March 2006

STUDY ON THE ENFORCEMENT OF STATE AID LAW AT NATIONAL LEVEL

Part II

Recovery of unlawful State aid: enforcement of negative Commission decisions by the Member States

Coordinated by

Thomas Jestaedt, Jones Day
Jacques Derenne, Lovells
Tom Ottervanger, Allen & Overy

TABLE OF CONTENTS

INTRODUCTION, METHODOLOGY

1. Introduction, methodology

This study looks at the practice of enforcement of negative Commission decisions by Member States[1]. The focus is on the five Member States with the largest total number of recovery cases as at 1 July 2005: Germany, France, Spain, Italy and Belgium.

We have applied an **empirical methodology,** looking at the practice of **administrative** recovery and corresponding **court decisions**. With respect to administrative practice, we have had conversations with the Commission about recovery cases pending as at 1 July 2005. As regards court decisions, we have relied on all published recovery decisions.

This part of the study starts with a summary in section 2 of EC rules applicable to the recovery of unlawful aid.

For ease of reference, we present at the outset, in section 3, a summary and a description of the obstacles to efficient recovery and proposed remedies, as well as proposed best practices guidelines, all derived from sections 4 to 8 of the study.

Sections 4 to 8 contain a detailed analysis of the recovery methods used in Belgium, France, Germany, Italy and Spain, structured as follows:

- description of the authorities responsible for recovery at national level
- rules applicable to recovery
    - administrative law rules
    - civil law rules
    - interim relief
    - recovery in insolvency proceedings
- actions for recovery (or opposing recovery) before the national courts
- main difficulties encountered in recovery proceedings
- proposed remedies and best practices

The situation in the all other old Member States is described briefly in section 9.

[1] The authors of this study express their gratitude to Eva Mona Götz and Charlotte Wright, lawyers from Lovells, for their invaluable contribution in compiling this study.

SUMMARY OF EC LAW
ON RECOVERY OF UNLAWFUL AID

2. Summary of EC law on recovery of unlawful aid

The procedure for the application of Articles 87 EC and 88 EC has been described in Part I of this study. Part II of this study is dedicated to examining recovery issues in five Member States (Belgium, France, Germany, Italy and Spain).

Before describing and discussing the ways in which these Member States deal with these issues, it is useful to recall briefly the main EC rules applicable to recovery of unlawful aid as derived from Articles 87 and 88 EC and construed by case law, as well as from Regulation No. 659/1999 and Regulation No. 794/2004. These regulations have, in fact, consolidated most of the principles on recovery of State aid which have been established over a period of 40 years in the case law of the ECJ and of the CFI.

2.1 Regulation No. 659/1999 laying down detailed rules for the application of Article 88 EC (the "Procedural Regulation")[2]

Recovery of State aid only concerns unlawful State aid, which is defined by Article 1 (f) of the Procedural Regulation as "*new aid put into effect in contravention of Article* [88] *(3) of the Treaty*".

Recovery can also concern the misuse of aid, which is assimilated to unlawful aid following a Commission decision (aid used by a beneficiary in contravention of a decision not to raise objections, a positive decision or a conditional decision; Article 1 (g) of the Procedural Regulation). All rules applicable to unlawful aid apply to "misused aid".

A 'recovery injunction' can first be ordered by the Commission pursuant to Article 11 (2) of the Procedural Regulation. However, the conditions imposed on the Commission when seeking such provisional recovery are so strict that it has not yet been used. The conditions are that there must be (i) no doubt that the measure concerned constitutes aid; (ii) urgency to act; and (iii) a serious risk of substantial and irreparable damage to a competitor.

If the unlawful aid is not recovered pursuant to such a recovery injunction, Article 12 of the Procedural Regulation empowers the Commission to refer the matter directly to the ECJ and to apply for a declaration that non-compliance by the Member State concerned constitutes an infringement of the EC Treaty. In the case of non-compliance by a Member State, the Commission will also be entitled to take a decision on the basis of the information available (Article 13 of the Procedural Regulation).

The most important provision of the Regulation concerning recovery decisions is Article 14, which sets out the following principles:

[2] Council Regulation No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty, OJ (1999) L 83/1.

- the Commission should order recovery of State aid once it has declared the aid unlawful and incompatible with the Common Market (confirmed by case law in 1973[3] although this was deemed to constitute merely a power of the Commission);

- the amount of aid to be recovered includes interest, payable from the date on which the unlawful aid was at made available to the beneficiary until the date of its recovery; Articles 9 to 11 of Regulation 794/2004 implementing the Procedural Regulation contain detailed rules on the method for fixing the interest rate, on its publication and on the method of applying interest (see below);

- recovery has to be effected:

  - "*without delay*" (without prejudice to any order of the ECJ pursuant to Article 242 EC);

  - "*in accordance with the procedures under the national law of the Member State concerned*";

  - "*provided that they allow the immediate and effective execution of the Commission's decision*"; and

- (in order to achieve recovery) Member States are obliged to take "*all necessary steps which are available in their respective legal systems, including provisional measures, without* prejudice *to Community law*".

These rules, echoing an underlying political compromise existing at the time of the adoption of the Regulation, nevertheless contain a powerful potential development in the light of the interpretation of the principle of supremacy of EC law over national laws (notably the words "*provided that*…").

Finally, Article 15 of the Procedural Regulation lays down a limitation period of ten years for the Commission to recover aid[4]. The limitation period starts to run from the day on which the unlawful aid was awarded to the beneficiary. It is interrupted by any action taken by the Commission, or by a Member State acting at the request of the Commission (the ten-year period starts to run afresh after the interruption)[5]. It will be suspended when proceedings are pending before the ECJ or the CFI.

[3] Case 70/72, Commission v Germany [1973] ECR 813.
[4] The CFI interpreted the scope of Article 15 in Case T-366/00, Scott SA v Commission [2003] ECR II-1763. This case has been appealed to the ECJ (Case C-276/03 P); the appeal was dismissed on 11 October 2005.
[5] It can be deduced from the CFI's decision in the *Scott* case that they considered that a request for information from the Commission addressed to a Member State constitutes an action brought by the Commission which interrupts the limitation period.

2.2 Regulation No. 794/2004 implementing Regulation No. 659/1999 (the "Implementing Regulation")[6]

Recital 10 of the Implementing Regulation specifies that the purpose of recovery is to re-establish the situation existing before the aid was unlawfully granted. Therefore, as recital 10 continues, in order to ensure equal treatment, the advantage should be measured objectively from the moment when the aid was made available to the beneficiary.

In order to achieve this objective, Articles 9 to 11 of the Implementing Regulation lay down the methods for fixing the interest rate and of applying interest in recovery cases.

Article 9 specifies that, unless otherwise provided for in a specific decision, the interest rate to be used for recovering State aid granted in breach of Article 88 (3) EC shall be an annual percentage rate fixed for each calendar year. The interest rate will be calculated on the basis of the interbank swap rate and, where no such rate or similar reference point exists in a Member State, the Commission will fix the applicable rate in close cooperation with the Member State concerned (Article 9 (4)). This possibility will be of relevance mainly for new Member States.

The Commission publishes current and relevant historical interest rates in the Official Journal of the European Union (Article 10).

The Implementing Regulation further provides that the interest rate to be applied shall be the rate applicable on the date on which the unlawful aid was first at the disposal of the beneficiary (Article 11 (1)). Compound interest will be applied in order to ensure full neutralisation of the financial advantages resulting from the unlawfully paid aid (Article 11 (2)). Furthermore, the interest rate shall be recalculated at five-yearly intervals (Article 11 (3)).

This approach is in line with the Commission communication of 8 May 2003, which makes clear that the effect of unlawful aid is to provide the recipient with funding on conditions similar to those of a medium-term non-interest-bearing loan[7].

2.3 Case law of the ECJ and of the CFI

The case law of the ECJ and the CFI has formed the basis of the Procedural Regulation and the Implementing Regulation. Nevertheless, it is useful to recall the principles on recovery set out in the case law of the Community courts.

First, the ECJ established the principle that the obligation on a Member State to abolish aid, which the Commission considers to be incompatible with the Common Market, has as its purpose to re-establish the situation previously existing. The ECJ considered that this

[6] Commission Regulation No. 794/2004 of 21 April 2004 implementing Council Regulation No. 659/1999, OJ (2004) L 140/1.
[7] Commission communication on the interest rates to be applied when aid granted unlawfully is being recovered, OJ (2003) C 110/21.

objective is attained once the aid in question, increased where appropriate by interest, has been repaid by the recipient to the relevant public body that granted the aid. Indeed, according to the ECJ, by repaying the aid, the recipient forfeits the advantage enjoyed over its competitors on the market, and the situation existing prior to payment of the aid is restored[8].

Secondly, with regard to the amounts to be reimbursed, established case law sets out the following principles:

– there is no obligation on the Commission to quantify the aid[9];

– it is for the relevant authorities of the Member States to calculate the amount of aid to be recovered, particularly where that calculation is dependent on information which that Member State has not provided to the Commission[10];

– interest to be recovered on the sums illegally granted is aimed at eliminating any financial advantages incidental to such aid; to refrain from claiming payment of interest on the sums illegally granted would be tantamount to enabling the undertaking in receipt of those sums to retain financial advantages resulting from the grant of the unlawful aid, in the form of an interest-free loan, and that, in itself, would constitute aid which could distort, or threaten to distort, competition; the CFI did, however, observe that interest may only be recovered in order to offset financial advantages that actually result from the allocation of the aid to the recipient, and must be in proportion to the aid[11];

– such interest is not "default interest", i.e. interest payable by reason of the delayed performance of the obligation to repay the aid; the interest must, instead, be equivalent to the financial advantage arising from the availability of the funds in question, free of charge, over a given period[12];

– the interest period cannot start to run before the date (a date which, in principle, must be fixed by the Commission and not the national authorities) on which the recipient of the aid actually had those funds at its disposal[13];

– the national authorities must take account of any potential tax implications (for example, tax deductions as a result of the aid) when calculating the basis of assessment in accordance with procedures and provisions of national law[14]; and

[8] Case C-350/93, Commission v Italy [1995] ECR I-699, para. 21 and 22 (also in Case C-348/93, Commission v Italy [1995] ECR I-673).
[9] Joined Cases C-67/85, C-68/85 and C-70/85, Kwekerij Gebroeders van der Kooy BV and others v Commission [1988] ECR 219.
[10] Case C-382/99, The Netherlands v Commission [2002] ECR I-5163; see also Case T-67/94, Ladbroke v Commission [1997] ECR II-1.
[11] Case T-459/93, Siemens v Commission [1995] ECR II-1675, para. 97 to 99.
[12] *Ibid*, para. 101.
[13] *Ibid*. para. 103.

– where an aid has been granted in the form of a tax exemption and has then been declared unlawful, it is not correct to assume that recovery of the aid in question must necessarily take the form of a retroactive tax, which would as such be absolutely impossible to enforce; indeed, the Member State must merely take measures ordering the undertakings which have received the aid to repay sums equivalent in amount to the tax exemption unlawfully granted to them[15].

