SUMMARIES OF STATE AID JUDGMENTS AT NATIONAL LEVEL

JUDGMENTS SELECTED FROM THE 2009 STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

I- Information on the judgment

Federal Court of Justice (FCJ) ("Bundesgerichtshof (BGH), 9. Zivilsenat), 05.07.2007, IX ZR 256/06, Insolvency procedure v. State aid law 1

II- Brief description of the facts and legal issues

The presence of State aid elements in the debtor's capital does not prevent a creditor from challenging a national insolvency procedure.

Parties:

The applicant: liquidator in insolvency proceedings;
The defendant: publicly-owned bank that aims at encouraging investment in Thuringia.

Factual background:

The applicant is a liquidator in insolvency proceedings concerning L. GmbH (the debtor, later renamed C. GmbH). The defendant is a publicly-owned bank which focuses on encouraging investment in Thuringia. The debtor was a company manufacturing had been producing compact discs in Thuringia since 1990. The defendant granted significant loans to the debtor within the framework of a restructuring plan.

In a Decision dated 21June 2000, the Commission Stated that these loans constituted unlawful State aid amounting to DM 166.3 million, and ordered Germany to recover it with interest, by any possible means. The Land of Thuringia challenged the legality of the Commission's decision before the CFI. Pending the CFI's ruling, C. GmbH paid back the unlawful aid it had received. Shortly after, C. GmbH filed for bankruptcy (on 22 September 2000).

The CFI eventually rejected the claim (Case T- 318/00 Freistaat Thüringen v Commission [2005] ECR II- 4179).

In the insolvency proceedings, the liquidator of C. GmbH demanded the bank to repay the sums paid back by the debtor, as well as the revenues earned from the sale of the debtor's real estate and remaining assets. In essence, the liquidator sought access to the debtor's capital assets in order to claim back the unlawful aid.

German bankruptcy law distinguishes between "first-class" creditors and "subordinated" creditors. Subordinated creditors include the shareholders who had granted loans to the bankrupt company. Indeed, for the purposes of bankruptcy proceedings shareholder loans are essentially considered as substitutes for equity (*eigenkapitalersetzende Darlehen*).

The issue was whether State aid law takes precedence over German bankruptcy law. In particular, the BGH had to decide whether the existence of State aid elements prevents a creditor from being able to challenge an insolvency procedure, and if so to what extent.

III- Summary of the Court's findings

The BGH ruled that the presence of State aid elements does not prevent a creditor (in this case the liquiditor) from challenging the insolvency procedure. In this particular case, the possibility of recovered unlawful aid was nonetheless ruled out.

The BGH began by referring to the primacy of EC law over domestic rules and the fact that Member States are under duty to take all necessary steps to recover unlawful aid. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (Case C- 277/00 Germany v Commission [2004] ECR I- 3925). In this sense, Article 88(3) EC, in so far as it sets out the prohibition on implementing unlawful State aid, shall be construed as a "prohibition law" (para. 34 of the judgment).

Despite the fact that German bankruptcy law provides that the creditors of shareholder loans shall qualify as subordinate creditors, such provisions may not apply in cases where the public authority seeks to recover unlawful aid following a decision of the European Commission. On the contrary, the public authority must be qualified as first class creditor, regardless of whether the unlawful aid was granted via shareholder loans or not and regardless of any contractual subordination clause.

The fact that the Commission decision came after the conclusion of the contract granting the unlawful aid and the repayment of this aid to the bank does not change the above conclusions. According to the BGH, a Member State is only obliged to recover State aid once it has been declared incompatible by the Commission, although it is entitled to claim repayment before if the aid has been awarded in breach of Article 88(3) EC.

The applicant cannot accuse the bank of unjust enrichment, since the aid was unlawful and incompatible.

The liquidation of the aid recipient is important from a competition standpoint as it frees the market segment previously held by the firm and makes it available to creditors, while giving them the opportunity to acquire the assets and reallocate them more effectively (C- 399/00 Italy and SIM 2 Multimedia v Commission [2003] ECR I- 4035, para. 69).

The obligation to pay back the aid shall be considered as fulfilled even if the aid is not reimbursed in total if the company therefore goes into liquidation. In German law, an insolvency procedure is governed by the principle of equal treatment among creditors of the same rank. In this particular case, the disappearance of the aid recipient from the market was deemed sufficient in itself to remove the market distortion caused by the unlawful aid (para. 44 of the judgment). Thus, a national insolvency procedure can be challenged in the event of an alleged discrimination among creditors of the same rank. The liquidator of C. GmbH was therefore permitted to contest it. However, following an examination of the merits of the claim, the latter is rejected.

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

Federal Court of Justice (FCJ) ("Bundesgerichtshof (BGH), 9. Zivilsenat"), 05.07.2007, IX ZR 221/05, Insolvency procedure v. State aid law 2

II- Brief description of the facts and legal issues

Quoting Daniel von Brevern, *German Federal Court of Justice clarifies that State aid law supersedes German bankruptcy law (SKL)*, 5 July 2007, e-Competitions, n°14825, www.concurrences.com.

From 1997 to 2000, BVT Industrie-Beteiligungsgesellschaft Magdeburg mbH ("BVT"), a company ultimately controlled by the German government, granted several loans to SKL Motoren und Systembautechnik GmbH ("SKL"), a company which developed and manufactured engines for ships and the energy sector. In September 1999, in the course of the restructuring of SKL, BVT became the sole shareholder of SKL. In August 2000, the Commission initiated formal State aid proceedings to investigate the granted loans, and in September 2000 SKL filed for bankruptcy. In April 2002, the Commission decided that BVT, i.e. Germany, had granted EUR 34.26 million of unlawful State aid to SKL, and that Germany was therefore required to recover that aid.

As SKL was bankrupt, Germany had to recover the aid as a creditor within the bankruptcy proceedings. German bankruptcy law distinguishes between "first-class" creditors and "subordinated" creditors. Subordinated creditors include the shareholders of the bankrupt company with regard to loans they granted to it. Indeed, for the purposes of bankruptcy proceedings shareholder loans are essentially considered as substitutes for equity (*eigenkapitalersetzende Darlehen*).

The liquidator of SKL claimed that BVT granted the loans as a shareholder of SKL and therefore had to be qualified as a subordinated creditor. BVT brought a claim to the District Court Magdeburg, claiming that, even though it was shareholder of SKL, it should qualify as first class creditor, as a qualification as subordinated creditor would make it impossible to implement the Commission's recovery decision. The case was appealled to the Higher Regional Court Naumburg, and then to the Federal Court of Justice ("FCJ").

III- Summary of the Court's findings

Quoting Daniel von Brevern, *German Federal Court of Justice clarifies that State aid law supersedes German bankruptcy law (SKL)*, 5 July 2007, e-Competitions, n°14825, www.concurrences.com.

The FCJ held that public authorities, who are required to recover unlawful aid following a decision by the European Commission, do have to be qualified as first class creditors - even though, absent the State aid issue, they would have qualified as subordinated creditor.

The court began by acknowledging the settled case law of the ECJ. The Member State, to which a decision requiring recovery of unlawful aid is addressed, is obliged to take without delay all measures necessary to implement that decision without delay. On repayment, the aid recipient loses the advantage which it had enjoyed over its competitors, and the situation prior to payment of the aid is restored (Case C- 277/00 Germany v Commission [2004] ECR I- 3925, para. 75).

However, in the case of bankrupt aid recipients, the reestablishment of the situation prior to payment of the aid and the elimination of the distortion of competition can be achieved, and is therefore sufficient, if the Member State concerned registers the recovery claim as a liability during

the bankruptcy proceedings (ECJ, Germany v. Commission, quoted above, para. 85). The proceeds of the sale of the assets allow the creditors, including the Member State, to be repaid. Even if insufficient to cover all the debts of the aid recipient the proceeds of the sale will constitute sufficient repayment of the aid even though it may not be recovered in full. In such circumstances, the liquidation of the aid recipient is important from a competition standpoint as it frees the market segment previously held by the firm and makes it available to creditors, while giving them the opportunity to acquire the assets and reallocate them more effectively (Case C-328/99 Italy and SIM 2 Multimedia v. Commission [2003] ECR I-4035, para. 69).

The FCJ subsequently held that, based on this case law, the Member State is required to make as effective a use as possible of the national bankruptcy proceedings. The qualification of the Member State, who is required to recover unlawful aid from a bankrupt company, as subordinate creditor, is not sufficient. To the extent that German bankruptcy law provides that the creditors of shareholder loans qualify as subordinate creditors, such provisions may apply in cases where the public authority seeks to recover unlawful aid following a decision by the European Commission. In such circumstances, the public authority must be qualified as first class creditor, regardless of whether the unlawful aid was granted by shareholder loan or not.

I- Information on the judgment

Federal Court of Justice (FCJ) ("Bundesgerichtshof (BGH), 3. Zivilsenat"), 06.11.2008, III ZR 279/07, Investitionsförderung des Landes Brandenburg

II- Brief description of the facts and legal issues

The granting authority must advise the guarantor (or "collateral provider") of the aid recipient when allocating non notified aid. If the granting authority has omitted to do so, the guarantor is entitled to oppose an action for damages against the recovery.

Parties:

- The applicant: administrative body (Public Agency responsible for promoting investment in the Land Brandenburg)
- The defendant: executive director and guarantor of D. GmbH, a property development company (aid recipient)

Factual background:

On 1 December 2000, the applicant granted D. GmbH a subsidy of over € 1 million for the development of business premises in the greater Berlin area. The general collateral clauses in the official letter granting the aid Stated in which cases the aid might have to be repaid by the beneficiary. No reference was made to a failure to notify by the granting authority.
As sole executive and director of the aid beneficiary, the defendant signed on 17 December 2000 a declaration of liability (*Haftserklärung*) for the benefit of the company, thus becoming its guarantor. The subsidy was spent by the company.

The amount of the subsidy had been calculated on the basis of the German regional aid map in the Berlin-Brandenburg area ("*Fördergebietskarte*"). However, on 17 August 1999 the European Commission decided to initiate proceedings in order to examine the compatibility of this German regional aid map. It wanted to ensure that in Berlin and the Brandenburg area which belongs to the Berlin employment market, the aid did not exceed 20% net of the overall investment for large undertakings and 20% net + 10% gross for SMEs of the overall investment. On 6 February 2001, the Commission sent to the German government a request for information informing it that part of the aid awarded in the Berlin-Brandenburg area was above the thresholds and therefore unlawful.

Consequently, the applicant issued a decision with retroactive effect ordering partial recovery of the aid amounting to award € 200.000 so as to comply with the aid intensity caps set by the Commission. In July 2002, the aid beneficiary filed for bankruptcy. Meanwhile, on the grounds that the subsidy had not been used for the purpose of creating jobs, the applicant claimed the recovery of more than € 1 million.

The defendant refused that its guarantee should be called upon to pay off the insolvent company's debts towards the applicant. He argued that he had no influence on the circumstances which led to the decision of 1 December 2000 being repealed and the subsequent partial recovery order rest upon circumstances. Besides, the general collateral clauses did not mention the illegality of the aid as a valid reason to repay it. The defendant insisted that he would not have accepted to step in as a collateral provider if the administration had not acted negligently by omitting to inform him that the aid had been granted unlawfully in part.

III- Summary of the Court's findings

The Federal Court upholds the ruling of the Court of Appeal, which rejected the arguments of the German administration, stating that the applicant had no valid title against the defendant on the basis of its declaration of liability. The applicant's claim is thwarted by the action for damages filed by the defendant, which is justified by serious contractual default (§ 15).

The prior notification to the Commission of new State aid is mandatory under Article 88(3) EC. By omitting to proceed accordingly and by implementing the aid measure without Commission's approval, the applicant violated its obligations.

In any case, the applicant was under a duty to inform the aid recipient and the latter's guarantor(s) that the aid had been granted in breach of the obligation to notify and to await the Commission's aid approval, and that as a result the aid incurred the risk of having to be recovered. This ought in particular to be the case, when the German administration is itself responsible for the violation of EC law (§ 17). None of the letters sent by the applicant to the defendant mentioned the compatibility with EC State aid rules as a mandatory condition for the validity of the aid contract (§ 18).

The violation of the notification requirement is due to the "*gross negligence*" of the applicant. The administration must have been aware of the obligation to notify. Publication in the EC Official Journal forms an essential prerequisite, a "cardinal obligation" in the work of any aid-granting public body. No circumstance was advanced to justify the absence of a notification in the present case (§ 19).

Yet, EC case-law repeatedly insists that a diligent aid recipient shall ensure that the granting authority has respected its requirement to notify the aid to the Commission and to stay its implementation, pending approval. Only in those circumstances can it bring a legitimate expectations claim rendering an effective recovery impossible (§23). The same principles are also deemed to apply to SMEs.

The Court then balances both types of negligence, in order to ascertain which party carries the heaviest responsibility for the breach of Article 88(2) EC. It concludes that in this case, the applicant shall predominantly be blamed (§§ 24, 28). It is indeed arguable that the aid beneficiary can legitimately expect that the specialised administrative body granting State aid abides by EC law (§ 25).

Quoting various ECJ rulings, the Court recalls that recovery of unlawful State aid is to be effected in accordance with the procedures of national law. The main objective of recovery is to put an end to the distortion of competition caused by the advantage enjoyed by the beneficiary. This goal is achieved when the amount of unlawful aid leaves the beneficiary's capital. For this purpose, it is not decisive whether the State, a third-party who is liable for paying back the aid, or the latter's successor effectively recovers the undue sums (§ 29).

I- Information on the judgment

Kiel District Court ("Landgericht Kiel 1. Kammer für Handelssachen"), 27.07.2006, 14 O Kart. 176/04, "Ryanair 1"

II- Brief description of the facts and legal issues

To the extent that the "Ryanair Agreement" between the airline and the Lübeck airport was on more favourable terms with Ryanair than with other airlines, this amounts to unlawful State aid (only example of a German court accepting the claim of competitors and ordering recovery - quashed by the ruling of the Higher Regional Court Schleswig-Holstein of 20 May 2008 (*Ryanair 1*).

Parties:

The applicant: Air Berlin, a private airline (competitor to Ryanair)
The defendant: private (though until 2005 publicly controlled) undertaking that operates the Lübeck airport

Factual background:

The defendant manages the airport of Lübeck. Until 2005, it was publicly controlled by the city of Lübeck, which was under a contractual duty to fully compensate for the airport's losses. Since 2005 however, it is organised as a private company. The defendant's tariffs for airlines taking off and landing are defined in a tariff regulation (*Entgeltordnung*). This regulation is supposed to be regularly reviewed and approved by the regional administration. Since 1999, the defendant's balance sheet has continuously showed heavy increasing losses.

The tariff regulation does not apply to low-cost carrier Ryanair; instead it has negotiated an individual agreement with the airport according to which take-off and landing costs as well as other costs and taxes depart from the normal rule (hereafter the "Ryanair-Agreement"), on a non transparent basis. Ryanair for example benefited from marketing support, incentives to support the launching of new connections, the granting of special discounts and services for the use of the airport's facilities, lower rates for the accommodation of Ryanair's personal, etc. (see § 11).

The applicant (Air Berlin) is also a low-cost carrier. It does not flight to and from Lübeck, even if it had done so in the past but may consider using the platform again in the future. It has instead chosen to be based in the Hamburg airport, which is located relatively close to Lübeck.

Before the Kiel District Court, Air Berlin argued that the tariffs contained in the "Ryanair-Agreement" are far below the normal tariff regulation applicable to the other airlines using the airport, and that they do no reflect the actual costs incurred by the airport. The individual negotiation of agreements would violate the principle of equity and necessarily entail discrimination.
Moreover, it considered that these lower tariffs amounted to unlawful State aid, which has to be recovered by the defendant from Ryanair (§ 14).

As a third party Air Berlin had no access to the exact terms and conditions of the Ryanair Agreement, and consequently was not in a position to calculate the amount to be paid back by Ryanair. Therefore, the applicant first requested the court to force the defendant to provide further details about the Ryanair Agreement, reserving an action to order recovery for later proceedings.

Air Berlin considers its complaint to be admissible on the grounds that, as an actual or potential user of the Lübeck airport, it has a right to be protected (*Rechtsschutzinteresse*) from the latter's anticompetitive practices. In terms of *locus standi*, it considers that Article 88(3) EC enables it to request the aid grantor to recover unlawful aid from the beneficiary (§ 14). The defendant contends that the claim is inadmissible because of the absence of an appropriate German legal basis. In any case, the Ryanair agreement is transparent and does not create discrimination.

III- Summary of the Court's findings

The Landgericht Kiel, following Air Berlin's request, ordered the defendant to make details available about the terms and conditions of the Ryanair Agreement from 2000 to 2004.

a) Application for assessment (*Feststellungsantrag*)

Regarding admissibility, German law requires the requested assessment to relate to a "*current legal relationship*". Such prerequisite was met. Even if the applicant did not operate flights at the time of this litigation, it did so in the past and was considering doing it again in the future (§ 54). Moreover, a current legal relationship resulted from the obligation to contract (*Kontrahierungszwang*) which is imposed on the defendant. As a private operator of a public service, the defendant is obliged to contract with any airline that wishes to operate from the Lübeck airport (§ 55-56).

On the merits, the Court assessed whether the defendant treated the different airlines unequally, following arbitrary criteria. Particular attention was given to the principles of equivalence, cost recovery and transparence (§ 60). The conclusion of individual agreements granting special discounts, which depart from the tariff regulation, infringed the transparency requirement (§ 65).

b) Application for details about the Ryanair Agreement (*Auskunftsantrag*)

This application was justified, because communication of this information was essential to dispel the uncertainty in which the applicant finds itself. The Court considers that Article 88(3) EC is a law of "*protection*" (*Schutzgesetz*). The granting of State aid in breach of Article 88(3) EC creates a legitimate claim for damages that can be made by competitors of the beneficiary (§ 78).
The Court agrees with Air Berlin that, to the extent that the Ryanair Agreement was on more favorable terms with Ryanair than with other airlines, it formed a selective advantage (§ 85-86) detrimental to competitors such as the applicant. Since the defendant was controlled until the end of 2004 by a public entity, the criterion of State resources was met. The Court therefore concluded that the defendant granted unlawful State aid to Ryanair.
The defendant's argued that the private investor test demonstrated that it did not grant State aid to Ryanair. But the Court rejected this test as inapplicable, as the defendant ran a service of general interest and was under an obligation to contract. Any differentiated treatment should be transparent and duly justifiable, which was not the case here (§ 85).
Air Berlin, as a direct competitor of Ryanair, was entitled to request recovery of unlawful State aid awarded by the defendant and to file an action for damages. For this purpose, Air Berlin's request for information related to the Ryanair Agreement was accepted.

I- Information on the judgment

Higher Regional Court Schleswig-Holstein (Court of Appeal) ("Oberlandesgericht Kiel"), 20.05.2008, 6 U 54/06, "Ryanair 2"

II- Brief description of the facts and legal issues

The 2006 ruling of the Regional Court Kiel is quashed and Air Berlin's claims rejected on grounds of inadmissibility and on the merits. Air Berlin's interest to bring proceedings does not meet the required conditions. Articles 87 and 88 EC as well as the linked national provisions cannot be construed as supporting claims of competitors. Only the airport could request recovery by Ryanair (*Ryanair 2*).

Parties:

The applicant: Air Berlin, a private airline (competitor to Ryanair)
The defendant: private (though until 2005 publicly controlled) undertaking that operates the Lübeck airport

Factual background:

The Higher Regional Court had to deal with the appeal against the "Ryanair 1" decision of the Kiel Regional Court of 27 July 2006 (see Kiel District Court of 27 July 2006, Landgericht Kiel 1 (Kammer für Handelssachen), 14 O Kart. 176/04, "Ryanair 1"). The factual background of both cases is identical.

In its appeal the defendant asked for the annulment of the decision of the Kiel District Court of 27 July 2006. It claimed that the applicant had no legal interest *(Feststellungsinteresse)* apply for the assessment of non-applicability of the defendant's fee regulation in the first place.

Regarding the application for communication of information *(Auskunftsantrag)* the defendant argues that this application was inadmissible, as the applicant already knew the details of the underlying contract. It contended that the application was also unfounded as the airport contract did not amount to State aid pursuant to Article 87(1) EC, consequently Article 88(3) EC was not applicable in this case.

Furthermore the defendant argued that the Regional Court was wrong to decide that Article 88(3) EC is a law of "*protection*" (*Schutzgesetz)* according to Section 823(2) German civil code (BGB) and that the granting of State aid in breach of Article 88(3) EC creates a legitimate claim for damages that can be exercited by competitors of the beneficiary. It claimed that there was no obligation to recover the aid since in special circumstances - like in the present case - such an obligation would not apply, even if the court found the aid was unlawful.

The applicant asked for the appeal to be dismissed.

III- Summary of the Court's findings

The Oberlandesgericht Kiel quashed the ruling of the Regional Court Kiel.

a) Application for assessment (*Feststellungsantrag*)

The Oberlandesgericht found that Air Berlin was lacking the necessary legal interest *(Feststellungsinteresse)* to bring this claim and that the claim was therefore inadmissible. In its application for assessment, Air Berlin had asked the court to State that the fee regulation applied by the defendant from 2002 until 2006 was unfair. This fee regulation was however never binding on Air Berlin.

The court concluded that Air Berlin's aim of establishing fair competition between itself and Ryanair cannot be reached by the means of an application for assessment. Therefore it negated the legal interest for assessment, which is a necessary element for pursuing an application.

b) Application for details about the Ryanair Agreement (*Auskunftsantrag*)

The Oberlandesgericht found that Air Berlin's application for details about the Ryanair Agreement was admissible but unfounded. It considered that Air Berlin's claims under this section were aimed at achieving the recovery of financial advantages granted to Ryanair and stated that Section 242 BGB in conjunction with Sections 823(2) and Section 1004(1) BGB in conjunction with Article 88(3) EC did not constitute a legal basis for the applicant's claim to oblige the defendant to recover the State aid from Ryanair. The court further found that German civil law does not provide legal basis on which Air Berlin could make such a claim.

In particular the court found that the European State aid rules cannot be considered to be protection rules *(Schutzgesetze)* pursuant to Sections 823(2) BGB, aimed at the protection of single individuals. The court stated that though a non notification of State aid renders the underlying civil contracts null and void under Article 88(3) EC, its aim is not the protection of the individuals, as Article 88(3) EC is addressed to Member States and not the market participants.

The Court further States that even if the benefits given to Ryanair were to be considered State aid, Article 87(1) EC is not addressed to the applicant in order to safeguard its competitive position but only to the defendant, the airport that granted the State aid. On the basis of Article 3(1) g EC the agreements between the Member States serve the only purpose to protect the common market but not the interest and the protection of a competitor.

In the view of the Court it is not obvious that the European State aid rules were developed in order to give a competitor the possibility either to oblige the beneficiary to repay the received State aid to the granting authority or to oblige the authority that granted the State aid to recover such aid from the beneficiary. As far as the ECJ ruled in 1996 that the national courts are obliged to order recovery of unlawful State aid in reaction to a claim by a competitor, this can only hold true as long as there is a corresponding legal basis in national law. Consequently the ECJ ruling has to be interpreted in a way that those Member States that have a corresponding legal basis, have to order recovery in reaction to a claim made by a competitor. It does not mean however that Article 88(3) EC itself would constitute a sufficient legal basis.

Third parties such as competitors are in the view of the Oberlandesgericht sufficiently protected, as they can make their views known to the Commission during the formal procedure pursuant to Article 88(2) EC. In case the Commission fails to take a decision and violates its obligations, third parties can bring an action under Article 232 EC. As the Commission had initiated a proceeding

under Article 88(2) EC in the present case, the Court concluded that the applicant was sufficiently protected under the European rules.

The Court finally found that the applicant had no other legal basis to ask for recovery of the State aid granted to Ryanair, in particular the court found that Section 242 BGB in conjunction with Section 19(1); 33 GWB; Section 242 BGB in conjunction with Section 20(1), 33 GWB and Section 242 BGB in conjunction with Section 3, 4, 8(1) UWG do not constitute a legal basis for such a claim.

I- Information on the judgment

Bad Kreuznach Regional Court ("Landgericht Bad Kreuznach 2. Zivilkammer"), 16/05/2007, 2 O 441/06, "Ryanair 3"

II- Brief description of the facts and legal issues

Article 88(3) EC does not confer any specific protection to a competitor and does not entitle the latter to challenge the award of State aid. The payment of so-called marketing support from an airport operator to an airline company does not constitute an unlawful action to the detriment of a competitor, even if the payment is inadmissible according to EC State aid law (Ryanair 3).

