

# Application of EU State Aid Law in the Netherlands

## From a plan to grant aid to the recovery of unlawful aid: the role of national law and practice

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### I. Introduction

EU State aid law has been the subject of growing attention over the last few years. Referring to the Lisbon goals for the European Union, the European Council has repeatedly called on the Commission and the Member States to further their efforts to promote fair and uniform application of and compliance with the State aid rules, each in accordance with their respective powers.<sup>2</sup> Member States should grant ‘less and better targeted State aid’.<sup>3</sup> Focusing on this aim, the Commission has made State aid control one of the cornerstones of its policy.<sup>4</sup> Supported by the European Council, the Commission works on a thorough reform of the State aid rules, which should result in a more transparent and effective pro-active State aid control in an enlarged European Union.<sup>5</sup> The effectiveness and credibility of such a pro-active State aid control presupposes a proper enforcement of the applicable rules in cases where these rules have been breached.<sup>6</sup>

It should be noted that the Commission and the Member States share the responsibility for making the EU State aid procedures work. The EU State aid rules, laid down in the Articles 87, 88 and 89 of the EC Treaty, in several regulations of both the Council and the Commission, and in jurisprudence, set a procedural framework relating to State aid, within which Member States have in some respects a certain margin of manoeuvre. In particular, the effectiveness of enforcement of EU State aid law will depend to a large extent on the availability of institutions and applicable procedures in the Member States, in the absence of Community law provisions for this purpose.

In order to provide a basis for a comparative assessment of how Member States make use of the margin of manoeuvre provided under EU State aid rules, to identify best practices conducive to the good functioning of the State aid procedural system and to identify problems

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<sup>2</sup> According to the Lisbon goals, the European Union must become ‘the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion’ (European Council, Lisbon, March 2000, para. 5).

<sup>3</sup> Conclusions of the European Council, Lisbon, March 2000, para. 16-17; Conclusions of the European Council, Stockholm, March 2001, para. 20; Conclusions of the European Council, Barcelona, March 2002, para. 18; Conclusions of the European Council, Brussels, March 2003, para. 26; Conclusions of the European Council, Brussels, March 2005, para. 23.

<sup>4</sup> See N. Kroes, ‘Building a Competitive Europe – Competition Policy and the Relaunch of the Lisbon Strategy’, speech held at a conference at Bocconi University, Milan 7 February 2005.

<sup>5</sup> See the State Aid Action Plan. Less and better targeted state aid; a roadmap for state aid reform 2005-2009, COM(2005) 107 final; Conclusions of the European Council, Brussels, March 2003, para. 26; Communication from the Commission ‘A pro-active Competition Policy for a Competitive Europe’, COM(2004) 293 final, p. 13 and 16; State Aid Scoreboard autumn 2004 update, COM(2004) 750 final, p. 8.

<sup>6</sup> See the State Aid Action Plan, Less and better targeted state aid; a roadmap for state aid reform 2005-2009, COM(2005) 107 final, p. 13; European Commission, *Report on competition policy 2004, Volume I*, p. 4, 5 and 115; State Aid Scoreboard spring 2006, COM(2006) 130 final, p. 33; A. Matthias-Werner, ‘Reform of procedural rules for state aid cases’, *Competition Policy Newsletter* 2004 (2), p. 91-93; P. Anestis, S. Mavroghenis & S. Drakakakis, ‘Recent developments in EC state aid policy’, *The European Antitrust Review* 2005, p. 68-72.

which may need to be addressed, the FIDE has issued a comprehensive questionnaire directed to national rapporteurs.<sup>7</sup> This report endeavours to answer the FIDE-questionnaire from a Dutch perspective, focusing on both applicable national law and practice with regard to State aid in the Netherlands.<sup>8</sup> Given the comprehensive list of questions and the maximum length set for the national reports, it was not possible to elaborate on all relevant aspects of national law and practice. The answers given to the questions should, therefore, be considered as leads for further research and discussion. After this introduction, first, the basic principles of Dutch law with regard to the grant of State aid will be discussed in section II. Next, various mechanisms to ensure compliance with the notification obligation will be dealt with in section III. Mechanisms to ensure the compatibility of aid and the application of the block exemptions for certain categories of State aid will be the subject of section IV. Then, in section V the applicable Dutch law and practice with regard to recovery of State aid will be discussed. This report will be concluded with some final remarks in section VI.<sup>9</sup>

## II. Basic principles of Dutch law with regard to State aid

The national rapporteurs were requested first to provide an overview of the basic national law governing the grant of State aid. While no Community law obligations may exist in relation to the basic choices by Member States to be investigated under this section, the choices made by Member States may, according to the questionnaire, be more or less conducive to the good functioning of the EU State aid system.

Dutch law does not provide for particular rules on State aid.<sup>10</sup> The grant of State aid in the Netherlands will, therefore, be subject to the general rules applicable to (favouring) acts of governments, as well as to the general principles of proper administration. As far as relevant, these general rules and principles have been taken into account in answering the questions of the questionnaire. Particular attention will be paid to Title 4.2 of the General Administrative Law Act (hereinafter referred to as GALA), in which general rules on subsidies are contained. According to Article 4:21 (1) GALA, ‘subsidy’ means the entitlement to financial resources provided by an administrative authority for the purpose of certain activities of the applicant, other than as payment for goods or services supplied to the administrative authority. Subsidies could easily be qualified as State aid, provided that the conditions of Article 87 (1) EC, in which the concept of State aid has been laid down, are fulfilled.<sup>11</sup> It should be noted further that in the Netherlands, being a decentralized, unitary State, several levels of government exist, each with their own powers and responsibilities: the central government, regional

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<sup>7</sup> The questionnaire has been set by General Rapporteur Mr. Paul F. Nemitz, Head of Legal Affairs at DG Fisheries and Maritime Affairs of the European Commission.

<sup>8</sup> See recent studies in this field: T. Jestaedt, J. Derenne & T. Ottervanger (coordinators), *Study on the Enforcement of State Aid Law at National Level*, Luxembourg: Office for Official Publications of the European Communities 2006; P.C. Adriaanse, *Handhaving van EG-recht in situaties van onrechtmatige staatssteun [Enforcement of EC law in situations of unlawful State aid]*, Deventer: Kluwer 2006; B.W.N. de Waard et al., *Terugvordering van staatssteun. Een rechtsvergelijkend onderzoek [Recovery of State aid. A comparative law research]*, Nijmegen: Wolf Legal Publishers 2005.

<sup>9</sup> Given the factual nature of the FIDE-questionnaire, this report is mainly empirical, describing Dutch practice and the underlying law. As far as questions refer to case law of national courts, use has been made of [www.rechtspraak.nl](http://www.rechtspraak.nl) and *Kluwer Plaza Juridisch en Fiscaal*.

<sup>10</sup> It should be noted that a working group, consisting of representatives of all ministries (ICER), currently examines if and how Dutch law should be modified in order to be into line with Community law requirements in the field of State aid law. For this purpose a comparative law study was carried out. See De Waard et al. 2005.

<sup>11</sup> For an overview of the similarities and differences between the concepts of State aid in the sense of Article 87 (1) EC and subsidies in the sense of the GALA see J.R. van Angeren & W. den Ouden, ‘Subsidierecht en staatssteun’ [Subsidy law and State aid] in: B. Hessel et al., *Staatssteun op het grensvlak van bestuursrecht, Europees recht en fiscaal recht [State aid on the borders of administrative law, European law and fiscal law]*, VAR-Preadviezen, Den Haag: Boom Juridische uitgevers 2005, p. 83-107.

governments (provinces) and local governments (municipalities). Since State aid could be granted by all these governments, the EU State aid rules apply equally to all of them. This has been taken into account as much as possible, in answering the questions of the questionnaire. As a result of the decentralization of powers, particular problems could arise as regards compliance with Community law requirements. Also these problems will be elaborated further in this report.

*1. Is there an obligation to make amounts of State aid transparent in the Member States budgets, and if so, according to which rules? If not, are they made transparent in fact, and in what manner?*

Dutch law does not provide for a general obligation for governments to make amounts of State aid transparent in their budgets. However, given the obligation for Member States under Article 21 of Regulation 659/1999 to submit to the Commission annual reports on existing State aid, governments should keep lists of all existing aid schemes.<sup>12</sup> On the national level this task will be performed by State aid coordinators within the different ministries. Also regional and local governments are required to keep lists of existing aid schemes.<sup>13</sup> The reports of these governments will be coordinated by a special State aid agency within the Dutch Ministry of Home Affairs, the *Coördinatiepunt Staatssteun voor decentrale overheden*. This agency puts all relevant information, collected from decentralized governments, into the annual report from the Dutch government to the Commission. Meanwhile, some regional governments have adapted their general subsidy acts to the Community law requirements, by putting the competent authorities under an obligation to register all State aid measures.<sup>14</sup>

The prescribed legality control of public expenses from regional and local governments, to be carried out by an accountant, could also contribute to more transparency about State aid measures. For some years, this legality control also extends to legality under the European rules on State aid.<sup>15</sup> In order to make it possible for accountants to verify whether the State aid rules have been breached, or not, regional and local governments will have to make transparent in their budgets which measures could be considered as State aid in the sense of Article 87 (1) EC. Regional and local governments, therefore, have been advised to keep a file on State aid measures.<sup>16</sup>

*2. Is a formal legal basis (parliamentary law) necessary for a grant of aid in the Member States, or can public authorities grant aid without a formal legal basis, e.g. based on budgetary provisions only, possibly accompanied by a ministerial decree?*

In the Netherlands State aid could be granted in different legal forms. Subsidies in the sense

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<sup>12</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [now Article 88] of the EC Treaty, OJ 1999 L 83/1 (hereinafter Regulation 659/1999).

