SUMMARIES OF STATE AID JUDGMENTS AT NATIONAL LEVEL

JUDGMENTS SELECTED FROM THE 2006 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL – PART I

I- Information on the judgment

President of Commercial Court of Brussels, 15 September 2000 and Court of Appeal of Brussels of 7 December 2001, Hays v La Poste (Assurmail service) and Key Mail, unreported

II- Brief description of the facts and legal issues

Hays brought an action for a cease and desist order against the conditions adopted by La Poste for setting up a division (Assurmail) which would compete with Hays' Document Exchange service (DX) in the insurance sector.

Hays claimed that Assurmail benefited from cross-subsidies constituting non-notified State aid in breach of Article 88 (3) EC. Hays also claimed that La Poste's action breached Article 82 EC.

III- Summary of the Court's findings

The President of the Commercial Court decided to refer a question the Commission, but on the day of the re-opening of the oral hearing, its decision was appealed; the Court of Appeal did not come to a ruling on this matter as the Commission issued a decision (on 5 December 2001) declaring that the service was in breach of Article 82 EC. This was sufficient for La Poste to discontinue Assurmail (the Court of Appeal decided on 7 December 2001 to stay the proceedings until the adoption of a Commission decision, which was adopted two days before the delivery of this judgment).

I- Information on the judgment

President of Commercial Court of Brussels, Judgment of 13 February 1995, Breda Fucine Meridionali v Manoir Industries, JTDE, 1995, p. 72

II- Brief description of the facts and legal issues

The Belgian national railways (SNCB-NMBS) launched a tender for the provision of railways materials. Breda, an Italian company, and Manoir Industries, a French company, submitted competing offers. It appeared that Breda's offer was 40 % lower than Manoir's offer.

Manoir filed a complaint with the Commission, alleging that Breda benefited from State aid granted by the Italian State. Manoir also lodged an action for a cease and desist order before the President of the Brussels Commercial Court alleging that Breda's offer was abnormally low and unfair due to this State aid, which had not been notified to the Commission. An order was rendered by default in favour of Manoir. Breda filed an opposition with the same judge, requesting a contradictory judgment.

III- Summary of the Court's findings

The President of the Brussels Commercial Court first recalled, rejecting Breda's pleas, that the national court has powers to interpret and apply the concept of aid with a view to determining whether a State measure had to comply with Article 88 (3) EC. The President of the court explicitly referred to *Steinike & Weinlig*[1].

The President of the court further rejected the argument that the definitive and non-provisional character of the powers of the court, in the context of the cease and desist order procedure, would be incompatible with a possible Commission decision on the compatibility of the aid with the Common Market. The Court referred this time to *Saumon - FNCE*[2] in order to confirm that any Commission decision could not have the effect of a posteriori regularising a violation of Article 88 (3) EC. The national court may therefore not be requested to stay the proceedings while waiting for such a Commission decision.

Finally, the President of the court ruled that Breda could not exonerate itself by arguing that the notification obligation bears on the Italian State and not on itself, the State aid being "*incompatible with the Common Market, and therefore unacceptable, on this market,* [sic] *Breda committed an abuse in intervening on it as it did with its offer to the SNCB, with the help of such State aid; this abuse constitutes an act of unfair competition prohibited by Article* [88] *of the Law on the protection of commerce and consumers since it infringes or may infringe a subjective right of Manoir to an undistorted competition, inherent to its professional interests*".

IV- Comment of the authors of the 2006 study

This is an exemplary decision which refers to all the consequences, vis-à-vis the beneficiary of unlawful aid, of the violation of Article 88 (3) EC. The State claiming any benefit from this violation constitutes an act of unfair competition under national legislation3. The competitor of such a beneficiary has the right to stop this act of unfair competition by having recourse to an efficient

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1 Case 78/76, Steinike & Weinlig [1977] ECR 595.

2 Case C-354/90, Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de Saumon [1991] ECR I-5505.

3 See Case C-39/94, SFEI a.o. v La Poste a.o. [1996] ECR I-3547.

litigation procedure which leads to a definitive decision, although the latter is adopted by virtue of an interim relief procedure (specific procedure for a cease and desist order).

There is, however, one confusing point in the judgment. Rejecting Breda's argument, the President of the court rightly stated that the question of the eventual compatibility of the State aid was not at stake. However, in its concluding decision, the President of the court wrongly qualified the State aid in question as being "incompatible aid with the Common Market". This was perhaps an error of wording, but it should nevertheless not be repeated in order to avoid confusing the important distinction between the legality/lawfulness of the aid, on the one hand, and its compatibility with the Common Market, on the other hand (the only scope of intervention of the judge under Article 88 (3) EC read in conjunction with Article 87 (1) EC).

It should be noted that Breda later on brought an action before the Council of State seeking to annul the decision of the SNCB to avoid the tender to Manoir.

I- Information on the judgment

Court of Appeal of Brussels, 5 February 1993, Namur-Les Assurances du Crédit SA and Compagnie Belge d' Assurance Crédit SA v The Office National du Ducroire and the Belgian State, unreported

II- Brief description of the facts and legal issues

Under the Belgian Law of 31 August 1939 on the Office national du Ducroire ("OND"), that body, which is a public establishment responsible, in particular, for guaranteeing risks relating to foreign trade transactions, was accorded a number of advantages. These were: a State guarantee, formulated as a general principle, capital endowment of State income-producing bonds, the covering of its annual financial deficit by the State and exemption from the tax on insurance contracts and from corporation tax.

Namur-Les Assurances du Crédit SA and Compagnie Belge d'Assurance Crédit SA, another private undertaking operating on the same market, considered that, in view of the advantages accorded by the State to the OND, the enlargement of its field of activity was of such a nature as to distort competition. They therefore lodged a complaint with the Commission, alleging infringement of Articles 87 and 88 EC. They also made an application to the national court seeking, in particular, on the basis of Article 88 (3) EC, suspension of the OND's activity as a credit insurer for exports to Member States until the adoption by the Commission of a decision on the compatibility of the aid accorded or the delivery of a judgment on the substance of their action against the OND and the Belgian State.

III- Summary of the Court's findings

The Court of Appeal of Brussels referred a request for a preliminary ruling to the ECJ and asked inter alia the following question: "*(1) Must Article* [88]*(3) of the Treaty be interpreted as meaning that the granting or alteration of aid includes a decision of a Member State to authorize, after the entry into force of the Treaty, a public establishment, which previously engaged only incidentally in credit insurance for exports to other Member States, to exercise that activity in future without restriction, so that the aid which was granted by that State to the establishment under legislation predating the entry into force of the Treaty now applies to the exercise of that activity as thus extended?*"

The ECJ responded that "*enlargement, in circumstances such as those described in the judgment making the reference, of the field of activity of a public establishment which is in receipt of aid granted by the State under legislation predating the entry into force of the Treaty cannot, where it does not affect the system of aid established by that legislation, be regarded as constituting the granting or alteration of aid which is subject to the obligation of prior notification and the prohibition on putting aid into effect laid down by that provision*"[4].

IV- Comment of the authors of the 2006 study

This case helped the ECJ clarify the scope of the notion of existing State aid.

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[4] Case C-44/93, cited above.

I- Information on the judgment

Court of Arbitration, Case 195/2004, 1 December 2004, Nestlé Waters Benelux and others (action for annulment of provisions of the law on fiscal aspects of environmental taxes and ecobonuses and the programme act of 2003), excerpt published in Belgisch Staatsblad/ Moniteur belge of 10 December 2004, p. 81699[5]

II- Brief description of the facts and legal issues

Nestlé Waters and others filed actions for annulment of some provisions of the law on fiscal aspects of environmental taxes and eco-bonuses and the Programme Act of 2003. These provisions introduced a new tax regime for drinks' packaging. This regime involved so-called 'eco-bonuses' in the form of a reduction of excise duties and value added taxes on drinks and a levy on packaging, subject to an exemption under certain conditions.

The Programme Act of 2003 abolished the legal provision which exempted from the levy packaging that was made up of a minimum percentage of recyclable raw materials. At the same time the Programme Act gave the government the power to introduce such an exemption and expressly provided that the exemption could only enter into force after authorisation by the Commission. This legal change was triggered by a letter from the Commission to the Belgian Government, expressing doubts as to the possible State aid character of this exemption.

The claimants challenged the new tax regime for drinks' packaging under various headings. The majority of their arguments related to infringements of taxation principles, such as legal certainty, predictability and legality. The latter principle requires that there is a parliamentary act which determines the essential elements of the tax. Other arguments concerned alleged breaches of EC law, in particular Articles 28 and 30 EC, Article 90 EC and certain directives.

The claimants also challenged the new framework for exemptions of recyclable raw materials from the levy, submitting that it amounted to an illegitimate discrimination between re-usable packaging on the one hand, which is exempted by the Act itself, and recyclable packaging on the other hand, which can only be exempted after the government decides to grant the exemption.

