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Enforcement of State Aid Law in the Netherlands

Legislative Initiative for Effective Recovery Procedures in Dutch Law

*Paul Adriaanse and Willemien den Ouden**

I. Introduction

European State aid law has been the subject of growing attention over the last few years. A broad interpretation of the concept of State aid, more applicable rules, a considerable amount of case law and a strict Commission policy have increased the awareness of the far-reaching implications State aid rules could have for the Member States as well as for undertakings. The effectiveness and credibility of European State aid control presuppose proper enforcement of the applicable rules.¹ As far as enforcement is concerned, the European Commission, being the central monitoring actor in European State aid control, plays an important role, but the Member States, too, are involved in several ways. Studies and case law, however, show that the enforcement of European State aid law still raises many questions and presents a number of obstacles Europe-wide.²

A few years ago the Dutch Government initiated research into the specific legal problems with respect to the enforcement of State aid law under Dutch law. Several issues appeared to be problematic, such as claiming interest from recipients of unlawful State aid. Other studies focused on Dutch law gave rise to comparable conclusions. Partly under pressure from infringement proceedings which the Commission brought against the Netherlands as a result of tardy recovery

proceedings, the Dutch Government has now submitted a legislative proposal designed to eliminate some of the bottlenecks identified. This State aid recovery bill aims to ensure that Dutch authorities and courts are able to satisfy their Community obligations more easily.³ In doing so, the Netherlands enacts specific national legislation for the purpose of enforcing European State aid law. In this article we will examine this national State aid legislation.

After a brief overview of the principles underlying the enforcement of State aid law in the Member States (section 2), we will describe the problems affecting implementation practice in the Netherlands in recent years (section 3). Next, the outlines of the legislative proposal are described (section 4), followed by some remarks on the relationship between Community law obligations and the Dutch principle of legality (section 5). Next, we will examine the proposed changes in the light of the Dutch implementation practice (section 6). We will conclude with some final remarks (section 7). Solutions found with regard to Dutch law may provide inspiration for other Member States in search of new or alternative possibilities for enforcing European State aid law as effectively as possible.

II. Enforcement of State Aid Law: Dual Vigilance in the Member States

European State aid law can be enforced by means of both public and private enforcement measures. In both cases the effectiveness of these measures will, in the absence of Community law provisions, to a large extent depend on the efforts by national authorities and courts in the Member States as well as on the availability and suitability of applicable provisions in national law.

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1 See the State Aid Action Plan (COM(2005) 107 final, p. 13).

2 See 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.F. Nemitz (ed.), The Effective Application of EU State Aid Procedures. The Role of National Law and Practice, Alphen a/d Rijn: Kluwer Law International 2007.

3 The infringement proceedings have been withdrawn.

1. Public Enforcement Measures

As far as public enforcement measures are concerned, Regulation 659/1999 provides for several measures to be taken by the Commission.⁴ In practice, the most important provision appears to be Article 14 of Regulation 659/1999, which empowers the Commission to require recovery in cases where aid has been granted unlawfully and, after the closure of a formal investigation procedure, the Commission has decided that this aid is incompatible with the common market.⁵ In fact, this provision codifies consistent case law of the Court of Justice of the European Communities and consistent practice of the Commission, in which it was recognized that the only way to restore competitive positions and to guarantee to all Member States equal application of State aid rules in situations of unlawful State aid is to require recovery 'ex tunc'. It has subsequently been confirmed that recovery is to be considered the logical consequence of the unlawful nature of State aid.⁶

For the Member State concerned, 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. Although the decision itself is addressed to the Member State as a whole, the obligation to recover is applicable to all public entities, in particular in respect of the entity that has granted the aid unlawfully. Under Article 10 EC, national courts, too, are in principle obliged to give full effect to the Commission decision.

The obligation to comply with the Commission decision means that the Member State concerned will have to take all necessary measures to make recovery possible. The question whether any discretion will be left to the national authorities is generally answered in the negative.⁷ The Commission is supposed to have taken into account all relevant interests of the actors involved. This is why Article 14 of Regulation 659/1999 requires Member States to take all necessary measures to recover the aid from the beneficiary according to the procedures under the national law of the Member States (including provisional measures, without prejudice to Community law), but provided that they allow the immediate and effective execution of the Commission's decision. Provisions of national law that do not meet this requirement must be left unapplied, as was the case in *Commission v. France* concerning a French rule providing for the suspen-

sory effect of actions brought against demands for payment.⁸

In cases of non-compliance with a recovery decision, the Commission may refer the matter to the Court of Justice direct, in accordance with Article 88(2) of the Treaty. From the case law of the Court, it can be ascertained that the only acceptable argument is that recovery will be absolutely impossible.⁹ The case law of the Court of Justice also shows that a provision of domestic law and domestic practices or circumstances cannot impede the reimbursement of aid. As long as the Member State has not taken any attempt to recover the unlawful aid, it will not be accepted that recovery is absolutely impossible. The Commission and the Member State must respect the principle underlying Article 10 EC, which imposes a duty of genuine cooperation on the Member States and the Community institutions, and they must work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, and in particular the State aid provisions.¹⁰

The 2006 study on the enforcement of State aid law at national level found that while recovery of unlawful and incompatible State aid had improved over the past few years, the recovery of such aid by Member States still faced a number of obstacles. The authors of the study mention the following: a lack of clarity as to the identity of the national body responsible for issuing a recovery decision and of the beneficiary required to repay the aid and as to the exact amount of the aid to be repaid; the absence of a clear predetermined procedure to recover aid in some Member States; no availability or no use of interim relief to recover aid; stay of the recovery proceedings while an appeal is pending

4 Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art 88) of the EC Treaty (OJ 1999 L 83/1).