Parties:

The applicant: Lufthansa, a private airline (competitor to Ryanair)
The defendant: undertaking (held partially by a publically listed company and partially by two Federal States) that operates the Frankfurt Hahn airport

Factual background:

The defendant manages the airport of Frankfurt-Hahn. Ryanair is the most important airline flying to and from Frankfurt-Hahn airport, using this airport as its continental European basis. The defendant is 65% owned by a publicly listed company; the Federal States Hesse and Rhineland-Palatinate respectively hold 17.5%. The majority of the shares of the publically listed company are held by the Federal Republic of Germany, the Federal State Hesse and the city of Frankfurt.

Ryanair pays fees to the defendant for the use of the airport. These fees are calculated on the basis of the defendant's fee regulation. In its contract with Ryanair the defendant agreed to provide yearly contributions to Ryanair, which are officially declared as "*marketing support*".

The applicant claimed that between 2001 and 2006 the application of the fee regulation led to very generous fees for Ryanair which resulted in the defendant making economic losses. It claimed that the fee regulation and the marketing support granted to Ryanair constitute unlawful State pursuant to Articles 87 and 88 EC. In any event, the applicant claimed that the aid had not been notified to the Commission. The applicant contends that the marketing support was paid on the basis of a secret contract between Ryanair and the defendant without conferring any special obligations on Ryanair. It claimed that a private investor would not have given such favorable treatment to Ryanair.

The applicant asked details about the amount paid by the defendant to Ryanair in form of marketing support, to be communicated, as well as the amount saved by Ryanair on the basis of the preferential treatment laid down in the fee regulation. It further asked the court to find that the defendant had an obligation to recover the State aid granted to Ryanair, both in form of marketing support and preferential treatment.

The defendant argued that the claim was inadmissible and unfounded. It claims that the fees and the marketing support were non-discriminatory financial instruments and open to all airlines using the Frankfurt-Hahn airport. It further claimed that any recovery claims for the years 2002 and 2003 are subject to time limitation.

The defendant explained that expected to make profits for 2009 and that was quite normal for an undertaking such as an airport starting new business to make losses during the first 10 years.

It asked the court to reject the claim.

III- Summary of the Court's findings

The Landgericht Bad Kreuznach found that the claim was admissible but unfounded. It considers the civil courts to be competent as the rights claimed by the applicant are rights based on civil law rules.

Application for communication of the Ryanair Agreement (*Auskunftsantrag*)

As in the case dealt with above (Higher Regional Court Schleswig-Holstein of 20 May 2008, Oberlandesgericht Kiel, 6 U 54/06, "Ryanair 2") the Regional Court found that the applicant was pursuing the ultimate aim of achieving the recovery of the financial advantages allegedly granted to Ryanair.

The court found that it was not relevant whether the financial contributions granted to Ryanair qualified as State aid pursuant to Articles 87 and 88 EC and that were granted in violation of the obligation to notify pursuant to Article 88(3) EC, as long as the European Commission had not taken any (negative) decision. It further found that it was not relevant for the case that the underlying agreements between the defendant and Ryanair could be null and void (due to a potential violation of Article 88(3) EC).

The court ruled instead that the claim was unfounded as there is no legal basis in German law for a competitor to claim recovery of unlawful State aid.

First, the court refused to consider that Section 3, 8 UWG could be such a legal basis as the marketing support did not constitute an unlawful arrangement to the detriment of the applicant.

The court further Stated that even if the benefits given to Ryanair were to be considered as State aid, Article 87 et seq. EC are not addressed to the applicant in order to safeguard their competitive position but only to the defendant, the airport that granted the State aid. On the basis of Article 3(1) g EC the agreements between the Member States serve the only purpose to protect the common market but not the interest and the protection of a single competitor.

Secondly, the Court found that neither Section 823(1) nor Section 823(2) BGB could serve as a legal basis for the claim. In particular the court Stated that the European State aid rules can not be considered to be "*protection rules*" *(Schutzgesetze)* pursuant to Sections 823(2) BGB, aimed at the protection of individuals. The court Stated that though a non notification of State aid leads to the underlying civil contracts being null and void under Article 88(3) EC, its aim is not the protection of the individuals, as Article 88(3) EC is addressed to the Member States and not to market players.

Finally the court Stated that Article 88(3) does not alone constitute a legal basis as it is a rule based on the EC Treaty, that does not confer direct rights to competitors. Also with regard to an effective protection of rights, it would not be necessary to use Article 88(3), as a direct legal basis.

The court concluded that that the national courts can only be obliged to order recovery of unlawful State aid in reaction to a claim by a competitor, in case there is a legal basis in national law. Consequently the ECJ case law had to be interpreted in a way that those Member States that have a legal basis, have to order recovery in reaction to a claim made by a competitor. It does not mean however that Article 88(3) EC itself would constitute a sufficient legal basis.

I- Information on the judgment

Coblence Higher Regional Court ("Oberlandesgericht Koblenz, 2. Zivilkammer"), 25/02/2009, 4 U 759/07, "Ryanair 4"

II- Brief description of the facts and legal issues

The appeal of Lufthansa against LG Bad Kreuznach's judgment is rejected. The OLG Koblenz rules that the appeal lacks a legal basis. A Commission decision (be it provisional or definitive) ordering the recovery of an unlawful aid measure shall first be issued; only then may a German court deal with such a request brought by a competitor. The questions on the application of the MEIP test and the existence of aid are still open (*Ryanair 4*).

Parties:

The applicant: Lufthansa, a private airline (competitor to Ryanair)
The defendant: undertaking (held partially by a publically listed company and partially by two Federal States) that operates the Frankfurt Hahn airport

Factual background:

The Higher Regional Court had to deal with the appeal against the "Ryanair 3" decision of the Bad Kreuznach Regional Court of 16 May 2007 (see case n°7). The factual background of both cases is identical.

In its appeal the applicant had claimed that several procedural rights had been violated. It also upheld the claims brought forward in the first instance. In particular the applicant claimed that the violation of Article 88(3) EC does confer direct rights to the claimant and that the European rules on State aid, Articles 87 and 88 EC, do protect the rights of third parties and competitors.

III- Summary of the Court's findings

The Higher Regional Court rejected the appeal as unfounded and confirmed the ruling of the Bad Kreuznach Regional Court. It found that Article 88(3) EC does not confer a direct right to a competitor to ask for recovery by the authority having granted the aid. It further found that, though the infringement of Articles 87 and 88(3) EC leads to the underlying civil agreement being null and void, these rules give no protection to third parties pursuant to Section 823(2) BGB.

In line with the regional court, the Koblenz Higher Regional Court did not consider in its judgment whether the measures constituted State aid pursuant Articles 87 and 88 EC or not. It Stated that no decision on the qualification as State aid was necessary as (i) the Commission was investigating the marketing support granted by the defendant and the fee regulation and (ii) the applicant had no individual right to claim recovery of any potential State aid.

The Court stated that the European State aid rules were not developed in order to give a competitor. However the possibility either to oblige the beneficiary to repay the received State aid to the granting authority or to oblige the authority that granted the State aid to recover such aid from the beneficiary. As the ECJ ruled in 1996 (Case C-39/94, SFEI and Others, [1996] ECR I-3547), national courts are obliged to order recovery of unlawful State aid in reaction to a claim by a competitor. However, this can only hold true where there is a legal basis in the national law (such as in France).

Consequently the ECJ ruling had to be interpreted in a way that those Member States that have a legal basis, have to order recovery in reaction to a claim made by a competitor. It does not mean however that Article 88(3) EC itself would constitute a sufficient legal basis.

The court noted that the legal system in Germany is based on repressive control by ordering recovery on the basis of a negative Commission decision or on the basis of State aid being granted in violation of Article 88(3), but not based on protection of a competitor or any other third party. It found that there is no necessity for any further protection of competitors.

The Court stated repeatedly that the State aid rules are addressed to Member States and not to individual (competitor). The purpose of Article 88(3) EC is to protect the common market and not the competitor. The Higher Regional Court based this finding on the interpretation of the ECJ's SFEI decision (cited above) and contends that the ECJ assumes that Article 88(3) would be a direct legal basis giving a subjective right to the competitor.

Any recovery prior to a negative Commission decision and on the basis of Article 88(3) could consequently only be enforced by the authority that has granted the State aid (for example through a claim of unlawful enrichment, section 812 BGB). Any claim by a competitor could only be brought after the Commission has taken a negative decision.

In its further judgment the court found, in line with the judgment of the regional court, that the German legal system does not provide any other legal basis for a competitor to bring a claim for recovery (prior to a Commission decision).

In particular, the court analysed again if Articles 87 and 88 EC are "protection laws" pursuant to Section 823(2) BGB and refuted this with the same arguments as the regional court. The court found that these rules are addressed to Member States, which it further strengthened by giving a narrow interpretation of the rules set out in EC Regulation 659/1999.

In the view of the court it is important to guarantee that only the European Commission controls whether the measure in question constitutes (unlawful) State aid. This could be assured best if the competitor had the possibility to address itself to the Commission in order to trigger an investigation into the alleged State aid but not by giving it the right to claim recovery before national courts. Otherwise the national court would have to assess whether the measure was in fact State aid or not.

Finally the court found that Section 33 GWB was not a legal basis for the applicant's claim, as this section refers to a violation of the antitrust rules in Articles 81 and 82 EC, which is a different constellation to the one in the present case.

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

Hamburg Administrative court of appeal ("Hamburgisches Oberverwaltungsgericht 1. Senat"), 29/05/2007, 1 Bs 334/06, Gesellschaftsanteile für Pflegen und Wohnen Betriebs GmbH

II- Brief description of the facts and legal issues

Documents on ongoing proceedings do not fall within the scope of the Hamburg Freedom of Information Act setting the law on access to file. The existence of ongoing proceedings before the European Commission according to Article 88(2) EC also prohibits access to documents covered by these proceedings.

Parties:

The applicant: A bidder in a tender for a company (including real eState)
The defendant: The tenderer

Factual background:

In 2005 the applicant participated in a tender published by the defendant for the sale of a company (the Pflegen und Wohnen Betriebs GmbH), including real eState belonging to this company. In the first part of the bidding process, the plaintiff was excluded from the procedure, while six other bidders were retained.
After finding out about the final price paid by the successful bidder, the applicant sought access to certain information and records held by the defendant, in order to verify the legality of the tender procedure. The plaintiff based its claim on Section 29 VwVfG (administrative procedural law) and on Section 1(3) of the Hamburg Freedom of Information Act.
At the time the claim was brought, the tendering process was not yet finalised. The applicant had brought a complaint to the European Commission pursuant to Article 20(2) of Regulation 659/1999, claiming that the city of Hamburg had granted unlawful State aid in connection with the sale of the Pflegen und Wohnen Betriebs GmbH.

III- Summary of the Court's findings

The Hamburg Administrative court of appeal partially accepted the appeal and ordered the defendant to provide certain written information to the applicant. However, the court rejected most claims, mainly on the grounds that Section 29 VwVfG does not provide a legal basis for such a claim and that Section 1(3) of the Hamburg Freedom of Information Act does not foresee access to documents during ongoing procedures.
The court found that the fact that where the Commission opens a State aid procedure pursuant to Article 88(2) EC, the national tendering procedure needs to be qualified as ongoing. Any ongoing procedure is however not subject to the right of access to documents and information according to Article 1(3) of the Hamburg Freedom of Information Act.
The court found that there was no other overriding interest for the applicant to get immediate access to the information asked for.

IV- Comment

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

Baden-Württemberg administrative court of appeal ("Verwaltungsgerichtshof Baden-Württemberg 2. Senat"), 08/05/2008, 2 S 2163/06, "Rundfunkgebühr 1"

II- Brief description of the facts and legal issues

A tax payer, refusing to pay a radio tax, cannot base its claim upon an alleged infringement of EC State aid rules by the German radio financing system. This broadcasting tax is part of an existing aid and cannot be challenged before national courts as long as the European Commission has not requested its suppression or modification according to Article 88(2) EC (*Rundfunkgebühr*).

Parties:

The applicant: A citizen subject to a broadcasting tax
The defendant: The authority responsible for the collection of broadcasting taxes (Gebühreneinzugszentrale)

Factual background:

The applicant is a German lawyer, registered at the German bar since October 1996 and working as an independent lawyer since January 1997. Since January 1997 she is using a car, registered in her name, also for the performance of her independent activity. Her car has a built-in radio.

In April 2004 the defendant, the authority responsible for the collection of broadcasting taxes, addressed a request to pay to the applicant, asking for the retroactive payment of the broadcasting tax for the period October 1996 until March 2005, amounting to € 515.87. Under the German broadcasting tax Law, radios that are used in company cars or cars used to perform a professional activity are separately subject to broadcasting tax (and not covered by the tax paid by the private person for a radio used in the private home).

The court of first instance has found in January 2001 that the request to pay was legitimate and the authority was correct in assuming that the applicant's car was used also for her professional activity.

The applicant appealed the judgment arguing, amongst other, that the broadcasting tax Law was not applicable as it constitutes unlawful State aid pursuant to Articles 87 and 88 EC.

III- Summary of the Court's findings

The Baden-Württemberg administrative court of appeal found the appeal to be admissible but unfounded. It confirmed the ruling of the court of first instance in its main findings. In particular it confirmed that the law on the broadcasting tax is not a violation of the European State aid rules and therefore not applicable.

The court stated in its decision that for the present ruling it was not relevant to decide if there was an infringement of the State aid rules or if the broadcasting tax had to be considered as State aid pursuant to Article 87(1) EC at all. Although the European Commission had already clarified in a letter of 24 April 2007 that certain services provided by broadcasting agencies were potentially infringing competition rules (such as online services), the broadcasting tax in the present case was

based on the broadcasting tax Law which would in any event qualify as an existing aid pursuant to Article 88(1) EC and Article 17 seq. Regulation 659/1999.

According to the court the broadcasting tax fulfils the criteria of Article 1 b) of Regulation 659/1999 stating that existing aid is also *"aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State*".

Accordingly, and as existing aid is not subject to the normal notification procedure but only to a revision pursuant to Article 88(1) EC in conjunction with Article 17 seq. Regulation 659/1999, the applicant could not claim any violation of an alleged notification obligation. The court found that any existing State aid falls only under the general prohibition of Article 87(1) EC once the European Commission asks for its suppression or modification according to Article 88(2) EC. As long as the Commission has not taken any such decision, the State aid is legitimate, regardless of the general prohibition under Article 88(3) EC. Consequently the court found that in cases of existing aid, individuals can only claim the violation of subjective rights, once the European Commission has taken a prohibition decision according to Article 88(2) EC. Until then there is no room for a claim before the national courts, even if the State aid was incompatible with the common market.

The court therefore found that the Commission had a monopoly on the control of existing aid.

I- Information on the judgment

Thuringia Higher Regional Court ("Thüringer Oberlandesgericht 6. Zivilsenat"), 30/11/2005, 6 U 906/04, Insolvency procedure v State aid law 3

II- Brief description of the facts and legal issues

When dealing with the recovery of unlawful State aid, the provisions of the German laws on maintenance of capital and insolvency should be considered, so long as this does not contravene the rationale of Article 87(1) EC. EC State aid rules do not supersede the claim of a liquidator to recover an unlawful capital-substitutive (kapitalersetzend) financial aid that was recovered by the granting authority.

Parties:

The applicant: Liquidator of the L. GmbH
The defendant: Public authority dedicated to the promotion of economic development in the region of Thuringia

Factual background:

The L. GmbH, a company producing compact discs, went bankrupt in December 2000. The applicant was appointed liquidator by a regional court.

In the years prior to the bankruptcy, the group to which the L. GmbH belonged received financial support of more than DM 550 million from the defendant and from other public authorities dedicated to the promotion of economic development. In 1992, the regional tax authorities provided an additional investment allowance of DM 6 million. In 1993 the defendant gave a loan of DM 20 million to the predecessor of the L. GmbH; in 1994 the defendant bought 2% of the shares of the predecessor of the L. GmbH, the other 98 % of the shares being acquired by another public authority dedicated to the promotion of economic development in the region of Thuringia (and intervenor in the discussed case).

In 1994 and 1995 the defendant granted four further loans to the predecessor of the L. GmbH of DM 64.5 million in total. Subsequently the defendant granted a guarantee for further bank loans of the L. GmbH.

In November 1994 and up on request of the European Commission, the German authorities made an official notification of the State aid given to the predecessors of the L.GmbH. The Commission opened formal proceedings pursuant to Article 88(2) EC in July 1998 and decided in June 2000 that the group to which the L. GmbH belonged had received unlawful State aid amounting to DM 426 million. Germany was asked to take the necessary steps in order to recover the unlawful State aid. In 2005 the CFI confirmed the decision of the Commission in its ruling on the appeal brought by the Federal State of Thuringia.

In October 1995, during the ongoing assessment of the aid by the Commission, the predecessor of the L. GmbH and the defendant reached a settlement (in a different matter) by virtue of which the defendant waived its right to repayment of several loans of DM 36.8 million in total. In this

settlement the defendant further gave a guarantee to disburden the L.GmbH from any claims by the tax authorities to repay the additional investment allowance of DM 6 million granted in 1992.

In 1999 the tax authorities asked the L. GmbH to repay the investment allowance of DM 6 million and interests of DM 2 million. After selling some real estate, the L. GmbH paid back DM 8.1 million to the tax authorities in September 2000.

The applicant claimed that the defendant had to pay € 4.1 million on the basis of the settlement agreement reached in 1995. It claimed that, as the defendant had given a guarantee to disburden the L.GmbH from any claims by the tax authorities and as the L. GmbH had repaid the investment allowance to the authorities in the meantime, it would now have a direct claim against the defendant based on the settlement reached for the payment of € 4.1 million.

The defendant claimed, amongst other, that the settlement could not lead to an obligation to pay, as such an obligation would be in violation of State aid rules. The obligation to recover the unlawfully granted State aid would conflict with the claim asserted by the applicant.

The applicant further claimed that the defendant had to repay an amount of €19.5 million. This amount was paid by the L.GmbH to the defendant prior to the initiation of the insolvency proceedings in order to (partially) pay back the loans that the predecessor of the L.GmbH had received in 1994 and 1995. The applicant took the view that these loans were capital-substitutive shareholder loans (*kapitalersetzende Gesellschafterdarlehen*) and that repayment of these loans was in violation of German insolvency law rules. Consequently the applicant challenged the repayment of these loans (*Insolvenzanfechtung*).

The defendant also argued that repayment to the applicant would lead to a violation of superseding State aid rules as it would render full recovery impossible.

Both the applicant and the defendant agreed that the financial contributions granted by the defendant constituted unlawful State aid pursuant to Article 88(2) EC, as they were not notified to the Commission.

III- Summary of the Court's findings

The Thuringia Higher Regional Court found the appeal to be admissible and partially founded. It ordered the defendant to pay € 14.6 million (plus interests) to the applicant. It rejected the claim of payment of €4.1 million on the basis of the 1995 settlement agreement as unfounded.

Regarding the claim based on the settlement agreement the court interpreted this settlement, contrary to the interpretation given by the applicant, not to grant a guarantee to disburden the L.GmbH from any claims by the tax authorities. The court Round therefore that the applicant had no legal basis to ask for repayment of the €4.1 million paid to the tax authorities. As there was no legal basis for this claim, the court did not decide whether the settlement agreement could infringe EC State aid rules and therefore be (partially) null and void.

Regarding the claim based on the challenged repayment of certain loans (*Insolvenzanfechtung*) the court found that this claim is founded and not excluded by State aid rules. According to the court's findings, the loans given had to be treated in this particular case as bound share capital (*gebundenes Stammkapital*) pursuant to Section 30, 31 GmbH law.

The court noted that these loans (the bound share capital of the GmbH) constituted unlawful State aid pursuant Article 88(3) EC, as they had not been notified to the Commission. It further concluded that the granting of the loans was null and void, according to Article 88(3) EC in conjunction with Section 134 BGB.

However the court found that, due to the fact that the defendant had not claimed the repayment of the (unlawful) loans on the grounds of unlawful enrichment in time, these loans have turned into capital substituting means (*kapitalersetzende Mittel*). These capital substituting means had been repaid to the defendant at a time at which they were already bound share capital.

The court further found that the repayment of these (repaid) loans did not conflict with the State aid rules. It Stated that, as a general principle, any recovery of unlawful State aid always underlies national rules and that national rules should not be applicable where they render recovery impossible.

However it found that the application of State aid rules cannot lead to the non-applicability of national capital maintenance and capital substitutive rules (*Kapitalerhaltungs- und Kapitalersatzvorschriften*). In the present case it would be necessary to apply these capital maintenance and capital substitutive rules leading so that the public authority had to repay the capital substituting means (which had been formerly granted as unlawful State aid) to the insolvent company. The public authority could then claim its rights in the ordinary insolvency procedure together with other creditors of the bankrupt company. The application of State aid rules would not have to lead to the situation that the authority having to recover unlawful State aid is treated as a preferential creditor.

The court contended that this was also in line with the findings of the Commission which stated in its decision of 21 June 2000 that the public authority (recovering State aid) had to be treated in the same way as any other private creditor of the company. It would further be in line with the previous ECJ judgments that had constantly accepted that a recovery order should be treated as an ordinary claim of a first class creditor and that consequently, in most of the cases, a complete recovery of the State aid would not be possible. It would be sufficient to level out the distortive element of the State aid for the company that had received the aid to exit the market due to bankruptcy. The court concluded that the case in which the aid was recovered before the opening of the insolvency procedure could in this regard not be treated differently to the case in which the recovery was initiated only after the opening of the insolvency procedure, in which the recovery claim would be treated as a normal claim by a first class creditor.

The overall conclusion is therefore that the superseding interest to recover unlawful State aid does not prevent the realisation of a proper insolvency procedure under national law.

I- Information on the judgment

Potsdam Administrative Court ("Verwaltungsgericht Potsdam 3. Kammer"), 26.08.2008, 3 K 3343/03, Betriebsstätte des Tourismusgewerbes Berlin-Potsdam

II- Brief description of the facts and legal issues

If an aid measure that is found to formally infringe EC law cannot automatically be challenged for recovery, the infringement justifies the suspension of any further payment of that aid to the beneficiary.

Parties:

The applicant: Property developer;
The defendant: German local administration.

Factual background:

The applicant's predecessor applied for State aid in the form of a lump sum in order to erect business premises for use by a tourism office. On 9 May 2000, the local administration granted aid amounting to DM 5.380.000 (around EUR 2.750.750) covering the period 1 January 1998 to 31 August 2001. That period was later extended until 30 September 2002.

On 21 September 2001, the local administration informed the aid recipient that, in order to comply with State aid rules, it had to ensure that, in the Brandenburg area, the aid did not exceed 20% net for large undertakings and 20% net + 10% gross for SMEs of the overall investment. The aid recipient was sent various tax documents to fill in, so as to enable the grantor to ascertain whether the caps had been respected. It was also warned that, due to these strict rules, the final amount of the aid was likely to be decreased.

On 17 June 2002, the local administration claimed reimbursement of the aid which corresponded to the amounts above the Community thresholds. In addition, the administration told the aid beneficiary that the Commission had requested that the German regional aid map in the Berlin-Brandenburg area to be applied ("*Fördergebietskarte*"). This meant that the aid intensity in the Brandenburg area be lowered, and put in line with the aid intensity applicable to the city of Berlin.

The aid recipient opposed recovery of these amounts of aid, which it considered to be perfectly legal.

III- Summary of the Court's findings

The Potsdam administrative court dismissed the claim, on the grounds that the decision ordering recovery was lawful and that none of the applicant's rights had been violated.

In its findings, the court began by stating that the decision to grant the aid was in breach of Article 88(3) EC, and incompatible with the common market because part of it violated the rules established by the Commission (see §30). The court noted that the German local authorities had been informed by the Commission on 17 August 1999 that the Commission had initiated proceedings to examine the compatibility of the German regional aid map. In the absence of a Commission decision validating the regional aid map and, consequently, the aid measures based on it, there was no legal basis on which to grant State aid.

The court went on to State that, if an aid measure that is found to formally infringe EC law cannot automatically be recovered, the infringement justifies the suspension of any further payment of that aid to the beneficiary (see §32). Moreover, according to the Commission decision no operating aid could be granted to businesses under that scheme.

The court recalled that, pursuant to Article 249 EC, and contrary to the applicant's belief, the Commission decision was mandatory and directly binding on the German authorities. Neither the late publication of the decision nor the fact that it had been challenged before the CFI had an impact on its applicability, since a Commission decision has direct effect.

The recovery order did not violate any alleged protection based on existing law. An expectation to keep the aid despite its unlawfulness cannot be protected.

In relation to the *de minimis* aid, the court referred to the Commission's practice, whereby it accepts that aid granted as *de minimis* does not have to be repaid, even if it granted unlawfully. Lastly, the recovery measure was found to be proportionate.

