

Review of State Aid Case Law

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Introduction

I have opted for a more complete (but certainly not exhaustive) presentation of the case law, with some more emphasis on 2006 judgments. All views expressed are strictly personal. In this context, I would like to present various judgments regarding:

A) Procedural issues

B) The basic rules governing the application of Article 87

First, the concept of state aid under Article 87

Second, the Commission's margin of discretion in applying Article 87

Third, the de minimis ceiling,

Fourth, taxation and

Fifth, various other rulings, and finally I will speak about

C) Recovery

A) Procedural issues

1. Air One, which submitted a complaint to the Commission alleging unlawful aid granted by the Italian authorities to the air carrier Ryanair in the form of reduced prices for the use of airport and ground handling services. In the case Air One v Commission before the CFI, the Commission contented among others that a potential competitor cannot be regarded as a party concerned having standing to bring proceedings. In its judgment of May 10th 2006, case T-395/04, the CFI concluded that since the applicant already operates in the Italian market providing scheduled air transport of passengers, it cannot be denied the status of party concerned merely on the ground that the routes it operates directly do not coincide exactly with those operated by the recipient of the contested measures. For the purposes of article 88 (2) admissibility, it is sufficient to find that the applicant is a competitor of the recipient of the contested State measures insofar as those two undertakings operate, directly or indirectly, services providing scheduled air transport of passengers from or to Italian airports and, in particular, regional airports.

2. As far as international routes are concerned, the applicant provides, inter alia, services between Rome and Frankfurt, two cities also served by Ryanair. Indeed, the applicant does not operate that route directly using aircraft from its own fleet but has concluded a code-sharing agreement with Lufthansa. However, the fact that the applicant was able to

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provide the public with air transport services between those two cities cannot be overlooked. Moreover, as the applicant already has a fleet of aircraft at its disposal, it is in a position to expand its activities to include other destinations which are also served by Ryanair. With regard to domestic routes, it is clear that whilst, at the material time, Ryanair did not operate routes between Italian cities, the possibility cannot be excluded that it could subsequently do so in direct competition with the applicant. In those circumstances, it is possible to conclude that there was a sufficient relationship of competition, for the purposes of admissibility, between the applicant and the recipient of the contested measures. Consequently, Air One was considered a party concerned within the meaning of Article 88(2) EC. It was therefore admissible for Air One to challenge a decision taken by the Commission under Article 88(3) EC in order to secure its procedural rights as a party concerned. In those circumstances, it is entitled to seek from the CFI a declaration as to any failure to act on the part of the Commission, given that the possibility remains open to the Commission to define its position on the complaint without initiating the formal investigation procedure. The action was therefore declared admissible but was dismissed on the merits.

3. Dealing with the question of who must notify to the Commission, I would like to quote the case *P&O European Ferries (Viscaya) and Disputacion Floral de Viscaya v Commission*, C-442/03 and C-471/03, of June 1st 2006, where the ECJ estimated that it is apparent from the actual structure of Article 88(3), which establishes a bilateral relationship between the Commission and member States, that only the Member States are under an obligation to notify. That obligation can thus not be regarded as satisfied by notification by an undertaking receiving the aid. The machinery for reviewing and examining State aid established by Article 88 does not impose any specific obligation on the recipient of aid. First, the notification requirement and the prior prohibition on implementing planned aid are directed to the Member State. Second, the Member State is also the addressee of the decision by which the Commission finds that aid is incompatible with the common market and requests the Member State to abolish the aid within the period determined by the Commission.

4. In the case *Scott v Commission*, C-276/03 P, of October 6th 2005, the ECJ noted that Article 15 of Regulation No 659/1999 lays down a limitation period of 10 years which begins on the day on which the unlawful aid is awarded to the beneficiary. Under the second sentence of Article 15(2), the limitation period is interrupted by '[a]ny action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid'. While that provision indeed contains a reference to both 'action[s] taken by the Commission' and 'request[s] of the Commission', that cannot mean, however, that a request for information addressed by that institution to the Member State concerned constitutes 'action taken by the Commission' only provided it has been notified to the beneficiary of the aid. Alternatively, there may be situations in which a 'request of the Commission' does not automatically and simultaneously constitute 'action taken by the Commission'.