Thirdly, the ECJ has set out a number of principles with respect to the recovery of unlawful aid from a third party which has bought shares in the company that is the beneficiary of the aid:

– where an undertaking that has benefited from unlawful State aid is bought at the prevailing market price, i.e. at the highest price which a private investor acting under normal competitive conditions would be prepared to pay for that company in the situation that it was in, in particular after having benefited from State aid, the aid element is assessed at prevailing market price and is included in the purchase price; according to the ECJ, the buyer cannot, in such circumstances, be regarded as having benefited from an advantage in relation to other market operators[16];

– however, this case law is far from being final since the ECJ has, in an earlier decision, held that "*the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery*" and that, accordingly, in the case of a sale of shares by the beneficiary, the State aid must, in any event, be reimbursed by the beneficiary[17]; and

– moreover, in the recent *Olympic Airways* decision, the ECJ endorsed the view of the Advocate General that the Commission may be compelled to require that recovery is not restricted to the original undertaking, but is extended to the undertaking which continues the activity of the original undertaking in cases where certain elements of the transfer point to economic continuity between the two undertakings; indeed, the ECJ considered that, where a transfer of assets from the beneficiary to a new company was structured in such a way that it would be impossible to recover the debts of the beneficiary from the new company, that operation created an obstacle to the effective implementation of the recovery decision[18].

Fourthly, with regard to Member States' arguments relating to difficulties encountered when recovering aid, the ECJ has made the following observations:

---

[14] *Ibid*. para. 82-84 and 107.
[15] Case C-193/91, Commission v Greece [1991] ECR I-3131, para. 17.
[16] See, for example, Case C-277/00, Germany v Commission [2004] ECR I-3925, para. 80.
[17] Case C-328/99 and C-399/00, Italy and SIM 2 Multimedia v Commission [2003] I-4035, para. 83.
[18] Judgment of 12 May 2005, Case C-415/03, Commission v Greece, not yet published, para. 33 and 34, and Opinion of Advocate General Geelhoed of 1 February 2005, also at para. 33 and 34.

– it is for the Member State concerned to present a proposal on how the difficulties relating to the recovery of the aid should be overcome, including those difficulties relating to the calculation of the aid[19]; and

– the only defence available to a Member State in opposing an application by the Commission under Article 88 (2) EC for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to properly implement the decision ordering recovery; a Member State cannot justify the non-application of a Commission recovery decision on the grounds that it was impossible to execute the decision in question if its difficulties were of a merely technical and administrative nature; moreover, an absolute impossibility to execute the decision does not exist if there are indirect ways of calculating the amount of the aid to be recovered[20].

[19] See, for example, Case C-378/98, Commission v Belgium [2001] ECR I-5107, para. 41.
[20] *Ibid*.

SUMMARY, OBSTACLES TO EFFICIENT RECOVERY AND PROPOSED REMEDIES, PROPOSED BEST PRACTICE GUIDELINES

3. Summary, obstacles to efficient recovery and proposed remedies, proposed best practice guidelines

3.1 Summary

This study is based on an analysis of the published case law of the Member States concerning the recovery of State aid pursuant to negative Commission decisions. It focuses on Belgium, France, Germany, Italy, and Spain, being the Member States with the largest number of recovery cases as at 1 July 2005 (the "Selected Member States"). With respect to the Selected Member States, this study contains a description of:

- the national authorities responsible for recovery;
- the substantive rules applying to recovery;
- the procedures for recovery;
- interim relief;
- the extent to which the legitimate expectations of the beneficiary can prevent recovery;
- recovery in insolvency proceedings; and
- obstacles to immediate and effective recovery.

This study also contains short general sections on the situation in the ten remaining old Member States, including relevant published court decisions.

The country rapporteurs of the Selected Member States described the law applicable to the recovery of aid in their respective Member States and have analysed relevant court cases. In addition, the rapporteur of each country has examined the list of recovery cases that were considered open as at 1 July 2005 provided by the Recovery Unit of the Directorate-General for Competition of the Commission. The rapporteurs have been informed in general about the difficulties encountered (if any) in each case.

3.1.1 Competent authorities

A principle common to all countries reviewed is that recovery must be effected by **the authority that granted the aid**. This leads to the involvement of a **variety of central**, **regional** and **local bodies**, as well as **public entities**, in the recovery process.

Among the Selected Member States, France and Germany have a **central body** that controls and oversees the recovery process: in France, the *Ministère de l'Économie et des*

Finances ("*Trésor*"); in Germany, the Federal Ministry of Finance. In Belgium, Italy, and Spain, there is no central body that controls the recovery process.

Whereas the evidence obtained from the range of cases reviewed by the authors is statistically insufficient to draw conclusions, it appears that the existence of a central body in charge of implementing recovery decisions that has ongoing contact with the Commission is more likely to ensure **efficient implementation** of recovery decisions than a system where a variety of central, regional or local bodies are actively involved in the process.

3.1.2 Substantive rules applicable to recovery

In each of the Selected Member States, recovery is effected either on the basis of **administrative** law or **civil law** or, sometimes, on the basis of a combination of both.

The applicable substantive law is determined by reference to the measure **underlying the grant of the aid**. If the aid was granted by means of an act of public law, it must be recovered under administrative law. If the aid was part of a **civil law transaction (granted by means of a loan, a capital injection or other civil law transaction)**, it must be recovered pursuant to civil law. The applicable law is therefore **determined by the nature of the act** on the basis of which the aid was granted. The authorities have **no discretion** in determining whether administrative or civil law rules should apply.

In France, Germany, Italy, and Spain, most of the recovery cases examined were based on administrative law. In Belgium, the basic recovery decision is based on administrative law (adopted by administrative bodies). However, if the beneficiary does not challenge this decision before the Council of State, then the actual recovery process is conducted under civil law (the administrative bodies sue the beneficiary in the civil courts).

- In **France**, the administrative act ordering recovery can be based **directly** on the negative Commission decision.

- In **Belgium**, the administrative act ordering recovery (which may simply be a letter to the beneficiary or proceedings) can also be based **directly** on the negative Commission decision.

- In **Germany**, the prevailing view of the courts is still that a negative Commission decision cannot provide a valid legal basis for a recovery order since the negative Commission decision is only addressed to the Member State. The courts in Germany therefore always **require a domestic legal basis**. In administrative law, this legal basis is section 48 of the Administrative Law Act, which provides that illegal administrative acts can be repealed. However, this does not apply where the aid was granted through a civil law transaction rather than by way of an administrative act. In principle, such aid must be recovered on the basis of civil law principles, based on the reasoning that the underlying transaction violates Article 88 (3) EC and is therefore

null and void (under section 138 of the German Civil Code). Under German civil law, the effect is that the aid may be reclaimed pursuant to the principle of **unjust enrichment**.

In the recent *Kvaerner* case (see below), the German government attempted to base an administrative law recovery action directly on the relevant negative Commission decision in order to avoid the usual problems associated with recovery under civil law. The Administrative Court of Berlin rejected this approach on the basis of principles of German constitutional law. The German government has appealed this decision.

– In **Italy**, there is little evidence of recovery through court actions.

– In **Spain**, **a specific law** (No. 38/2003) created a legal basis for the recovery of illegal subsidies (i.e. payments) granted by an administrative act, although the procedure for recovery must be carried out pursuant to general rules of administrative law. Spanish authorities have issued individual recovery orders based on **general principles of administrative law**. Whereas civil law recovery is an option in certain cases based on the nullity of the underlying transaction which violates EC State aid law, we have been unable to find (within the scope of our review) any cases on this point.

3.1.3 Procedural rules applicable to recovery

In the Selected Member States, the procedural rules follow the applicable substantive rules in principle, with the **exception of Belgium**. In Belgium, the basic decision ordering recovery is based on administrative law, whereas the procedure for collecting the amounts due is **based on civil law**.

Recovery pursuant to administrative law is **more efficient** and **faster** than recovery pursuant to civil law. This is because the State is generally able to obtain **immediate enforcement of its payment claim** on the basis of an administrative procedure. In civil law proceedings, obtaining the enforcement of a payment claim requires a court decision.

– Thus, in **France**, recovery can be obtained by means of an immediately enforceable act ("*acte exécutoire*"), directly based on the Commission's negative decision.

– In **Spain** the position is comparable to that in France. As a rule, administrative acts ("*actos ejecutorios*") are immediately enforceable.

– Similarly, in **Germany**, the body seeking recovery can issue an administrative act ("*Verwaltungsakt*"), which can be declared immediately enforceable where **"public interests"** are at stake.

– The same applies to a certain extent, to **Italy**.

However, the administrative procedure aimed at ensuring that an enforceable decision is promptly made available in **France** is often frustrated. In fact, the administrative procedure in France follows the principle that **every executory act is automatically suspended by an objection by the aid beneficiary**. In France, this appears to be a major obstacle in securing the rapid implementation of a negative Commission decision.

In some cases, notably where there is a large number of recipients, recovery can be carried out through a legislative procedure (*Maribel* case in **Belgium**).

3.1.4 Immediate enforcement and interim relief

Under Article 14 of Regulation No. 659/99, a Member State must enforce a negative Commission decision by ordering recovery **"without delay"**. This means that the Member State cannot await the outcome of court proceedings, either at Community or at national level. To comply fully with this obligation, authorities must, wherever possible, seek **immediate enforcement of recovery claims** under national law. At the same time, it must be ensured that aid beneficiaries cannot delay repayment of the aid through the misuse of national proceedings.

In the Selected Member States, immediate recovery of State aid is more likely to be effective in **administrative proceedings than in civil law proceedings**. In general, an administrative repayment order is, or can be made, **immediately enforceable**:

- in Germany, an administrative act ("Verwaltungsakt") can be made immediately enforceable where immediate execution is "in the public interest"; the beneficiary must apply for a court order to stop the enforcement process;

- in Italy, an administrative payment order is immediately enforceable. However, if the beneficiary seeks interim relief, a high threshold test, generally recognised in most Member States, must be met: (i) a prima facie case; and (ii) the risk of serious and imminent damage to the claimant's interests if interim relief is not granted;

- the same procedure applies in Spain, where the effects of an administrative act can be suspended if the conditions for interim relief are met; and

- a major obstacle to efficient recovery in this respect exists in France, where it is sufficient for a beneficiary to file an objection to an administrative recovery in order to frustrate the execution of the order (suspension).

The situation for interim relief is different where recovery is sought pursuant to **civil law**. In civil law proceedings, the Member States authority seeking repayment will normally be the claimant that must **apply for interim relief** and **support the application by evidence**. In particular, this requires establishing urgency. It could be argued that Article 14 of Regulation No. 659/99 presupposes immediate repayment of the amount of aid. This could be

interpreted as imposing an obligation on the Member States to create procedures whereby immediate recovery can be ensured. Thus, it could be considered that establishing the condition of urgency may not always be necessary for a Member States' authority to apply for interim relief. However, it is not clear to what extent this would require a more fundamental reshaping of Member States' laws on civil procedure. In fact, by virtue of the principle of supremacy of EC law, an adequate remedy should be provided by giving full effect to the provisions of Article 14 of Regulation No. 659/1999 (and to the phrase "*provided that*"), which emphasise that national procedures should not prevent immediate and effective recovery. National courts should be encouraged to set aside any national procedural rules which render an efficient recovery procedure ineffective. The authors of the study have not found any evidence of interim relief being obtained by a Member State in civil law recovery proceedings.