<sup>13</sup> See paragraph 7.2 of the 'Informatiewijzer staatssteun voor decentrale overheden' [Information on State aid for decentralized governments] issued by the Ministry of the Interior and Kingdom Relations, and Information Centre 'Europa Decentraal' (an organization established to provide knowledge and expertise about European law to regional and local governments, and to improve the proper application of European law by these governments).

<sup>14</sup> See e.g. Article 5 of the General Subsidy Act of the Province of Utrecht, as modified by order of Provincial States of Utrecht of 15 May 1998.

<sup>15</sup> See Article 213 Local Government Act (Gemeentewet), Article 217 Regional Government Act (Provinciewet), and Order accountant's control provinces and municipalities (Besluit accountantscontrole provincies en gemeenten), *Staatsblad* 2003, nr. 362.

<sup>16</sup> See the Assistance document for an order concerning the grant of subsidies and State aid (Handreiking voor een collebesluit inzake subsidieverstrekking en steunverlening), issued by the Ministry of the Interior and Kingdom Relations, the Inter-provincial Consultation Group, the Association of Netherlands Municipalities and Information Centre 'Europa Decentraal', p. 7, 8 and 14 ([www.europadecentraal.nl](http://www.europadecentraal.nl)).

of the GALA will normally be granted on the basis of an administrative act.<sup>17</sup> Fiscal aid will often be of a public law nature also. However, State aid could be granted by way of a private law agreement too, e.g. by selling public goods under the market price. Under Dutch law, there is no general rule which requires a formal legal basis for all these kinds of aid measures. Subsidies, however, may, according to Article 4:23 (1) GALA, only be provided under a statutory regulation which specifies the activities for which a subsidy may be granted. For administrative authorities at national level this implies that the power to grant subsidies should, either directly or indirectly, rest upon a formal legal act, adopted by the formal legislator.<sup>18</sup> Often, such laws will be enabling acts, containing only minimum requirements.<sup>19</sup> At regional or local level a statutory regulation, as referred to in the GALA, could be a general subsidy act, adopted by the legislative power at either regional or local level. It should be mentioned that several exemptions from the requirement of a formal legal basis for subsidies have been accepted. For example, according to Article 4:23 (3) GALA, no statutory regulation is required in occasional cases, if the subsidy is provided for a maximum of four years.

*3. Will beneficiaries have a right to obtain an aid, if the conditions for the granting of aid laid down under national rules are complied with, or is the granting of aid within the discretion of the government, and if so, to what extent?*

By lack of particular rules on State aid in Dutch law, it is difficult to give a general answer to this question. With regard to one category of possible aid measures, namely subsidies, the following remarks could be made, based on the general provisions on subsidies, as laid down in Title 4.2 of the GALA. According to Article 4:42 GALA, only an administrative decision fixing the subsidy (*vaststellingsbeschikking*) will confer entitlement to payment of the fixed amount.<sup>20</sup> That does not take away from the fact that, according to Article 4:29 GALA, unless provided otherwise by statutory regulation, an administrative decision about the granting of subsidy (*verleningsbeschikking*) may be made prior to the fixing of the subsidy if an application has been filed before the end of the activity or the period for which subsidy is requested. Such an administrative decision about the granting of subsidy will normally contain a description of the activities for which the subsidy is requested (Article 4:30 GALA), the amount of the subsidy (Article 4:31 GALA), as well as possible obligations for the beneficiary (Article 4:37 GALA et seq.). Once the obligations have been fulfilled, the administrative authority shall, according to Article 4:46 GALA, fix the subsidy in accordance with the administrative decision granting the subsidy. In fact, a decision granting a subsidy could already vest a conditional right for the beneficiary to obtain the subsidy.

Whether a filed application to obtain a decision granting a subsidy will be awarded by the administrative authority concerned, will primarily depend on the conditions as laid down in the underlying statutory regulation. Where such a regulation does not exist, the administrative authority will have a wide margin of discretion to decide, within the limits of the general principles of proper administration, whether the application should be awarded.<sup>21</sup> The GALA provides for several general grounds on the basis of which applications to obtain a decision granting a subsidy could be refused. It should be stressed, however, that these grounds have

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<sup>17</sup> See W. den Ouden, M.J. Jacobs & N. Verheij, *Subsidierecht [Subsidy law]*, Deventer: Kluwer 2004, p. 40 et seq.

<sup>18</sup> *Ibid.*, p. 29.

<sup>19</sup> See e.g. the Enabling Act financial grants Ministry of Finance (Kaderwet financiële verstrekkingen Financiën), *Staatsblad* 1996, nr. 98; Enabling Act subsidies Ministry of Economic Affairs (Kaderwet EZ-subsidies), *Staatsblad* 1996, nr. 180.

<sup>20</sup> Article 4:52 (1) GALA reads: 'The amount of subsidy shall be paid as specified in the administrative decision fixing the subsidy, after deduction of the advances paid.'

<sup>21</sup> See Den Ouden, Jacobs & Verheij 2004, p. 52.

an optional character. Therefore, administrative authorities are not obliged to apply these grounds. Article 4:35 GALA, in which those general grounds have been laid down, does not in any respect refer to the EU State aid rules. Nevertheless, in practice more and more general subsidy acts of regional and local governments explicitly provide that applications for subsidies which should be notified to the Commission in accordance with Article 88 (3) EC, cannot be awarded as long as the Commission has not given its approval.<sup>22</sup> Regional and local governments in the Netherlands have explicitly been advised to provide for these standstill-provisions in their general subsidy acts.<sup>23</sup>

*4. Can the Member State under national law choose between different legal forms for the grant of aid (e.g. grant by public law act or by private law agreement) and what are the determinants and consequences of these choices?*

Under Dutch law, public law acts (orders<sup>24</sup>) can only be taken, if public law confers upon an administrative authority the particular power to do so.<sup>25</sup> Normally, this power will follow from a written legal basis in national public law. However, with regard to some kinds of orders, the power to act is considered to be included in related powers.<sup>26</sup> It has been recognised in jurisprudence that in exceptional circumstances public powers could also be derived from unwritten general principles of public law.<sup>27</sup> For the exercise of powers under private law, on the contrary, no specific basis is required. These powers could be exercised by all natural and legal persons. As far as governments are to be qualified as legal persons under national law, they could, therefore, in principle make use of powers under private law, like entering into private law agreements. According to Article 2:1 (1) of the Dutch Civil Code, the State, regional governments, and local governments have in any case legal personality under national law.

The question raises if a government (administrative authority) which enjoys the power to act on a public law basis, could still make use of its powers under private law. This question cannot be answered in general. In a concrete case several determinants should be taken into account. One should first see whether the public regulation at issue provides for an answer. If this is not the case, the answer should, according to consistent jurisprudence, be found by applying the so-called ‘thwarting-doctrine’ (doorkruisingsleer). The main idea in this doctrine is that the use of private law powers by governments will only be allowed, as long as that use does not thwart an existing public regulation in an unacceptable way. In order to examine whether this is the case, one should, according to the Dutch Supreme Court in the Windmill-case, take into account several aspects, like the content and the purpose of the public regulation (which could also be derived from its history) and the way in which the interests of civilians have been protected by the regulation. All these aspects should be weighed against the background of other written and unwritten rules of public law. Moreover, it has to be

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<sup>22</sup> See e.g. Article 11 of the General Subsidy Act of the Province of Utrecht, as modified by order of Provincial States of Utrecht of 15 May 1998; Article 6 of the General Subsidy Act of the Province of Noord-Brabant.

<sup>23</sup> See the Assistance document for an order concerning the grant of subsidies and State aid (Handreiking voor een collesluit inzake subsidieverstrekking en steunverlening), noted supra, p. 13.

<sup>24</sup> According to Article 1:3 (1) GALA ‘order’ means a written decision of an administrative authority constituting a public law act.

<sup>25</sup> According to Article 1:1 GALA ‘administrative authority’ means: a) an organ of a legal entity which has been established under public law [i.e. the State, regional and local governments], or b) another person or body which is vested with any public authority.

