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

Competition Appeal Tribunal, 10.12.2008, 1107/4/10/08, Merger Action Group v. Secretary of State for Business, Enterprise and Regulatory Reform, [2008] CAT 36

II- Brief description of the facts and legal issues

The application for review of the decision of the Secretary of State not to refer the proposed merger between Lloyds TSB and HBOS to the Competition Commission was refused. Amongst other findings, the Competition Appeal Tribunal ("CAT") said that the FSA had not necessarily made an error of law in its submission to the Secretary of State by stating that EC State aid rules could have a dampening effect on the competitive efforts of a recipient.

Parties:

- The applicants: Merger Action Group;
- The respondent: Secretary of State for Business, Enterprise and Regulatory Reform.

Factual background:

This case took place against the background of the global crisis in the financial markets which caused many major banking institutions to experience unprecedented difficulties. On 18 September 2008, it was announced that terms had been agreed for an acquisition by Lloyds TSB of HBOS. The bid was conditional on no reference to the Competition Commission being made. On the same day, the Secretary of State issued an intervention notice under section 42(2) of the Enterprise Act. This section provides that the Secretary of State may issue an intervention notice if he believes that a relevant merger situation has been created to which one or more public interest considerations are relevant. The Secretary of State then laid before Parliament an order specifying a new public interest consideration which was approved and came into force on 24 October 2008. The new public interest consideration is "the interest of maintaining the stability of the UK financial system" (Section 58(2D), Enterprise Act 2002). The OFT produced a report to the Secretary of State, as required by the relevant legislation, in which it found that the proposed merger may be expected to result in a substantial lessening of competition such that further inquiry by the Competition Commission is warranted.

By a decision dated 31 October 2008 the Secretary of State decided not to refer to the Competition Commission the proposed merger between Lloyds TSB and HBOS ("the Decision"). The Decision stated that the interest of maintaining the stability of the UK financial system was relevant to the case and that taking account only of the substantial lessening of competition and the public interest consideration the creation of a relevant merger situation was not expected to operate against the public interest. The Secretary of State said that, despite the recommendations of the OFT, having regard to the submissions made by HM Treasury, the Financial Services Authority and the Bank of England he considered that the merger would result in significant benefits to the public interest as it relates to ensuring the stability of the UK financial system and that those benefits outweighed the potential for the merger to result in the anti-competitive outcomes identified by the OFT.

During this period, several sets of measures were implemented by the Government to attempt to ensure the stability of the financial system including making commercial investments in banks and building societies to help them stabilise their position. Lloyds TSB and HBOS were amongst the beneficiaries of the proposed schemes but the government support was conditional on the proposed merger going ahead. This rescue package was approved by the European Commission under the State aid rules.

III- Summary of the Court's findings

Legal issues:

The CAT considered the following issues:

- locus standi of the applicants; and
- as grounds for review of the Decision itself:
    - fettering of discretion;
    - irrationality;
    - irrelevant considerations; and
    - proportionality.

On the first issue, the CAT established that the relevant test for standing in these circumstances is contained in section 120(1) of the Enterprise Act. In order to be able to apply for review of the Decision, the applicants must establish that they are 'persons aggrieved' by the Decision. The Enterprise Act contains no definition of 'person aggrieved'. The CAT decided that although the test for standing in claims for judicial review is phrased differently, in that a claimant must prove 'sufficient interest' to proceed with a claim for judicial review, there was no reason why the factors that inform the question of standing in the current case should be wholly different.

The CAT held that the question of whether an applicant is an aggrieved person should be determined in the light of all the circumstances of the case. Having reviewed the factors for and against according standing to the applicants, the CAT decided that the position was borderline. However, they considered that given the "wholly exceptional circumstances of the case and particularly in view of the specific interest and strong feeling which the Merger has aroused in Scotland"(At paragraph 47) it was justified to find that the applicants were 'persons aggrieved'.

In conjunction with arguments regarding fettering of discretion by statements made prior to the Decision being taken and irrationality in the assessment of advice given by the OFT, the applicants submitted that the Secretary of State had erred in law as the FSA's references to the State aid provisions of the EC Treaty, which were recited in the Decision, contained inaccuracies. It was also submitted that the Decision overlooked certain developments in the European Commission Communication on compliance with State aid rules in the context of the current financial crisis (The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis" (OJ [2008] C270/02)).

The CAT established that the present application should be determined applying the same principles as would be applied by a court on an application for judicial review which do not differ materially between the jurisdictions of Scotland and England and Wales. This means that the Tribunal is considered solely with the lawfulness of the Decision rather than its correctness.

Evidence was put before the CAT regarding statements made by the Prime Minister and the Chancellor of the Exchequer about the merger, to the effect that competition concerns would be waived in the public interest, before the Decision had actually been taken. It was asserted that these statements fettered the discretion of the Secretary of State such that he did not decide independently but merely followed government policy. The applicants then pointed to certain parts of the Decision which, in their opinion, demonstrated this fettering effect. One of these concerned the FSA's submissions on the effect of the State aid provisions of the EC Treaty upon a banking institution which is in receipt of aid. The FSA stated that,

"*EU State aid rules preclude a government-owned entity from competing aggressively with private sector banks*" (At paragraph 84)

The applicants contended that this fettered the discretion of the Secretary of State as the views were different from those of the OFT which were then belittled by them. Also, they said that the statement was wrong in law and by referring to it in the Decision the error was incorporated therein thereby vitiating the Decision itself. The applicants submitted that the Commission's recently modified approach meant that there would be little if any constraint on the competitive ability of a recipient of State aid.

The CAT did state that there was considerable force in the argument of the respondent that the situation was more complicated than the applicants had represented, but did not decide whether or not there was an error of law by the FSA. It found that views of the OFT and the FSA were actually quite similar. Both bodies took the view that the State aid rules could have a dampening effect on the competitive efforts of a recipient. Also the Secretary of State had merely recited these submissions in the Decision and there was no evidence of adoption of them so it could not be asserted that the FSA statements had fettered the Secretary of State's discretion.

The CAT also found that there was no evidence that the Secretary of State had failed to take into account alternative means of addressing the problem of HBOS, such as the government recapitalisation programme announced after the merger proposal. The evidence pointed to the fact that the merger and the recapitalisation programme were complementary and there was no basis to assert that the Secretary of State did not properly consider the continuing need for the merger in the light of subsequent developments.

Ultimately the CAT found that, although the applicants had standing to bring the challenge, all of the arguments of the applicants failed to prove the unlawfulness of the Decision and therefore the application should be dismissed.

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

I- Information on the judgment

Actions instituted by beneficiaries: R v The Secretary of State for Trade and Industry (and others) ex parte The Isle of Wight Council CO/4077/1999

II- Brief description of the facts and legal issues

The Isle of Wight Council sought judicial review of two measures taken to classify areas within the UK. This classification was for the purpose of the grant by the UK Government of regional selective assistance ("RSA") and the grant by the Commission of assistance similarly made available on a regional basis from the structural funds of the EC, more particularly in relation to Objective 2 areas.

Grants of RSA generally constitute State aid falling within Article 87 EC. The Commission's guidelines on regional aid set population ceilings for areas qualifying under Article 87 (3) (a) and (c) EC. Member States must send the Commission their draft regional aid map, setting out the regions they propose for approval under Article 87 (3) (c) EC.

In response to the government's public consultation process on the Assisted Areas map in March 1998, the Isle of Wight based its case for inclusion on (i) poor GDP per head, (ii) very high unemployment and (iii) exceptional problems of insularity. However, in the final analysis, the Isle of Wight was not proposed as an Assisted Area because it was not suitable for the kind of large scale industrial aid that the revised RSA would cover.

Similarly, with regard to the structural funds, there is a population ceiling for each Member State, and the aggregate population of the Objectives 1 and 2 regions in a Member State must not exceed that population ceiling. Article 4 of the Structural Funds Regulation (Council Regulation (EC) No 1260/1999 (the "Regulation")) sets out the basis on which geographic areas can qualify for Objective 2. It is the Member State that proposes Objective 2 areas, but the Commission that takes the final decision. After consultation, the UK Government did not include the Isle of Wight within the proposed areas on the basis, *inter alia*, that it failed to meet many of the Article 4 criteria.

The applicants accepted that the Isle of Wight was not entitled as of right to be an Objective 2 region: their argument was essentially that the government ought to have made a special case for the Isle of Wight and that it could be criticised for not doing so on the basis that it failed to understand the extent of its discretionary powers.

III- Summary of the Court's findings

The application in respect of both proposals was dismissed.

With regard to RSA, the High Court concluded that neither Article 158 EC nor Article 159 EC gave guidance as to how the "complex balancing exercise" Member States must engage in to formulate their economic regional aid policy should be carried out. In the circumstances "*it cannot be irrational to exercise their powers so as to carry out a comparison between areas to reach a conclusion*." As a matter of fact, it found that the government had paid sufficient attention to the fact that the Isle of Wight is an island and to issues connected with its insularity.

With regard to the structural fund, the issue was not that the government could not make a special case for the Isle of Wight (i.e. that there was no basis on which a case could be made), as the applicants' arguments seemed to suggest. The High Court found that because, despite the wide discretion permitted to government, the making of a case for the inclusion of the Isle of Wight would constitute such a departure from the permitted degree of discretion as to amount to the making of a special case, the government could not be said to be so wrong in its view that its conclusion should be treated upon a perceived incapability to present the case, but as a discretionary decision not to present it. The applicants' arguments thus went to questions of 'overall balance and not to the integrity of the decision'. The wide powers of the government in this case were discretionary and the individual integrity of the discretion had not been subjected to attack.

