

## 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

Athens Administrative Court of Appeal ("Διοικητικό Εφετείο Αθηνών (Δ. Εφ. Αθ.)"), 31.05.2007, 2156/2007, Heracles General Cement Company S.A. v. Greece

#### II- Brief description of the facts and legal issues

Following a 1999 Commission decision, finding part of the aid granted to a Greek cement manufacturer (Heracles General Cement Company S.A.) in the form of capitalization of its debts to be incompatible with the Common Market, the beneficiary was ordered to pay back an amount of approximately GRD 2,5 billion (Commission Decision 2000/199/EC of 17.03.1999 on State aid given by Greece to Heracles General Cement Company, OJ (2000) L 66/1).

However, the Commission ordered the sums to be recovered with interest from the date on which they had been made available to the recipient until their actual recovery, a requirement that raised the amount to approximately GRD 23.5 billion. Soon after the recovery order, the recipient filed its income statement, objecting to the amount of its net taxable income. In particular, it claimed that it had already paid back an amount of approximately GRD 1.5 billion in the form of interest on part of its capitalized debts that had to be recovered, it contested the reason generating the obligation of payment of the sum at issue, as well as the amount and method of its calculation, and further claimed that the said amount pertained to accrued interest, which had to be deducted by virtue of Article 31 (1) (d) of Law 2238/1994.

In addition, it claimed that, pursuant to Article 106(1) (b) of Law 2238/1994, an amount of approximately GRD 400 million pertaining to income from interest should have been deducted from its taxable profits, given that no distribution of profits had taken place during the relevant fiscal year.

Given the tacit rejection of the recipient's objection by the Head of the Athens Public Financial Service and the subsequent dismissal of its action against that rejection by the Athens administrative court of first instance as unfounded, the recipient lodged an appeal with the Athens administrative court of appeal, calling on the latter to pronounce upon the aforementioned issues.

#### III- Summary of the Court's findings

The administrative court of appeal rejected the argument that the contested decision of the administrative court of first instance had erroneously found that the method of calculation of interest could not be contested, on the grounds that the said decision had not assessed the legality of the method of calculation of the interest due, but had simply rejected the relevant argument as inadmissible.

In examining the nature of the interest due, the court of appeal recalled that unlawful State aid is to be recovered with interest to eliminate the financial advantages resulting from the aid. Given that the legal basis of the obligation to pay interests is the same as the legal basis of the obligation to recover unlawful aid, the interest which the appellant was called upon to pay could not be categorized as accrued interest on loans or, generally, on other credit, within the meaning of Article 31(1) (d) of law 2238/1994; therefore, it could not be deducted.

The court pointed out that the term “generally” included in the aforementioned provision cannot broaden the basic characteristics of the notion of loan or credit, which are not present in the case of interest due in relation to unlawful State aid that has to be recovered.

Finally, the court of appeal rejected the argument that an amount of approximately GRD 400 million pertaining to non-taxable profits should have been deducted from the appellant’s total profits due to non-distribution of profits (an issue whose determination under national law is obviously immaterial for the purposes of recovery of unlawful aid as it cannot affect the quantification of the amount that needs to be recovered) as unfounded, on the grounds that: (i) the said amount had not been included by the appellant in the profits, when filing the income statement, (ii) the appellant had not provided any evidence to prove that the said profits were non-taxable or subject to special taxation and, (iii) the appellant never claimed that the relevant amount had not been declared properly in the income statement in error. Therefore, the court dismissed the appeal as unfounded.

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

### I- Information on the judgment

Decision 618/ 2004 of the Supreme Court ("Arios Pagos")

### II- Brief description of the facts and legal issues

A Greek firm had assigned to a Greek bank its claim for State aid relating to the production of fruit juices. The Greek State, however, paid to the assignee bank only part of the State aid and set off the remaining part with a sum equal to that due by the beneficiary firm to the Organisation of Social Security ("IKA"). The Greek bank had already lodged an appeal before the Nafplion Appeal Court, which had ordered the payment by the State of the whole amount of the assigned claim to the bank.

### III- Summary of the Court's findings

In this decision, the *Arios Pagos*, which is the Greek Civil Supreme Court, quashed the judgments of the inferior civil courts for lack of competence. It held that actions of undertakings against the State relating to the grant of State aid to an undertaking's productive activity, and the resulting actions against the State for damages, constitute substantial administrative acts to be judged by administrative courts because they refer to grants emanating from public bodies and have as their object the service of a public interest.

### IV- Comment of the authors of the 2006 study

The only interest of this judgment lies in the clarification it offers on the competence of administrative courts in matters of State aid.