5 Pursuant to Article 16 of Regulation 659/1999, Article 14 equally applies in case of misuse of aid by the beneficiaries.

6 See Case C-70/72 *Commission v Germany* (Kohlegesetz) [1973] ECR 829, para. 13; Case C-404/00 *Commission v Spain* [2003] ECR I-6695, para. 44; Cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani et al.*, n.y.r., para. 387.

7 Case C-24/95 *Land Rheinland-Pfalz* [1997] ECR I-1619, para. 34.

8 Case C-232/05 *Commission v. France* [2006] ECR I-10071, para. 53.

9 See e.g. Case C-441/06 *Commission v. France* [2007] ECR I-8887, para. 27.

10 *Ibid.* para. 28.

and difficulties experienced by the governmental authorities of a Member State when recovering aid at local level.¹¹

Recent policy documents of the Commission show that the Commission is monitoring the execution of recovery decisions by Member States more closely.¹² The Commission has taken a strict line and has systematically initiated infringement proceedings against Member States that do not take all available measures to implement such decisions. In order to support the Member States, the Commission has issued a notice in which it mentions the principles applying to recovery of State aid and defines the respective roles of the Commission and the Member States in recovery procedures.¹³

2. Private Enforcement Measures

Besides submitting a complaint to the Commission, Community law offers competitors or other interested private parties several directly effective legal grounds for actions against unlawful State aid before national courts. In particular Article 88(3), last sentence, EC, in which the standstill obligation, which is directed to Member States, has been laid down, should be mentioned.¹⁴ Although these pri-

ate enforcement actions are focused primarily on obtaining judicial review by national courts, they could at the same time have a deterrent effect on the behaviour of the actor that breached the rules. According to Roach and Trebilcock, private plaintiffs could be considered private attorneys general securing a positive public good by vindicating a publicly endorsed standard or norm contained in a statute.¹⁵ As early as 1962, the Court of Justice emphasized in the *Van Gend en Loos* case in general terms: 'The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.'¹⁶ In the recent State Aid Scoreboard of Autumn 2008, the Commission considers 'that State aid enforcement by national courts can play an important role in the overall system of State aid control. National courts are often well placed to protect individual rights affected by violations of the State aid rules and can offer quick and effective remedies to third parties.'¹⁷ This view is in line with consistent case law of the Court of Justice and the 1995 notice of the Commission on cooperation between national courts and the Commission in the State aid field.¹⁸

In the field of State aid, the Court has ruled in the FNCE ('Salmon') case that '... the validity of measures giving effect to aid is affected if national authorities act in breach of the last sentence of Article 93(3) [now 88(3)] of the Treaty. 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.'¹⁹ In the SFEI case, the Court explained that the availability of the remedy of recovery should not depend on the national laws of the Member States. The Court stated: 'Having regard to the importance for the proper functioning of the common market of compliance with the procedure for prior review of planned State aid, national courts must in principle allow an application for repayment of aid paid in breach of Article 93(3) [now 88(3)] of the Treaty. However ... there may be exceptional circumstances in which it would be inappropriate to order repayment of the aid.'²⁰ It will be the task of national courts to determine and interpret these circumstances in close

11 See the results of the Study on the Enforcement of State Aid Law at National Level (noted supra 2), p. 34.

12 See the State Aid Action Plan (COM(2005) 107 final); State Aid Scoreboard Autumn 2008 update (COM(2008) 751 final), par. 3.3.

13 Notice from the Commission _ Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ 2007, C 272/4).

14 Case 120/73 *Lorenz v Germany* [1973] ECR 1483, para. 8. See also Article 3 of Regulation 659/1999.

15 See K. Roach & M.J. Trebilcock, 'Private Enforcement of Competition Laws', *Osgood Hall Law Journal* 1997 (34-3), p. 471 et seq. See also W. Naysnerski & T. Tietenberg, 'Private Enforcement of Federal Environmental Law', *Land Economics* 1992 (68-1), p. 46; A.P. Komninos, 'New Prospects for Private Enforcement of EC Competition Law: *Courage v. Crehan* and the Community Right to Damages', *CML Rev.* 2002 (39-3), p. 458.

16 Case 26/62 *Van Gend en Loos* [1963] ECR, p. 3.

17 State Aid Scoreboard Autumn 2008 update (COM(2008) 751 final), par. 3.2.

18 Notice on cooperation between national courts and the Commission in the State aid field (OJ 1995 C 312/8).

19 Case C-354/90 FNCE ('Salmon') [1991] ECR I-5528, para. 12. This line of reasoning was extended to the method of financing the aid in Joined Cases C-261/01 and C-262/01 *Van Calster and Cleeren* [2003] ECR I-12249, para. 53-54.