3.1.5 Protection of legitimate expectations as a means of preventing recovery

- Legitimate expectations, as a means of preventing recovery, have been an issue particularly in **Germany**. The German Administrative Law Act specifically provides that an act whereby a sum of money is granted cannot be revoked, even if the aid granted was illegal and if the recipient of the money has relied on the validity of the act. This provision of the German Administrative Law Act served as part of the argument relied on by the beneficiary in the *Alcan* case[21]. The ECJ ruled that domestic law must be applied in such a manner as to preserve the *effet utile* of the Commission's recovery decision. Domestic follow-up litigation in the *Alcan* case in Germany resulted in a final decision by the Federal Constitutional Court which, in February 2000, rejected the constitutional claim raised by the aid recipient and paved the way for recovery of the aid. Since 2000, there have been no further cases in which the principle of the protection of the legitimate expectations of the beneficiary has been relied on successfully. To apply this principle, the beneficiary of State aid will always be required to ascertain whether the aid has been properly notified to, and approved by, the Commission.

The situation in the other Selected Member States is similar:

- in **France**, the principle of legitimate expectations is **not one of domestic law**, but can be applied only in an EC law context; there is no evidence of cases in which beneficiaries have successfully relied on this principle before the French courts;

- in **Belgium**, the national courts will expect beneficiaries to verify whether the aid has been notified and approved; and

- in **Italy** and **Spain**, legitimate expectations are either (i) not a ground for refusing to repay aid or (ii) not recognised as a domestic legal principle.

[21] Case 94/89, Commission v Germany [1989] ECR 175.

3.1.6 Insolvency

The Commission has dealt with a number of cases in which recovery had to be sought in the context of insolvency. In this regard, one particularly large category of cases is represented by certain unsuccessful privatisation projects in Germany's New Federal States ("*Neue Länder*").

Typically, the issues arising in insolvency proceedings relate to (i) **preferential treatment** of recovery claims and (ii) participation in a **restructuring plan**.

– **In Italy and Spain**, claims for repayment by the government are usually treated as preferential claims in insolvency proceedings. In these countries, it appears that, where the claim is based on administrative law, preferential treatment may also be available to State aid recovery claims.

– **In Germany**, the distinction between preferential and non-preferential claims has been abolished. The law distinguishes only between ordinary and subordinate claims. Some court decisions have clarified that State aid recovery claims are not subordinate, even in situations where a claim by a private party would have been subordinate (capital injections or the grant of a loan by a shareholder).

Restructuring plans in insolvency proceedings are a relatively new phenomenon in Europe. The question is to what extent the State can waive, as part of such a restructuring plan, part of a claim for repayment of aid in order to secure the continued existence of the insolvent business. The study (in particular, the section on Germany) suggests that there are a number of legal issues that need to be clarified between the Commission and the Member States.

3.1.7 Table on summary of key findings

	Belgium	France	Germany	Italy	Spain
Competent national authority for recovery	▪ **Federal or regional government** that granted the aid ▪ **Other public entities** that granted the aid ▪ **No central monitoring**	▪ **Ministry of Finance** or **other ministries** ▪ **Local authorities** where aid granted by local entities ▪ Recovery **monitored centrally** by Ministry of Finance	▪ **Federal government**, **Federal State's government, municipality,** or **other public body** depending on who granted the aid ▪ **Central monitoring** and control by Federal Ministry of Finance	▪ **Central government, local governments** and **other public bodies** depending on who granted the aid ▪ **No central monitoring**	▪ **Central government, local authorities** or **other public entities** depending on who granted the aid ▪ **Ministry of Foreign Affairs** as **channel to the Commission**
Substantive rules for recovery	▪ **Recovery decision under administrative law** ▪ **Followed by recovery based on civil law only** ▪ **Recovery of aid granted by statute by amending statute**	▪ **Administrative law** where aid granted by public law act ▪ **Civil law** where aid granted through civil law transaction	▪ **Administrative law** where aid granted by public law act: annulment of the initial act; recovery generally pursuant to a negative administrative act ▪ **Civil law** where aid granted through civil law transaction: underlying transaction null and void (section 138 Civil Code); recovery pursuant to	▪ **Administrative law** where aid granted by public law act: annulment of the initial act or other public law measure ▪ **Civil law** where aid granted through civil law transaction (no published case law): underlying contract null and void; recovery also pursuant to provisions on unjust enrichment	▪ Repayment of State aid pursuant to **Law No. 38/2003** ▪ Recovery orders based on supremacy of EC law ▪ In appropriate cases recovery by means of **individual administrative acts** ("*orden foral*") ▪ **Civil law** where aid granted through private law transaction: nullity of private act based

	Belgium	France	Germany	Italy	Spain
			provisions on unjust enrichment	▪ **Recovery of aid granted by statute by amending statute**	on Article 6 (3) of Civil Code; recovery pursuant to rules on unjust enrichment
Procedural rules for recovery	▪ **Civil law recovery procedure before civil courts:** Debt recovery procedure, i.e. letter of formal notice to the debtor and action before civil courts if failure to comply with formal request	▪ **Administrative procedure**: Recovery by means of an executory act which beneficiary can challenge before administrative court to avoid execution ▪ In rare **civil law cases,** court action before ordinary civil courts	▪ **Negative administrative act** must be challenged by beneficiary before administrative court in order to avoid immediate execution ▪ In **civil law cases,** payment action against beneficiary before ordinary courts	▪ **Administrative procedure:** Recovery generally by means of an administrative act which must be challenged by the aid beneficiary before the administrative courts to avoid execution. Ordinary court action against beneficiary, if does not fulfill repayment obligation ▪ In **civil law cases**, ordinary court action against beneficiary	▪ **Administrative procedure**: Recovery by means of an administrative act in the form of a claim for payment addressed to the beneficiary; other administrative means to enforce payment of debts ▪ In **civil law cases,** payment action against beneficiary before ordinary courts

	Belgium	France	Germany	Italy	Spain
Immediate enforcement of repayment claim (Interim relief)	▪ **Civil law procedure:** Conditions to be met by State to be granted interim relief (high standard): - (i) urgency; - (ii) *prima facie* case; and - (iii) serious and imminent damage	▪ **Administrative procedure:** In principle, action against administrative act has no suspensory effect; **however** suspensory effect where order for recovery challenged by means of an opposition to execution ("*opposition à exécution*") ▪ **Civil law procedure:** Conditions to be met by State to be granted interim relief (high standard): - (i) urgency; - (ii) *prima facie* case; and (iii) difficulties that could hinder the recovery process.	▪ **Administrative procedure:** No suspensory effect of action where immediate execution in the "public interest": immediate recovery of aid generally enforceable ▪ **Civil law procedure:** Conditions to be met by State to be granted interim relief (high standard): - (i) urgency; - (ii) *prima facie* case; and - (iii) serious and imminent harm	▪ **Administrative procedure:** In principle, high standards to be met for interim relief where administrative acts are challenged: - (i) *prima facie* case; and - (ii) danger of serious and imminent damage to the claimant's interests ▪ **Civil law procedure** (no case law)**:** Conditions to be met for interim relief are the same as those applicable to administrative procedure	▪ **Administrative procedure:** Administrative act may be suspended; courts reluctant to grant interim relief on the grounds that negative Commission decision is challenged before Community courts; conditions to be met by State to be granted interim relief: - (i) *prima facie* case; and - (ii) danger of serious and imminent damage ▪ **Civil law procedure:** Conditions to be met for interim relief are the same as those applicable to administrative procedure

	Belgium	France	Germany	Italy	Spain
Legitimate expectations as a means to prevent recovery	▪ **Generally not:** beneficiary must verify compliance with Article 88 EC procedure	▪ **Not a principle of French public law**; only applicable in a European context	▪ **Generally not**: beneficiary must verify compliance with Article 88 EC procedure ▪ **Exceptional circumstances** may be established	▪ **Generally not** (no case law)	▪ **Generally not** ▪ **Exceptional circumstances,** within the meaning of Community courts' case law may be established
Recovery in insolvency proceedings	▪ State is not a preferential creditor ▪ Participation in a programme of judicial composition ("*concordat judiciaire*"/ "*gerechtelijk akkoord*") possible. This permits debtor to restructure by temporarily suspending rights of creditors.	▪ Participation in restructuring plan possible	▪ State is a normal creditor (category of preferential creditors abolished by 1999 Insolvency Act) ▪ Repayment of capital injections and shareholder loans by State treated as ordinary claims (not subordinate) ▪ Participation of State in insolvency plan ("*Insolvenzplan*") possible under domestic law; details for purpose of State aid recovery unclear	▪ State may be a preferential creditor depending on the source of its claim (tax claims are in general privileged)	▪ State may be a preferential creditor

	Belgium	France	Germany	Italy	Spain
Competent national authority for recovery	▪ **Federal or regional government** that granted the aid ▪ **Other public entities** that granted the aid ▪ **No central monitoring**	▪ **Ministry of Economics** and Finance or **other Ministries** ▪ **Local authorities** where aid granted by local entities ▪ Recovery **monitored centrally** by Ministry of Finance	▪ **Federal government**, **government of a Land, municipality,** or **other public body** depending on who granted the aid ▪ **Central monitoring** and control by Federal Ministry of Finance	▪ **Central government, local governments** and **other public bodies** depending on who granted the aid ▪ **No central monitoring**	▪ **Central government, local authorities** or **other public entities** depending on who granted the aid ▪ **Ministry of Foreign Affairs** as **channel to the Commission**
Substantive rules for recovery	▪ **Recovery decision under administrative law** ▪ **Followed by recovery based on civil law only** ▪ **Recovery of aid granted by statute through amending statute**	▪ **Administrative law** where aid granted through public law act ▪ **Civil law** where aid granted through civil law transaction ▪ **Recovery of aid granted by statute through amending statute**	▪ **Administrative law** where aid granted through public law act: annulment of the initial act; recovery generally pursuant to a negative administrative act ▪ **Civil law** where aid granted through civil law transaction: underlying transaction null and void (Section 138 Civil Code); recovery pursuant to provisions on unjust	▪ **Administrative law** where aid granted through public law act: annulment of the initial act or other public law measures ▪ **Civil law** where aid granted through civil law transaction (no published case-law): underlying contract null and void; recovery also pursuant to provisions on unjust enrichment ▪ **Recovery of aid**	▪ Repayment of subsidies pursuant to **Law 38/2003** ▪ Recovery orders based on primacy of EC law ▪ In appropriate cases recovery by means of **individual administrative acts** (*orden foral*) ▪ **Civil law** where aid granted through private law transactions: nullity of private acts based on Art. 6.3 of Civil Code; recovery

	Belgium	France	Germany	Italy	Spain
			enrichment	**granted by statute through amending statute**	pursuant to rules on unjust enrichment
Procedural rules for recovery	▪ **Civil law recovery procedure before civil courts:** Debt recovery procedure, i.e. letter of formal notice to the debtor and action before civil courts if failure to comply with formal request	▪ **Administrative procedure**: Recovery by means of an executory act which beneficiary must challenge before administrative court to avoid execution ▪ In rare **civil law cases,** court action before ordinary civil courts	▪ **Negative administrative act** must be challenged by beneficiary before administrative court in order to avoid immediate execution ▪ In **civil law cases,** payment action against beneficiary before ordinary courts	▪ **Administrative procedure:** Recovery generally by means of an administrative act which the aid beneficiary must challenge before administrative courts in order to avoid execution of the administrative act. It may be necessary to resort to ordinary action against beneficiary, should it not fulfill its repayment obligation. ▪ In **civil law cases**, ordinary action against beneficiary	▪ **Administrative procedure**: Recovery by means of an administrative act in the form of a claim for payment addressed to the beneficiary; any other administrative means to enforce payment of debts ▪ In **civil law cases,** payment action against beneficiary before ordinary courts

