2. Outline of the availability of judicial relief under the German legal system

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

Actions concerning infringements of Article 93(3) EC Treaty are available under the German legal system before both administrative and civil courts[1]. To some extent, the rules on public procurement also provide for (limited) judicial relief for competitors for breaches of Article 93(3)[2]. To date, however, there have been only two cases in Germany[3] where third parties have challenged in court aid granted to a competitor based on the argument of an infringement of Article 93(3) EC Treaty.

2.1.1. Procedure before administrative courts

a. General

The typical procedure in State aid cases where a company learns of a competitor that is about to receive, or is in receipt of, State aid would be for that company to lodge an administrative complaint against the agency that took the decision to grant the aid. This complaint is called "*Widerspruch*" (objection). If the agency which granted the aid together with its supervising authority take the position that the objection should be rejected, the competitor can bring an action in the Administrative Court (*Verwaltungsgericht*) asking that the decision granting the aid be annulled.

In the event that aid is granted through a public law contract between an agency and a beneficiary (as opposed to a unilateral administrative decision; see case 3.6. in the case summary) third party competitors cannot lodge an objection (which is available only in cases involving unilateral administrative decisions). Nonetheless, third party competitors may also bring actions before administrative courts in this situation. These would aim to remove the consequences of an illegally granted aid (so-called "*Folgenbeseitigungsanspruch*"). Although there have been a few cases where third party competitors have challenged or have tried to challenge unilateral administrative decisions

1 See below 2.1.1. and 2.1.2.

2 See below 2.1.3.

3 See cases no 3.1 and 3.6 in the case summary

involving the granting of aid[4] there has been only one case[5] in which the grant of aid through a contract was challenged (unsuccessfully) in court.

Cases brought before the Administrative Court (*Verwaltungsgericht*) may be appealed twice to the Higher Administrative Court (*Oberverwaltungsgericht, Verwaltungsgerichtshof*) and (if certain condition are satisfied) to the Federal Administrative Court (*Bundesverwaltungsgericht*).

b. *Locus standi*

Under the German Act on Administrative Court Procedures (*Verwaltungsgerichtsordnung* - VwGO), a company has *locus standi* and can therefore challenge an administrative act (and likewise an administrative law contract) that is favourable to one of its competitors if administrative act is unlawful and violates the rights of the plaintiff. The view that *locus standi* exists for the infringement of rights set forth in Article 93(3) EC Treaty as well as for the infringement of rights provided for under German law (in particular fundamental rights protected by the German Constitution - *Grundgesetz*), has not been clearly expressed by German courts until very recently. An order of the Higher Administrative Court (*Oberverwaltungsgericht*) for North-Rine Westphalia dated 19 Dezember 1995[6] *impliedly* confirms the opinion of the court of first instance (*Verwaltungsgericht* Aachen) that judicial relief may be granted to a competitor where that the procedure provided for in Article 93(3) was not observed when aid was granted. On 2 September 1998 the *Verwaltungsgericht* Magdeburg for the first time *expressly* stated that a violation of Article 93(3) EC Treaty confers *locus standi* on a competitor directly affected[7]. The court found on the merits (the decision was rendered in interlocutory proceedings and was still pending on appeal when the case was reported) that Article 93(3) does prevent national authorities from granting unnotified subsidies. The latter decision was, however, based mainly on infringements of German domestic rules through the granting of the subsidy. These decisions are in sharp contrast with earlier decisions that appear not to take into account potential violations of Article 93(3) EC Treaty when deciding on *locus standi*. In an order dated 2 June 1993[8] the *Verwaltungsgericht* of Hanover looked exclusively into potential violations of rights under German law when the granting of a guarantee to a competitor was challenged. It did

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4 See cases 3.1., 3.6. and 3.9. in the case summary. Case 3.9. did not involve a claim of a violation of Article 93(3) (although the argument could have been made).

5 See case 3.21. in the case summary.

6 Unpublished as of yet; see case 3.6. in the case summary.

7 See case 3.1. in the case summary.

8 Unpublished as of yet; see case 3.9. in the case summary.

not deal with the question of whether the intention to grant the guarantee had been notified under Article 93(3) EC Treaty (*locus standi* was, however accepted on the basis of a potential violation of "German law" rights in this case). Likewise, the Higher Administrative Court (*Oberverwaltungsgericht*) of Münster in its judgment of 26 November 1991[9] took the view in an *obiter dictum* that a violation of Article 93(3) EC Treaty was not sufficient ground for a claim for repayment of subsidies as a "mere" violation of Article 93(3) EC Treaty is not equivalent to incompatibility with the Common Market. This dictum appears to prevent third party competitors from bringing such a claim although it is not entirely clear whether the Higher Administrative Court (*Oberverwaltungsgericht*) of Münster would deny *locus standi* or rather dismiss such a claim on the merits.

Likewise, German academics appear to have given up only very recently a clear reluctance as regards the admissibility of claims brought by third parties against aid granted to competitors based on an alleged infringement of Article 93(3) EC Treaty[10]. Arguments put forward against the admissibility of such third party actions are that, unlike a negative Commission decision, mere illegality under Article 93(3) EC Treaty does not necessarily amount to a distortion of competition. Moreover, it is emphasised that such third party claims would also be available for foreign competitors based in Member States where no such claims are available for German companies. Even academics that draw far-reaching conclusions from the ECJ's case law on Article 93 EC Treaty with respect to an *ipso iure* nullity of national measures which infringe Article 93(3) EC Treaty[11] do not go into details when it comes to describing the protection of third party competitors.

A recent annotation[12] to the decision of the Administrative Court of Magdeburg[13] clearly endorses for the first time the view that a violation of Article 93(3) EC Treaty is sufficient to establish *locus standi* for actions against the granting of non-notified aid (and to find in favour of third party competitors on the merits). One may expect that this very recent development (assuming the Magdeburg decision is upheld on appeal) will lead to an increased awareness of the functions of Article 93(3) EC Treaty (as stressed by the ECJ) among German courts, German authorities that administer subsidies and third party competitors.

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9 See case no 3.12. in the case summary.

10 See e.g. Götz, in Dauses, Handbuch des EU-Wirtschaftsrechts, loose leaf edition, November 1996, Vol. 2, H.III at para. 116

11 See e.g. Steindorff, Nichtigkeitsrisiko bei Staatsbürgschaften, EuZW 1997, 7 et seq.

12 Pechstein, EuZW 1998, 671

13 Case 3.1. in the case summary

c. Interlocutory proceedings

The German Act on Administrative Court Procedures also makes interlocutory relief (to be granted by the *Verwaltungsgericht*) available to parties challenging administrative acts made in favour of their competitors (and likewise administrative law contracts concluded with their competitors). However in a case involving questions of illegality of State aid under EC law, the *Verwaltungsgericht* may be reluctant to grant an interlocutory injunction as long as the European Commission has not decided that the aid definitely is illegal. This was the view taken by the Higher Administrative Court (*Oberverwaltungsgericht*) for North-Rhine Westphalia on 19 December 1995[14]. Although the very recent decision of the *Verwaltungsgericht* of Magdeburg mentioned above[15] now undoubtedly points to a different conclusion it remains to be seen whether other administrative courts will find it sufficient reason for granting an injunction that the aid has been granted without being notified to the European Commission pursuant to Article 93(3) EC Treaty (particularly if the decision of the *Verwaltungsgericht* of Magdeburg is not upheld on appeal).

Orders of the German Administrative Courts (*Verwaltungsgerichte*) in interlocutory proceedings can be appealed only to the Higher Administrative Court. There is no further appeal.