I- Information on the judgment

Gelsenkirchen Administrative Court ("Verwaltungsgericht Gelsenkirchen 14. Kammer"), 19.12.2008, 14 K 2147/07, Regional rail transport services in Nordrhein-Westfalen

II- Brief description of the facts and legal issues

A service contract for regional public rail transport is not subject to a notification requirement. A definitive Commission decision stating declaring that Article 87(1) EC has been infringed is necessary before declaring the underlying contract null and void and requesting recovery.

Parties:

The applicant: Regional rail transport services operator in Nordrhein-Westfalen;
The defendant: Special purpose association subject to public law.

Factual background:

The applicant was an undertaking operating regional rail transport services in Nordrhein-Westfalen. The defendant was a special purpose association subject to public law, one of nine in Nordrhein-Westfalen, which, following an agreement with Deutsche Bahn AG, managed contracts with undertakings operating rail transport services, such as the applicant.

Between 1997 and 2003, the applicant operated transport services for the defendant. Following this, the defendant posted a European-wide invitation to tender. Only the applicant submitted an offer and therefore won the contract. The contract was signed on 12 July 2004. Pursuant to the contract the applicant had to apply some pricing rules and respect certain security and quality requirements. In order to finance its activities, the applicant was entitled to receive subsidies from the Land as well as compensatory funds set by law for public services operators. Specific provisions in the contract Stated that, in the event of a drop in subsidies, the applicant could reduce its operations. If the applicant's operations did not meet the quality standards, the compensation might lawfully be reduced.

In February 2007, the defendant informed the applicant that, due to liquidity shortage, it would have to decrease its financial support. At the same time, it urged the plaintiff to improve the quality of its services, which gave rise to long disputes. Invoking budget restrictions and non-satisfactory service quality, the defendant continued to cut the amount of aid throughout 2007.

Considering that service quality was so poor that it represented a real danger, in July 2008 the defendant decided to terminate the contract with immediate effect, on the grounds that it violated both EC State aid rules and German pricing law.

The applicant demanded payment of EUR 53.7 million. According to the defendant, there was no legal basis for such claim in so far as the sum corresponded to an over-compensation of public service costs, which is prohibited by EC State law. Moreover, it put forward that none of the four *Altmark* criteria were fulfilled.

III- Summary of the Court's findings

The court analysed the disputed contract in the light of Articles 87 and 88 EC, as well as Regulation 1191/69 (on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway), as amended by Regulation 1893/91.

Quoting a judgment of the *Bundesgerichtshof* ("BGH") of 04/04/2003, the court stated that: "*a material infringement of the prohibition to grant illegal aid pursuant to Article 87(1) EC does not automatically render an agreement granting such aid null and void. Indeed, this provision is deemed to have direct effect in the national legal order only after it has been "substantiated" by a European Commission decision pursuant to Article 88(1) EC*" (§ 129). The court then quoted ECJ rulings that allegedly backed up the BGH's analysis. In the absence of any Commission decision qualifying the aid as unlawful, the Court considered that the unilateral assertion of a procedural infringement is insufficient to allow a claim for recovery of aid already granted (§§ 138-140).

The court went on to consider whether a stand-still obligation should be observed regarding the aid measures. It recognised that the prohibition on implementing unnotified aid measures is meant to protect the rights of competitors and third parties, yet was unsure whether a notification was actually necessary in the present case, and decided to leave the question open (§ 152-157).

The contract signed between the applicant and the defendant was deemed to fall within the scope of Regulation 1191/69. With regard to the latter regulation and Article 88(2) EC, the Court concluded that, since the contract does not entail any kind of "*privileges*" benefitting the applicant, it was not subject to the notification requirement (§ 167; § 203).

In order to determine whether a notification is necessary, the next step for the court should have been to assess the challenged contract against the *Altmark* criteria. It came to the conclusion that such analysis should not take place in the present case, because the challenged contract did not fall within the remit of the *Altmark* jurisprudence, which applies to compensation granted to offset clearly defined public service obligations (§§ 181 to 203).

The Court refused to refer the case to the ECJ.

I- Information on the judgment

Hamburg Financial Court ("Finanzgericht Hamburg 4. Senat"), 05.09.2008, 4 V 180/08, Mineralölsteuer 2

II- Brief description of the facts and legal issues

It is seriously doubtful whether the duty for national courts under Community law to recover unlawful State aid shall supersede the national procedural laws on prescription.

Parties:

The applicant: Farming company growing different types of plants in greenhouses;
The defendant: German Custom Office (Hauptzollamt A.).

Factual background:

Between 2001 and 2004, the applicant was awarded aid in the form of tax exemptions, pursuant to specific provisions contained in the petroleum tax law (*Mineralölsteuergesetz*) for undertakings producing plants in greenhouses. However, on 10 March 2008 a Commission decision Stated that the basis for tax laid down in the *Mineralölsteuergesetz* was wrongly defined. As a result, the aid measures were found to be partially unlawful and incompatible with the common market. Subsequently, pursuant to a decision dated 10 June 2008, German customs demanded the applicant, to repay the aid it had unlawfully received.

The applicant brought a claim before the financial court, demanding the suspension of the recovery order. In a ruling dated 29 July 2008, the suspension was granted, by virtue of a provision in the German consumption tax law providing for a one year limitation for effective tax recovery by the administration.

German customs challenged this decision, arguing that no "*serious doubt*" could remain in relation to the legality of the recovery order, since it had been approved on its substance (§ 3). They argued that the principle of primacy of EC law was sufficient to set aside any contradictory national law - in the present case, Regulation 659/99 EC should take precedence over German tax law. Moreover, no argument based on the protection of legitimate expectations may frustrate the recovery of unlawful aid.

III- Summary of the Court's findings

The financial court agreed with the defendant that the Commission decision of 10 March 2008 constituted a valid and binding legal act. By declaring part of the aid incompatible, this decision obliged the German State, and essentially its courts, to recover the incompatible aid (§10). The issue the Court wanted to deal with here is actually whether EC law hinders the compliance with national procedural laws (§12).

The starting point was the fact that, in the absence of any EC procedural order, recovery must occur pursuant to the relevant procedure in national law. The applicable German consumption tax law provides for a one year limitation, whereas Article 15(1) of EC Regulation 659/99 the limitation only takes place after 10 years. In the absence of any Community case-law dealing with this specific issue, the Court "*seriously doubts*" that the prescription set by German law should be cast aside by the EC

Regulation, without primary change in the German consumption tax law (§13). In other words, it is seriously doubtful whether the European Commission's competence to order recovery of unlawful State aid in form of tax reductions supersedes the national laws on prescription. The Court queried whether a claim which is inadmissible under national procedural law (due to the prescription) can be "resuscitated" because of community law (§13).

The Court noted that, according to well-established case-law of the Community courts, Member States can neither argue the protection of legitimate expectations nor the existence of legal provisions or circumstances of an internal nature to escape the recovery obligation. However, it ought to be further examined whether these principles suffice to reject basic procedural rights established by national law (§16).

In addition to the protection of legitimate expectations, the Court considered that this case raised issues related to basic principles of legal certainty, essential elements in any legal system (§18). To that end, it had to be determined whether the non-application of such a fundamental procedural right, which seems to violate the very concept of rule of law, is possible or whether it would be anti-constitutional. If necessary, this point could have been referred to the ECJ for a preliminary ruling under Article 234 EC (§18).

The Court expressly rejected the approach adopted by the Düsseldorf financial court in its decision of 8 August 2008 (§19).

The Court did not rule on the merits of the case, it referred to the "main proceedings" (*"Hauptsacheverfahren"*) which would be considered at a later stage. In the meantime and pending clarifications of these issues, the Court declared that it had "serious doubts", as to whether suspension of the recovery order should be maintained (§20).

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

I- Information on the judgment

Higher Administrative Court ("Oberverwaltungsgericht") of Lüneburg, 16 September 2004, 7 LB 3545/01, NZBau 2005, 53

II- Brief description of the facts and legal issues

The claimant, a transport company, challenged the licence for local public transport services granted to another transport company ("third party") by the defendant, a local public authority. The claimant argued that the third party would not be able to provide the transport services without public financial support.

III- Summary of the Court's findings

The *Oberverwaltungsgericht Lüneburg* rejected the claimant's claim. It acknowledged that public financial support granted as compensation for the supply of public transport services may constitute unlawful State aid. However, the law on transportation of persons ("*Personenbeförderungsgesetz", "PBefG*") provides that various criteria must be taken into account when a licence for local public transport services is granted. Whether or not the owner of the licence will require public financial support to operate the licensed transport services is not among the criteria to be taken into account. The *Oberverwaltungsgericht Lüneburg* therefore concluded that public financial support does not affect the legality of the license itself, even if the financial support constitutes unlawful State aid.

I- Information on the judgment

Administrative Court ("Verwaltungsgericht") of Freiburg, 18 December 2002, 1 K 2400/99, NJOZ 2004, 1167

II- Brief description of the facts and legal issues

The claimant, a transport company, challenged the licence for local public transport services granted to another transport company ("third party") by the defendant, a local public authority. The claimant argued that the third party would not be able to provide the transport services without public financial support, and that such financial support constituted unlawful State aid.

III- Summary of the Court's findings

The *Verwaltungsgericht Freiburg* rejected the claim. The evidence presented in court showed that the third party would be able to provide transport services in the foreseeable future without having to rely on public financial support. Financial support would be required only during the first years of operating the service. Such "start-up" support would also be granted by a private investor in situations where this would promote long-term profitability interests. The *Verwaltungsgericht Freiburg* therefore concluded that, according to the private investor test, financial support to the third party would not constitute State aid.

IV- Comment of the authors of the 2006 study

This judgment is one of the few decisions by German courts where the private investor test was applied by a national court.

I- Information on the judgment

Federal Administrative Court ("Bundesverwaltungsgericht"), 6 April 2000, 3 C 7/99, NZBau 2001, 225

II- Brief description of the facts and legal issues

In 1990, the transport company Altmark Trans obtained licences and State aid to operate passenger transport within the district of Stendal. The licence was renewed by the defendant, a local public authority, in 1994. The claimant, a competitor of Altmark Trans who had also applied for the licence, challenged the renewal of the licence, arguing that Altmark Trans was not financially viable because it could not have survived without public financial support.

III- Summary of the Court's findings

The *Bundesverwaltungsgericht* referred the question whether public financial support to cover deficits in local public transport could amount to State aid and whether such support could affect trade between Member States to the ECJ. The ECJ held[1] that the existence of State aid did not depend on the local or regional nature of the transport services supplied, or on the scale of the activity concerned. In addition, the ECJ clarified the conditions according to which public authorities may grant financial compensation to safeguard the fulfilment of public services obligations. At the time of the ECJ's decision, the licence for Altmark Trans had expired and the proceedings were terminated without a final decision.

[1] Case C-280/00, Altmark Trans GmbH v Nahverkehrsgesellschaft Altmarkt GmbH [2003] ECR I-7747.

I- Information on the judgment

Administrative Court ("Verwaltungsgericht") of Magdeburg, 2 September 1998, EuZW 1998, 669

II- Brief description of the facts and legal issues

In Germany, the Federal Agency for Special Tasks related to German Unification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*", "BvS") and a private law company acting on behalf of BvS were responsible for allocating agricultural and forest estate formerly owned by the German Democratic Republic to individuals upon application. The relevant rules provided for different categories of eligible persons since one of the aims of these rules was to compensate for irreversible expropriations carried out by Soviet authorities from 1945 to 1949 and thereafter by authorities of the German Democratic Republic, the land was sold to eligible applicants at less than half the market value. This land acquisition/compensation scheme was never notified by Germany to the Commission. After various third party complaints the Commission opened an investigation under Article 88 (2) EC on 18 March 1998 and informed Germany accordingly by letter dated 30 March 1998. The Commission's position was that any transfer of land that was not intended to provide or exceeded the level of compensation required for past expropriations may constitute aid incompatible with the Common Market.

The claimant (who belonged to a category of persons fully eligible for compensation) challenged the decision to transfer certain land to another applicant in interlocutory proceedings on the grounds that this applicant was not eligible and that Article 88 (3) EC prohibited the granting of aid to the applicant.

III- Summary of the Court's findings

The Administrative Court of Magdeburg found in favour of the claimant and stated that the decision to transfer the land in issue to the applicant violated both the relevant legal criteria for eligibility (which had been wrongly applied in this case) and that Article 88 (3) EC prohibited the transfer.

IV- Comment of the authors of the 2006 study

The decision by the Administrative Court of Magdeburg was the first published decision that explicitly acknowledged that a violation of Article 88 (3) EC confers standing on a company that was directly affected by the grant of aid to a competitor.

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

Higher Administrative Court ("Oberverwaltungsgericht") of Münster, 4 B 418/95, 19 December 1995; Administrative Court ("Verwaltungsgericht") of Aachen, 3 L 2123/94, 14 December 1994

II- Brief description of the facts and legal issues

A waste paper collection company challenged an administrative act granting State aid to a competitor. The decision to grant State aid was not notified to the Commission.
The claimant first lodged an objection with the administrative agency responsible for the grant of the aid. As the grant of the aid was of immediate effect, the objection had no suspensory effect, i.e. it could not prevent the beneficiary from actually receiving the aid.

III- Summary of the Court's findings

The complainant attempted to obtain the suspensory effect of its objection in interlocutory proceedings before the Administrative Court ("*Verwaltungsgericht*") of Aachen. The Admininstative Court of Aachen, however, rejected the application. The Administrative Court of Aachen held that suspensory effect of the objection could be granted only if the administrative act granting the aid was clearly unlawful, i.e. if it clearly violated the rights of the complainant, for example under Article 88 (3) EC. The Administrative Court of Aachen held that it was not sufficiently clear whether a violation of these rights had been established in this case. The Administrative Court of Aachen, stated that, for there to be a violation of Article 88 (3) EC the aid must a qualified as State aid within the meaning of Articles 87 and 88 EC. According to the Administrative Court of Aachen this was doubtful as it could not be denied that consideration was given for the grant of the aid. As the beneficiary was obliged under its Articles of Association to pursue certain social goals, such as educating and training unemployed teenagers, the Administrative Court of Aachen held that this amounted to consideration for the aid.

The appeal brought before the Higher Administrative Court of Münster was also dismissed. In support of its claim the appellant put forward further arguments and in particular, that the decision of the Administrative Court of Aachen was based on an erroneous interpretation of the notion of State aid. The appellant stressed that the Commission, in a letter dated 9 August 1995, appeared to have taken the view that the aid amounted to State aid.

Although the Higher Administrative Court confirmed that Article 88 (3) EC was designed to safeguard the interests of the competitors of a potential beneficiary and that it was the task of national courts to protect those interests, it reached the conclusion that it was doubtful whether the aid amounted to State aid. The Higher Administrative Court indicated that it was possible that the aid was merely intended to compensate the beneficiary for certain costs incurred as a result of the purposes it pursued. Furthermore, the Higher Administrative Court did not want to rule out the possibility that the aid amounted to an educational measure, which would mean that it could not qualify as State aid according to a decision of the Commission of 26 March 1991[2]. The letter of the Commission was interpreted as a preliminary statement. The court refused to make a reference for a preliminary ruling to the ECJ under Article 234 EC, taking the view that there was no corresponding obligation in interlocutory proceedings. Moreover, it refused to make a reference under Article 234 EC since the Commission had previously commenced proceedings under Article 88 (2) EC and since

[2] OJ (1991) L 215/11.

non-compliance by the German authorities with a negative decision of the Commission (if any) could be challenged directly before the ECJ.

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I- Information on the judgment

Higher Administrative Court ("Oberverwaltungsgericht") of Lower Saxony, 10 M 3142/94, 30 May 1994; Administrative Court ("Verwaltungsgericht") of Hanover, 11 B 3745/94, 27 May 1994

II- Brief description of the facts and legal issues

The case concerned the provision of a guarantee by the Government of Lower Saxony. The guarantee amounted to DM 35 million and was granted as collateral security for bank loans granted for the purposes of the beneficiary's business. This was challenged in court by third party competitors of the beneficiary, who sought interlocutory relief.

III- Summary of the Court's findings

Both the Administrative Court of Hanover and the Higher Administrative Court of Lower Saxony rejected the competitors' claim. The decisions dealt exclusively with the question of whether the grant of the guarantee violated the rights of the competitors under German law, which was denied. The question of whether Article 88 (3) EC had been complied with was not addressed. Only one sentence in the decision of the Administrative Court of Hanover mentioned EC law without going into any detail. The Administrative Court of Hannover merely stated that a violation of EC law had not been established by the claimant (although proceedings before the administrative courts are generally inquisitorial, requiring the Administrative Court of Hanover to investigate a violation of EC law *ex officio*).

Shortly after the case was closed the Commission was informed of the grant of the guarantee. Having asked the German authorities on 30 June 1994 to comment in detail on the guarantee (whereupon Germany notified the guarantee by letter dated 13 October 1994) the Commission initiated proceedings under Article 88 (2) EC[3]. By decision of 29 May 1996[4], the Commission declared the aid partly incompatible with the Common Market and ordered that Germany obtain repayment of that part of the aid which was incompatible. The application for annulment brought by Germany was rejected by the ECJ[5].

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[3] OJ (1995) C 201/16.
[4] OJ (1996) L 246/43.
[5] Case C-288/96, Germany v Commission [2000] ECR 1-8237.

I- Information on the judgment

Higher Administrative Court ("Oberverwaltungsgericht") of Münster, 22 September 1982, NVwZ 1984, 522

II- Brief description of the facts and legal issues

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

III- Summary of the Court's findings

Both the Administrative Court and the Higher Administrative Court of Münster found that the claimant did not have standing to challenge the building lease because the lease was a private law contract that could not be challenged in the administrative courts. The courts did, however, find that the loan agreement constituted financial aid which was governed by public law. However, the Courts held that the claimant's rights were not directly affected by the grant of the aid. The Courts specifically stated that the entry of a new competitor to the market does not affect the rights of existing players on that market. In dismissing the action, the Courts stated that Article 87 EC was not directly applicable because the Commission could declare aid compatible with the Common Market under Article 88 (2) EC.

IV- Comment of the authors of the 2006 study

The case is a typical example of the traditional view held by the administrative courts in Germany, which prevents competitors from challenging decisions by which State aid was granted.

I- Information on the judgment

Administrative Court ("Verwaltungsgericht") of Würzburg, 15 November 2004, W 8 K 04.555 and W 8 K 4439, BeckRS 2004, 26951, 26952

II- Brief description of the facts and legal issues

The claimant challenged an invoice for the participation fee ("*Teilnehmerentgelt*") imposed by the defendant, a public authority with special competences in the field of media. The claimant argued, *inter alia*, that the participation fee constituted unlawful State aid and, accordingly, that it could not be enforced. The Bavarian media law ("*Bayerisches Mediengesetz*", "*BayMG*") provided for the participation fee, which was imposed on operators of TV cable networks and TV cable network customers. It was imposed in addition to fees charged by the cable network operators ("*Kabelgebühr*") and TV license fees ("*Rundfunkgebühren*"). The purpose of the participation fee was to promote local and regional TV and radio stations. The claimant argued, *inter alia*, that the participation fee constituted unlawful State aid and, accordingly, that it could not be enforced.

III- Summary of the Court's findings

The Administative Court of Würzburg rejected the claim, holding that the participation fee did not involve direct or indirect state resources within the meaning of Article 87 EC. The Administative Court of Würzburg referred to the Amsterdam protocol on public service broadcasting ("the protocol"), without discussing the protocol's impact on the interpretation of Article 87 (1) EC. In addition, the Administative Court of Würzburg argued that, even if the participation fee amounted to State aid, it would be exempt under Article 87 (2) (iii) (d) EC.

IV- Comment of the authors of the 2006 study

This decision exemplifies that some German courts were still unaware of even the most basic State aid rules: the Administative Court of Würzburg fails to appreciate that an exemption according to Article 87 (2) or (3) EC can only be granted by the Commission.

I- Information on the judgment

Higher Administrative Court ("Verwaltungsgerichtshof)" of Mannheim, 2. November 2004, 5 S 1063/04

II- Brief description of the facts and legal issues

The city of Heidelberg intended to build tracks for a new tramway. The construction of the new tramway was subject to the formal approval of a plan ("*Planfeststellungsbeschluss*", "plan"), which was adopted by the defendant, the competent regional authority. To secure the financing of the project, the city of Heidelberg had applied for funds under a special aid scheme for local infrastructure projects "(*Gemeindeverkehrsfinanzierungsgesetz*", "*GVFG*"). The claimant, who owned property adjacent to the planned tracks, challenged the plan, arguing that the financing of the tramway would amount to unlawful State aid and that this would affect the legality of the plan.

III- Summary of the Court's findings

The Higher Administrative Court of Mannheim rejected the complaint. It acknowledged that a plan may be void if, due to a lack of financing, it is unlikely to be realised. All parties to the procedure agreed that the tramway project could not be realised without *GVFG*-financing. The relevant question was therefore whether GVFG-financing amounted to unlawful State aid. The ECJ established in its *Altmark Trans* decision[6] that State aid in the field of local public transport could affect trade between Member States since the transport market had been open to competition since 1995. However, the same is not necessarily true for the provision of infrastructure services for tramways. The claimant did not contest the defendant's assertion that there is no competition in respect of the construction of tramway infrastructure facilities. In addition, neither the ECJ nor the Commission had decided that the financing of infrastructure projects constituted unlawful State aid. This could be explained by the fact that infrastructure projects most often did not favour specific undertakings. The Higher Administrative Court of Mannheim concluded that there was no reason for the defendant to believe that the financing of the project constituted unlawful State aid, and that the plan had insofar been lawfully adopted.

[6] Case C-280/00, Altmark Trans v Nahverkehrsgesellschaft Altmark GmbH [2003] ECR I-7747.

I- Information on the judgment

Administrative Court ("Verwaltungsgericht") of München, 12 August 2004, M 17 K 02.1633, MMR 2005, 64

II- Brief description of the facts and legal issues

The claimant challenged an invoice for the participation fee ("*Teilnehmerentgelt*") imposed by the defendant, a public authority with special competences in the field of media.

III- Summary of the Court's findings

The Administrative Court of München rejected the claim on the basis of the ECJ's *Preussen Elektra* decision[7], holding that the participation fee did not involve direct or indirect state resources within the meaning of Article 87 EC. In addition, the Administrative Court of München took the view that the Amsterdam protocol on public service broadcasting ("the protocol") applied to the same extent to participant fees and TV license fees. The Administrative Court of München does not further discuss the protocol's impact on the interpretation of Article 87 (1) EC.

[7] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I-2099.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht)" of Düsseldorf, 8 September 2004, VII-Verg 38/04, NZBau 2004, 688

II- Brief description of the facts and legal issues

The defendant, a public entity, offered facility management contracts through a public procurement procedure. The complainant, a medium-sized company, complained that the tendered lot should have been sub-divided to allow small and medium-sized companies to submit offers. The claimant relied on section 97 of the Act against Restraints of Competition ("*Gesetz gegen Wettbewerbsbeschränkungen", "GWB*"), which expressly provided that the interests of small and medium-sized undertakings "*shall primarily be taken into account in an appropriate manner by subdividing contracts into trade-specific and partial lots*". The defendant refused to do so, arguing, *inter alia*, that section 97 GWB amounted to unlawful State aid.

III- Summary of the Court's findings

The Higher Regional Court of Düsseldorf found in favour of the claimant holding that section 97 *GWB* did not constitute State aid. The provision did not distort competition, but rather increased competition by affording small and medium-sized companies the opportunity to participate in public procurement in which big companies were also allowed to participate. Since the same conditions apply to all companies, small and medium companies are not favoured over big companies.

I- Information on the judgment

Federal Tax Court ("Bundesfinanzhof)", 19 May 2004, III R 12/02, BeckRS 2004, 25006542

II- Brief description of the facts and legal issues

The claimant, who operated a wind power plant complained against a decision by the tax authorities according to which the claimant did not qualify for an investment grant under the law on investment grants ("*Investitionszulagengesetz," "InvZulG*"). One of the issues was whether the denial of the investment grant was justified on the grounds that producers of energy from renewable sources benefited from financial aid under the Law on Feeding Electricity from Renewable Energy Sources into the Public Grid ("*Stromeinspeisungsgesetz", "StrEG*").

III- Summary of the Court's findings

The Federal Tax Court confirmed that the StrEG did not amount to unlawful State aid on the basis of the ECJ's Preussen Elektra decision[8].

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[8] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I-2099.