III- Summary of the Court's findings

The Court of Arbitration rejected all of the actions, except for the challenge to the provision which allowed the government, instead of the legislator, to change the tax bands, since this amounted to an infringement of the principle of legality of taxes.

In order to justify the new exemption regime which led to discrimination between re-usable and recyclable packaging, the Court of Arbitration expressly referred to the Commission's letter expressing doubts as to the possible State aid character of this exemption, which prompted the legislator to provide that the new exemption could only enter into force after approval by the Commission.

[5] Full text available on the website of the Court of Arbitration at http://www.arbitrage.be/.

I- Information on the judgment

Court of Arbitration, Case 32/2004, 10 March 2004, Municipality of Schaarbeek against the Belgian State (preliminary question – tax exemption of the public telecoms operator), excerpt published in Belgisch Staatsblad/ Moniteur belge of 10 May 2004, p. 37541[6]

II- Brief description of the facts and legal issues

In a dispute between the Municipality of Schaarbeek and the Belgian State before the Court of First Instance of Brussels, the latter court referred a preliminary question to the Court of Arbitration regarding the constitutionality of Article 25 of the Act of 19 July 1930 establishing the Telegraph and Telephone Agency ("R.T.T."). This article exempted Belgacom (successor of the R.T.T.) from all taxes in favour of municipalities, despite the fact that the company was performing both a public service and a commercial activity.

Complaints had been filed with the Commission, alleging that the exemption after the liberalisation of the market constituted illegal and incompatible State aid. The Commission closed its file on this matter once it learned from the Belgian State of its intention to repeal the measures in question, which it did in August 2002.

In this procedure, Schaarbeek alleged that the tax exemption constituted an infringement of Articles 10 and 11 of the Belgian Constitution (non-discrimination), read in conjunction with Articles 86 and 87 EC. In particular, it submitted that the fact that Belgacom had continued to be exempted in the period between the liberalisation of the market and August 2002 was unconstitutional, in that it favoured Belgacom over its competitors.

III- Summary of the Court's findings

According to the Court of Arbitration, it can be inferred from the Commission's decision to close the file that the tax exemption is an existing State aid (the exemption was enacted in 1930), although the Commission did not state whether it concerned existing aid or new aid (at least the judgment did not elaborate on the reasoning of the Commission for closing the file). The Court of Arbitration ruled that the aid can only be considered incompatible after a negative Commission decision. Since the Commission filed the complaint, there had been no such decision. Moreover, the exemption had been abolished by the Belgian State upon request by the Commission. The Court of Arbitration therefore concluded that Articles 87 and 88 EC had not been infringed.

Furthermore, the fact that the exemption was not abolished with retroactive effect was not found to be unconstitutional. Belgacom had to be given the appropriate time to adjust to the requirements of a liberalised market.

IV- Comment of the authors of the 2006 study

The Court of Arbitration is competent to judge on the compatibility of a parliamentary act with the Belgian Constitution when read in conjunction with the articles in the EC Treaty on State aid. In making this judgment, the Court of Arbitration respected the (alleged) view of the Commission as to whether there was (existing) aid.

[6] Full text available on the website of the Court of Arbitration at http://www.arbitrage.be/.

One can query the fact that the Court did not simply state that it was not competent to adjudicate on the matter as the aid in question concerned existing aid (an area in which national courts have no competence to adjudicate).

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I- Information on the judgment

Court of Arbitration, Case 143/2004, 5 November 2003, Province of Hainaut and municipalities of Schaarbeek and Sint-Joost-Ten-Node (action for annulment of programme act of 2001), excerpt published in Belgisch Staatsblad/ Moniteur belge of 25 November 2003, p. 56634[7]

II- Brief description of the facts and legal issues

Belgacom was exempted from municipal and provincial taxes by virtue of the Law of 19 July 1930. Complaints were filed with the Commission against this measure on the grounds that it constituted incompatible State aid contrary to Article 87 EC. As a result of these complaints this tax exemption was repealed by Law in 2001 and 2002 with *ex nunc* effect ("the contested measures"). The Commission closed its file on this matter once it learned from the Belgian State of its intention to repeal the measures in question.

The claimants, the Municipalities of Schaerbeek and St Josse Ten Noode, sought the annulment of the contested measures in so far as they had no retroactive effect. According to the claimants, since the liberalisation of the telecommunications market in Belgium in 1992, the tax exemption in question violated inter alia Articles 87 and 88 EC in so far as the exemption favoured Belgacom over other economic operators. Accordingly, the complainant considered that Belgacom should be required to pay the municipalities all unpaid taxes since 1992.

III- Summary of the Court's findings

The Court of Arbitration inferred from the Commission's decision to file the complaint against the measures in question that the Commission considered that the tax exemption constituted existing aid, the repeal of which by the Law of 2001 and 2002 was sufficient to meet the requirements of the EC Treaty.

The Court of Arbitration ruled that, as the measure constituted existing aid (it was enacted in 1930), it could only be considered as incompatible with the EC Treaty once the Commission had adopted a decision to that effect.

The Court of Arbitration therefore concluded that there was no violation of Articles 87 and 88 EC.

[7] Full text available on the website of the Court of Arbitration at http://www.arbitrage.be/.

I- Information on the judgment

Court of Arbitration, Case 20/97, 15 April 1997, Professional Association of the Belgian and foreign insurance companies operating in Belgium (action for annulment of provisions of the Law of 20 December 1995 containing social provisions), published in Belgisch Staatsblad/Moniteur belge of April 1997, p. 9567[8]

II- Brief description of the facts and legal issues

An association of insurance companies (the "UPEA") filed an action challenging the constitutionality of a specific regime of deductibility of contributions to retirement funds and the provision of a State guarantee for the solvability margin of one social fund, i.e. the "*Caisse de Prévoyance*" of doctors, dentists, and pharmacists (the "Doctors' fund").

The State guarantee was only granted to one social fund and not to the traditional insurance companies. The UPEA therefore alleged that a competitive advantage was being granted to the Doctors' fund by way of a State aid measure which had not been notified to the Commission. In the UPEA's view this amounted to an infringement of the Belgian Constitution, read in conjunction with the EC Treaty provisions on State aid.

III- Summary of the Court's findings

The action was dismissed. The Court of Arbitration considered the absence of notification of a potential State aid measure as a matter relating purely to the establishment of the legislative act in question rather than to its substance. Therefore, as the objection did not concern the substance of the challenged legislative act but rather the way in which that act was established, the Court of Arbitration considered that it was not competent to rule on the matter.

IV- Comment of the authors of the 2006 study

The Court erred in law by holding that the absence of notification of a potential State aid measure is a procedural matter, which relates to the establishment of the legislative act introducing the measure and does not affect the substance of the act itself. If a newly introduced State aid measure has not been notified to the Commission, the aid is unlawful on the basis of Article 88 (3) EC, and so should be declared null and void under national law. In light of the supremacy of EC law, the legislative act introducing the aid should then be regarded as unlawful.

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[8] Full text also available on the website of the Court of Arbitration at http://www.arbitrage.be/.

I- Information on the judgment

Court of Arbitration, Case 17/2000, 9 February 2000, Georges Lornoy & Sons and others (action for annulment of provisions of act establishing budgetary fund for the health and quality of animals and animal products), published in Belgisch Staatsblad/Moniteur belge of 7 March 2000, p. 6681[9]

II- Brief description of the facts and legal issues

The Law of 24 March 1987 on animal health established a system to finance services combatting animal diseases and improving animal hygiene and the health and quality of animals and animal products. The claimants were required to make contributions to this system. The Belgian State failed to notify this aid scheme to the Commission in breach of Article 88 (3) EC.

On 7 May 1991, the Commission adopted Decision 91/538/EEC on the animal health and production fund in Belgium. The Commission ruled that the aid granted by Belgium in the beef, veal and pork sectors was incompatible with the Common Market within the meaning of Article 87 EC and must be discontinued in so far as the compulsory contribution was also imposed on products imported from other Member States at the stage of slaughter.

On 16 December 1992, the ECJ, following a request for a preliminary ruling by a Belgian court (see case summary in section 3.3.3 below), held that the contributions in question could constitute a charge having equivalent effect to a customs duty contrary to Article 12 EC, as well as State aid contrary to Article 87 EC[10].

The 1987 Law was repealed and replaced by the Law of 23 March 1998 on the establishment of a budgetary fund for the health and quality of animals and animal products. The 1998 regime had retroactive effect with regard to the measures introduced by the 1987 law requiring persons to make contributions to the fund. This State aid scheme was properly notified to the Commission and approved in 1996 (Commission Decision of 9 August 1996 relating to aid measure N 366/96).