I- Information on the judgment

Actions instituted by competitors: British Telecommunications plc v Director General of Telecommunications CO/1560/2000

II- Brief description of the facts and legal issues

by Directive 97/33/EC, the Interconnection Directive, and a decision of the Commission dated 22 December 1999, the UK Government had to require BT to introduce carrier pre-selection technology (which allowed customers to choose Other Licensed Operators' ("OLO") networks for certain telecommunications messages) by 1 April 2000. It was not possible to upgrade BT's network by this deadline so, as an interim solution, the Director General of the Office of Telecommunications ("Oftel") decided that autodialler boxes should be installed in customers' houses (which would route the relevant calls to the pre-selected OLO). Oftel decided that BT should pay half of the costs of this interim solution, given that it was BT's system which was not ready by the due date. BT appealed against that decision on various grounds, including that the decision on cost allocation amounted to illegal State aid.

III- Summary of the Court's findings

Mr Justice Moses ruled that the determination was not a measure constituting State aid. There was no advantage conferred exclusively on the OLOs. This was because, while BT had to pay 50% of the OLOs' costs of the autodiallers, the obligation originally imposed in the relevant directive meant that BT should provide carrier pre-selection facilities, and this obligation was now being met by the installation of autodialler boxes by the OLOs, pending BT's full compliance with its obligations under the relevant directive. The obligation could equally have been met by the provision of autodialler boxes by BT, in which case the OLOs might have been required to contribute to the costs. There was merely a division of the burden of costs resulting from the new system. Thus the determination did not represent aid at all.

Although it was not necessary for the High Court to determine the issue, it flagged the main area of dispute between the parties in relation to State aid. This was on the question of whether the measure involved a transfer of State resources. Oftel contended that the determination entailed no financial burden on the UK, either directly (in the form of any grant paid by the State), or indirectly (in the form of revenue foregone)[1]. BT contended that the authorities upon which, in the main, Oftel relied were no longer good law. BT cited a 1996 case concerning a preferential tariff system applied in the Netherlands for supplies of natural gas to a Dutch nitrate fertiliser producer[2].

In Mr Justice Moses' view, Oftel's position was the more correct one. However, had it been necessary to determine the issue, he would have referred the matter to the ECJ.

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1 Oftel cited Case 82/77, Openbaar Ministerie v Van Tiggele [1978] ECR 25 para 25. The ECJ concluded that a Dutch measure fixing minimum retail prices did not amount to a grant of aid by a Member State or through State resources (see paragraph 25 and the opinion of the Advocate General at paragraph 66). See also Joined Cases C-72 and C-73/91, Sloman Neptun v Bodo Ziesemer [1993] ECR I-887; Case C-189/91, Petra Kirsammer-Hack v Nurhan Sidal [1993] ECR I-6185; and Case T-358/94, Air France v Commission [1996] ECR II-2109 para. 58.

2 Case C-56/93, Belgium v Commission [1996] ECR I-723.

I- Information on the judgment

Actions instituted by competitors: R v Ministry of Agriculture Fisheries & Food ex parte 1. British Pig Industry Support Group and 2. Meryl Suzanne Ward CO/0608/2000

II- Brief description of the facts and legal issues

The applicants (an association of pig producers and persons in allied trades, and its treasurer) sought judicial review of the decision of the Ministry, of 30 November 1999, not to apply for authorisation for aid to compensate the pig industry for the costs incurred as a result of the ban on mammalian meat and bone meal in animal feed (the "MBM ban"), and the Ministry's continuing failure to seek authorisation to grant adequate aid to the pig industry.

The applicants contended that they had been discriminated against in comparison to the beef and sheep industries in respect of compensation sought by the government for the hardship suffered by farmers as a result of BSE. The ban affected all red meats, even though the cause of it, BSE, had not affected pigs. The applicants submitted that their exclusion from compensation was discriminatory and unlawful. They submitted that they had been discriminated against in two ways: first, by the lack of compensation and, secondly, by reason of the ban imposing higher costs on the pig industry. The applicants further submitted that there was no objective justification for such discrimination.

Thus the applicants were not attacking the lawfulness of the measures said to have given rise to the situation of discrimination. They did not contend that the MBM ban was unlawful by reason of its discriminatory impact; nor did they contend that the various means of financial assistance[3] up to that point had been unlawful by reason of their discriminatory impact. The applicants were claiming that those measures had resulted, by way of 'side-effects', in (unintended) discrimination, and that the government had a duty to rectify that situation by granting adequate aid to the pig industry.

III- Summary of the Court's findings

The application for judicial review was dismissed.
Mr Justice Richards held that there was no realistic prospect of the Commission approving aid of the kind that the applicants sought, nor was there a legal basis for compelling the Ministry to seek approval for such aid. The adverse reaction of Commission officials to proposals originally put forward by the UK pig industry for aid in respect of the MBM ban meant that continued efforts were futile, as they would not be approved by the Commission. The fact that the UK Government had made these initial efforts meant that it had complied with any purported duty. There was no real possibility of persuading the Commission to grant exceptional occurrence aid, so again there was no breach of any purported duty. This was because, in approving TRISS, the Commission had stressed its acceptance of a vital short term measure in the immediate aftermath of the BSE crisis, whereas the reality of the situation at hand was that the passing of time had created a different situation, no longer concerned with the immediate aftermath of the crisis but with a longer term public health issue and a range of longer term problems affecting the profitability of the UK pig industry.

3 These included the Temporary Rendering Industry Support Scheme, ("TRISS"), intended to compensate abattoirs and renderers of carcasses into MBM for the loss of their markets. Abattoirs had to pay to dispose of their waste, rather than receive a fee for it from the renderers. The immediate viability of abattoirs and renderers was threatened by the MBM ban, which would have threatened a collapse of the meat supply and disposal chain. TRISS allowed renderers to maintain pre-crisis prices to slaughter houses for the waste removed by them.

The High Court assumed that the applicants were able, in principle, to benefit from the non-discrimination principle. However, the difference in treatment between the beef and sheep sectors on the one hand and the pig sector on the other did not amount to a prima facie breach of the principle of non-discrimination, because the applicants sought a response to the special circumstances of the pig industry and did not seek the removal of a difference of treatment between producers in a similar situation. If a *prima facie* breach of the principle of non-discrimination was to be found, the difference in treatment which gave rise to that discrimination was objectively justified because of the different regime for pig meat. The government did not breach its duty towards the applicants because it had acted lawfully throughout, because no rectification duty fell on a Member State alone, and because Article 10 of the European Convention on Human Rights and Fundamental Freedoms 1950 did not have direct effect in domestic law.

I- Information on the judgment

Actions instituted by competitors: Re an application by Peninsula Securities Ltd for judicial review, the High Court of Justice in Northern Ireland, Queens Bench Division (Crown Side), judgment of 11 June 1998

II- Brief description of the facts and legal issues

The applicant owned a shopping centre in Londonderry, Northern Ireland and had received no grant or subsidy for the construction of the centre or the purchase of the land on which it stood.

The Department of the Environment for Northern Ireland adopted a development scheme for a semi-derelict site in Foyle Street, Londonderry, which involved the construction of a rival shopping centre on the site. A joint venture, Foyleside, came forward to implement the development scheme and build the rival shopping centre.

The Department made an urban development grant of £7.5 million to Foyleside. Such grants have been the main urban regeneration measure for Londonderry since 1982 and their function is to stimulate private investment which either would not have been made or which would have led to development at a pace that was slower or on a scale or standard that was less than satisfactory. Foyleside had applied for an urban development grant and the Department had concluded that the projected cost of the development was £7.5 million greater than the market value of the completed development. £7.5 million was the minimum that would trigger the scheme, and so a grant for that amount was made.

The Department transferred the land comprised in the development scheme to Foyleside for £1 (one pound). The Department spent £2.3 million in acquiring the land in the scheme area which it did not already own (43% of the total). The Department also carried out road and environmental improvement works near the development without charge to Foyleside.

The applicant challenged the Department's decision to:

- pay the £7.5 million urban development grant;
- incur site assembly costs and to transfer the land in the development scheme for £1; and
- execute road access and environmental improvement works next to the site without charge

on the grounds that:

- these measures constituted the granting of State aid to Foyleside, which distorted competition by favouring Foyleside in breach of Article 87 (1) EC; and
- in breach of Article 88 (3) EC, the Commission had not been notified of the Department's plans to grant new aid.

Pursuant to the Commission's Communication concerning co-operation between the Commission and national courts in the field of State aid[4], the Northern Irish courts wrote to the Commission seeking guidance. In its reply to the Northern Irish High Court, the Commission stated that the approval of the Single Regeneration Budget (a UK State aid (N 31/95) approved by the Commission on 4 May 1995) reflected the Commission's view that measures which are aimed at the construction of infrastructure for general public use and do not provide a subsidy to the final user are not State aid in the Articles 87 and 88 EC sense. The Commission stated that it did not intend to prejudge an

[4] OJ (1995) C 312/8.

analysis on the effect on trade at the level of intermediaries as opposed to final users. The Commission drew a distinction between general infrastructure measures and aid favouring certain companies. If aid strengthened the intra-Community trade position of some undertakings compared with others, it would fall under Article 87 (1) EC.

III- Summary of the Court's findings

The judge considered the wording of Article 87 (1) EC and concluded that four cumulative criteria had to be met before it would apply: aid had to be granted by a Member State, the aid had to distort or threaten to distort competition, the distortion had to occur because an undertaking was favoured, and there had to be a distortion (sic) of inter-state trade.