I- Information on the judgment

Higher Regional Court "(Oberlandesgericht)" of Brandenburg, 2 September 2003, Verg W 3/03, NZBau 2003, 688

II- Brief description of the facts and legal issues

The defendant, a local public authority, entered into a service contract for the provision of certain regional transport services with a transport company without having carried out a public procurement procedure. The service contract required the transport company to provide rail services, for which it would receive up to a certain amount in financial compensation from the defendant. The claimant, a competing transport company, complained that the defendant had not adhered to the public procurement procedure. One of the claimant's arguments was that a service contract that provided for financial compensation could not be awarded without a public procurement procedure, which would amount to unlawful State aid.

III- Summary of the Court's findings

The Higher Regional Court of Brandenburg decided that the complaint was inadmissible, since the defendant was not required to respect the public procurement rules. The Higher Regional Court of Brandenburg agreed that financial compensation for discharging public service obligations may amount to State aid, referring to the criteria laid down by the ECJ in the *Altmark Trans* decision[9]. However, the ECJ did not decide that awarding financial compensation without a public procurement procedure necessarily constituted State aid. The Member States may instead determine an adequate level of compensation by carrying out a detailed cost analysis. Consequently, the *Altmark Trans* decision does not prevent Member States from entering into agreements that provide for financial compensation for discharging public service obligations without respecting the public procurement rules. Since the complaint was rejected as inadmissible, the *Oberlandesgericht* did not take a position as to whether the level of compensation agreed in the service contract actually met the criteria laid down in the *Altmark Trans* decision.

[9] Case C-280/00, Altmark Trans GmbH v Nahverkehrsgesellschaft Altmark GmbH [2003] ECR I-7747.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Düsseldorf, 26 July 2002, Verg 22/02, NZBau 2002, 634

II- Brief description of the facts and legal issues

The defendant, a public entity, tendered regional rail transport services by means of a public procurement procedure. The complainant, a provider of rail transport services, competed in the tendering procedure with *Deutsche Bahn AG* ("DB"), a major provider of rail transport services. The complainant argued that DB had received unlawful State aid in the past, and that competition would be distorted if the defendant did not take this aid into account during the tendering procedure. The public procurement tribunal ("*Vergabekammer*") accepted the complaint and ordered the defendant to reinitiate the procedure, allowing for unlawful State aid to be taken into account when making the decision. The defendant appealed.

III- Summary of the Court's findings

The Higher Regional Court of Düsseldorf annulled the decision by the public procurement tribunal. The Higher Regional Court of Düsseldorf left open whether DB had actually received unlawful State aid. The fact that a company that participated in the tendering procedure had received unlawful State aid in the past was not something that had to be taken into account during the tendering procedure.

I- Information on the judgment

Federal Tax Court ("Bundesfinanzhof"), 21 February 2002,VII B 281/01, DAR 2002, 374

II- Brief description of the facts and legal issues

Under the German motor vehicle tax law ("*Kraftfahrzeugsteuergesetz*", "*KraftStG*"), certain new cars equipped with a catalytic converter were tax privileged over old cars equipped with a catalytic converter. The claimant, the owner of a not tax privileged old car, challenged the tax assessment by the tax authority, the defendant. One of the claimant's arguments was that the distinction between new and old cars constituted unlawful State aid and was therefore unenforceable.

III- Summary of the Court's findings

The Federal Tax Court rejected the claim. The Federal Tax Court agreed that, whereas the tax privilege primarily benefits consumers, it may create general market conditions in favour of the automobile industry. However, the tax privilege provided for in the *KraftStG* did not constitute State aid since it did not favour specific undertakings in the automotive sector.

I- Information on the judgment

Administrative Court ("Verwaltungsgericht") of München, 15 February 2002, M 6a K 01, ZUM-RD 2002, 564

II- Brief description of the facts and legal issues

The claimant challenged an invoice for TV license fees issued by the defendant, a public authority charged with collecting TV license fees ("*Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten in der Bundesrepublik Deutschland, "GEZ*"). One of the claimant's arguments was that TV license fees amounted to unlawful State aid.

III- Summary of the Court's findings

The Administrative Court of München argued that TV license fees did not amount to State aid, since they were aimed at compensating public service broadcasts for the discharge of public service obligations. Furthermore, even if license fees constituted an advantage within the meaning of Article 87 (1) EC, this could be justified under Article 86 (2) EC.

I- Information on the judgment

Federal Tax Court ("Bundesfinanzhof"), 15 January 2002, IX R 55/00, NZM 2002, 1036

II- Brief description of the facts and legal issues

The German law on home owner allowances ("*Eigenheimzulagengesetz*", "*EigZulG*") provided that individuals could apply for home owner allowance if they bought shares in a building society ("*Wohnungsbaugenossenschaft*"). The claimant, an individual, bought shares in a building society and subsequently applied for the allowance. The defendant, the tax authority, refused to accept the application, arguing that the defendant did not actually use housing space owned by a building society. One of the arguments brought forward by the defendant was that if the allowance was granted automatically upon the purchase of shares in a building society, this would constitute unlawful State aid in favour of the building societies.

III- Summary of the Court's findings

The Federal Tax Court rejected the defendant's argument, holding that the claimant was entitled to obtain home owner allowance. The allowance did not constitute State aid since it was granted to individuals, not undertakings. Admittedly, the allowance was effectively used by the individual to provide the building society with capital. However, by acquiring shares in the building society the individual obtained adequate consideration.

I- Information on the judgment

Federal Labour Court ("Bundesarbeitsgericht"), 3 April 2001, 9 AZR 301/00, NJW 2002, 1364

II- Brief description of the facts and legal issues

Under the German Insolvency Code ("*Insolvenzordnung*", "*InsO*") and the Social Security Code ("*Sozialgesetzbuch*"), the employees of an insolvent company may request the German Federal Employment Agency ("*Bundesanstalt für Arbeit*, "BfA") to assume the insolvent company's salary obligations ("*Insolvenzgeld*"). The BfA (the claimant) had paid *Insolvenzgeld* and had subsequently requested the insolvency administrator (the defendant) to treat the payment of *Insolvenzgeld* as a preferred claim ("*Masseverbindlichkeit*") during the insolvency proceedings. The defendant refused, arguing that the payment of *Insolvenzgeld* is not one of the preferred claims listed in the *InsO*. The claimant took the position that the refusal to regard the payment of *Insolvenzgeld* as preferred claim amounted to unlawful State aid.

III- Summary of the Court's findings

The Federal Labour Court rejected the claim. The payment of *Insolvenzgeld* by the claimant afforded insolvent companies relief from the obligation to pay salaries. The fact that the payment of *Insolvenzgeld* was not regarded as a preferred claim was intended to facilitate restructuring efforts. The refusal to regard the payment of *Insolvenzgeld* as a preferred claim could only amount to unlawful State aid if it benefited specific undertakings. This was not the case since *Insolvenzgeld* was available to all companies without distinction.

I- Information on the judgment

Federal Tax Court ("Bundesfinanzho"f), 12 October 2000, III R 35/95

II- Brief description of the facts and legal issues

The law on investment grants ("*Investitionszulagengesetz", "InvZulG*") allowed for investment grants of 12% of the purchase price of certain goods in specific regions. In 1993, the Commission decided that the *InvZulG* amounted to unlawful State aid. The *InvZulG* was subsequently amended, henceforth allowing for investment grants of only 8% of the purchase price. The claimant applied in 1993 for an investment grant for goods he had purchased in 1992. The defendant granted an investment grant of 8%, but refused to grant 12%. The claimant challenged the refusal, arguing that he was retroactively deprived of a vested legal entitlement.

III- Summary of the Court's findings

The Federal Tax Court rejected the complaint, holding that the claimant had not been unlawfully deprived of a vested legal entitlement. The amendment of the *InvZulG* was based on a decision by the Commission that had not been challenged within the mandatory time limit laid down in Article 230 (5) EC. Germany was therefore under an obligation to amend the *InvZulG*. In addition, the claimant could not rely on the principle of good faith since, at the time the investment was made, the Commission had already initiated a formal State aid investigation. Consequently, the claimant should have been aware that the investment grant of 12% provided for in the *InvZulG* amounted to unlawful State aid.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Dresden, 10 December 1999, 3 W 1832/99, VIZ 2000, 430

II- Brief description of the facts and legal issues

The complainants acquired land from a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), which was charged with the privatisation of formerly State-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act (*"Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1999, the Commission decided that parts of the *AusglLeistG* amounted to State aid which was incompatible with the Common Market and ordered Germany to recover the incompatible aid[10]. Following the signing of the purchase contracts, the complainants requested to formally register the respective transfers of property ("*Auflassung*"). The registry of deeds ("Grundbuchamt") refused to do so, arguing that the transfers of property infringed Article 88 (3) (3) EC and were therefore null and void. The complainants challenged the refusal.

III- Summary of the Court's findings

The Higher Regional Court of Dresden ordered the registry of deeds to register the transfers of property. The Higher Regional Court of Dresden left open whether and to what extent contracts that infringe Article 88 (3) (3) EC are void. In particular, it did not decide whether an infringement merely affects the legality of the purchase contracts, or whether the nullity extends to the contract by which the property was transferred. The Commission's decision in respect of the *AusglLeistG* made a distinction between different groups of land owners, some of which were entitled to receive State aid while others were not. The Higher Regional Court found that it was not upon the registry of deeds to assess to which group of landowners the complainants belonged.

[10] OJ (1999) L 107/21.

I- Information on the judgment

Federal Tax Court ("Bundesfinanzhof"), 23 November 1999, VII R 17/97, DStRE 2000, 261

II- Brief description of the facts and legal issues

The claimant, an operator of a combined heat and power (cogeneration) plant, requested permission from the defendant, a public authority, to use a specific, tax privileged heating oil. According to the Law on Petroleum Tax ("*Mineralölsteuergesetz*", "*MinöStG*"), heating oil could be tax privileged if it was used in a cogeneration plant that satisfied certain criteria. The parties agreed that the plant operated by the claimant did not satisfy these criteria. However, the claimant argued that granting the tax privilege to only a limited number of cogeneration plants amounted to State aid.

III- Summary of the Court's findings

The Higher Regional Court rejected the claim, arguing that the provisions in the *MinöStG* did not favour specific undertakings. In addition, even if the *MinöStG* favoured certain undertakings, this could be justified by the nature of the tax system. The Higher Regional Court referred insofar to the Commission notice on the application of the State aid rules to measures relating to direct business taxation[11].

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[11] OJ (1998) C 384/4.

I- Information on the judgment

Regional Court ("Landgericht") of Dresden, 17 August 1999, 2 T 422/99, VIZ 2000, 560

II- Brief description of the facts and legal issues

The complainant acquired land from a sub-agency of the Federal Agency for Special Tasks related to German Unification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*", "BvS"), which was charged with the privatisation of formerly State-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1999, the Commission decided that parts of the *AusglLeistG* amounted to State aid which was incompatible with the Common Market and ordered Germany to recover the incompatible aid[12]. Following the signing of the purchase contract, the complainant requested to formally register the transfer of property ("*Auflassung*"). The registry of deeds ("*Grundbuchamt*") refused, arguing that the transfer of property infringed Article 88 (3) (3) EC and was therefore null and void. The complainant challenged the refusal.

III- Summary of the Court's findings

The Regional Court of Dresden ordered the registry of deeds to register the transfer of property. The Regional Court of Dresden acknowledged that, generally, contracts that infringe Article 88 (3) (3) EC are void. However, the infringement of Article 88 (3) (3) EC occurred as a consequence of the purchase contract ("*Kaufvertrag*"), in which the parties agreed on a purchase price below market value. The purchase contract required the seller to transfer the property to the buyer. Yet, according to the *Abstraktionsprinzip*, a pivotal principal of German law, the nullity of the purchase contract does not affect the legality of the contract with which the property is transferred.

IV- Comment of the authors of the 2006 study

The Dresden Court's decision is one of many cases dealing with questions arising from the *AusglLeistG*. However, the particularity of the decision is that it touches upon the relationship between Article 88 (3) (3) EC and the *Abstraktionsprinzip*, a pivotal principle underlying German civil law. The question is also discussed by the decision of the Higher Regional Court of Dresden ("*Oberlandesgericht Dresden*") of 10 December 1999 (see above).

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[12] OJ (1999) L 107/21.

I- Information on the judgment

Administrative Court ("Verwaltungsgericht") of Düsseldorf, 18 Mai 1999, 15 K 7725/97

II- Brief description of the facts and legal issues

The claimant challenged an invoice for TV licence fees issued by the defendant, a public authority charged with collecting TV licence fees ("*Gebühreneinzugszentrale der öffentlich-rechtlichen Rundfunkanstalten in der Bundesrepublik Deutschland*", "GEZ"). One of the claimant's arguments was that TV licence fees amounted to unlawful State aid.

III- Summary of the Court's findings

The Administrative Court of Düsseldorf argued that TV licence fees did not amount to State aid, since they were aimed at compensating public service broadcasters for the discharging of public service obligations. The Administrative Court of Düsseldorf left open whether, if the licence fees constituted State aid, they would be exempt under Article 87 (3) (d) EC or Article 86 (2) EC.

IV- Comment of the authors of the 2006 study

The Administrative Court of Düsseldorf did not seem to be aware of the fact that exemptions according to Article 87 (3) EC could only be granted by the Commission.

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I- Information on the judgment

State Social Court ("Landessozialgericht") of Nordrhein-Westfalen, L 9Ar 200/94 LSG NRW, 22 March 1996

II- Brief description of the facts and legal issues

This case involved the German rules relating to employment of disabled or handicapped persons. Companies that employed 16 employees or more were under a legal obligation to employ disabled or handicapped persons (on a defined pro rata basis). If they failed to do so, they were obliged to pay monetary compensation.

The claimant hairdresser in this case had a widespread network of branches in Germany. Although each individual branch employed less than 16 employees, the competent administrative authority aggregated the number of employees at the claimant's different branches and reached the conclusion that the claimant exceeded the relevant threshold. This was challenged by the claimant in court with, *inter alia*, the argument that the obligation of companies of a certain size to employ disabled or handicapped persons constituted State aid for small companies that were not under this obligation, and therefore came within the meaning of Article 87 EC.

III- Summary of the Court's findings

The State Social Court rejected this argument. The State Social Court referred to the jurisprudence of the ECJ[13], according to which an advantage resulting from legal rules constituted State aid only if it contained a benefit that was granted directly or indirectly through public resources.

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[13] Case C-189/91, Ketra Kirshammer-Hack v Hurhan Sidel [1994] ECR I-6185.

I- Information on the judgment

Higher Administrative Court ("Oberverwaltungsgericht") of Hamburg, OVG Bf VI 53/93, 14 February 1995; Administrative Court ("Verwaltungsgericht") of Hamburg, 7 VG 4424/92, 2 June 1993

II- Brief description of the facts and legal issues

State aid amounting to DM 5.9 million was granted to construct a German commercial vessel. The State aid was granted under a so-called public law contract (as opposed to granting State aid pursuant to a unilateral administrative act). The public law contract imposed an obligation on the beneficiary to reimburse the aid in the event that title to the vessel was transferred to third parties within a specified period of time after completion of the vessel. The defendant in this case, a shareholder of the company that owned the vessel, accepted joint and several liability to repay the agency that had granted the aid.

When the vessel was acquired by third parties as a result of bankruptcy proceedings within the relevant time limit, the agency brought a claim against the joint and several debtor for the repayment of the aid.

III- Summary of the Court's findings

Both the Administrative Court of Hamburg and the Higher Administrative Court of Hamburg found in favour of the claimant and ordered the defendant to repay the money. A further appeal was not allowed by the Federal Administrative Court.

One of the arguments raised by the defendant was that the public law contract granting the aid was void as it violated Articles 87 and 88 EC, the underlying argument being that the joint and several liability of the defendant only covered contractual claims for repayment as opposed to non-contractual claims, for example unjust enrichment. It was held that the grant of the aid did not breach these provisions. The Higher Administrative Court of Hamburg stressed that aid to shipbuilding may be considered compatible with the Common Market under Article 87 (3) (c) EC (on which the applicable, older version of the EC Directive on aid to shipbuilding was based). The Higher Administrative Court of Hamburg stated that there was sufficient proof that Germany had complied with the notification obligations provided for in this directive and that there had been no objection from the Commission.

I- Information on the judgment

Federal Administrative Court ("Bundesverwaltungsgericht"), 3 C 18.93, 7 July 1994

II- Brief description of the facts and legal issues

This case involved the imposition of an import duty on certain imported products (for example, fruit and vegetables), which was challenged by an importer.

III- Summary of the Court's findings

The Federal Administrative Court held that the fund, which was financed by the relevant import duties and the purpose of which was to promote sales of German goods ("*Absatzfonds*"), was not incompatible State aid within the meaning of Articles 87 and 88 EC. The Federal Administrative Court referred to the ECJ's case law[14] according to which the German act underlying the relevant fund had been notified to the Commission in compliance with Article 88 EC Treaty and not been objected to by the Commission.

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[14] Case C-78/76, Steinike Weinlig v Germany [1997] ECR 595.

I- Information on the judgment

Federal Administrative Court ("Bundesverwaltungsgericht"), 12 May 1993, NJW 1994, 337

II- Brief description of the facts and legal issues

The case involved a claim under German tax law for the grant of a depreciation allowance on capital expenditure. The grant of the allowance depended on whether the capital expenditure served the purpose of protecting the environment. The administrative authority, which was the defendant in this case, raised the defence that the grant of a conditional depreciation allowance would constitute State aid within the meaning of Article 87 EC.

III- Summary of the Court's findings

The Federal Administrative Court took the view that, even if this argument were correct, the grant of the aid would not be incompatible with the EC Treaty since it would be covered by Article 87 (3) (b) EC. This view was based on the legislative history of the rules of German tax law in issue, and the fact that the Commission had intervened during the legislative proceedings in the German Parliament because of a possible violation of the State aid rules of the EC Treaty. This intervention had resulted in the enactment of new rules which had been modified in accordance with the Commission's intervention.

I- Information on the judgment

Administrative Court ("Verwaltungsgericht") of Frankfurt, 11 December 1991, EuZW 1993, 69

II- Brief description of the facts and legal issues

The case involved the German rules under which importers of foreign meat were obliged to pay a contribution into a German fund to promote the sale of German agricultural products. The claimant brought an action for annulment against the administrative act ordering payment of this contribution.

III- Summary of the Court's findings

The Administrative Court of Frankfurt made a reference for a preliminary ruling to the ECJ under Article 234 EC. It asked the ECJ whether the national rules providing for the contribution could be declared compatible with EC law, in particular Article 87 EC, and whether the financing of the fund through contributions amounted to a protectionist mechanism comparable to State aid within the meaning of Article 87 EC. The Administrative Court also asked whether the contributions to the fund were incompatible with Article 87 EC.

IV- Comment of the authors of the 2006 study

In its judgment, the ECJ found that the contributions to the fund could constitute State aid within the meaning of Article 87 EC and that, subject to judicial review by the ECJ, the Commission had the authority to apply Article 87 EC[15].

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

I- Information on the judgment

Federal Social Court ("Bundesozialgericht"), 2 RU 32/90, 24 January 1991; Bavarian State Social Court ("Landessozialgericht") of Munich, L2 U 218/87, 7 February 1990

II- Brief description of the facts and legal issues

The case concerned the social security contributions of the claimant, an agricultural company. The claimant challenged the method of calculation of these contributions, which was based on the size of the area used for agricultural purposes by the company. One of the claimant's main arguments was that this method of calculation amounted to granting aid to smaller competitors which was incompatible with the Common Market under Article 87 EC. Furthermore, the claimant argued that the aid had not been notified to the Commission under Article 88 (3) EC. The claimant therefore contended that the rules on the method of calculating the contributions were invalid.

III- Summary of the Court's findings

These arguments were rejected by the Federal Social Court. First, it stated that the question of whether an aid is incompatible with the Common Market could only be decided by the Commission and not by the national courts. It added that the argument of incompatibility raised in this case might nonetheless justify a reference for a preliminary ruling under Article 234 EC. However, the Federal Social Court took the view that it was not required to make a reference for a preliminary ruling, as the rules on the method of calculation were older than the EC Treaty and had never been challenged by the Commission. The consequences of this method of calculating the contributions, i.e. that small companies enjoy the benefit of comparatively lower contributions than larger companies such as the claimant, is inherent in the German system of social security, so that the contributions do not amount to State aid. The Federal Social Court therefore came to the conclusion that there was no State aid in this case, and therefore no violation of Article 88 (3) EC.

The lower court ("State Social Court"), had adopted a similar approach. It discussed the notion of State aid and held that, as a general rule, it can be argued that a provision of national law that violates Article 88 (3) EC is not applicable. However, the State Social Court was of the opinion that the rules challenged by the claimant did not constitute State aid, since they did not exempt certain companies from obligations that would otherwise apply, but rather laid down ex ante rules for calculating social security contributions. In other words, the State Social Court took the view that potential benefits for certain companies were inherent in the social security system.

I- Information on the judgment

Federal Social Court ("Bundessozialgericht"), 4/11a RLw 5/87, 4 October 1988

II- Brief description of the facts and legal issues

The claimant was allegedly entitled to certain benefits which would reduce his social security contributions.

III- Summary of the Court's findings

The Federal Social Court found that the rules on which the claimant based his claim may violate Article 87 EC and considered making a reference for a preliminary ruling to the ECJ for clarification. However, as the findings of fact of the lower court were insufficient, the Federal Social Court referred the case back to the lower court, but no further decision is reported.

I- Information on the judgment

Federal Administrative Court ("Bundesverwaltungsgericht"), 3 CB 32.85, 19 December 1986

II- Brief description of the facts and legal issues

The case concerned duties that were imposed on pork meat.

III- Summary of the Court's findings

The Federal Administrative Court rejected the appeal against the decision of the Higher Administrative Court ("*Oberverwaltungsgericht*") of Hessen, which was based, *inter alia*, on the argument that certain duties imposed on pork meat constituted State aid within the meaning of Article 87 EC. The Federal Administrative Court stated that it was not for the national courts to decide this question unless the scope of Article 87 EC was sufficiently defined by general rules under Article 89 EC or by individual decisions of the Commission under Article 88 (2) EC. The Federal Administrative Court held that this was not the case in the present case. The question whether an order for a preliminary ruling by the ECJ should be made to clarify the notion of State aid was not addressed in the decision.

I- Information on the judgment

Federal Administrative Court ("Bundesverwaltungsgericht"), 15 May 1984, BVerwGE 69, 227

II- Brief description of the facts and legal issues

The claimant challenged acts requiring it to pay contributions to the Absatzfonds.

III- Summary of the Court's findings

The Federal Administrative Court referred to the ECJ's case law[16] and held that the German act which established the fund had been notified to the Commission in compliance with Article 88 (3) EC and had not been objected to by the Commission.

[16] Case C-78/76, Steinike & Weinlig v Germany [1977] ECR 595.

I- Information on the judgment

Fiscal Court ("Finanzgericht") of Hamburg, of 17 April 1984, RIW 1984, 554

II- Brief description of the facts and legal issues

The case concerned a claim by an importer of whiskey for an exemption from a duty. The claim was based on the argument that certain distillers in Germany were granted State aid and that importers should be treated similarly by exempting them from the duties imposed on them, since the prohibition in Article 91 EC would otherwise apply.

III- Summary of the Court's findings

The Fiscal Court held, however, that the mere fact that State aid had been granted (the compatibility of which with the Common Market falls within the exclusive jurisdiction of the Commission and the ECJ according to an *obiter dictum* in the judgment) does not necessarily result in the application of the prohibition laid down in Article 91 EC to the duties imposed on importers. This would require a closer connection between the aid and the duty at issue, particularly in economic terms.

I- Information on the judgment

Fiscal Court ("Finanzgericht") of Hamburg, 31 October 1980, EFG 1981, 274

II- Brief description of the facts and legal issues

The case concerned a claim raised by a distiller for a tax reduction since other distillers were in receipt of financial aid.

III- Summary of the Court's findings

To the extent that the financial aid constituted State aid within the meaning of Articles 87 and 88 EC, the Fiscal Court of Hamburg stated that the aid would in any event have been granted illegally, since it had not been notified pursuant to Article 88 (3) EC. As a general rule, German law does not recognise claims for equal treatment of beneficiaries of unlawful aid. Therefore, no claim could be made in this case for benefits equivalent to the subsidies (e.g. by means of tax reductions).

I- Information on the judgment

Fiscal Court ("Finanzgericht") of Hamburg, 31 October 1980, RIW/AWD 1981, 233

II- Brief description of the facts and legal issues

The case concerned the reduction of duties imposed on distillers.

III- Summary of the Court's findings

The Fiscal Court of Hamburg referred the case to the ECJ. The Fiscal Court of Hamburg asked the ECJ whether certain reductions in the duties imposed on distillers came within the scope of Articles 91 and 31 EC or rather within the scope of Articles 87 and 88 EC and, in case of the latter, whether the general principle of equal treatment entitled other distillers who did not yet benefit from a reduction in the amount of duty imposed to receive the same benefit.