The claimants brought an action seeking the annulment of the 1998 regime. They claimed inter alia that the 1998 regime breached Articles 10 and 11 of the Belgian Constitution, read in conjunction with Articles 87 and 88 EC, the principle of legal certainty, and the general principle of the non-retroactivity of laws. According to the claimants, the 1998 regime deprived Article 88 (3) EC of its effectiveness in so far as it prevented them from seeking reimbursement of the contributions made under the 1987 regime.

III- Summary of the Court's findings

The Court of Arbitration dismissed the actions of the producers on the grounds set out below.

First, the Court of Arbitration noted that Belgian law allows a measure to have retroactive effect when it is indispensable for achieving an objective of general interest, such as the good functioning of the public service.

The Court of Arbitration then considered that the 1998 law only consolidated the provisions of the 1987 regime. It did not contain any new provision which differed from those contained 1987 regime.

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9 Full text also available on the website of the Court of Arbitration at http://www.arbitrage.be/.

10 Case C-17/91, Georges Lornoy en Zonen NV and others v Belgian State [1992] ECR I-6525.

The national producers should therefore have expected that Belgium would maintain the measures in question after meeting its obligation to notify these measures.

The Court of Arbitration finally considered that this did not go against Community law. Indeed, as the Commission had, by virtue of its 1996 Decision, approved the 1998 regime without any condition, and, given the importance of the measure in question, the Court considered that the 1998 law was compatible.

IV- Comment

This judgment runs contrary to the principles established in the earlier judgments of the ECJ concerning the impact of non-notification of State aid measures in breach of Article 88 (3) EC[11].

The ECJ's later ruling in 2003 in the *Van Calster and Cleeren* case[12] concerned the same measures examined by the Court of Arbitration. The ECJ noted that Article 88 (3) EC precludes the levying of charges which finance specifically an aid scheme that has been approved by the Commission, in so far as those charges are imposed retroactively in respect of a period prior to the date of that decision (the Court of Appeal of Antwerp, which referred this *Van Calster* case to the ECJ[13], has not yet delivered its judgment).

According to the ECJ, the 1996 Commission decision does not approve the retroactive effect of the 1998 regime; even if the Commission did examine the compatibility of the charges imposed with retroactive effect, it does not have competence to decide that an aid scheme put into effect contrary to Article 88 (3) EC is legal.

Unlike the Court of Arbitration, the Supreme Court has now taken into account the ECJ's ruling.

11 See, in particular, Case C-354/90, Saumon - FNCE [1991] ECR I-5505 and Case C-39/94, SFEI a.o. v La Poste a.o. [1996] ECR I-3547.

12 Joined cases C-261 and C-262/01 [2003] ECR I-12249.

13 Court of Appeal of Antwerp, 28 June 2001, Belgium v NV Openbaar Slachthuis.

I- Information on the judgment

Supreme Court, Case no. C.02.0133.N, 11 March 2005, Voeders Velghe – De Backer v Belgian State (contributions on basis of Law on animal health)[14]

II- Brief description of the facts and legal issues

See the ruling of the Court of Arbitration in the *Lornoy* case. This case concerns the same 1987 law referred to in the *Lornoy* case and its amendment in 1998.

The claimants brought an action seeking recovery of the contributions they made under the 1987 law on the grounds that this constituted unlawful State aid.

The Court of Appeal of Brussels (following the Court of Arbitration ruling in *Lornoy*) considered that the 1998 law retroactively brought to an end the unlawfulness of the 1987 law and that there was therefore no need to reimburse the relevant contributions.

The parties lodged an appeal on points of law ("*pourvoi en cassation*") before the Supreme Court, which upheld the parties' appeal and annulled the judgment of the Court of Appeal.

III- Summary of the Court's findings

The Supreme Court first noted that where a State aid measure is implemented in breach of the obligation to notify, the national judicial bodies are obliged to order the reimbursement of the relevant contributions setting up this measure.
The Supreme Court observed that, whilst the assessment of the compatibility of aid measures with the Common Market falls within the exclusive competence of the Commission, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 88 (3) EC is infringed.
The Supreme Court then referred to the ECJ's judgment in *Van Calster and Cleeren*, in which it specifically examined the 1987 Belgian law. The Supreme Court ruled that a Commission decision declaring the draft 1998 law compatible does not retroactively remedy the failure to notify the 1987 law.
On this basis, the Supreme Court considered that the Court of Appeal was therefore wrong to consider that the 1998 law could have retroactive effect and regularise the contributions made under the 1987 law, a measure which was not notified to the Commission in breach of Article 88 (3) EC.

IV- Comment of the authors of the 2006 study

This judgment rightly applies the principles of the ECJ's case law, in particular cases C-354/90 *Saumon - FNCE*, C-39/94 *SFEI a.o. v La Poste a.o.* and Joined cases C-261/01 and C-262/01 *Van Calster*. This case illustrates that the Belgian civil courts have not applied the Court of Arbitration's reasoning in the *Lornoy* case, and are now correctly applying EC case law.

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[14] Full text available on the website of the Supreme Court at http://www.juridat.be/juris/jucf.htm, 8 April 2005.

I- Information on the judgment

Supreme Court, Case no. C 96.0091.N, 19 January 2001, Belgian State against Georges Lornoy & Sons and others (parafiscal retributions)[15]

II- Brief description of the facts and legal issues

In this case, the Belgian State was pursued by veal importers before Civil courts seeking the reimbursement of the contributions they had to make to the fund for the health and safety of animals (which was set up by the 1987 law on animal health). This is the same fund referred to in the Cour of Arbitration's ruling in the *Lornoy* case and the Supreme Court's ruling in the *Voeders Velghe* judgment. However, this case does not concern the impact of the subsequent amendment of the law in 1998 which was the subject in those other cases.

In 1991, the Court of First Instance of Turnhout made a reference for a preliminary ruling to the ECJ, asking whether this measure constituted incompatible State aid. On the basis of the ECJ's response to its request for a preliminary ruling (see Case C-17/91, *Lornoy*,) and the Commission's Decision of 7 May 1991 declaring that the State aid was incompatible with the Common Market, the Court of First Instance of Turnhout ordered the Belgian State to reimburse the contributions. This judgment was upheld in 1995 by the Court of Appeal.

On appeal, on points of law, the Belgian State argued that the Supreme Court should set aside the Court of Appeal's judgment on, among others, the following grounds:

- the Court of Appeal should not have considered that the entire aid regime constituted incompatible State aid in so far as the Commission decision of 7 May 1991, declaring this aid incompatible, did not require the parties to change the obligatory contributions established for national products - i.e. in the Belgian State's view only the charges imposed on imported goods should be reimbursed;

- by virtue of a Law of 21 December 1994, the 1987 law had been amended so as to bring the aid regime in line with the Commission's decision; and

- the reimbursement of the contributions could lead to an unjust enrichment of the parties involved.

III- Summary of the Court's findings

The Supreme Court confirmed the Court of Appeal's ruling and rejected arguments submitted by the appellant.

First, by failing to notify the aid regime (and subsequent modification) to the Commission, the State violated Article 88 (3) EC. The Court of Appeal had to draw all the consequences concerning the validity of the measures in question. By virtue of Article 88 (3) EC, the sanction for not notifying the aid in question was to render it impossible for the Member State in question to apply the 1987 law.

[15] Full text available on the website of the Supreme Court at http://www.juridat.be/juris/jucf.htm, 18 October 2001; *Arr. Cass.*2001, afl. 1,141.

Secondly, the Law of 19 December 1994 amending the 1987 law introduced a new aid regime which should have been notified to the Commission in accordance with its Decision of 7 May 1991. The Supreme Court noted that the Belgian State had failed to do so. The Supreme Court considered that by virtue of Article 88 (3) EC, the Commission should have been informed of each proposed aid measure that the Member State wished to introduce.

Thirdly, the Supreme Court, relying on the ECJ's judgment in the *Dilexport* case[16], considered that the national judge could indeed consider that the reimbursement of the contributions in question might constitute an unjust enrichment. However, national authorities would not require persons seeking reimbursement of such contributions to submit evidence that they had not passed on the debt to third parties.

IV- Comment of the authors of the 2006 study

The Supreme Court has correctly applied the principles of EC law and fully drew the consequences of the State's failure to notify a State measure in breach of Article 88 (3) EC. The parties needed ten years of legal proceedings in order to obtain a final order for the reimbursement of their contributions. It is interesting that in this case the Supreme Court did not even refer to the earlier Court of Arbitration ruling on the retroactive effect of the 1998 law.

[16] Case C-343/96 [1999] ECR I-579.