	Belgium	France	Germany	Italy	Spain
Immediate enforcement of repayment claim (Interim relief)	▪ **Civil law procedure:** Conditions to be met for State to be granted interim relief (high standards): - (i) urgency; - (ii) prima facie case; *and* - (iii) serious and imminent harm	▪ **Administrative procedure:** In principle, action against administrative act has no suspensory effect; **however** suspensory effect where order of recovery challenged by means of an opposition to execution ("*opposition à exécution*") ▪ **Civil law procedure:** Conditions to be met for State to be granted interim relief (high standards): - (i) urgency; - (ii) prima facie case; *and* (iii) difficulties that could hinder the recovery process.	▪ **Administrative procedure:** No suspensory effect of action where immediate execution in the "public interest": immediate recovery of aid generally enforceable ▪ **Civil law procedure:** Conditions to be met for State to be granted Interim relief (high standards): - (i) urgency; - (ii) prima facie case; *and* - (iii) serious and imminent harm	▪ **Administrative procedure:** In principle, high standards to be met for interim relief where administrative acts are challenged: - (i) prima facie case; *and* - (ii) danger of serious and imminent damages to the plaintiff's interests ▪ **Civil law procedure** (no case-law)**:** Conditions to be met for interim relief are the same as in the administrative procedure	▪ **Administrative procedure:** Administrative act may be suspended; courts however reluctant to grant interim relief on the grounds that negative Commission decision has been challenged before the European courts; conditions to be met for State to be granted interim relief: - (i) prima facie case; *and* - (ii) danger of serious and imminent damages ▪ **Civil law procedure:** Conditions to be met for interim relief are the same as in the administrative procedure

	Belgium	France	Germany	Italy	Spain
Legitimate expectations as a means to prevent recovery	▪ **Generally not:** beneficiary must ascertain compliance with Article 88 EC procedure	▪ **Not a principle of French public law**; only applicable in a European context	▪ **Generally not**: beneficiary must ascertain compliance with Article 88 EC procedure ▪ **Exceptional circumstances** may be established	▪ **Generally not** (no case-law)	▪ **Generally not** ▪ **Exceptional circumstances,** within the meaning of European courts' case-law may be established
Recovery in insolvency proceedings	▪ State is not a preferential creditor ▪ Participation in a programme of judicial composition (concordat judiciaire/ gerechtelijk akkoord) possible. This permits debtor to restructure by temporarily suspending the rights of creditors.	▪ State may be a preferential creditor ▪ Participation in restructuring plan possible	▪ State is a normal creditor (category of preferential creditors abolished by 1999 Insolvency Act) ▪ Repayment of capital injections and shareholder loans by State treated as ordinary claims (not subordinated) ▪ Participation of State in insolvency plan (*Insolvenzplan*) possible under domestic law; details for purposes of state aid recovery unclear	▪ State may be a preferential creditor depending on the source of its claim (tax claims are in general privileged)	▪ State may be a preferential creditor

3.2 Obstacles to efficient recovery and proposed remedies

Based on the information available to us, we have been unable to assess whether Member States' discipline in recovery cases has improved or deteriorated over the past few years. In general, it seems fair to say that Member States appear to be **paying more attention to recovery than some ten years ago**. There is evidence of swift and efficient recovery in some of the largest and most complex State aid cases in recent years (*EDF* case*, Landesbanken* case). The perceived **excessive length** of recovery proceedings is a recurring theme in all country reports. There are various factors that must be considered when assessing the length of proceedings, not all of which are in the control of the Member States:

3.2.1 Lack of clarity as to the national body that must issue the recovery decision, the beneficiary, and the amount of the aid

Basic questions regarding the body responsible for recovering the aid, identification of the aid beneficiary, and the exact amount of the aid often lead to delays in the implementation of negative Commission decisions. It is the body originally granting the aid that must seek its recovery. Thus, depending on the circumstances, a number of different governmental entities may be involved in the process of recovery. A particularly telling example of how the involvement of different administrative players can delay recovery is the *Beaulieu* case in Belgium, where recovery took more than fifteen years from the date of the Commission decision.

We would suggest that:

– delays due to questions concerning the identity of the appropriate body for recovering the aid can be avoided by **nominating the body in charge of recovery proceedings** at the outset. The Member State should be invited to inform the Commission of the various governmental and administrative bodies involved in the recovery process within the two-month time limit granted for implementing a negative Commission decision. This recommendation has been included in our suggested best practice guidelines (section 3.3).

Similarly, in some recovery cases both (i) the identity of the party from whom recovery must be sought under national law; and (ii) the exact amount of the aid to be recovered have been a controversial issue. Difficulties relating to the identity of the beneficiary often arise where all of the assets of the beneficiary have been transferred to a third party. Difficulties relating to the amount of the aid most often arise in cases where the Commission fails to specify the exact amount of the aid to be recovered, including interest, in its negative decision.

– Again, both difficulties could be avoided if the relevant issues were **clarified from the outset** (although established case law allows the Commission not to address these issues). We have inserted a corresponding item in our proposed list of best practices.

3.2.2 Questions regarding the applicable procedure

Most country reports have identified the question of the determination of the applicable national laws as a problem area. This applies, in particular, to cases where it is not clear whether recovery should be effected pursuant to administrative or civil law.

Where the purpose is to secure immediate enforcement of a negative Commission decision, it is **preferable to resort to administrative law proceedings,** in which the State can order immediate repayment. However, Article 14 of Regulation No. 659/99 clearly provides that recovery must be effected pursuant to the laws of the Member States, and the distinction between administrative and civil law, in most Member States, is embedded in legal tradition. Thus, it will not be possible to provide that recovery must, in each and every case, be effected pursuant to the Member States' rules of administrative law.

– At the very least, the Member State should be invited to **clarify on or before the commencement of every recovery procedure** (i.e. within the two-month time limit for implementing the decision) whether recovery will be governed by administrative or civil law. If civil law is chosen, the Commission may inquire about the underlying reasons for this choice.

We have inserted a corresponding item in our suggested list of best practices.

3.2.3 Lack of clarity as to the immediate enforceability of recovery orders/interim relief

In the country reports and section 3.1, we describe to what extent national authorities dispose of the means to seek immediate enforcement of an order for repayment of illegal aid. Generally, where aid is recovered pursuant to administrative law, it is easier to secure immediate enforcement, as opposed to when civil law procedures must be followed.

There may be questions as to whether the French practice of providing for suspensory effect where an administrative appeal (opposition) has been filed by the beneficiary is compatible with EC law. Similarly, it could be considered whether Member States should have a general obligation to provide for immediate enforcement, even where civil law rules apply.

Based on our review, we believe that the law in this area is in flux and that it may be worthwhile to await further court decisions both at the national and at the Community level.

– In order to avoid misunderstandings, however, the Commission, as a rule, should consider asking the Member State, **at the outset of the recovery procedure, how the Member State will ensure immediate enforcement** of the recovery decision that it will have to obtain under its national law.

We have inserted an item to this effect in the best practice list.

3.2.4 Stay of national proceedings where Commission decision has been challenged

Another group of cases in which recovery appears to take a very long time is where the substance of the negative Commission decision has been challenged in court. There is evidence that these delays are caused both by litigation before the European courts in Luxembourg and before the national courts. Whereas we have not found any published decisions of national courts actually setting aside or willfully ignoring a Commission decision, the length of proceedings involving national court actions suggests that some acceleration may be achieved **by clarifying the rules (possibly in a notice)**:

(i) where the underlying Commission decision has been challenged before the European courts, the national court should be allowed to stay its proceedings **only if immediate implementation of the Commission decision threatens the financial survival of the aid recipient** (i.e. in practice, where the claimant has requested and obtained suspension of execution of this decision before the President of the CFI). The authors find that alternative approaches are incompatible with the principle of supremacy of EC law; in addition, one could argue that, where the Commission decision is challenged only as to its compatibility assessment (and not as to the existence of an aid, by definition unlawful), there should be no logical reason for a judge to stay the proceedings; and

(ii) where there is no such immediate risk, the national court must fully enforce the Commission decision without a stay, even if an action for annulment of such decision is still pending before the European courts.

In particular, it is necessary to clarify the rules on when the national judge can stay its proceedings pending an action for annulment against the underlying Commission decision in Luxembourg. The *Oberlandesgericht Dresden* in *Saxonia* and the Italian courts in a number of cases granted stays of their proceedings and thereby deprived the Commission decision of its immediate effect. Arguably, a suspension without appropriate interim measures to secure the ultimate enforcement of the recovery claim violates Article 242 EC. In any event, national courts will benefit from a clarification of the rules on the stay of their proceedings.

Finally, there is a last group of cases where the decision challenged is **the national recovery order only**, but **without contesting the legality/validity of the negative Commission decision**. In this case, where the Commission decision has not been challenged, any challenge of the national recovery order has the effect of delaying the implementation of the negative Commission decision. This delay may be contrary to the principle of supremacy of EC law if the argument on which the challenge is based should have been raised against the Commission decision.

3.2.5 Recovery of aid granted at local level

There is some evidence that, in systems where aid recovery at national level is not effected through a single agency, there will be some delays and inefficiencies.

This is, of course, particularly true in systems where aid has been granted by the regional government and the central government, the Commission's counterpart, which have no power to enforce a negative decision concerning aid granted at regional or local level. This appears to be the case particularly in Spain. Obviously, under EC law, the absence of national provisions to secure enforcement at regional or local level does not relieve the Member State of its recovery obligation.

– As a procedural point, however, consideration should be given to **providing the Commission with direct access to regional and local authorities** that must act in order to secure recovery. This might even be extended to the **aid recipient**.

More direct contact between the Commission and those who must take action to recover aid will limit both misunderstandings and the repetition of questions asked by the Commission to the Member States.

3.2.6 Inherent conflict of interest of the Member State granting and recovering aid

Based on our review, we have not found any cases where a national authority has openly acted in bad faith in seeking to recover aid pursuant to a negative Commission decision (despite significant delays in certain cases). Nevertheless, there are a number of factors indicating that there does exist an inherent conflict of interest for a Member State that is asked **to recover aid that it previously granted**: the length of recovery proceedings, the protracted procedures that are often used, and the extensive efforts required by the Commission to secure recovery, and particularly in those cases where the Member State has challenged a negative Commission decision in court.

An example of the inherent conflict of interest surfacing in court proceedings is reflected in the first instance judgment involving *Hamburger Stahlwerke* (Germany). In this case, the *Landgericht Hamburg* clearly stated that both the claimant and the defendant took the view that the underlying Commission decision was illegal. It is clear that this did not fail to make an impression on the court. A similar situation occurred in the *Scott Paper* case (France), in which both the beneficiary and the local authorities granting aid - although issuing recovery orders immediately suspended by objections - challenged the decision before the CFI. Conversely, also in France, the *EDF* case is an example: aid was fully reimbursed a few days following the national recovery order, before the beneficiary challenged (supported by the State) the Commission's decision before the CFI.