2.1.2. Procedure before civil courts

a. Nearly all the reported cases in Germany deal with situations in which either recovery of the aid was challenged by the beneficiary before the administrative agencies and various administrative courts that have jurisdiction ("classical" administrative courts and "specialised" administrative courts, such as fiscal and social courts) or in which a plaintiff applied for aid. Only four cases involve plaintiffs which challenged the grant of aid to a competitor[16]. These latter cases were brought before administrative courts.

It is nonetheless conceivable that a competitor could take a private law action directly against the recipient of State aid. The statutory provision on which a private law action before the civil courts might be based is Section 1 of the Act Against Unfair Competi-

14 See case 3.6. in the case summary.

15 Case 3.1. in the case summary

16 See cases 3.1., 3.6., 3.9. and 3.21. in the case summary.

tion (*Gesetz gegen den unlauteren Wettbewerb* – UWG). Section 1 UWG generally prohibits competitive activities that are *contra bonos mores*. A vast body of case law has been developed by the German courts as to what can be considered to be *contra bonos mores*. One of the instances in which German courts will often find Section 1 UWG to apply is where a company obtains a competitive edge over its competitors by either breaching the law itself or by taking advantage of a breach of the law by a third party (*Vorsprung durch Rechtsbruch*). Typically cases decided in this category will involve breaches of legislation designed to maintain a level playing field.

As regards the recipient of illegal aid, two questions arise in respect of Section 1 UWG: Does the recipient of aid obtain a competitive edge over its competitors by simply accepting aid? And does the breach of the law by the grantor of tle aid sufficient to find that the recipient's behaviour is *contra bonos mores*? No competitor of a recipient of State aid has yet attempted to apply Section 1 UWG to this kind of situation before the German courts. As there are no cases on point the waters have yet to be tested.

b. Interlocutory relief by civil courts would also theoretically be available to a competitor of a recipient.

c. In the case of State aid, a claim for damages will normally have to be directed against the grantor of the illegal aid, i.e. the party which has breached the law. German private law provides for a general obligation of the state to indemnify private parties for a breach of official duties which has led to loss for private parties[17]. The duty to notify State aid is an official duty designed to protect third parties, i.e. the competitors of the recipient of the aid. It is thus conceivable that damage claims can be brought under Section 839 of the German Civil Code (*Bürgerliches Gesetzbuch* - BGB). However, no such case has so far been brought (before the competent civil courts). Obviously, the problem – just as in damage cases based on breaches of Article 85 and 86 EC Treaty – will be to prove a causal link between the damage for which recovery is sought and the breach of the law. The same problem arises where one would base a damage claim on the so-called *Francovich* doctrine developed by the European Court of Justice in a case of 1991[18]. In that case, the European Court of Justice established that a Member State in breach of a community law provision designed to protect a third party must under certain conditions pay damages to the third party.

2.1.3. Special remedies under the rules on public procurement

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17 Section 839 of the German Civil Code, BGB.

18 Joint Cases C-6/90 and C-9/90, [1991] ECR I-5357

There is a special procedure under the German rules on public procurement through which a competitor of a recipient of State aid can to a certain extent limit the effects of State aid. The procedure is based on the EC directives on government procurement and allows a competitor of a recipient of State aid to demand that the recipient be excluded from the bidding process (Sections 25b, 26 VOB/A, Sections 25b, 26 VOL/A). There is no German case on point yet.

2.2. Procedures concerning the enforcement of negative Commission decisions

As a general rule, the agency that granted aid subsequently found by the Commission to be incompatible with the Common Market will order repayment by way of a so-called administrative act (*Verwaltungsakt*) if repayment is ordered by the Commission[19]. Such an administrative act is also subject to the procedure outlined above (objection by recipient and subsequent court action to the administrative court for annulment). An action against the agency aimed at obtaining an order for repayment would also be available to competitors.

One of the problems often encountered in proceedings for repayment of an unlawfully granted aid arises from Section 48 of the German Act on Administrative Procedure (*Verwaltungsverfahrensgesetz* - VwVfG). This Section not only protects recipients of aid in good faith (from which recovery cannot be sought at all), but also generally establishes that an administrative agency is prevented from asking repayment of aid if one year has lapsed since the administrative agency first learnt about the illegality of the aid. Several German administrative courts have referred to the European Court of Justice (ECJ) questions on the compatibility of Section 48 VwVfG and the rules laid down in Articles 92, 93 EC Treaty. In the *Alcan*-case[20], the ECJ decided that Section 48 VwVfG must not as a rule be applied in a manner which makes recovery of illegal aid impossible. This decision of the ECJ is fully taken into account in the final judgment of the German Federal Administrative Court[21]. The German Federal Administrative Court holds in particular that legitimate expectations may be used as a defence against orders for repayment only in very exceptional circumstances[22]. In future, the *Alcan* de-

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19 See e.g. the judgment of the Higher Administrative Court (*Verwaltungsgerichtshof)* of Baden-Württemberg dated 10 Dezember 1996, NVwZ 1998, 87 et seq., case 3.4. in the case summary

20 See case no 3.2. in the case summary

21 Judgment of 23 April 1998; unpublished as of yet; see under 3.2. in the case summary

22 See case 3.2. in the case summary

cisions will prevent most recipients of illegal aid in Germany from relying on Section 48 VwVfG.

As regards the position where State aid has been granted by contract (rather than through unilateral administrative decision), e.g. in the case of loans or guarantees, the agency that granted the aid cannot simply (unilaterally) order repayment once the Commission has issued a negative decision providing for an obligation to recover. Instead, the agency would have to take action before either the civil or the administrative courts by bringing an action for repayment[23]. The court's jurisdiction will depend on whether the contract providing for the granting of the aid is a civil law or a public law contract.

2.3. Procedures concerning the implementation of positive Commission decisions

If an aid "cleared" by the Commission is to be granted or has been granted it would be possible for a competitor to bring an action before the courts to prevent the granting of the aid or to obtain an order for repayment. Such an action (if based on the argument that the Commission wrongfully concluded that a proposed aid was compatible with the Common Market) would be tantamount to trying to obtain an order referring the case to the ECJ under Article 177 EC Treaty.

Direct actions against the recipient of an aid before the civil courts are, however, extremely unlikely as it could not be successfully argued that it is *contra bonos mores* to accept an aid which is in full compliance with the applicable procedures and approved of ''on the merits" by the Commission.

3. List of cases with summaries

3.1. Administrative Court (*Verwaltungsgericht*) of Magdeburg, order of 2 September 1998[24] (D)

Facts: In Germany, the Federal Agency for Special Tasks related to German Unification (*Bundesanstalt für vereinigungsbedingte Sonderaufgaben* - BvS) and a private law

[23] This scenario is reflected in case 3.7. of the case summary.

[24] Reported in EuZW 1998, 669

company acting on behalf of the BvS are responsible for allocating agricultural and forest estate formerly owned by the German Democratic Republic to individuals upon application. The relevant rules define different categories of eligible individuals. As one of the aims of these German rules is to compensate for irreversible expropriations carried out by Soviet authorities from 1945 to 1949 and thereafter by authorities of the German Democratic Republic, the real estate is sold to eligible applicants at less than half the market value. This real estate acquisition/compensation scheme was never notified by Germany to the European Commission. After various third party complaints the European Commission opened an investigation under Article 93(2) EC Treaty on 18 March 1998 and informed Germany accordingly by letter dated 30 March 1998. The European Commission's position is that any attribution of real estate that is not motivated by or exceeds compensation for past expropriations may constitute aid which is incompatible with the Common Market.