The ECJ held that there was no need to determine whether Articles 87 and 88 EC applied. Even if this were the case, the case would have to be decided under Article 91 EC since State aid granted pursuant to an obligation that is applied in a discriminatory manner fell within its scope.[17]

[17] Case C-17/81, Pabst & Richarz KG v Hauptzollamt Oldenburg [1982] ECR 1331.

I- Information on the judgment

Fiscal Court ("Finanzgericht") of Hamburg, 22 March 1978, RIW/AWD 1978, 402

II- Brief description of the facts and legal issues

The case concerned duties imposed on imported distilled alcoholic beverages.

III- Summary of the Court's findings

The Fiscal Court of Hamburg referred the case to the ECJ. The Fiscal Court of Hamburg asked the ECJ whether certain increases in the duties imposed on imported distilled alcoholic beverages came within the scope of Article 31 EC, although these measures contained elements of State aid. In its judgment, the ECJ found that Article 31 EC was lex specialis to Articles 87 and 88 EC with regard to measures taken by the State in connection with the exercise of a State monopoly. The ECJ held that the case should be decided under Article 31 EC[18].

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

I- Information on the judgment

Fiscal Court ("Finanzgericht") of Hamburg, 24 October 1977, RIW/AWD 1978, 70

II- Brief description of the facts and legal issues

The case concerned a reduction in the duties granted to certain domestic producers.

III- Summary of the Court's findings

The Fiscal Court of Hamburg referred the case to the ECJ. The Fiscal Court of Hamburg asked the ECJ whether a reduction in the duties granted to certain domestic producers constituted State aid within the meaning of Article 87 EC or whether only Article 90 EC was applicable. The ECJ held that the case had to be decided under Article 90 EC[19].

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

I- Information on the judgment

Administrative Court ("Verwaltungsgericht") of Frankfurt; Federal Constitutional Court ("Bundesverfassungsgericht"), 28 July 1977, RIW/AWD 1977, 715

II- Brief description of the facts and legal issues

An order requiring payment of a duty levied on the importation of agricultural products was challenged by an importer before the Administrative Court of Frankfurt.

III- Summary of the Court's findings

The Administrative Court of Frankfurt took the view that the German rules providing for the imposition of an import duty on certain importers of agricultural products constituted State aid that was incompatible with the Common Market under Article 87 EC. Accordingly, the Administrative Court of Frankfurt made a reference for a preliminary ruling to the ECJ. The question referred by the court was whether the procedural rules of Article 88 EC prohibited references for a preliminary ruling on Article 87 EC and subsequent decisions by the national courts on the applicability of Article 87 EC.

In its judgment of 22 March 1977[20], the ECJ found that Article 88 EC did not prohibit references for a preliminary ruling concerning the interpretation of Article 87 EC, but that national courts could not themselves determine whether State aid was compatible with the Common Market that had not been the object of a relevant decision of the Commission. The ECJ thereby required the Administrative Court of Frankfurt to find against the claimant since the relevant German rules had been duly notified to the Commission under Article 88 (3) EC, and the Commission had not raised any objections.

The Administrative Court of Frankfurt subsequently asked the Federal Constitutional Court whether it had jurisdiction to declare the German rules providing for the imposition of an import duty on certain importers of agricultural products compatible with Article 87 EC. The Federal Constitutional Court rejected the reference made by the Administrative Court of Frankfurt. It stated that it had no power to interpret the provisions of the EC Treaty in a way that differed from the interpretation adopted by the ECJ as far as the applicability of these provisions in Germany was concerned.

[20] Case C-78/76, Steinike & Weinlig v Germany [1977] ECR 595.

I- Information on the judgment

Fiscal Court ("Finanzgericht") of Hessen, 12 March 1974, EFG 1974, 455

II- Brief description of the facts and legal issues

The claimant, a German distiller, sought compensation for the export of its products from the German authority administering the monopoly in distilled alcoholic beverages. The claimant was legally entitled to this compensation.

III- Summary of the Court's findings

The Fiscal Court of Hessen found that, under the rules governing the monopoly in distilled alcoholic beverages, the claimant was entitled to such compensation. The Fiscal Court of Hessen added that the claim was well-founded irrespective of the concern that the compensation might not comply with Article 87 EC since the purpose of the compensation was to increase the competitiveness of German distillers abroad.

The Fiscal Court of Hessen held that Article 87 EC was not directly applicable but rather required action by the Commission. Such action may, however, result in an obligation to abolish national rules which violate Article 87 EC.

I- Information on the judgment

Federal Fiscal Court ("Bundesfinanzhof"), 1 March 1974, Bundessteuerblatt 1974, II, 374

II- Brief description of the facts and legal issues

The case concerned house building financial aid granted by the German authorities to a German citizen who was a public servant of the EC. When the beneficiary decided to use the aid to build a house in Belgium, the German authorities demanded repayment of the funds, which was challenged by the beneficiary.

III- Summary of the Court's findings

The Federal Fiscal Court found in favour of the beneficiary. The Federal Fiscal Court stated, inter alia, that the financial aid did not constitute State aid within the meaning of Article 87 EC since it not only promoted the German construction industry but also foreign construction companies that were active in Germany.

I- Information on the judgment

Fiscal Court ("Finanzgericht") of Baden-Wurttemberg, 29 April 1970, EFG 1970, 367

II- Brief description of the facts and legal issues

The case concerned the imposition of a tax on road transport of goods.

III- Summary of the Court's findings

The Fiscal Court of Baden-Wurttemberg referred the case to the ECJ. The Fiscal Court of Baden-Wurttemberg asked whether the imposition of a tax on the road transport of goods infringed certain EC tax rules. The Fiscal Court of Baden-Wurttemberg held that the imposition of a tax on certain companies did not amount to granting State aid to the competitors of those companies, i.e. in this case the beneficiary of the road transport companies' obligation to pay tax was the Federal German railroad company.

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

[21] Case C-20/70, Lesage v Hauptzollamt Flensburg [1970] ECR 861.

I- Information on the judgment

Fiscal Court ("Finanzgericht") of Munich, 23 February 1970, EFG 1970, 367

II- Brief description of the facts and legal issues

The case concerned the imposition of a tax on road transport of goods.

III- Summary of the Court's findings

The Fiscal Court of Munich referred the case to the ECJ. The questions asked by the court mainly concerned the compatibility of the relevant German rules with EC tax rules and, by way of precaution only, the court raised the question whether Articles 87 and 88 EC also applied to transport and whether they prohibited the imposition of protective measures in favour of railroad companies operated by the state. On the latter issue, the reference was based on the claimant's argument that the law imposing the tax on road transport of goods violated Article 88 (3) EC since, in the absence of a positive decision of the Commission, Member States may not grant State aid.
In its decision of 6 October 1970[22] the ECJ only addressed the tax law aspects of the case.

[22] Case C-9/70, Grad v Finanzamt Traunstein [1970] ECR 825.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Munich, 15 May 2003, 29 U 1703/03, EuZW 2004, 125

II- Brief description of the facts and legal issues

The claimant, an operator of a crematorium, provided his services in competition with the city of Munich, which also operated a crematorium. Whereas the services provided by the claimant were subject to sales tax, the services provided by the city of Munich were not. The claimant requested that the defendants, the city of Munich and the Federal State of Bavaria also impose sales tax on the crematorium services provided by the city of Munich.

III- Summary of the Court's findings

The Higher Regional Court of Munich rejected the request.

(I) The Higher Regional Court of Munich left open whether the exemption from sales tax actually constituted State aid. It held that even if the exemption constituted unlawful State aid, the claimant had no claim in law that could prevent the defendants from exempting the city of Munich from sales tax.

(II) The claimant could not rely on section 1 of the Law against Unfair Competition ("*Gesetz gegen den unlauteren Wettbewerb", "UWG*"). Section 1 *UWG* provides for cease and desist orders and damages if a person acts contrary to generally accepted business behaviour ("gute Sitten") in order to compete. Not every infringement of the law constitutes an action that is contrary to generally accepted business behaviour. Rather, section 1 *UWG* requires that the rule which is infringed is aimed at, although not necessarily exclusively, protecting the fairness of competition ("*sekundärer Marktbezug*"). According to the Higher Regional Court of Munich, the State aid provisions of the EC Treaty as well as the regulations implementing these provisions were not aimed at protecting the fairness of competition. The potential effects on competitors were an irrelevant consideration in the application of the prohibition of Article 87 EC, which was limited to public measures and justified by the fact that the unlawful aid was granted by a public authority. Whether the conditions of demand and supply were affected by the aid was of no relevance for the prohibition of State aid.

(III) The claimant could not rely on section 823 (2) of the German Civil Code ("*Bürgerliches Gesetzbuch", "BGB*"). Section 823(2) BGB provided for damages (including cease and desist orders) in case of an infringement of a statute that aimed to protect other persons ("*den Schutz eines anderen bezweckendes Gesetz*"). Referring to its findings on section 1 UWG, the Higher Regional Court of Munich held that the State aid provisions as well as the regulations implementing these provisions were not aimed at protecting other persons.

IV- Comment of the authors of the 2006 study

It is difficult to reconcile the decision by the Higher Regional Court of Munich with established case law of the ECJ and CFI in the State aid area. The whole concept of Article 88 (3) EC being directly applicable is based on the very idea that the State aid provisions are aimed at protecting competitors. It is unfortunate that the *Bundesgerichtshof* decided to dismiss the appeal[23]. However, it seems unlikely

[23] BGH, 4 December 2003, 1 ZR 140/03.

that the decision by the Higher Regional Court of Munich, and in particular its reasoning will be followed by other national courts.

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I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Koblenz, 21 August 2001, 4 U 957/00, MMR 2001, 812

II- Brief description of the facts and legal issues

The defendant, the public broadcasting station ZDF, intended to construct a media-related amusement park ("*the ZDF-Medienpark*", "ZDFM"). The ZDFM was supposed to be operated by a private company ("operating company"), which would also bear the investment costs. The defendant would not participate as a shareholder in the operating company, but would provide some land and allow the operating company to use certain trademarks. The operating company would pay the defendant consideration for the land provided and the right to use the trademarks. The claimants, several operators of amusement parks, challenged the defendant under unfair competition rules, and alleged, in addition, that the ZDFM amounted to unlawful State aid.

III- Summary of the Court's findings

The Higher Regional Court of Koblenz rejected the claim. The defendant intended to provide land and the right to use the trademarks to the operating company in return for a consideration which would satisfy the private investor test. Accordingly, the operating company would not receive a benefit within the meaning of Article 87 (1) EC. This position was confirmed by the Commission in separate proceedings[24].

IV- Comment of the authors of the 2006 study

Since the Higher Regional Court of Koblenz decided that no State aid was involved, it did not address the question whether an infringement of Article 88 (3) EC constituted a valid legal basis for the claimant's claim against its competitor.

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[24] Commission, 3 April 2002, NN 2/2002, ZDF Medienpark.

I- Information on the judgment

Federal Court of Justice ("Bundesgerichtshof"), 11 June 2003, VIII ZR 160/02 and 161/02, NVwZ 2003, 1143

II- Brief description of the facts and legal issues

The claimant, an operator of a wind power plant, requested from the defendant, an undertaking supplying electricity, to connect the wind power plant to the electricity network, to purchase the electricity produced and to pay the price laid down by the law on Feeding Electricity from Renewable Energy Resources into the Public Grid ("*Stromeinspeisungsgesetz*", "*StrEG*"). The defendant refused, arguing, *inter alia*, that the *StrEG* amounted to State aid and was therefore unlawful.

III- Summary of the Court's findings

Referring to the ECJ's *Preussen Elektra* decision, the Federal Court of Justice rejected the claim that the *StrEG* amounted to State aid[25].

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[25] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I - 2099.

I- Information on the judgment

Federal Constitutional Court ("Bundesverfassungsgericht"), 3 January 2002, 2 BvR 1827/01, NVwZ-RR 2002, 321

II- Brief description of the facts and legal issues

The complainant, an electricity supply company, argued that the law on Feeding Electricity from Renewable Energy Resources into the Public Grid ("*Stromeinspeisungsgesetz", "StrEG*"), notably the obligation to purchase energy from renewable resources at a fixed price, amounted to unlawful State aid.

III- Summary of the Court's findings

Referring to the ECJ's *Preussen Elektra* decision the Federal Constitutional Court rejected the claim that the *StrEG* amounted to State aid[26].

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[26] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I - 2099.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Schleswig, 7 September 1999, 6 U Kart 87/97

II- Brief description of the facts and legal issues

The claimant, an operator of a biomass energy plant, asked the defendant, an undertaking supplying electricity, to purchase the electricity produced by the biomass energy plant and to pay the price laid down by the Law on Feeding Electricity from Renewable Energy Resources into the Public Grid ("*Stromeinspeisungsgesetz", "StrEG*"). The defendant refused, arguing, *inter alia*, that the *StrEG* amounted to State aid and was therefore unlawful.

III- Summary of the Court's findings

The Higher Regional Court of Schleswig rejected the claim, holding that the StrEG did not involve direct or indirect State resources within the meaning of Article 87 EC.

Comment: Although the Higher Regional Court of Schleswig (which is the competent court of appeals for the *Landgericht Kiel*) was aware of the preliminary reference to the ECJ by the *Landgericht Kiel* (see below) regarding the *StrEG*, the Schleswig Court did not consider it necessary to suspend the proceedings until the ECJ's final decision.

I- Information on the judgment

Regional Court ("Landgericht") of Kiel, 1 September 1998, 15 O 134/98, EuZW 1999, 29

II- Brief description of the facts and legal issues

The German law on Feeding Electricity from Renewable Energy Resources into the Public Grid ("*Stromeinspeisungsgesetz", "StrEG*") required electricity supply undertakings to purchase electricity from renewable sources paying a fixed price, as provided for in the *StrEG*. The claimant, an electricity supply company, accordingly paid 500,000 DM to the defendant, an operator of wind power plants. The claimant subsequently requested the defendant to refund the respective amount, arguing, *inter alia*, that the *StrEG* amounted to unlawful State aid.

III- Summary of the Court's findings

The Regional Court of Kiel referred the question whether the *StrEG* amounted to State aid to the ECJ. In its decision[27], the ECJ held that provisions like those in the *StrEG* did not involve advantages granted directly or indirectly by means of State resources.

IV- Comment of the authors of the 2006 study

The decision by the Regional Court of Kiel to make a preliminary reference to the ECJ and the subsequent decision by the ECJ had a significant influence on numerous other proceedings involving similar questions.

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[27] Case C-379/98, Preussen Elektra AG v Schleswag AG [2001] ECR I-2099.

I- Information on the judgment

Labour Court ("Arbeitsgericht") of Reutlingen, 4(2) Case 85/91, 3 May 1991

II- Brief description of the facts and legal issues

The claimant brought an action to challenge the lawfulness of the termination of an employment contract. Under German law, small companies employing five or fewer employees are exempt from the fairly strict rules on the protection of employees against termination of employment contracts that would otherwise apply.

III- Summary of the Court's findings

The Labour Court of Reutlingen took the view that this legal distinction between small companies and other companies, where only the latter are subject to strict employment protection rules, produced a considerable competitive advantage for small companies and must therefore be classified as State aid. The Labour Court of Reutlingen made a preliminary reference to the EJC, asking whether this interpretation of the notion of State aid was correct.

The ECJ held that exempting small companies from certain rules of German law did not amount to State aid within the meaning of Article 87 EC, as it did not result in benefits being granted to the recipients out of state funds. In this judgment the ECJ emphasised that, when deciding whether the grant of State aid violates Article 88 (3) EC, a national court may ask the ECJ to interpret the notion of State aid within the meaning of the EC Treaty[28].

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.

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

I- Information on the judgment

Labour Court ("Arbeitsgericht") of Bremen, 9 October 1990, EuZW 1991, 389

II- Brief description of the facts and legal issues

The case concerned certain rules of German labour law under which it was possible to employ non-German staff on German vessels under exemptions from rules of German labour and social security law. The labour law and social security law standards thus set for non-German staff were substantially lower than the standards applicable to German staff.

III- Summary of the Court's findings

The Labour Court of Bremen made a reference to the ECJ for a preliminary ruling under Article 234 EC. The Labour Court of Bremen was of the opinion that the resulting benefits for ship-owners, such as lower social security contributions, were State aid that came within the scope of Article 87 EC (and, furthermore, amounted to a violation of Article 136 EC).

In its judgment the ECJ found that there was no State aid in this case, as the benefits for ship-owners which resulted from the different legal standards were not financed out of State funds[29].

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

I- Information on the judgment

Regional Court ("Landgericht") of Magdeburg, 27 September 2002, 10 O 499/02 and Higher Regional Court ("Oberlandesgericht") of Naumburg, 14 May 2003, 12 U 161/02

II- Brief description of the facts and legal issues

The case concerned a claim for damages arising out of an alleged failure of the Land of Sachsen-Anhalt to notify aid in the steel sector in a timely manner. The claim was based on a Commission decision under the ECSC Treaty allowing aid to steel producers in the German New Federal States provided that the aid was notified to the Commission by 30 June 1994. The German government notified the aid after the expiration of the notification period. The Commission found that the aid was incompatible. In the proceedings before the Regional Court of Magdeburg, the claimant claimed that the aid would have been compatible had the German government abided by the notification period. Accordingly, the claimant reclaimed a certain part of the amount that had been paid as damages under German tort law.

III- Summary of the Court's findings

The Regional Court of Magdeburg dismissed the action. It was somewhat unclear to what extent the Commission would have been able to approve the State aid if the notification deadline of 30 June 1994 had been met. The claimant had referred to another case ("*EKO-Stahl*") in which the Commission had granted such an exceptional approval. The Regional Court of Magdeburg dismissed the action because the claimant had failed to show a causal link between the failure of the German administration to notify the State aid in a timely manner and the declaration of incompatibility by the Commission. The Regional Court of Magdeburg also stated that if it was to grant the claimant damages, this would amount to State aid on its own. Subsequently, the Higher Regional court of Naumburg dismissed the claimant's appeal and the Federal Court of Justice ("*Bundesgerichtshof*") rejected the claimant's application to appeal further.

I- Information on the judgment

Administrative Court ("Verwaltungsgericht") of Berlin of 15 August 2005, 20 A 135.05

II- Brief description of the facts and legal issues

The case concerned the implementation of a negative Commission decision of 20 October 2004 in the so-called *Kvaerner* matter[30]. The Commission had decided that Kvaerner, a shipyard, had received unlawful State aid which Germany was required to reclaim. The *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), which was charged with the recovery of the State aid, had issued an administrative act ordering recovery. Kvaerner challenged the administrative act, arguing that it was not based on a valid legal basis ("*Rechtsgrundlage*"). The BvS took the view that it was entitled to base administrative acts either on Article 14 (3) Regulation No. 659/1999 or directly on the Commission decision itself.

III- Summary of the Court's findings

The Administrative Court of Berlin decided that the recovery decision by BvS was unlawful. The German constitution stipulates that any administrative act imposing a burden on a person must be based on a specified legal basis ("*Vorbehalt des Gesetzes*", Article 20 (3) *Grundgesetz*). According to the Administrative Court of Berlin, the administrative act ordering recovery was not based on a valid legal basis. Both Article 14 (3) of Regulation No. 659/1999 and the Commission decision provide that recovery of unlawful State aid must be implemented according to national law. The case law of the ECJ and CFI[31] does not provide for an obligation to recover unlawful State aid by means of an administrative act. Similarly, current case law[32] does not indicate that recovery of unlawful State aid can only be effective if implemented by means of an administrative act.

IV- Comment of the authors of the 2006 study

The Administrative Court of Berlin confirmed that, where State aid has been granted by contract (rather than by unilateral administrative decision), for example, in the case of loans or guarantees, the public authority that granted the aid cannot simply (unilaterally) order repayment once the Commission has issued a negative decision that provides for an obligation to recover. Instead, the public authority must take action before either the civil or the administrative courts by bringing an action for repayment ("*Leistungsklage*").

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30 OJ (2005) L 120/21.

31 Case T-155/96 R, Stadt Mainz v Commission [1996] II-1557.

32 In particular, Case C-404/97, Commission v Portugal [2000] I-4922.

I- Information on the judgment

Regional Court ("Landgericht") of Halle, 23 December 2004, 9 O 231/04

II- Brief description of the facts and legal issues

The claimant, the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), sued the insolvency trustee of Zemag which had been part of the Lintra group and in respect of which insolvency proceedings were opened on 1 March 2001. The Lintra group had received State aid which the Commission had declared illegal by decision of 28 March 2001. Part of that aid had been allocated to Zemag. When BvS applied to have the recovery claim registered as an insolvency claim, the trustee rejected the request on the grounds that section 41 (1) of the German Insolvency Act allows for the registration of claims only if they were issued before the commencement of the insolvency proceedings. In addition, the trustee claimed that BvS did not show that the amount in question had actually been paid by Lintra to Zemag. Finally, the trustee claimed that the recovery of the State aid would violate the principle of good faith laid down in section 242 of the German Civil Code.

III- Summary of the Court's findings

The Regional Court of Halle found in favor of the claimant. It applied the case law developed by the *Bundesgerichtshof* in 2003 pursuant to which contracts that involve the grant of illegal State aid are null and void *ab initio* (under section 134 of the German Civil Code). Thus, section 41 (1) of the insolvency Act did not prevent the registration of the claim. The Regional Court of Halle also rejected the argument that the principle of good faith precluded the recovery during insolvency proceedings.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Dresden, 24 September 2004, 3 U-1013/04; Regional Court ("Landgericht") of Chemnitz, 28 April 2004, 8 O-3619/02

II- Brief description of the facts and legal issues

The case concerns the implementation of a negative Commission decision of 28 March 2001 in the so-called Lintra matter. Lintra was a holding company in the New Federal States and was privatised in January 1995. The holding company comprised eight businesses, including Saxonia Edelmetalle GmbH, which was sold to a third party in June 1997. As part of the original privatisation deal, the German privatisation agency committed to paying a total of DM 824.2 million in restructuring aid. The Commission approved the restructuring aid in 1996, but subsequently opened proceedings for misappropriation of State aid. In these proceedings, concluded by decision of 28 March 2001, the Commission ordered that an amount of DM 35 million should be repaid by the subsidiaries of Lintra. DM 3.2 million of the overall amount was allocated to Saxonia, the defendant. The defendant challenged the Commission decision before the CFI. Since the defendant was not prepared to repay the amount voluntarily, the privatisation agency sued the defendant in the Regional Court of Chemnitz.

III- Summary of the Court's findings

(I) During the proceedings before the Regional Court of Chemnitz, the defendant argued that there was no basis for the privatisation agency to reclaim any amount under the provisions concerning unjust enrichment of the German Civil Code (section 812 *Bürgerliches Gesetzbuch* ("*BGB*")). The defendant argued that, to be able to rely on section 812 *BGB*, the claimant had to show that it had actually paid the amount reclaimed to the defendant. In the defendant's view, the State aid had been paid to the parent company (Lintra) and there was no evidence that any part of that payment had been passed on to the subsidiary. The Regional Court of Chemnitz held that these considerations under national law were irrelevant because the Commission decision stated that a specific amount must be reclaimed from Saxonia. The Regional Court of Chemnitz explained that it was in no position to challenge the Commission decision on this point.

(II) The Higher Regional Court of Dresden did not follow the decision by the Regional Court of Chemnitz and suspended the proceedings pending Saxonia's court action against the decision before the CFI: The Higher Regional Court of Dresden took the position that there was no basis under German CFI law to recover the State aid from Saxonia because there had been no proof that part of the State aid had actually been paid to Saxonia. The only basis for direct recovery was the Commission decision which specified that a specific amount should be reclaimed from Saxonia. The Higher Regional Court of Dresden stated that the decision by the CFI was prejudicial for the outcome of the proceedings before it. Thus, it suspended the proceedings pursuant to a section of the German Code of Civil Procedure which allows suspension in the event that prejudicial proceedings are pending in another court. In the opinion of the Higher Regional Court of Dresden, this suspension did not violate Article 242 EC (which establishes that actions against Commission decisions do not have suspensory effect). In the opinion of the Higher Regional Court of Dresden, since there were substantial doubts as to the legality of the Commission decision, the alternative to a suspension of the national proceedings would have been to refer the case to the ECJ under Article 234 EC. In light of the proceedings pending before the CFI, the Higher Regional Court of Dresden decided to suspend its own proceedings.