20 Case C-39/94 SFEI [1996] ECR I-3598, para. 70. See also Case C-368/04 *Transalpine Ölleitung* [2006] ECR I-9957, para. 40.

cooperation with the Commission and with due regard for the possibility of preliminary questions to the Court. The CELF/SIDE ruling shows, however, that in a situation where a private enforcement action is examined after the Commission has adopted a positive decision, Community law does not impose an obligation of full recovery of unlawful aid even in the absence of exceptional circumstances. According to the Court of Justice, the national court applying Community law must order the aid recipient to pay interest over the period of unlawfulness.²¹ Apart from imposing a recovery obligation as a remedy for infringement of Community law, a national court may also have to deal with questions concerning damages. Where competitors are able to prove that they have suffered a loss caused by unlawfully granted aid, the Member State might be obliged, under the general principle of State liability for breach of Community law, to pay compensation to private parties.²²

The Commission has recently issued a new draft notice on State aid enforcement by national courts, which is to replace the 1995 cooperation notice in the near future. In this new notice the Commission informs national courts and potential claimants about the remedies available in the event of a breach of State aid rules and gives them guidance on the practical application of these rules.²³

III. Dutch Enforcement Practice

As it turns out the loyal cooperation of national authorities and courts and the availability and suitability of relevant provisions in national law are very important to the enforcement of European State aid law. In recent years, however, it has been established on several occasions that the implementation of State aid law in the Netherlands is not as effective as it should be mainly as a result of shortcomings in national law. It is sometimes difficult for national authorities and courts to reconcile the Dutch legislation to be applied with the requirements imposed on them by the case law of the Court of Justice. In view of the diversity of forms in which State aid can be granted, questions concerning the application of national law arose in various fields of national law. In the area of tax law, several cases raised questions about taxes levied to finance aid measures. It turned out that Dutch tax law is not in every respect fit to European State aid law.²⁴ In

the field of private law, too, it was found that Dutch law put up barriers to the effective enforcement of the Commission's recovery decisions, particularly with respect to the requirement that interest must be claimed on aid received with effect from the date at which this aid was available to the beneficiary.²⁵ Most problems, however, occurred in cases in which Dutch administrative law was applicable, in particular, in situations where State aid was granted in the form of a subsidy and had to be recovered by order of the Commission pursuant to the public enforcement measures discussed in section 2. Below, these problems will be illustrated on the basis of two administrative law cases from the Dutch enforcement practice of the past few years.

In the first case the European Commission required the Netherlands to recover State aid based on a subsidy regulation for service stations located near the German border. Under this regulation, hundreds of subsidies were granted in the late 1990s as an allowance for service stations that suffered an economic loss because petrol in the Netherlands was much more expensive than in Germany due to tax measures. The Dutch Minister of Finance tried to stay below the *de minimis* limit applicable at the time by providing that the maximum subsidy amount to be granted to each applicant was €100,000 over a three-year period. The Commission's investigation showed, however, that through contracts between service stations and large oil companies, a large proportion of the aid had been

21 Case C-199/06, *CELF v. SIDE*, n.y.r. See also T. Jaeger, 'The CELF Judgment: A Precarious Conception of the Standstill Obligation', *EStAL* 2008, pp. 279-289.

22 Case C-6/90 and C-9/90 *Andrea Francovich et al. v Italy* [1991] ECR 5405; Case C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany* [1996] ECR I-1029. See J. Flynn, 'The Role of National Courts' in A. Biondi, P. Eeckhout & J. Flynn, *The Law of State Aid*, Oxford: Oxford University Press 2003, p. 333; K. Bacon, 'State Aids in the English Courts: Definition and Other Problems' in Biondi, Eeckhout & Flynn 2003, p. 354; U. Soltész, 'Der Rechtsschutz des Konkurrenten gegen gemeinschaftswidrige Beihilfen vor nationalen Gerichten', *EuZW* 2001 (7), pp. 202-207; N. Sasserath, *Schadenersatzansprüche von Konkurrenten zur Effektivierung der Beihilfenkontrolle?*, Berlin: Ducker & Humblot GmbH 2001, p. 169.

23 Commission Notice on the Enforcement of State Aid Law by National Courts (for consultation at the website of DG Competition of the Commission).

24 On tax-related State aid and recovery issues, see also H.C. Lujja, *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.

25 Decision of the District Court of Rotterdam dated 4 July 2007, LJN BB0270.

received mainly by the latter and the *de minimis* limit had been exceeded by a wide margin. The Dutch appeal against the Commission's recovery decision was dismissed by the European Court of Justice.²⁶

In the course of the years 1999, 2000 and 2001, the Minister of Finance took hundreds of withdrawal and recovery decisions at national level to implement the Commission's decision. One of the problems, however, was that the oil companies were not direct subsidy recipients. The Dutch rules do not provide for explicit possibilities of recovering subsidies from parties other than those to whom such subsidies were granted. For this reason, the Minister had to base his authority to recover State aid from the oil companies on the general – non-codified – principle of unjust enrichment. In its case law, the Dutch Council of State recognizes that this principle originally based on civil law can also be applicable in a public law context, provided, however, that the relationship in question is governed by administrative law.²⁷ And the latter point constituted a problem in the case at hand: there was no relationship governed by administrative law (subsidy relationship) between the Minister of Finance and the oil companies. Many wondered whether in situations of this kind recovery decisions could be taken in the form of a subsidy order governed by public law. The fact that in reliance on Regulation 659/1999, the Minister claimed interest on the unlawful State aid with effect from the date at which the challenged subsidies had been granted also gave rise to questions. The subsidy regulation did not include any basis of authority for this kind of interest claim, even though it is fairly generally assumed in the Netherlands that government actions of this kind do require some basis of author-

ity at national level. Other possible bases, such as an implied administrative authority or authority based on non-codified general legal principles, could not be assumed present in the case at hand, according to the relevant Dutch case law.