The plaintiff (who belongs to a category of persons fully eligible for compensation) has challenged in interlocutory proceedings the decision to attribute (sell) certain real estate to another applicant on the grounds that this applicant is not eligible and that Article 93(3)(3) EC Treaty prohibits the granting of the aid to this applicant.

Decision: The Administrative Court of Magdeburg found in favour of the plaintiff and stated that the decision to attribute the real estate to the other applicant violates both the relevant legal criteria for eligibility (that were wrongly applied to the case) and that Article 93(3)(3) EC Treaty prohibits the sale of the real estate to the other applicant. In this respect the court expressly referred to the judgments of the ECJ in the "*Salmons"*-case[25], in *Alcan*[26], in *Gilbert*[27] and in *SFEI*[28]. The decision has not yet become final.

3.2. "Alcan Case":

Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of 23 April 1998[29] after a reference for a preliminary ruling by the ECJ of 28 September 1994[30]; Higher Administrative Court (*Oberverwaltungsgericht*) of

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25 Judgment of 21 November 1991, case C-354/90, [1991] ECR I-5505

26 See case 3.2 in the case summary.

27 Judgment of 16 December 1992, joint cases C-144/91 and C-145/91, [1992] ECR I-6613

28 Judgment of 11 July 1996, case C-39/94, [1996] ECR I-3547

29 Unreported; file no. 3 C 15.97

30 Reported in EuZW 1995, 314; judgment of ECJ of 20 March 1997, case C-24/95, [1997] ECR I-1591

Koblenz, jugdment of 26 November 1991[31] and Administrative Court (*Verwaltungsgericht*) of Mainz, judgment of 7 June 1990[32] (A)

Facts: The case involved aid amounting to DM 8 million granted to an aluminium plant operator in order to safeguard the future operation of the plant. Before the aid was granted detailed negotiations had taken place between the administrative agency granting the aid and the plant's operator. Although the European Commission, which became aware of the intention to grant the aid through press coverage, had asked that notification under Article 93(3) be made, no notification had been forthcoming. The Commission found that the aid was incompatible with the Common Market and ordered its recovery[33]. The German authorities, however, did not claim repayment. The Commission's order for recovery was confirmed by the ECJ[34] after the Commission had commenced litigation against Germany.

After the ECJ's decision the administrative agency issued an order for repayment of the aid. This order was challenged in court by the recipient, who invoked the principle of legitimate expectations as a defence to repayment. He further argued that the aid granted had been fully spent and that the order for repayment violated the one-year deadline under Section 48 of the German VwVfG which applies to orders for repayment.

Decision by court of first instance and by court of appeal: Both the court of first instance (*Verwaltungsgericht* Mainz) and the Higher Administrative Court (*Oberverwaltungsgericht*) of Koblenz found in favour of the recipient. The *Oberverwaltungsgericht* of Koblenz reached a conclusion on the meaning of Section 48 VwVfG which was fundamentally contradictory to the judgment of the *Oberverwaltungsgericht* of Münster handed down on the same day and which is summarised below[35]. It stated that, in the absence of rules of Community law providing for an obligation to repay illegally granted aid which is incompatible with the Common Market, any obligation to repay is governed by domestic law, e.g. Section 48 VwVfG in Germany. The *Oberverwaltungsgericht* of Koblenz then went on to apply this provision without modification to the case (whereas the *Oberverwaltungsgericht* of Münster construed the provision narrowly to allow for an order for repayment of aid to be made). The *rationale* of the judg-

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31 Reported in EuZW 1992, 349

32 Reported in EuZW 1990, 389

33 Decision of 14 December 1985, OJ L 72/30 of 15 March 1986

34 ECJ, judgment of 2 February1989, case 94/87, [1989] ECR 175

35 See under 3.12.

ment is that the order for repayment violates the one-year time limit of Section 48 VwVfG. The *Oberverwaltungsgericht* found that the deadline started to run in June 1986, i.e. when the negative decision of the Commission became final and absolute. The order for repayment was issued on 26 September 1989.

Reference for preliminary ruling after further appeal: The Federal Administrative Court (*Bundesverwaltungsgericht*), to which the case was then appealed, asked the ECJ by way of a reference for a preliminary ruling, whether an order for repayment of an illegally granted State aid must be issued by the national authority despite the fact that the deadline under national law for orders of repayment has expired. It furthe asked whether a positive obligation to order repayment exists in spite of the fact that it is the national authority which is fully responsible for the illegality of the grant of the aid, and that an order for repayment may therefore be classed as bad faith of the national authority. Finally, the *Bundesverwaltungsgericht* asked whether an order for repayment must be issued even if the recipient has fully spent the State aid granted and therefore may argue that there is no unjust enrichment on its part as a result of the State aid. All these issues raised by the *Bundesverwaltungsgericht* correspond to various provisions of Section 48 VwVfG which governs (*inter alia*) orders for repayment.

Judgment of ECJ: The ECJ, in its judgment of 20 March 1997[36] answered all three questions in the affirmative. The ECJ in particular stated that a legitimate expectation as to the lawfulness of the granting of State aid may only exist on the part of the recipient if the recipient has duly ascertained that the procedures laid down in Article 93 EC Treaty have been fully observed.

Final judgment of Federal Administrative Court (*Bundesverwaltungsgericht*): This reasoning was fully adopted by the *Bundesverwaltungsgericht* in its judgment of 23 April 1998. The *Bundesverwaltungsgericht* emphasised that it is bound by the ECJ's judgment. It refuted the argument by the recipient that the ECJ's judgment is *ultra vires.* In the aftermath of the ECJ's judgment the recipient took the view that consequences for the interpretation of German rules on recovery of illegally granted State aid that are as far reaching as the ones that would result from the ECJ's judgment could be based only on a Council Regulation under Article 94 EC Treaty. The *Bundesverwaltungsgericht* stressed that, notwithstanding a very restrictive interpretation of the defence of legitimate expectations in the ECJ's judgment (such that legitimate expectations may be asserted only if the beneficiary has duly checked on the notification and control procedure set forth in Article 93 EC Treaty), the beneficiary can bring an action

[36] Case C-24/95, [1997] ECR I-1591.

before the ECJ against Commission decisions ordering recovery of aid in exceptional circumstances where legitimate expectations can be established.

The judgment does not indicate when such an exception can be established. If one considers the general rule emphasised by both the ECJ and the *Bundesverwaltungsgericht*, i.e. that a beneficiary must check compliance with Article 93 EC Treaty if it wants successfully to argue legitimate expectations, it is clear that such exceptional cases will be extremely rare. Up to now there has been only one case where the ECJ accepted the defence of legitimate expectations raised against an order for recovery[37]. In this case aid was granted on the basis of an aid scheme approved by the Commission but granted to a larger extent than originally foreseen. This modification had been communicated by the Netherlands to the Commission, which took 26 months before it decided that the aid was incompatible with the Common market and ordered recovery. The ECJ held that this period of time was excessive and therefore gave rise to legitimate expectations for the beneficiary.

It appears therefore that the only case where this argument can be made is where upon due notification of an aid the Commission does not reach a conclusion within a reasonable period of time. However, it is not possible to indicate what period may be regarded as unreasonable. Although the Commission has set itself the ambitious goal of carrying out investigations under Article 93(2) EC Treaty within six months, this deadline is rarely met. In fact, investigations frequently last substantially longer.