The judge ruled that the first of these criteria was met; the urban development grant and the transfer of the land for the nominal figure of £1 did amount to the granting of State aid.

As for the distortion of competition, the judge found that the applicant had failed to demonstrate that the measures adopted had created such distortion. It was accepted by all parties that only a "small potential distortion" needed to be shown. Rules on State aid were not subject to the same requirement of "appreciability" which must be present for Articles 81 and 82 EC to apply. The judge identified two possible markets on which the distortion might occur: that for the development of shopping centres and that for landlords of shopping centres. In the former market, the urban development grant and the site assembly costs did not confer an economic advantage on Foyleside. They merely ensured that development which might have happened elsewhere occurred at a particular site; they favoured a particular site, they did not improve Foyleside's competitive position.

The judge said:
"… the measures taken by the Department may be said to have enabled the development to proceed and competition to take place with other shopping centres but that is not the same as bringing about a distortion of competition. As a prudent developer, Foyleside would not have proceeded with a development on a site [with a negative value of] £7.5 million… The removal of the negative value does not give Foyleside a competitive edge; it merely places it in the position that it would have occupied had it [been] located on a site where it would not have been saddled with such an unacceptable encumbrance".

The judge rejected, for lack of evidence, the claim that Foyleside obtained any advantage over its competitors in its role as landlord.

As for the third criterion, the favouring of an undertaking, the judge relied on the judgment in SFEI v La Poste5, and stated that a grant of aid should confer on an undertaking an economic advantage which it would not have enjoyed under normal market conditions. The judge held:
"…in normal market conditions, no sensible developer would contemplate constructing a shopping centre on that site. [The aid] did not confer an economic advantage which would not have been available in normal market conditions. Without the measures, development of the site would not have been considered. An economic advantage could only be said to have accrued to the developer if it would have proceeded without the grant. There is no reason to believe it would have done so".

[5] Case C-39/94, Syndicat Francais de L'Express International (SFEI) & Others v La Poste & others [1996] ECR 3547, para. 60.

The removal of a disabling negative value did not place Foyleside in a better position than competing shopping centres such as that of the applicant, which the judge assumed had not suffered from negative value difficulties.

As for the road and environmental works, the judge thought it could not be the case that a State authority was forbidden to carry out road improvements for the benefit of the public lest any incidental benefit accrue to a developer.

As for the fourth and final criterion, trade between Member States, the judge found that trade between the Republic of Ireland and Northern Ireland had not been affected. The judge recognised that shoppers in the Republic had been attracted to the new shopping development at Foyleside, but that alone did not establish that the pattern of cross-border shopping had been affected or was liable to be affected. It might have been true that shoppers from the Republic were more likely to shop at Foyleside than at other shopping centres in Londonderry. However, the judge did not consider that such a change of shopping pattern within Northern Ireland could be said to affect trade between Member States. According to the judge:
"Article [87 EC] is designed to maintain an equilibrium of competition between Member States on a Community wide level. It is not designed to ensure that trade attracted from one Member State to another is distributed evenly between undertakings within the latter Member State".

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I- Information on the judgment

Actions instituted by competitors: R v Secretary of State for National Heritage and another, *ex parte* John Paul Getty Trust (Court of Appeal) 27 October 1994 (unreported)

II- Brief description of the facts and legal issues

On 30 August 1994, the John Paul Getty Trust (the "Trust") applied for leave to seek judicial review of the decision of 9 August 1995 of the Secretary of State for National Heritage to defer for a further period of three months (commencing on 5 August 1994) the decision on the application for the grant of an export licence in respect of the sculpture known as the "Three Graces" by Antonio Canova. The Trust sought, amongst other things, a declaration that a payment of £3.6 million by the National Heritage Memorial Fund (the "Fund") to the Victoria and Albert Museum and the loan by the Fund to the National Galleries of Scotland to enable them to buy the statue were or would be unlawful because they were contrary to Articles 87 and 88 EC.

This was an appeal against a refusal by the judge at first instance to allow the initial application for leave to move for judicial review. Accordingly, it was sufficient for the Trust to be able to show that any one or more of the grounds relied on was arguable.

By an agreement of 23 September 1988 the Trust had agreed to buy the sculpture from a company called "Fine Art" for £7.6 million. The agreement provided for Fine Art to deliver the statue to the Trust in the United States and was conditional on obtaining an export licence. The agreement also provided that if a licence were refused or not granted within 18 months from 23 September 1988, the agreement would be null and void. On 24 September 1988, Fine Art made an application for an export licence.

On 16 February 1994, the Secretary of State for National Heritage announced that he was deferring a decision on the export licence for the Three Graces until 5 August 1994. The system whereby the consideration of applications for export licences is deferred has been in existence for many years and was instituted so that museums and art galleries in the UK could have an opportunity of trying to raise funds to purchase the work of art concerned and ensure that the work remained in the UK.

On 15 July 1994, the Victoria and Albert Museum announced that it had secured pledges amounting to £4.7 million (including £3.6 million from the Fund) and needed another £2.9 million to match the £7.6 million which the Trust had agreed to pay for the Three Graces. At about the same time, the Museum wrote to the Secretary of State for National Heritage, asking for an extension of the deferral period for a further three months beyond 5 August 1994. Subsequently, the National Galleries of Scotland agreed to join in a partnership with the Victoria and Albert Museum and to make a £1.1 million contribution towards the money required to purchase the Three Graces. On 9 August 1994, the Secretary of State for National Heritage decided to make a final deferral of up to three months.

One of the grounds advanced by the Trust to challenge the Secretary of State's decision of 9 August was that the sum of £3.6 million amounted to State aid and should have been notified to the Commission pursuant to Articles 87 and 88 EC. The Trust drew a distinction between "general grants in aid", such as the sum which was paid by the government to enable the Victoria and Albert museum to operate, and specific grants, such as that which was given by the Fund, which was arguably State aid within the meanings of Articles 87 and 88 EC.

The Court of Appeal noted that one of the types of discretionary aid which may be considered to be compatible with the Common Market is the type of aid set out in paragraph 3(d) of Article 87 EC, which is aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest.

The Trust claimed that the £3.6 million provided by the Fund was unlawful and contrary to the EC Treaty because it had not been notified. The Trust claimed that the "legality" of that aid could only be determined by the Commission, and national courts had a very limited role in this area in that they were constrained only to decide, first, whether there had been aid provided or an offer of aid made and, secondly, whether or not notification had been made in accordance with paragraph 3 of Article 88 EC. Apart from that, any other questions under Articles 87 and 88 EC were matters for the Commission and not for the national courts.

III- Summary of the Court's findings

The Court of Appeal was prepared to assume, in favour of the Trust, that the Trust had a sufficient interest to challenge the grant of unnotified aid. The Court of Appeal was also prepared to assume in the Trust's favour that the Trust was an undertaking within the meaning of Article 87 EC. The question remained as to the role the Court of Appeal could play in determining whether the payment of £3.6 million was State aid which ought to have been notified under Article 87 EC. The Court of Appeal held that there had to be a threshold which had to be crossed by any aid before it could be considered as State aid to which Article 87 EC applied. If it were not so, an impossible burden would be placed on the Commission to determine all of these matters. The Court of Appeal had to be in a position to consider whether the aid which it was proposed should be given was capable of affecting trade between Member States. The contract in question between the Trust and Fine Art was a conditional contract. If the aid were given, the effect of it would be that the sale of the statue to a museum in California would be replaced by the sale of the statue to the Victoria and Albert Museum and the Scottish National Galleries. In those circumstances, it seemed impossible to argue that such aid was capable of affecting trade between Member States. The Court of Appeal thought that it was right that it should determine this point at that stage. The Court of Appeal did not agree that this was an arguable point and therefore refused leave to move for judicial review.

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I- Information on the judgment

Actions instituted by beneficiaries: R (on the application of Professional Contractors' Group and others) v Inland Revenue Commissioners [2001] EWCA Civ 1945

II- Brief description of the facts and legal issues

IR 35 ("Inland Revenue 35" is a shorthand for measures enacted in the Finance Act 2000, the Welfare Reform Pensions Act 1999, and the Social Security Contributions (Intermediaries) Regulations 2000) set out the changes to be introduced in order to counter tax-avoidance in the area of personal service provision, in particular with regard to individuals providing their services through their own service companies so as to avail themselves of corporate, as opposed to personal, taxes.

Employees are liable to income tax on their earnings and they must also pay social security contributions. These taxes are imposed at source and there is little ability for an employee to deduct expenses. By contrast, if someone who was formerly an employee set up a service company, became the controlling shareholder of that company and provided his services to his former employer, he would pay corporation tax on the service company's profits (as opposed to income tax) and could distribute the company's revenue to himself without paying social security. The new IR 35 regime would apply only where the worker had a material interest in the company or received a "traceable dividend" (i.e. it would not apply to all arrangements whereby individuals offered their services through companies).

Thus, the people who would be adversely affected by the new regime would be those who, in effect, provide employee services, as opposed to the services of self-employed independent contractors. The tax would only bite on those who therefore "ought" to be paying employee tax and were not.
The appellants sought judicial review of the lawfulness of IR 35, claiming, *inter alia*, that it was incompatible with EC law as it was an unnotified State aid contrary to Articles 87 and 88 EC.

III- Summary of the Court's findings

The appeal was dismissed.