At the beginning of the present century, there were quite a few legal actions concerning the recovery decisions taken by the Minister of Finance as meant in this case and in several first-instance decisions, administrative courts gave different answers to the questions raised above. It was reported that the oil companies reached a settlement with the Minister and no appeal was filed in any of the actions. This meant that no final answers or even preliminary questions were forthcoming for the time being.

A second Dutch case that concerned the recovery of subsidies by order of the Commission related to subsidies granted by the Dutch Minister of Agriculture for pilot projects in the field of manure processing. The Commission had approved the subsidy scheme (called the BPM scheme) for a fixed period and this period was extended later until 1 January 1995. Even after this extended period had expired, project subsidies were granted, however. The Commission received complaints lodged by competitors. The Commission arrived at the opinion that the subsidies that had been granted after the approved period had expired were not compatible with the common market. With respect to each individual decision, the Netherlands was ordered to recover the relevant subsidies, including interest. It concerned six subsidy recipients.²⁸

One of these subsidy recipients, Fleuren Compost BV, challenged the Commission's decision before the European Court of First Instance by invoking the principle of legitimate expectations, for the minister had published an amendment of the BPM scheme in the Netherlands Government Gazette²⁹ and had stated in the explanatory memorandum that applications filed before 1 January 1995 would come within the scope of a decision of approval of the Commission. The Court of First Instance held that even though this provision of information by the Government was 'regrettable', this could not result in legitimate expectations on the part of Fleuren Compost BV vis-à-vis the Commission. Accordingly, the notice in the Government Gazette could not affect the lawfulness of the Commission's decision which was in dispute before the Court of First Instance.³⁰

26 Case C-382/99 Netherlands/Commission [2002] ECR I-5163. In this ruling the ECJ decided in favour of the Commission on all points.

27 Decision of the Administrative Jurisdiction Division of the Council of State dated 21 October 1996, AB 1996, 496.

28 Commission Decision 2001/521/EC 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).

29 Stcrt. 1994, 201. The Netherlands Government Gazette is one of the official publications in the Netherlands for publishing legislation.

30 Case T-109/01 Fleuren Compost [2004] ECR II-127. For a recent overview of this issue, see A. Giraud, 'A study of the notion of legitimate expectations in State aid recovery proceedings: "Abandon all hope, ye who enter here"?', CML Rev. 2008-45, pp. 1399-1431.

In later actions against national withdrawal and recovery decisions before national courts, the beneficiaries were not very successful either.³¹ Various district courts concluded that as a result of the Court of First Instance judgment, it had been established in law that the BPM subsidies were to be regarded as unlawful State aid and that for this reason, the Minister was required to withdraw and recover this aid, including interest, without any scope of discretion being left with him. Because Dutch law did not provide any basis of authority, various district courts derived this authority to bring an interest claim from Community law. They seemed to base the foregoing on the notion that this was the only way to satisfy the requirement of loyal cooperation as envisaged in Article 10 EC and the principle of effectiveness. The Council of State, the highest administrative court in the Netherlands, did not endorse this 'European law friendly' approach, however. In other subsidy cases, the Council had already held that it did not assume the existence of any unwritten public-law authority for administrative bodies to claim statutory interest on unduly paid sums of money.³² In an appeal regarding the recovery of the subsidies, the Council also rejected Article 87 EC and Article 14 of procedural Regulation 659/1999 as a basis for the interest claim. According to the Dutch Council, these provisions put an obligation on the Member State, but are not intended to create any public law authority for a Dutch administrative body, such as the Minister of Agriculture in the case in hand.³³ The latter was referred to the civil court for his interest claim required under European law.³⁴

The highest Dutch administrative court did not appear to have any doubts: the Dutch principle of legality precludes claiming interest under public law because it lacks a statutory basis. This is also true, according to the Council of State, where the Member State the Netherlands is under a Community law obligation to bring an interest claim for the purpose of implementing a recovery decision of the Commission. The Council of State did not consider it necessary at the time to ascertain by means of a preliminary question whether in a case like that, authority may be derived directly from European law in the absence of a public law basis in national law, even though this very issue had been the subject of a lively debate in the literature, not only in the Netherlands.³⁵ But in the same year the Council of State did raise preliminary questions about this issue when it

faced disputes concerning the recovery of European Social Fund subsidies, for which there was no statutory authority in Dutch law either.³⁶ This issue will be dealt with further in paragraph 5.

