

2. Outline on the availability of judicial relief under the legal system of Luxembourg

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

Articles 92 to 94 of the European Community Treaty governing State aids are not recognised as having direct effect. The exception is the last sentence of Article 93(3), which forbids Member States from implementing aid before the preliminary examination procedure has resulted in a final ruling¹.

Whilst the European Commission has exclusive jurisdiction in determining whether a State aid is compatible with the common market, national courts are required, due to the direct effect of Article 93(3), to declare unlawful State aid which has been granted prematurely, and without following the procedures of Article 93(3).

A final decision of the European Commission stating that a particular State aid is compatible with the common market does not regularise *a posteriori* acts granting aid in infringement of Article 93(3). Such acts remain invalid and unlawful².

To the best of our knowledge, no Luxembourg case law exists dealing with the direct effect of Article 93(3) of the EC Treaty. The following comments are therefore based upon Luxembourg experience in other areas of litigation.

Actions concerning infringements of Article 93(3) of the EC Treaty are available before both administrative and civil courts.

2.1.1 Procedure before administrative courts

By laws dated 12 July 1996, and 7 November 1996, jurisdiction formerly held by the State Council to rule on administrative actions, was transferred to the newly created administrative courts (Tribunal administratif et Cour administrative).

The implementation by public authorities of a State aid without complying with the procedure in Article 93(3) of the EC Treaty is open to challenge by any interested third party.

If the aid has been granted by an individual administrative act, a competitor or any other interested party can initiate proceedings before the Administrative Court

¹ Cour de Justice, C-120/73, 11 décembre 1973, *Lorenz*, [1973] ECR 1483; Cour de Justice, C-354/90, 21 novembre 1991, *Fenacomex/Rép. Française*, [1991] ECR I-5505.

² Cour de Justice, C-354/90, 21 novembre 1991, *Fenacomex/Rép. française*, op.cit.

(*Tribunal administratif*) within a period of three months from notification and seek an annulment of the relevant act, pursuant to Article 2 of the law dated November 7, 1996.

Under Article 7 of the law dated 7 November 1996, proceedings against administrative regulation must be initiated before the Higher Administrative Court (*Cour Administrative*) within a period of three months from the day of publication or, where the regulation is not published, from the day on which the claimant has knowledge of it.

The Administrative Court (*Tribunal administratif*) can only declare void a public authority's decision or regulation in case of incompetence, excess or abuse of powers, infringement of the law or of formalities established to protect private interests. The only available remedy is the annulment of the decision or regulation. No damages can be obtained before administrative courts³.

Appeals against rulings of the administrative court can be lodged before the Higher Administrative Court (*Cour Administrative*). A ruling of the Higher Administrative Court (*Cour Administrative*) is final.

Such administrative actions do not have suspensory effect unless expressly ordered by the administrative courts (Article 3 of the grand-ducal decree of August 21, 1866 establishing contentious proceedings before the State Council, as modified). According to case law, a stay of enforcement may be granted only if enforcement of the decision risks causing serious and irreparable damage to the claimant and if the grounds for the action appear serious⁴.

An exception to the general principle that no summary proceedings are available in administrative matters is the law dated March 13, 1993, implementing European directive n°89/665 co-ordinating the provisions relating to appeal proceedings in matters of public procurement. According to the first Article of this law, any person fulfilling the legal requirements for submitting a bid, who believes that community law relating to public procurement has been infringed by the grantor of a public procurement and that his rights have not been respected, can bring the case before the President of the Administrative Court (*Cour Administrative*). By way of summary proceedings, the President of the Administrative Court (*Cour Administrative*) may order any temporary measures to redress the alleged infringement or to prevent future damages. Amongst other powers, the President has the right to suspend the proceedings.

2.2 Procedure before civil courts

³ G. RAVARANI, "La responsabilité civile de l'Etat", *Pas.* 28, p.144.

2.2.1 Proceedings against the public authority which granted the aid

Liability in tort

As mentioned above, administrative courts have no jurisdiction to award damages to the claimant. Thus, the victim of an illegal administrative decision or regulation (i.e. on which grants a State aid in breach of Article 93(3) of the EC Treaty) who wishes to obtain damages has to sue the public authority in tort before the civil courts.

According to the general rules laid down in Articles 1382 et seq. of the Luxembourg Civil Code, the plaintiff must establish the fault of the public authority, the fact of the damage and the causal link between the fault and the damage. A specific law was adopted dated September 1, 1988 relating to the civil liability of the State and other public bodies largely based upon the general principles of civil liability mentioned above. To a certain extent, general rules of civil liability have also been amended or completed⁵.

The majority of cases state that the annulment of a decision (i.e. an individual administrative act) by the administrative courts is both a sufficient and a necessary condition to establish a fault in the conduct of the public authority.

Indeed, pursuant to case law unchallenged since 1983, a public authority, the decision of which it has been declared void by the administrative court is automatically deemed to be at fault⁶.