IV- Comment of the authors of the 2006 study

The decision by the Higher Regional Court of Dresden conforms to Community law. The CFI explicitly stated that "[…] *Community law does not preclude the national court from ordering suspension of operation of the application for recovery lodged by [the Member State] pending settlement of the case before the [CFI] or from referring a question to the Court of Justice for a preliminary ruling under Article 234 EC. Since the applicant has contested the legality of the contested decision under Article 230 EC, the national court is not bound by the definite nature of that decision*[33]."

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[33] Case T-181/02 R, Neue Erba Lautex v Commission ECR [2002] II-5081.

I- Information on the judgment

Regional Court ("Landgericht") of Magdeburg, 8 August 2002, 4 O 194/02 and Higher Regional Court ("Oberlandesgericht") of Naumburg, 18 December 2002, 5 U 100/02

II- Brief description of the facts and legal issues

The case concerned an action for the repayment of shareholders' loans granted by the privatisation agency for businesses in the New Federal States ("*Treuhandanstalt*") to SKET, an equipment manufacturer. During the entire privatisation period in the early 1990s, SKET had received State aid on an ongoing basis from *Treuhandanstalt*. In 1996, privatisation efforts finally failed and bankruptcy proceedings were opened regarding SKET's assets. In 1997, the Commission declared (some of) the State aid received by SKET incompatible and ordered its repayment. *Treuhandanstalt* brought proceedings before the Regional Court of Magdeburg against the trustee in bankruptcy who refused to recognise the recovery claim and, alternatively, took the position that the claim should be treated as a subordinate shareholders' loan. The decision by the Regional Court of Magdeburg had to address a number of issues raised under German law relating to unjust enrichment and the question of whether a claim for the recovery of a loan granted by a public shareholder that had been found to constitute state aid can be treated as a subordinate loan (pursuant to section 32 (1) (a) of the German Act on Companies with Limited Liability).

III- Summary of the Court's findings

The Regional Court of Magdeburg found in favor of the claimant ("*Treuhandanstalt*") and set aside the defendant's arguments based on the law of unjust enrichment and the subordination of the loan. It based its decision on considerations of German law only. Following the defendant's appeal to the Higher Regional Court of Naumburg, the Higher Regional Court affirmed the decision of the lower court and, in addition, declared that the *effet utile* of the Commission decision required that the recovery claim be treated as a normal bankruptcy claim; the provision of German corporate law which provides that claims for the repayment of a loan by the shareholder who had granted the loan in a situation in which a prudent shareholder would have provided capital instead cannot be applied to a situation where State aid is reclaimed pursuant to a Commission decision.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Hamburg of 2 April 2004, 1U-119/00; Regional Court ("Landgericht") of Hamburg, judgment of 29 June 2000, 303O-358/96

II- Brief description of the facts and legal issues

The two judgments concern the recovery of State aid pursuant to a negative decision of the Commission of 31 October 1995 in the case of Hamburger Stahlwerke GmbH. In its decision, the Commission found that loans granted to Hamburger Stahlwerke GmbH during the period from 1992 to 1993 in the sum of DM 204 million constituted restructuring aid that was incompatible with Article 4 (c) of the ECSC Treaty. It ordered Germany to recover those amounts from "the aid beneficiary". During the period in which the loans were granted, Hamburger Stahlwerke GmbH underwent a series of restructuring steps each of which was accompanied by successive loans granted by Hamburger Landesbank, the public bank which was wholly controlled by the City of Hamburg. Ultimately, the business of Hamburger Stahlwerke GmbH was transferred to an Indian steel manufacturing group ("ISPAT"). That group acquired the loans granted to Hamburger Stahlwerke GmbH from Hamburger Landesbank at a price that was DM 90 million less than face value. The loans were subsequently transferred to another group member and eventually repaid by the new company operating the business of Hamburger Stahlwerke. Thus the loans had eventually "disappeared". In implementing the negative Commission, the City of Hamburg filed a court action against the defendant operator of the Hamburger Stahlwerke business to recover the balance between the face value of the loans and the price paid by the ISPAT group.

III- Summary of the Court's findings

The Federal Republic of Germany had filed an appeal against the negative Commission decision which was still pending when the Regional Court of Hamburg had to render its decision on the court action by the City of Hamburg for the recovery of the loan amounts. In its decision, the Regional Court of Hamburg notes that both the claimant and the defendant were of the view that the Commission decision was illegal and should be annulled by the ECJ. Nevertheless, the Regional Court of Hamburg went on to decide the case as if the Commission decision could stand. On the question before it, the Regional Court of Hamburg reaches the conclusion that the action by the City of Hamburg should be dismissed because the loan was paid out by Hamburger Landesbank and not by the City of Hamburg and, due to the transfer of the loans to another entity of the ISPAT group and the subsequent repayment of the loan amounts, there were no open claims that could be the basis for a recovery action. The Regional Court of Hamburg notes that this result which it regards as compulsory under national law may be unfortunate because the purpose pursued by the illegal aid - the continued operation of the business of Hamburger Stahlwerke GmBH - has been achieved and there was nothing that could be done to reverse this. However, according to the Regional Court of Hamburg, the result was inevitable, given the structure of the national legal provisions under which the illegal aid has to be recovered.

When the case was before the *Oberlandesgericht*, the action of the German government against the negative Commission decision was dismissed by the ECJ. The *Oberlandesgericht of Hamburg* set aside the judgment of the Landgericht and held that the new owners of the business of Hamburger Stahlwerke GmbH would have to repay the loan amounts received from Hamburger Landesbank directly to the City of Hamburg. In reaching this decision, the *Oberlandesgericht* held that the violation of Article 88 (3) EC resulted in the invalidity of both the loan granted by Hamburger Landesbank to Hamburger Stahlwerke GmbH and the underlying agreement between the City of Hamburg and

Hamburger Landesbank pursuant to which the loan was granted. Thus, the City of Hamburg was in a position to bring a direct claim against Hamburger Stahlwerke GmbH (and its successors) for unjust enrichment. The *Oberlandesgericht* reasoned that it was necessary to regard all contractual relationships surrounding the grant of the loan as null and void in order to preserve the *effet utile* of the Commission decision.

I- Information on the judgment

Federal Court of Justice ("Bundesgerichtshof"), 20 January 2004, XI ZR 53/03, NVwZ 2004, 636

II- Brief description of the facts and legal issues

The defendant, a producer of synthetic fibres and yarns, had received an investment grant ("*Investionszuschuss*") of DM 1.2 million in 1982 from the claimant, a publicly owned bank. In addition, the claimant received an investment allowance ("*Investitionszulage*") of DM 1.7 million in 1984 from another public authority. In 1985, the Commission decided that both the investment grant and the investment allowance constituted unlawful State aid and that they had to be recovered[34]. The Commission's decision was subsequently confirmed by the ECJ[35], and the defendant repaid the investment allowance. In 1995, the claimant requested repayment of the investment grant plus interest from the defendant. The defendant refused, arguing, inter alia, that the recovery of the investment grant would be contrary to the principle of good faith ("*Treu und Glauben*", section 242 BGB).

III- Summary of the Court's findings

The *Bundesgerichtshof* confirmed that contracts that infringe Article 88 (3) (3) EC are void according to section 134 BGB. Any payments or goods received under the respective contracts must be returned on the basis of the provisions of unjust enrichment ("*ungerechtfertigte Bereicherung*"). The *Bundesgerichtshof* held that the defendant could not refuse to repay the investment grant on the basis of the principle of good faith. In particular, the defendant could not draw any conclusions from the fact that it took eight years since the ECJ judgment for the defendant to be asked to repay the investment grant. Also, recovery was not precluded by reason of the fact that German public officials had frequently assured the defendant that the investment grant would not be recovered. As regards the recovery of unlawful State aid, national authorities do not have any discretionary power. Their role is limited to executing the Commission's decisions. Finally, the court decided that the claimant was entitled to ask for payment of interest, and that the claimant was correct in calculating the level of interest on the basis of national law.

IV- Comment of the authors of the 2006 study

The *Bundesgerichtshof* fails to acknowledge that Article 14 (2) of Regulation No. 659/1999 provides that "*the aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission*".

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[34] OJ (1985) L 278/26.

[35] Case C-310/85, Deufil GmbH & Co. KG v Commission [1987] ECR 901.

I- Information on the judgment

Federal Court of Justice ("Bundesgerichtshof"), 24 October 2003, V ZR 48/03, EuZW 2004, 254

II- Brief description of the facts and legal issues

The claimant, a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), was charged with the privatisation of formerly State-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz", "AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1997, the claimant sold 150 acres to the defendant, some of which were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* granted State aid which was incompatible with the common market and ordered Germany to recover the unlawful aid[36]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be adapted retroactively to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts, requesting the additional payment. The defendant refused to pay, arguing that the Commission's decision was unlawful.

III- Summary of the Court's findings

The *Bundesgerichtshof* ordered the defendant to make the additional payment.

(I) The *Bundesgerichtshof* found that the question of the legality of the Commission decision was relevant to the case. However, the *Bundesgerichtshof* held, with reference to the ECJ's case law[37], that the defendant was precluded from questioning the lawfulness of the Commission decision before a national court. The defendant, as the beneficiary of the unlawful State aid, could have challenged that decision before the CFI, but instead allowed the mandatory time limit laid down in Article 230 (5) EC to pass.

(II) The *Bundesgerichtshof* subsequently confirmed that the recovery of unlawful State aid can be excluded in exceptional circumstances according to the principle of good faith ("*Treu und Glauben*", section 242 BGB). However, the arguments brought forward by the defendant were not sufficient to establish the existence of such exceptional circumstances.

[36] OJ (1999) L 107/21.

[37] Case C-188/87, TWD Textilwerke Deggendorf v Germany [1994] ECR I-833.

I- Information on the judgment

Federal Court of Justice ("Bundesgerichtshof"), 4 April 2003, V ZR 314/02, VIZ 2003, 340

II- Brief description of the facts and legal issues

The claimant, a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), was charged with the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz", "AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1997, the claimant sold 200 acres to the defendant, some of which were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* granted State aid which was incompatible with the common market and ordered Germany to recover the unlawful aid[38]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be adapted retroactively to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts, requesting the additional payment. The defendant refused the payment, arguing that section 3 (a) *AusglLeistG* was unconstitutional since it deprived him retroactively of a vested legal entitlement.

III- Summary of the Court's findings

The *Bundesgerichtshof* ordered the defendant to make the additional payment.

(I) Section 3 (a) *AusglLeistG* could have deprived the defendant only of a vested legal entitlement if the purchase contract entered into in 1997 was valid. But this was not the case. The sale of the land below market value infringed Article 88 (3) (3) EC. Under section 134 of the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*"), a contract that infringes a legal prohibition ("*gesetzliches Verbot*") is void. Referring to the ECJ's case law[39], the *Bundesgerichtshof* held that section 134 BGB must be understood as applying to infringements of Article 88 (3) (3) EC. This applies regardless of whether the Commission subsequently approves the State aid in question. Only the nullity of the contract succeeds in removing distortions of competition since it enables competitors to request the recovery of the unlawful State aid.

(II) Generally, if a contract is void according to section 134 BGB, the parties to the contract must return any payments or goods received under the contract. Hence, the defendant would have been obliged to return the land to the claimant. However, the *Bundesgerichtshof* held that, following the amendment to the *AusglLeistG* (section 3 (a) *AusglLeistG*), the contract was affirmed ("*Bestätigung*", section 141 *BGB*) subject to modified conditions, namely with a purchase price that did not amount to unlawful State aid.

(III) Finally, the *Bundesgerichtshof* discussed whether the recovery of unlawful State aid could be excluded according to the principle of good faith ("*Treu und Glauben*", section 242 BGB). Usually, the community interest in restoring competition prevails over the interests of the beneficiary of the aid, even if the beneficiary did not act negligently when receiving the unlawful aid. The *Bundesgerichtshof* left open whether recovery may be excluded in exceptional cases, since the defendant did not argue that such exceptional circumstances existed in his case.

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38 OJ (1999) L 107/21.

39 Case C-120/73, Lorenz v Germany [1973] ECR 1471 and Case C-354/90, FNCE v France [1991] ECR I-5505.

IV- Comment of the authors of the 2006 study

The *Bundesgerichtshof's* decision resolves the highly debated question under German law of the nature of the legal implications for a civil law contract if that contract infringes Article 88 (3) EC. Prior to the judgment, the majority of commentators had argued that, as long as recovery of the unlawful aid is guaranteed, ECJ case law40 did not necessarily require the nullity of a contract infringing Article 88 (3) EC, and that section 134 BGB could not be applied.

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40 In particular, Case C-354/90, FNCE v France [1991] I-5505.

I- Information on the judgment

Regional Court ("Landgericht") of Rostock, 23 July 2002, 4 O 468/01, VIZ 2002, 632

II- Brief description of the facts and legal issues

The claimant, a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), was charged with the privatisation of formerly State-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1998, the plaintiff sold some land to the defendant, a local farmer. Some plots of the land were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* granted State aid which was incompatible with the common market and ordered Germany to recover the unlawful aid[41]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be being retroactively adapted to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts, requesting the additional payment. The defendant refused to pay, arguing that at the time the contract was concluded, he could not have known that the *AusglLeistG* provided for unlawful State aid.

III- Summary of the Court's findings

The *Landgericht of Rostock* decided in favour of the defendant, rejecting the claimant's request for additional payment.

(I) The *Landgericht of Rostock* discussed in detail the ECJ's jurisprudence, in particular the Alcan decision[42] and subsequent decisions by German courts. The *Landgericht of Rostock* acknowledged that the legitimate expectations of the recipients of unlawful State aid could be protected only in exceptional circumstances. In particular, the beneficiary of the State aid could not rely on legitimate expectations if he knew or could have known that the State aid, although notifiable, had not been notified to the Commission. These principles apply regardless of whether the State aid was granted by an administrative act or by means of a private contract.

(II) The *Landgericht of Rostock* held that the request for additional payment was legitimately based on section 3 (a) *AusglLeistG*, but that it was contrary to the principle of good faith laid down in section 242 German Civil Code ("*Bürgerliches Gesetzbuch", "BGB*"). The defendant had, relying on the validity of the purchase contract, assumed various financial commitments, which, if he had been obliged to repay the aid, could have threatened his entire financial existence. As a local farmer, he could not have known that the sale of land under the AusglLeistG contained elements of State aid. The situation in the Alcan case was different, since Alcan was a globally active company, which knew that it was in receipt of State aid. Taking into account that the effect of the unlawful State aid was regionally limited, the *Landgerich of Rostockt* held that, in this particular case, the interests of the defendant outweighed the Community interest, and that the claimant was therefore unable to recover the State aid.

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41 OJ (1999) L 107/21.

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

IV- Comment of the authors of the 2006 study

The *Landgericht of Rostock* distinguished this case from the *Alcan* case on the basis that Alcan was a large company, while the defendant was only a small farmer, whose existence would have been threatened by the recovery of the State aid. It seems unlikely that these findings can be reconciled with the ECJ's case law and the Commission practice. The mere fact that the beneficiary of the aid is not a large company does not prevent recovery, and the disappearance of a market player following a recovery decision is an explicitly recognised and accepted consequence of such a decision.

I- Information on the judgment

Higher Regional Court ("Kammergericht") of Berlin, 31 Mai 2002, 25 U 20/02, KGR Berlin 2003, 217

II- Brief description of the facts and legal issues

The defendant, a sub-agency of the *Bundesanstalt für vereinigungsbedingte Sonderaufgaben* ("BvS"), was charged with the privatisation of formerly State-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1997, the defendant sold some land to the claimant. Plots of the land were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* granted State aid which was incompatible with the common market and ordered Germany to recover the unlawful aid[43]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be adapted retroactively to the market price. Based on section 3 (a) *AusglLeistG*, the defendant asked the claimant for an additional payment for the land sold. The claimant paid the additional amount, and subsequently brought an action in the civil courts, requesting repayment.

III- Summary of the Court's findings

The *Kammergericht of Berlin* decided in favour of the defendant, rejecting the claimant's request for repayment. The request for additional payment was legitimately based on section 3 (a) *AusglLeistG*.

The *Kammergerich of Berlin* held that the BvS was bound by the Commission's finding that the initial purchase contract constituted State aid. It found that, as a consequence, the contract was void according to section 134 of the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*"). However, the contract was subsequently affirmed by means of section 3 (a) *AusglLeistG*. Section 3 (a) *AusglLeistG* was found to be constitutional.

The *Kammergericht of Berlin* furthermore discussed whether the request for additional payment could be challenged according to the principle of good faith ("*Treu und Glauben*", section 242 *BGB*). However, the Community interest in restoring competition prevails over the interests of the beneficiary of the aid, even if the beneficiary did not act negligently when receiving the unlawful aid. The *Kammergericht of Berlin* left open whether recovery may be excluded in exceptional cases, since the claimant did not argue that such exceptional circumstances existed in his case.

[43] OJ (1999) L 107/21.

I- Information on the judgment

Regional Court ("Landgericht") of Meiningen, 12 Mai 2002, 4 P 362/02, ZInsO 2003, 1006

II- Brief description of the facts and legal issues

The claimant, a public authority, granted an investment grant to the beneficiary in 1993. In 1997, the beneficiary filed for bankruptcy and insolvency proceedings were initiated. According to the then applicable law, the insolvency administrator decided that all claims by the creditors had to be registered with the competent insolvency court by the end of August 1997 at the latest. In 2002, the Commission decided that the investment grant constituted State aid and had to be recovered. The claimant subsequently registered the recovery claim with the insolvency court. According to section 14 of the Regulation on the Execution of Insolvency Proceedings ("*Gesamtvollstreckungsordnung*", "*GesO*"), late claims cannot be admitted unless the delay can be justified. The claimant argued that he was only in the position to register the claim once the Commission had decided that the investment grant had to be recovered. The insolvency court rejected the request, arguing that the Commission decision did not have any influence on the insolvency proceedings.

III- Summary of the Court's findings

The *Landgericht of Meiningen* reversed the decision by the insolvency court. It held that national law could not hinder the implementation of recovery decisions. The *Landgericht of Meiningen* left open whether the delay could be justified. Instead, the *Landgericht of Meiningen* decided that section 14 *GesO* would not apply if its application could prevent the implementation of recovery decisions by the Commission. The claimant's claim regarding the recovery of the investment grant was thus allowed.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Nürnberg, 21 March 2002, 12 U 2961/01; Regional Court ("Landgericht") of Amberg, 23 July 2001, 41 HKO 546/97

II- Brief description of the facts and legal issues

The decisions concerned the enforcement of a negative Commission decision in the *Neue Maxhütte* case. In its decisions of 18 October 1995 and of 13 March 1996, the Commission held that loans granted by the Land of Bavaria to the ailing steel maker Neue Maxhütte-Stahlwerke GmbH amounting to DM 74 million, in total, constituted State aid that had been granted in violation of Article 4 (c) of the ECSC Treaty. The Commission ordered the recovery of that amount. During the entire period in which the loans were granted, the Land of Bavaria was a shareholder in Neue Maxhütte-Stahlwerke GmbH. Under the applicable section 32 (a) (1) of the Act on Companies with Limited Liabilities ("*GmbH-Gesetz*"), a shareholder who granted a loan to a company with limited liability in a situation where a diligent shareholder would have subscribed to equity (because the company was in a crisis), was treated as a non-preferred creditor with a secondary claim ("*nachrangige Insolvenzforderung*") with respect of the loan if the company became insolvent. In the case before the *Landgericht of Amberg*, the insolvency administrator claimed that since the Land of Bavaria ("*Freistaat Bayern*") was a shareholder when it granted the loans in question, it should be treated as a non-preferential, secondary creditor.

III- Summary of the Court's findings

The *Landgerich of Amberg* held that the loans should be treated as ordinary claims in bankruptcy (not as unsecured secondary claims as the insolvency administrator had suggested). The *Landgericht of Amberg* reasoned that any other treatment of the loans would jeopardise the effet utile of the negative Commission decision. The *Oberlandesgericht of Nürnberg* rejected the appeal brought by the insolvency administrator as it was inadmissible. In particular, the *Oberlandesgericht of Nürnberg* did not feel that it was necessary to refer the question relating to the proper treatment of the loans granted by the Land as a shareholder to the ECJ. It followed the decision of the Landgericht of *Nürnberg* which had ruled that the ECJ in *Alcan* required that illegal State aid be recovered under national law in a manner which did not render the recovery of the illegal State aid practically impossible.

IV- Comment of the authors of the 2006 study

The decisions deal with a fairly complicated issue ("*Eigenkapitalersetzende Darlehen*") involving questions of insolvency law, the *GmbH-Gesetz* and State aid law. Interestingly, the *Landgericht of Erfurt* (see below) decided a similar case raising the same questions only a few weeks after the *Landgericht of Amberg* – and came to a very different result.

I- Information on the judgment

Regional Court ("Landgericht") of Erfurt, 8 August 2001, 3 HK O 400/00, ZIP 2001, 1673

II- Brief description of the facts and legal issues

From 1993 to 1997 the Weida Leder GmbH received various loans and guarantees from the defendant, a bank owned by the New Federal State of Thüringen ("*Freistaat Thüringen*"). From 1995 on, the defendant was acting as the main shareholder of Weida Leder. Occasionally, Weida Leder paid interest on loans granted by the defendant. In 1998, insolvency proceedings were initiated against Weida Leder and the claimant was appointed as insolvency administrator. In 1999, the Commission decided that Weida Leder had received about DM 30 million in unlawful State aid and requested Germany to recover the aid[44].

The claimant requested repayment of the interest paid by Weide Leder from the defendant. The claimant argued that, under the then applicable section 32 (a) (1) of the Act on Companies with Limited Liabilities ("*GmbH-Gesetz", "GmbHG*"), a shareholder who granted a loan to a company with limited liability in a situation where a diligent shareholder would have subscribed to equity (because the company was in a crisis), must be treated as having granted equity and would therefore not be entitled to file a claim in the insolvency case. For loans granted on or after 1 January 1999, section 32 (a) (1) *GmbHG* now provides that such claims are treated as unsecured secondary claims ("*nachrangige Insolvenzforderung*", i.e. different from equity, but a less valuable insolvency claim than ordinary insolvency claims). The defendant rejected the claimant's request, arguing that, since he was obliged to recover the unlawful State aid, section 32 (a) (1) *GmbHG* did not apply.

III- Summary of the Court's findings

The *Landgericht of Erfurt* held that the loans should be recoverable as secondary claims. It did not apply section 32 (a) (1) *GmbHG*, which provided that loans granted prior to 1 January 1999 must be treated as equity and could therefore not be reclaimed in insolvency proceedings. However, the *Landgericht of Erfurt* rejected the suggestion that the defendant's claim, since implementation the Commission's recovery decision, should be treated as an ordinary insolvency claim.

The *Landgericht of Erfurt* agreed that the ECJ's case law required that incompatible State aid be recovered under national law in a manner which did not render the recovery practically impossible. The *Landgerich of Erfurt* took the view that the classification of the claim as a secondary insolvency claim was sufficient to satisfy these requirements. The main purpose of the State aid rules – maintaining effective and undistorted competition – had been achieved by the liquidation and disappearance from the market of Weida Leder being liquidated and having disappeared from the market as a consequence of the insolvency proceedings. There was therefore no need to treat the defendant's claim as an ordinary insolvency claim. In addition, the *Landgericht of Erfurt* held that treating the defendant's claim as an ordinary insolvency claim would unjustifiably reward the defendant, who had knowingly granted unlawful State aid to Weida Leder for political reasons.

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.

[44] OJ (2000) L 61/4.

I- Information on the judgment

Federal Constitutional Court ("Bundesverfassungsgericht"), 17 February 2000, 2 BvR 1210/98, EuZW 2000, 445

II- Brief description of the facts and legal issues

In 1983, the claimant had received DM 8 million in contributions for an aluminium plant from the defendant, a public authority. Prior the granting of the State aid, detailed negotiations had taken place between the claimant and the defendant. Although the Commission, who had become aware of the intention to grant State aid, had requested that the notification requirement be complied with, the State aid was granted without prior notification. The Commission subsequently found that the State aid was incompatible and had to be recovered. After several years of litigation between Germany and the Commission, the defendant finally ordered the claimant to repay the State aid. The claimant refused, on the basis of the principle of legitimate expectations and the principle of good faith. The *Bundesverwaltungsgericht* referred the case to the ECJ, asking whether and to what extent the beneficiaries of unlawful aid could rely on the principle of legitimate expectations and the principle of good faith. The ECJ decided that recovery of unlawful aid could be excluded only in exceptional cases[45]. The *Bundesverwaltungsgericht* subsequently ordered the claimant to refund the State aid. The claimant complained to the *Bundesverfassungsgericht* arguing that the recovery of the State aid infringed his constitutional rights.