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## I- Information on the judgment

Decisions 1916/2002, 1917/2002 & 1918/2002 of the *Hellenic Conseil d'Etat* and decisions 1335/2002 and 1957/1999 of the *Hellenic Conseil d'Etat*

## II- Brief description of the facts and legal issues

In 1988, a decision of the Minister of Finance, later ratified by law, imposed an extra charge on the profits of undertakings, exempting, however, their profits from export activity. The Commission had considered that this exemption constituted illegal State aid to the undertakings with an export activity which infringed Article 88 (3) EC and was not compatible with the Common Market in accordance with Article 87 (1) EC. It therefore requested in its Decision 89/659/EEC<sup>1</sup> that the Greek State revoke the State aid by collecting the part of the exempted charge. Further, the Commission brought an action before the ECJ on the basis of Article 88 (2) EC, second subparagraph, and the ECJ, by its judgment of 10 June 1993<sup>2</sup>, ruled that Greece did not comply with the above Commission decision without there being any valid reason of impossibility to execute such decision, and thus infringed its Treaty obligations. In view of the above developments, Greece has subsequently introduced a legislative provision which has retroactively replaced the initial ministerial decision and has revoked the initial exemption from the extra tax on profits relating to exports to EEC Member States.

In all of these judgments, the *Hellenic Conseil d'Etat* had to rule, as a supreme court of appeal regarding previous decisions of the administrative courts, on whether Article 78 (2) of the Greek Constitution was infringed by the retroactive revocation of a tax exemption concerning the export activity of Greek undertakings, while this tax exemption was found by a Commission decision (which was confirmed by a judgment of the ECJ) to constitute illegally granted State aid. This constitutional provision prohibits the retroactive application of taxation or financial charges beyond the year during which they are imposed and could allegedly invalidate the legislative provision by which the exemption of the export activity of Greek undertakings from the relevant tax had been revoked.

## III- Summary of the Court's findings

The *Hellenic Conseil d'Etat*, however, ruled that the initial provision exempting from taxation the export activity of undertakings had been invalid from the start (as contrary to Article 87 (1) EC) and therefore the imposition of a tax payment to the Greek undertakings which were initially exempt from it did not constitute an infringement of a constitutional provision.

## IV- Comment of the authors of the 2006 study

It is very positive that in all of the above judgments, the *Hellenic Conseil d'Etat* did not hesitate to uphold the constitutionality and the validity of provisions imposing the reimbursement of illegal aid as a result of the enforcement of a negative Commission decision.

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<sup>1</sup> Commission Decision 89/659/EEC (OJ (1989) L 394/1).

<sup>2</sup> Case C-183/91, Commission v Hellenic Republic [1993] ECR I-O3131.

**I- Information on the judgment**

Decision 220/2002 of the *Hellenic Conseil d'Etat*

**II- Brief description of the facts and legal issues**

The claimant undertaking argued that the award of a public supply tender to companies other than itself, allegedly offering the same prices as those offered by the claimant, constituted State aid contravening Article 87 EC.

**III- Summary of the Court's findings**

The *Hellenic Conseil d'Etat* rejected the above claim on the grounds that the provisions of Article 87 EC do not have direct effect.

**IV- Comment of the authors of the 2006 study**

Irrespective of the merits of this action, the *Hellenic Conseil d'Etat* failed to examine whether such measure could constitute State aid which had not been notified (see also comments regarding case 1093/1987 in section 3.9 below).

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**I- Information on the judgment**

Decision 89/2002 of the Suspensions Committee of the *Hellenic Conseil d'Etat* (injunction proceeding)

**II- Brief description of the facts and legal issues**

In this case, the claimant requested the suspension of the execution of a ministerial decision against which it had lodged an action before the *Hellenic Conseil d'Etat*. This decision had revoked the submission of the complainant company's business plan under the provisions of law 1892/1990 and had requested the reimbursement by the claimant of a State grant. The claimant claimed, *inter alia*, that the administration had infringed Article 88 (3) EC by deciding that its failure to notify the Commission of the submission of the above business plan (under the State aid system introduced by Law 1892/1990) obliged it to revoke such aid.

**III- Summary of the Court's findings**

The *Hellenic Conseil d'Etat* rejected the above and the other grounds for suspension of the execution of the administrative act as being obviously unfounded.

**IV- Comment of the authors of the 2006 study**

The *Hellenic Conseil d'Etat* did not allow the suspension of the execution of a ministerial decision imposing the reimbursement by the claimant of a State grant which, in the view of the Greek State, infringed Article 88 (3) EC and thus facilitated the reimbursement thereof.

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**I- Information on the judgment**

Decision 150/1999 of the *Hellenic Conseil d'Etat*

**II- Brief description of the facts and legal issues**

The claimant claimed that a ministerial decision authorising the capitalisation of an undertaking's debt to its creditors should be annulled as contrary to the provisions of Article 87 EC.

