisfactorily in dealing with the issues of EC State aid law. We therefore do not see a need to propose a general harmonization of national court procedures to secure the enforcement of EC State aid rules.