(i) This issue and other delays in recovery proceedings could be avoided if the Commission was given an active role in national recovery procedures. This could be achieved by making the Commission an ***amicus curiae*** **in a similar way as under Regulation No. 1/2003**. Since the number of contentious State aid recovery cases is limited, it would be possible for the Commission to take an active role in each recovery case. To be efficient, this *amicus curiae* status should allow the Commission to take the position of an "intervening party" in the national procedure.

(ii) Another means of overcoming the inherent conflict of interest of a Member State, in particular in cases where the Commission's negative decision has been challenged, would be to entrust the recovery measures to **independent agencies** at Member State level. This would ensure that recovery progressed, regardless of whether the Member State itself still had (sometimes legitimate) doubts about the legality of the underlying Commission decision.

One possibility would be to allocate this task to the **national competition authorities** of the Member States ("NCA"), provided that they have the required degree of independence.

An alternative would be to place the recovery process in the hands of those government agencies that must supervise **the budget**. The attractiveness of this alternative is that it would result in, to a certain extent, a reversal of the conflict of interest: the government agencies responsible for supervising the budget are most likely to vigorously pursue claims for the repayment of amounts from aid recipients.

3.3 Best practice guidelines

1. Identify the administrative **body** that must **recover** the aid. Give Commission access to that body.

2. Identify the **beneficiary,** taking into account the transfer of assets pursuant to *Seleco/Banks* case law.

3. Calculate and communicate immediately to Commission the exact **amount of aid** to be repaid, **including interest**, based on Commission decision.

4. Identify **whether recovery should be effected pursuant to an administrative or civil law procedure**. Where the underlying transaction is not clearly a civil law transaction, then use **administrative procedure**.

5. **Administrative procedure**

5.1 Issue executory administrative act.

5.2 Declare an administrative act **immediately enforceable**.

6. **Civil law procedure**

6.1 Set a **time limit of one month** for payment by the aid beneficiary. If no payment within time limit, seek **immediate court action for payment** before competent court of Member State.

6.2 Seek **interlocutory relief** where grant and/or use of aid would lead to serious distortion of competition (i.e. provisional recovery).

7. **Insolvency**

7.1 Apply for **registration of recovery** claim with trustee.

7.2 Where trustee in bankruptcy does not recognise recovery claim, seek immediate **action for declaratory judgment** by the government.

8. **No stay of any national proceedings** at any stage **merely based on challenge of underlying negative Commission decision before Community courts**.

9. Provide **copies of all briefs** filed by parties in national proceedings to the Commission.

GERMANY

Dr. Thomas Jestaedt

Alexandra Deege

JONES DAY

Bvd. Brand Whitlock 165, B-1200 Brussels

Tel.: 0032-2-6451414

Fax: 0032-2-6451445

tjestaedt@jonesday.com

6. Germany

6.1 Authorities responsible for recovery

The Federal Ministry of Finance of the Federal German government is responsible for dealing with the Commission on State aid matters.[55] The Federal Ministry of Finance also oversees the implementation of negative Commission decisions with recovery obligations.

Under the German Constitution, the Federal government can only implement recovery decisions where the aid which is to be recovered was granted by the Federal government or one of the public bodies controlled by it (such as the former Privatisation Agency for Businesses in the New Federal States ("*Treuhandanstalt*") and its legal successors). Where the aid to be recovered was granted by one of the sixteen Federal States ("*Länder")* or a municipality (or an entity controlled by one or more Federal States or a municipality), the Federal government must liaise with the officials of the Federal States responsible for State aid matters. Normally these officials are employed by the Federal Ministry of Finance of the respective Federal State. Sometimes, where several Federal States have an interest in a recovery case (such as in those *Landesbanken* cases where the banks were owned by several Federal States), the Federal government will consult with officials from more than one Federal State.

Since the officials of the Federal States are responsible for all State aid issues arising at the level of the Federal States (including the assessment of aid projects and the preparation of draft notifications), they have developed extensive knowledge and experience over time. Generally, the exchange between the Federal Ministry of Finance and the competent officials of the Federal States appears to function well.

We have not found any indications of differing opinions between the Federal Ministry of Finance and any of the Federal States in the matters which we have reviewed. In so far as there are difficulties in German recovery cases, they do not appear to be due to the German federal structure.

Theoretically, in the event of differing opinions between the Federal government and one of the Federal States on a recovery matter, the Federal government would have the right, under the German constitutional principle of "federal loyalty" ("*Bundestreue*"), to demand that a Federal State takes all steps necessary to recover aid in a specific manner.

6.2 Rules applicable to recovery

When examining recovery of State aid in Germany, a distinction must be made between recovery under administrative law and recovery under civil law. Where an aid has been

[55] Technically, correspondence is exchanged between the Commission and the Permanent Representation to the European Union.

granted under administrative law measures, such as State aid granted under a public law contract, the aid must be recovered pursuant to German administrative law. Any litigation regarding such recovery claims must be brought before the administrative courts.

If the illegal aid was granted by way of a civil law transaction, for example an injection of capital into a privately owned company or the issuance of a guarantee, the State aid must be recovered pursuant to the provisions of the German Civil Code ("*Bürgerliches Gesetzbuch*"). A court action regarding a recovery claim of this type must be brought before the ordinary courts.

6.2.1 Public law

Where illegal State aid has been granted by way of an administrative act ("*Verwaltungsakt*") under public law, the recovery of that State aid will normally also be effected pursuant to a so-called "negative administrative act" ("*belastender Verwaltungsakt*") under German public law. German administrative law is laid down in the Act on Administrative Procedure ("*Verwaltungsverfahrensgesetz*") which applies to administrative acts of the Federal government and its subdivisions. Similar legislative acts exist with respect to administrative acts of the Federal States. Also, similar rules apply where aid is granted in the form of tax benefits.

For a long time, legal discussion of administrative proceedings for the recovery of State aid in Germany has focused on the extent to which the recipient can rely on the principle of legitimate expectations. Section 48 (2) of the Act on Administrative Procedure contains a provision which specifically provides that the recipient of illegal State aid (irrespective of whether the illegality is based on EC law or on domestic German law) can prevent recovery of the aid if it relied in good faith on the legality of the grant. Section 48 (4) of the Act on Administrative Procedure provides that the recovery of aid is illegal if more than a year has expired since the administration learnt of the reasons for recovery. The recipient of the illegal aid invoked this provision in the *Alcan* case which was ultimately decided by the ECJ. The ECJ held that domestic law on recovery must not be applied in a manner that makes recovery impossible. Following the decision of the ECJ, the beneficiary of the aid went to the Federal Constitutional Court and claimed a violation of its basic rights. The Federal Constitutional Court rejected the claim in 2000.

It is notable that, since the final judgment in the *Alcan* case, there have been very few recovery cases before German administrative courts. Apparently, recipients of State aid and German courts have realised that reliance on general principles of administrative law is no longer possible, unless there is a clear case of reliance on good faith.

6.2.2 Civil law

Recovery of State aid is more complex in cases where incompatible aid was granted by way of a civil law transaction. Under German law, the Federal government, the Federal States'

governments and public entities all have the ability to enter into civil law contracts and transactions where this is necessary to carry out their tasks. Examples include capital injections, loans, and guarantees, as well as contracts for the purchase or sale of real estate, supply contracts and other transactions.

Where the State aid to be recovered was granted through a civil law transaction, recovery must, in principle, be sought through civil law means. Normally, recovery occurs pursuant to the provisions of the German Civil Code relating to unjust enrichment ("*ungerechtfertigte Bereicherung*") (sections 812 *et seq.*). These provisions require that the transaction underlying the grant of the aid be declared null and void.

Under German civil law, contracts and other civil law acts that violate a legal prohibition are null and void (section 134 *BGB*). It has long been in dispute whether section 134 *BGB* should be applied to violations of Article 88 (3) EC. The argument of those advocating non-applicability was that section 134 of the German Civil Code requires that *both* parties to the transaction must be in violation of the law. Since Article 88 (3) EC, on its face, is addressed to Member State only, the recipient of the aid would not be in violation of the law.

The legal uncertainty was removed in 2003 by a landmark decision of the Federal Court of Justice ("*Bundesgerichtshof*"), the highest German court for civil law matters, which held that section 134 *BGB* is indeed applicable to violations of Article 88 (3) EC. This is important, in particular, for transactions involving triangular relationships, such as the grant of a bank loan guaranteed by the State. In such case, where Article 88 (3) EC is violated, the question turns on whether it is only the actual payment of the loan by the bank to the ultimate recipient that is invalid or whether the breach of law also affects the guarantee given by the State to the bank. The decision of the Federal Court of Justice suggests that, because the transaction, in its entirety, is regarded as being in breach of the law, within the meaning of section 134 *BGB*, the grant of the guarantee to the bank by the State will also be affected.

It can be expected that the 2003 decision of the Federal Court of Justice, which it confirmed in another decision in early 2004, will further increase State aid discipline in Germany, in particular as regards the involvement of banks in the financing of such transactions.

6.2.3 Immediate Enforcement and suspensory effect

An appeal against an administrative act normally has suspensory effect (section 80 (1) of the Administrative Court Act ("*VWGO*")). However, the administrative body issuing the act can decide that an appeal should not have suspensory effect. This is permissible where the immediate execution of the act is in the "public interest" (section 80 (2) (4) *VWGO*). Generally, where State aid must be recovered pursuant to a negative Commission decision, immediate recovery and thus immediate enforcement of the administrative act ordering recovery are in the public interest. Thus, where recovery is sought pursuant to administrative law, it is relatively easy to ensure immediate enforcement of the national recovery decision.

This is different where recovery is sought pursuant to civil law. Under the German Code of Civil Procedure ("*Zivilprozessordnung*"), the claimant can freeze the assets of the defendant ("*Arrest*") against whom a payment action is brought, if it is able to show that, in the absence of a freezing order, enforcement of the judgment might become impossible ("*Arrestgrund*"). In addition, the claimant must show that the underlying claim is *prima facie* well-founded ("*Arrestanspruch*"). Similarly, a claimant in civil proceedings can obtain an injunction ("*einstweilige Verfügung*", for example, a prohibition on the defendant from spending certain monies) if it can show that, in the absence of an injunction, irremediable harm would be caused to the claimant. The thresholds to obtain an *Arrest* or an *einstweilige Verfügung* in civil proceedings are, therefore, very high. Whereas, in practice, defendants faced with private law actions for the recovery of State aid may accept mutually agreed interim measures, it is almost impossible to obtain an *Arrest* or *Einstweilige Verfügung* by means of a court decision. Thus, if the beneficiary refuses to repay the aid, the State must await the outcome of the court proceedings before any monies are repaid.

In certain cases, this is why, in order to ensure the swift and efficient implementation of a negative Commission decision in Germany, it is preferable to use administrative rather than civil law proceedings. The authority seeking recovery is not allowed to use its powers under administrative law in a case that is clearly governed by civil law. The applicable law is determined by statute. There is no discretion. However, the dividing line between administrative and civil law matters in the area of State aid is not always clear under German law. This is why the Federal government has very recently attempted to enforce a recovery claim in administrative proceedings based on the negative Commission decision alone (i.e. without a specific national legal basis).