I- Information on the judgment

Court of Appeal of Brussels, Case no. 95KR248, 4 December 1997, NV De Moor Gilbert and others against the Belgian State (contribution to fund for the health and production of animals)[17]

II- Brief description of the facts and legal issues

This case concerned a dispute between undertakings trading in pig meat, on one hand, and the Belgian State, on the other, about the legality of a compulsory contribution levied upon the slaughter or export of beef cattle, calves and pigs, for the benefit of the fund for the health and safety of animals (the "1987 law"). In a previous action, the undertakings had sought and received an order under which the State was prohibited from cashing the contributions pending the adoption of a Commission decision. However, the Court of First Instance ordered the slaughterhouses to transfer the amounts claimed to the Deposit and Consignation Fund in order to preserve the rights of the State pending that Commission decision. The Court of First Instance also submitted three preliminary questions to the ECJ[18]. The questions submitted by the Brussels Court of First Instance were very similar to the preliminary questions submitted by the Court of First Instance of Turnhout in the *Lornoy* case[19]. In this case, the slaughterhouses requested the release of the money blocked in the special fund. In the meantime, the Commission had decided on 7 May 1991 that the aid paid with the money collected through the contributions was incompatible with the Common Market. The ECJ for its part had ruled on the preliminary questions and had pointed to the role of the national judge to uphold the rights of those affected by a possible breach by the State of the prohibition on putting aid into effect without awaiting a positive Commission decision.

III- Summary of the Court's findings

The release of the blocked money was granted. On appeal, the Court of Appeal reasoned that the Belgian State had not notified the potential State aid measures and that a State could never implement State aid measures in the absence of a final positive Commission decision. Therefore, the State was not legally entitled to cash the contributions.

IV- Comment of the authors of the 2006 study

This case highlights the division of powers between the national judge and the Commission in State aid matters, noting the Commission's exclusive competence to assess the compatibility of aid with the Common Market and the national court's duty to draw the consequences of the failure by a State to notify an aid, in breach of Article 88 (3) EC.

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17 Full text available at http://www.juridat.be/cgi_juris/jurn.pl.

18 Joined Cases C-144/91 and C-145/91, Gilbert Demoor en Zonen NV and others v Belgian State [1992] ECR I-6613.

19 There were other cases on the same issue before lower courts - see, notably, Court of First Instance of Leper, 11 February 1994, Ministry of Agriculture v Gérard Claeys (which led to a preliminary ruling of the ECJ (Case C-114/91 [1992] ECR I-6559) in which the ECJ ruled that "[a] *parafiscal charge of the kind at issue in the main proceedings may, depending on how the revenue from it is used, constitute State aid incompatible with the common market if the conditions for the application of Article* [87] *of the Treaty are met, that being a matter for the Commission to determine in accordance with the procedure laid down for that purpose in Article* [88] *of the Treaty. In that respect, regard must also be had to the jurisdiction of the national courts where, in introducing the charge, the Member State concerned failed to comply with its obligations under Article* [88]*(3) of the Treaty, and where a Commission decision under Article 93(2) of the Treaty has found the levying of the charge as a method of financing State aid to be incompatible with the common market*".

I- Information on the judgment

Commercial Court of Kortrijk, Case no. 3176/02 R.K., 7 October 2003, Walloon Region v NV Ter Lembeek International, unreported

II- Brief description of the facts and legal issues

On 24 April 2002, the Commission issued a decision (Decision 2002/825) declaring that the State aid which Belgium implemented for the Beaulieu Group (Ter Lembeek International) in the form of the waiver of a debt of BEF 113,712,000 was incompatible with the Common Market. The Commission ordered Belgium to take all necessary steps to recover from the beneficiary the aid referred to in Article 1 and unlawfully made available to it.
On 22 July 2002, Ter Lembeek International brought an action before the CFI seeking the annulment of the Commission Decision (Case T-217/02, still pending).
The Walloon Region brought an action before the Commercial Court seeking the recovery of the unlawful aid.
Ter Lembeek requested the Commercial Court to suspend proceedings until after the judgment of the CFI. The Walloon Region claimed on the other hand that the decision of the Commission was binding and that actions before the ECJ have no suspensory effect.
On a subsidiary basis, the Walloon Region requested a bank guarantee. Ter Lembeek disagreed on the grounds that it was a solvent company.

III- Summary of the Court's findings

The Commercial Court noted that this case concerned the division of competences between the Commission and the national judge in State aid matters. The Commercial Court noted that where it is required to make a judgment under Articles 81 and 82 EC in a matter already adjudicated by the Commission, the national judge may not take a decision which goes against the Commission decision.

The Commercial Court considered that the Commission's decision would still be respected if it suspended the proceedings until the judgment of the CFI. Indeed, according to the Commercial Court, the Walloon Region would not suffer any damage as it could claim interest on the sums owed. The Commercial Court therefore suspended proceedings until the CFI's ruling in Case T-217/02.

The Commercial Court ordered Ter Lembeek to set up a bank guarantee for the sum owed which would become payable if the CFI upheld the validity of the Commission decision. No date was provided as regards the date by which this bank guarantee should be set up.

IV- Comment of the authors of the 2006 study

By staying the proceedings until judgment of the CFI, the Commercial Court has not given full effect to Article 88 (3) EC and the Commission's order to recover the unlawful aid. The Commercial Court's decision is clearly motivated by the fact that it would not wish to arrive at a situation where the CFI would annul the Commission's decision when Ter Lembeek had already repaid the aid. It should be noted that Ter Lembeek appealed the judgment to make a bank guarantee available to the Court of Appeal.

I- Information on the judgment

Commercial Court of Kortrijk, Case 088/03, 26 February 2004, Walloon Region against Ter Lembeek International NV (interim action), unreported

II- Brief description of the facts and legal issues

This case is a follow-up to the Commercial Court's judgment of 7 October 2003.

The Walloon Region pleaded that Ter Lembeek had not executed the Commercial Court's ruling to set up a bank guarantee. Indeed, the Commercial Court's ruling had not provided any time-limit by which the bank guarantee should be set up. The Walloon Region therefore requested the Commercial Court to require Ter Lembeek to execute the court's ruling in the above case by setting up a bank guarantee and order that any failure to do so would be subject to a penalty payment.

III- Summary of the Court's findings

The Court dismissed the Walloon Region's action on the ground that there was no urgency involved in the application for interim measures. Indeed, in the Commercial Court's view, there was no evidence that Ter Lembeek would become insolvent prior to the CFI's judgment on the Commission decision and that the Walloon Region would therefore suffer any irreparable damage.

IV- Comment of the authors of the 2006 study

The impact of this ruling in combination with the Commercial Court's ruling in the case summarised above is that Ter Lembeek can avoid taking any substantial measures to reimburse the aid, as long as an action for annulment against a Commission declaring the aid incompatible is pending before the CFI.

I- Information on the judgment

Commercial Court of Mons, RG 03630/01, 21 January 2002, SRIW (Walloon Region) v Mrs BLONDIAU (curator of the bankrupt estate of Verlipack), unreported

II- Brief description of the facts and legal issues

The Belgian State granted aid to the Verlipack group in form of a capital injection to Verlipack and two loans granted to a private company in order to finance the acquisition of a majority share in Verlipack. In its Decision of 4 October 2000, the Commission declared the aid illegal and incompatible with the Common Market and ordered the Belgian State to recover the aid from Verlipack. The Commission's decision was upheld by the ECJ on 3 July 2003[20].

Since the normal term open to creditors under Belgian law to lodge claims with the bankrupt's trustee had already passed, the Walloon Region had to seek an order from the Commercial Court allowing it to lodge its claim regarding the loans with the bankrupt estate. The government therefore brought proceedings against three companies which were part of the Verlipack group in two different proceedings.

III- Summary of the Court's findings

The Commercial Court issued two orders admitting the claim by the Walloon Region concerning the loans in the bankrupt estate. Consequently, the Walloon Region was registered as a creditor.

IV- Comment of the authors of the 2006 study

Without expressly saying so, the Commercial Court accepted the Commission's decision in which recovery of the aid was ordered as an autonomous cause of action which justifies admitting the State as a creditor of the bankrupt's estate. The approach of the Supreme Court in *Tubemeuse* does not seem to be contested any more.

[20] Case C-457/00, Belgium v Commission [2003] ECR I-6931.

I- Information on the judgment

Commercial Court of Kortrijk, Case No. 1310/90, 20 September 1994, Gimvindus and Flemish Region v Idealspun, De Clerck and others, unreported

II- Brief description of the facts and legal issues

The Belgian Government subscribed to a capital increase of Idealspun N.V., a subsidiary of Beaulieu, the biggest Belgian textile group. The Commission decided on 27 June 1984 (Decision 84/508) that the participation by the State constituted aid which was incompatible with the Common Market. On 9 April 1987, the ECJ found that Belgium had failed to comply with the Commission decision by not having recovered the aid[21]. On 19 February 1991, the ECJ found that Belgium had failed to comply with its 1987 judgment[22]. After these judgments of the ECJ, the Flemish Government (successor in title of the Belgian Government in the area of economic expansion policy) sued Idealspun and its other shareholders to recover the aid on the basis that the subscription was void. The obligation to repay the aid was not contested as such by the recipient. The issue at stake was the legal basis of that obligation. The government was of the opinion that the contract under which they had subscribed to the capital increase was contrary to EC law and was therefore void *ab initio* (see *Tubemeuse* case of 1992 below). This gave rise to an obligation on Idealspun to repay the amount paid under the void contract. According to the recipient, the contract was not void and if any repayment was due, it was under the contract itself. The recipient also asserted that it could still challenge the negative Commission decision in court since it had not been a party to the procedure before the Commission and the ECJ (violation of Article 6 ECHR).