The judge upheld the conclusion that IR 35 was a general measure whose aim was to ensure that all those supplying employee-like services should pay income tax and social security as employees, and should not be able to avoid that obligation by means of providing services through an intermediary company.

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I- Information on the judgment

Actions instituted by competitors: John Page/Empowerment Enterprises Ltd v Commissioners of Customs and Excise (2004) EDN/04/22

II- Brief description of the facts and legal issues

The appellant company provided private tuition services. The Commissioners ruled that this was not an exempt supply and, as such, VAT should be charged on these services. One of the grounds of appeal was that the imposition on the appellant of VAT for such services constituted State aid as defined in Article 87 EC.

III- Summary of the Court's findings

It was decided that the State aid ground of appeal was irrelevant because this was not a matter which could be appealed under section 83 of the Value Added Taxes Act 1994, from which the Tribunal, a statutory body, derived its jurisdiction.

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I- Information on the judgment

Actions instituted by competitors: R (on the application of British Aggregates Association and others) v Customs and Excise Commissioners [2002] EWHC Admin 926

II- Brief description of the facts and legal issues

This was an application for permission to apply for judicial review and, if granted, an application for judicial review concerning the aggregates levy introduced by the Finance Act 2001.

The aim of the government in imposing the levy was to make sure that the market price paid for the aggregates covered the environmental costs of extracting aggregate from natural rock. The legislation thus distinguished between aggregate sourced direct from natural rock ("primary" or "virgin" aggregate), and that derived from other material which can be used as aggregate, such as certain mineral and industrial waste ("secondary" or "recycled" aggregate).

While secondary or recycled aggregate was exempt from the levy, primary or virgin aggregate was subject to it. The government was thus hoping to promote the use of secondary or recycled aggregate.

Exported aggregate was also exempt from the levy.

The claimants, all companies or associations engaged in the production of aggregate through quarrying and related businesses, claimed that the system of exemptions constituted State aid which had not been notified to the Commission, contrary to Articles 87 (1) and 88 (3) EC.

III- Summary of the Court's findings

The measures did not infringe Article 87 (1) EC.

Moses J. considered first of all general principles applicable to tax measures. He confirmed:
"the mere fact that some undertakings benefit from the tax regime and others do not does not necessarily mean that the tax measures infringe the rules against State aid. It is thus necessary to consider and apply the selectivity principle: that is the principle by which the courts distinguish between those tax systems which provide for exemptions which constitute State aid and those which do not".

Thus, to determine whether the selectivity requirement was met, it was necessary first to determine the common system applicable and then determine whether the exception to the system derives directly from the guiding principles of the system.

<u>Export exemption</u>: in an earlier part of the judgment, Moses J. had found that the aggregates levy was an indirect tax. It was intended that the tax be passed on to the consumer, who would thus be influenced in making its aggregate purchasing decision and may be persuaded to seek aggregate from alternative sources. He considered point 91 of the Commission's Communication on Environmental Taxes (OJ (1997) C 224/4), which states:
"where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly".

He thus held, with regard to the export exemption, that, provided the levy did not infringe points 90 and 92 of that Communication (it had already been determined that it did not), then the levy would be permitted, unless it exceeded the amount imposed by the internal tax. It did not therefore constitute State aid.

Although it was unnecessary, Moses J. went on to consider whether the payment could be said to distort trade between Member States. He concluded it could not. He pointed out that those who export aggregate will compete in a market where the levy is not imposed. Conversely, if they sought to compete within the UK market, the aggregate would be subject to the levy. The function of the repayment was therefore to enable those producing aggregate within the UK but exporting it to compete on an equal basis with producers outside the UK.

<u>Exemption of secondary or recycled aggregate</u>: the claimant argued that the levy favoured certain sectors, such as those producing china clay or ball clay, since those products were not aggregate and thus the process by which they are extracted is exempt from the levy, whereas the extraction of limestone is not an exempt process.

It was found that the essence of the aggregate levy was to make a distinction between materials quarried for use as aggregate, and waste, capable of being used as aggregate. The intention was to move demand from one product to the other. The efficient use of virgin aggregates should thereby be promoted and there should be a reduction in the waste materials which could be used as aggregate, but which would otherwise be used as landfill. The effect of the exemptions to the levy should be to increase incentives to use this material, which is not subject to the levy, as aggregate.

It was relevant that the waste produced in the extraction of primary aggregate may also be used as aggregate and is, as such, taxable. Conversely, the production of clay was not a process concerned with primary aggregate (and as such not taxable) and it produces waste which may be used as aggregate (but which is not taxable under the regime).

The judge found that the distinction made between these two types of waste stemmed from the objective of discouraging the extraction of limestone for aggregate whilst not discouraging the production of non-aggregate material.

A system which taxes the extraction of virgin aggregate so as to reduce demand for it and, as part of the process of reducing demand for it, taxes also the waste derived from that extraction has as its aim the desire to reduce environmental damage caused by particular processes, not by every process which might cause environmental damage.

He therefore concluded that the differentiation between virgin aggregate and its waste, and non-aggregate and its waste did not constitute State aid.

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I- Information on the judgment

Actions instituted by competitors: CGNU, Airtours et al v Commrs of Customs & Excise, VAT and Duties, IPT 00007 Tribunal Decision 8.10.01, Case References LON/00/9000; 9001; 9002; 9003; 9004; 9019

II- Brief description of the facts and legal issues

This case concerned the liability of the Commissioners for Customs & Excise to repay higher rate Insurance Premium Tax ("IPT"), paid in respect of certain travel insurance provided by CGNU. In the *Lunn Poly* case, (see below at points (i) and (j)), differential IPT rates for travel insurance were found to be unlawful State aid, contrary to Article 87 EC.

III- Summary of the Court's findings

The appeal was dismissed as a result of issues not connected with State aid.

However, the Tribunal ruled that section 3(1) of the European Communities Act 1972[6] did not abrogate the doctrine of precedent and therefore, had the Tribunal to rule on the issue, it would have found that the ruling of the Court of Appeal in the *Lunn Poly* case bound it, and that the differential rate of IPT satisfied all the criteria of Article 87 (1) EC and was an unlawful State aid. In that regard, the position of CGNU as a taxpayer, potentially affected by distortions of competition by the favouring of those undertakings which paid tax at the standard rate, and the fact that the trade between Member States of insurers was the relevant market were important considerations. The Tribunal stated that it would also have inclined to the view that repayment of the tax overpaid would be an appropriate remedy but, like the Tribunal in the *GIL* case, (see below at points [(e) and (f))], it would have requested the ECJ to give a preliminary ruling on the issue.

The Tribunal went on to find that, if repayment were the appropriate remedy, the appellant could not have benefited from it anyway. Although CGNU, which was the only insurer amongst the appellants, had paid the tax, it had been reimbursed by the 'retail' sellers of the travel insurance. As it had not in fact had to bear the costs of the tax, the Tribunal therefore held that CGNU would be 'unjustly enriched' by any repayment of the tax differential. Although CGNU had made arrangements to repay the tax to the travel agents or tour operators, this was not considered sufficient because the reimbursement must be to those people who have, for all practical purposes, borne the cost of the original payment. In this case, it was the ultimate customers who bore the cost, whereas the reimbursement arrangements only related to repaying the tour operators and travel agents who had not borne any part of the cost of the original payment.

The Tribunal also found that none of the other appellants were entitled to a repayment, as their role had merely been to collect the insurance premiums and insurance premium tax from their customers and pass them to the insurers.

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[6] "*For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court or any court attached thereto)*".

I- Information on the judgment

Actions instituted by competitors: GIL Insurance Ltd v Customs and Excise Commissioners [2001] EuLR 401; [2001] V. & D.R. 97

II- Brief description of the facts and legal issues

GIL, a supplier of insurance for domestic appliances sold or rented to consumers by its parent, appealed against the rejection of its claim for the repayment of higher rate Insurance Premium Tax ("IPT"). The goods supplied were standard-rated for VAT purposes. The higher rate of IPT was introduced only for insurance supplied by connected insurers in the same position as GIL in 1997, based on a belief that VAT was being avoided by suppliers increasing exempt charges and reducing standard rate charges on the supply of domestic appliances (a practice known as 'value shifting').
The higher rate of tax therefore applied to domestic appliance insurance where the insurer was connected with the supplier of the appliances, arranged through the supplier, or where commission was paid to the supplier.

By contrast, where the insurer was independent and insurance was not arranged through the supplier and instead came from a direct insurer, standard rate tax was applied. GIL claimed, *inter alia*, that the imposition of the higher rate was illegal State aid contrary to Articles 76 and 88 EC.

III- Summary of the Court's findings

The Tribunal stayed the proceedings pending a preliminary ruling from the ECJ[7]. In its judgment of 2 March 2001, the Tribunal held, first, that the differential between the higher and standard rates of IPT was a State aid granted through State resources within the meaning of Article 87 EC. It was bound in this by the Court of Appeal ruling in the *Lunn Poly* case although, in any event, it agreed that the aid was granted directly by the State. It found that the State was thereby foregoing revenue from those taxed at the lower rate. Secondly, the Tribunal held that it favoured certain undertakings over others because the higher rate IPT placed direct insurance companies in a more favourable position than connected insurers. Thirdly, the Tribunal held that this distorted competition between different insurance providers in a way that was not objectively justifiable[8].
However, the Tribunal found itself unable to resolve the question of whether the higher rate IPT affected trade between Member States (although it inclined to the view that it did not) and therefore requested a preliminary ruling from the ECJ on this point.
The final issue for the Tribunal to decide was the question of whether repayment of the difference in the tax rates would be the right remedy for the appellants. Again the Tribunal found itself unable to resolve the issue and requested a preliminary ruling from the ECJ on this point. The proceedings were then stayed pending the reference.
In its 2004 ruling, the ECJ, however, found that the application of the higher rate of VAT to a specific part of insurance contracts previously subject to the standard rate "*must be regarded as justified by the nature and the general scheme of the national system of taxation of insurance. The IPT scheme cannot therefore be regarded as constituting an aid measure within the meaning of Article 87 (1) EC*".