<sup>26</sup> H.D. Van Wijk/W. Konijnenbelt & R. van Male, *Hoofdstukken van bestuursrecht [Chapters of administrative law]*, Den Haag: Elsevier juridisch 2005, p. 114-117.

<sup>27</sup> See e.g. Council of State 21 October 1996, AB 1996, 496 (Nanne). These exceptional circumstances are not relevant with regard to the grant of State aid. However, as it will be demonstrated in section V, they should be taken into consideration with regard to recovery of State aid.

examined whether the same result could be reached by using the powers provided for by the public regulation. When this is the case, use of private law powers will probably not be allowed.<sup>28</sup>

Supposed that a choice between different legal forms of State aid could be made, such choice will have several consequences for both the applicable law and judicial review. As far as the applicable law is concerned, it has to be remarked that State aid in the form of a public law act will primarily be subject to public law rules, whereas State aid in the form of a private law act will primarily be subject to private law rules. However, a strict distinction between these two areas of law cannot always be made. According to Article 3:1 (2) GALA several divisions of the GALA shall apply *mutatis mutandis* to acts of administrative authorities other than orders in so far as they are not incompatible with the nature of the acts. Moreover, Article 3:14 Dutch Civil Code provides that a power conferred upon someone by private law, shall not be used in breach of written and unwritten rules of public law. In addition, it is recognized in jurisprudence that the general principles of proper administration apply not only when administrative authorities act on a public law basis, but also with regard to use of private law powers by governments.<sup>29</sup>

As far as the consequences for judicial review in the Netherlands are concerned, the choice for State aid by way of private law agreement involves that judicial review should be obtained before civil courts. Administrative courts can only rule on orders, i.e. written decisions of administrative authorities constituting a public law act. Not all orders are open to judicial review by administrative courts.<sup>30</sup> If no use can be made of any administrative procedure, judicial review could be obtained from civil courts.<sup>31</sup> However, when State aid decisions are subject to administrative judicial review, an action before a civil court will be declared inadmissible as long as the administrative procedure is open. According to Article 6:7 GALA, the term for submitting a notice of objection or appeal shall be six weeks. If a claimant in such a case lodges a complaint before a civil court, after the term for appeal has expired, the order underlying the State aid will get legal force. Recipients of State aid and competitors should be aware of these consequences.

*5. Please describe the consequences of these choices, in particular as regards procedures for recovery e.g. by public law act or by application to a civil law court, and the protection of interests of third parties. If no choice is provided under national law, describe the legal form for the grant of aid and its consequences.*

In general, the consequences of a particular choice between the different legal forms in which State aid could be granted under Dutch law have been dealt with yet under question four already. As far as the particular consequences with regard to recovery of State aid are concerned, reference could be made to the answer to question 17 under section V of this report.

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<sup>28</sup> See Supreme Court 26 January 1990, *NJ* 1991, 393 (Windmill). Confirmed in many other cases.

<sup>29</sup> See Supreme Court 27 March 1987, *NJ* 727 (Amsterdam/Ikon); Supreme Court 9 January 1998, *JB* 27 (Snoopy). See further Van Wijk/Konijnenbelt & Van Male 2005, p. 405.

<sup>30</sup> See Article 8:2 et seq. GALA.

<sup>31</sup> See Article 112 (1) Dutch Constitution; Supreme Court 31 December 1915, *NJ* 1916, 407 (Guldmond/Noordwijkerhout); Supreme Court 8 February 1992, *NJ* 1993, 687 (Changoe/Staat).

### III. Mechanisms to ensure compliance with the notification obligation

This section serves to investigate means to ensure compliance with the notification obligation under Article 88 (3) EC and Article 2 of Regulation 659/1999. The notification obligation extends to all plans to grant new aid or to alter existing aid. According to consistent case law of the European Court of Justice, the purpose of this notification obligation is to provide the Commission with the opportunity to review, in sufficient time and in the general interest of the Community, any plan to grant or alter aid.<sup>32</sup> It becomes clear from this case law that the preliminary examination is intended merely to allow the Commission a sufficient period of time for reflection and investigation so that it can form a *prima facie* opinion of the partial or complete conformity with the Treaty of the aid concerned. Therefore, the Member State concerned shall, according to the last sentence of Article 88 (3) EC, not put its proposed measures into effect until the Commission has given its approval. This standstill obligation is designed to ensure that an aid measure cannot become operational before the Commission has had a reasonable period in which to study the proposed measure in detail and, if necessary, to initiate the formal investigation procedure provided for in Article 88 (2) EC.<sup>33</sup>

*6. Is there a national authority which has the task to ensure that Article 88 (3) of the Treaty and Article 2 of Regulation 659/1999 (notification requirement) are complied with? Please describe its rules of operation and the experience in practice.*

A national authority with the task to ensure compliance with the notification obligation does not exist in the Netherlands. All ministries at State level have their own State aid coordinators, which will coordinate State aid cases within their ministries. The ministries address their notification of aid measures directly to the Permanent Representation in Brussels, which will submit the standard notification forms to the Commission. A Coordination Centre within the Ministry of Economic Affairs has the task to confer on aid measures with other ministries when several ministries are involved in the grant of State aid.<sup>34</sup> The notifications of regional and local governments will be coordinated by a special State aid agency within the Dutch Ministry of the Interior and Kingdom Relations, called the *Coördinatiepunt Staatssteun voor decentrale overheden*. The main task of this agency is to assist decentralized governments with regard to notification of aid measures and to forward all notified aid measures of these governments to Brussels.

*7. Are there procedures foreseen under national law in order to ensure the enforcement of the notification requirement, and if so of what kind, including in the relationship between different levels of government?*

Research carried out by the Netherlands Court of Audit in 2001 showed that from eight aid-granting ministries in the Netherlands at that time, only five ministries had internal written procedures for the grant of State aid.<sup>35</sup> Based on the outcome of this research, it was

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<sup>32</sup> See Case 120/73 *Lorenz* [1973] ECR 1471, para. 3; Case 84/82 *Germany v Commission* [1984] ECR 1451, para. 11; Case C-301/87 *Boussac* [1990] ECR I-307, para. 17; Case C-99/98 *Austria v Commission* [2001] ECR I-1101, para. 53-54.

<sup>33</sup> See Case C-301/87 *Boussac* [1990] ECR I-307, para. 17. Further rules concerning the formal investigation procedure have been laid down in Article 6 of Regulation 659/1999.

<sup>34</sup> See the website of the Ministry of Economic Affairs (<http://www.ez.nl/content.jsp?objectid=40250>). Aid coordination activities between all the ministries take place as part of the Inter-ministerial Consultative Committee (ISO). In addition to specifically designated ministerial representatives, civil servants from the Ministry of Economic Affairs at the Permanent Representation, the Association of Provincial Authorities (IPO), and the Association of Netherlands Municipalities (VNG) take part in the ISO as observers.

<sup>35</sup> The Dutch report was published on 21 November 2001 under the title Notification of aid measures to the European Union (Aanmelding van steunmaatregelen bij de Europese Unie). This report was part of a combined audit report on the notification

suggested that standard procedures should be issued, which could then be implemented and adapted by all ministries. Since 2003 these procedures have been laid down in inter-ministerial agreements, by an order of the Minister of Economic Affairs.<sup>36</sup>

With regard to the grant of State aid by decentralized governments, several initiatives have been taken to inform regional and local governments about the European State aid rules and to standardize the procedures for notification.<sup>37</sup> As has been explained with regard to question six, the notifications of regional and local governments will be coordinated by a special State aid agency within the Dutch Ministry of the Interior and Kingdom Relations.<sup>38</sup>

It should be noted that all governments remain responsible for a correct notification of their own aid measures.<sup>39</sup> However, towards the Commission only the central government will be held responsible, also for the errors of regional and local authorities with regard to notification of State aid. Therefore, the question raises whether the central government in the Netherlands has enough supervisory instruments in order to guarantee compliance with European Community law requirements, in particular the notification obligation, at all levels of the Member State.<sup>40</sup> After years of debate, the Dutch cabinet has presented its position on this sensitive issue. In short, it has been concluded that the current supervisory instruments will not be sufficient in all cases. Therefore, the cabinet has announced to opt for a power for ministers to give, in exceptional circumstances, individual instructions to regional and local governments when State aid will obviously be notified incorrectly or will not be notified at all. The cabinet also opts for legislation which provides for a right of recovery of amounts to be paid by the central government to the European Union as a result of breach of Community law by regional or local governments.<sup>41</sup> However, these plans have not yet resulted in concrete legislation.

*8. Are there motivators in national law to avoid the granting of unlawful aid on the side of public authorities and its servants or motivators for private parties not to accept unlawful aid, beyond the recovery obligation existing under Community law?*

As a possible motivator under national law to avoid, in particular, on the side of public

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of State aid of the supreme audit institutions of Finland, Portugal, the Netherlands and the United Kingdom. See <http://www.rekenkamer.nl/cgi-bin/as.cgi/0282000/c/start/file=/9282300/modulesf/g6gcl398>.