5. The wording of Article 15 of Regulation No 659/1999 does not give any guidance as to whether there is any requirement to notify the action to the beneficiary of the aid if the

limitation period is to be interrupted. In that respect, according to recital 14 in the preamble to Regulation No 659/1999, for reasons of legal certainty the limitation period is designed to prevent the recovery of unlawful aid, which can no longer be ordered. The limitation period is therefore intended, in particular, to protect some of the interested parties, including the Member State concerned and the beneficiary of the aid. Those interested parties therefore in fact have a practical interest in being informed of action taken by the Commission which is capable of interrupting the limitation period. That practical interest cannot, however, have the effect of making the application of the second sentence of Article 15(2) of Regulation No 659/1999 subject to the requirement that that action be notified to the beneficiary of the aid. The procedure provided for in Article 93(2) of the Treaty takes place primarily between the Commission and the Member State concerned. It is initiated against that State and not against the beneficiaries (see, Joined Cases C-74/00 P and C-75/00 P Falck and Acciaierie di Bolzano v Commission [2002] ECR I-7869, paragraphs 81 and 83). It is true that case-law has granted the beneficiary of aid certain procedural rights. However, those rights are designed to enable the beneficiary to provide information to the Commission and to put forward its arguments, but do not confer on it the status of a party to the procedure. Therefore, even if the status of party could justify a notification requirement, it suffices to state that the beneficiary of aid does not have that status. Having regard to the foregoing, the ECJ concluded that the CFI did not interpret Article 15 of Regulation No 659/1999 incorrectly in holding that the limitation period could be interrupted by an action which has not been notified to the beneficiary of the aid.

B) Basic rules

a) Concept of state aid under Article 87

6. According to Article 87(1), any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market. However, under Article 87(2), aid having a social character, granted to individual consumers, and aid to make good the damage caused by natural disasters or exceptional occurrences is compatible with the common market, and under Article 87(3) aid intended to i) promote the economic development of underdeveloped areas; ii) promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; iii) facilitate the development of certain activities or areas, iv) promote culture and heritage conservation, may be compatible with the common market.

7. Before entering into more details, I must mention the case *Italy v Commission* (C-66/02, Judgment of December 15th 2005), in which the Republic of Italy alleged that Article 87 did not apply as the measure in question could not amount to an state aid, as it benefited other entities which could not be considered as undertakings under the meaning of Article 87(1). The ECJ ruled that the fact that an aid can benefit undertakings but also

other kinds of beneficiaries, which are not undertakings under the meaning of Article 87, cannot avoid the application of the said article to the aid in question as some undertakings were clearly beneficiaries of the contested aid.

8. Regarding the application of Article 87 as such, in the case *Enirisorse*, of March 23rd, 2006 (C-237/04), the ECJ recalled that it is settled case-law that the concept of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect. However, so the ECJ declared, national provisions whereby members of a company controlled by the State may, in derogation from the general law, withdraw from that company on condition that they relinquish all claims over that company's assets are not liable to be considered to be State aid for the purposes of Article 87. Such provisions, in the Court's view offer an advantage neither to members, who may exceptionally withdraw from the company without obtaining the reimbursement of their shares, nor to that company.

9. In its recent judgment of June 7th 2006, case T-613/97, *Ufex and Others v Commission*, the CFI recalled that the supply of goods or services on preferential terms is one of the indirect advantages which have the same effects as subsidies. Furthermore, according to settled case-law, Article 92(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects.

10. In this case, the Commission had contended in essence that the transfer of Postadex had not generated any costs and that therefore no State aid was involved, given that the judgment of the ECJ referred only to the remuneration intended to cover the costs. However, according to the CFI, the Commission's argument that the transfer of the Postadex client base was a logical corollary of a subsidiary being created and that, for this reason, it did not amount to State aid, could be accepted. According to the CFI, it was common ground that La Poste had transferred to SFMI-Chronopost the client base of its Postadex product for no consideration. It was clear from the Commission's replies that SFMI-Chronopost did not make any payment whatsoever for the transfer of the Postadex client base. The Postadex client base amounted to an intangible asset which had an economic value. In addition, the CFI recalled that it was with the resources of a legal monopoly that La Poste was able to create the Postadex service. The transfer of such an intangible asset constituted an advantage for the beneficiary. Similarly, the decision to transfer Postadex to SFMI-Chronopost could be attributed to the State. According to the CFI, it must therefore be held that the transfer of Postadex to SFMI-Chronopost constituted State aid, given that La Poste received no consideration from SFMI-Chronopost. That finding cannot be invalidated by the Commission's assertion that the Postadex client base had no value in accounting terms. It follows that the Commission erred in law in taking the view that the transfer of the Postadex client base did not constitute State aid on the ground that it did not entail any cash advantage. Consequently, the contested decision was annulled in so far as the Commission considered that the transfer of Postadex by La Poste to SFMI-Chronopost did not constitute State aid.