III- Summary of the Court's findings

The Commercial Court ruled in favour of the government. According to the Commercial Court, the contract was void since the Commission had decided that the aid was unlawful and incompatible with the Common Market, and this decision was not subject to review by the national judges.
Article 6 ECHR had not been infringed since the recipient of the aid could have intervened in the procedure before the Commission and challenged the Commission's decision before the CFI, but neglected to do so. The Commercial Court also did not accept that Idealspun had legitimate expectations regarding its entitlement to retain the aid. The Belgian Government had implemented the aid before the Commission had taken a decision. A diligent businessman would have known that the Belgian State had not complied with the standstill obligation under Article 88 (3) EC.

IV- Comment of the authors of the 2006 study

The Court drew the right legal conclusions from the Commission's decision in which the capital participation was declared to be aid which was incompatible with the Common Market. This should indeed lead to the conclusion that the contract under which the State had subscribed to the capital increase was contrary to EC law and was therefore void *ab initio*. The judgment drew all the consequences of the illegality under Article 88 (3) EC and applied the principles set out in the *Tubemeuse* judgment, which states that a statutory violation of EC law is deprived from any legal consideration.

[21] Case 5/86, Commission v Belgium [1987] ECR I-1773.
[22] Case C-375/89, Commission v Belgium [1991] ECR I-383.

I- Information on the judgment

Court of Appeal of Ghent, Case No. 1995/AR/55, 16 November 2000, Idealspun, De Clerck and others v Gimvindus, Flemish Region and Belgian State, unreported

II- Brief description of the facts and legal issues

The recipient of the aid appealed against the judgment of the Kortrijk Commercial Court. The recipient argued that at the time the negative Commission decision was adopted, in light of certain developments in the case law on admissibility of direct actions on the basis of Article 230 (4) EC, it was not clear that it could have challenged the decision. The recipient also urged the Court of Appeal to refer preliminary questions to the ECJ about the validity of the Commission's decision.

III- Summary of the Court's findings

The Court of Appeal confirmed the judgment in all of its aspects. According to the Court of Appeal, it was beyond doubt that the recipient undertaking, as the beneficiary of individual aid, had standing to appeal the negative Commission decision. The undertaking could not rely upon its wrong assessment of its right to appeal.

The Commission decision was final and could not be contested before the national judge. Therefore, the Court of Appeal ruled that the request for a preliminary procedure was pointless. The Court of Appeal concluded that the aid was illegal and the capital injection should be reimbursed (it should be noted that the Commercial Court of Ghent – see *Beaulieu* case - reached the same conclusions six years beforehand by even anticipating this principle recognised by the ECJ in 1994).

IV- Comment of the authors of the 2006 study

Six years have passed since the Commercial Court's ruling ordering recovery of the aid and 16 years since the Commission decision ordering reimbursement of the aid.

I- Information on the judgment

Commercial Court of Ghent, 25 February 1994, Socobesom, Flemish Region, Belgian State v Beaulieu and others, extract published in J.T.D.E. 1994, p 141

II- Brief description of the facts and legal issues

Socobesom granted aid amounting to BEF 725 million to NV Fabelta, an insolvent synthetic fibre producer. The aid would take the form of a majority holding by Socobesom in a newly formed enterprise (NV Beaulieu Kunststoffen), in which a large private textile group, mainly engaged in carpet production, would take a minority holding of BEF 200 million and would use part of the aid to manage a rescue operation by undertaking certain investments in order to maintain the nylon production of the insolvent firm. This aid was notified to the Commission. In its Decision 84/111 of 30 November 1983, the Commission decided that the aid was unlawful (implementation before its decision) and incompatible and ordered the Belgian Government to recover the aid. On 24 February 1989, the ECJ ruled that the Belgian Government had failed to implement the decision[23]. Sobescom and the Belgian Government started proceedings to recover the aid. Due to the refusal of Beaulieu to return the aid, Sobescom and the Belgian Government filed an action for recovery before the Commercial Court. The defendants argued that the Commission decision was unlawful.

III- Summary of the Court's findings

The Commercial Court upheld the arguments of the claimants on the same grounds as those set out in the Idealspun case described earlier. Indeed, the Commercial Court considered that only the ECJ could annul the Commission decision, and that the defendants had had the opportunity to challenge the decision before the CFI under Article 230 EC, but had failed to do so within the required time limits. The Commercial Court therefore considered it inappropriate to make a reference for a preliminary ruling before the ECJ relating to the validity of the Commission decision. The Commercial Court further noted that the defendants could not rely upon the principle of legitimate expectations. Indeed, the claimants, before receiving State aid should, each as a "careful undertaking", have examined whether the State aid measure had been notified and approved by the Commission. Furthermore, the Commercial Court noted that, as the defendants were undoubtedly familiar with transactions containing elements of State aid and were surrounded by efficient advisors on Community law, the relevant provisions of EC law should have been sufficiently known to them.
The Commercial Court ordered the defendants to reimburse the aid, including interest to be counted from 19 December 1988 (the date on which the Commission had sent a reasoned opinion to Belgium claiming that it had failed to comply with its obligations under the EC Treaty).

IV- Comment of the authors of the 2006 study

It is remarkable that the Commercial Court reached this reasoning a few days before a landmark case of the ECJ on the question of inadmissibility of a preliminary reference under Article 234 EC when the Commission's negative decision had not been challenged[24].

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[23] Case C-74/89, Commission v Belgium [1990] ECR I-491.
[24] Case C-188/92, TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland [1994] ECR I-833.

I- Information on the judgment

Court of Appeal of Ghent, Case No. 1994/AR/1609, 5 October 2000, NV Imcopack, Beaulieu and others v NV Socobesom, Flemish Region and Belgian State (recovery capital investment), unreported

II- Brief description of the facts and legal issues

This is NV Beaulieu's appeal against the judgment of the Commercial Tribunal of Ghent mentioned above. The arguments raised on appeal are very similar to those raised in the main proceedings.

NV Socobesom cross-appealed claiming that interest should be paid on the aid granted from 28 July 1983 to date.

III- Summary of the Court's findings

The Court of Appeal dismissed the appeal on the same grounds as the Commercial Court.

The Court however did consider that interest should be paid on the sum owed from 1 January 1985 rather than from 19 December 1988.

I- Information on the judgment

Supreme Court, Case No. C010093N/1, NV Imcopack, 22 February 2002, Beaulieu and others v NV Socobesom, Flemish Region and Belgian State, unreported (recovery capital investment)

II- Brief description of the facts and legal issues

This is NV Beaulieu's appeal against the judgment of the Court of Appeal.

III- Summary of the Court's findings

The Supreme Court dismissed the appeal.

I- Information on the judgment

Supreme Court, Case No. 9152, 18 June 1992, Belgian State v NV Tubemeuse (recovery capital investment)[25]

II- Brief description of the facts and legal issues

The Belgian State granted aid to the company Tubemeuse through the form of a subscription for shares in the capital of the company. In its decision of 4 February 1987, the Commission declared the aid incompatible and ordered the Belgian State to recover the aid (which had not been notified).

Tubemeuse was subject to insolvency proceedings. The Belgian State requested that it should be registered as a creditor in order to recover the unlawful aid. The judge at first instance and the Court of Appeal rejected this request on the grounds that the Commission decision did not transform the Belgian State's participation in the capital of Tubemeuse into a simple debt for the receiver.

The case was appealed to the Supreme Court.

III- Summary of the Court's findings

The Supreme Court stated that the EC State aid rules were public policy rules and therefore any act granting State aid contrary to these provisions would be illegal.

Accordingly, the capital injection introduced by the Belgian State in SA Tubemeuse was deprived of any legal cause and should be declared null and void. The absolute nullity of the capital injection would allow the Belgian State to recover the aid.

The Supreme Court considered that the Court of Appeal's refusal to register the Belgian State as a creditor did not recognise the effect of the absolute nullity of the capital injection and violated EC law. In this respect, the Court of Appeal's judgment was overturned.

IV- Comment of the authors of the 2006 study

This exemplary decision of the Supreme Court illustrates how efficient the application of EC law can be if all of the consequences of violating Article 88 (3) EC and a Commission decision are recognised by the judge.

The Supreme Court went on to set aside the application of national law in order to ensure the full effectiveness of EC law.

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[25] Full text available on the website of the Supreme Court at http://www.juridat.be/juris/jucf.htm, 18 October 2001; *Arr. Cass.* 1991-92, 985.