IV. The Dutch Legislative Proposal

1. Background of the Legislative Proposal

As a result of cases like the ones described above, the Dutch legislator had realised that European State aid law could not always be enforced immediately and effectively on the basis of the 'ordinary' application of Dutch law. Various committees addressed the problem and concluded, like many academic publications, that Dutch law does not have sound rules that allow the recovery operation ordered by the Commission in all cases.³⁷ Reference was also made

31 Decision of the District Court of Rotterdam dated 11 March 2005 (n.r.) and decision of the District Court of 's-Hertogenbosch dated 26 November 2004, LJN AR6630.

32 Decision of the Administrative Jurisdiction Division of the Council of State dated 10 July 2002, AB 2003, 123.

33 Decision of the Administrative Jurisdiction Division of the Council of State dated 11 January 2006, AB 2006, 208. See the earlier decision of the Administrative Jurisdiction Division of the Council of State dated 4 May 2005, AB 2005, 362.

34 But there he was not (fully) successful either: decision of the Rotterdam District Court dated 4 July 2007, LJN BB0270.

35 See R.J.M. van den Tweel, 'Beschouwingen over effectieve terugvordering van staatssteun' [Thoughts about effective recovery of State aid], SEW 2007, p. 366 et seq.; M.J. Jacobs, W. den Ouden & N. Verheij, 'Bezint eer ge begint! Spraakmakende hofjurisprudentie over Europese subsidies' [Look before you leap, European case law on European subsidies], NTB 2008, p. 155 et seq., and the literature mentioned in this article. A comparable discussion is being conducted in Germany. See e.g. C. Herrmann & T. Kruis, 'Die Rückforderung vertraglich gewährter gemeinschaftsrechtswidriger Beihilfen unter Beachtung des Gesetzesvorbehalts', EuR 2007, p. 141 et seq.; H. Eberhard, 'Das Legalitätsprinzip im Spannungsfeld von Gemeinschaftsrecht und nationalem Recht', Zeitschrift für öffentliches Recht 2008, pp. 49 – 116.

36 Decision of the Administrative Jurisdiction Division of the Council of State dated 30 August 2006, AB 2007, 240 and 241.

37 See Dutch Interdepartmental Commission of European Law, Trends in de rechtspraak, terugvordering van staatssteun [Trends in Case Law, Recovery of State Aid], ICER 2002-03/30b rev.; B.W.N. de Waard, A.J.C. de Moor-van Vugt et al., Terugvordering van staatssteun, een rechtsvergelijkend onderzoek [Recovery of State Aid. A Comparative Law Study], Nijmegen: WLP 2005; R.J.G.M. Widdershoven, M.J.M. Verhoeven et al., De Europese Agenda van de Awb [The European Agenda of the GALA], The Hague: BJu 2007; P.C. Adriaanse, 'De rol van nationale rechters bij de terugvordering van onrechtmatige staatssteun' [The Role of National Courts in Recovering Unlawful State Aid], in W. den

to problems that have not occurred in Dutch cases as yet but that are conceivable. For example, the periods within which Dutch administrative bodies must decide on applications for subsidies and other financial contributions are often too short if a proposed decision has to be notified to the Commission under Article 88(3) EC. In addition, explicit statutory grounds for refusing an application in cases where providing funds by the government would result in State aid are often lacking and Dutch legislation includes limitation periods that are different from the one included in the procedural Regulation 659/1999. Hence, the Commission's announcement, not long after the publication of the BPM decision, that it would initiate an infringement action because Dutch legislation rendered the implementation of its recovery decisions unnecessarily complicated and time-consuming cannot have taken the Dutch Government by surprise. It was the right time for a proposal to change the law.

2. Scope and Object of the Legislative Proposal

The main object of the State Aid Recovery Bill (hereinafter also referred to as 'the legislative proposal') is to create new bases of authority in Dutch legislation for the purpose of implementing an obligation to recover State aid arising from a recovery decision of the Commission or a decision rendered by a national court. In this way the legislator responds to the case law described above in which the absence of national authority provisions had proved a source of difficulty for Dutch courts. In addition, some existing national statutory provisions, which may prevent the effective enforcement of European State aid, are to be repealed.

Ouden (ed.), *Staatssteun en de Nederlandse rechter* [State Aid and Dutch Courts], Deventer: Kluwer 2005; J.R. van Angeren & W. den Ouden, *Subsidie recht en staatssteun* [Subsidy Law and State Aid], VAR geschriften 134, The Hague BJu: 2005, p. 75 et seq.; P.C. Adriaanse, *Handhaving van EG-recht in situaties van onrechtmatige staatssteun* [Enforcement of EC Law in Situations of Unlawful State Aid], Kluwer: Deventer 2006.

38 In the Netherlands, administrative law is applicable not only to the aforementioned subsidy cases, but also, for example, to granting an allowance or compensation for loss resulting from administrative acts. See M.K.G. Tjepkema and W. den Ouden, 'Schadevergoeding van overheidswege en het verbod op staatssteun' [Government Compensation and the State Aid Prohibition], *Overheid en Aansprakelijkheid* 2007, pp. 80-103.