Moreover, it should be added that for the CFI, the contested decision had (also) to be annulled for defective reasoning in so far as it concluded that the logistical and commercial assistance provided by La Poste to SFMI-Chronopost did not constitute State aid

b) The Commission's margin of discretion in applying Article 87

11. Dealing with the Commission's margin of discretion in applying Article 87, the ECJ had the opportunity to delimit the said margin, in the case *Belgium v Commission*, judgment of April 14th 2005, C-110/03, Rec. p. I-2801. By its application, the Kingdom of Belgium sought the annulment of Commission Regulation (EC) No 2204/2002 of 5 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ 2002 L 337, p. 3, corrigendum in OJ 2002 L 349, p. 126).

12. The ECJ concluded that the Council, by means of Regulation No 994/98, conferred on the Commission the power to declare that certain categories of aid are compatible with the common market and are not subject to the obligation of notification. Having regard to Article 87, the Council thus confined itself to empowering the Commission to give effect to paragraph 3 of that article by laying down exceptions to the principle of incompatibility of aid enunciated in paragraph 1 thereof. By contrast, it did not confer on the Commission any power to interpret Article 87(1), which defines the concept of State aid. The Commission therefore had no power to lay down a binding and general definition of the concept of State aid. It thus acted within the limits of its powers and, accordingly, did not contravene the general principles of legal certainty, subsidiarity and proportionality. In effect, the ECJ reminded us that the Commission has a wide margin of discretion under Article 87, paragraph 3, to determine the compatibility of a State aid measure with the common market but enjoys (no power to modify the definition) margin of appreciation as regards the definition of State aid under Article 87, paragraph 1.

13. In the *Corsica Ferries France v Commission* a judgment of the CFI, 15th of June 2005, case T-349/03, a French aid to a maritime company, operating on several routes to Corsica, was challenged (the aid in question concerned the route Corsica-Italy). In this case, the CFI held that the Commission had made an erroneous appraisal of the question whether the aid was limited to the minimum, a defect which rendered its decision unlawful. The CFI considered that although the Commission was under a duty to take into account the whole of the net proceeds of disposal realised in implementation of the restructuring plan, it left out of its calculation a sum of EUR 10 million which represented the net proceeds of disposal of the fixed assets of the Société nationale maritime Corse-Méditerranée. The CFI observed that although the Commission was, in principle, entitled in the exercise of its broad discretion to proceed on the basis of an approximate evaluation of the net proceeds of the disposal of assets under the restructuring plan, in this case it had the information necessary to assess the aid exactly.

c) De minimis ceiling

14. Before examining the de minimis ceiling as such, the case *Unicredito Italiano* of December 15th 2005, (C-148/04) must be cited, in which a reform of the Italian banking system was challenged. According to new provisions on the capital restructuring and consolidation of credit institutions governed by public law, a tax advantage in the form of a reduction to 12.5% of the rate of income tax was granted to banks which merge or engage in similar restructuring, for five consecutive tax years, provided that the profits were placed in a special reserve which could not be distributed for a period of three years. It stipulated that the profits placed in the special reserve could not exceed 1.2% of the difference between the sum of credits and debits of the post-merger bank and the sum of the credits and debits of the largest pre-merger bank.

15. In this case, the ECJ reasserted the principle according to which, since the Commission was examining in the case in question an aid scheme and not individual aid, it was not required to examine each particular case of application of the scheme which would not have resulted in exceeding the maximum amount of the de minimis State aid ceiling. The complaint based on the failure to examine the tax reduction from the point of view of 'de minimis aid' was accordingly unfounded. Dealing with the application of Article 87(3), the ECJ recalled that for the purposes of applying Article 87(3) the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. The ECJ, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment in the matter for that of the competent authority but must confine itself to examining whether the authority's assessment is vitiated by a manifest error or by misuse of powers.