<sup>36</sup> Recently these procedures have been updated. See the Order of the Ministry of Economic Affairs of 14 February 2006, nr. EP/EIS 5724354, containing inter-ministerial agreements about State aid (Interdepartementale afspraken inzake staatssteun), *Staatscourant* 2006, nr. 35, p. 19.

<sup>37</sup> See the website of the Ministry of the Interior and Kingdom Relations where information is provided about Community legislation with regard to State aid, and where standard notification forms could be downloaded: [http://www.minbzk.nl/internationale\\_zaken/binnenlands\\_bestuur/europese\\_financiele/staatssteun/checklist](http://www.minbzk.nl/internationale_zaken/binnenlands_bestuur/europese_financiele/staatssteun/checklist).

<sup>38</sup> See also the Assistance document for an order concerning the grant of subsidies and State aid (Handreiking voor een collegebesluit inzake subsidieverstreking en steunverlening), noted supra, which recommends to every civil servant to use checklists for State aid.

<sup>39</sup> See the Inter-ministerial agreements about State aid, para. 1.

<sup>40</sup> See further B. Hessel, 'European integration and the supervision of local and regional authorities Experiences in the Netherlands with requirements of European Community law', *Utrecht Law Review* 2006, vol. 2 (1), p. 91-110. See also B. Hessel (ed.), *In de Europese houdgreep? Over zwaarder ministerieel toezicht [In the European hold? About stricter ministerial supervision]*, in the series *Europees recht voor decentrale overheden [European law for decentralized governments]*, part 2, Deventer: Kluwer 2003, with contributions by D. Benschop, J.Th.J. van den Berg, J.W. van de Gronden, B. Hessel, F. Hilterman, R. Lefeber, M.Q.M. Ooschot, J. Peters and R.J.M. van den Tweel; J. Jans et al., *Inleiding tot het Europees bestuursrecht [Introduction to European administrative law]*, Nijmegen: Ars Aequi Libri 2002, p. 42 et seq.; J. Gerards, 'Naleving van het Europees recht door de decentrale overheden: naar een herzien stelsel van toezicht' [Compliance with European law by decentralized governments: towards a revised system of supervision], *SEW* 2000, p. 208-215.

<sup>41</sup> See the Letter of 7 July 2004 from the Minister of the Interior and Kingdom Relations to the President of the Lower House, *Kamerstukken II* 2003-2004, 21 109, nr. 138.

authorities of decentralized governments the granting of unlawful aid, the strict legality control of public spending of these governments could be mentioned. As has been explained with regard to question one, this legality control covers the legality under the European rules on State aid, which means that unlawful granting of State aid could result in a negative declaration of an accountant. Further reference could be made to proposed legislation that, as has been mentioned with regard to question seven, should give the central government specific powers to react on decentralized governments that operate in breach of Community law requirements. The existence of these powers in future may give an incentive to decentralized governments not to grant unlawful State aid. Whether there are also motivators under Dutch law for private parties not to accept unlawful aid, beyond the risk to be confronted with a recovery obligation, is still unclear. It could be argued that action for damages may be brought against beneficiaries, although there have been no precedents in national case law in this respect.<sup>42</sup>

*9. Please describe the options and obstacles for interested parties, in particular competitors, to obtain enforcement of the standstill obligation by national courts, including by recourse to any of the consequences of illegality described under the previous question.*

Considered from a Community law perspective, the validity of measures giving effect to aid is affected if national authorities act in breach of the standstill obligation as laid down in the last sentence of Article 88 (3) EC. The Court of Justice has made clear that national courts ‘must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.’<sup>43</sup>

As has been explained with regard to question 4, the grant of State aid in the Netherlands could give rise to different procedures for judicial review, depending on the form in which the aid has been granted and the division of powers between administrative courts and civil courts. In administrative procedures private parties could ask for the annulment of the administrative acts underlying the grant of unlawful State.<sup>44</sup> They could also ask for interim measures, based on Article 8:81 GALA.<sup>45</sup> Even damages could be asked for, either on the basis of Article 8:73 GALA,<sup>46</sup> or by filing an application to the aid granting agency to take a separate administrative decision on damages.<sup>47</sup> Possible obstacles for private enforcement actions in administrative procedures could arise of a limited interpretation of the concept of interested party (*belanghebbende*) as a condition for admissibility, in particular in fiscal

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<sup>42</sup> See T. Ottervanger, S. Evans & M. van den Oord in the Dutch report for the *Study on the Enforcement of State Aid Law at National Level*, Luxemburg: Office for Official Publications of the European Communities 2006, p. 367. See also Adriaanse 2006, p. 220-221.

<sup>43</sup> See Case C-354/90 *FNCEPA (Saumon)* [1991] ECR I-5505, para. 12. See also Case C-39/94 *SFEI* [1996] ECR I-3547, para. 70.

<sup>44</sup> Since the one who has the right to appeal against an order to an administrative court will normally have to lodge an objection against the order before lodging an appeal, the annulment in an administrative court procedure will primarily concern the administrative decision taken on the objection. Based on Article 8:72 (4) GALA however, administrative courts will be able to annul (revoke) the underlying administrative decision as well.

<sup>45</sup> Article 8:81 GALA reads: ‘If an appeal against an order has been lodged with the district court or, prior to a possible appeal to the district court, an objection has been made or an administrative appeal has been lodged, the president of the district court which has or may have jurisdiction in the proceedings on the merits may, on request, grant a provisional remedy where speed is of the essence because of the interests involved.’

<sup>46</sup> Article 8:73 (1) GALA reads: ‘If the district court rules the appeal well-founded, it may, at the request of a party and if there are grounds for doing so, order the legal entity designated by it to pay compensation for the damage suffered by that party.’

<sup>47</sup> See Council of State 6 May 1997, *AB* 1997, 229 (Van Vlodrop).

matters, a relatively short period of appeal (six weeks), a difficult burden of proof for complainants of unlawful State aid and the allowance of exceptional circumstances in which legitimate expectations of State aid recipients could be accepted. These obstacles arise, in particular, when the applicable provisions of Dutch administrative law are interpreted in a reserved national way, which national courts sometimes do.<sup>48</sup> That does not take away from the fact that, even with a ‘Community law friendly’ interpretation of national legal provisions, current Dutch administrative law does not provide for the possibility for administrative courts to grant all remedies intended by the Court of Justice in situations of unlawful State aid. Administrative courts cannot give recovery orders to the administrative authorities, for example. The possible obstacles in Dutch administrative procedures do not yet imply that the Dutch legal system does not fulfil the Community law requirements of effective judicial protection in cases of unlawful State aid. There could be additional judicial review in a civil law procedure. Dutch civil courts are always competent, although procedural requirements like admissibility conditions and limitation periods have to be taken into account. When Dutch civil courts come to the conclusion that aid is to be declared unlawful, they can, to a large extent, meet the requirements laid down by the Court of Justice with regard to remedies. They can declare private law agreements void,<sup>49</sup> they can condemn a government to suspend or to recover State aid,<sup>50</sup> as well as to reimburse contributions levied specifically for the purpose of financing that aid. Finally, it will be up to the administrative authorities, however, to actually suspend, recover or reimburse. Civil courts can also award damages. It will often be difficult, however, to proof the causal link between the breach of Community law and the damages suffered thereof. A possible obstacle in civil procedures could be the passive role that civil courts are supposed to play in civil litigation. This role could be in contradiction with the active role that national courts have to play in procedures about unlawful State aid, although in general this principle of Dutch civil procedural law is not considered to be in breach of Community law.<sup>51</sup>

#### **IV. Mechanisms to ensure the compatibility of aid and the application of the Block exemptions**

According to the questionnaire, this section serves to establish how compatibility of aid can be secured in Member States. The position of interested parties, in particular competitors, under national law shall be studied, beyond the questions already covered under previous sections. For some categories of State aid the Commission has issued so-called block exemption regulations.<sup>52</sup> The Member States are allowed to grant aid measures that fulfil the criteria of these regulations without prior notification to the Commission. National courts will be able to review these decisions, since the provisions of these regulations are considered to be directly effective within the national legal orders. In particular, the practice of national

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<sup>48</sup> See e.g. Council of State 17 December 2003, *AB* 2004, 262 (Martinihal).

<sup>49</sup> It has not yet been recognized in Dutch jurisprudence that a breach of Article 88 (3) last sentence EC will render void any private law act underlying the aid measure concerned. However, this consequence could be derived from Article 3:40 Dutch Civil Code. See further Adriaanse 2006, p. 298-304; De Waard et al. 2005, p. 36-37.

<sup>50</sup> See Court of Appeal Amsterdam 1 April 2004, *BR* 2004, 694 (AZ Alkmaar); President of the District Court Groningen 3 September 2004, *LJN* AQ8920 (Essent Kabelcom BV).