39 Parliamentary Papers II 2007/08, 31 418, no. 3, p. 7.

The proposal takes into account that various branches of national law may be relevant with respect to the enforcement of European State aid law. Given the broad interpretation of the concept of State aid by the European Courts, State aid may in particular be subject to administrative law, private law, as well as tax law.³⁸ In the legislative proposal, the Dutch Government has opted for an approach that is in line with the general statutory regimes applicable in these three main branches of national law, to wit the Dutch Civil Code, the General Administrative Law Act ('GALA') and the State Taxes Act. According to the Dutch Government, this means that the bill relates to all forms of aid within the meaning of Article 87(1) EC granted at central government level or at local level by administrative bodies or by legal entities or bodies on which central or local government exercises a dominating influence or that are publicly funded. In this way recovery actions may be embedded within the existing legal relationship, which ensures that these fit into the existing legal system (including the judicial division of authority) in the best possible manner, according to the explanatory memorandum to the act.³⁹ In this way the implementation of State aid law is shaped and incorporated into the regular statutory rules. As a consequence, legal protection in the relevant branch of law will be guaranteed to the maximum extent possible.

3. Proposed Changes in Dutch Law

The part of the bill relating to administrative law provides for an amendment of the GALA. A new part entitled 'Recovery of State Aid' embodies a discretionary power for administrative bodies to recover State aid. The new part of the act will apply to aid within the meaning of Article 87(1) EC granted by Dutch administrative bodies in the decisions rendered by them. The new recovery power to be included in the GALA not only refers to subsidies, but has a much broader scope. The new authority provision gives Dutch administrative bodies granting aid the opportunity to recover this aid from the beneficiary for the purpose of implementing a recovery decision rendered by the Commission or a court decision that is no longer subject to appeal. The use of the Community law concept of 'beneficiary' allows them to address an inde-

pendent recovery decision to third party beneficiaries who were not the addressees of the original aid decision.⁴⁰ This provides a solution for cases where the beneficiary of the aid is not the ultimate beneficiary, as was the case with the subsidised service stations in the Dutch border region. Further, the act provides that to the extent that the aid was granted by an administrative decision, the administrative body may amend or withdraw this decision. This is usually a necessary step for taking a recovery decision, because it should first be established that the aid was unduly paid. At the same time, the existing grounds that allow Dutch administrative bodies to reduce the level of subsidies or withdraw or amend subsidy decisions are to be supplemented. As a result, existing withdrawal and amendment grounds, which were defined for national situations, need not be interpreted in conformity with Community law in a laborious fashion anymore.

Further, the bill provides for the urgently needed general power (and obligation) to charge interest pursuant to the relevant provisions of procedural Regulation 659/1999 in the context of the national aid recovery decision. In this way the problem that occurred in the manure subsidy case is solved and it will no longer be necessary in the Netherlands to conduct both administrative and private law proceedings in order to ensure compliance with Community law obligations. The bill provides that the amount to be recovered may be collected by means of an 'enforcement order', which means that judicial authorisation is no longer required should the beneficiary refuse to pay. In addition, the bill provides that national provisions in respect of statutory interest, limitation and recovery periods that are not in line with Community State aid law are not applicable in the context of the recovery of State aid.

The legislative proposal also includes some provisions that have no direct bearing on the recovery of State aid. For example, the GALA will include a provision that the statutory decision period with respect to a subsidy application is suspended if the Dutch administrative body informs the applicant that, pursuant to Article 88 EC, the Commission has been asked to render its opinion on whether the measure concerned is compatible with Article 87 EC. The suspension continues until the date on which the Commission has communicated its decision to the applicant. Further, on the advice of the Dutch Council of State, a general ground for refusal

of subsidy has been added for situations where the Commission has determined that a subsidy applied for is incompatible with the common market. It is remarkable that this ground for refusal cannot be invoked by administrative bodies independently, separately from a decision rendered by the Commission. Even where a national court determines that a subsidy application should have been refused on the ground of State aid law, it cannot base its decision on this provision, unless the Commission has meanwhile declared the aid incompatible with the common market on substantive grounds.

In addition to changes of an administrative nature to the GALA, the bill also includes changes in Dutch tax legislation. Even though tax aid usually relates to administrative decisions, the statutory tax regime has its own provisions on taxation and the reversal thereof. This is why the tax legislation, too, is adjusted to the Community law requirements, among other things concerning interest and limitation. Various national tax law provisions are declared to be inapplicable and a basis for authority is created to revise an administrative decision rendered under tax law for the purpose of recovering State aid in the form of a tax measure.

Finally, Dutch civil law is made State aid law proof as well. An independent private-law basis for recovery or reversal of State aid is created. Already existing recovery options were not used as a basis (such as a claim based on unjust enrichment or undue payment) to prevent difficult questions relating to procedural law about, for example, nullity by operation of law.⁴¹ This turned out to be a fortunate choice. Since the Court of Justice's decision in the CELF case, it has become less clear whether a violation of the notification requirement of Article 88(3) EC, automatically means nullity of the juridical act at national level.⁴² In addition, an independent legal ground means that the beneficiary cannot invoke any national defences by virtue of the provisions concerning undue payment and unjust enrichment, leaving scope for full effect of Community law, according to the Dutch Govern-