16. Dealing now with the de minimis ceiling as such, the ECJ had to verify in *Heiser*, a judgment of March 3rd 2005, case C-172/03, Rec. p. I-1627, whether an aid amounted to a state aid and in the affirmative whether it could fall under the de minimis ceiling. In this case, an Austrian national court was asking the ECJ to clarify whether a national rule, which provides that, following a change in the VAT status applicable to medical services from taxable to exempt, no adjustment has to be made to the tax deductions made by doctors and dentists prior to this change, constituted a State aid under Article 87. The applicant and the Austrian government claimed that there was no effect on trade between Member States as the amounts concerned by the adjustment of deductions were limited. For the applicant the amount of adjustment would not exceed EUR 30 000 for the entire period from 1997 to 2004 (that is far below the de minimis ceiling of EUR 100 000).

17. In this case the ECJ recalled that neither the relatively small amount of aid nor the relatively small size of the undertaking receiving it excluded the possibility that the trade between Member States might be affected. In addition, the ECJ considered that the fulfilment of the condition that EC trade must be affected does not depend on the local or regional character of the services supplied or on the amount of aid concerned. Finally, and regarding the de minimis ceiling as such², the ECJ ruled that it was not certain that the amount of the deductions which a medical practitioner may be able to make under a

² See the relevant Commission Notice, 96/C68/06, OJ 1996 C-68, applicable at that time.

measure such as that at issue, was, in all circumstances, less than the de minimis amount, which was set at EUR 100 000 over three years. The national legislation, as the Commission rightly observed, did not lay down any limit on the amount a medical practitioner, as an individual undertaking, could receive as a result of the discontinuance of the adjustment of deductions. It resulted from this circumstance that the measure could not be covered by the de minimis rule laid down by that notice.

d) Taxation

18. In *Casino France and Others*, joined cases C-266/04 to 270/04, 276/04 and 321/04 to 325/04, October 27th 2005, the ECJ had the opportunity to recall the constant case law regarding taxation. In this case, Article 3, paragraph 2 of French Law N° 72-657 of 13 July 1972 establishing measures for certain categories of elderly traders and establishes a tax to support the trade and craft sectors (*Taxe d'aide au commerce et à l'artisanat*, hereinafter 'the TACA'). The TACA was a progressive tax borne directly by retail stores in France which have a sales area exceeding 400 m² and an annual turnover in excess of EUR 460 000. The tax rates progressed in step with annual turnover per m². The questions referred for a preliminary ruling essentially concerned the question whether Articles 87(1) and 88(3) forbid the levy of a tax such as the TACA.

19. According to consistent case-law, taxes do not fall within the scope of the EC Treaty's provisions concerning State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure. The ECJ had thus to consider whether a tax such as the TACA may be regarded as forming an integral part of one or more aid measures within the meaning of the case-law cited above.

- Exemption from the TACA for small retail outlets

20. The claimants in the main proceedings submitted that exemption from the TACA for small retail outlets constituted an aid measure within the meaning of Article 87(1). It was a selective advantage granted through State resources and was likely to adversely affect competition and trade between Member States. As the tax was inseparable from the exemption from it, it was an integral part of the aid.

21. For a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid. In the event of such hypothecation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the common market. Thus the ECJ has held that businesses liable to pay a tax cannot rely on the argument that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax. Accordingly, even if the tax exemption for small retail outlets constitutes an aid measure within the meaning of Article 87(1), the possible illegality of that aid is not such as to affect the legality of the TACA.

- The various uses to which the revenue from the TACA is put

22. As regards the cessation payment, under the national legislation at issue, that measure was funded by the TACA. However, contrary to the submissions of the claimants in the main proceedings³, the ECJ concluded that the national legislation did not provide for hypothecation of the TACA to the cessation payment. The national legislation at issue in the main proceedings could thus be distinguished from that considered in the case which gave rise to the judgment in Case 47/69 France v Commission [1970] ECR 487, paragraph 20, where it was provided that the aid which it established increased ‘in proportion to the increase in the revenue from the charge’.

23. By contrast, in the cases in the main proceedings, there was no connection between the revenue from the TACA and the amount of the cessation payment granted to traders and craftsmen who permanently cease working. The national legislation at issue established the amount of the cessation payment between a minimum and maximum value regardless of the revenue from the tax. It is then for the local committee to decide upon the amount of the cessation payment solely on the basis of the personal circumstances of the traders and craftsmen concerned. Since the revenue from the TACA does not influence the amount of the advantage granted to traders and craftsmen by virtue of the cessation payment, the TACA is not hypothecated to the cessation payment within the meaning of the case-law cited in paragraph 40 of this judgment. In those circumstances, the possible illegality of the cessation payment in the light of the Treaty provisions on State aid is not such as to affect the lawfulness of the TACA. Consequently, even if the "Fonds d'intervention pour la sauvegarde de l'artisanat et du commerce (Fisac) and the "Comité professionnel de la distribution des carburants" (CPDC) finance measures could be classified as State aid, the possible illegality of such aid would not be such as to affect the lawfulness of the TACA in the light of the Treaty provisions in respect of State aid.

