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

The obligations provided for in Article 93(3) EC Treaty are part of the Portuguese legal system, under the principle in Article 8(2) of the Constitution of the Portuguese Republic[1] (hereinafter "CRP"). The Article determines the system of automatic incorporation of the provisions of adequately ratified or approved international conventions. There exist, therefore, no obstacles under national law to the application of Article 93(3) with direct effect as recognised by the ECJ since the decisions in *Capolongo*[2] and *Lorenz*[3]. It is up to national courts to establish the consequences of the application of Article 93(3) as part of Portuguese law regarding the relationship between the State and individuals, as well as between individuals, in accordance with the rules and judicial remedies available.

The prohibition in the last sentence of Article 93(3) does not create a mere suspensory effect of the Commission decision to open proceedings provided for in Article 93(2). According to established case-law of the ECJ, the prohibition extends to aid granted during the Commission's preliminary examination and, in particular, to aid granted before any notification is made to the Commission. The latter probably represent the majority of cases on the illegal grant of aid in violation of Article 93(3). Despite the fact that the prohibition has a preventive or interim function, and that, consequently, it has force only until the final Commission decision in the proceedings[4], the violation of the prohibition constitutes a material or substantive breach of the law as opposed to a mere formal or procedural one. This material nature obviously does not result from an assessment on the incompatibility of the aid with the Common Market, which can only be undertaken by the Commission in its final decision. It is based rather on the fact that the prohibition is independent from the procedural obligation to notify, neither starting nor terminating with such notification. The ECJ position that a favourable decision of the Commission on the compatibility of the aid with the Common Market does not have retrospective effect to legalise the illegal granting of the aid before such a final decision, in violation of Article 93(3), reinforces the idea that the breach is substantive in nature. It is distinct and autonomous from the actual granting of the aid declared incompatible with the Common Market.

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1 As amended by Constitutional Law 1/82, of 30 September 1982, Constitutional Law 1/89, of 8 July 1989, Constitutional Law 1/92, of 25 November 1992, and Constitutional Law 1/97, of 20 September 1997.

2 Case 77/72, *Capolongo*, [1973] ECR, p. 611, 612.

3 Case 120/73, *Lorenz*, [1973] ECR, p. 1471.

4 Either until the decision of not opening the contentious procedure provided for in Article 93 (2) or until the end of the two month time period fixed by the ECJ for the closing of the preliminary examination.

Aid granted in Portugal by means of an administrative decision, in breach of Article 93(3), may be subject to judicial review through an "action for annulment" before the competent administrative court. The administrative courts – which are independent from the Administration itself – are a separate jurisdiction from the ordinary courts, and have their highest instance the Supreme Administrative Court (*Supremo Tribunal Administrativo*, hereinafter "STA").

The "action for annulment" (inspired by the French concept of "*recours pour excès de pouvoir*") does not require a prior complaint to the administrative authority granting the aid. However, according to the traditional and still prevailing understanding of the case-law, such an action may be brought only against a final act ("*acto definitivo*") of the Administration. This means both a final decision issued in the corresponding proceedings and a decision taken by the highest body of the entity granting the aid[5]. This latter requirement may entail the bringing of a prior appeal within the Administration ("*recurso hierárquico*")[6].

The standing of competing companies to bring the "action for annulment" does not depend on the grounds invoked. As long as the party bringing the action demonstrates that it has a direct and individual interest in such annulment, it may allege the violation of any rule or legal principle or the mere existence of a material error of fact. Portuguese administrative courts have admitted for some time[7] that a relationship of competition is sufficient to entitle a company to challenge the administration's acts capable of illegally benefiting another company.

The judicial decision to annul cannot include injunctions or any other measures aimed at prescribing the subsequent action to be taken by the administration. These measures may, however, be adopted subsequently in the context of the judicial enforcement procedure, if the administrative authority does not take the necessary decisions to redress the situation.

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5 The requirement of a "final act", as stated in Article 25(1) of the Administrative Courts Procedure Act (approved by Decree-Law 267/85, of 16 July 1985), become the object of a controversy over its constitutionality after 1989, when Constitutional Law 1/89 amended Article 268(4) of the Constitution in order to guarantee the right of the individuals to bring an action against every administrative act affecting their rights or interests. So far, however, administrative courts have held that Article 25(1) is in principle consistent with the Constitution, although their case-law has shown some flexibility in what constitute preliminary or preparatory decisions. Some examples of the latter can be seen in the decision by the Supreme Administrative Court (hereinafter "STA"), of 22 September 1994, published in "Acórdãos Doutrinais do Supremo Tribunal Administrativo" (hereinafter "AD") n. 399, March 1995, p. 272.

6 See decisions by STA of 9 February 1995 (AD n. 409, January 1996, p. 35), of 17 November 1994 (AD n. 401, May 1995, p. 512), and of 16 February 1994 (AD n. 400, April 1995, p. 383), all of them reaffirming the compatibility of this previous appeal with the Constitution.