III- Summary of the Court's findings

The Federal Constitutional Court rejected the constitutional complaint. The *Bundesverwaltungsgericht* had, based on the ECJ's *Alcan* decision, correctly applied the law. In particular, it had taken sufficient account of the claimant's legitimate expectations and other rights derived from the principle of good faith. The fact that the Federal Constitutional Court had decided that the Community interest in recovering unlawful State aid outweighed the claimant's interests did not infringe the claimant's fundamental rights. In addition, the Federal Constitutional Court saw no reason to discuss whether the ECJ's *Alcan* decision had exceeded the limits of Community law ("*ausbrechender Rechtsakt*").

IV- Comment of the authors of the 2006 study

The *Bundesverfassungsgericht's* decision marks the end of the "*Alcan*-saga" described below.

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

I- Information on the judgment

Federal Administrative Court ("Bundesverwaltungsgericht"), 3 C 15.97, 23 April 1998 and 28 September 1994, EuZW 1995, 314; Higher Administrative Court ("Oberverwaltungsgericht") of Koblenz, 26 November 1991, EuZW 1992, 349; Administrative Court ("Verwaltungsgericht") of Mainz, 7 June 1990, EuZW 1990, 389 - "Alcan Case"

II- Brief description of the facts and legal issues

The case involved State aid in the amount of DM 8 million that was granted to an aluminium plant operator in order to safeguard the future operation of the plant. Before the State aid was granted detailed negotiations had taken place between the administrative agency granting the aid and the operator of the plant. Although the Commission, which became aware of the agency's intention to grant State aid through press coverage, had requested that a notification be made under Article 88 (3) EC, no notification was made. The Commission found that the aid was incompatible with the Common Market and ordered its recovery[46]. However, the German authorities did not claim repayment. The Commission's order for recovery was affirmed by the ECJ[47].

Following the ECJ's decision, the administrative agency issued an order for the repayment of the State aid. This order was challenged in court by the beneficiary who invoked the principle of legitimate expectations by way of defence. He further argued that the money received in State aid had been spent and that the order for repayment violated the one-year time limit under section 48 of the German *VwVfG* that was applicable to orders for repayment.

III- Summary of the Court's findings

Both the court of first instance and the Higher Administrative Court of Koblenz found in favour of the beneficiary. The Higher Administrative Court of Koblenz stated that, in the absence of rules of Community law providing for an obligation to repay illegally granted aid that is compatible with the Common Market, any obligation to repay is governed by national law, for example, section 48 *VwVfG* in Germany. The rationale of the judgment is that the order for repayment violates the one-year time limit laid down in section 48 *VwVfG*. The Higher Administrative Court of Koblenz found that time started to run in June 1986, i.e. when the negative decision of the Commission became final and absolute. The order for repayment was issued on 26 September 1989.

On a further appeal to the Federal Administrative Court, the Federal Administrative Court referred the case to the ECJ, asking whether an order for repayment of illegally granted State aid could be issued by the national authority notwithstanding that the time limit for orders of repayment under national law had expired. It further asked whether a positive obligation to order repayment existed despite the fact that the national authority is fully responsible for the illegal grant of the aid, and that an order for repayment may therefore be regarded as evidence of bad faith on the part of the national authority. Finally, the Federal Administrative Court asked whether an order for repayment could be issued, even if the beneficiary has fully spent the money received in State aid and may therefore argue that he was not unjust enriched by receiving State aid. All these issues raised by the court corresponded to various provisions of section 48 *VwVfG* which govern, *inter alia*, orders for repayment.

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46 OJ (1986) L 72/30.

47 Case C-94/87, Land Rheinland-Pfalz v Alcan [1989] ECR 175.

In its decision[48], the ECJ answered all three questions in the affirmative. The ECJ stated, in particular, that a legitimate expectation as to the lawfulness of the granting of State aid may only exist on the part of the beneficiary if the beneficiary duly ascertained that the procedures laid down in Article 88 EC have been fully observed.

This reasoning was adopted in its entirety by the Federal Administrative Court in the national proceedings. The Federal Administrative Court emphasised that it was bound by the ECJ's judgment. It refuted the argument of the beneficiary that the ECJ's judgment was *ultra vires*. In the aftermath of the judgment, the beneficiary took the view that the consequences for the interpretation of German rules on the recovery of illegally granted State aid, which are as far reaching as the ones that resulted from the ECJ's judgment, could be based only on a Council Regulation under Article 89 EC. The Federal Administrative Court stressed that, notwithstanding the very restrictive interpretation of the defence of legitimate expectations in the ECJ's judgment (such that legitimate expectations may be asserted only if the beneficiary has duly verified that the notification and control procedures set forth in Article 88 EC have been complied with), the beneficiary could bring an action before the ECJ against Commission decisions ordering the recovery of State aid in exceptional circumstances, such as where legitimate expectations could be established.

The judgment does not indicate when such an exception can be established. If one considers the general rule emphasised by both the ECJ and the Federal Administrative Court, i.e. that a beneficiary must check compliance with Article 88 EC if it wants to successfully bring the argument relating to legitimate expectations, it is clear that such exceptional cases will be extremely rare.

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[48] Case C-24/96, Land Rheinland-Pfalz v Alcan [1997] ECR I-1591.

I- Information on the judgment

Federal Constitutional Court ("Bundesverfassungsgericht"), 3 December 1997, NJW 1998, 1547

II- Brief description of the facts and legal issues

The case concerned a constitutional complaint by, *inter alia*, an investment fund that invested in the purchase of ships. German tax rules applying until 25 April 1996 provided for a special accelerated depreciation scheme for the owners of new commercial ships. This depreciation scheme was abolished by an act adopted by the Federal parliament on 7 November 1996, which provided that the special depreciation scheme would no longer be applicable to purchase agreements for ships concluded after 24 April 1996. This cut-off date was chosen because, on 25 April 1996, the Federal government introduced a bill amending the depreciation scheme in parliament. The original government bill stated that the depreciation scheme would not apply to contracts concluded after 1 May 1996. The cut-off date of 24 April 1996 was introduced by parliament at a later stage.

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

III- Summary of the Court's findings

The Federal Constitutional Court rejected the constitutional complaint, holding that there was no reason for the claimant to have relied on the tax depreciation scheme after the abolition of the scheme had been announced by the Federal government. The Constitutional Court stated that it did not have to decide the question of whether the pending decision of the Commission on the notification of the tax depreciation scheme had a bearing on whether or not the claimant should have relied on the continuation of the depreciation scheme.

I- Information on the judgment

Higher Administrative Court ("Verwaltungsgerichtshof") of Baden-Württemberg, 10 December 1996, NVwZ 1998, 87

II- Brief description of the facts and legal issues

The case concerned the grant of State aid to the receiver of a company that was subject to bankruptcy proceedings without prior notification under Article 88 (3) EC. The subsidy was granted by governmental agencies in Baden-Württemberg. The purpose of the State aid was to fund the acquisition of a newly established rescue company (of which the receiver was the sole shareholder) by a third party company. The rescue company used the aid to finance an increase in its share capital. Subsequently, the third party company merged with the rescue company and continued business under the name of the latter.

In its decision of 17 November 1987 addressed to Germany[49] the Commission found the financial aid to be State aid that was incompatible with the Common Market under Article 87 EC and ordered recovery of the aid. This decision was neither challenged by Germany nor complied with by the German authorities. In an action brought by the Commission against Germany, the ECJ handed down a declaratory judgment that Germany was in breach of the EC Treaty[50]. The governmental agency that granted the State aid was informed of this judgment (and of the negative Commission decision) by the German Federal Ministry of the Economy and then issued an order for repayment. This order was challenged by the rescue company which was the addressee of the order.

III- Summary of the Court's findings

The judgment of the Higher Administrative Court of Baden-Württemberg mainly deal with the issue of when the one-year time limit for orders concerning the repayment of illegally granted State aid started to run under the applicable German rules. The Higher Administrative Court held that the time-limit had been complied with. It started to run when the governmental agency responsible for recovery was informed of the negative Commission decision and of the judgment of the ECJ. The Higher Administrative Court also emphasised that, as a general rule, the public interest in the repayment of State aid granted in violation of EC law takes precedence over the legitimate expectations of the beneficiary to keep the State aid. It appears that the Higher Administrative Court would be more inclined to consider the legitimate expectations of the beneficiary if the grant of State aid "only" violated German rules.

IV- Comment of the authors of the 2006 study

It is interesting to note that the Higher Administrative Court of Baden-Württemberg stated in an obiter dictum that an order for repayment could not be issued if the order could be regarded as evidence of bad faith on the part of the governmental agency. The ECJ clearly took a different view in its judgment in the AIcan case, which was delivered only a few months after the judgment of the Higher Administrative Court. There, the ECJ held that a governmental agency must recover illegally granted aid even if its behaviour may be attributed to bad faith.

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[49] OJ (1988) L 79/29.

[50] Case C-5/89, Commission v Germany [1990] ECR I-3437.

I- Information on the judgment

Federal Administrative Court ("Bundesverwaltungsgericht"), 17 February 1993, NJW 1993, 2764; Higher Administrative Court ("Oberverwaltungsgericht") of Münster, 26 November 1991, EuZW 1992, 286; Administrative Court ("Verwaltungsgericht") of Cologne, 21 April 1988, EuZW 1990, 387

II- Brief description of the facts and legal issues

The case concerned the grant of tax allowances. The Commission found that this amounted to illegal State aid as no notification had been made under Article 88 (3) EC. It further found the aid to be incompatible with the Common Market under Article 87 EC and ordered recovery by decision of 10 July 1985. The beneficiary challenged the administrative act ordering the recovery of the State aid (which was issued on 27 March 1986, i.e. when the Commission had handed down its decision but before the ECJ delivered judgment[51], confirming the Commission's view when the beneficiary had already challenged the decision before the ECJ. This administrative act was based on section 48 of the German Act on Administrative Proceedings ("*VwVfG*") that empowers administrative agencies to annul illegal administrative acts.

III- Summary of the Court's findings

The Federal Administrative Court fully upheld the previous judgments in the case and dismissed the beneficiary's action. It stated that orders for the recovery of illegally granted State aid must be based on section 48 *VwVfG*. It further stated that, although the interest of the beneficiary in not being required to repay the State aid had to be balanced with the public interest in recovering the illegally granted State aid, as a general rule the beneficiary would have no legitimate interest worthy of protection if the State aid at issue was granted without due notification under Article 88 (3) EC. This amounted to a narrow construction of section 48 *VwVfG* which states that, as a general rule, repayment of illegally granted payments must not be ordered if the beneficiary has a legitimate interest in retaining the sum granted. The provision further states that a legitimate interest will generally exist if the recipient has already spent the sum granted. The provision also lists cases where the beneficiary may not invoke a legitimate interest, i.e. if he obtained payment by fraud or by misrepresentation of fact or if he was aware of the unlawfulness of the payment, or if his ignorance of the unlawfulness was caused by gross negligence. The Federal Administrative Court further stated that, as a general rule, a beneficiary can reasonably be required to check whether a notification pursuant to Article 88 (3) EC has been made. Finally, the Federal Administrative Court found that the order for repayment complied with the rule that such an order must be made within one year after the date when the administrative authority concerned became aware that the State aid had been unlawfully granted.

IV- Comment of the authors of the 2006 study

It is interesting to note that the Higher Administrative Court stated in this case that the mere fact that the State aid was illegally granted due to the non-notification of the aid under Article 88 (3) EC is insufficient ground for making an order for recovery. Although this is only an *obiter dictum*, it would exclude actions by third party competitors aimed at obtaining an order for recovery, before the Commission has decided whether the State aid is compatible with the Common Market.

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[51] Case C-310/85, Deufil v Commission [1987] ECR 901.

I- Information on the judgment

Federal Administrative Court ("Bundesverwaltungsgericht"), 4 August 1993, NJW 1994, 339

II- Brief description of the facts and legal issues

The case concerned a depreciation allowance on capital expenditure in connection with production facilities under German tax law. The depreciation allowance applied only where the capital expenditure was incurred before 1 January 1975 and served the purpose of environmental protection. A relocation of the claimant's production facilities after 1 January 1975 precluded the application of the depreciation scheme. As a general rule, a relocation is considered to amount to the construction of new production facilities unless the reconstruction is necessary for the purposes of environmental protection.

III- Summary of the Court's findings

The Federal Administrative Court held that the relocation could not be justified by considerations of environmental protection and that the depreciation scheme did therefore not apply. The Federal Administrative Court went on to state that the application of the limitation in the scope of the depreciation scheme to capital expenditure incurred on or before 31 December 1974 was expressly required by the Commission following its investigation of the relevant German rules under Article 88 (2) EC.

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

I- Information on the judgment

Administrative Court ("*Verwaltungsgericht*") of Berlin, 15 August 2005, 20 A 135/05 (A); Higher Administrative Court ("*Oberverwaltungsgericht*") of Berlin, 8 November 2005

II- Brief description of the facts and legal issues

The case concerns the implementation of a negative Commission decision of 20 October 2004 in the so-called *Kvaerner* matter[52]. The Commission decided that Kvaerner, a shipyard, had received unlawful State aid which Germany was required to recover. The Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), which was responsible for recovering the State aid, issued an administrative act ordering recovery of the aid. Kvaerner challenged the administrative act, arguing that it was not based on a valid legal basis ("*Rechtsgrundlage*"). BvS took the view that it was entitled to base administrative acts either on Article 14 (3) of Regulation 659/1999 or directly on the Commission decision itself.

III- Summary of the Court's findings

The Administrative Court of Berlin decided that the recovery decision issued by BvS was unlawful. The German Constitution stipulates that every administrative act that imposes a burden on a person must be based on a specified legal basis ("*Vorbehalt des Gesetzes*", Article 20 (3) "*Grundgesetz*"). According to the Administrative Court of Berlin, the administrative act ordering recovery was not based on a valid legal basis. Both Article 14 (3) of Regulation (EC) No. 659/1999 and the Commission decision provided that recovery of unlawful State aid had to be implemented according to national law. The case law of the Community courts[53] does not, according to the Administrative Court of Berlin provide for an obligation to recover unlawful State aid by means of an administrative act. Similarly, the Berlin Court took the position that established case law[54] does not indicate that recovery of unlawful State aid can only be carried out if implemented by means of an administrative act. On 8 November 2005, the Higher Administrative Court of Berlin set aside the decision of the Administrative Court of Berlin and ruled that the administrative act for recovery issued by BvS was well-founded. According to the Higher Administrative Court, the *effet utile* of the negative Commission decision required that administrative law provided means of recovery to the grantor of the aid.

IV- Comment of the authors of the 2006 study

The decision of the Administrative Court of Berlin and of the Higher Administrative Court of Berlin were handed down in preliminary proceedings. If the position adopted by the Higher Administrative Court of Berlin is confirmed in the main proceedings, it can be expected that recovery of aid in Germany will only be sought in administrative proceedings in the future.

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[52] OJ (2005) L 120/21.

[53] In particular, Case T-155/95, Stadt Mainz v Commission [1996] ECR I-1557.

[54] In particular, Case C-404/97, Commission v Portugal [2000] ECR I-4922.

I- Information on the judgment

Regional Court ("Landgericht") of Halle, 23 December 2004, 9 O 231/04

II- Brief description of the facts and legal issues

The claimant, the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), sued the insolvency trustee of Zemag, which had been part of the Lintra group and in respect of which insolvency proceedings were opened on 1 March 2001. The Lintra group had received aid declared illegal by the Commission by decision of 28 March 2001. Part of that aid had been allocated to Zemag. When BvS applied to have the recovery claim registered as an insolvency claim, the trustee rejected the request on the grounds that section 41 (1) of the Insolvency Act only provided for the registration of claims created before the commencement of insolvency proceedings. In addition, the trustee claimed that BvS failed to show that the aid in question had actually been paid by Lintra to Zemag. Finally, the trustee claimed that recovery of the aid would violate the principle of good faith laid down in section 242 of the German Civil Code.

III- Summary of the Court's findings

The Halle Court found in favor of the claimant. It applied the case law developed by the Federal Court of Justice in 2003 pursuant to which contracts that involve the grant of illegal aid are null and void *ab initio* (under section 134 of the German Civil Code). Thus, section 41 (1) of the Insolvency Act did not prevent registration of the claim. The Halle Court also rejected the argument that the principle of good faith precluded recovery in insolvency proceedings.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Dresden, 24 September 2004, 3 U-1013/04; Regional Court ("Landgericht") of Chemnitz, 28 April 2004, 8 O-3619/02

II- Brief description of the facts and legal issues

The case concerned the implementation of a negative Commission decision of 28 March 2001 in the so-called *Lintra* matter. Lintra was a holding company in the New Federal States that was privatised in January 1995. The holding company comprised eight businesses, including Saxonia Edelmetalle GmbH that was sold to a third party. As part of the original privatisation deal, the German privatisation agency committed to paying a total of DM 824.2 million in restructuring aid. The Commission approved the aid in 1996, but subsequently opened proceedings for misappropriation of State aid. These proceedings were concluded by decision of 28 March 2001, in which the Commission ordered that an amount of DM 35 million should be repaid by the Lintra subsidiaries. DM 3.2 million of the total amount was allocated to Saxonia, the defendant. The defendant challenged the Commission decision before the CFI. Since the defendant refused to repay the amount voluntarily, the privatisation agency sued the defendant in the Regional Court of Chemnitz.

III- Summary of the Court's findings

In the proceedings before the Regional Court of Chemnitz, the defendant argued that there was no basis for the privatisation agency to reclaim the money under the provisions of unjust enrichment contained in the German Civil Code (section 812 "*Bürgerliches Gesetzbuch*" or "BGB"). The defendant argued that, to be able to rely on section 812 BGB, the claimant would have to show that it had actually paid the amount reclaimed to the defendant. In the defendant's view, the aid had been paid to the parent (Lintra) and there was no evidence that any part of that payment had been passed on to the subsidiary. The Regional Court of Chemnitz held that these considerations under national law were irrelevant, because the Commission decision stated that this specific amount should be reclaimed from Saxonia. The Regional Court of Chemnitz explained that it was in no position to challenge the Commission decision on this point. The Higher Regional Court of Chemnitz did not follow the Regional Court of Chemnitz and suspended the proceedings, pending Saxonia's court action against the decision before the CFI. The Higher Regional Court of Chemnitz took the position that there was no legal basis under German national law for recovery of the aid from Saxonia because there was no proof that the aid had actually been paid to Saxonia. The only legal basis for direct recovery was the Commission decision specifying that this specific amount should be reclaimed from Saxonia. The Higher Regional Court of Chemnitz stated that the decision of the CFI was prejudicial to the outcome of the proceedings. It therefore suspended the proceedings pursuant to a section of the German Code of Civil Procedure that allows for the suspension of proceedings in the event that prejudicial proceedings are pending before another court. In the opinion of the Higher Regional Court of Chemnitz, this suspension did not violate Article 242 EC (which provides that an action against a Commission decision does not have suspensory effect). In the opinion of the Higher Regional Court of Chemnitz, the alternative to suspending national proceedings would have been to refer the case to the ECJ under Article 234 EC given the substantial doubts as to the legality of the Commission decision. The Higher Regional Court of Chemnitz considered that this was not advisable, since proceedings were already pending before the CFI and, accordingly, decided instead to suspend the proceedings.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Hamburg, 2 April 2004, 1 U-119/00; Regional Court ("Landgericht") of Hamburg, 29 June 2000, 303O-358/96

II- Brief description of the facts and legal issues

These two judgments concerned the recovery of State aid pursuant to a negative decision of the Commission of 31 October 1995 in the case of *Hamburger Stahlwerke GmbH*. In its decision, the Commission found that loans granted to Hamburger Stahlwerke GmbH during the period from 1992 to 1993 amounting to DM 204 million constituted restructuring aid that was incompatible with Article 4 (c) ECSC. It ordered Germany to recover those amounts from the beneficiary of the aid. During the period in which the loans were granted, Hamburger Stahlwerke GmbH underwent a series of restructuring steps, each of which was accompanied by successive loans granted by a public bank that was controlled by the City of Hamburg, Hamburger Landesbank. Ultimately, the business of Hamburger Stahlwerke GmbH was transferred to an Indian steel manufacturing group ("ISPAT"). ISPAT acquired the loans granted to Hamburger Stahlwerke GmbH from Hamburger Landesbank at a price that was DM 90 million less than face value. The loans were subsequently transferred to another group member and eventually repaid by the new company operating the business of Hamburger Stahlwerke GmbH. Thus, the loans had eventually "disappeared". To implement the negative Commission decision, the City of Hamburg filed a court action against the defendant operator of the business of Hamburger Stahlwerke GmbH to recover the balance between the face value of the loans and the price paid by the ISPAT group.

III- Summary of the Court's findings

The Federal government filed an appeal against the negative Commission decision, which was still pending when the Regional Court of Hamburg rendered its decision in the case brought by the City of Hamburg regarding the recovery of the loan. In its decision, the Regional Court of Hamburg noted that both the claimant and the defendant were of the view that the Commission decision was illegal and should be annulled by the ECJ. Nevertheless, the Regional Court of Hamburg went on to decide the case as if the Commission decision could stand. On the question before it, the Regional Court of Hamburg reached the conclusion that the action by the City of Hamburg should be dismissed, because the loan had been paid out by Hamburger Landesbank and not by the City of Hamburg and, due to the transfer of the loans to another entity of the ISPAT group and their subsequent repayment, there were no open claims that could be the basis for a recovery action. The Regional Court of Hamburg noted that this result, which it regarded as obligatory under national law, may be unfortunate, because the purpose pursued by the illegal aid, the continued operation of the business of Hamburger Stahlwerke GmbH, had been achieved and there was nothing that could be done to reverse this. However, according to the Regional Court of Hamburg, the result was inevitable, given the structure of the national legal provisions under which the illegal aid had to be recovered.

When the case was before the Higher Regional Court of Hamburg, the action by the Federal government against the negative Commission decision was dismissed by the ECJ. The Higher Regional Court of Hamburg set aside the judgment of the Regional Court of Hamburg and held that the new owners of the business of Hamburger Stahlwerke GmbH would have to repay the loans received from Hamburger Landesbank directly to the City of Hamburg. In reaching this decision, the Higher Regional Court of Hamburg held that the violation of Article 88 (3) EC resulted in the invalidity of both the loan granted by Hamburger Landesbank to Hamburger Stahlwerke GmbH and

the underlying agreement between the City of Hamburg and Hamburger Landesbank pursuant to which the loan had been granted. Thus, the City of Hamburg was in a position to bring a direct claim against Hamburger Stahlwerke GmbH (and its successors) for unjust enrichment. The Higher Regional Court of Hamburg explained that it was necessary to regard all contractual relationships surrounding the grant of the loan as null and void in order to preserve the *effet utile* of the Commission decision.

I- Information on the judgment

Federal Court of Justice ("Bundesgerichtshof"), 20 January 2004, XI ZR 53/03, NVwZ 2004, 636

II- Brief description of the facts and legal issues

The defendant, a producer of synthetic fibers and yarns, received an investment grant ("*Investitionszuschuss*") amounting to DM 1.2 million in 1982 from the claimant, a publicly owned bank. In addition, the claimant received an investment allowance ("*Investitionszulage*") amounting to DM 1.7 million in 1984 from another public authority. In 1985, the Commission decided that both the investment grant and the investment allowance constituted unlawful State aid and that they must be recovered[55]. The Commission's decision was subsequently confirmed by the ECJ[56], and the defendant repaid the investment allowance. In 1995, the claimant requested repayment of the investment grant plus interest from the defendant. The defendant refused, arguing, inter alia, that recovery of the investment grant would be contrary to the principle of good faith ("*Treu und Glauben*", section 242 *BGB*).

III- Summary of the Court's findings

The Federal Court of Justice confirmed that contracts that infringe Article 88 (3) (3) EC are null and void according to section 134 *BGB*. Any payments or goods received under the respective contracts must be returned on the basis of the provisions of unjust enrichment ("*ungerechtfertigte Bereicherung*"). The Federal Court of Justice held that the defendant could not refuse to repay the investment grant by invoking the principle of good faith. In particular, the defendant could not draw conclusions from the fact that it took eight years from the ECJ judgment for the defendant to be asked to repay the investment grant. Also, recovery was not precluded by the fact that German public officials had frequently assured the defendant that the investment grant would not be recovered. With regard to recovery of unlawful State aid, national authorities do not have discretionary powers. Their role is limited to executing Commission decisions. Finally, the Federal Court of Justice decided that the claimant was entitled to ask for payment of interest, and that it was correct in calculating the level of interest on the basis of national law.

[55] OJ (1985) L278/1.
[56] Case C-310/85, Deufil GmbH & Co. KG v Commission [1987] ECR 901.