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7 Case C-308/01, GIL Insurance Ltd and Others v Commissioners of Customs & Excise [2004] ECR I-4777.

8 R. v Customs and Excise Commissioners Ex p. Lunn Poly Ltd [1999] S.T.C. 350

I- Information on the judgment

Actions instituted by Competitors: Customs and Excise Commissioners v GIL Insurance Limited others [2000] STC 204

II- Brief description of the facts and legal issues

The Commissioners of Customs and Excise appealed from two interlocutory decisions of the Value Added Tax and Duties Tribunal concerning, *inter alia*, its jurisdiction to hear, and the conduct of, appeals by Gil Insurance Ltd and others (the "taxpayers") against the Commissioners' refusal of their claims to repayment of Insurance Premium Tax.

The taxpayers all provided insurance for domestic appliances. A change to the Finance Act 1994 in 1997 introduced Insurance Premium Tax ("IPT") at a higher rate for premiums of some descriptions and at a standard rate on others. The taxpayers, who had been taxed at the higher rate, alleged that the differential rate was unlawful State aid and sought repayment of sums paid by way of higher rate IPT. The Commissioners rejected the claim. They asserted that even if the differential did constitute State aid, it would not follow that amounts paid by way of higher rate IPT would have been paid by way of tax that was not due to the Commissioners.

The taxpayers appealed on the basis that differential tax was contrary to Community law as it was a State aid which had not been notified to the Commission.

The Commissioners applied for a direction that the State aid issue be struck out or be heard as a preliminary issue of law. On 26 October 1999, the Value Added Tax and Duties Tribunal held that it was arguable that the higher rate or the differential was illegal. It declined to strike out the State aid issue or direct that it be heard as a preliminary issue of law.

III- Summary of the Court's findings

The Commissioners' appeals were dismissed.

The Value Added Tax and Duties Tribunal's decision not to strike out the ground of appeal on the State aid issue was a decision properly open to it.

Furthermore, the Value Added Tax and Duties Tribunal was entitled to take the view that there were reasonable grounds for the taxpayers to raise the State aid issue. It was acknowledged that the remedy was not obvious. The Commissioners argued that the taxpayers could not be repaid the differential as this would exacerbate rather than alleviate the State aid issue. Richards J. held that, while these arguments had considerable force, it was possible that the taxpayers might succeed in a restitutionary claim as this was an uncertain and developing area of the law. The fact that it was a lead case, and substantial amounts of tax were at stake, was also relevant in determining whether the matter should be dealt with at a full hearing. Moreover, the Value Added Tax and Duties Tribunal had not erred in refusing to direct that the State aid issue be heard as a preliminary issue because a resolution of that point would not be decisive of the litigation.

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I- Information on the judgment

Actions instituted by competitors: R (on the application of BT3G Ltd and others) v Secretary of State for Trade and Industry [2001] EWCA Civ 1448

II- Brief description of the facts and legal issues

This case arose out of the auction process for the five universal mobile telecommunications (UMTS) licences offered by the UK Government. The auction took place in March to April 2000. BT and One 2 One (the "appellants") were appealing against a judgment of Silber J. of 21 December 2000[9]. Their appeal related to the rules of the auction which provided that licences had to be paid for when they were granted.

The appellants had successfully bid for two of the five licences and paid for these shortly after the auction process had terminated. Two of the other successful bidders, Vodafone Ltd and Orange Personal Communication Services Ltd were also successful bidders. They were not granted their licences immediately because they were associated companies. Under the terms of the auction a pre-condition of obtaining a licence required that the companies cease to be associated. Vodafone therefore had to divest itself of Orange. This was done on 22 August 2000 and Vodafone and Orange were thus granted their licences. They paid for them on 1 September 2000.

The appellants alleged that the effect of the auction rules meant that because Vodafone and Orange had paid for their licence some 15 to 16 weeks after the appellants they had received a "financial holiday". This meant that their savings in interest on the licence cost were in the region of £85 million. Thus the interest cost that the appellants had to bear was irrational, unfair, disproportionate, discriminatory and in breach of the State aid rules.

Silber J. found that, although the benefit enjoyed by Vodafone and Orange was, in principle, capable of constituting State aid, it did not in fact do so.

III- Summary of the Court's findings

The appeal was dismissed.

Although the Court of Appeal was not "wholly persuaded" that the benefit received by Vodafone and Orange by not having to pay for their licence until a later date was "capable" of being State aid, they were content to proceed on the basis that the judge's conclusion was correct. The basis on which Silber J. had found that State aid could exist was as follows:

"To my mind, the use of the words in Article 87 (1) [EC] of 'any aid…in any form whatsoever' are sufficiently wide to cover the failure by a government to crystallize or accelerate a potential liability where it had a power to do so. By the same reasoning, a failure to invoke powers under the Auction Rules to delay the obligations of the applicants to pay for their licences until Vodafone and Orange were obliged to pay is capable of amounting to State aid".

The Court of Appeal upheld the finding of objective justification for the aid and the absence of discrimination, notably because the relevant rules were transparent and had been known by all parties from the beginning of the auction process, they were not discriminatory (as they were potentially applicable to all bidders (on the basis that any bidder might become "associated" at any time during the auction process), and because the Secretary of State could not reasonably have requested a payment from Vodafone and Orange before the divestment was made (on the basis that there was

[9] [2001] EuLR 325.

no certainty that the divestment would occur). For this reason, Vodafone and Orange were in a different position to the applicants.

The Court of Appeal, although finding that it was an "academic issue", considered what any remedy would be. It took the view that if Vodafone and Orange's "payment holiday" constituted State aid, then to waive the extra costs incurred by BT and One 2 One would also amount to State aid. There would thus have been four beneficiaries of State aid rather than two.

The Court of Appeal endorsed the findings of Silber J. and dismissed the appeal.

The importance of using open, non-discriminatory and transparent procedures, in compliance with objective, non-discriminatory and transparent criteria, was again stressed in the French *UMTS* case. The Commission held there was no State aid where the French Government charged operators different amounts for similar licences[10]. This case is now pending before the CFI[11].

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[10] Decision of 20 July 2004, State aid Case NN 42/2004, France.
[11] Case T-475/04, Bouygues and Bouyges Télécom v Commission, not yet decided.

I- Information on the judgment

Actions instituted by competitors: University of Sussex v Customs and Excise Commissioners [2001] STC 1495

II- Brief description of the facts and legal issues

The University of Sussex (the "university") appealed to the High Court against a decision of the London Value Added Tax and Duties Tribunal released on 26 May 2000[12], dismissing the university's appeal against the rejection by the Commissioners of Customs and Excise of the university's claim for repayment of input tax previously unclaimed. This claim was made following guidance issued by the Commissioners covering the adjustment and correcting of errors in VAT returns.

The State aid issue raised by the appeal was whether the difference in time limits for late claims for input tax between so-called 'payment traders' (i.e. those whose output tax exceeded their input tax in their returns and who had to account to the Commissioners for VAT) (the university's situation) and 'repayment traders' (those whose input tax exceeded their output tax in their returns and who were entitled to a credit or a payment from the Commissioners) amounted to unlawful State aid.

The judge held that if a late claim for input tax is subject to a strict three-year time limit for payment traders but is not subject to any specific time limit for repayment traders, then that would be capable of representing a differential between competing entities in the same line of trade. The judge conceded that this differential could represent State aid to repayment traders as it may give them some form of competitive edge.
However, the university failed to make its case: it produced no evidence to show that the aid distorted or threatened to distort competition nor that it affected trade between Member States. The judge stated that:
"…in order to make out a case under Article 87 EC, there must, at least normally, be some positive evidence of distortion or of a threat of distortion of competition, and indeed evidence of an effect on trade between Member States. However, I would accept that in some cases it would be self-evident that it is more likely than not that there is distortion (or a threat of distortion) and/or effect on trade so that the onus shifts to the person denying infringement of Article 87 EC".
However, in this instance the onus had not so shifted.
Finally, the judge found that the university's State aid argument could not be raised in order to justify a tax repayment. Where there is unlawful State aid, the appropriate remedy is an order against the State ordering that the aid be discontinued and maybe that the beneficiary of the aid repay it. The judge found that the unlawfulness of the aid would be compounded by seeking to extend it to payment traders.

III- Summary of the Court's findings

The appeal was allowed but the university's State aid argument was rejected.

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12 (2000) VAT Decision 16656.

I- Information on the judgment

Actions instituted by competitors: R v Customs and Excise Commissioners, *ex parte* Lunn Poly Limited and another [1999] STC 350

II- Brief description of the facts and legal issues

In January 1999, three judges of the Court of Appeal heard an appeal by the Commissioners of Customs and Excise against a decision of the previous year by the High Court, finding that the differential rates of Insurance Premium Tax ("IPT") provided for in the Finance Act 1997 constituted an unlawful State aid contrary to Article 87 EC.