3.3. Federal Constitutional Court (*Bundesverfassungsgericht*), judgment of 3 December 1997[38] (A)

Facts: The case concerned a constitutional complaint by, *inter alia*, an investment fund, which invested in the purchase of ships. German tax rules that were valid until 25 April 1996 provided for a special accelerated depreciation scheme for the owners of new commercial ships. This depreciation scheme was abolished by an act adopted by the federal parliament on 7 November 1996, which provided that the special depreciation scheme would no longer be applicable to purchase agreements for ships concluded after 24 April 1996. This cut-off date was chosen because, on 25 April 1996, the federal government introduced a bill amending the depreciation scheme in parliament. The original government bill had stated that the depreciation scheme would not

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37 Case 223/85 „Rijn-Schelde-Berolme (RSV) Machinefabrieken en Scheepswerven NV v. Commission of the European Communities“, judgment of 24 November 1987, [1997] ECR 4618, 4654

38 Reported in NJW 1998, 1547

apply to contracts concluded from 1 May 1996 onwards. The cut-off date of 24 April 1996 was introduced by parliament at a later stage.

The plaintiff had concluded a purchase agreement for a ship on 30 April 1996 and brought a constitutional claim against the retroactive cut-off date based, *inter alia*, on the principle of legitimate expectations (*Vertrauensschutz*). The federal government argued that there was no reason for the later complainant to have had legitimate expectations because, when the bill was introduced in the parliament, it was clear that the tax depreciation scheme would be abolished. In addition, the government argued that, at the time of the conclusion of the relevant contract (i.e. 30 April 1996) the European Commission had not yet approved the German tax depreciation scheme; indeed, at that time the notification by the German government was still pending. It was only in October 1996 that the Commission declared the scheme compatible with the Common Market.

Decision: The Federal Constitutional Court rejected the constitutional complaint, holding that there were no reasons for the complainant to have relied on the tax depreciation scheme after the announcement by the federal government of the scheme's abolition. The Constitutional Court said that it did not have to decide on the question of whether the pending decision of the European Commission on the notification of the tax depreciation scheme had a bearing on whether or not the complainant should have relied on the continuation of the depreciation scheme.

3.4. Higher Administrative Court (*Verwaltungsgerichtshof*) of Baden-Württemberg, judgment of 10 December 1996[39] (A)

Facts: The case deals with the grant of a subsidy to the receiver of a company in bankruptcy proceedings without notification under Article 93(3) EC Treaty. The subsidy was granted by governmental agencies in *Baden-Württemberg*. The purpose of the subsidy was to allow for an acquisition of a newly established rescue company (of which the receiver was the sole shareholder) by a third party company. The rescue company used the subsidy to finance an increase of its share capital. Subsequently the third party company merged with the rescue company and continued business under the name of the latter.

In a decision of 17 November 1987[40] addressed to Germany the Commission found the subsidy to be State aid incompatible with the Common Market under Article 92 and

[39] Reported in NVwZ 1998, 87

ordered recovery of the subsidy. This decision was neither challenged by Germany nor complied with by German authorities. In an action brought by the Commission against Germany the ECJ handed down a declaratory judgment that Germany was in breach of the EC Treaty[41].

The governmental agency that granted the subsidy was informed of this judgment (as well as of the negative decision of the Commission) by the German Federal Ministry of Economy and then issued an order for repayment. This order was challenged by the rescue company who was the addressee of the order.

Decision on appeal (decision of court of first instance unreported): The judgment of the Higher Administrative Court (*Verwaltungsgerichtshof*) mainly deals with the point in time at which the one-year time-limit for orders of repayment of illegally granted State aid starts to run under the applicable German rules. The Higher Administrative Court (*Verwaltungsgerichtshof*) held that the time-limit had been complied with. It started to run when the governmental agency responsible for recovery was informed of the negative decision of the Commission and of the judgment of the ECJ. The Higher Administrative Court (*Verwaltungsgerichtshof*) also emphasised that, as a general rule, the public interest in repayment of State aid granted in violation of EC law takes precedence over legitimate expectations of the recipient that he may keep the State aid. It appears that the Higher Administrative Court (*Verwaltungsgerichtshof*) would be more inclined to consider legitimate expectations of the recipient if "only" German rules were violated by the grant of aid.

It is interesting to note that the *Verwaltungsgerichtshof* states in an *obiter dictum* that an order for repayment could not be issued if this order could be classed as bad faith by the governmental agency. The ECJ clearly took a different view in its judgment in the *Alcan* case (cf. above under 3.2.) which was delivered only a few months after the judgment of the *Verwaltungsgerichtshof.* The ECJ there held that a governmental agency must recover illegally granted aid even if its behaviour may be classed as being in bad faith.

3.5. State Social Court of Northrhine-Westphalia (*Landessozialgericht Nordrhein-Westfalen*), judgment of 22 March 1996[42] (B)

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40 OJ L 79 of 24 March 1988

41 ECJ, case C-5/89, [1990] ECR I-3437

42 Unreported; file no. L 9Ar 200/94 LSG NRW

Facts: This case involves the German rules relating to employment of disabled or handicapped persons. Companies which employ 16 employees or more are under a legal obligation to employ disabled or handicapped persons (on a defined pro rata basis). If they fail to do so, they are obliged to pay monetary compensation.

The plaintiff hairdresser in this case has a widespread network of branches in Germany. Although the individual branches each employ less than 16 employees, the competent administrative authority aggregated all employees of the plaintiff's different branches and reached the conclusion that the plaintiff exceeded by some margin the relevant threshold. This was challenged by the plaintiff in court with the argument *inter alia* that the obligation of companies of a certain size to employ disabled or handicapped persons constitutes State aid for small companies which are not under this obligation, and therefore comes within the meaning of Article 92 EC Treaty.

Decision: The State Social Court rejected this argument. It referred to the judgment of the ECJ in case C-189/91 (reference for a preliminary ruling made by the Labour Court of Reutlingen; cf. below under 3.14.). The ECJ there held that advantages resulting from legal rules constitute State aid only if they contain benefits which are granted directly or indirectly out of public resources (which was also denied in case C-189/91).

3.6. Higher Administrative Court of Northrine-Westphalia (*Oberverwaltungsgericht Nordrhein-Westfalen*), order of 19 December 1995[43] and Administrative Court (*Verwaltungsgericht*) of Aachen, order of 14 December 1994[44](D)

Facts: A waste paper collection company challenged an administrative act granting a subsidy to a competitor. The decision to grant the subsidy was not notified to the European Commission.

The complainant first lodged an objection with the administrative agency responsible for the grant of the subsidy. As the grant of the subsidy was declared immediately effective, the objection had no suspensory effect, i.e. it could not prevent the beneficiary from actually receiving the aid.

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43 Unreported; file no 4 B 418/95

44 Unreported; file no 3 L 2123/94

Decision by court of first instance: The complainant attempted to obtain the suspensory effect of its objection in interlocutory proceedings before the *Verwaltungsgericht* Aachen. The *Verwaltungsgericht*, however, rejected the application. It held that suspensory effect of the objection could be granted only if the administrative act on the granting of the subsidy was clearly unlawful, i.e. if it clearly violated rights of the complainant, e.g. rights under Article 93(3) EC Treaty. The *Verwaltungsgericht* held that it was not sufficiently clear that a violation of these rights was established in this case. It stated that the alleged violation of this provision requires that the subsidy is to be classed as State aid within the meaning of Articles 92 and 93 EC Treaty. According to the *Verwaltungsgericht* this was doubtful as it could not be denied that there was consideration for the subsidy. As the beneficiary is obliged under its Articles of Association to pursue certain social goals, such as the education and training of unemployed teenagers the *Verwaltungsgericht* held that this may be classified as consideration for the subsidy and referred to the judgment of the ECJ of 7 February 1985 (case 240/83)[45].