40 Parliamentary Papers II 2007/08, 31 418, no. 3, p. 11.

41 Parliamentary Papers II 2007/08, 31 418, no. 3, p. 16.

42 Case C-199/06 CELF v. SIDE, n.y.r. On the subject of 'pending nullity', see in this context T. Jaeger, 'The CELF-Judgment: A Precarious Conception of the Standstill Obligation', EStAL 2008, pp. 279-289.

ment's explanatory memorandum to the legislative proposal.⁴³ This approach fits into the case law of the European courts which shows that in situations of unlawful aid, the national authorities may refrain from recovery only in exceptional circumstances.⁴⁴

The private-law recovery authority, too, is deliberately phrased in optional terms in the legislative proposal. Also in this context the Community concepts of aid and beneficiary were used as a point of departure. This is, according to the explanatory memorandum, because these concepts better reflect the fact that the withdrawal of unlawful aid is based on a special legal claim derived from Community law.⁴⁵ In civil law, too, the provisions in respect of statutory interest will be brought in line with European State aid law. Pursuant to procedural Regulation 659/1999, the interest to be claimed on unlawfully received aid must be charged with effect from the date at which the aid became available to the beneficiary, which is impossible under the current civil law provisions applicable to recovery claims. Once coming into force, the legislative proposal will also make it possible to charge interest at a special rate in conformity with the European interest rate for State aid matters and several civil law provisions in respect of limitation periods are declared inapplicable.

V. Community Law Obligations and the Dutch Principle of Legality

Before further discussing the proposed legislative changes mentioned above, we will deal with an important preliminary question: is the bill actually necessary? The bill is in line with the Dutch Council of State's view that Article 87 EC and Article 14 of procedural Regulation 659/1999 cannot constitute

independent bases of authority for Dutch administrative bodies. This view is based on the prevailing Dutch doctrine that assumes that if provisions of European regulations do not specify what national administrative body is competent to act in the context of Community obligations, this must be specified in a Dutch statutory document under the Dutch principle of legality.⁴⁶ But can this doctrine be adhered to if this means in specific cases that compliance with Community obligations is difficult if not impossible, as in the manure subsidy case? Should it not be assumed in such cases, on the basis of the loyalty principle of Article 10 EC, for example, that authority for national authorities can be derived direct from European provisions? If that were the case, the present legislative proposal, to the extent that it includes various authority provisions, would not be necessary. As stated above, the Dutch Council of State referred preliminary questions to the Court of Justice in connection with this very authority issue in several recovery cases related to the European Social Funds (ESF).

The answer given by the Court of Justice in these ESF recovery cases is not very clear.⁴⁷ In its judgment, the Court first and foremost states that 'it is clear from the very terms of the second paragraph of Article 249 EC that Community regulations are directly applicable in all Member States' and that 'Member States are to take action against irregularities and to recover any amounts lost as a result of an irregularity or negligence'. With respect to the question whether this Community obligation also results in any authority for national administrative bodies, the Court states only that there is a Community obligation to claim recovery, 'without there being any need for authority to do so under national law'.⁴⁸ Although the Court of Justice does not explicitly answer the authority question, it could be defended on the basis of the phrase 'without there being any need for authority to do so under national law' that the Court of Justice has meant to state that national administrative bodies may derive authority to recover ESF subsidies direct from European law, if required.⁴⁹ Following this line of reasoning, it could be argued that the authority Dutch administrative bodies require for the recovery of State aid under national law can probably also be derived from the relevant provisions of procedural Regulation 659/1999. If this reasoning holds, the current Dutch bill contains provisions that are at least partly redundant. However,

43 Parliamentary Papers II 2007/08, 31 418, no. 3, p. 16.

44 See e.g. Case C-199/06 CELF v. SIDE, n.y.r.

45 Parliamentary Papers II 2007/08, 31 418, no. 3, p. 15.

46 See J.H. Jans et al., *Europeanisation of Public Law*, Groningen: Europa Law Publishing 2007, pp. 23-29.

47 Joined Cases C-383-385/06 Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening, n.y.r.

48 Paras. 35-40.

49 The Council of State seems to follow this line of reasoning in its final judgment in de ESF-recovery-cases dated 24 December 2008, LJN BG8284.

one should take into account the circumstances under which the Court of Justice rendered its decision in the ESF recovery cases. Before reading fundamental significance into the Court's single judgment it must be mentioned that there was no opinion of an advocate-general given in this case, nor does the judgment contain a thorough statement of reasons on the source of the recovery authority. For this reason, we do not consider the State Aid Recovery Bill to be redundant.

VI. Will Dutch Law be State Aid Proof?

An important question is whether the proposed legislation will enable the Netherlands to better fulfill its Community law obligations arising from State aid law. Has the bill removed the bottlenecks identified in Dutch administrative practice and in the legal literature?

The most remarkable feature of the authority provisions proposed is their discretionary formulation, while the bill intends to introduce provisions for situations where State aid law forces the recovery of State aid. In the explanatory memorandum to the bill, it is observed in this context that it cannot be entirely ruled out that there are situations where a claim for recovery is not directly instituted by Dutch authorities, for example, if an appeal has been filed against a Commission decision or in cases where the Commission considers revoking a decision.⁵⁰ According to the Dutch government, this would be at odds with a recovery obligation under national law. Consistent with case law of the European Courts, the Dutch Council of State rightly observed in its advice concerning the proposed provisions that it would be better to develop imperative bases of authority.⁵¹ The Dutch government did not follow this advice on the basis of the argument that an obligation to bring a claim would not fit well into the system of, in particular, Dutch private law.