I- Information on the judgment

Supreme Court, Case No. C.03.0409.N, 18 February 2005, Rijksdienst voor Sociale zekerheid v Champagne Holding and others (acquittal of social security debt)[26]

II- Brief description of the facts and legal issues

The *Rijksdienst voor Sociale zekerheid/ Office National Sécurité Sociale* (the "Social Security Service") challenged the restructuring and payment plan for Champagne Holding. The plan had been approved by a majority of creditors and the Commercial Court, and provided for a write-off of all debts up to 40% of the amount due.

The Social Security Service alleged *inter alia* that the partial write-off of social security debts constituted illegal State aid and, since the rules on State aid were matter of public policy, the Commercial Court had wrongly approved the restructuring and payment plan.

III- Summary of the Court's findings

The Supreme Court rejected this and all other arguments. According to the Supreme Court, as long as the partial write-off of social security debts is of the same nature as the write-off of debts to private creditors granted under the same restructuring and payment plan, the write-off does not constitute illegal State aid. The loss of social security contributions for the State in such a situation does not prove the existence of a burden on the State nor of a benefit for the recipient. To support this argument the Supreme Court cited cases C-480/98, *Spain v Commission* [2000] ECR I-8717 and C-200/97, *Ecotrade* [1998] ECR I-7907.

IV- Comment of the authors of the 2006 study

The Supreme Court took a very narrow approach to the concept of burden on the State and benefit to the recipient of the aid. A write-off of social security debts clearly places a burden on the State treasury to the benefit of the creditor. The comparison with the write-off of debts to private creditors does not appear to be relevant in that respect.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[26] Full text available on the website of the Supreme Court at http://www.juridat.be/juris/jucf.htm.

I- Information on the judgment

Commercial Court of Liège, 16 April 2002, Office Nationale de Sécurité Sociale v L and Schroeder and Props (bankruptcy – social security debt), published in jurisprudence, de Liège, Mons et Bruxelles 2002/31 p. 1373

II- Brief description of the facts and legal issues

Mr L was in deep financial trouble. By virtue of the Law of 17 July 1997 on Arrangements with Creditors, a plan was approved by the majority of Mr L's creditors (in terms of numbers and money owed) in order to settle Mr L's debt. The ONSS, the social security service, which was one of Mr L's creditors, was against this arrangement as it would reduce Mr L's social security contributions.

The ONSS brought an action before the Commercial Court claiming *inter alia* that the reduction of social security contributions was contrary to Article 87 EC and contrary to the ECJ's ruling of 17 June 1999 concerning Belgium's *Maribel* aid scheme[27].

III- Summary of the Court's findings

The Commercial Court considered that the *Maribel* case law was not pertinent as it concerned a situation where the collecting entity granted the aid in question to one specific undertaking in a discretionary manner. In the case at hand, the 1997 law would apply to all undertakings in difficulty, and any positive measure would need to satisfy the objective conditions set out in the 1997 law.

The Commercial Court, applying a private creditor test, further noted that Mr L's private creditors voted massively in favour of the measures demanded by Mr L, thus illustrating that the private creditors were happy with that kind of measure.

[27] See Case C-75/97, Belgium v Commission [1999] ECR I-3671.

I- Information on the judgment

Commercial Court Brussels, 7 July 1997, Déménagements-Manutention Transports (DMT) – summarised in ECJ ruling of 29 June 1999[28]

II- Brief description of the facts and legal issues

The Commercial Court was examining the question of whether it should, of its own motion, declare DMT insolvent. Indeed, under the national applicable rules, insolvency may be pronounced by judgment of the Commercial Court upon application by the insolvent trader, or on the application of one or several creditors, or of its own motion. An investigation into the possible insolvency of an undertaking is initially carried out by the investigating judge who, once he has sufficient information to suggest that the undertaking may be insolvent, refers the matter to the Commercial Court. That is what happened in this case. DMT's balance sheet showed that DMT could not, with its current assets, meet current liabilities. Notably, DMT owed social security contributions to the *Office National de Sécurité Sociale* (National Social Security Office) ("the ONSS"). It is accepted that the ONSS may, at its discretion, grant periods of grace to employers and vary such periods.

III- Summary of the Court's findings

The Commercial Court pointed out that the ONSS appeared to have shown "exceptional patience" towards DMT in exercising that power. It therefore took the view that, by those payment facilities, the ONSS had contributed to sustaining, artificially, the business of an insolvent undertaking which was unable to obtain funding under normal market conditions. Accordingly, the Court decided to stay the proceedings and refer the following questions to the ECJ for a preliminary ruling: "*1. Is Article* [88] *of the Treaty to be interpreted as meaning that measures in the form of payment facilities granted by a public body such as the ONSS enabling a commercial company to retain over a period of at least eight years a proportion of the sums collected from staff and to use those sums in support of its commercial activities, when that undertaking is unable to obtain funding under normal market conditions or to increase its capital, are to be considered State aid within the meaning of that article? 2. If the first question is answered in the affirmative, is Article* [87] *of the Treaty to be interpreted as meaning that such aid is compatible with the common market?*"

The ECJ ruled that the Commercial Court had, of course, no jurisdiction to refer the second question, the Commission being exclusively competent to examine the compatibility of State aid with the Common Market. On the first question, the ECJ developed the so-called "private creditor test" and ruled that "*Payment facilities in respect of social security contributions granted in a discretionary manner to an undertaking by the body responsible for collecting such contributions constitute State aid for the purposes of Article* [87]*(1) of the EC Treaty if, having regard to the size of the economic advantage so conferred, the undertaking would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation vis-à-vis that undertaking as the collecting body*" (operative part of the ruling).

IV- Comment of the authors of the 2006 study

This case resulted from specific powers granted to the Commercial Court in the control of insolvent companies; however, it illustrates how Article 88 (3) EC can be given full effectiveness if national courts raise, within the limits of their powers, of their own motion, the violation of public policy rules such as Article 88 (3) EC. The Commercial Court did not rule any further on the matter. The sums in question were recovered.

[28] Case C-256/97, DMT [1999] ECR I-3913t

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

I- Information on the judgment

Commercial Court Brussels, 8 February 1999, Public Prosecutor v SA Taverne Falstaff (payment scheme VAT), extract published in DAOR, 1999/99 p. 49

II- Brief description of the facts and legal issues

The public prosecutor demanded the bankruptcy of SA Taverne Falstaff. In its defence, the Taverne invoked the payment scheme granted to it by the VAT administration. This scheme allowed the Taverne to repay its debt in monthly installments over a period of seven to eight years, applying an interest rate much below the market rate. Therefore, the Taverne argued that it was not in a situation where it had lost the confidence of its creditors, which is a precondition to being declared bankrupt.

III- Summary of the Court's findings

The Taverne was declared bankrupt by the Commercial Court. It held that the payment scheme constituted illegal State aid which had not been notified to the Commission, since the debt at stake concerned money received by the tax payer and distorted competition, particularly in light of the interest rate below market conditions. Therefore, the credit granted to the Taverne was void.

In support of its decision, the Commercial Court invoked the opinion of Advocate Jacobs in DMT, which set out the private investor test for the first time.

IV- Comment of the authors of the 2006 study

It may be doubted whether in this case the aid granted actually (or even potentially) affected trade between Member States.

I- Information on the judgment

Council of State, case no. 110.759, 30 September 2002, VZW V.K.W Limburg and VZW Kamer van Handel en Nijverheid van Limburg v Flemish Regions[29]

II- Brief description of the facts and legal issues

On 26 October 2000, the Flemish Government notified to the Commission certain amendments to "directives" on soft aid for consultancy, training and studies (Flanders) which implemented inter alia the Law of 30 December 1970 concerning economic expansion and the Law of 4 August 1978 concerning economic reorientation. This aid scheme was approved by the Commission in a letter dated 12 January 2001 (aid No 712/2000) and on 14 December 2001, the Directives entered into force.

The claimants, the association of Christian employers of the Limburg Region and the Chamber of commerce of Limburg, filed actions for annulment and suspension of the measure in question.

The parties argued that their members would be negatively affected by the amendments introduced to the aid scheme.

III- Summary of the Court's findings

The Council of State examined only whether it should suspend the measure in question or not. The Council of State pointed out that it can only suspend a measure if the claimants concerned can show that there are serious grounds for annulling the measure and that the claimants themselves will suffer irreparable damage due to the implementation of the measure.

The Council of State considered that, where the members of associations are individually affected by a measure, those members must themselves bring an action for the suspension of the measure in question. An association cannot bring an action for suspension of a measure on behalf of third parties.

The Council of State therefore dismissed the action for suspension.

IV- Comment of the authors of the 2006 study

This case is interesting in so far as it shows that associations are not able to seek before the Council of State the suspension of State aid on behalf of the beneficiaries (who are members of the association in question) of the measure.

It should be noted that the action for annulment was later on withdrawn by the parties.