The Luxembourg Court of Appeal ruled in various cases that civil courts are not competent to examine the lawfulness of an individual administrative act⁷. The right to determine whether public authorities have committed a fault by adopting an administrative act is thus denied to civil courts. However, this principle, which is not unanimously followed by the lower courts⁸, has been criticized because it does not take into account the fundamental differences between an action for annulment before administrative courts and an action for tortious liability aiming to obtain damages⁹ before the civil courts.

⁴ Conseil d'Etat, 20 juillet 1977, Pas. 24, p.12.

⁵ G. RAVARANI, "La responsabilité civile de l'Etat", Pas. 28, p.115-116.

⁶ Cour d'appel, 13 décembre 1983; Cour d'appel, 30 octobre 1986, Pas. 27, p.266; Cour d'appel, 20 avril 1989, n°10271 du rôle Cour d'appel, 10 juillet 1991, n°12508 du rôle, Tribunal d'arrondissement de et à Luxembourg, 3 juillet 1986, n°408/86, Tribunal d'arrondissement de et à Luxembourg, 19 décembre 1984, Pas. 26, p.285.

⁷ Cour d'appel, 13 décembre 1983, Etat/Nilles; Cour d'appel, 21 novembre 1985, Editpress Lux. / Etat; Cour d'appel, 22 mai 1996, n°17096 du rôle.

⁸ Tribunal d'arrondissement de et à Luxembourg, 19 décembre 1984, Pas. 1986, p.285.

⁹ G. RAVARANI, "La responsabilité civile de l'Etat", Pas. 28, p.145.

Where a particular State aid has been granted in infringement of Article 93(3) of the Treaty by way of a regulation, civil courts have the constitutional duty not to apply these (illegal) regulations (Article 95 of the Constitution). Prior to the administrative reform of 1996, this rule was justified by the fact that the State Council had no jurisdiction to declare regulations void. Even if it seems that Luxembourg case law is not entirely settled on the point, Luxembourg civil courts tend to declare public authorities liable for their regulatory activities¹⁰. It should therefore be possible to sue public authorities in a tort action for infringement of community law¹¹.

Nowadays, regulations can be declared void by the Higher Administrative Court (*Cour Administrative*). Hence, future case law will have to determine whether regulations which have not been submitted in time to the Higher Administrative Court (*Cour Administrative*), may still be declared illegal (i.e. inapplicable in a particular situation) by civil courts, entailing the civil liability of the responsible public authority.

It has to be stressed that case law of the Court of Justice requires the Member States to indemnify private individuals for damages caused by an infringement of community law¹². National provisions relating to competence, and procedural requirements, must not render the obtaining of damages impossible or excessively difficult¹³. In our opinion, there are grounds for applying this case law where civil courts refuse to declare illegal a decision or regulation which has not been previously declared void by administrative courts.

Summary proceedings

In case of urgency, the President of the District Court can order any measure not subject to serious dispute or which may be justified by the existence of a disagreement (Article 806 first paragraph of the Luxembourg Code of Civil Proceedings).

Besides, the President of the District court may also order any kind of conservatory measure, or a measure tending to restore a situation to its former state, either to

¹⁰ Tribunal d'arrondissement de et à Luxembourg, 16 novembre 1994, n° 924/94, confirmé par Cour d'appel, 9 juillet 1996, n°17751 du rôle; Cour d'appel, 22 novembre 1995, n°16525 du rôle.

¹¹ F. SCHOCKWEILER, "Le dommage causé par suite d'une violation du droit communautaire par l'autorité publique et sa réparation en droit luxembourgeois", *Pas.* 28, p.38.

¹² Cour de Justice, 19, novembre 1991, *Francovich et Bonifaci c/ République italienne*, c-6/90 et C-9/90, [1991] ECR I-5357.

¹³ Cour de Justice, 19, novembre 1991, *Francovich et Bonifaci c/ République italienne*, c-6/90 et C-9/90, [1991] ECR I-5357; Cour de Justice, 5 mars 1996, *Brasserie du Pêcheur et Factortame*, C-46/93 et C-48/93, [1996] ECR I-1029.

prevent imminent damage, or to stop any obviously illegal disturbance (Article 807 first paragraph of the Luxembourg Code of Civil Proceedings).

A court order pronounced in summary proceedings is provisional in nature.

2.2.2. Proceedings against the recipient of State aid

Liability in tort

Where a competitor of a recipient of State aid infringing Article 93(3) of the EC Treaty, successfully proves the recipient's fault, as well as a damage and the causal link between this fault and damage, the recipient can be sued for damages before the civil courts. However, proof of such fault (consisting in an infringement of either a legal provision or of the general duty of care) seems rather difficult to establish.

Action for cessation

Under Luxembourg law, another ground exists for legal action by recipients' competitors. Pursuant to Article 16 dated 27 November 1986 (as amended) of the Luxembourg law, regulating certain commercial practices and sanctioning unfair competition, any merchant, industrialist or craftsman commits an act of unfair competition where by an action contrary to honest commercial and industrial practices or to contractual commitments, they detract or attempt to detract from their competitors part of their customers or attempts to cause prejudice to a contender's competitive power".