<sup>51</sup> In practice, civil courts do not seem to be limited in State aid cases. See e.g. Supreme Court 7 March 2003, *NJ* 2004, 59 (Compaxo).

<sup>52</sup> The Block Exemption regulations have been adopted on the basis of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 [now 87 and 88] of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ 1998 L 142/1. It concerns Commission Regulation (EC) No 68/2001 of 12 January 2001 for training aid, OJ 2001 L 10/20; Commission Regulation (EC) No 70/2001 of 12 January 2001 for aid to small and medium-sized enterprises, OJ 2001 L 10/33; Commission Regulation (EC) No 2204/2002 of 12 December 2002 for aid for employment, OJ 2002 L 337/3.

courts relating to the application of the Commission regulations exempting certain categories of aid from notification and declaring them compatible shall be established in this section.

*10. Is there an authority which has the task to ensure compatibility of State aid, in particular compliance with block exemptions? Please describe its rules of operation and the experience in practice.*

Such an authority does not exist in the Netherlands.

*11. Are there procedures foreseen for this purpose, and if so of what kind?*

The national rapporteur is not aware of any plans to introduce procedures which should ensure compatibility of State aid in the Netherlands, in particular compliance with block exemptions.

*12. How are the rules on cumulation of aid complied with, in particular in cases where aid can be granted by authorities on different levels of government, i.e. national, regional, and local?*

A central register of *de minimis* aid containing complete information on all *de minimis* aid granted by any authority within the Member State, as meant in Article 3 (2) of Regulation 69/2001,<sup>53</sup> does not exist in the Netherlands. Where a government grants *de minimis* aid to an enterprise, it shall, according to Article 3 (1) of Regulation 69/2001, therefore, inform the enterprise about the *de minimis* character of the aid and obtain from the enterprise concerned full information about other *de minimis* aid received during the previous three years. The Member State may only grant the new *de minimis* aid after having checked that this will not raise the total amount of *de minimis* aid received during the relevant period of three years to a level above the ceiling of currently EUR 100.000.<sup>54</sup>

In the Netherlands inter-ministerial procedures provide for rules on cumulation of aid on the national level of government.<sup>55</sup> According to these rules, the first responsible ministry with regard to an aid measure shall coordinate the grant of the aid by different ministries. In consultation these ministries could decide to allocate that task to another ministry. In fiscal cases the coordination task will be allocated depending on the substance of the aid measure. If it concerns a purely fiscal matter, the Ministry of Finance will perform this task. The inter-ministerial rules also provide for situations in which several levels of government are involved in the grant of aid (national, regional and/or local). In these situations, the coordination task will be allocated in consultation with all parties concerned.

More and more regional and local governments in the Netherlands adapt their legislation and practice to these requirements of Community law. General Subsidy Acts often contain *de minimis* clauses, in which the conditions for the grant of *de minimis* aid have been laid down.<sup>56</sup> Governments at all levels have been advised to contain *de minimis* clauses also in

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<sup>53</sup> Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid, OJ 2001 L 10/30.

<sup>54</sup> Recently the Commission has proposed to raise the ceiling for *de minimis* aid from EUR 100 000 up to EUR 200 000. See the Commission proposal for an amended *de minimis* rule [http://ec.europa.eu/comm/competition/state\\_aid/overview-/sar.html#2](http://ec.europa.eu/comm/competition/state_aid/overview-/sar.html#2).

<sup>55</sup> See the Order of the Ministry of Economic Affairs of 14 February 2006, nr. EP/EIS 5724354, containing inter-ministerial agreements about State aid (Interdepartementale afspraken inzake staatssteun), *Staatscourant* 2006, nr. 35, p. 19.

<sup>56</sup> See e.g. the General Subsidy Act of the Province of Noord-Brabant.

concrete decisions on the grant of aid.<sup>57</sup> Beneficiaries are so made aware of the *de minimis* character of the aid. In concrete decisions the aid granting authority often refers to a *de minimis* declaration, to be filled in by the beneficiary in order to get a right to obtain the aid. In such a *de minimis* declaration the beneficiary will be asked to declare whether he has received during the last three years any *de minimis* aid. Relevant information that could be asked for concerns the names of the aid granting authorities, the amounts of aid received, the date of the grant of aid and the form in which the aid was granted.<sup>58</sup> In practice the decision on the grant of *de minimis* aid will be based on the information provided by the beneficiary, although the aid granting authority will in every case remain responsible for compliance with the Community law requirements with regard to *de minimis* aid.<sup>59</sup> The result of that practice is that, if the decision later appears to be in breach with the *de minimis* rules (which could result in the obligation to recover the aid granted), the beneficiary will not be able to rely on legitimate expectations.<sup>60</sup> If a beneficiary is not able to provide the relevant information on prior received aid, the aid granting authorities will, if possible, contact the authorities that have granted that aid. In case the relevant information could not be obtained, aid granting authorities will normally assume that all amounts that do not exceed the fixed ceiling could be considered as *de minimis* aid.<sup>61</sup> That practice does not take away from the fact that all governments have been advised to record and compile all the information regarding *de minimis* aid, in order to meet the requirements of Article 3 (3) of Regulation 69/2001.<sup>62</sup> Such records shall contain all information necessary to demonstrate that the conditions of this Regulation have been respected. Records regarding an individual *de minimis* aid shall be maintained for 10 years from the date on which it was granted and records regarding a *de minimis* aid scheme, for 10 years from the date on which the last individual aid was granted under such scheme. On written request the Member State concerned shall provide the Commission, within a period of 20 working days, or such longer period as may be fixed in the request, with all the information that the Commission considers necessary for assessing whether the conditions of Regulation 69/2001 have been complied with, in particular the total amount of *de minimis* aid received by any enterprise.

### *13. Are there administrative procedures for the protection of third party interests, e.g. publication of the intention to grant aid with the possibility to comment?*

If State aid is to be granted by way of an administrative decision, i.e. an order which is not of a general nature, the General Administrative Law Act does provide for an administrative procedure for the protection of third party interests. According to Article 4:8 (1) GALA, an administrative authority shall, before making an administrative decision about which an interested party who has not applied for the administrative decision may be expected to have reservations, give that interested party the opportunity to state his views, if: a) the administrative decision is based on information about facts and interests relating to the interested party, and b) this information was not supplied in the matter by the interested party

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<sup>57</sup> See the Assistance document for an order concerning the grant of subsidies and State aid (Handreiking voor een collesluit inzake subsidieverstrekking en steunverlening), noted supra, p. 14.

<sup>58</sup> See e.g. Article 10 of the General Subsidy Act of the Province of Utrecht, as modified by order of Provincial States of Utrecht of 15 May 1998.

<sup>59</sup> Several regional and local governments have their own *de minimis* checklists. See e.g. the checklists State aid of the provinces of Noord-Brabant and Overijssel, to be downloaded at [www.europadecentraal.nl](http://www.europadecentraal.nl).

<sup>60</sup> See B. Hessel, 'De vrijstellingsverordening voor *de minimis*- steun. Een hulpmiddel bij aanpassing van staatssteunregelingen [The exemption regulation for *de minimis* aid. A tool for adaptation of State aid schemes], *De Europese Gemeente* 2003/5, p. 2-3.

<sup>61</sup> See the Factsheet on the application of the *de minimis*-threshold of 25 August 2005, issued by Information Centre *Europa Decentraal* at [www.europadecentraal.nl](http://www.europadecentraal.nl).

<sup>62</sup> Ibid.

himself. However, according to the second paragraph of Article 4:8 GALA, this rule does not apply if the interested party has not complied with a statutory obligation to supply information. Furthermore, the administrative authority may, according to Article 4:11 GALA refrain from applying Article 4:8, in so far as: a) the need for expedition precludes this; b) the interested party has already been given the opportunity to state his views in connection with a previous administrative decision, or to another administrative authority, and no new facts or circumstances have occurred since then, or c) the purpose of the administrative decision can be achieved only if the interested party is not informed of it beforehand. According to Article 4:12 GALA the administrative authority may also refrain from applying Article 4:8 in the case of an administrative decision laying down a financial obligation or claim, if: a) an objection may be made or an administrative appeal may be lodged against that administrative decision, and b) the adverse consequences may be completely nullified after an objection or administrative appeal. This provision could be particularly relevant in State aid matters, since the grant of State aid will normally imply a financial claim on the aid granting authority.