24. I would also like to quote the cases *Cassa di Risparmio di Firenze and Others* (C-222/04, of January 10th 2006) in which the ECJ recalled that a tax exemption on dividends amounted to a State Aid⁴ and *Servizi Ausiliari Dottori Commercialisti* (C-451/03, of March 30th 2006), where the ECJ ruled that a measure by which a Member State provides for the payment of compensation from State funds to certain undertakings

³ According to the claimants in the main proceedings, the various uses to which the revenue from the TACA was put all constitute State aid for the purposes of Article 87(1), which had been granted in breach of Article 88(3). In the context of the cases in the main proceedings, which all concern demands for reimbursement of taxes that are allegedly unlawful under Articles 87(1) and 88(3), the question whether the various measures financed by means of the TACA constitute State aid was relevant only in so far as it was established that the tax is hypothecated to the measures concerned (ECJ judgment of 13th January 2005, case C-174/02 **Strekgewest**, par. 26). According to the claimants in the main proceedings, there was such hypothecation of the TACA to the measures financed by that tax. The revenue from the TACA was not allocated to the Treasury. On the contrary, the legislation establishing the TACA specifically aimed to finance aid measures in favour of certain categories of traders who were in competition with those subject to the tax.

⁴ « l'exonération d'une retenue fiscale sur les dividendes de l'exercice 1998 ».

responsible for helping taxpayers in connection with the completion of tax declarations must be classified as State aid within the meaning of Article 87(1), where: the level of the compensation exceeds what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations, and the compensation is not determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the means required so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

e) Various other rulings

25. In the case *Le Levant 001 and Others v Commission* of February 22nd 2006 (T-34/02), was challenged a French aid given under the form of a development aid for the boat *Le Levant*, which was based in the island *Saint-Pierre et Miquelon*. First, the CFI insisted in its ruling on the fact that the Commission must do its best, in its decision to open the formal investigation procedure, to identify the beneficiaries of an aid. This obligation is of importance as the beneficiaries must have, at this very early stage, the opportunity to give their view on the aid in question. Then, the CFI ruled that the Commission has the duty to explain in what way an aid is to be considered as incompatible with the common market. Regarding this issue, the CFI recalled that trade between Member States must be affected by the aid in question. In this case, the CFI noticed that *Saint-Pierre-et-Miquelon* was not part of the EU territory, and that the Commission had failed to explain in what way the trade between Member States would be affected by the said aid, bearing in mind that no definition of the relevant market was indicated. Accordingly, the CFI decided to annul the Commission's decision.

26. Recent case-law tries to find an appropriate balance regarding the Commission's burden of proof. In the case *Atzeni and Others* of February 23rd 2006 (Joined Cases C-346/03 and C-529/03), an aid granted by the Region of Sardinia, Italy, in the agriculture sector was challenged. The ECJ reasserted the principle according to which in the case of aid which was not notified to the Commission at the planning stage, the Commission is bound, in the statement of reasons for its decision, to refer at least to the circumstances in which aid has been granted where those circumstances show that the aid is such as to affect trade between Member States, but it is not bound to demonstrate the real effect of aid already granted. If it were, that requirement would ultimately favour Member States which grant aid in breach of the duty to notify laid down in Article 93(3) of the Treaty, to the detriment of those which do notify aid at the planning stage. In the present case, it was apparent from the contested decision that the Commission stated how the aid granted conferred an advantage on the recipients. The Commission also stated that, for agricultural products, any aid which favours domestic products may affect trade between Member States. Consequently, it stated the reasons for which it was of the view that the aid granted distorted competition and could affect trade between Member States. Since the aid measures had not been notified, it was not required to give a description of the market or explain in detail the trade flows for the products concerned between Member States.