This summary has not been prepared by DG Competition or any other service of the Commission. The content of this judgment and this summary have not in any way been approved by the Commission and should not be relied upon as a statement of the Commission's or DG Competition's views.

[29] Published on the website of the Council of State at http://raadvst-consetat.fgov.be/.

I- Information on the judgment

Employment Court of Tongeren (tribunal du travail), Case No. 2775/2000, 7 June 2002, Ford v Rijksdienst Sociale Zekerheid (Maribel aid scheme), unreported

II- Brief description of the facts and legal issues

In common with many other companies, Ford received aid from the Belgian State in the form of reductions of social security contributions (the so-called *Maribel-bis* and *Maribel-ter* scheme). This scheme was declared unlawful and incompatible by the Commission, which ordered the Belgian State to recover the aid (Decision 97/239 of 4 December 1996). The ECJ rejected the Belgian State's action seeking the annulment of the Commission decision (Case C-75/97 cited above). Shortly afterwards, the Belgian State and the Commission concluded a Protocol Agreement which laid down the arrangements for repayment of the illegally granted aid.

Ford repaid the amount which was due on the basis of the National Act implementing the Protocol Agreement. However, it then attempted to reclaim part of this sum, asserting that the claim of the Belgian State to this part was time-barred.

In support of this claim, Ford argued that the applicable limitation period was five years, i.e. the limitation period applicable to claims by the Social Security Service against employers regarding social security contributions. According to Ford, the starting point of this limitation period was the date on which the aid was granted since the Commission decision declaring the aid incompatible with the Common Market had retroactive effect.

III- Summary of the Court's findings

The Employment Court rejected Ford's claim. According to the Employment Court, the applicable limitation period was eight years and not five years, as claimed by Ford. The obligation to reimburse reductions of social security contributions is a specific obligation stemming from the EC State aid regime, and is not the same as the general obligation to pay social security contributions. Moreover, the act implementing the Protocol Agreement expressly laid down a limitation period of eight years.

The Employment Court considered that as to the starting point of the limitation period, the issue was when the claim of the State became due. The Employment Court considered, citing the *FNEC* case[30], that when aid is granted in breach of Article 88 (3) EC is subject to a negative Commission decision, the transaction under which the aid granted is void *ab initio*. According to the Employment Court, this does not mean that the right to recover the aid existed from the moment the aid was granted. Citing the *Ladbroke* case[31], the Employment Court stated that it is for the Member State to determine the legal basis for recovery of the aid. Therefore, the right to recover was due only once the act implementing the Protocol Agreement had been adopted, shortly after the judgment of the ECJ which finally confirmed the obligation for the Belgian State to recover the aid.

The Employment Court upheld the retroactive effect of the act establishing a prolonged limitation period of eight years. To hold otherwise would render it impossible for the Belgian State to recover the aid. According to the Employment Court, the principle that acts should not have retroactive effect should not be followed by the legislator when exceptional circumstances exist. In this case, the Employment Court recognised that the obligations of Belgium under the law of the EC constituted

30 Case C-354/90, Fédération nationale du commerce extérieur [1991] ECR I-5505.
31 Case T-67/94, Ladbroke/Commission [1998] ECR II-1.

exceptional circumstances in light of the supremacy of EC law. Lastly, the Employment Court confirmed the principle established by the ECJ, according to which the breach of the obligation to notify aid prevents the recipient undertakings from relying on the principle of protection of legitimate expectations, as held by the ECJ[32].

IV- Comment of the authors of the 2006 study

The Employment Court stretched the case law of the ECJ on the implementation of the obligation of the Member States under EC law to recover illegal aid. The ECJ has always recognised that the recovery of aid must take place in accordance with the relevant procedural provisions of national law, subject, however, to the condition that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible (see also Article 14 (3) of Regulation No 659/1999). Moreover, the illegal and void character of the aid resulted directly from Article 88 (3) EC and not from the Commission's negative decision. Therefore, the supremacy of EC law (and Regulation No 659/1999) should have been used in order to justify that the limitation period of five years could not be applied, since this would have rendered the recovery practically impossible.

In this case, the Employment Court did not find that the application of national procedural law (i.e. the five year limitation period) would render the recovery impossible. The Employment Court therefore did not justify its statement that the non-applicability of the normal limitation period was justified by the application of EC law.

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[32] Case C-24/95, Land Rheinland Pfalz v Alcan Deutschland GmbH [1997] ECR I-1591.

I- Information on the judgment

Council of State, case no. 94.080, 16 March 2001, SA Dufrasne Métaux v the Walloon Region (action for annulment of decision to withdrawing decision granting investment aid)[33]

II- Brief description of the facts and legal issues

In 1995, investment aid was granted by the Walloon region to the company Dufrasne Métaux SA in order to purchase a specific piece of machinery.

In June 1996, the Walloon region discovered that the aid did not fall within the scope of the Community Framework of Aid to Steel Industry. On this basis it decided to withdraw the aid granted to Dufrasne, request it to refund the aid already paid out, and not provide it with final instalments of the aid.

Dufrasne brought an action seeking the annulment of this decision.

The Region considered that the action was deprived of any purpose since, if annulled, the new act could only be identical. Indeed, the sum granted to Dufrasne would constitute an unlawful aid contrary to Article 88 (3) EC. By virtue of the *Alcan* case law[34], this would require the Walloon Region to seek reimbursement of that aid.

III- Summary of the Court's findings

The Council of State did not accept the argument of the Walloon Region. According to the Council of State, it was not clear whether the measure in question would be prohibited by Commission decision 3855/91/ECSC, establishing Community rules for aid to the steel industry.

Moreover, the *Alcan* case is not relevant since the present case does not concern an obligation to withdraw an aid declared incompatible by a definitive Commission decision. Indeed, in the present case there exists no Commission decision declaring the aid incompatible.

The Council of State further considered that there was no reason not to apply the case law stating that an act 'creating rights', even if irregular, cannot be withdrawn after the expiry of the time period for challenging it (60 days). On this basis, the contested decision was annulled.

IV- Comment of the authors of the 2006 study

The judgment contains no reference to Article 88 (3) EC, the violation of which would seem to justify a solution similar to *Alcan* (obligation to withdraw an illegal act even if not allowed under national law). Indeed, given that the measure in question did not fall within the scope of the Community Framework of Aid to Steel Industry (Walloon Region), any implementation of the aid measure in question would breach the notification requirement to the Commission under Article 88 EC.

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[33] Published on the website of the Council of State at http://raadvst-consetat.fgov.be/.

[34] Case C-24/95, Land Rheinland Pfalz v Alcan Deutschland GmbH [1997] ECR I-1591.

I- Information on the judgment

Council of State, case no. 55.426, 27 September 1995, Breda Fucine Meridionali v SNCB (action for suspension of decision SNCB rejecting offer by Breda Fucine Meriodionali and allotting assignment to competitor)[35]

II- Brief description of the facts and legal issues

The claimant sought the suspension of the implementation of the decision taken by the SNCB to reject the claimant's tender and award the contract to other bidding companies.

The claimant was accused of having submitted an abnormally low bid, supported by illegal State aid granted by the Italian State. Upon the request of another bidding company, the President of the Commercial Court of Brussels ordered the claimant to withdraw its bid. The claimant challenged this judgment. Shortly afterwards, the Commission decided that the SNCB should not award the contract to the claimant since its bid was partially financed by State aid which had not been approved by the Commission. On hearing the challenge, the President of the Brussels Commercial Court confirmed its earlier judgment (procedure on opposition).

Following this judgment, the claimant notified the SNCB in writing that it had withdrawn its bid, but expressly stated that it was appealing the judgment of the President of the Brussels Commercial Court.

In the meantime, the SNCB had awarded the contract to other bidding companies.

III- Summary of the Court's findings

The action for suspension was rejected because of a lack of interest on the part of the claimant in filing the action. The Council held that the claimant had withdrawn its own bid pending the judgment on appeal. Therefore, the claimant filed this action for suspension for the sole purpose of delaying the new decision to award the contract until the judgment on appeal was rendered. Since the suspension procedure cannot be used to block an executory administrative decision, the Council rejected the action.

[35] Published on the website of the Council of State at http://raadvst-consetat.fgov.be/.

JUDGMENTS SELECTED FROM THE 2006 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL - PART II

I- Information on the judgment

Commercial Court of Kortrijk, Case No. 3176/02 R.K, 7 October 2003, Walloon Region v NV Ter Lembeek International

II- Brief description of the facts and legal issues

On 24 April 2002, the Commission issued a decision (Decision 2002/825) declaring that the State aid which Belgium had implemented for the Beaulieu Group (Ter Lembeek International) in the form of the waiver of a debt of BEF 113,712,000 (i.e. €2,818,846) was incompatible with the Common Market (OJ (2002) L 296/60). The Commission ordered Belgium to take all necessary steps to recover from the beneficiary the unlawful aid concerned.