7 At least since the 50's: see decisions by STA of 9 January 1953, and of 6 December 1957; more recently, see decision of 1 March 1990 (AD n. 347, November 1990, p. 1345).

The annulled act can be renewed (with *ex nunc* effects) only if the existing irregularity may be remedied. It is generally understood that formal irregularities, such as the lack of a notification are capable of remedy[8]. However, it is not likely that a Portuguese court will accept in that case the renewal of the decision granting the aid, since the fulfilment of the notification requirement at a later stage does not affect the prohibition in the last sentence of Article 93(3).

Portuguese law admits only one interim-type of measure in the "action for annulment", being the interim suspension of the effects of the contested act. This suspension must be requested of the court and shall be granted only where the company bringing the action demonstrates that **(i)** the immediate enforcement of the contested act causes damage not easily capable of repair, **(ii)** the suspension, in turn, does not cause serious damage to the public interest, and **(iii)** the "action for annulment" is *prima facie* admissible.

The condition identified under **(ii)** depends on the reasons for the granting of the aid. As regards the former condition, Portuguese courts tend to consider that loss of market share, because it is difficult to evaluate is a damage difficult to repair[9]. Losses, however, are traditionally required to be a direct, immediate and necessary consequence of the act under review. This led the courts to exclude those losses suffered by competitors of the beneficiary. In our view, such understanding is no longer acceptable, given the recently reformulated constitutional guarantee of an effective judicial protection of individuals' rights and interests against administrative offences. In fact, this guarantee requires an interpretation that allows those seeking the annulment of an act to apply for its interim suspension. No judicial decision, however, can yet be cited to confirm this understanding.

With regard to interim measures, it is important to consider the ongoing reform of the administrative court system. This reform was initiated after the last constitutional amendments, with the purpose of reinforcing the system of judicial remedies and the guarantees of individuals. It should also be mentioned that, according to the reform projects under discussion, an assessment of the interest of the company beneficiary of the aid, i.e. the evaluation of the damage suffered by the beneficiary due to such suspension, is likely to be required in the future, to be balanced against the interest of the competitor.

The remedies referred to above ("action for annulment" and "suspension of effects") are no longer applicable when the aid is granted through acts which are not classed as

8 See, among others, decision by STA of 21 March 1991 (AD n. 370, October 1992, p. 1114).

9 See, for example, decisions by STA of 12 June 1986 and of 14 July 1988 (published in "Apêndices ao Diário da República", of 31 May 1991, p. 2530, and of 30 October 1993, p. 4105) respectively.

administrative acts. This happens, *e.g.,* with aid granted through participation in the share capital of companies, the subscription of bonds, financial operations by State-owned credit or financial institutions, civil law contracts or similar acts. In these cases the remedies available before the administrative courts are scarce, given the limited powers traditionally conferred upon them by law.

The administrative courts do not have powers of injunction which enable them to impose specific measures on the administration, except in a few situations and in a narrowly defined context except in a few situations and, to a certain extent, within the framework of judicial enforcement of annulment decisions. Outside the scope of "actions for annulment", individuals are currently entitled to bring an action only to obtain the "recognition of rights or legally protected interests", and this remedy has proved to have limited practical effects[10].

This scarcity of effective guarantees before administrative courts can hardly be overcome by the recourse to ordinary courts and civil actions. Ordinary courts will not find themselves, in principle, competent to rule on rights infringed through the violation of public law rules, as is the case of the prohibition set forth in Article 93(3).

In the meantime, it is likely that the reform referred to above will broaden the powers of administrative courts, to give effect to the guarantee provided for in Article 268(4) CRP, according to which the law must grant individuals "an effective jurisdictional protection of their legally protected rights and interests".

The infringement of the prohibition in Article 93(3) may be invoked as a ground for an action for damages by the competitors of the company benefiting from the aid. Portuguese courts do not accept such claims when based on the disregard of merely procedural or formal requirements, unless they are specifically aimed at protecting the plaintiff's interest[11]. However, this type of restriction does not affect the liability of public authorities for the violation of Article 93(3), since that violation must be considered as a substantive breach of the law and will therefore always be seen as an administrative tort.

In principle, the action should be brought against the administrative entity granting the aid and not against the company benefiting from it, since it was the administration that caused the damage through its own action. The possibility of claiming damages from the beneficiary, *instead of from the administration,* could be envisaged only where the

[10] See, among many others, decision by STA of 26 June 1997 (AD n. 430, October 1997, p. 1113), stating that "actions for recognition of rights" are a complementary remedy, its use being allowed only if all other remedies prove ineffective.

[11] See decision by STA of 1 July 1997 (published in "Cadernos de Justiça Administrativa", n. 7, January/February 1998, p. 32).

former gave cause to the breach of the law, culpably misleading the Administration as to any relevant factual element for the application of Article 93(3). Even then, however, Portuguese courts would not easily admit an action brought directly against the beneficiary of the aid, given that there is no immediate link between the behaviour of the latter and the damage suffered by the third party.