C) Recovery

27. To finish, I would like to deal with recovery as, where it finds that aid is incompatible with the common market, the Commission may order the Member State to recover it from the recipient. The cancellation of unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previously existing situation on the market. According to the case-law, that objective is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient, in other words, the undertakings which have actually benefited from it. Before entering into more the details, I would like to recall at this preliminary stage that the Commission determines only the conformity of an aid with the common market. There are no specific Community rules for the recovery of the State aid, the said recovery being governed according to national law. In the recent case *Kuwait petroleum (Nederland) v Commission* of May 31st, 2006, T-354/99, the CFI recalled that in the absence of pertinent provisions of Community law, the recovery of aid which has been declared incompatible with the common market is to be carried out in accordance with the rules and procedures laid down by national law, in so far as those rules and procedures do not have the effect of making the recovery required by Community law practically impossible and do not undermine the principle of equivalence with procedures for deciding similar but purely national disputes.

28. In Case C-415/03, *Commission v Greece* [2005] ECR I-3875 (May 12th 2005), the Commission asked the ECJ to declare that, by failing to take within the prescribed period, in accordance with Article 3 of Decision 2003/372, all the measures necessary for repayment of the aid found in that decision to be unlawful and incompatible with the common market, or, in any event, by failing to inform it of the measures taken pursuant to that decision, the Hellenic Republic had failed to fulfil its obligation.

29. To facilitate the understanding of this case, it would be useful to recall the factual background of this case. In 1996 the Commission had initiated against the Hellenic Republic the procedure laid down in Article 93(2) of the EC Treaty (now Article 88(2)), which led to the adoption of Decision 1999/332. Under that decision, the grant of aid was coupled with a revised restructuring plan for the period from 1998 to 2002 and was subject to special conditions. Following further complaints about the grant of more aid to Olympic Airways, the Commission initiated a new procedure under Article 88(2), on the ground that the company's restructuring plan had not been implemented and that some of the conditions laid down in its earlier decision had not been fulfilled, in particular the requirement to provide the Commission with information pursuant to Article 10 of Council Regulation (EC) N° 659/1999. At the end of that procedure, the Commission adopted Decision 2003/372, which was based in particular on the findings that most of the objectives of the Olympic Airways restructuring plan had not been attained, that the conditions imposed by the approval decision had not been fully met and that the approval decision had been wrongly implemented. In addition, the Commission referred to the existence of new operating aid, which consisted, in essence, in the toleration by the Greek

State of the non-payment of, or deferment of the payment dates for, social security contributions, value added tax on fuel and spare parts, rent payable to airports, airport charges and a tax imposed on passengers on departure from Greek airports, called 'spatosimo'. The Commission required the Hellenic Republic to take the necessary measures to recover the aid concerned from the beneficiary and inform the Commission within a period of two months from the date of notification of its decision on the measures taken to comply with it. Since the Greek Government refused to comply and the Commission was not satisfied with the explanations provided by it, the Commission brought the case now under discussion.

30. The ECJ found that the Commission's application was well founded. It observed that the only defence available to a Member State in opposing an application by the Commission under Article 88 (2) for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to implement properly the decision ordering recovery of the aid in question. The condition that it is absolutely impossible to implement a decision is not fulfilled, in the case of a Commission decision on State aid, where the defendant government merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real step to recover the aid from the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could enable those difficulties to be overcome. Where the implementation of such a decision encounters a certain number of national difficulties, the Commission and the Member State concerned must respect the principle underlying Article 10, which imposes a duty of genuine cooperation on the Member States and the Community institutions to work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, in particular the provisions on State aid. That had not happened in this case. The ECJ moreover confirmed that, in an action concerning the failure to implement a decision on State aid which has not been referred to the ECJ by the Member State to which it was addressed, the latter is not justified in challenging the lawfulness of that decision.

31. Lastly, the ECJ also observed that no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling its recipient to work out himself, without overmuch difficulty, that amount. The Commission may therefore legitimately confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amounts to be repaid.

Conclusion

32. It results from the recent case-law mentioned, that both the ECJ and the CFI play an important role in the control of the accurate application of Articles 87 and 88. In the near

future and in the light of the Commission's State aid action plan⁵, the Courts will have new opportunities to develop and adapt their case law to the new provisions and concepts which would result from the said reform, bearing in mind that the target must be the protection of undistorted trade between Member States.

⁵ Which aims to present a comprehensive and consistent reform package based on the following elements (less and better targeted state aid; a refined economic approach; more effective procedures, better enforcement, higher predictability and enhanced transparency; a shared responsibility between the Commission and Member States: the Commission cannot improve state aid rules and practice without the effective support of Member States and their full commitment to comply with their obligations to notify any envisaged aid and to enforce the rules properly). See the action plan on the web address: http://ec.europa.eu/comm/competition/state_aid/others/action_plan/saap_en.pdf