The first test case was *Kvaerner*, which involved the grant of operating aid by the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), the privatisation agency for East-German businesses, to the Kvaerner shipyard. The Commission issued a decision pursuant to which part of that aid was incompatible. When Kvaerner refused to repay the aid, BvS issued an administrative act ordering immediate repayment of the amount in question rather than bringing an action against Kvaerner for repayment of the aid before the ordinary courts (which have jurisdiction in civil law matters). BvS declared that act to be immediately enforceable, because immediate enforcement was in the public interest. When Kvaerner brought an action which concerned immediate enforcement only, the Administrative Court of Berlin annulled the decision declaring BvS's administrative act immediately enforceable. The decision of the Berlin Court is based on a principle of German constitutional law pursuant to which any claim for reimbursement of aid by a State authority must have a statutory basis ("*Gesetzesvorbehalt*"). In fact, the German constitution prohibits actions by administrative authorities against private parties for which there is no statutory basis. On 8 November 2005, the Higher Administrative Court ("*Oberverwaltungsgericht*") of Berlin set aside the decision of the lower court and held that the *effet utile* of the Commission decision required that BvS be

allowed to recover the aid by way of an administrative act. In the opinion of the Higher Administrative Court, the public party recovering the aid is not necessarily bound to recover the aid in the same manner in which it was granted in the first place. If the decision of the Higher Administrative Court of Berlin is confirmed in the main proceedings, it can be expected that, in the future, recovery of aid in Germany will, in principle, be carried out pursuant to administrative rules.

The question of whether a negative Commission decision as such can constitute the legal basis for recovery under German law was also discussed in *Saxonia*. In that case, the negative Commission decision provided that Saxonia should repay part of the amount originally granted to its parent, Lintra. In national proceedings, commenced by a privatisation agency intending to recover those amounts, Saxonia claimed that there was no evidence in the Commission decision that any of the amounts paid to Lintra had actually been passed on to Saxonia. The Higher Administrative Court of Dresden found that, in the absence of proof that the monies had actually been transferred to Saxonia, the only legal basis for recovery of these amounts was the negative Commission decision itself. Since that decision had been challenged before the CFI, the Higher Administrative Court of Dresden thought it appropriate to suspend the proceedings pending the appeal.

The *Saxonia* case illustrates that, in practical terms, reliance on a national legal basis for recovery creates, under the German legal system, an incentive for parties to challenge aspects that may already have been dealt with in the Commission decision, whose implementation is being sought, such as the amount to be recovered, interest, and other aspects. Direct reliance on the negative Commission decision in national proceedings would limit the issues that could be addressed by the national court to those not expressly dealt with in the Commission decision.

6.2.4 Recovery in insolvency proceedings

a) General Insolvency Act

Of the 45 German recovery cases pending as of 1 July 2005, 20[56] are recovery cases against an insolvent beneficiary. Of these, 17 cases relate to aid beneficiaries located in the New Federal States (i.e. Eastern Germany), which became insolvent following a failed privatisation. The remaining cases concern sensitive sectors such as steel and shipyards. Thus, while the number of recovery cases involving insolvency does appear to be large, once

the remaining privatisation cases in the New Federal States have been closed, their number can be expected to decrease significantly.

Insolvency proceedings are governed by the Insolvency Act ("*Insolvenzordnung*") which entered into force on 1 January 1999 and which, in part, was designed to address the special situation of companies in the New Federal States. Pursuant to the Act, following the opening of insolvency proceedings, the local court ("*Amtsgericht*") appoints a trustee in insolvency ("*Insolvenzverwalter*") who administers the asset of the insolvent company. Creditors must notify the trustee of their claims. Where the trustee does not recognise the validity of a claim, the creditor can bring an action for a declaratory judgment before the ordinary courts. Following recognition of a claim (either by the trustee or by the court), the assets of the insolvent party are distributed to the creditor. The 1999 Insolvency Act abolished differential treatment of preferred and non-preferred creditors. The Act only distinguishes between normal creditors and subordinate creditors (for example, shareholders requesting repayment of their capital or shareholder loans). Secured creditors (for example, those who have a lien over a particular asset), and creditors of claims created by the trustee ("*Massenschulden*", i.e. claims arising after insolvency has been declared). In particular, tax, social security and other claims by the State no longer enjoy preferential treatment over other creditors.

The 1999 Insolvency Act introduced the so-called "insolvency plan procedure" ("*Insolvenzplanverfahren*") which is a restructuring procedure modelled on US-style Chapter 11 proceedings. In essence, the *Insolvenzplanverfahren* consists of a plan jointly worked out by the creditors pursuant to which each creditor waves a certain percentage of its claim in order to secure the continued existence of the debtor. Since the insolvency plan is designed to ensure the financial survival of the debtor, participation in such a plan may, in some cases, contravene the purpose of recovery of unlawful aid which, where full recovery cannot be secured, may require that the aid beneficiary be forced to stop its economic activities.

b) Practical problems

Capital injections and loans by the Federal government

In practice, since the entering into force of the 1999 Insolvency Act, there are fewer difficulties in assessing the correct treatment of State aid claims in insolvency proceedings in Germany:

---

[56] 2000/C31 Neuer Harzer Werke GmbH, 17/10/2001, L 134, 51-62, 22/05/2002, 10/12/2003, not yet published; 1992/C14 Bremer Vulkan Krupp & Hibeg, 25/02/1998, L 316, 25-32, 25/11/1998; 1994/C28 Hamburger Stahlwerke GmbH, 31/10/1995, L 78, 31-43, 28/03/1996; 1996/C07 MTW Schiffswerft und Volkswerft Stralsund, 22/07/1998, L 108, 34-43, 27/04/1999; 1997/C06 Dieselmotorenwerk Vulkan GmbH, 21/04/1999, L 232, 24-32, 02/09/1999; 1997/C45 SMI, 11/04/2000, L 238, 50-58, 22/09/2000; 1997/C56 Zeuro Möbelwerk, 21/12/2000, L 282, 1-14, 19/10/02; 1997/C58 Hartha, 03/02/1999, L 145, 32-36, 10/06/1999; 1997/C80 Pittler/Tomos, 28/07/1999, L 65, 26-32, 14/03/2000; 1998/C05 Brockhausen Holze, 28/07/1999, L 7, 6-13, 12/01/2000; 1998/C78, 21/04/1999, L 230, 4-8, 31/08/1999; 1995/C41, 13/03/1996, L 198, 40-46, 08/08/1996; 1994/C55, Neue Maxhütte Stahlwerke GmbH, 18/10/1995, L 53, 041-49, 02/03/1996; 1999/C26 Dessauer Geräteindustrie, 15/02/2000, L 1, 10-20, 04/01/2001; 1999/C36 Korn Fahrzeuge, 23/02/2000, L 295, 21-29, 23/11/2000; 1999/C41 Lintra, 28/03/2001, L 236, 3-14, 05/09/2001; 2000/C66 ZEMAG GmbH, 10/10/2001, L 62, 44-53, 05/03/2002; 2000/C44 SKL Motoren GmbH, 09/04/2002, L 314, 75-85, 18/11/2002; 2000/C28 Hirschfelder Leinen und Textil GmbH, 30/01/2002, L 314, 45-61, 18/11/2002; 2001/C13 Jahnke Stahlbau, 01/10/2003 not yet published; 1998/C42 CD Albrechts, 21/06/2000, L 318, 16/12/2000; 2000/C36 Henneberg Porzellan GmbH, 30/10/2001, L 307, 1; Lautex/ERBA Lautex, CR 23/97, CR 62/2001.

The key question concerned capital injections into companies. Pursuant to the Insolvency Act and German company law, a shareholder in a company who reclaims its capital is treated as a subordinate creditor. The same is true for a shareholder attempting to recover a loan at a time when a prudent shareholder would have provided capital ("*kapitalersetzendes Gesellschafterdarlehen*"). In the *Neue Max Hütte* case concerning a shareholder loan which the Federal State of Bavaria granted to a steel producer, the Regional Court of Amberg and, on appeal, the Higher Regional Court of Nürnberg were faced with the question of whether the claim for repayment of the loan by the Federal State (following a negative decision by the Commission) was a subordinate or an ordinary claim. The Regional Court of Amberg took the position that the reclaiming of the loan by the Federal State of Bavaria should be treated like any other claim for repayment of capital by a shareholder and thus be subordinate. The Higher Regional Court of Nürnberg rejected that approach and stated that it was necessary to disregard the position of shareholder of the Federal State of Bavaria when assessing the correct treatment of the claim for insolvency purposes, in order to safeguard the *effet utile* of the negative Commission decision. Thus, the Higher Regional Court of Nürnberg treated the loan repayment claim of the Federal State of Bavaria like an ordinary claim. The same results could have been achieved by relying on German law alone. Since, following the negative Commission decision, the loan agreement was null and void (pursuant to section 138 of the German Civil Code), the claim for repayment brought by the Federal State of Bavaria was no longer a claim by a normal shareholder, but should rather have been based on unjust enrichment. If the claim had been categorised accordingly, there would have been no question of subordination.

d) Transfer of business

Another practical issue, which has arisen in a number of insolvency proceedings in Germany in the past, is the extent to which the trustee in insolvency is able to transfer all or part of the insolvent business to a third party without exposing the acquirer to the risk of State aid recovery claim. This issue has been the subject of litigation at Community level (in *Seleco*, *SMI*, *and other banks*). The ECJ has established the principle that, where the fair market value is paid for the business, a recovery claim stays with the original beneficiary (i.e. the insolvent estate). A number of questions may arise regarding the proper method of valuation of the business, the requirement of a tender and other practical issues. However, in general, it is to be expected that issues regarding the resale of a business to secure payment of creditor claims will be handled more efficiently in the future. The authors of the report have not found a recent example of a German court case involving these issues.

c) Insolvency plan

The treatment of State aid recovery claims in insolvency plan proceedings is an open issue. There are no court cases on this point. A creditor voting on an insolvency plan will have to weigh whether the non-acceptance of the plan would lead to a situation where it recovers less than the percentage of the claim recoverable under the insolvency plan. For the State

this is a difficult judgment to make. We understand that the Commission takes the position that it is only possible for the State to participate in an insolvency plan if the plan provides for the complete repayment of the entire recovery claim within a short period of time (one year).

It should be noted that an insolvency plan can be accepted by a majority of creditors only if the voting creditors also hold more than 50 per cent of the claims (section 244 Insolvency Act). Thus, it is possible that, where the State rejects an insolvency plan, the plan will nevertheless be adopted by a majority of creditors. Any insolvency plan must be confirmed by the insolvency courts ("*sofortige Beschwerde*"). It is possible to challenge the confirmation decision by immediately bringing a complaint. It is an open question whether the court before which such a complaint is brought must set aside the insolvency plan despite the positive vote of the creditors, merely because the plan was rejected by the State reclaiming recovery of the aid.

6.3 Actions for recovery (or opposing recovery) before the national courts

6.3.1 Action by the State

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

Facts and legal issues: The case concerns the implementation of a negative Commission decision of 20 October 2004 in the so-called *Kvaerner* matter[57]. The Commission decided that Kvaerner, a shipyard, had received unlawful State aid which Germany was required to recover. The Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), which was responsible for recovering the State aid, issued an administrative act ordering recovery of the aid. Kvaerner challenged the administrative act, arguing that it was not based on a valid legal basis ("*Rechtsgrundlage*"). BvS took the view that it was entitled to base administrative acts either on Article 14 (3) of Regulation 659/1999 or directly on the Commission decision itself.