Decision on appeal: The appeal from this decision brought by the complainant before the *Oberverwaltungsgericht* Münster was also fully dismissed. In support of its position the complainant put forward further arguments, and in particular, that the decision of the *Verwaltungsgericht* Aachen was based on a wrongful interpretation of the notion of State aid. The complainant stressed that the European Commission, in a letter dated 9 August 1995, appeared to have taken the view that the subsidy was in fact State aid and that, therefore, the ECJ's judgment of 7 February 1985 could not serve as authority in this case.

Although the *Oberverwaltungsgericht* Münster confirmed that Article 93(3) EC Treaty is also designed to safeguard the interests of the competitors of a potential beneficiary and that it is the task of national courts to protect those interests, it reached the conclusion that it was doubtful whether the subsidy was State aid. It indicated that it was possible that the subsidy merely compensated the beneficiary for certain costs incurred as a result of the purposes it pursued. Furthermore, the *Oberverwaltungsgericht* Münster did not want to rule out the possibility that the subsidy may qualify as an educational measure, which would mean that it cannot be classed as State aid according to a decision of the European Commission of 26 March 1991 (OJ L 215/11). The letter of the European Commission was interpreted as a preliminary statement by the *Oberverwaltungsgericht.* The court refused to make a reference for a preliminary ruling to the ECJ under Article 177(3) EC Treaty, taking the view that there was no corre-

[45] *ADBHU*, [1985] ECR 531

sponding obligation in interlocutory proceedings. Moreover, it refused to make a reference under Article 177(2) EC Treaty due to the fact that the Commission had previously commenced proceedings under Article 93(2) EC Treaty and that non-compliance of German authorities with a negative decision of the Commission (if any) could be challenged before the ECJ directly under Article 93(2) EC Treaty.

3.7. Higher Administrative Court of Hamburg (*Hamburgisches Oberverwaltungsgericht*), judgment of 14 February 1995[46] and Administrative Court (*Verwaltungsgericht*) of Hamburg, judgment of 2 June 1993[47] (A)

Facts: A subsidy amounting to DM 5.9 million was granted on the construction of a German commercial vessel. The subsidy was granted by a so-called public law contract (as opposed to the granting of a subsidy through a unilateral administrative act). The contract on the granting of the subsidy provided for an obligation for the beneficiary to reimburse the money in the event that title to the vessel was transferred to third parties within a specified period of time after construction of the vessel. The defendant in this case, a shareholder of the company which owned the vessel, accepted joint and several liability for repayment to the agency that granted the subsidy.

When the vessel was acquired by third parties as a result of bankruptcy proceedings within the relevant time limits, the agency brought a claim against the joint and several debtor for repayment of the entire subsidy. The Regional Court (*Landgericht*) of Hamburg, the civil court before which the claim was brought, considered that it had no jurisdiction and referred the matter to the competent Administrative Court (*Verwaltungsgericht*) of Hamburg.

Decisions of court of first instance and on appeal: Both the Administrative Court (*Verwaltungsgericht*) and the Higher Administrative Court (Obervе*rwaltungsgericht*) found in favour of the plaintiff and ordered the defendant to repay the money. A further appeal was not allowed by the Federal Administrative Court (*Bundesverwaltungsgericht*).

One of the arguments raised by the defendant was that the contract on the granting of the subsidy was void as it violated Articles 92, 93 EC Treaty (the underlying argument obviously being that the joint and several liability of the defendant only covers contractual claims for repayment as opposed to claims based on non-contractual grounds,

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46 Unreported, file no OVG Bf VI 53/93

47 Unreported, file no 7 VG 4424/92

e.g. unjust enrichment). It was held that the granting of the subsidy did not breach these provisions. The Higher Administrative Court (Oberv*erwaltungsgericht*) stressed that aid to shipbuilding may be considered compatible with the Common Market under Article 92(3)(c) EC Treaty (on which an older version of the EC Directive on aid to shipbuilding which applied when the vessel was constructed was based). The Oberv*erwaltungsgericht* stated that there was sufficient proof that Germany had complied with notification obligations provided for in this directive and that there had been no objection from the European Commission.

3.8. Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of 7 July 1994[48] (B)

This case involved the imposition of a duty on certain imported products (e.g. fruit and vegetables) which was challenged by one importer. The Federal Administrative Court held that the fund, which was financed by the relevant duties and the purpose of which is to promote sales of German goods (the so-called *Absatzfonds*), was not incompatible State aid within the meaning of Articles 92, 93 EC Treaty. It refered to an earlier judgment of the same senate of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 15 May 1984[49] which in turn was based on the ECJ's judgment of 22 March 1977, case 78/76, *Steinike* and *Weinlig*[50]. There it was held that the German act underlying the relevant fund had been notified to the Commission in compliance with Article 93 EC Treaty and not been objected to by the Commission.

3.9. Higher Administrative Court of Lower Saxony (*Niedersächsisches Oberverwaltungsgericht*), order of 30 May 1994[51] and Administrative Court (*Verwaltungsgericht*) of Hanover, order of 27 May 1994[52] (D)

Facts: The case deals with the granting of a guarantee by the Government of Lower Saxony. The guarantee amounted to DM 35 million and was granted as collateral for bank loans granted for the purpose of the recipient's business. This was challenged in court by third party competitors of the recipient, who sought interlocutory relief.

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48 Unreported; file no. 3 C 18.93

49 See below case 3.19. in the case summary.

50 For reference see below case 3.26. in the case summary.

51 Unreported; file no 10 M 3142/94

52 Unreported; file no 11 B 3745/94

Decisions of court of first instance and on appeal: Both the Administrative Court (*Verwaltungsgericht*) and the Higher Administrative Court (Obervе*rwaltungsgericht*) rejected the competitors' claim. The decisions deal exclusively with the question of whether the grant of the guarantee may violate the rights of the competitors under German law (and answers this in the negative). The question of whether Article 93(3) EC Treaty has been complied with is not addressed in the decisions. Only one sentence in the decision of the *Verwaltungsgericht* makes mention of EC law, and even this does not go into detail. The *Verwaltungsgericht* merely stated that a violation of EC law had not been sufficiently proven by the plaintiffs (although proceedings before the administrative courts are generally inquisitorial, which would oblige the *Verwaltungsgericht* to investigate a violation of EC law *ex officio,* this rule applies to a somewhat limited extent in interlocutory proceedings, which are of a summary nature and therefore require plaintiffs to substantiate their case by *prima facie* evidence).

Subsequent developments: Shortly after the national litigation the European Commission was informed of the grant of the guarantee. After having asked the German authorities on 30 June 1994 to comment in detail on the guarantee (whereupon Germany notified the guarantees by a letter dated 13 October 1994) the European Commission commenced proceedings under Article 93(2) EC Treaty by its communication published in OJ C 201/6 of 5 August 1995. By a decision of 29 May 1996[53] the European Commission declared the aid partly incompatible with the Common Market and ordered that Germany obtain repayment of those parts of the aid found incompatible. On 26 August 1996 Germany brought an application for annulment of the decision before the ECJ. The case is currently pending[54].

3.10. Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of 4 August 1993[55] (B)

Facts: The case involved a depreciation allowance on capital expenditure on production facilities under German tax law. The depreciation allowance was permitted only where the capital expenditure that was incurred before 1 January 1975 was for the purpose of environmental protection; a relocation of the plaintiff's production facilities after 1 January 1975 prevented the application of the depreciation scheme. As a rule, such a relocation is considered to be a new erection of production facilities unless rendered necessary by considerations of environmental protection.