**III- Summary of the Court's findings**

The *Hellenic Conseil d'Etat* did not uphold the above claim. It held that this claim could be relevant only against a previous ministerial decision<sup>3</sup> which, however, had been subject to the court's scrutiny, and action against it had already been rejected by its Decision 1400/1987.

**IV- Comment of the authors of the 2006 study**

See also Decision 1093/1987 of the *Hellenic Conseil d'Etat* in section 3.9 below.

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<sup>3</sup> In accordance with this ministerial decision, the undertaking in question had been put under the temporary management of the Institution for the Economic Restructuring of Enterprises ("OAE").

**I- Information on the judgment**

Decision 5110/1994 of the Administrative Court of First Instance of Athens

**II- Brief description of the facts and legal issues**

An action for damages was brought against the National Drugs Organisation and the Greek State for the infringement of Articles 86 and 87 EC. The claimant was a "*société anonyme*" engaged in the trade of imported drugs and was obliged to pay to the National Drugs Organisation a charge used by the National Drug Organisation to finance two State companies with business in the area of pharmaceuticals.

**III- Summary of the Court's findings**

In this case, the Administrative Court of First Instance of Athens held that the State, legal entities of the public sector and local authorities are liable for the acts or omissions of their organs which, although in compliance with a formally adopted Greek law, contravene a law of superior force, such as the Constitution or EC law, provided that the lesser law infringes a person's right which is directly protected by the superior law. Although in this case the Court upheld the *locus standi* of the claimant, it rejected its action on the grounds of lack of evidence. In particular, the Court held that a 15% charge on the wholesale price of drugs used by the National Drug Organisation to finance two State companies engaged in business in the area of pharmaceuticals did not infringe Articles 86 and 87 EC because no evidence had been submitted by the claimant to prove that competition and trade between Member States had been affected as a result of such measure.

**IV- Comment of the authors of the 2006 study**

It is important that the Administrative Court of First Instance of Athens recognised the liability of the State, legal entities of the public sector and local authorities to pay damages to competitors of a beneficiary of State aid if the relevant EC provisions were infringed. Moreover, it is positive that the same Court also examined the existence of State aid in the case under consideration. However, important evidence on market shares and turnovers of the beneficiary undertakings was lacking and the existence of the State aid in question was not established.

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**I- Information on the judgment**

Decision 3910/1988 of the Hellenic Conseil d'Etat

**II- Brief description of the facts and legal issues**

In this case, the claimant claimed that a ministerial decision, which had authorised the provisional suspension of payment of overdue debt by an undertaking in financial difficulty, infringed the provisions of Article 87 EC.

**III- Summary of the Court's findings**

The *Hellenic Conseil d'Etat* rejected the above claim on the grounds that the provisions of Article 87 EC were not of direct effect.

**IV- Comment of the authors of the 2006 study**

The *Hellenic Conseil d'Etat* failed to examine, however, whether such measure could constitute State aid which had not been notified. See comments in similar case 1093/1987 in section 3.9 below.

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**I- Information on the judgment**

Decision 3905/1988 of the *Hellenic Conseil d'Etat*

**II- Brief description of the facts and legal issues**

An action on the grounds of EC State aid law provisions was brought before the *Hellenic Conseil d'Etat* against a ministerial decision refusing to license a "*société anonyme*" to operate a pharmaceutical storehouse. The relevant legislation in force (Law 517/1968 and Law 328/1976) did not allow the operation of a pharmaceutical storehouse by a "*société anonyme*", whereas this was allowed to two State companies dealing with the import, export and trade of pharmaceutical goods in order to serve general social interests. The claimant argued that the ministerial decision and the underlying legislation infringed the provisions of Articles 87 *et seq.* EC.

**III- Summary of the Court's findings**

Such action failed to succeed because the *Conseil d'Etat* ruled that the claimant did not prove that the cross-border trade had been affected as a result of such ministerial decision.

**IV- Comment of the authors of the 2006 study**

On the whole, the Greek courts hesitate to uphold the *prima facie* existence of State aid on the basis of lack of necessary evidence.

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**I- Information on the judgment**

Decision 1093/1987 of the *Hellenic Conseil d'Etat*

**II- Brief description of the facts and legal issues**

An action was brought by shareholders of an important Greek paper manufacturer who, on the grounds of an infringement of Article 87 EC, requested the annulment of a ministerial decision by which an undertaking had been submitted to the special regime provided by Law 1386/83 on the Institution for the Restructuring of Enterprises (OAE).