Actions for damages against administrative entities are tried by administrative courts when the damage is a consequence of public law acts. The notion of a public law act is wider than that of administrative acts and the limits are not always clear. Some hesitation may be expected when the aid results from civil and commercial contracts because they must be analysed simultaneously under both public and private regimes. The clarification of these cases could be brought about only by a wider use of the notion of "detachable acts", to make the separation between the contract and the decision (explicit or implicit) to grant a certain aid.

2.2 Procedures concerning the enforcement of negative Commission decisions

The enforcement by national authorities of Commission decisions declaring the incompatibility of State aids may be effected by non-judicial means, under the provisions on the revocation of administrative acts, as long as the aid has been granted by administrative decision. However, the reimbursement may be challenged in these cases by the beneficiary of the aid, on the basis of the rule under which unlawful acts are only revocable within the longest time limit for bringing an "action for annulment" (currently one year). This rule has a long-standing tradition in Portuguese law, because of the accepted principle that time eliminates the consequences of invalidity, unless the law exceptionally considers the act as being null and void as opposed to merely voidable[12].

The ECJ has recently considered, in the *Alcan*[13] case, that the expiry of national time limits for revocation cannot prevent Member States from enforcing Commission decisions and that the beneficiary undertaking may not invoke its legitimate expectations in the maintenance of an aid considered incompatible with the Common Market or granted in violation of Article 93(3). This understanding is not in accordance with the *rationale* behind Portuguese law, which tends to protect individuals, irrespective of their good faith, and to preserve the stability of non challenged administrative acts. It is possible that this case law may evolve in a different direction,

[12] The principle that unlawful acts are merely voidable is a main feature of the Portuguese system of administrative law, in contrast with common law systems, and implies the consolidation of non challenged acts as definite and conclusive resolutions: see, for example, decision by STA of 24 May 1994 (AD n. 395, November 1994, p. 1250).

[13] Case 24/95, Alcan, [1997 - 3] ECR. I, p.1519.

although there are no visible signs of any such change. In any case, Portuguese courts may be willing to accept the argument that the precarious nature of unlawful administrative acts must not last indefinitely.

The courts may also take the view that if a positive Commission decision does not eliminate the illegality, then a negative decision should similarly not harm the individual by extending the time limit for revocation.

Another difficulty which may arise in the enforcement of Commission negative decisions concerns the aid granted by public administration independent entities, whether at local level ("*autarquias locais*", mainly municipalities) or at regional level "*regiões autónomas*").

As a consequence of their constitutionally protected autonomy, the government has no executive means to impose on these local or regional entities the enforcement of the reimbursement of an aid granted in violation of last sentence of Article 93(3). Government's supervision powers over municipalities are restricted to inspections and other investigative procedures. The results of these inspections can lead to the dismissal of the responsible authority or authority member, but only in a certain number of situations strictly defined by law, none of which cover the infringement of Article 93(3). As to the "*regiões autónomas*" (Azores and Madeira), they are not subject to any control by government.

This lack of executive means of enforcement can hardly be compensated by the use of judicial remedies, either before the administrative courts or any other courts. Outside the collection of taxes and debts, judicial enforcement of public authority decisions is exceptional in the Portuguese legal system. The Government may not by itself apply to the courts for any kind of orders and injunctions against individuals or lower authorities. Such orders or injunctions may be sought by special magistrates acting as public attorneys ("*Ministério Público*" agents), but only against individuals in breach of the law (not regional or local authorities). Further more, "*Ministério Público*" magistrates are seen as a judiciary rather than executive body, and enjoy an accordingly large degree of autonomy. Unless the law imposes on them a specific obligation to apply to the courts (as in the case of actions for dismissal of local authorities or their members, when applicable, the decision to bring an action remains within their discretion, although they are expected to act on Government's well grounded requests. Anyway, since injunctions are not available, all that Government can get through this narrow path is an action for annulment brought against the local or regional authority's refusal to obtain the reimbursement.

The possibility for competitors to bring judicial enforcement of Commission negative decisions is of considerable importance. Current Portuguese law does not entitle them

to do so, given the restrictions imposed on the administrative courts' jurisdiction. However, in this respect, the pending reform referred to above should provide the necessary means to guarantee the "effective judicial protection" of individuals' rights, among which is, under the terms of Article 268(4) CRP[14], the possibility to obtain the "definition of the legally required administrative acts".

2.3. Procedures concerning the implementation of positive Commission decisions

Commission positive decisions are mandatory only to the that extent they include an assessment of the compatibility of the aid with the Common Market which national authorities and courts cannot oppose. It is possible for a competitor of the beneficiary to judicially challenge the act granting the aid, under the general procedures in the "action for annulment". However, if the ground for annulment is the incorrect application of Article 92 by the Commission, Portuguese courts are likely to refer the question to the ECJ under Article 177 EC Treaty. The same would apply where the competitor brings an action for damages against the authority granting the aid.

3. Cases

We are not aware of any cases in which Portuguese courts have applied Articles 92 or 93 EC Treaty.

[14] As amended by Constitutional Law 1/97, of 20 September 1997.