Following Commission Decision 2002/825 ordering the recovery of the aid, the legal counsel of the Walloon Region sent a letter of formal notice to Ter Lembeek International requesting for the reimbursement of the aid, plus interest, amounting to €457,540.09.

After Ter Lembeek's failure to comply with the formal notice, the Walloon Region brought an action against Ter Lembeek before the Commercial Court of Kortrijk seeking the recovery of the aid in question.

III- Summary of the Court's findings

The Commercial Court suspended the proceedings pending the outcome of an action for annulment brought by Ter Lembeek before the CFI against the Commission decision (Case T-217/02)[36]. The Commercial Court ordered Ter Lembeek to set up a bank guarantee for the sum owed which would become payable if the CFI upheld the validity of the Commission decision. No condition / time limit was imposed for the setting up of the bank guarantee. Accordingly, Ter Lembeek did not set up the bank guarantee.

Ter Lembeek has appealed to the Court of Appeal of Ghent against the Commercial Court's judgment ordering it to set up a bank guarantee.

The Walloon Region has cross-appealed against the fact that the Commercial Court ordered a suspension of the proceedings.

This case is still pending. As mentioned above, the Walloon Region also brought an action for interim measures in order to force Ter Lembeek to set up the bank guarantee. This action was dismissed on the grounds of lack of urgency.

IV- Comment of the authors of the 2006 study

The Commercial Court's judgment suspending the proceedings does not appear to be in line with the ECJ's case law concerning the jurisdiction of national courts to suspend enforcement of a national

[36] It can be noted that the claimant contests the qualification as State aid of the State measure in question.

measure based on Community legislation[37]. Indeed, according to the ECJ, in order for a national court to be entitled to grant such a suspension, it must:

- entertain serious doubts as to the validity of the Community measure;
- refer the question of the validity of the Community measure to the ECJ (if this has not yet been done);
- find that there is urgency in the sense that the claimant is threatened with serious and irreparable damage;
- take due account of the interests of the Community.

The Commercial Court does not appear to have complied with the first, third and fourth of the conditions mentioned above, i.e. it neither assessed the validity of the Commission decision in question nor addressed the question of whether there was urgency for the claimant while duly taking into account the Community interest (here, the restoration of the distorted competition by virtue of the obligation of Belgium to order recovery of the unlawful aid – or, more simply, the effectiveness of Article 88 (3) EC in order to allow EC State aid control to be carried out as provided for by Articles 87 and 88 EC).

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[37] Joined Cases C-143/88 and C-92/89, Zuckerfabrik Süderdithmarschen [1991] ECRI 540, para. 25 *et seq.*

I- Information on the judgment

Commercial Court of Mons, RG 03630/01, 21 January 2002, SRIW (Walloon Region) v Mrs. BLONDIAU (Curator of the bankrupt estate of Verlipak)

II- Brief description of the facts and legal issues

On 4 October 2000, the Commission issued Decision 2001/856 (OJ (2000) L 320/28) finding that the BEF 350 million capital injected into Verlipack, the largest Belgian producer of hollow container glass, by the Walloon Region in April 1997 and the two loans of BEF 250 million granted by the region's investment company SRIW ("*société régionale d'investissement de Wallonie*") in March 1997 to Heye to finance Heye's capital contribution to Verlipack constituted unlawful and incompatible aid. Belgium was ordered to recover the aid.

The Commission's decision was upheld by the ECJ on 3 July 2003[38].

Since the normal term open to creditors under Belgian law to lodge their claims with the bankrupt's trustee had already passed, the Walloon Region had to seek an order from the Commercial Court allowing it to lodge its claim regarding the loans with the bankrupt's estate. The government therefore brought proceedings against three companies which were part of the Verlipack group in two different proceedings.

III- Summary of the Court's findings

The Commercial Court issued two orders admitting the claim by the Walloon Region concerning the loans to the bankrupt's estate. Consequently, the Walloon Region was registered as a creditor.

IV- Comment of the authors of the 2006 study

Without expressly saying so, the Commercial Court has accepted the Commission's decision in which recovery of aid was ordered as an autonomous cause of action, justifying admitting the State as a creditor of the bankrupt's estate. The approach of the Supreme Court in *Tubemeuse* does not seem to be contested any more.

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[38] Case C-457/00, Belgium v Commission [2003] ECR I-6931.

I- Information on the judgment

Idealspun case

II- Brief description of the facts and legal issues

The Belgian Government subscribed to a capital increase of Idealspun N.V., a subsidiary of Beaulieu, the biggest Belgian textile group. The Commission decided on 27 June 1984 (Decision 84/508) that the participation by the State constituted aid which was incompatible with the Common Market. On 9 April 1987, the ECJ found that Belgium had failed to comply with the Commission decision for not having recovered the aid[39]. On 19 February 1991, the ECJ found that Belgium had failed to comply with its 1987 judgment[40].

After these judgments, the Flemish Government (successor in title to the Belgian Government in the area of economic expansion policy) sued Idealspun and its other shareholders to recover the aid on the basis that the subscription was void.

The obligation to repay the aid was not contested as such by the recipient. The issue at stake was the legal basis of that obligation. The government was of the opinion that the contract under which it had subscribed to the capital increase was contrary to EC law and was therefore void *ab initio* (see *Tubemeuse* case of 1992). This gave rise to an obligation on Idealspun to repay the amount paid under the void contract. According to the recipient, the contract was not void and if any repayment was due, it was under the contract itself. The recipient also asserted that it could still challenge the negative Commission decision in court since it had not been a party to the procedure before the Commission and the ECJ (violation of Article 6 ECHR).

III- Summary of the Court's findings

The case is interesting with regard to the defences raised by Idealspun, which were one by one rejected by the Commercial Court in its judgment of 20 September 1994.

First, Idealspun argued that the validity of the Commission decision could still be challenged. The Commercial Court rejected this argument, explaining that Idealspun had failed to bring an action for annulment against the decision before the CFI within the required time limits, and that, in all circumstances, the Commercial Court no longer had any competence to question the validity of the decision (*TWD* principles).

Secondly, Idealspun argued that there was a breach of the principle of the protection of legitimate expectations as it was not the addressee of the Commission decision. The Commercial Court simply noted that a beneficiary of aid is under a duty to act as a "careful entrepreneur" and should have checked whether the aid had been approved by the Commission.

The Commercial Court further ruled that its decision could be provisionally enforced pending any appeal on the grounds that it was in the Community's interest that the aid be recovered as soon as possible.

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39 Case 5/86, Commission v Belgium [1987] ECR I-1773.

40 Case C-375/89, Commission v Belgium [1991] ECR I-383.

Idealspun appealed the Commercial Court's judgment to the Court of Appeal of Ghent. On 16 November 2000, the Court of Appeal upheld the Commercial Court's judgment on all grounds (for more details, see the summary in Part I).

IV- Comment of the authors of the 2006 study

It is interesting to note that it took more than four years for the Commercial Court to come to a ruling on the matter after the State introduced its action for recovery, and that it took another six years for the Court of Appeal to handle the appeal. All in all, the Belgian State's action for recovery took more than ten years. This is obviously not in line with the principles provided by Article 14 (3) of Regulation 659/1999. On the other hand, the Commercial Court did allow for the provisional enforcement of its decision. It is unclear whether the Belgian authorities decided to actually recover the aid on the basis of that first instance judgment.

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I- Information on the judgment

Beaulieu case

II- Brief description of the facts and legal issues

Socobesom granted aid amounting to BEF 725 million to NV Fabelta, an insolvent synthetic fibre producer. The aid would take the form of a majority holding by Socobesom in a newly formed enterprise (NV Beaulieu Kunststoffen), in which a large private textile group, mainly engaged in carpet production, would take a minority holding of BEF 200 million and would use part of the aid to manage a rescue operation by undertaking certain investments in order to maintain the nylon production of the insolvent firm. This aid was notified to the Commission.

In its Decision 84/111 of 30 November 1983, the Commission decided that the aid was unlawful (implementation before the decision) and ordered the Belgian Government to recover the aid. On 24 February 1989, the ECJ ruled that the Belgian Government had failed to implement the decision[41].

Socobescom and the Belgian Government started proceedings to recover the aid. Due to the refusal of Beaulieu to return the aid, Socobescom and the Belgian Government filed an action for recovery before the Commercial Court. The defendants argued that the Commission decision was unlawful.

III- Summary of the Court's findings

The arguments raised by Beaulieu are identical to those described in the *Idealspun* case and the Commercial Court, in a judgment of 25 February 1994, ordered Beaulieu to reimburse the aid.

The case was appealed to the Ghent Court of Appeal, and on 5 October 2000, the Court of Appeal came to a judgment upholding the Commercial Court's judgment.

IV- Comment of the authors of the 2006 study

This is again an example of a case where the national court proceedings took excessively long and delayed a rapid recovery of the aid.

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[41] Case C-74/89, Commission v Belgium [1990] ECR I-491.