**III- Summary of the Court's findings**

The *Hellenic Conseil d'Etat* rejected the above action, stating that the provisions of Article 87 EC cannot be directly applied by the national court but are only applied with the procedure of Article 88 EC, which concerns the relations between the Member States.

**IV- Comment of the authors of the 2006 study**

The *Hellenic Conseil d'Etat* came to the above conclusion without first checking whether the submission of the undertaking in question to the special regime provided by Law 1386/83 on the Institution for the Restructuring of Enterprises (OAE) constituted, at least in part, State aid to this undertaking. If this was the case, the *Hellenic Conseil d'Etat* should have examined whether the aid regime provided by the above law had been notified to the Commission and had been authorised by it. Further, if it was found that the notification procedure of Article 88 (3) had not been complied with, the *Hellenic Conseil d'Etat* could then have applied the EC Treaty State aid provisions.

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In 1988, a decision of the Minister of Finance, later ratified by law, imposed an extra charge on the profits of undertakings. It exempted, however, their profits from export activity. The Commission considered this exemption to constitute illegal State aid to the undertakings with an export activity, which infringed Article 88 (3) EC and was not compatible with the Common Market in accordance with Article 87 (1) EC. It therefore requested, in its Decision 89/659/EEC<sup>4</sup>, that the Greek State revoke the State aid by collecting the part of the exempted charge. Further, the Commission brought an action before the ECJ on the basis of Article 88 (2) EC, second subparagraph, and the ECJ, by its judgment of 10 June 1993<sup>5</sup>, ruled that Greece had not complied with the above Commission decision, without there being any valid reason of impossibility of executing such decision, and thus had infringed its Treaty obligations. In view of the above developments, Greece subsequently introduced a legislative provision, which retroactively replaced the initial ministerial decision, and revoked the initial exemption from the extra tax on profits relating to exports to EC Member States.

In all of these judgments, the *Hellenic Conseil d'Etat* had to rule, as a supreme court of appeal on previous decisions of the administrative courts, on whether Article 78 (2) of the Greek Constitution was infringed by the retroactive revocation of a tax exemption concerning the export activity of Greek undertakings, while this tax exemption was found by a Commission decision (which was confirmed by a judgment of the ECJ) to constitute illegally granted State aid. This constitutional provision prohibits the retroactive application of taxation or financial charges beyond the year during which they are imposed and could allegedly invalidate the legislative provision by which the exemption of the export activity of Greek undertakings from the relevant tax had been revoked.

## III- Summary of the Court's findings

The *Hellenic Conseil d'Etat*, however, ruled that the initial provision exempting from taxation the export activity of undertakings had been invalid from the start (as contrary to Article 87 (1) EC) and therefore, the imposition of a tax payment to the export activities of Greek undertakings which were initially exempt from it did not constitute an infringement of a constitutional provision.

## IV- Comment of the authors of the 2006 study

It is very positive that in all of the above judgments, the *Hellenic Conseil d'Etat* did not hesitate to uphold the constitutionality and validity of the provisions imposing the reimbursement of illegal aid as a result of the enforcement of a negative Commission decision.

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<sup>4</sup> Commission Decision 89/659/EEC (OJ (1989) L 394/1).

<sup>5</sup> Case C-183/91, Commission v Hellenic Republic [1993] ECR I-O3131.

**I- Information on the judgment**

Decision 89/2002 of the Suspensions Committee of the *Hellenic Conseil d'Etat* (injunction proceeding)

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In this case, the claimant requested suspension of the execution of a ministerial decision against which it had lodged an action before the *Hellenic Conseil d'Etat*. This decision revoked the submission of the complainant company's business plan under the provisions of law 1892/1990 and requested the reimbursement by the claimant of a State grant. The complainant claimed, *inter alia*, that the administration had infringed Article 88 (3) EC by deciding that its failure to notify the Commission of the submission of the above business plan (under the State aid system introduced by law 1892/1990) obliged it to revoke such aid.

**III- Summary of the Court's findings**

The *Hellenic Conseil d'Etat* rejected the above and the other grounds for suspension of the execution of the administrative act as being clearly unfounded.

**IV- Comment of the authors of the 2006 study**

The *Hellenic Conseil d'Etat* did not allow the suspension of the execution of a ministerial decision imposing the reimbursement by the claimant of a State grant which, in the opinion of the Greek State, infringed Article 88 (3) EC and thus facilitated the reimbursement thereof.

The *Hellenic Conseil d'Etat* did not hesitate to uphold the constitutionality and validity of the provisions imposing the reimbursement of illegal aid as a result of the enforcement of a negative Commission decision in a series of its judgments (1916/2002, 1917/2002, 1918/2002, 1335/2002 and 1957/1999).

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