*14. Are third party interests, including from other Member States, (to be) taken into account in the preparation of a project of aid according to national law, and if so, how and to what extent, and under which procedure?*

In the General Administrative Law Act procedures have been laid down in order to guarantee that third party interests will be taken into account in the preparation of acts by governments. These procedures apply primarily to orders in the sense of the GALA, i.e. written decisions of administrative authorities constituting a public law act. However, according to Article 3:1 (2) GALA, several of these provisions shall apply *mutatis mutandis* to acts of administrative authorities other than orders in so far as they are not incompatible with the nature of the acts. According to Article 3:2 GALA, an administrative authority shall, when preparing an order, gather the necessary information concerning the relevant facts and the interests to be weighed. In addition, Article 3:4 (1) GALA provides for the obligation for administrative authorities, when making an order, to weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised. The adverse consequences of an order for one or more interested parties may, according to Article 3:2 (2) GALA, not be disproportionate to the purposes to be served by the order. More detailed procedures could be applicable, if this is required by statutory regulation or by order of the administrative authority.<sup>63</sup> These general provisions of the GALA will equally apply to the preparation of projects of State aid, provided that third parties could be considered as interested parties in the sense of the GALA, i.e. persons whose interests are directly affected by an order.<sup>64</sup> Given the strict interpretation of this condition in Dutch jurisprudence, it can seriously be doubted whether the interests of other Member States will be regarded as directly affected by an aid project in a given case. As far as the interests of competitors are concerned, it follows from jurisprudence that competitors are not automatically considered as interested parties in the sense of the GALA. They will have to show that their interest is directly affected by an order constituting State aid.<sup>65</sup>

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<sup>63</sup> Division 3.4 of the GALA provides for a public preparatory procedure. Division 3.5 of the GALA provides for an extensive public preparatory procedure.

<sup>64</sup> According to consistent jurisprudence, interested parties should have an own interest, which must be objective, personal and current.

<sup>65</sup> See e.g. Council of State 27 June 1997, *JB* 1997, 191; Council of State 17 May 2001, *AB* 2002, 58; Council of State 11 December 2002, *AB* 2003, 308; Administrative Court for Trade and Industry 23 January 1996, *AB* 1996, 182.

15. Please provide an overview of the cases in which national courts applied any of the Block Exemption regulations adopted by the Commission.

Only one case has been found in which a national court had to deal with the application of a Block Exemption regulation. It concerns a judgment of the Council of State of 17 December 2003,<sup>66</sup> in which the application of Regulation 70/2001 on State aid to small and medium-sized enterprises was at issue.<sup>67</sup> In this case a public body, called *Samenwerkingsverband Noord-Nederland*, had granted a subsidy of EUR 1 815 120 to the Municipal Executive of Groningen for the expansion of an exhibition and conference centre, called the *Martinihal*. A competitor, called *Stichting Prins Bernhardhoeve*, lodged an objection against the grant of the subsidy. This objection was rejected. *Stichting Prins Bernhardhoeve* succeeded in its appeal before the District Court of Groningen, which annulled the prior decision on objection. In a procedure before the Council of State the *Samenwerkingsverband Noord-Nederland* and the Municipal Executive of Groningen appealed against the judgment of the District Court of Groningen, by relying on several arguments. One of these arguments was that the District Court was mistaken in finding that, given Regulation 70/2001, the subsidy at issue could not be exempted from the notification obligation. The Council of State, therefore, had to decide on whether this Regulation had been applied correctly. However, the Council of State did not examine the substance of the subsidy for compatibility with the conditions of Regulation 70/2001. It confined itself to the question whether the practical requirements laid down in the Articles 3 (1) and 9 (1) of Regulation 70/2001 had been complied with.<sup>68</sup> Since this had not been the case, the Council of State found that the decision to grant a subsidy had been taken without the requisite level of due care, according to Article 3:2 GALA, and consequently confirmed the judgment of the District Court of Groningen.<sup>69</sup>

16. If no such rulings exist, or only very few, please provide your opinion why this is the case.

Given the direct effect in the national legal orders of the provisions of the Block Exemption regulations, one should expect more cases in which national courts applied any of these regulations. It is difficult to examine why exactly interested parties do not make use of the possibilities for private enforcement of the EU State aid rules more often. With regard to question nine about possibilities for private parties, in particular competitors, to obtain enforcement of the standstill obligation by national courts, several obstacles in Dutch administrative and private (procedural) law have been discussed. These obstacles will equally apply to actions based on the Block Exemption regulations. Therefore, at this place reference can be made to the answer to question nine. More in general, several reasons have been mentioned in literature which could possibly explain why private parties may not act more often against alleged breaches of the law in procedures before national courts. Apart from the costs and risks of applications before national courts, bars to admissibility, the burden of

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<sup>66</sup> Council of State 17 December 2003, *AB* 2004, 262 (Martinihal). See about this case also Ottervanger, Evans & Van den Oord 2006, p. 380.

<sup>67</sup> Commission Regulation (EC) No 70/2001 on the application of Articles 87 and 88 of the EC Treaty to small and medium-sized enterprises, OJ 2001 L 10/33.

<sup>68</sup> Article 3 (1) reads: 'Individual aid outside any scheme, fulfilling all the conditions of this Regulation, shall be compatible with the common market within the meaning of Article 87 (3) of the Treaty and shall be exempt from the notification requirement of Article 88 (3) of the Treaty provided that it contains an express reference to this Regulation, by citing its title and publication reference in the *Official Journal of the European Communities*.' Article 9 (1) reads: 'On implementation of an aid scheme, or grant of individual aid outside any scheme, exempted by this Regulation, Member States shall, within 20 working days, forward to the Commission, with a view to its publication in the *Official Journal of the European Communities*, a summary of the information regarding such aid scheme or individual aid in the form laid down in Annex II.'

<sup>69</sup> See for a critical analysis of this case M.J. Jacobs & W. den Ouden in an annotation to this judgment in *AB* 2004, 262. See also M.J. Jacobs & W. den Ouden, 'De toetsing getoetst' [The review reviewed], in: W. den Ouden (red.), *Staatssteun en de Nederlandse rechter [State aid and Dutch courts]*, Deventer: Kluwer 2005, p. 8-10.

proof and the powers (or lack of powers) of discovery by courts, it has also been suggested that competitors of State aid recipients may be reluctant to act against State aid, because they do not want to forfeit their good relationship with the aid granting authorities. It could also be that competitors do not feel strong incentives to go to court, caused by the fact that they have not suffered real damages. Another reason could be the possible lack of transparency as to how much aid has been granted, which could especially be the case in fiscal matters. A lack of knowledge of the State aid rules and the possibilities they offer for litigation amongst lawyers, enterprises and courts, could be another reason as to why private enforcement in State aid cases is still underused.<sup>70</sup>

## **V. Recovery of aid – the role of national courts and the position of State aid debt in bankruptcy law**

According to Article 14 of Regulation 659/1999, the Commission shall, where negative decisions on the compatibility of aid are taken, decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. This provision codifies consistent case law of the Court of Justice and a consistent practice of the Commission, in which it was recognized that the only way to restore the competition positions and to guarantee to all Member States an equal application of the State aid rules in situations of unlawful State aid, is to require recovery ‘ex tunc’ from the Member State concerned.<sup>71</sup> It has subsequently been confirmed that recovery could be considered as the logical consequence of the unlawful character of State aid.<sup>72</sup> Only through recovery, which means that the aid will be reimbursed, will the recipient forfeit the advantage that it enjoyed over its competitors on the market and will the situation as it existed prior to the grant of State aid be restored.<sup>73</sup> However, the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law. A recovery decision lays down an obligation which will, according to Article 249 EC, be binding in its entirety upon those to whom it is addressed, i.e. the Member State concerned. Therefore, also national courts are, on the basis of Article 10 EC, in principle obliged to give full effect to the Commission decision. According to Article 14 (2) of Regulation 659/1999, recovery shall be effected without delay and 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

*17. What types of procedure are available under national law in order to recover unlawful aid? Does the procedure depend on the form in which aid was granted, and if so, with what consequences on the recovery?*

Depending on the form in which aid was granted, several types of procedure could be distinguished for recovery of State aid in the Netherlands. Only the main characteristics of these procedures will be shortly mentioned here.

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<sup>70</sup> See about this topic K. Roach & M.J. Trebilcock, ‘Private Enforcement of Competition Laws’, *Osgood Hall Law Journal*, 1997-34(3), p. 461-508; R.J.M. van den Tweel, ‘Effectieve rechtsbescherming in de praktijk’ [Effective judicial review in practice], in: Den Ouden 2005, p. 30-38; Adriaanse 2006, p. 178-179.

<sup>71</sup> See Case C-70/72 *Commission v Germany* (Kohlegesetz) [1973] ECR 829, para. 13.

<sup>72</sup> See e.g. Case 310/85 *Deufil v Commission* [1987] ECR 927, para. 24; Case C-142/ 87 *Belgium v Commission* [1990] ECR I-1020, para. 66; Case C-305/89 *Italy v Commission* [1991] ECR I-1645, para. 41; Case C-183/91 *Commission v Greece* [1993] ECR I-3150, para. 16; Case C-404/97 *Portugal v Commission* [2000] ECR I-4897; Case C-404/00 *Commission v Spain* [2003] ECR I-6695, para. 44.

<sup>73</sup> See Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, para. 89; Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, para. 76. See also L. Hancher, T. Ottervanger & P.J. Slot, *EC State Aids*, London: Sweet & Maxwell 1999, p. 392.

