

## **2. Outline on the availability of judicial relief under the legal system of Greece**

### **2.1 General Introduction to Hellenic Administrative Law Provisions**

In accordance with Article 94 of the Hellenic Constitution, in principle civil courts judge private disputes whereas administrative courts have competence over administrative disputes.

In particular, ordinary administrative courts<sup>1</sup> (hereafter called administrative courts) are, in accordance with law 1406/83, competent to judge “substantial administrative disputes” but may also be given competence of judicial review over certain enforceable administrative acts, provided the Conseil d’ Etat remains the ultimate court of appeal on such cases.

The Hellenic Conseil d’ Etat (*Symvoulío tis Epikratias*), which is very similar in function to the French Conseil d’ Etat, has powers of judicial review over enforceable regulatory or individual administrative acts (which are not subject to any judicial remedy before other courts) for excess of power, infringement of law, lack of competence or lack of essential procedural requirement.

In addition, the Conseil d’ Etat acts as a Supreme Court of appeal for irrevocable decisions of administrative courts on grounds of excess of power or infringement of law and may also judge substantial administrative disputes, if so provided by the Constitution and relevant laws.

In many cases an administrative complaint must first be lodged with the administrative authority which issued the act in question, and rejected by the authority before an action is permissible before the Conseil d’ Etat.

Administrative courts may not only annul but also amend the administrative act in question and may judge not only its legality but also its essence. They may not, of course, consider the expediency of the act in question.

As a result, the choice of judicial remedy and the Court’s jurisdiction in the case of legal action concerning State aids depends not only on the nature of dispute and the interests and rights involved in each particular case, but also on the nature and extent of judicial review requested.

The constitution and the relevant law<sup>2</sup> do not provide definitions of “substantial administrative dispute” and “enforceable administrative acts subject to judicial review”. This may have the effect of impairing access to quick and effective judicial remedy in the case of State aids.

## **2.2 Procedures concerning the Direct Effect of Article 93(3) EC Treaty**

If a State aid has been introduced in Greece without prior notification to and approval by the Commission and is therefore in direct infringement of Article 93(3) EC Treaty, one has to consider first which legal form such State aid has taken: i.e. the form of law, of presidential decree, of administrative decision or of a contract between the beneficiary undertaking(s) and the state (public authorities, a legal person belonging to the public sector or a private legal person under the control or influence of the state).

As a rule State aids in Greece are introduced under legislative provisions adopted by Parliament or sometimes by administrative decisions that may or may not be subsequently ratified by laws adopted by the Parliament.

Examples are Law 2271/1994 on the restructuring of Olympic Airways, Law 1386/83 on the Organization for the Economic Restructuring of Undertakings, Law 1892/90 on modernization and development and other provisions (system of regional aids) and Law 1796/88 which ratified Decision E 3789/88 of the Minister of Finance, which had excluded profits relating to exports of undertakings from a special taxation.

Alternatively, State aids may be introduced by ministerial decisions, such as Joint Decision 30512/91 of the Ministers of National Economy, Industry, Energy and Technology on the support of shipbuilding companies and works.

Statutes may not be directly challenged by persons whose interests are affected by their provisions, although courts are obliged not to apply unconstitutional laws. A legislative provision may be declared unconstitutional by a competent court only incidentally, where the legality of an administrative act stemming from such a law is challenged before it (incidental control).

Individuals affected (including legal persons) may, however, take legal action against ministerial decisions or other administrative regulatory or individual acts which implement the above laws on State aids in particular cases. Examples are the decisions of the Minister of National Economy on the grant of State aids to specific undertakings (under Article 7(2) of L 1892/90, Decision of the Minister of Finance

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<sup>1</sup> Ordinary administrative courts are all first instance and appeal administrative courts with the exception of the Hellenic Conseil d'Etat.

<sup>2</sup> Law 1406/83

specifying the debts, loans and obligations of Olympic Airways which are taken over by the Greek State under Law 2271/94.

It is interesting to note, however, that certain aspects of the aid regime on the restructuring of Olympic Airways do not require their further enactment by other enforceable administrative acts. An example is the maintenance until 31.12.95 of the special tax regime granted earlier to Olympic Airways which may be only incidentally challenged as being unconstitutional.

If, however, State aid is granted by an enforceable administrative act (such as a ministerial decision) regardless of whether it implements a law on State aids in a specific case or is issued ad hoc, it may be challenged before the Hellenic Conseil d'Etat. The Fourth Chamber, which may submit the case to the Plenary Session of the Conseil d'Etat, if considered of general importance, is particularly relevant. Judgments of the Conseil d'Etat are not subject to further appeal.

On the other hand if a State aid were to be granted by means of an administrative contract, or if the administrative act referred to taxation or the collection of public income, such agreement or act may be challenged before the Administrative Courts subject to review before the Hellenic Conseil d'Etat.

In the past, certain laws relating to state incentives on investment, such as Law Decree 2687/1953, on investment and the protection of foreign capital and Law 4171/1961, a law (now repealed) on development and investment, provided that disputes between the state and undertakings relating to the interpretation and eventual omissions of the awarding administrative acts would be settled by arbitration. The jurisprudence of the Hellenic Supreme Court has so far accepted that arbitration could lead to the recognition of the illegality of administrative acts but not directly to their annulment.

Moreover, civil courts may judge on actions relating to State aid awarded by a private law undertaking (e.g. an action against an act of the Agricultural Bank of Greece, which is a private law bank under state control, providing for the discharge or the favourable settlement of agricultural cooperatives' debt).