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53 OJ L 246/43 of 27 September 1996

54 Case C-288/96, Jadekost

55 Reported in NJW 1994, 339

Final decision (decisions of court of first instance and on appeal not reported): The Federal Administrative Court (*Bundesverwaltungsgericht*) held that the relocation could not be motivated by considerations of environmental protection and that therefore the depreciation scheme did not apply. The *Bundesverwaltungsgericht* went on to state that the limitation of the depreciation scheme until 31 December 1974 was expressly required by the Commission after an investigation under Article 93(2) EC Treaty of the relevant German rules.

3.11. Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of 12 May 1993[56] (B)

Facts: The case also involved a claim under German tax law for the grant of a depreciation allowance on capital expenditure. The allowance depended on whether the capital expenditure served purposes of environmental protection. The administrative authority, which was the defendant in the case, raised the defence that the grant of a conditional depreciation allowance would constitute State aid within the meaning of Article 92 EC Treaty.

Final decision (decisions of court of first instance and on appeal not reported): The Federal Administrative Court (*Bundesverwaltungsgericht*) took the view that, even if this argument were correct, the grant of this aid would not be incompatible with the EC Treaty but would rather be covered by Article 92(3)(b) EC Treaty. This view was based on the legislative history of the rules of German tax law at issue, and the fact that the European Commission had intervened during the legislative proceedings in the German Parliament because of a possible violation of the State aid rules of the EC Treaty. This intervention had resulted in an enactment of rules modified in accordance with the Commission's intervention[57].

3.12. Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of 17 February 1993[58], Higher Administrative Court (*Oberverwaltungsgericht*) of Münster, judgment of 26 November 1991[59] and Administrative Court (*Verwaltungsgericht*) of Cologne, judgment of 21 April 1988[60] (A)

Facts: The case involved the grant of tax allowances. The European Commission found that this amounted to an illegal State aid as no notification had been made under Article 93(3) EC Treaty. It further found the aid to be incompatible with the Common Market under Article 92 EC Treaty and ordered recovery of the aid by a decision of 10 July 1985.

The recipient challenged the administrative act ordering recovery of the aid (which was issued on 27 March 1986, i.e. after the Commission handed down its decision but be-

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56 Reported in NJW 1994, 337

57 See also above case 3.10. in the case summary.

58 Reported in NJW 1993, 2764

59 Reported in EuZW 1992, 286

60 Reported in EuZW 1990, 387

fore the ECJ delivered a judgment[61] confirming the Commission's view after the recipient had challenged the decision before the ECJ). This administrative act was based on section 48 of the German Act on Administrative Proceedings (VwVfG) which empowers administrative agencies to annul illegal administrative acts.

Final decision: The Federal Administrative Court (*Bundesverwaltungsgericht*) fully upheld the previous judgments in the case and dismissed the recipient's action. It stated that orders for recovery of illegally granted State aid are to be based on section 48 VwVfG. It further stated that, although the interest of the recipient not to be obliged to repay the State aid has to be balanced against the public interest in recovery of illegally granted State aid, as a general rule there will be no legitimate interest of the recipient worthy of protection if State aid has been granted without due notification under Article 93(3) EC Treaty. This amounted to a narrow construction of Section 48 VwVfG which states that, as a general rule, repayment of illegally granted payments must not be ordered if the recipient has a legitimate interest in retaining the sum granted. The provision further states that a legitimate interest will generally exist if the recipient has already spent the sum granted. The provision also lists the cases where no legitimate interest may be invoked by a recipient, i.e. if he has obtained payment by fraudulent behaviour or by misrepresentation of facts or if he was aware of the unlawfulness of the payment, or if his ignorance of its unlawfulness was caused by gross negligence.

The *Bundesverwaltungsgericht* further stated that as a general rule a recipient can reasonably be required to check whether a notification pursuant to Article 93(3) EC Treaty has been duly made. Finally the *Bundesverwaltungsgericht* found that the order for repayment complied with the rule which provides that such order must be made within one year after the date when the administrative authority concerned becomes aware of the unlawfulness of the granting of the aid.

It is interesting to note that the Higher Administrative Court (*Oberverwaltungsgericht*) stated in this litigation that mere illegality of the granting of the aid due to a lack of notification under Article 93(3) EC Treaty is insufficient ground for an order of recovery. Although this is only an *obiter dictum* it would exclude actions of third party competitors aiming at obtaining an order for repayment before the Commission has decided on compatibility with the Common Market.

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[61] Judgment of 24 February 1987, case 310/85, Deufil, [1987] ECR 901

3.13. Administrative Court (*Verwaltungsgericht*) of Frankfurt, reference for a preliminary ruling by ECJ of 11 December 1991[62] (B)

Facts: The case involved the German rules under which importers of foreign meat are obliged to pay a contribution into a German fund to promote the sales of German agricultural products[63]. The claimant raised an action for annulment against an administrative act ordering payment of this contribution.

Decision: The Administrative Court (*Verwaltungsgericht*) made a reference for a preliminary ruling under Article 177 EC Treaty. It asked the ECJ whether it is allowed to declare the compatibility with EC law, in particular Article 92 EC Treaty, of the national rules providing for the challenged contribution and whether the financing of the fund through contributions amounts to a protectionist mechanism comparable to a protectionist State aid within the scope of Article 92 EC Treaty. The *Verwaltungsgericht* additionally asked whether the contributions to the fund are incompatible with Article 92 EC Treaty.

In its judgment of 27 October 1993[64] the ECJ found that contributions to the fund could in fact constitute State aid within the meaning of Article 92 EC Treaty and that, subject to judicial review by the ECJ, the European Commission has the authority to apply Article 92 EC Treaty.

3.14. Labour Court (*Arbeitsgericht*) of Reutlingen, reference for a preliminary ruling by order of 3 May 1991[65] (B)

The order deals with an action brought to challenge the lawfulness of the termination of an employment contract. Under German law, small companies employing five or fewer employees are exempted from the fairly strict rules on protection of employees against termination of employment contracts which would otherwise apply. The Labour Court (*Arbeitsgericht*) estimated that this legal distinction between small companies and other companies which are subject to the strict rules on employment protection produced considerable competitive advantages for small companies and must therefore be classed as State aid. It asked the ECJ whether this understanding of the notion of State aid is correct.

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62 Reported in EuZW 1993, 69

63 See also above case 3.8. and below cases 3.19. and 3.25. in the case summary.

64 Case C-72/92, [1993] ECR I-5509, Herbert Scharbatke GmbH v. Federal Republic of Germany.

65 Unreported; file no. 4(2) Case 85/91

The ECJ, in its judgment of 30 November 1993[66] held, however, that the exemption of small companies from certain rules of German law does not constitute State aid within the meaning of Article 92 EC Treaty, as it does not result in benefits being granted to recipients out of state funds. In this judgment the ECJ emphasised that, when deciding whether the granting of subsidies violates Article 93(3) EC Treaty, a national court may ask the ECJ to interpret the notion of State aid within the meaning of the EC Treaty.

3.15. Federal Social Court (*Bundesozialgericht*), judgment of 24 January 1991[67] and Bavarian State Social Court (*Bayerisches Landessozialgericht*) of Munich, judgment of 7 February 1990[68] (B)

Facts: The case involved social security contributions of the plaintiff, an agricultural company. The plaintiff challenged the method of calculation of these contributions which were based on the size of the area used by the company for agriculture. One of the plaintiff's main arguments was that such a method of calculation amounts to an aid to smaller competitors which is incompatible with the Common Market under Article 92 EC Treaty. Furthermore, the plaintiff argued that the aid was not notified to the European Commission under Article 93(3) EC Treaty. The plaintiff therefore contended that the rules on the method of calculation of the contributions were not valid.