Decision: The Administrative Court of Berlin decided that the recovery decision issued by BvS was unlawful. The German Constitution stipulates that every administrative act that imposes a burden on a person must be based on a specified legal basis ("*Vorbehalt des Gesetzes*", Article 20 (3) "*Grundgesetz*"). According to the Administrative Court of Berlin, the administrative act ordering recovery was not based on a valid legal basis. Both Article 14 (3) of Regulation (EC) No. 659/1999 and the Commission decision provided that recovery of unlawful State aid had to be implemented according to national law. The case law of the Community courts[58] does not, according to the Administrative Court of Berlin provide for an obligation to recover unlawful State aid by means of an administrative act. Similarly, the

[57] OJ (2005) L 120/21.
[58] In particular, Case T-155/95, Stadt Mainz v Commission [1996] ECR I-1557.

Berlin Court took the position that established case law[59] does not indicate that recovery of unlawful State aid can only be carried out if implemented by means of an administrative act.

On 8 November 2005, the Higher Administrative Court of Berlin set aside the decision of the Administrative Court of Berlin and ruled that the administrative act for recovery issued by BvS was well-founded. According to the Higher Administrative Court, the *effet utile* of the negative Commission decision required that administrative law provided means of recovery to the grantor of the aid.

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

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

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

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

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

Facts and legal issues: The case concerned the implementation of a negative Commission decision of 28 March 2001 in the so-called *Lintra* matter. Lintra was a holding company in the

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

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

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

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

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

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

When the case was before the Higher Regional Court of Hamburg, the action by the Federal government against the negative Commission decision was dismissed by the ECJ. The Higher Regional Court of Hamburg set aside the judgment of the Regional Court of Hamburg

and held that the new owners of the business of Hamburger Stahlwerke GmbH would have to repay the loans received from Hamburger Landesbank directly to the City of Hamburg. In reaching this decision, the Higher Regional Court of Hamburg held that the violation of Article 88 (3) EC resulted in the invalidity of *both* the loan granted by Hamburger Landesbank to Hamburger Stahlwerke GmbH and the underlying agreement between the City of Hamburg and Hamburger Landesbank pursuant to which the loan had been granted. Thus, the City of Hamburg was in a position to bring a direct claim against Hamburger Stahlwerke GmbH (and its successors) for unjust enrichment. The Higher Regional Court of Hamburg explained that it was necessary to regard all contractual relationships surrounding the grant of the loan as null and void in order to preserve the *effet utile* of the Commission decision.

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

Facts and legal issues: The defendant, a producer of synthetic fibers and yarns, received an investment grant ("*Investitionszuschuss*") amounting to DM 1.2 million in 1982 from the claimant, a publicly owned bank. In addition, the claimant received an investment allowance ("*Investitionszulage*") amounting to DM 1.7 million in 1984 from another public authority. In 1985, the Commission decided that both the investment grant and the investment allowance constituted unlawful State aid and that they must be recovered[60]. The Commission's decision was subsequently confirmed by the ECJ[61], and the defendant repaid the investment allowance. In 1995, the claimant requested repayment of the investment grant plus interest from the defendant. The defendant refused, arguing, *inter alia*, that recovery of the investment grant would be contrary to the principle of good faith ("*Treu und Glauben*", section 242 *BGB*).

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

[60] OJ (1985) L 278/1.
[61] Case C-310/85, Deufil GmbH & Co. KG v Commission [1987] ECR 901.

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

Facts and legal issues: The claimant, a sub-agency of the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), was responsible for the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*" or "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1997, the claimant sold 150 acres to the defendant, some of which were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* contained State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid[62]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be adapted retroactively to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts, requesting the additional payment. The defendant refused to pay, arguing that the Commission decision was unlawful.

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

(I) The Federal Court of Justice found that the question of the legality of the Commission decision was relevant for the case. However, it held, with reference to established ECJ case law[63], that the defendant was precluded from questioning the lawfulness of the Commission decision before a national court. The defendant, as the beneficiary of the unlawful State aid, could have challenged the decision before the ECJ, but instead allowed the mandatory time limit laid down in Article 230 (5) EC to pass.

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

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

Facts and legal issues: The case concerned a claim for damages arising out of the alleged failure of the Federal State of Saxony-Anhalt ("*Land of Sachsen-Anhalt*") to notify aid in the steel sector within the time limit. The claim was based on a Commission decision under the ECSC Treaty allowing aid to steel producers in the German Federal States provided that the aid was notified to the Commission by 30 June 1994. The Federal government notified the

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

aid after the expiration of the notification period. The Commission found that the aid was incompatible. In the proceedings before the Regional Court of Magdeburg, the claimant claimed that the aid would have been compatible, had the Federal government abided by the notification period. Consequently, the claimant reclaimed a certain part of the amount that it was required to repay as damages under German tort law.

Decision:

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

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

Facts and legal issues: The claimant, a sub-agency of the Federal Institute for special tasks related to reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" ("BvS"), was responsible for the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1997, the claimant sold 200 acres to the defendant, some of which were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* contained State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid[64]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be adapted retroactively to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts requesting the additional payment. The defendant refused to pay, arguing that section 3 (a) *AusglLeistG* was unconstitutional, since it retroactively deprived the defendant of a vested legal entitlement.

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

---

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

(I) Section 3 (a) *AusglLeistG* could only deprive the defendant of a vested legal entitlement if the purchase contract entered into in 1997 was valid. But this was not the case. The sale of the land below market price infringed Article 88 (3) (3) EC. Under section 134 of the German Civil Code ("*Bürgerliches Gesetzbuch*", "*BGB*"), a contract that infringes a legal prohibition ("*gesetzliches Verbot*") is void. Referring to the ECJ's case law[65], the Federal Court of Justice held that section 134 *BGB* must be understood as applying to infringements of Article 88 (3) (3) EC. This applies regardless of whether the Commission subsequently approves the aid in question. Only the nullity of the contract can remove any distortions of competition by enabling competitors to request recovery of the unlawful State aid.

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

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

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

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

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

shareholder, which had been found to constitute State aid, can be treated as a subordinate loan (pursuant to section 32 (a) of the German Act on Companies with Limited Liability).

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

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

Facts and legal issues: The claimant, a sub-agency of the Federal Institute for Special Tasks related to Reunification ("*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" or "BvS"), was responsible for the privatisation of formerly state-owned land in Eastern Germany. The land was sold under the Indemnification and Compensation Act ("*Ausgleichsleistungsgesetz*", "*AusglLeistG*"), which provided for the possibility to sell the land below market price. In 1998, the claimant sold land to the defendant, a local farmer. Some plots of land were sold below market price. In 1999, the Commission decided that parts of the *AusglLeistG* contained State aid which was incompatible with the Common Market and ordered Germany to recover the unlawful aid[66]. The *AusglLeistG* was subsequently amended and a new provision (section 3 (a) *AusglLeistG*) was introduced. Section 3 (a) *AusglLeistG* allowed for the purchase price to be retroactively adapted to the market price. Based on section 3 (a) *AusglLeistG*, the claimant asked the defendant for an additional payment for the land sold. Since the defendant refused, the claimant brought an action in the civil courts, requesting the additional payment. The defendant refused to pay, arguing that at the time the contract was concluded, it could not have known that the *AusglLeistG* provided for unlawful State aid.

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

(I) The Regional Court of Rostock discussed the ECJ's jurisprudence in detail, in particular the *Alcan* decision[67] and subsequent decisions by German courts. The Regional Court of Rostock acknowledged that the legitimate expectations of the recipients of unlawful State aid could be protected only in exceptional circumstances. In particular, the beneficiary of the aid recipient could not rely on legitimate expectations if he knew or should have known

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

that the aid, although notifiable, had not been notified to the Commission. These principles applied regardless of whether the aid had been granted by an administrative act or under a private contract.

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

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

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

Decisions: The Regional Court of Amberg held that the loans should be treated as ordinary claims in bankruptcy (not as unsecured secondary claims as the trustee in bankruptcy suggested). The Regional Court of Amberg explained that treating the loans differently would jeopardise the *effet utile* of the negative Commission decision. The Higher Regional Court of Nürnberg rejected the appeal brought by the trustee in bankruptcy as inadmissible. In particular, the Higher Regional Court of Nürnberg did not consider that it was necessary to

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

refer the question concerning the proper treatment of the loans granted by the Federal State of Bavaria in its capacity as shareholder to the ECJ. The Higher Regional Court of Nürnberg applied the reasoning of the Regional Court of Amberg which had stated that the ECJ required in *Alcan* that illegal aid be recovered under national law in a manner which does not render recovery practically impossible.

(25) Action by competitors

There are no published German court cases on recovery where the recovery action was brought by a competitor.

6.3.2 Action by beneficiary (opposition)

(26) Higher Administrative Court ("*Verwaltungsgerichtshof*") of Baden-Württemberg, 10 December 1996[68]

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

In its decision of 17 November 1987 addressed to Germany[69], the Commission found that the financial aid was State aid that was incompatible with the Common Market under Article 87 EC and ordered recovery of the aid. This decision was neither challenged by Germany nor complied with by the German authorities. In an action brought by the Commission against Germany, the ECJ handed down a declaratory judgment holding that Germany was in breach of the EC Treaty[70.]

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

Decision on appeal (the decision of the Court of First Instance is unreported): The judgment of the Higher Administrative Court of Baden-Württemberg mainly dealt with the question of when the one-year time limit for orders of repayment of illegally granted State aid starts to run under the applicable German rules. The Higher Administrative Court of Baden-Württemberg held that the time limit had been complied with, which started to run when the

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

governmental agency responsible for recovery was informed of the negative decision of the Commission and of the judgment of the ECJ. The Higher Administrative Court of Baden-Württemberg emphasised that, as a general rule, the public interest in obtaining repayment of State aid granted in violation of EC law takes precedence over the legitimate expectations of the beneficiary to keep the State aid. It appears that the Higher Administrative Court of Baden-Württemberg is more inclined to consider the legitimate expectations of the beneficiary if the grant of State aid only violates German rules.

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

(27) Federal Administrative Court ("*Bundesverwaltungsgericht*"), 17 February 1993[71]; Higher Administrative Court ("*Oberverwaltungsgericht*") of Münster, 26 November 1991[72]; Administrative Court ("*Verwaltungsgericht*") of Cologne, 21 April 1988[73]

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

The recipient challenged the administrative act ordering recovery of the aid (which was issued on 27 March 1986, i.e. once the Commission had rendered its decision but before the ECJ delivered its judgment[74] confirming the Commission's view following the recipient's challenge of the decision before the ECJ). This administrative act was based on section 48 of the German Act on Administrative Proceedings ("*VwVfG*"), which empowers administrative agencies to annul illegal administrative acts.

Final decision: The Federal Administrative Court upheld the previous judgments in the case in full and dismissed the beneficiary's action. The Federal Administrative Court stated that orders for recovery of illegally granted State aid must be based on section 48 *VwVfG*. The Federal Administrative Court further stated that, as a general rule, although the interest of the beneficiary not to be ordered to repay the State aid must be weighed against the public interest that illegally granted State aid is recovered, there will be no legitimate interest of the beneficiary worthy of protection if State aid was granted without due notification under Article 88 (3) EC. This amounted to a narrow construction of section 48 *VwVfG*, which states that,

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

as a general rule, repayment of illegal payments must not be ordered where the recipient has a legitimate interest in retaining the sum granted. The provision further states that a legitimate interest will generally exist if the recipient has already spent the sum granted. The provision also lists the cases where no legitimate interest may be invoked by the recipient, i.e. if the recipient obtained payment by fraud or by misrepresentation of fact or was aware of the unlawfulness of the payment, or if the recipient's ignorance of the unlawfulness of the payment was due to gross negligence.