### **2.3 Action for damages**

First instance and appeal administrative courts also have jurisdiction over actions for damages (under Articles 105-106 of the Introduction to the Civil Code) against the State and legal persons governed by public law and for illegal acts or omissions of

their organs in the exercise of public power. The Conseil d' Etat also acts as supreme court of cassation in this case. Compensation is possible only if the illegal acts or omissions in question do not infringe provisions adopted in the common interest.

The State is not liable for compensation for damage caused by laws adopted by Parliament unless such laws contain a provision to the contrary or are judged by the courts to infringe the Constitution or European Union law.

An action for damages has already been brought against the National Drug Organization and the Greek state for contravention of Articles 92 and 93 EC Treaty [See Decision 5110/1994, Administrative First Instance Court of Athens reported in Review of Social Insurance Law /1994 (621) (E)].

In this case the Court held that the State, legal entities of the public sector and local authorities are liable for the acts or omissions of their organs which, although in compliance with a formally adopted Greek law, contravene a law of superior force such as the Constitution or European Community law, provided that the lesser law infringes a person's right directly protected by the superior law. Although in this case the Court upheld the *locus standi* of the complainant, it rejected his action on grounds of lack of evidence.

## **2.4 Injunction Proceedings**

A person challenging an enforceable administrative act before the Hellenic Conseil d' Etat may request the court to suspend its implementation by issuing a reasoned decision<sup>3</sup>. Injunction proceedings before the Conseil d' Etat are crucial in the case of State aids granted in contravention of Art. 93(3) EC Treaty because this court may take a long time to issue a judgment.

Injunction proceedings are also possible before an administrative court where an administrative agreement has already been challenged, or a substantial administrative dispute is pending for judicial control.

The lodging of an action before an administrative court does not in itself suspend the effects of an administrative act unless otherwise provided by law<sup>4</sup>.

However, the competent administrative court may order suspension of the implementation of the challenged administrative act only if, as a result of enforcement, the complainant may suffer material or moral damage, which is irreparable or may only be redressed with difficulty, if the act is eventually annulled.

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<sup>3</sup> Article 52 of Presidential Decree 18/1989

An injunction is not granted by administrative courts in the case of negative administrative acts or omissions or if public interest or the normal functioning of the Public Administration may be affected<sup>5</sup>.

To the best of our knowledge, no interim measures have so far been ordered by Greek courts to safeguard the parties' interests in the context of actions pending concerning State aids granted without prior notification (e.g. by ordering the freezing or return of moneys illegally paid).

## **2.5 Locus standi in lawsuits against decisions addressed to other parties**

Under Greek law an enforceable administrative act granting a State aid to a specific recipient in contravention of Article 93(3) EC Treaty may be challenged by a competitor of the recipient whose legal interests are directly, individually and presently affected by such act.

To be classed as a competitor, it is sufficient to prove that one is engaged in activity similar to that of the relevant recipient.

Although a collective action by professional associations or other collective professional institutions is also possible, the Hellenic Conseil d'Etat may require that the administrative act which is challenged does not favour certain members of the professional institution in question<sup>6</sup>.

Creditors of the recipient of a State aid granted in contravention of Article 93(3) EC Treaty may also challenge a relevant administrative act since it may affect their legal interests (e.g. by creating an eventually false image of creditworthiness of the beneficiary concerned or by suspending measures of forfeiture or confiscation against an ailing beneficiary undertaking, see Decision 3910/1988 of the 4<sup>th</sup> Chamber of the Hellenic Conseil d'Etat).

However, *actio popularis* is not recognized in this context.

## **2.6 The enforcement of negative Commission decisions**

If the Commission issues a negative decision declaring an aid as being incompatible with the EC Treaty, the member state in question, i.e. Greece, must, as the case may be, either abolish or alter or refuse to grant the unauthorized aid.

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<sup>4</sup> Pr. Decree 341/78, Article 31

<sup>5</sup> Article 31 of Pr. Decree 341/78

<sup>6</sup> Dec 4256/79

Under these circumstances interested third parties<sup>7</sup> may challenge the compatibility of such aid with Article 92(1) EC Treaty before the Greek courts, once this provision has been applied by a specific decision of the Commission under Article 93(2) EC Treaty. The courts of competent jurisdiction are those described under sections I and II above.

Beneficiary undertakings which are requested to reimburse aid illegally granted have *locus standi* to challenge the relevant administrative act and also to request damages, where they can establish extraordinary circumstances justifying a legitimate expectation in the legality of the administrative act which awarded them such aid in the first place. A preliminary question may be addressed to the European Court in this respect<sup>8</sup>.

In this case the Court held that the course of action above would be open to the complainant but that it did not have to rule on it.

## **2.7 The implementation of positive Commission decisions**

Existing State aids were in theory considered to be immune from actions by third interested parties before domestic courts as being incompatible with the Treaty, unless the Commission had taken a negative decision under Article 93(2) which has never retroactive effect.

Following Salt Union v Commission, State aid cleared by a positive decision of the Commission may be challenged by competitors and other interested parties before the competent Hellenic courts if, for instance, there is evidence that such aid has been granted in a specific case in contravention of a general aid scheme approved by the Commission.

Moreover, the relevant administrative acts may be challenged before the competent Hellenic courts<sup>9</sup> on other grounds unrelated to EC law such as for infringement of the relevant domestic law or for excess of power.

No Greek case law exists so far on actions brought before Hellenic courts challenging the grant of State aid which has been authorized by the Commission.

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<sup>7</sup> See section II(3) above

<sup>8</sup> Decision 5024/1995, Administrative First Instance Court of Thessaloniki reported in *Diikitiki Diki*/1996 (1039) (E, G)

<sup>9</sup> See sections I and II above