Decisions: These arguments were rejected by the Federal Social Court (*Bundessozialgericht*). Firstly, it stated that the question of whether an aid is incompatible with the Common Market can be decided by the European Commission only and not by national courts. It added that the argument of incompatibility in this litigation might nonetheless justify reference for a preliminary ruling under Article 177 EC Treaty. However, it took the view that it did not have to make a reference for a preliminary ruling, as the rules providing for the method of calculation are older than the EC Treaty and have never been challenged by the European Commission. The consequence of the method of calculating the contributions, i.e. that small companies enjoy the benefit of comparatively lower contributions than larger companies such as the plaintiff, is inherent in the German system of social security. This prevents them from being classed as State aid. The lower court (State Social Court, *Landessozialgericht*), had adopted a similar approach. It discussed the notion of State aid and held that, as a general rule, it can be argued that, where a provision of national law violates Article 93(3) EC Treaty,

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66 Case C-189/91, [1994] ECR I-6185, Petra Kirshammer-Hack v. Nurhan Sidal.

67 Unreported; file no. 2RU 32/90

68 Unreported; file no. L2 U218/87

it is not applicable. However, the *Landessozialgericht* was of the opinion that the rules challenged by the plaintiff did not constitute State aid, as they did not exempt certain companies from obligations that would otherwise apply, but rather laid down *ex ante* the rules for calculating contributions to the social security system. In other words, the *Landessozialgericht* took the view that potential benefits for certain companies are inherent in the social security system.

The *Bundesozialgericht* came to the conclusion that it was clear there was no State aid in this case, and therefore no violation of Article 93(3) EC Treaty.

3.16. Labour Court (*Arbeitsgericht*) of Bremen, order of 9 October 1990[69] (B)

The Labour Court (*Arbeitsgericht*) made a reference for a preliminary ruling under Article 177 EC Treaty. The case involved certain rules of German labour law under which it is possible to employ non-German staff on German vessels under exemptions to rules of German labour and social security law. The labour law and social security law standards thus set for non-German staff are substantially lower than the standards that apply to German staff. The *Arbeitsgericht* was of the opinion that the resultant benefits for ship-owners such as lower social security contributions, were State aid within the scope of Article 92 EC Treaty (and furthermore amounted to a violation of Article 117 EC Treaty).

In its judgment of 17 March 1993[70], the ECJ found that there was no State aid in this case, as benefits for ship-owners resulting from the different legal standards are not financed out of state funds.

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69 Reported in EuZW 1991, 389.

70 Joint cases C-72/91 and C-73/91, [1993] ECR I-887, Sloman Neptun.

3.17. Federal Social Court (*Bundessozialgericht*), judgment of 4 October 1988[71] (B)

In this case, the plaintiff claimed to be entitled to certain benefits reducing his social security contributions. The Federal Social Court (*Bundessozialgericht*) found that the rules on which the plaintiff based his claim may violate Article 92 EC Treaty and that this might require a clarification through a reference for a preliminary ruling. However, as the findings of facts of the lower court were insufficient, the *Bundessozialgericht* referred the case back to the lower court (of which no further decision is reported).

3.18. Federal Administrative Court (*Bundesverwaltungsgericht*), order of 19 December 1986[72] (B)

The Federal Administrative Court (*Bundesverwaltungsgericht*) rejected an appeal against a decision of the Higher Administrative Court (*Oberverwaltungsgericht*) of Hesse which was based, *inter alia*, on the argument that certain duties imposed on pork meat were State aid within the meaning of Article 92 EC Treaty. The *Bundesverwaltungsgericht* stated that it is not for the national court to decide this question unless the scope of Article 92 EC Treaty has been clarified either by general rules under Article 94 EC Treaty or through individual decisions of the Commission under Article 93(2) EC Treaty. The *Bundesverwaltungsgericht* held that in the case at hand, neither had been done. The question of whether an order for a preliminary ruling by the ECJ should be made regarding the notion of State aid was not dealt with in the decision.

3.19. Federal Administrative Court (*Bundesverwaltungsgericht*), judgment of 15 May 1984[73] (B)

The plaintiff challenged acts ordering it to pay contributions to the *Absatzfonds* already mentioned above under 3.8. The Federal Administrative Court (*Bundesverwaltungsgericht*) referred to the ECJ's judgment of 22 March 1977[74] and held that the German act underlying the fund had been notified to the Commission in compliance with Article 93(3) EC Treaty and had not been objected to by the Commission.

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71 Unreported; file no. 4/11aRLw5/87

72 Unreported; file no. 3 CB 32.85

73 Reported as BVerwGE 69, 227

74 [1977] ECR 595, case 78/76, Steinike and Weinlig

3.20. Fiscal Court (*Finanzgericht*) of Hamburg, judgment of 17 April 1984[75] (B)

The case involved a claim raised by an importer of whiskey, who sought exemption from a duty. This claim was based on the argument that certain distillers in Germany are granted subsidies and that importers must be treated similarly through an exemption from duties imposed on them, as the prohibition in Article 95 EC Treaty would apply. The Fiscal Court (*Finanzgericht*) held, however, that the mere fact that subsidies have been granted (the compatibility of which with the Common Market falls in the exclusive jurisdiction of the Commission and the ECJ according to an *obiter dictum* in the judgment) does not necessarily result in the prohibition laid down in Article 95 EC Treaty applying to duties imposed on importers. This would rather require that the aid be closely connected to the duty at issue, particularly in economic terms.

3.21. Higher Administrative Court (*Oberverwaltungsgericht*) Münster, judgment of 22 September 1982[76] (D)

Facts: The case concerned a subsidy granted by the defendant municipality to a large hotel chain for the construction of a hotel. The grant was by way of several agreements providing for a building lease and a loan on very favourable terms. A competitor of the aid recipient brought an action for annulment of the aid "decision" before the administrative courts.

Decision: Both the administrative court and the higher administrative court found that the plaintiff lacked *locus standi* concerning the building lease because the lease was a private law contract that could not be challenged in the administrative courts (*Verwaltungsgerichte*). The courts did, however, find that the loan agreement constituted a grant of a subsidy which was governed by public law. However, they held that the plaintiff's rights were not directly affected by the grant of the subsidy. They specifically stated that the entry of a new competitor to the market does not affect the rights of existing players on that market. In dismissing the action, the courts stated that Article 92 EC Treaty is not directly applicable because the Commission can declare aid compatible with the common market under Article 93(2) EC Treaty. The case is a typical example of the traditional view of administrative courts in Germany that prevented competitors from challenging decisions to grant subsidies.

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75 Reported in RIW 1984, 554

76 Reported in NVwZ 1984, 522

3.22. Fiscal Court (*Finanzgericht*) of Hamburg, judgment of 31 October 1980[77] (B)

The case involved a claim raised by a distiller for a tax reduction based on the argument that other distillers were granted subsidies. As far as those subsidies could be classed as State aid within the meaning of Articles 92 and 93 EC Treaty, the Fiscal Court (*Finanzgericht*) stated that they would in any event have been granted illegally, as no notification had been made under Article 93(3) EC Treaty. As a general rule, German law does not recognise claims for equal treatment with beneficiaries of unlawful measures. Therefore, no claim could be raised in this case for benefits equivalent to the subsidies (e.g. by means of tax reductions).