That earlier application for judicial review before the High Court had been brought by Lunn Poly Ltd, a travel agent, and Bishopsgate Insurance Ltd, specialist insurers who provided Lunn Poly with a range of travel insurance policies which Lunn Poly endorsed and sold as Lunn Poly insurance. The case arose because the Finance Act 1997 replaced the previously uniform rate of 2.5% IPT with two different rates: a standard rate of 4%; and a higher rate of 17.5% which applied only to certain travel insurance contracts. The effect of the change made the premiums on travel insurance arranged by tour operators or travel agents or persons connected with them subject to the higher rate. By contrast, if the insurance was arranged by an independent insurance company, only the lower rate was payable.

The High Court accepted that those paying IPT at the lower rate were receiving State aid because the UK was foregoing the difference between the higher rate tax and the lower rate tax in the case of those who were not subject to the higher rate.

The Commissioners appealed the High Court finding that the differential rates were State aid under Article 87 EC.

III- Summary of the Court's findings

Before assessing the State aid point, Lord Justice Woolf considered a preliminary point raised by the Commissioners. They queried the role of the High Court in the earlier proceedings, suggesting that it might be limited only to reviewing the decision for breach of the principles of sound administration, rather than extending to finding a breach of the State aid rules. Lord Woolf responded that "*if the provision in national legislation conflicts with a requirement of the Treaty, it is the responsibility of the domestic courts to provide a remedy of the type granted by the Divisional Court in this case if the provision which is contravened is of direct effect*". The relevant provisions (Article 88 (3) EC) were of direct effect.

In considering what constitutes 'aid', the Commissioners had argued that in this case there was no transfer of State resources and no foregoing by the State of tax revenue. Rather, there were simply different rates of taxation set by Parliament. Lord Woolf found that to determine this issue, it was necessary to look at the position before the differential tax rates were introduced. If there were an objective justification for the introduction of the differential this would be relevant.

By way of justification for the differential, the Commissioners had argued that the different rates were introduced to avoid the loss of revenue as a result of value shifting - the travel sector allegedly sold insurance by earning low margins on the principal product of holidays, whilst earning high margins on the related travel insurance. Lunn Poly and Bishopsgate Insurance denied that any of their activities could be seen as tax avoidance. It was found, however, that there was "*no loss of tax which provides an objective justification for the discriminatory rate of tax imposed on tour operators and agents providing insurance. The higher rate contrary to the stand adopted by the Commissioners cannot be objectively justified as an anti-tax avoidance measure*".

Lord Woolf went on to find that the reason high margins could be achieved on travel insurance was because "*demand for travel insurance is highly price inelastic. This enables travel agents, in particular, to charge their customers a premium which they should find uncompetitive. They do not do so because they are guided by factors other than price when making their purchasing decision on insurance*".

The Commissioners then argued that there was no State aid because the 'selectivity' requirement was not met. The higher rate applied to "the generality of taxpayers" as opposed to a "specific undertaking". Lord Woolf responded that "*specific (…) should not be regarded as meaning that there can only be a State aid in relation to an individual undertaking.*" A group of taxpayers could receive State aid where another body of taxpayers does not receive the same benefit. In this case, Lord Woolf stated that *"those providing travel insurance, who are not subject to the higher rate of tax, are a clearly defined part of the group providing travel insurance and they received a benefit in the form of a lower tax rate which another defined part of those providing travel insurance, namely the travel operators and travel agents, did not receive. The aid was both specific and selective".*

As for the distortion of competition and the effect on inter-state trade, Lord Woolf held that the High Court was "entitled" to find that the differential tax rates were bound to affect trade between Member States. He commented that "the extent of the difference between the two rates would make it surprising if there was no distortion".

Lord Justice Clarke continued that the differential tax rates were "not justified by the general scheme of the tax system in the United Kingdom" and "not objectively justified by the considerations advanced by the applicants".

The appeal was therefore dismissed.

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I- Information on the judgment

Actions instituted by competitors: R v Customs and Excise Commissioners, *ex parte* Lunn Poly Limited and another, Queen's Bench Division (Divisional Court) [1998] STC 649, judgment of 2 April 1998

II- Brief description of the facts and legal issues

Lunn Poly Limited and Bishopsgate Insurance Limited sought judicial review of the differential rates of Insurance Premium Tax ("IPT") imposed by sections 21 and 22 of the Finance Act 1997 on the grounds that they were incompatible with Community Law, including Treaty provisions on State aid, and could not lawfully be applied.

IPT was introduced in the UK by the Finance Act 1994. Section 21 of the Finance Act 1997 amended the 1994 Act by replacing the previous uniform rate for insurance contracts (which included contracts of travel insurance) with two rates, a standard rate and a higher rate. The higher rate applied to a premium under a taxable insurance contract relating to travel risks if the contract was arranged through, *inter alia*, a tour operator or travel agent. Lunn Poly was a travel agent and part of the Thomson Travel Group, which included a tour operator. Bishopsgate was a specialist travel insurer, most of whose policies were sold through travel agents.

Lunn Poly and Bishopsgate claimed to be placed at a disadvantage by the differential rates of IPT and by the fact that they were subject to the higher rate. They sought a declaration that the statutory provisions giving effect to the differential rates of IPT were incompatible with Community Law and could not be applied lawfully. They claimed, amongst other things, that the differential rates of IPT ought to have been notified to the Commission under Article 88 EC on the grounds that they conferred a State aid, within the meaning of Article 87 EC, on competing insurers and intermediaries offering travel insurance, who had no links with a tour operator or travel agent and so were liable at the lower rate, and distorted or threatened to distort competition and affected trade between Member States.

III- Summary of the Court's findings

The High Court granted the declaration sought on the following grounds. The concept of State aid within the meaning of Article 87 EC was wide. Where a Member State legislated for significantly differential tax rates to be applied to competitors in relation to the supply of the same commodity or service, the terms of Article 87 (1) EC and the relevant jurisprudence made it clear that the measures amounted to a State aid.

Whether or not that involved a breach of Article 87 (1) EC depended on whether the introduction of the differential rates distorted or threatened to distort competition by favouring certain undertakings and whether it affected trade between Member States.

On the available material in the instant cases, it was highly probable that the introduction of the differential rates both distorted and threatened to distort competition by favouring those to whom the lower rate applied. Further, in determining whether such rates affect trade between Member States, the relevant market was the Community travel insurance market, and potential and indirect effects, whether or not appreciable, were relevant. The facts in the instant case pointed to the clear conclusion that the differential rates of IPT were bound to affect trade between Member States. Accordingly, the differential rates of IPT constituted State aid within the meaning of Article 87 EC and, since the Commission had not been notified and had not given its approval as required by Article 88 (3) EC, the differential rates were therefore illegal. The declaratory relief claimed was therefore granted.

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I- Information on the judgment

Actions instituted by competitors: R v Attorney General, *ex parte* ICI plc ([1987] 1 CMLR 72 (Court of Appeal))

II- Brief description of the facts and legal issues

This was an application for judicial review in which Imperial Chemical Industries Plc ("ICI") sought a declaration that the UK Government, by enacting, and by the manner in which it gave or proposed to give effect to section 134 and Schedule 18 of the Finance Act 1982, was acting or was proposing to act, unlawfully in contravention of Article 88 (3) EC.

At the relevant time, Esso were building a large ethylene plant in Scotland. The costs of the project were being shared with Shell who would also share the output of the plant. The Esso/Shell ethylene plant would be in competition with ICI's ethylene production facilities and with BP's ethylene plant. There were no other UK ethylene producers. ICI used naphtha as a feedstock for its ethylene; BP used dry gas (predominantly methane and ethane); and the Esso/Shell plant was to use ethane as a feedstock for ethylene. It is cheaper to produce ethylene using ethane than it is to do so using naphtha.

Demand for ethylene declined rapidly, with the result that there was excess ethylene supply capacity in Western Europe. In this context, ICI was concerned about the consequences of additional capacity from the Esso/Shell ethylene plant coming on stream. Moreover, ICI would have been at a disadvantage vis-à-vis both BP and Esso/Shell because of the natural advantages of ethane. ICI complained that, in addition, the government had added an additional advantage by providing for Esso, Shell and BP an artificially favourable fiscal regime. ICI maintained that the 1982 Finance Act required the ethane, which was to be used as the feedstock at BP's and Esso/Shell's plants, to be undervalued for petroleum revenue tax purposes or, if this was not what the Act required, the Revenue intended to undervalue the ethane nonetheless. The undervaluing of the ethane would have resulted in less petroleum revenue tax being paid, because the lower the value of the ethane, the lower the profit and therefore the smaller the amount of petroleum revenue tax payable. The 1982 Finance Act therefore resulted in an aid being conferred upon BP and Esso/Shell which should have been referred to the Commission under Article 88 (3) EC before it was put into effect.

III- Summary of the Court's findings

The Court of Appeal held that it was clear that a fiscal measure such as the 1982 Finance Act could amount to State aid. It was equally clear that if legislation provided for a valuation for fiscal purposes which reflected a true current arm's length valuation, such a provision would not normally amount to aid, the reason being that a valuation on this basis did not confer any benefit and was in the normal course as it adopted the standard approach to valuation for fiscal purposes.