When aid has been granted by way of public law act, recovery will normally take the form of an administrative procedure in which several decisions should be taken. First, the decision granting the aid will have to be repealed.<sup>74</sup> After, another decision has to be taken in order to recover the money unduly paid.<sup>75</sup> If the beneficiary refuses to repay the money, an order of a civil court should be asked for in order to be entitled to execution, since, under current Dutch law, an administrative recovery decision is considered not to give such a right.<sup>76</sup> Whether the administrative decisions, as mentioned here, could be taken, will primarily depend on the general aid scheme underlying the grant of aid in a particular case.<sup>77</sup> With regard to a special category of aid measures based on a public law act, namely subsidies, general rules for repeal and recovery of subsidies have been laid down in the General Administrative Law Act.<sup>78</sup> In situations where no written legal basis could be found in public law for decisions to repeal and to recover aid granted by way of a public law act, the power to take these decisions could, according to case law of the Council of State, nevertheless be derived from general principles of public law.<sup>79</sup> Recently, the Council of State has confirmed that this case law does not apply to interest, which, according to Article 14 of Regulation 659/1999, shall be ordered in cases of unlawful State aid. Confirming earlier judgments, the Council of State found that interest cannot be ordered without a written legal basis in national law.<sup>80</sup>

Under Dutch law, particular procedural rules apply to recovery of fiscal State aid. These rules will be elaborated further with regard to question twenty-two.

When State aid has been granted by way of a private law act, recovery will have to be carried out according to applicable procedures of private law. It has not yet been recognized in Dutch jurisprudence that a breach of Article 88 (3) last sentence EC will render void any private law act underlying the aid measure concerned. However, this consequence could nonetheless be derived from Article 3:40 Dutch Civil Code.<sup>81</sup> Given this consequence, the amounts of unlawfully granted State aid could be considered as unduly paid, which will offer the possibility to recover these amounts based on either Article 6:203 (undue payment) or Article 6:212 (unjustified enrichment) of the Dutch Civil Code.

#### *18. What possibilities does the beneficiary have to obtain judicial review of recovery action by the Member State?*

Since recovery of State aid, including interest, will deprive the beneficiary of a given advantage, the implementation of a recovery decision of the Commission at national level could give rise to actions of judicial review.<sup>82</sup> Dutch administrative procedural law (fiscal

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<sup>74</sup> Alternatively, the aid could be fixed at a lower amount.

<sup>75</sup> In practice, both decisions will often be taken simultaneously.

<sup>76</sup> As soon as the 'fourth tranche' of the General Administrative Law Act will enter into effect, a public law title for enforcement of public money debts by administrative authorities will be provided. See the bill on the fourth tranche of the General Administrative Law Act, *Kamerstukken II 2003-2004*, 29 702, nr. 2.

<sup>77</sup> See e.g. the *Kaderwet financiële verstrekkingen Financiën* [Enabling Act financial grants Ministry of Finance], *Staatsblad* 1996, nr. 98, and the *Kaderwet EZ-subsidies* [Enabling Act subsidies of the Ministry of Economic Affairs, *Staatsblad* 1996, nr. 180, which explicitly provide for a legal basis to repeal subsidies that have been granted in breach of Community law requirements.

<sup>78</sup> See Articles 4:48 et seq. GALA.

<sup>79</sup> See Council of State 21 October 1996, *AB* 1996, 496 (Nanne) about the principle of undue payment; Council of State 26 August 1997, *AB* 1997, 461 (Samenwerkingsverband Noord-Kennemerland) about the principle of unjustified enrichment; Council of State 11 January 2006, *AB* 2006, 208 about repeal of subsidies.

<sup>80</sup> See Council of State 11 January 2006, *AB* 2006, 208. See also Council of State 4 May 2005, *AB* 2005, 395; Council of State 10 July 2002, *AB* 2003, 123.

<sup>81</sup> See further Adriaanse 2006, p. 298-304; De Waard et al. 2005, p. 36-37.

<sup>82</sup> See for a description of the Community legal framework in which judicial review of recovery decisions by Member States has to be carried out Adriaanse 2005, p. 57-73.

matters included) does provide for several stages of judicial review, normally starting with objection or in some situations administrative appeal to an administrative order, possibly followed by appeal before an administrative court, and higher appeal.<sup>83</sup> Which possibilities of judicial review will exist in a concrete situation and which administrative court will be competent in a concrete case, will depend on the area concerned and the specific rules applicable in that area.<sup>84</sup> As has been noted with regard to question seventeen, under Dutch law, several decisions will have to be taken by the authorities concerned in order to recover State aid that has been granted by way of an administrative decision. All these different decisions could give rise to actions of judicial review. The outcome of an administrative procedure may give rise to an additional procedure before a civil court. If the State aid measure is of a purely private law nature, or in case no judicial review could be obtained in an administrative procedure, claimants could rely on civil courts. Civil procedures could be followed in three stages: before a District Court, before a Court of Appeal, and, as far as legal questions are concerned, before the Supreme Court. In both administrative and civil procedures interim measures could be asked for. Further reference shall be made to what has been said about judicial review in the Netherlands with regard to question four.

*19. Is the judicial review under national law sufficiently limited in order 'to allow the immediate and effective execution of the Commission's decision' (see reference in Council Regulation 659/1999 Article 14 (3))? Please review the legislation and case law of your Member States' courts, if any, and give your opinion. Please differentiate between cases in which the beneficiary has obtained judicial review of the Commission decision by the Community Courts and cases in which the beneficiary relies exclusively on the review of the Member State's action for recovery by national courts.*

Referring to the various possibilities and different stages of judicial review under Dutch law, as they have been explained with regard to question eighteen, it should be doubted whether judicial review in the Netherlands is sufficiently limited in order to allow the immediate effective execution of the Commission's decision.<sup>85</sup> This conclusion also follows from an analysis of recovery cases in the Netherlands.<sup>86</sup> In particular, reference should be made to the Ferm-O-Feed case, which concerns the recovery of a subsidy granted to Ferm-O-Feed B.V. on the basis of the *Bijdrageregeling proefprojecten mestverwerking [Contribution scheme for a pilot manure-processing project]*. This case clearly shows that the process of recovery could especially be delayed in administrative procedures, where the different decisions that will be necessary in order to come to recovery could give rise to several actions by deprived parties. The recovery decision of the Commission in this case was taken 13 December 2000.<sup>87</sup> Until recently (2006) however, the aid including interest had not been recovered. First, the Administrative Court 's-Hertogenbosch had to rule on this case. The Court, reasoning in a 'Community law friendly' manner, found no reason to annul the decision of the Secretary of Agriculture, Nature and Fisheries by which the objection of Ferm-O-Feed B.V. to the recovery decision of the Secretary had been rejected.<sup>88</sup> However, a few months later, after

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<sup>83</sup> See for general rules on administrative judicial review chapters 6, 7 and 8 of the GALA. In fiscal procedures the Dutch Supreme Court will in last instance be competent as Court of Cassation.

<sup>84</sup> See e.g. the *Wet bestuursrechtspraak bedrijfsorganisatie* [Administrative Jurisdiction Industrial Organization Act] for specific rules in the area of economic public law.

<sup>85</sup> This is just an observation. The author is not pleading for less possibilities of judicial review in State aid cases. See also De Waard et al. 2005, p. 34.

<sup>86</sup> This analysis was based on reported cases. Recipients could also decide not to make use of their possibilities of judicial review and just repay the State aid.

<sup>87</sup> Commission Decision of 13 December 2000 on the aid scheme implemented by the Kingdom of the Netherlands for six manure-processing companies, OJ 2001 L 189/13.