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

It is interesting to note that the Higher Administrative Court of Münster stated, in this case, that the mere illegality of the grant of aid due to lack of notification under Article 88 (3) EC does not constitute a ground for an order for recovery. Although only *obiter dicta*, this would exclude actions by third party competitors seeking to obtain an order for recovery, before the Commission has pronounced itself on the compatibility of the aid with the Common Market.

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

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

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

(29) *Alcan* case:

Federal Administrative Court ("*Bundesvewaltungsgericht*"), 23 April 1998[75] after a reference for a preliminary ruling to the ECJ of 28 September 1994[76]; Higher Administrative Court ("*Oberverwaltungsgericht*") of Koblenz, 26 November 1991[77] and Administrative Court ("*Verwaltungsgericht*") of Mainz, 7 June 1990[78]

Facts and legal issues: The case involved aid amounting to DM 8 million granted to an aluminum plant operator in order to safeguard the future operation of the plant. Before the aid was granted detailed negotiations took place between the administrative agency granting the aid and the operator of the plant. Although the Commission, which became aware of the agency's intention to grant the aid through press coverage, had requested notification under Article 88 (3) EC, no notification was made. The Commission found that the aid was incompatible with the Common Market and ordered recovery[79]. The German authorities, however, did not claim repayment. The Commission's order for recovery was upheld by the ECJ[80] in proceedings commenced by the Commission against Germany.

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

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

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

started to run in June 1986, i.e. when the negative decision of the Commission had became final and absolute. The order was issued on 26 September 1989.

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

Judgment of ECJ: The ECJ, by judgment of 20 March 1997[81], answered all three questions in the affirmative. The ECJ stated, in particular, that the recipient may only have a legitimate expectation as to the lawfulness of the granting of State aid if it has duly ascertained whether the procedures laid down in Article 88 EC have been fully complied with.

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

The judgment does not indicate when this exception can be established. If one considers the general rule emphasised by both the ECJ and the Federal Administrative Court, i.e. that a beneficiary must check compliance with Article 88 EC if it wants to argue the defence of legitimate expectations successfully, it is clear that exceptional cases will be extremely rare. Up to now there has been only one case where the ECJ accepted the raising of the defence

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

of legitimate expectations against an order for recovery[82]. In that case, aid was granted on the basis of a scheme approved by the Commission but more aid was granted than originally foreseen. The Netherlands notified this modification to the Commission, which decided after 26 months that the aid was incompatible with the Common Market and ordered recovery. The ECJ held that this period of time was excessive and gave rise to legitimate expectations on the part of the beneficiary.

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

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

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

6.4 Difficulties encountered by the Commission in German recovery cases

6.4.1 General

The main difficulties encountered by the Commission in implementing recovery decisions in Germany in recent years are the following:

- Delay resulting from the ambiguity as to whether recovery in a specific case should be claimed pursuant to administrative or civil law;
- Delay resulting from the suspension of national enforcement proceedings pending an appeal against a Commission decision before the Community courts;
- Transfer of the business or other assets of the recipient of the aid to another party; and

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

- Enforcement of recovery claims in insolvency proceedings (including questions arising in the context of an insolvency plan).

6.4.2 Types of cases

We have reviewed 45 pending German recovery cases (as of 1 July 2005). Despite the large number of pending cases, overall, there appears to be a clear improvement in recovery discipline over the years. Only a few cases show no regular progress. Where the recipient of the aid is financially viable, recovery usually takes place within the time frame set by the Commission. A positive example are the recent *Landesbanken* cases in which the Commission decided that a total amount of EUR 2.815 billion should be recovered as illegal aid, following capital injections by several Federal States in the early 1990s. Whereas there are still open questions relating to recovery, the banks made payment within the time frame set by the Commission.

Not surprisingly, a large number of cases in Germany (i.e. eighteen) concerns the recovery of aid granted to companies in the New Federal States. In almost all of these cases, successful recovery ultimately led to insolvency proceedings.

Major obstacles have arisen in recovery proceedings where the recipient business was transferred by the original owner. For instance, in the *Hamburger Stahlwerke* case, both the business and a loan (which constituted incompatible State aid) were transferred to another industrial group following a negative Commission decision. Having structured the transaction in such a way that the recoverable loan "disappeared", the transferee group was in a position to resist recovery for some time.

6.4.3 Legal issues

In general, it appears that both the Federal Ministry of Finance and officials of German authorities responsible for state aid enforcement in Federal States have extensive experience in implementing Commission decisions and are aware of the necessity to do so swiftly and efficiently. Obstacles to effective implementation usually arise on legal grounds. The requirement under German law to base each and every recovery decision on an appropriate national statutory provision leads to additional complexity in recovery proceedings. This results very often in the revisiting, by the court, of issues that have already been addressed by the Commission. It would therefore be desirable to have, at national level, only one set of rules applying to the recovery of aid. If recovery at the national level was based directly on negative Commission decision along the lines of the new practice adopted by the Federal government in *Kvaerner Warnow* and other cases, a more efficient and simpler way of enforcing negative decisions could be achieved. It remains to be seen whether this approach will be upheld by the courts or whether specific legislation, i.e. a "State Aid Act", will be required.

It is still unclear whether a stay of national proceedings is permissible when an action against the underlying negative decision is pending before the Community courts. The order of the Higher Regional Court of Dresden to stay the proceedings in the *Saxonia* case is an example of a German national court disregarding Article 242 EC.

Considering German recovery procedures, it might be helpful to grant the national courts more direct access to the Commission in recovery procedures. One way of achieving this might be to give the Commission the role of an *amicus curiae*, similar to the provisions laid down in Regulation (EC) No. 1/2003[83]. Since recovery procedures following negative Commission decisions are limited in number, it would be helpful to give the Commission a regular role in national proceedings to assist the national government in clarifying any issues arising. This is particularly true if, in the future, recovery in Germany will be based directly on the negative Commission decision.

6.5 Proposed best practice guideline

1. Identify administrative **body** (Federal government, Federal State or municipality or public entity) having to **recover** aid;

2. Identify **beneficiary** based on *Seleco/Banks* case law;

3. Calculate **amount of aid** to be repaid **including interest** based on Commission decision; and

4. Identify **whether administrative or civil law procedure** to be followed. Where the underlying transaction is not clearly a civil law transaction, use **administrative procedure**.

5. **Administrative procedure**

5.1 Issue **negative administrative act** ("*belastender Verwaltungsakt*") within two-month time limit for implementation of Commission decision. Provide for repayment *ex tunc*, i.e. with interest;

5.2 Declare administrative act **immediately enforceable** ("*Anordnung der sofortigen Vollziehung*");

5.3 Where aid recipient successfully challenges decision to immediately enforce recovery act (before an Administrative Court), file **complaint** ("*Beschwerde*") immediately with Higher Administrative Court ("*Oberverwaltungsgericht*"); and

5.4 Where addressee of negative administrative act successfully challenges act before Administrative Court, immediately file **appeal** ("*Berufung*") to Higher Administrative

[83] OJ (2003) L 1/1.

Court and, where applicable, further appeal ("*Revision*") to Federal Administrative Court ("*Bundesgerichtshof*").

6. **Civil law procedure**

6.1 Set **time limit of one month** for payment by aid beneficiary. If no payment within time limit, **immediate court action for payment** before Regional Court ("*Landgericht*");

6.2 Seek **interlocutory relief** ("*einstweilige Verfügung*") where grant and use of aid would lead to serious distortion of competition; and

6.3 Where Regional Court rejects court action, immediately **appeal** to Higher Regional Court ("*Oberlandesgericht*") and, where applicable, to Federal Court of Justice ("*Bundesgerichtshof*").

7. **Insolvency**

7.1 Apply for registration of recovery claim in insolvency register ("*Insolvenztabelle*"). Recovery claim to be given **same priority as other claims by government entities**;

7.2 Where trustee in bankruptcy does not recognise recovery claim, bring **declaratory action** ("*Feststellungsklage*") immediately; and

7.3 **No participation in an insolvency plan** ("*Insolvenzplan*") unless plan provides for total repayment of aid.

8. No **stay of any proceedings** at any stage **when underlying negative Commission decision challenged before Community courts; and**

9. Provide Commission with **copies of all briefs** filed by parties in national proceedings.

OTHER MEMBER STATES

9. Other Member States:

- Austria
- Denmark
- Finland
- Greece
- Luxembourg
- The Netherlands
- Portugal
- Sweden
- United Kingdom

9.1 Austria

9.1.1 Recovery Procedure

Once the Commission has ascertained the illegality of a particular aid measure, it will order its repayment. Abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful (*Spain v Commission: "Province of Teruel"*). The technique of recovery (and the applicable rules) will largely depend on the legal basis on which the aid was granted. For instance, whether aid consists of a tax incentive or of a capital increase in a public undertaking does make a major difference for recovery proceedings. In the following, we only consider the straightforward case of aid in the form of a direct monetary transfer. Even here, one has to distinguish between two different types of case:

- aid that has been granted by contract under civil law; and
- aid that has been granted by an administrative order.

9.1.2 Aid granted by way of contract

If the aid was awarded by contract, the rules of the Austrian General Civil Code ("ABGB") apply. Pursuant to section 879 ABGB, a contract is void (and may be revoked with retroactive effect) if it infringes *bonos mores* or a statutory prohibition. Based on the ECJ's case law in *Lorenz* and its progeny, it is hardly disputable that the Community State aid rules contain statutory prohibitions within the meaning of section 879 ABGB.

Consequently, a subsidy contract which infringes Article 87 (1) EC is void and restitution can be ordered pursuant to the ABGB provisions on unjust enrichment (section 877 ABGB).

9.1.3 Aid granted by way of an individual administrative act ("*Bescheid*")

Under Austrian law, a *Bescheid* can only be revoked under exceptional circumstances. In particular, it can be declared void by a higher body if it contains a defect explicitly dealt with by nullity under the applicable law (see section 68(4)(4) AVG, "*Allgemeines Verwaltungsverfahrensgesetz*"); special rules apply in tax matters. As for aid granted by way of civil law contracts, the main question is whether the provisions of the EC Treaty relating to State aid are statutory prohibitions in the meaning of section 68(4)(4) AVG. For the same reasons (i.e. in particular with regard to the unconditional obligation of Member States to give effect to Community law) we believe that this is the case. However, there is still much uncertainty. For instance, it is unclear whether the order with which a *Bescheid* is revoked for failure to meet Article 87 EC may also provide details of how repayment should be effected (interest etc).

Please note that section 68(4) AVG does not entail any possibility to have orders avoided which were issued by the highest administrative instance. With regard to such measures, Austria could find itself in the position of being unable to comply, on the basis of the law as it

stands, with Community rules regarding recovery of illegal State aid. Here again, the Supreme Administrative Court might be forced to set aside those provisions in the AVG which would render the recovery of aid impossible.