I- Information on the judgment

Federal Court of Justice ("Bundesgerichtshof"), 24 October 2003, V ZR 48/03, EuZW 2004, 254

II- Brief description of the facts and legal issues

The claimant, a sub-agency of the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), was responsible for the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*" or "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1997, the claimant sold 150 acres to the defendant, some of which were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* contained State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid[57]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be adapted retroactively to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts, requesting the additional payment. The defendant refused to pay, arguing that the Commission decision was unlawful.

III- Summary of the Court's findings

The Federal Court of Justice ordered the defendant to make the additional payment.

(I) The Federal Court of Justice found that the question of the legality of the Commission decision was relevant for the case. However, it held, with reference to established ECJ case law[58], that the defendant was precluded from questioning the lawfulness of the Commission decision before a national court. The defendant, as the beneficiary of the unlawful State aid, could have challenged the decision before the ECJ, but instead allowed the mandatory time limit laid down in Article 230 (5) EC to pass.

(II) The Federal Court of Justice subsequently confirmed that recovery of unlawful State aid can be excluded in exceptional circumstances according to the principle of good faith ("*Treu und Glauben*", section 242 BGB). However, the arguments brought forward by the defendant were not sufficient to establish exceptional circumstances.

[57] OJ (1999) L 107/21.
[58] Case C-188/92, TWD Textilwerke Deggendorf GmbH v Germany [1994] ECR I-833.

I- Information on the judgment

Regional Court ("Landgericht") of Magdeburg, 27 September 2002, 10 O 499/02 and Higher Regional Court ("Oberlandesgericht") of Naumburg, 14 May 2003, 12 U 161/02

II- Brief description of the facts and legal issues

The case concerned a claim for damages arising out of the alleged failure of the Federal State of Saxony-Anhalt ("*Land of Sachsen-Anhalt*") to notify aid in the steel sector within the time limit. The claim was based on a Commission decision under the ECSC Treaty allowing aid to steel producers in the German Federal States provided that the aid was notified to the Commission by 30 June 1994. The Federal government notified the aid after the expiration of the notification period. The Commission found that the aid was incompatible. In the proceedings before the Regional Court of Magdeburg, the claimant claimed that the aid would have been compatible, had the Federal government abided by the notification period. Consequently, the claimant reclaimed a certain part of the amount that it was required to repay as damages under German tort law.

III- Summary of the Court's findings

The Regional Court of Magdeburg dismissed the claimant's action. It was unclear to what extent the Commission would have been able to approve the aid if the notification deadline of 30 June 1994 had been met. The claimant had referred to another case, *EKO-Stahl*, in which the Commission had granted such exceptional approval. The Regional Court of Magdeburg dismissed the action because the claimant had failed to show a causal link between the failure of the German administration to notify the aid within the time limit and the declaration of incompatibility of the aid by the Commission. The Regional Court of Magdeburg also stated that if it was to grant the claimant damages, that would amount to aid of its own. Subsequently, the Higher Regional Court of Naumburg dismissed the claimant's appeal and the Federal Court of Justice rejected the claimant's application for a further appeal.

I- Information on the judgment

Federal Court of Justice ("Bundesgerichtshof"), 4 April 2003, V ZR 314/02, VIZ 2003, 340

II- Brief description of the facts and legal issues

The claimant, a sub-agency of the Federal Institute for special tasks related to reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" ("BvS"), was responsible for the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1997, the claimant sold 200 acres to the defendant, some of which were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* contained State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid[59]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be adapted retroactively to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts requesting the additional payment. The defendant refused to pay, arguing that section 3 (a) *AusglLeistG* was unconstitutional, since it retroactively deprived the defendant of a vested legal entitlement.

III- Summary of the Court's findings

The Federal Court of Justice ordered the defendant to make the additional payment.

(I) Section 3 (a) *AusglLeistG* could only deprive the defendant of a vested legal entitlement if the purchase contract entered into in 1997 was valid. But this was not the case. The sale of the land below market price infringed Article 88 (3) (3) EC. Under section 134 of the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*"), a contract that infringes a legal prohibition ("*gesetzliches Verbot*") is void. Referring to the ECJ's case law[60], the Federal Court of Justice held that section 134 BGB must be understood as applying to infringements of Article 88 (3) (3) EC. This applies regardless of whether the Commission subsequently approves the aid in question. Only the nullity of the contract can remove any distortions of competition by enabling competitors to request recovery of the unlawful State aid.

(II) Generally, if a contract is void according to section 134 *BGB*, the parties to the contract must return any payments or goods received under the contract. Hence, the defendant would have been obliged to return the land to the claimant. However, the Federal Court of Justice held that, following the amendment to the *AusglLeistG* (section 3 (a) *AusglLeistG*), the contract was affirmed ("*Bestätigung*", section 141 *BGB*) subject to modified conditions, namely with a purchase price that did not amount to unlawful State aid.

(III) Finally, the Federal Court of Justice discussed whether recovery of unlawful State aid can be excluded according to the principle of good faith ("*Treu und Glauben*", section 242 BGB). Usually, the community interest in restoring competition prevails over the interests of the beneficiary of the aid, even if the beneficiary does not act negligently when receiving the unlawful aid. The Federal Court of Justice left open whether recovery may be excluded in exceptional circumstances, since the defendant did not argue that such exceptional circumstances existed in his case.

[59] OJ (1999) L 107/21.

[60] Case C-120/73, Lorenz v Germany [1973] ECR 1471; Case C-354/90, FNCE v France [1991] ECR I-5505.

I- Information on the judgment

Regional Court ("Landgericht") of Magdeburg, 8 August 2002, 4 O 194/02 and Higher Regional Court ("Oberlandesgericht") of Naumburg, 18 December 2002, 5 U 100/02

II- Brief description of the facts and legal issues

The case concerned an action for the repayment of shareholders' loans granted by the Privatisation Agency for Businesses in the New Federal States ("*Treuhandanstalt*") to SKET, an equipment manufacturer. During the entire privatisation period in the early 1990s, SKET had received aid on an ongoing basis from the Privatisation Agency. In 1996, privatisation efforts finally failed and bankruptcy proceedings were opened regarding SKET's assets. In 1997, the Commission declared (some of) the State aid received by SKET incompatible and ordered its repayment. The Privatisation Agency brought proceedings before the Regional Court of Magdeburg against the trustee in bankruptcy who refused to recognise the recovery claim and, alternatively, took the position that the claim should be treated as a subordinated shareholder loan. The Regional Court of Magdeburg had to address a number of issues raised under German law relating to unjust enrichment and the question of whether a claim for the recovery of a loan granted by a public shareholder, which had been found to constitute State aid, can be treated as a subordinate loan (pursuant to section 32 (a) of the German Act on Companies with Limited Liability).

III- Summary of the Court's findings

The Regional Court of Magdeburg found in favour of the Privatisation Agency and set aside the defendant's arguments based on the law of unjust enrichment and the subordination of the loan. The Regional Court of Magdeburg based its decisions only on considerations of German law. Following the defendant's appeal to the Higher Regional Court of Naumburg, that Court affirmed the decision of the Regional Court of Madgeburg and, in addition, declared that the *effet utile* of the Commission decision required that the recovery claim be treated as a normal bankruptcy claim. The provisions of German corporate law which provide that claims for the repayment of a loan by a shareholder who granted a loan in a situation in which a prudent shareholder would have provided capital cannot be applied to a situation where State aid is reclaimed pursuant to a Commission decision.

I- Information on the judgment

Regional Court ("Landgericht") of Rostock, 23 July 2002, 4 O 468/01, VIZ 2002, 632

II- Brief description of the facts and legal issues

The claimant, a sub-agency of the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), was responsible for the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1998, the claimant sold land to the defendant, a local farmer. Some plots of land were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* contained State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid[61]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be retroactively adapted to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts, requesting the additional payment. The defendant refused to pay, arguing that at the time the contract was concluded, it could not have known that the *AusglLeistG* provided for unlawful State aid.

III- Summary of the Court's findings

The Regional Court of Rostock decided in favour of the defendant, rejecting the claimant's request for additional payment.

(I) The Regional Court of Rostock discussed the ECJ's jurisprudence in detail, in particular the *Alcan* decision[62] and subsequent decisions by German courts. The Regional Court of Rostock acknowledged that the legitimate expectations of the recipients of unlawful State aid could be protected only in exceptional circumstances. In particular, the beneficiary of the aid recipient could not rely on legitimate expectations if he knew or should have known that the aid, although notifiable, had not been notified to the Commission. These principles applied regardless of whether the aid had been granted by an administrative act or under a private contract.

(II) The Regional Court of Rostock held that the request for additional payment was legitimately based on section 3 (a) *AusglLeistG*, but that it was contrary to the principle of good faith laid down in section 242 BGB. The defendant had, relying on the validity of the purchase contract, assumed various financial commitments, which, if it was required to repay the aid, could threaten its financial existence. As a local farmer, the defendant could not have known that a sale of land under the *AusglLeistG* comprised aid elements. The situation in the *Alcan* case was different, since Alcan was a globally active company, which knew that it had been granted aid. Taking into account that the effect of the unlawful aid was regionally limited, the Regional Court of Rostock held that, in this particular case, the interests of the defendant outweighed the Community interest, and that the claimant was therefore not allowed to recover the aid.

[61] OJ (1999) L 107/21.

[62] Case C-24/95, Land Rheinland-Pfalz v Alcan [1997] ECR I-159.

I- Information on the judgment

Higher Regional Court ("Oberlandesgericht") of Nürnberg, 21 March 2002, 12 U 2961/01, Regional Court ("Landgericht") of Amberg, 23 July 2001, 41 HKO 546/97

II- Brief description of the facts and legal issues

These decisions concerned the implementation of the negative Commission decision in the *Neue Maxhütte* case. In its decisions of 18 October 1995 and 13 March 1996, the Commission held that loans granted by the Federal State of Bavaria ("*Bayern*") to the ailing steel maker Neue Maxhütte-Stahlwerke GmbH amounting to DM 74 million constituted State aid granted in violation of Article 4 (c) ECSC. The Commission ordered recovery of this amount. During the entire period in which the loans were granted, the Federal State of Bavaria was a shareholder in Neue Maxhütte-Stahlwerke GmbH. Under the applicable German Act on Companies with Limited Liability ("*GmbH-Gesetz*", section 32 (a) (1)), a shareholder who grants a loan to a company with limited liability in a situation in which a diligent shareholder would have subscribed to equity (because the company was in a crisis) will be treated as a non-preferential creditor with a secondary claim ("*nachrangige Konkursforderung*") with respect to its loan if the company becomes insolvent. In the case before the Regional Court of Amberg, the trustee in bankruptcy claimed that the Federal State of Bavaria should be treated as a non-preferential secondary creditor, since it was a shareholder when it granted the loans in question.

III- Summary of the Court's findings

The Regional Court of Amberg held that the loans should be treated as ordinary claims in bankruptcy (not as unsecured secondary claims as the trustee in bankruptcy suggested). The Regional Court of Amberg explained that treating the loans differently would jeopardise the *effet utile* of the negative Commission decision. The Higher Regional Court of Nürnberg rejected the appeal brought by the trustee in bankruptcy as inadmissible. In particular, the Higher Regional Court of Nürnberg did not consider that it was necessary to refer the question concerning the proper treatment of the loans granted by the Federal State of Bavaria in its capacity as shareholder to the ECJ. The Higher Regional Court of Nürnberg applied the reasoning of the Regional Court of Amberg which had stated that the ECJ required in Alcan that illegal aid be recovered under national law in a manner which does not render recovery practically impossible.

I- Information on the judgment

Higher Administrative Court ("Verwaltungsgerichtshof") of Baden-Württemberg, 10 December 1996[63]

II- Brief description of the facts and legal issues

The case concerned the grant of State aid to the receiver of a company in bankruptcy proceedings without prior notification under Article 88 (3) EC. The aid was granted by governmental agencies of the Federal State of Baden-Württemberg. The purpose of the aid was to allow for the acquisition of a newly established rescue company (of which the receiver was the sole shareholder) by a third party company. The rescue company used the aid to finance an increase in its share capital. Subsequently, the third party company merged with the rescue company and continued business under the name of the latter.

In its decision of 17 November 1987 addressed to Germany[64], the Commission found that the financial aid was State aid that was incompatible with the Common Market under Article 87 EC and ordered recovery of the aid. This decision was neither challenged by Germany nor complied with by the German authorities. In an action brought by the Commission against Germany, the ECJ handed down a declaratory judgment holding that Germany was in breach of the EC Treaty[65].

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

III- Summary of the Court's findings

The judgment of the Higher Administrative Court of Baden-Württemberg mainly dealt with the question of when the one-year time limit for orders of repayment of illegally granted State aid starts to run under the applicable German rules. The Higher Administrative Court of Baden-Württemberg held that the time limit had been complied with, which started to run when the governmental agency responsible for recovery was informed of the negative decision of the Commission and of the judgment of the ECJ. The Higher Administrative Court of Baden-Württemberg emphasised that, as a general rule, the public interest in obtaining repayment of State aid granted in violation of EC law takes precedence over the legitimate expectations of the beneficiary to keep the State aid. It appears that the Higher Administrative Court of Baden-Württemberg is more inclined to consider the legitimate expectations of the beneficiary if the grant of State aid only violates German rules.

It is interesting to note that the Higher Administrative Court of Baden-Württemberg stated, *obiter dictum*, that an order for repayment cannot be issued if governmental agency could be considered to have acted in bad faith. The ECJ clearly took a different view in its judgment in the AIcan case, which was delivered only a few months after the judgment of the *Verwaltungsgerichtshof*. The ECJ held that a governmental agency must recover illegally granted aid even where it acted in bad faith.

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.

[63] Reported in NVwZ 1998, 87.
[64] OJ (1988) L 79/29.
[65] Case C-5/89, Germany v Commission [1990] ECR I-3437.

I- Information on the judgment

Federal Administrative Court ("Bundesverwaltungsgericht"), 17 February 1993[66]; Higher Administrative Court ("Oberverwaltungsgericht") of Münster, 26 November 1991[67]; Administrative Court ("Verwaltungsgericht") of Cologne, 21 April 1988[68]

II- Brief description of the facts and legal issues

The case involved the grant of tax allowances. The Commission found that this amounted to illegal State aid, since no notification had been made under Article 88 (3) EC. The Commission further found the aid incompatible with the Common Market under Article 87 EC and, by decision of 10 July 1985, ordered recovery of the aid.

The recipient challenged the administrative act ordering recovery of the aid (which was issued on 27 March 1986, i.e. once the Commission had rendered its decision but before the ECJ delivered its judgment[69] confirming the Commission's view following the recipient's challenge of the decision before the ECJ). This administrative act was based on section 48 of the German Act on Administrative Proceedings ("*VwVfG*"), which empowers administrative agencies to annul illegal administrative acts.

III- Summary of the Court's findings

The Federal Administrative Court upheld the previous judgments in the case in full and dismissed the beneficiary's action. The Federal Administrative Court stated that orders for recovery of illegally granted State aid must be based on section 48 *VwVfG*. The Federal Administrative Court further stated that, as a general rule, although the interest of the beneficiary not to be ordered to repay the State aid must be weighed against the public interest that illegally granted State aid is recovered, there will be no legitimate interest of the beneficiary worthy of protection if State aid was granted without due notification under Article 88 (3) EC. This amounted to a narrow construction of section 48 *VwVfG*, which states that, as a general rule, repayment of illegal payments must not be ordered where the recipient has a legitimate interest in retaining the sum granted. The provision further states that a legitimate interest will generally exist if the recipient has already spent the sum granted. The provision also lists the cases where no legitimate interest may be invoked by the recipient, i.e. if the recipient obtained payment by fraud or by misrepresentation of fact or was aware of the unlawfulness of the payment, or if the recipient's ignorance of the unlawfulness of the payment was due to gross negligence.

The Federal Administrative Court further stated that, as a general rule, a recipient can reasonably be required to check whether a notification pursuant to Article 88 (3) EC has been duly made. Finally, the Federal Administrative Court found that the order for repayment complied with the rule that such an order must be made within one year of the date when the administrative authority concerned becomes aware that the aid has been unlawfully granted.

It is interesting to note that the Higher Administrative Court of Münster stated, in this case, that the mere illegality of the grant of aid due to lack of notification under Article 88 (3) EC does not

[66] Reported in NJW 1993, 2764.
[67] Reported in EuZW 1992, 286.
[68] Reported in EuZW 1990, 387.
[69] Judgment of 24 February 1987, Case C-310/85, Deufil GmbH & Co. KG v Commission [1987] ECR 901.

constitute a ground for an order for recovery. Although only *obiter dicta*, this would exclude actions by third party competitors seeking to obtain an order for recovery, before the Commission has pronounced itself on the compatibility of the aid with the Common Market.

I- Information on the judgment

Federal Tax Court ("Bundesfinanzhof"), 12 October 2000, III R 35/95

II- Brief description of the facts and legal issues

The Law an Investment Grants ("*Investitionszulagengesetz*" or "*InvZulG*") allowed for investment grants of 12% of the purchase price of certain goods in specific regions. In 1993, the Commission decided that the *InvZulG* amounted to unlawful State aid. The *InvZulG* was subsequently amended, henceforth allowing for investment grants of only 8% of the purchase price. The claimant applied in 1993 for an investment grant for goods he had purchased in 1992. The defendant granted an investment grant of 8%, but refused to grant 12%. The claimant challenged the refusal, arguing that it was retroactively deprived of a vested legal entitlement.

III- Summary of the Court's findings

The Federal Tax Court rejected the complaint, holding that the claimant was not unlawfully deprived of a vested legal entitlement. The amendment of the *InvZulG* was based on a decision by the Commission, which had not been challenged within the mandatory time limit laid down in Article 230 (5) EC. Germany was therefore under the legal obligation to amend the *InvZulG*. In addition, the claimant could not rely on the principle of good faith, since, by the time the investment was made, the Commission had already initiated a formal State aid investigation. Accordingly, the claimant should have been aware that the 12% grant provided for in the *InvZulG* amounted to unlawful State aid.

I- Information on the judgment

Federal Administrative Court ("Bundesvewaltungsgericht"), 23 April 1998[70] after a reference for a preliminary ruling to the ECJ of 28 September 1994[71]; Higher Administrative Court ("Oberverwaltungsgericht") of Koblenz, 26 November 1991[72] and Administrative Court ("Verwaltungsgericht") of Mainz, 7 June 1990[73]

II- Brief description of the facts and legal issues

The case involved aid amounting to DM 8 million granted to an aluminum plant operator in order to safeguard the future operation of the plant. Before the aid was granted detailed negotiations took place between the administrative agency granting the aid and the operator of the plant. Although the Commission, which became aware of the agency's intention to grant the aid through press coverage, had requested notification under Article 88 (3) EC, no notification was made. The Commission found that the aid was incompatible with the Common Market and ordered recovery[74]. The German authorities, however, did not claim repayment. The Commission's order for recovery was upheld by the ECJ[75] in proceedings commenced by the Commission against Germany.

Following the ECJ's decision, the administrative agency issued an order for repayment of the aid. This order was challenged by the recipient of the aid, who invoked the principle of legitimate expectations as a defence to the claim for repayment. The defendant further argued that the amount granted in State aid had been fully spent and that the order for repayment violated the one-year time limit under section 48 *VwVfG* that applies to orders for repayment.

III- Summary of the Court's findings

Both the Court of First Instance ("*Verwaltungsgericht Mainz*") and the Higher Administrative Court ("*Oberverwaltungsgericht*") of Koblenz found in favour of the recipient. The Higher Administrative Court of Koblenz reached a conclusion on the meaning of section 48 *VwVfG* that was contradictory to that set out in the judgment of the Higher Administrative Court of Münster handed down on the same day (and which is summarised above). The Higher Administrative Court of Koblenz stated that, in the absence of EC rules which provide for an obligation to repay illegal State aid that is compatible with the Common Market, any obligation to repay is governed by national law, like section 48 *VwVfG*. The Higher Administrative Court of Koblenz then went on to apply this provision, without modification, to this case (whereas the Higher Administrative Court of Münster construed the provision narrowly to be able to grant the order for repayment). The rationale for the judgment was that the order for repayment violated the one-year time limit of section 48 *VwVfG*. The Higher Administrative Court of Koblenz found that the time limit started to run in June 1986, i.e. when the negative decision of the Commission had became final and absolute. The order was issued on 26 September 1989.

Reference for preliminary ruling after further appeal: The Federal Administrative Court, to which the case was then appealed, asked the ECJ in its reference for a preliminary ruling, whether an order for

[70] Unreported; file no. 3 C 15.97.
[71] Reported in EuZW 1995, 314; Judgment of ECJ of 20 March 1997, Case C-24/95, Land Rheinland-Pfalz v Alcan [1997] ECR I-159.
[72] Reported in EuZW 1992, 349.
[73] Reported in EuZW 1990, 389.
[74] Decision of 14 December 1985, OJ (1986) L 72/30.
[75] Judgment of 2 February 1989, Case C-94/87, Commission v Germany [1989] ECR 175.

the repayment of illegal State aid must be issued by the national authority even if the time limit under national law for orders of repayment has expired. The Federal Administrative Court further asked whether there is a positive obligation to order repayment regardless of the fact that the national authority is fully responsible for the illegality of the grant of the aid, and that an order for repayment may therefore amount to an act of bad faith on the part of the national authority. Finally, the Federal Administrative Court asked whether an order for repayment can be issued even if the recipient has fully spent the State aid granted who may argue that there was no unjust enrichment. All these issues raised by the Federal Administrative Court correspond to various provisions of section 48 VwVfG which governs, *inter alia*, orders for repayment.

Judgment of ECJ: The ECJ, by judgment of 20 March 1997[76], answered all three questions in the affirmative. The ECJ stated, in particular, that the recipient may only have a legitimate expectation as to the lawfulness of the granting of State aid if it has duly ascertained whether the procedures laid down in Article 88 EC have been fully complied with.

Final judgment of the Federal Administrative Court: The reasoning by the ECJ was fully adopted by the Federal Administrative Court in its judgment of 23 April 1998. The Federal Administrative Court emphasised that it was bound by the ECJ's judgment. The Federal Administrative Court rejected the argument of the recipient that the ECJ's judgment was *ultra vires*. Following the ECJ's judgment, the recipient argued that consequences as far reaching as the those resulting from the ECJ's judgment for the interpretation of German rules on recovery of illegally granted State aid can only be based on a Council Regulation under Article 94 EC. The Federal Administrative Court stressed that, notwithstanding the very restrictive interpretation of the defence of legitimate expectations by the ECJ (such that legitimate expectations may be asserted only if the beneficiary has duly verified that the notification and control procedure set forth in Article 88 EC have been complied with), the beneficiary can bring an action before the ECJ against Commission decisions ordering recovery of State aid in exceptional circumstances where the existence of legitimate expectations can be established.

The judgment does not indicate when this exception can be established. If one considers the general rule emphasised by both the ECJ and the Federal Administrative Court, i.e. that a beneficiary must check compliance with Article 88 EC if it wants to argue the defence of legitimate expectations successfully, it is clear that exceptional cases will be extremely rare. Up to now there has been only one case where the ECJ accepted the raising of the defence of legitimate expectations against an order for recovery[77]. In that case, aid was granted on the basis of a scheme approved by the Commission but more aid was granted than originally foreseen. The Netherlands notified this modification to the Commission, which decided after 26 months that the aid was incompatible with the Common Market and ordered recovery. The ECJ held that this period of time was excessive and gave rise to legitimate expectations on the part of the beneficiary.

It appears therefore that this argument can only be raised where the Commission, upon due notification of an aid, fails to reach a conclusion within a reasonable period of time. However, it is impossible to predict what period of time may be considered unreasonable. Although the Commission has set itself the ambitious goal of carrying out investigations under Article 88 (2) EC

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

[77] Case C-223/85, Rijn-Schelde-Berolme (RSV) Machinefabrieken en Scheepswerven NV v Commission [1997] ECR 4618.

within six months, this deadline is rarely met in practice. In fact, investigations frequently last substantially longer.

Federal Constitutional Court ("Bundesverfassungsgericht"), 17 February 2000, 2 BvR 1210/98, EuZW 2000, 445

The Federal Constitutional Court rejected the complaint. The Federal Administrative Court had, based on the ECJ's Alcan decision, correctly applied the law. In particular, the Federal Administrative Court had taken sufficient account of the claimant's legitimate expectations and other rights stemming from the principle of good faith . The fact that the Federal Administrative Court had decided that the Community interest in recovering unlawful State aid outweighed the claimant's interests did not infringe the claimant's fundamental rights. In addition, the Federal Constitutional Court had no reason to discuss whether the ECJ's *Alcan* decision exceeded the limits of Community law ("*ausbrechender Rechtsakt*").

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.