In case of an act of unfair competition, the law contemplates a specific action for cessation as well as, under certain circumstances, criminal sanctions. According to Article 21 of the law, the action for cessation of the act of unfair competition may be introduced by anyone having an interest. The action will be introduced by a petition filed with the president of the District Court of Luxembourg, sitting in commercial matters. It will be judged in the same way as summary proceedings. If the conditions of an act of unfair competition are satisfied, the president will order the cessation of such act. The order may even be accompanied, at the request of the applicant, by a penalty (*astreinte*) imposed on a daily basis for non-compliance with the presidential order (according to Article 2059 of the Civil Code). Additional sanctions may be ordered in the presidential order of cessation, such as the advertisement of the order or its publication in one or more newspapers at the expense of the offender.

The law does not provide for damages to be granted by the President of the District Court. To obtain damages, the plaintiff will have to bring a separate civil action (based on Articles 1382 and following of the Civil Code).

To the best of our knowledge no action of cessation has been filed with the Luxembourg courts by a competitor of a recipient of State aid.

Summary proceedings

A competitor of the recipient may also file for summary proceedings as described above.

2.2.3. The enforcement of negative Commission decisions

It often happens that the European Commission, in ordering the cessation of incompatible State aid, also orders the public authority to recover the funds from the recipient.

In this case the public authorities have to withdraw the administrative act which previously granted the aid.

Pursuant to Article 8 of the grand-ducal decree dated June 8, 1979 on the procedure to be followed by the local or state administrations, the retroactive withdrawal of a decision, which has created or recognised rights, is - unless otherwise provided - only possible during a period of three months of, and during, the period of the contentious procedure against this decision. The withdrawal of such decision is only permitted for the same reasons that would have justified its annulment.

However, this provision has to be viewed in the context of European case law, according to which the recovery of aid is ordered in accordance with national procedure including the national provisions relating to legal certainty and legitimate expectation on the withdrawal of an administrative act. On the other hand, the recipient of State aid may only have legitimate confidence in the regularity of this State aid if it has been granted to him in accordance with Article 93 of the EC Treaty¹⁴. In relation to national provisions regarding the period of time during which a withdrawal of administrative acts is possible, the Court of Justice stated that these provisions are, like any other national provisions, to be applied in a way which does not render the recovery practically impossible¹⁵.

In case the recipient refuses to refund the aid, the public authority will have to initiate ordinary proceedings before the civil courts in accordance with the general rules of civil procedure.

¹⁴ Cour de Justice, 20 septembre 1990, *Commission/République fédérale d'Allemagne*, [1990] ECR I-3437.

¹⁵ *idem*.

2.2.4. The implementation of positive Commission decisions

As mentioned above, a positive Commission decision does not *a posteriori* regularise the infringement of Article 93(3) of the EC Treaty. This means that the rulings and judgments rendered or to be rendered on the basis of the direct effect of Article 93(3) are valid and can be enforced.

If, prior to the approval of the Commission, State aid has not been granted, public authorities may legally start to implement the aid to the beneficiaries upon such approval.

Such implementation decisions can be challenged by the recipient's competitors in the administrative courts by arguing that the Commission wrongfully came to the conclusion that the aid is compatible with the common market. Such procedure will of course tend to obtain a court ruling referring the relevant question to the European Court of Justice under Article 177 of the EC Treaty.

3. List of cases and summary

3.1. Decision of the State Council dated 11 April, 1989 (A)

The commercial company MOULINS DE KLEINBETTINGEN filed for a subsidy with the Ministry of Agriculture, in accordance with the law dated December 18, 1986 promoting agricultural development (hereinafter "the Law"). The application was refused by the Ministry on the grounds that the applicant did not fall under the scope of application of Article 39 paragraph 1 of the Law which enumerates the potential beneficiaries of such subsidy, stating that such beneficiaries may, *inter alia*, be each undertaking whose main purpose is to increase the income of farmers in general.

The applicant instituted an administrative action against this decision before the State Council by arguing, firstly, that the Law had not been correctly applied by the Ministry and, secondly, that, by such incorrect application of the Law, Article 92 of the EC Treaty had been infringed in the sense that anti-competitive structures had been created.

As far as the first argument is concerned, the State Council held that the aim of the Law is to enable the Ministry of Agriculture to promote the agricultural sector. Hence, the potential beneficiaries of the subsidies are to be found amongst the agricultural population and the rural establishments. The subsidies foreseen by the Law are paid by the budget of the Ministry of Agriculture. As public expenditures must not be distracted from the purpose given to them by the legislator, it was held that the Minister

of Agriculture must restrict the granting of subsidies to those entities for which his Ministry is in charge. This was not the case of the company MOULINS DE KLEINBETTINGEN, a private company which falls under the competence of the department of Industry and Middle Class affairs. Accordingly, the decision of the Minister of Agriculture was upheld by the State Council.

As far as the applicant's second argument is concerned, the State Council simply considered, without any further comments or explanations, that the aid granted under the Law, just like the aid benefiting to the industrial sector as provided by a law dated May 14, 1986, is compatible with the derogation established under Article 92(2) and could not reasonably assert that the balance of the Common Market would risk to be disturbed by the mere fact that Luxembourg grants structural aid to the agricultural sector by means of the Law.