<sup>88</sup> Administrative Court 's-Hertogenbosch 26 November 2004, *LJN* AR6630.

higher appeal had been made against the decision of the Administrative Court 's-Hertogenbosch, the President of the Council of State found, by way of provisional relief, that Ferm-O-Feed B.V., pending the Council of State's judgement, would not be under an obligation to reimburse the subsidy, since the company declared itself willing to issue a bank guarantee. The idea behind this 'compromise' between the various interests at stake, must have been that, if the Council of State in the higher appeal procedure would come to the conclusion that the appeal were to be dismissed, this bank guarantee would still secure the effective implementation of the recovery decision of the Commission.<sup>89</sup> Then, on 11 January 2006, the Council of State gave its judgement. It found that both the decision to repeal the subsidies at issue and the decision to recover them were legitimate under Dutch law. However, according to the Council of State, Dutch administrative law does not provide for ordering interest, whereas no basis could be found directly in Community law. The decision of the Secretary of Agriculture, Nature and Fisheries, therefore, was annulled on this point. In order to come to a 'final solution in a long pending dispute', this was done by the Council of State itself, based on its powers provided by Article 4:72 (4) GALA.<sup>90</sup> It could be doubted however, whether the dispute will be really finished now, since the interest, to be ordered according to the recovery decision of the Commission, has not been paid so far. This story probably continues after more than ten years.<sup>91</sup>

*20. What possibilities do competitors have to obtain a judicial order enforcing the recovery decision of the Commission against the Member State? Please describe the case law, if any, and give your opinion on the reasons why there may be very few cases of this nature.*

Since the provisions of recovery decisions of the Commission are considered to be directly effective in the national legal orders, private parties could invoke these provisions in procedures before national courts.<sup>92</sup> Such actions by private parties could be an extra incentive for the Member State concerned to fulfil its obligations under Community law, in addition to possible action to be taken by the Commission based on Article 88 (2) EC. To obtain a judicial order enforcing a recovery decision of the Commission which has not been put into effect timeously and/or correctly, in the Netherlands competitors should rely on civil courts.<sup>93</sup> Under current Dutch law, administrative courts cannot issue orders towards administrative authorities of the Member State.<sup>94</sup> No cases have been found, however, in which private parties asked for a judicial order enforcing the recovery decision of the Commission against the Member State.<sup>95</sup> It is difficult to find out the reasons for this absence of cases. Could it be the fact that relatively few recovery decisions have been addressed to the Netherlands so far? Or may be the fact that private parties could also, without any costs, rely

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<sup>89</sup> President of the Council of State 10 May 2005, *AB* 2005, 361. See for further details the annotation to this judgment by W. den Ouden.

<sup>90</sup> Council of State 11 January 2006, *AB* 2006, 208.

<sup>91</sup> See also other cases in which the implementation of recovery decisions of the Commission was delayed by judgments of national courts. President of the Administrative Court Assen, *LJN* AA7472. In this case the President of the Administrative Court Assen concluded that the beneficiary could have been offered a longer repayment schedule than the four-week period. Pending the procedure, the recovery decision was, therefore, suspended in so far as it referred to a four-week period for repayment. Administrative Court Zutphen 20 May 1993, *LJN* AF9788. The Administrative Court Zutphen gave a Community law friendly ruling in this case. Nevertheless, the appeal was accepted, since the underlying decision had not been taken with the requisite level of due care, according to Article 3:2 GALA.

<sup>92</sup> The direct effect could be derived from general case law of the Court of Justice. See Case 77/72 *Capolongo* [1973] ECR 611, para. 6. See about this issue also N. Sasserath, *Schadenersatzansprüche von Konkurrenten zur Effektivierung der Beihilfenkontrolle? [Claims for damages from competitors to effectuate the State aid control?]*, Berlin: Duncker & Humblot GmbH 2001, p. 227.

<sup>93</sup> See Article 3:296 Dutch Civil Code.

<sup>94</sup> See on this issue further Adriaanse 2006, 275-276.

<sup>95</sup> See further on the issue of enforcement of Commission decisions in the field of State aid by national courts the conclusion of Advocate General P.J. Wattel to Supreme Court 30 September 2005, *LJN* AR7735.

on the Commission to take action against the Member State concerned? There may be other reasons, for which reference shall be made to the answer given to question sixteen.

*21. What are the rules for the recovery of amounts owed to the state in case of bankruptcy of an economic actor?*

It follows from general case law of the European Court of Justice that the fact that a firm is subject to bankruptcy proceedings will have no effect on the obligation of refunding unlawful State aid.<sup>96</sup> Recovery shall then be effected in accordance with national bankruptcy law. The authorities responsible for recovery will have to register their claims in bankruptcy proceedings, as creditors of the incompatible and unlawful State aid.<sup>97</sup> In general, Dutch insolvency law does not seem to give any special powers to the state in that respect, apart from the powers with regard to tax debts, as dealt with below. Therefore, at this place reference can be made to the general rules on insolvency, as laid down in the Dutch Insolvency Act.

*22. In particular, what are the rules for the recovery of tax debts and social security debts, and what position do these debts have in relation to debts towards private creditors?*

When fiscal State aid in the Netherlands relates to taxes imposed by the State, recovery will have to be effected in accordance with the provisions of the General Tax Act (hereinafter GTA).<sup>98</sup> The grant of fiscal State aid implies, for example, that a tax payer has been (partly) exempted from payment of a tax, or that a certain tax debt has been remitted. In order to recover this kind of aid, it will be necessary to impose an additional tax debt to compensate for the given advantage.<sup>99</sup> According to the GTA, in that respect, a distinction has to be made between recovery of fiscal aid related to direct taxes and recovery of fiscal aid related to indirect taxes. As far as direct taxes are concerned, the tax inspector will, according to Article 16 GTA, only be entitled to impose an additional tax if a new fact appears. According to Article 20 GTA, this condition does not apply to indirect taxes. It has been questioned whether the fact that State aid has been granted in breach of Community law requirements could be considered as a new fact in the sense of Article 16 GTA. If not, recovery of State aid related to direct taxes would be practically impossible under Dutch law.<sup>100</sup> The question raises which rules should apply when an additional tax has been imposed on a beneficiary of fiscal State aid, in order to 'recover' the given advantage, but the beneficiary refuses to pay its tax debts. In that situation Article 3 (2) of the Dutch Tax Collection Act 1990 offers the fiscal authorities all powers that could be used by private creditors based on other legal provisions. This means that the fiscal authorities will also be allowed to file a petition against the debtor.<sup>101</sup> In case of bankruptcy of the beneficiary, Article 21 of the Tax Collection Act 1990 provides for a preferential right for the fiscal authorities in relation to debts towards private creditors.

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<sup>96</sup> See Case C-404/97 *Portugal v Commission* [2000] ECR I-4897, para. 53; Case C-75/ 95 *Belgium v Commission* [1999] ECR I-3671, para. 89; Case C-42/93 *Spain v Commission* [1994] ECR I-4175, para. 33.

<sup>97</sup> See further A. Ford, *State aid control and insolvency*, Congress Paper for the 23<sup>rd</sup> Annual Congress of the INSOL, 2003, p. 11.

<sup>98</sup> In practice, the General Tax Act (GTA) equally applies to many taxes from decentralized governments, since General Tax Schemes of these governments often refer to the GTA.

<sup>99</sup> See about fiscal State aid and recovery issues further H.C. Luja, *Assessment and Recovery of Tax Incentives in the EC and the WTO: A view on State Aids, Trade Subsidies and Direct Taxation*, Antwerp: Intersentia 2003.

<sup>100</sup> See for further discussion De Waard et al. 2005, p. 39-47. H.C. Luja, 'Terugvordering van fiscale staatssteun' [Recovery of fiscal State aid], *Tijdschrift voor Formeel belastingrecht [Formal Tax Law Review]*, 2001-9, p. 7.

<sup>101</sup> See the *Leidraad Invordering 1990 [Guidelines Collection 1990]*, as recently modified, for further rules on the use of this power.

23. Please describe the rules, if any, on the position of debts to the State in the form of illegal and incompatible State aid. Does the position of debt depend on the form in which the aid was granted?

Under Dutch law, no particular rules exist on the position of debts to the State in the form of illegal and incompatible State aid. It is difficult to refer to general rules at this place, since these rules do not exist. As far as debts to the State resulting from public law are concerned, applicable rules can only be found in many different provisions, varying from one area to the other (like subsidies, social security payments, salaries of civil servants). Nevertheless, for one category, namely fiscal debts resulting from taxes imposed by the State, general rules could be found in the Tax Collection Act 1990.<sup>102</sup> It is to be expected, however, that in the near future general rules on debts to the State resulting from public law will be incorporated in the General Administrative Law Act.<sup>103</sup> As far as other debts to the State are concerned, the normal rules applicable to debts as laid down in the Dutch Civil Code will apply.<sup>104</sup>

## VI. Conclusion

In this report an overview has been given of Dutch law and practice with regard to State aid, based on questions set by the FIDE. General rules on State aid do not exist in the Netherlands. Nevertheless, as it follows from the answers given to the questions, the rules and requirements under Community law with regard to State aid have been taken into account on more and more occasions over the last few years at different levels of government. It may be concluded that a 'Community law friendly' interpretation of currently applicable provisions of Dutch national law would allow to meet the Community law requirements in many State aid cases. However, in order to provide more effectiveness, transparency and legal certainty for all parties concerned in State aid cases, further efforts should be made to adapt both Dutch law and practice to the Community law requirements in the field of EU State aid law.

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<sup>102</sup> In practice, the Tax Collection Act equally applies to many taxes from decentralized governments, since General Tax Schemes of these governments often refer to this Tax Collection Act.

<sup>103</sup> See the bill on the fourth tranche of the General Administrative Law Act, *Kamerstukken II 2003-2004*, 29 702, nr. 2. See further M.W. Scheltema, *Publiekrechtelijke geldschulden [Public law debts]*, Deventer: Kluwer 2005.

<sup>104</sup> See Article 6:27 et seq. and Article 6:111 et seq. Dutch Civil Code.