3.23. Fiscal Court (*Finanzgericht*) of Hamburg, reference for a preliminary ruling by the ECJ dated 31 October 1980[78] (B)

The Fiscal Court asked the ECJ whether certain reductions of duties imposed on distillers come within the scope of Articles 95 and 37 EC Treaty or rather within the scope of Articles 92 and 93 EC Treaty and, if the latter is the case, whether the general principle of equality would entitle other distillers not yet benefiting from the reduction of the duty to be granted the same benefit.

In its judgment of 29 April 1982[79] the ECJ held that there was no need to determine whether Articles 92 and 93 EC Treaty apply. Even if this were the case, the action would have to be decided, according to the ECJ, under Article 95 EC Treaty as this provision also catches State aid granted under an obligation which is applied in a discriminatory manner.

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77 Reported in EFG 1981, 274

78 Reported in RIW/AWD 1981, 233

79 ECJ case 17/81, [1982] ECR 1331, Pabst & Richarz KG v. Hauptzollamt Oldenburg.

3.24. Fiscal Court (*Finanzgericht*) of Hamburg, reference for a preliminary ruling by the ECJ dated 22 March 1978[80] (B)

The Fiscal Court asked the ECJ whether certain increases of duties imposed on imported distilled alcoholic beverages came within the scope of Article 37 EC Treaty even though these measures contain elements of State aid.

In its judgment of 13 March 1979[81] the ECJ found that Article 37 EC Treaty is *lex specialis* to Articles 92, 93 EC Treaty with respect to measures taken by the State in connection with the exercise of a State monopoly. The ECJ also held that the case has to be judged under Article 37 EC Treaty.

3.25. Fiscal Court (*Finanzgericht*) of Hamburg, reference for a preliminary ruling by the ECJ dated 24 October 1977[82] (B)

The Fiscal Court asked the ECJ whether a reduction of duties granted to certain domestic producers may be classified as State aid within the meaning of Articles 92 to 94 EC Treaty and whether a distinction can be made between the scope of these provisions and Article 95 EC Treaty on the one hand and Article 37 EC Treaty on the other.

The ECJ did not clearly distinguish between those sets of rules but rather held in its judgment of 10 October 1978[83] that the case must be decided under Article 95 EC Treaty.

3.26. Administrative Court (*Verwaltungsgericht*) of Frankfurt, reference for a preliminary ruling by the Federal Constitutional Court (*Bundesverfassungsgericht*) dated 28 July 1977[84] (B)

The Administrative Court (*Verwaltungsgericht*) asked the Federal Constitutional Court (*Bundesverfassungsgericht*) whether it has jurisdiction to declare on the compatibility with Article 92 EC Treaty of certain German rules providing for the imposition of duties on certain importers of agricultural products.

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80 Reported in RIW/AWD 1978, 402

81 Case 91/78, [1979] ECR 935, Hansen GmbH v. Hauptzollamt Flensburg.

82 Reported in RIW/AWD 1978, 70

83 Case 148/77, [1978] ECR 1787, H. Hansen jun. & O.C. Balle GmbH & Co. v. Hauptzollamt Flensburg

84 Reported in RIW/AWD 1977, 715

An order requiring payment of this duty was challenged by an importer before the Administrative Court (*Verwaltungsgericht*). The court took the view that the relevant German rules were to be classed as State aid incompatible with the Common Market under Article 92 EC Treaty. Therefore, the *Verwaltungsgericht* made a reference for a preliminary ruling by the ECJ. It wanted to know whether the procedural rules in Article 93 EC Treaty prohibit references for preliminary rulings on Article 92 EC Treaty and subsequent decisions of national courts on the applicability of Article 92 EC Treaty. In its judgment of 22 March 1977[85] the ECJ found that Article 93 EC Treaty does not prohibit references for preliminary rulings that concern the interpretation of Article 92 EC Treaty, but that national courts cannot themselves determine the incompatibility of State aid with the common market that has not been the object of a relevant decision of the European Commission. It thereby led the *Verwaltungsgericht* to find against the plaintiff as the relevant German rules had been duly notified under Article 93(3) EC Treaty to the European Commission, and the Commission had not raised objections.

The Federal Constitutional Court (*Bundesverfassungsgericht*) rejected the reference made by the *Verwaltungsgericht*. It stated that it has no power to interpret provisions of the EC Treaty in a way that differs from the interpretation made by the ECJ as far as their applicability in Germany is concerned. No subsequent final decision of the *Verwaltungsgericht* is reported.

3.27. Fiscal Court (*Finanzgericht*) of Hessen, judgment of 12 March 1974[86] (B)

In this litigation the plaintiff, a German distiller, sought compensation for exports of its product from the German authority administering the monopoly for distilled alcoholic beverages. The plaintiff was in fact entitled to this compensation. The Fiscal Court (*Finanzgericht*) found that, under the rules applicable to the monopoly for distilled alcoholic beverages. The *Finanzgericht* added that the claim was well-founded, despite some concern that the compensation may not comply with Article 92 EC Treaty (as the purpose of the compensation is to increase competitivity of German distillers abroad). The *Finanzgericht* held that Article 92 EC Treaty is not directly applicable but rather requires action by the European Commission. The action may, however, result in an obligation to abolish rules that violate that Article.

3.28. Federal Fiscal Court (*Bundesfinanzhof*), judgment of 1 March 1974[87] (B)

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85 [1977] ECR 595, case 78/76, Steinike and Weinlig

86 Reported in EFG 1974, 455.

The case involved house building subsidies granted by the German authorities to a German citizen who was a public servant of the EC. When the beneficiary wanted to use the subsidies for building a house in Belgium, the German authorities claimed repayment. The beneficiary challenged this. The Federal Fiscal Court (*Bundesfinanzhof*) found in favour of the beneficiary. It stated, *inter alia*, that the subsidies did not constitute State aid within the meaning of Article 92 EC Treaty as they promoted not only the German construction industry, but also foreign construction companies active in Germany.

3.29. Fiscal Court (*Finanzgericht*) of *Baden-Württemberg*, reference for a preliminary ruling by the ECJ dated 29 April 1970[88] (B)

The Fiscal Court (*Finanzgericht*) asked whether the imposition of taxes on road transport of goods infringed certain tax rules of the EC. The *Finanzgericht* held that the imposition of a tax on certain companies cannot be classed as a State aid granted to a competitor of those companies (in this case the "beneficiary" of the road transport companies' obligation to pay taxes was the Federal German railroad company).

The decision handed down by the ECJ on 21 October 1970[89] does not deal with the EC rules on State aid.

3.30. Fiscal Court (*Finanzgericht*) of Munich, reference for preliminary ruling by ECJ dated by 23 February 1970[90] (B)

This case also involved a tax imposed on road transport of goods. The questions asked by the Fiscal Court (*Finanzgericht*) of Munich mainly concern the compatibility of the relevant German rules with EC tax rules and, by way of precaution only, the question whether Articles 92, 93 EC Treaty also apply to transport and whether they prohibit protective measures for state-operated railroad companies that are operated by the state. On the latter issue, the reference was based on the plaintiff's argument that the law providing for the tax on road transport of goods violates Article 93(3) EC Treaty as, in the absence of a positive decision of the Commission, Member States must not grant State aid.

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87 Reported in Bundessteuerblatt 1974, II, page 374

88 Reported in EFG 1970, 367

89 Case 20/70, [1970] ECR 861, Lesage v. Hauptzollamt Flensburg.

90 Reported in EFG 1970, 310

In its decision of 6 October 1970[91] the ECJ dealt only with the tax law aspects of the case.

[91] Case 9/70, [1970] ECR 825, Grad v. Finanzamt Traunstein.