The Court of Appeal held that, on the facts, the provisions of the 1982 Act did not amount to the granting of aid. The Court of Appeal also considered whether aid would be granted if, in administering the 1982 Act, the Revenue either accepted a price formula which produced too low a value, or applied the price formula so as to produce a below market price. The Court of Appeal concluded that, even if the Revenue were to benefit BP and Esso/Shell by adopting a wrong valuation, this would not be a matter which could be remedied by reliance upon Article 88 (3) EC because no aid would be involved. In expressing this view, the Court of Appeal implied that it was empowered to decide whether or not a particular measure amounted to an aid and was not trespassing upon the proper province of the Commission. The Court of Appeal quoted from *Steinike*[13], "*a national court may have cause to interpret and apply the concept of aid contained in Article* [87] *EC in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article* [88(3)] *EC ought to have been subject to this procedure*". However, the Court of Appeal also held that a persistent misapplication or wrong valuation under the 1982 Act could have amounted to a State aid.

The Court of Appeal also held that if Article 88 (3) EC had been infringed in a manner which gave ICI rights under the directly applicable final sentence, the Court of Appeal had no doubts that ICI had sufficient standing to bring proceedings on the basis of Article 88 (3) EC.

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13 Case 78/76, Steinike & Weinlig v Federal Republic of Germany [1977] ECR 595.

I- Information on the judgment

Actions instituted by Member States: Department of Trade and Industry v British Aerospace plc and Rover Group Holdings plc [1991] 1 CMLR 165

II- Brief description of the facts and legal issues

In 1988, the Commission approved certain aid to British Aerospace to assist in the purchase of Rover from the UK Government. Following that decision, the British Government made available a further £44.4 million in aid which had not been approved by the Commission. By a second decision of 17 July 1990, the Commission declared that the £44.4 million in question amounted to State aid within the meaning of Article 87 (1) EC and ordered the UK to obtain from British Aerospace repayment of the £44.4 million. The British Government duly instituted proceedings in the High Court for recovery of the money. On 24 September 1990, British Aerospace and Rover brought proceedings in the ECJ for annulment of the Commission's decision of 17 July 1990 on the grounds that in taking this decision, the Commission had failed to observe the procedural rules laid down in Article 88 (2) EC. British Aerospace and Rover also applied in the High Court for a stay of the recovery proceedings. The High Court held that it was appropriate to exercise its inherent jurisdiction and grant a stay until delivery of judgment by the ECJ.
In the report of the case relating to the stay of the High Court proceedings, the judge comments in passing upon the claim made by the DTI against British Aerospace and Rover. The report states that the government's claim for repayment of the illegal State aid is founded upon the government's duty to comply with the 1990 decision of the Commission, and that it was also claimed that the duty imposed upon the government by the Commission afforded the government the right to seek recovery through the English courts for the entirety of the aid.
Counsel for British Aerospace apparently told the High Court that British Aerospace would be submitting that the government's pleadings as framed disclosed no cause of action in English law and would invite the High Court to strike them out.
Following the stay of the High Court proceedings, the ECJ held on 4 February 1992 in Case C-294/90[14] that the 1990 decision be annulled insofar as that decision required the United Kingdom Government to recover from British Aerospace State aid of £44.4 million. The ECJ found for British Aerospace on procedural grounds, namely that, in taking its 1990 decision, the Commission had failed to observe the procedural rules laid down in Article 88 (2) EC which includes a hearing of the interested parties.

Subsequently, the Commission followed the procedure under Article 88 (2) EC in respect of the aid of £44.4 million and found that it was illegal State aid and required repayment. Repayment was made and the initial High Court proceedings for recovery brought by the Department of Trade and Industry were not continued.

III- Summary of the Court's findings

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[14] Case C-294/90, British Aerospace and Rover Group Holdings v Commission [1992] ECR I 493.

I- Information on the judgment

Actions instituted by competitors: Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH [2003] EWHC 2403 (Comm)

II- Brief description of the facts and legal issues

The claimant, Betws (the owner of an anthracite colliery in South Wales) claimed that the defendant (Preussag, a German anthracite producer who sold anthracite into the UK) had unlawfully used State aid given to it by Germany. It alleged that this followed from Commission decision 1999/184/ECSC, which it characterised as evidence that the defendant had misused State aid given to it from the German State in 1996 and 1997 so as to operate a predatory and discriminatory pricing policy, thus distorting competition between Preussag and the British producers of anthracite.

In its decision, the Commission had found that the aid was permitted for use in relation to "fines" (used in power production) but that it had in fact been used to subsidise other production costs, not only fines. This enabled Preussag to sell anthracite at prices which did not cover the costs of production. The Commission therefore found that part of the aid could not be considered compatible with the Common Market and ordered Germany to recover DEM 9.8 million. A further part of the aid found incompatible had been granted to Preussag in anticipation of a Commission decision. The Commission therefore ordered Germany to require Preussag to repay this element of the aid (a sum of DEM 6.8 million). The Decision was addressed to the Federal Republic of Germany.

The claimant, who had complained to the Commission about the actions of Preussag (albeit too late for its complaint to be taken into account by the Commission in reaching its decision) brought proceedings in the English courts claiming that, as a result of the misuse of the State aid by the defendant, it had suffered loss and damage of approximately £4.5 million.
The main issue in the case was whether the claimant had a cause of action.

III- Summary of the Court's findings

There was no cause of action against Preussag and the claim was therefore dismissed.

It was accepted that the claimant might have a cause of action against Germany as the Commission's Decision was addressed to Germany. The claimant, however, argued that in addition to a claim against Germany, it should also have a claim against Preussag. This was on the basis that the recipient of the aid had committed a wrong independently of the State, thus "*both the aid itself, and the way it was used in practice were wrong*".

The High Court noted first that Articles 65 and 66 (7) ECSC, the counterparts of Articles 81 and 82 EC do not have direct effect. Thus in the absence of a Commission decision, these Articles do not afford undertakings a cause of action against other undertakings. A Commission decision is a pre-requisite to there being a viable course of action.

The High Court was persuaded by the reasoning in the *SFEI* case[15] which dealt with the question of the right to compensation of a competitor damaged by the grant of illegal aid, where Advocate General Jacobs had stated that "*…the Court's existing case law does not impose on recipients of aid the obligations to make good loss or damage incurred by competitors as a result of unlawful implementation… Moreover, I*

[15] Case C-39/94, Syndicat Francais de L'Express International (SFEI) & Others v La Poste & others [1996] ECR 3547.

do not think that the Court should extend its case law so as to confer on competitors a remedy in damages against recipients of aid … various remedies … including where appropriate, an order for recovery and possibly an award of damages against the Member State are capable of providing an effective response to a breach of that [the prohibition in Article 88 (3) EC]."

The Advocate General went on to conclude that:
"While Community Law may make a Member State or public body which unlawfully grants aid liable in damages, it does not oblige the recipient of such aid to make good the loss or damage sustained by competitors as a result of the unlawful grant of aid, unless the receipt of such an unlawful payment in corresponding circumstances gives rise under national law to liability in damages to third parties".

In the *SFEI* case, the ECJ concluded that the recipient of illegal aid who had not checked to find out whether the aid had been notified did not incur any liability vis-à-vis a competitor who had suffered damage as a result of the illegal aid solely on the basis of Community law. However, the ECJ in *SFEI* recognised that national law might afford the possibility of an action against the recipient on the basis of non-contractual liability. The claimant, however, did not submit that, as a matter of English law, the recipient of an unlawful aid who damages a competitor's business is liable to the competitor for the damage caused under UK tort law. Rather, its claim was based on a Community law tort. The High Court rejected the view that there was a cause of action in Community law against Preussag. The Judge stated that "*the position seems to me to be* acte clair *in the light of the* SFEI *case*".

Another issue which concerned the High Court in relation to the creation of a Community Law tort which would enable a competitor to sue the recipient of unlawful aid, was the scope of application of such a tort: would it be available to all those indirectly affected by it? The High Court noted that this could open a potential floodgate for claims. Because of this, Mr Justice Morrison suggested that "*these issues would need to be considered by the ECJ before it created a new Community tort of the kind suggested*".
The reasoning of the High Court in the *Betws Anthracite* case refers to another UK coal industry case[16], in which HJ Banks & Co. Ltd complained that it had to pay royalties for its open-cast mines whereas the privatised successor companies to British Coal did not pay such royalties.

HJ Banks did not initially allege before the UK courts that the differential treatment of these royalties constituted unlawful State aid. HJ Banks alleged discriminatory treatment between producers and that the royalties constituted 'special charges' - both of which were prohibited by the ECSC Treaty. The UK Court of Appeal referred four questions to the ECJ. The first question asked whether the difference in treatment was 'discrimination between producers,' a 'special charge,' and/or 'aid' within the meaning of Article 4 of the ECSC Treaty. The ECJ responded that, prior to their sale to private companies, the State-owned successor companies received licences and leases for coal mining for no consideration, whereas other operators had to pay royalties. The ECJ found that this amounted to aid and that the aid element was the amount of royalties that would 'normally' have been claimed for such rights.

The case was then remitted back to the Court of Appeal, which did not rule on the issue of aid as HJ Banks had not initially pleaded this point. HJ Banks then tried to re-amend its counter-claim and

[16] See the judgment of the Court of Appeal in H.J. Banks & Co. Ltd v. The Coal Authority; The Secretary Of State, [2002] EuLR 483 ([2002] EWCA Civ 841) and the judgment of the ECJ in Case C-390/98 H.J. Banks & Co. Ltd v The Coal Authority; Secretary of State for Trade and Industry [2001] ECR I-6117.

defence to allege that the exoneration from paying royalties by British Coal and the State companies was unnotified State aid. However, the Court of Appeal found that amending the claim in such a way meant that HJ Banks was advancing a whole new case. Citing the limitation rules on advancing new claims based on a new set of facts, the Court of Appeal did not allow HJ Banks to re-amend the case.

The Court of Appeal can arguably be criticised in the *HJ Banks* case for not taking a decision on the aid issue at the national level where it should have done. It might have considered setting aside the rules on limitation periods based on the supremacy of EC law and hearing the claims of unnotified State aid or, simply, raising this issue of its own motion in view of the public policy character of State aid rules, in particular following a ruling made in this case by the ECJ.

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

I- Information on the judgment

Department of Trade and Industry v British Aerospace plc and Rover Group Holdings plc [1991] 1 CMLR 165

II- Brief description of the facts and legal issues

In 1988, the Commission approved certain aid to British Aerospace to assist in the purchase of Rover from the UK Government. Following that decision, the UK Government made available a further £44.4 million in aid, which had not been approved by the Commission. By a second decision of 17 July 1990, the Commission declared that the £44.4 million in question amounted to State aid within the meaning of Article 87 (1) EC and ordered the UK to obtain from British Aerospace repayment of the £44.4 million. The UK Government duly instituted proceedings in the High Court for the recovery of the money. On 24 September 1990, British Aerospace and Rover brought proceedings in the ECJ under Article 173 (2) EC for annulment of the Commission's decision of 17 July 1990 on the grounds that in taking this decision, the Commission had failed to observe the procedural rules laid down in Article 88 (2) EC. British Aerospace and Rover also applied in the High Court for a stay of the recovery proceedings. The Court held that it was appropriate to exercise its inherent jurisdiction and grant a stay until delivery of judgment by the European Court.

In the report of the case relating to the stay of the High Court proceedings, the judge comments in passing upon the claim made by the DTI against British Aerospace and Rover. The report states that the government's claim for repayment of the illegal State aid is founded upon the government's duty to comply with the 1990 decision of the Commission and that it was also claimed that the duty imposed upon the government by the Commission afforded the government the right to seek recovery through the English courts for the entirety of the aid.

Counsel for British Aerospace apparently told the High Court that British Aerospace would be submitting that the government's pleadings, as framed, disclosed no cause of action in English law and that it would invite the Court to strike them out.

Following the stay of the High Court proceedings, on 4 February 1992, the ECJ, annulled the 1990 decision insofar as that decision required the UK Government to recover from British Aerospace State aid of £44.4 million[17]. The Court found for British Aerospace on procedural grounds, namely that in taking its 1990 decision, the Commission had failed to observe the procedural rules laid down in Article 88 (2) EC, which includes a hearing of the interested parties.

Subsequently, the Commission followed the procedure under Article 88 (2) EC in respect of the aid of £44.4 million and found that it was illegal State aid and required repayment. Repayment was made and the initial High Court proceedings for recovery brought by the Department of Trade and Industry were not continued.

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[17] Case C-294/90, British Aerospace and Rover Group Holdings v Commission [1992] ECR I/493.

I- Information on the judgment

R v Customs and Excise Commissioners, ex parte Lunn Poly Limited and another [1999] STC 350

II- Brief description of the facts and legal issues

In January 1999, three judges of the Court of Appeal heard an appeal by the Commissioners of Customs and Excise against a decision of the previous year by the High Court, finding that the differential rates of Insurance Premium Tax ("IPT") provided for in the Finance Act 1997 constituted an unlawful State aid contrary to Article 87 EC.

That earlier application for judicial review before the High Court had been brought by Lunn Poly Ltd, a travel agent, and Bishopsgate Insurance Ltd, specialist insurers who provided Lunn Poly with a range of travel insurance policies which Lunn Poly endorsed and sold as Lunn Poly insurance. The case arose because the Finance Act 1997 replaced the previously uniform rate of 2.5% IPT with two different rates: a standard rate of 4%; and a higher rate of 17.5% which applied only to certain travel insurance contracts. The effect of the change made the premiums on travel insurance arranged by tour operators or travel agents or persons connected with them subject to the higher rate. By contrast, if the insurance was arranged by an independent insurance company, only the lower rate was payable.

The High Court accepted that those paying IPT at the lower rate were receiving State aid because the UK was foregoing the difference between the higher rate tax and the lower rate tax in the case of those who were not subject to the higher rate.

The Commissioners appealed the High Court finding that the differential rates were State aid under Article 87 EC.

III- Summary of the Court's findings

Before assessing the State aid point, Lord Justice Woolf considered a preliminary point raised by the Commissioners. They queried the role of the High Court in the earlier proceedings, suggesting that it might be limited only to reviewing the decision for breach of the principles of sound administration, rather than extending to finding a breach of the State aid rules. Lord Woolf responded that "*if the provision in national legislation conflicts with a requirement of the Treaty, it is the responsibility of the domestic courts to provide a remedy of the type granted by the Divisional Court in this case if the provision which is contravened is of direct effect*". The relevant provisions (Article 88 (3) EC) were of direct effect.

In considering what constitutes 'aid', the Commissioners had argued that in this case there was no transfer of State resources and no foregoing by the State of tax revenue. Rather, there were simply different rates of taxation set by Parliament. Lord Woolf found that to determine this issue, it was necessary to look at the position before the differential tax rates were introduced. If there were an objective justification for the introduction of the differential this would be relevant.

By way of justification for the differential, the Commissioners had argued that the different rates were introduced to avoid the loss of revenue as a result of value shifting - the travel sector allegedly sold insurance by earning low margins on the principal product of holidays, whilst earning high margins on the related travel insurance. Lunn Poly and Bishopsgate Insurance denied that any of their activities could be seen as tax avoidance. It was found, however, that there was "*no loss of tax* *which provides an objective justification for the discriminatory rate of tax imposed on tour operators and agents providing insurance. The higher rate contrary to the stand adopted by the Commissioners cannot be objectively justified as an anti-tax avoidance measure*".

Lord Woolf went on to find that the reason high margins could be achieved on travel insurance was because "*demand for travel insurance is highly price inelastic. This enables travel agents, in particular, to charge their customers a premium which they should find uncompetitive. They do not do so because they are guided by factors other than price when making their purchasing decision on insurance*".

The Commissioners then argued that there was no State aid because the 'selectivity' requirement was not met. The higher rate applied to "the generality of taxpayers" as opposed to a "specific undertaking". Lord Woolf responded that "*specific (…) should not be regarded as meaning that there can only be a State aid in relation to an individual undertaking*." A group of taxpayers could receive State aid where another body of taxpayers does not receive the same benefit. In this case, Lord Woolf stated that "*those providing travel insurance, who are not subject to the higher rate of tax, are a clearly defined part of the group providing travel insurance and they received a benefit in the form of a lower tax rate which another defined part of those providing travel insurance, namely the travel operators and travel agents, did not receive. The aid was both specific and selective*".

As for the distortion of competition and the effect on inter-state trade, Lord Woolf held that the High Court was "entitled" to find that the differential tax rates were bound to affect trade between Member States. He commented that "the extent of the difference between the two rates would make it surprising if there was no distortion".

Lord Justice Clarke continued that the differential tax rates were "not justified by the general scheme of the tax system in the United Kingdom" and "not objectively justified by the considerations advanced by the applicants".

The appeal was therefore dismissed.

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I- Information on the judgment

Customs and Excise Commissioners v Gil Insurance Limited others [2000] STC 204

II- Brief description of the facts and legal issues

The Commissioners of Customs and Excise appealed from two interlocutory decisions of the Value Added Tax and Duties Tribunal concerning, *inter alia*, its jurisdiction to hear, and the conduct of, appeals by Gil Insurance Ltd and others (the "taxpayers") against the Commissioners' refusal of their claims to repayment of Insurance Premium Tax.

The taxpayers all provided insurance for domestic appliances. A change to the Finance Act 1994 in 1997 introduced Insurance Premium Tax ("IPT") at a higher rate for premiums of some descriptions and at a standard rate on others. The taxpayers, who had been taxed at the higher rate, alleged that the differential rate was unlawful State aid and sought repayment of sums paid by way of higher rate IPT. The Commissioners rejected the claim. They asserted that even if the differential did constitute State aid, it would not follow that amounts paid by way of higher rate IPT would have been paid by way of tax that was not due to the Commissioners.

The taxpayers appealed on the basis that differential tax was contrary to Community law as it was a State aid which had not been notified to the Commission.

The Commissioners applied for a direction that the State aid issue be struck out or be heard as a preliminary issue of law. On 26 October 1999, the Value Added Tax and Duties Tribunal held that it was arguable that the higher rate or the differential was illegal. It declined to strike out the State aid issue or direct that it be heard as a preliminary issue of law.

III- Summary of the Court's findings

The Commissioners' appeals were dismissed.

The Value Added Tax and Duties Tribunal's decision not to strike out the ground of appeal on the State aid issue was a decision properly open to it.

Furthermore, the Value Added Tax and Duties Tribunal was entitled to take the view that there were reasonable grounds for the taxpayers to raise the State aid issue. It was acknowledged that the remedy was not obvious. The Commissioners argued that the taxpayers could not be repaid the differential as this would exacerbate rather than alleviate the State aid issue. Richards J. held that, while these arguments had considerable force, it was possible that the taxpayers might succeed in a restitutionary claim as this was an uncertain and developing area of the law. The fact that it was a lead case, and substantial amounts of tax were at stake, was also relevant in determining whether the matter should be dealt with at a full hearing. Moreover, the Value Added Tax and Duties Tribunal had not erred in refusing to direct that the State aid issue be heard as a preliminary issue because a resolution of that point would not be decisive of the litigation.

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