In our opinion, the discretionary wording may easily give rise to misunderstandings, because in view of the strict Community framework governing the recovery of State aid, as evidenced in procedural Regulation 659/1999 and the case law of the European Courts, it is an established fact that a recovery decision issued by the Commission creates direct obligations for the Member State. In accordance with Article 242 EC, an appeal lodged against

it has no suspensive effect, except for the possibility of interim relief. The recovery obligation must therefore be implemented directly. In extraordinary circumstances, national courts may still decide not to require the recovery of unlawfully granted aid, but once the court's decision requires the administrative body to recover State aid,⁵² it should be assumed that the administrative authorities no longer have any scope of discretion. The question arises whether Dutch administrative bodies and recipients of State aid are always aware of this legal regime. Viewed from this perspective, we believe that recovery obligations defined in unmistakable terms are to be preferred. Perhaps, the text may still be amended during the parliamentary debate.

Viewed from a Community law perspective, questions may also be raised about the requirement that decisions rendered by a Dutch court must first be final and unappealable before Dutch administrative bodies may apply the bases of authority for recovery provided for in the bill. This kind of requirement can easily be in conflict with the effective implementation of State aid law in cases where a private person contests a decision granting unlawful State aid to his competitor. If a national first-instance court has established that the directly effective suspension obligation of Article 88 EC has been violated, immediate steps must be taken to protect the appellant, as stated above. It is difficult for the administrative body to contribute to this immediately if the court decision must first have become final and no longer subject to appeal, because there is a fair chance that the State aid recipient will file an appeal against the court decision, which will delay the process.

In addition, it is highly important that the bill has created a general (non-discretionary) authority to claim interest on unlawfully granted State aid, which, in addition, may be charged in the manner prescribed by procedural Regulation 659/1999 and Regulation 794/2004,⁵³ as this point had caused a great deal of difficulty in Dutch practice. It is less practical, however, that this authority in the bill is

50 Parliamentary Papers II 2007/08, 31 418, no. 3, p. 8.

51 Parliamentary Papers II 2007/08, 31 418, no. 4, p. 2.

52 Dutch administrative courts cannot order recovery direct from State aid recipients.

53 Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 2004, L 140/1).

explicitly connected with the adoption of a national recovery decision, because the above-mentioned CELF decision of the Court of Justice shows that in cases where State aid was granted without the Commission's approval but was approved by the Commission retrospectively, the relevant Member State may refrain from recovering this aid. The Court of Justice does require the Member State to claim interest on the aid over the period in which the recipient thereof received this aid unlawfully, namely without the Commission's approval. This case law seems to justify the conclusion that in some cases, national authorities should be able to bring an independent interest claim. In this respect, too, it is advisable to amend the legislative proposal.

In a more general sense, the question was raised whether this legislative proposal facilitates the implementation of State aid law in the Netherlands in the best possible manner.⁵⁴ For instance, in the Dutch literature there have been many pleas for the creation of powers to give instructions for the purpose of allowing the central government to intervene in cases where local government bodies fail to satisfy their Community law obligations. This is because in such cases, the central government, as the representative of the Member State the Netherlands, is liable to the Community. For this reason, any fines or penalties as a result of infringements of Community law must first be paid by the

central government. Since it has been established on several occasions that local government bodies do not always observe State aid law meticulously,⁵⁵ the Dutch Government has announced that it will introduce supervision legislation in this field.⁵⁶ How will this legislation relate to the State aid provisions that will be incorporated into the general civil, administrative and tax legislation after the entry into force of the State Aid Recovery Bill? With respect to the Dutch situation, the Government points out that a deliberate choice was made to incorporate the rules into these general legislative documents that Dutch private actors are familiar with, because the recovery of State aid requires regulating the relationship between government and citizen (businesses). Any powers to give instructions relate to the relationship between government bodies mutually and may be regulated in separate legislation. Viewed from this perspective, there are good arguments for including recovery powers in the above-mentioned acts, whereas the power to instruct an administrative authority to take a recovery decision will be enshrined in a special act called the Compliance with European Legislation by Subnational Authorities Act,⁵⁷ another example of Dutch legislation specifically drafted to enable European law to be fully applied in the Netherlands.⁵⁸

VII. Final Remarks

The State Aid Recovery Bill was recently discussed in the Dutch Parliament. On that occasion, Dutch Members of Parliament from different political parties asked many critical questions.⁵⁹ The legal issues mentioned above received hardly any attention; the parliamentary parties mainly raised questions about the Government's 'expeditious' approach of this subject. Dutch politicians seem to be concerned, inter alia, about the low level of protection of expectations raised among Dutch undertakings and the cancellation of national limitation periods. The politicians do not seem to realise that these issues have already been fully settled in the relevant European case law and that in drafting legislation in this field, the national legislator should operate within the strict parameters of European law.

Separate mention merits the politicians' question why so many powers are created for the

54 On proactive implementation of European law, see also P.C. Adriaanse et al., 'Effective implementation of European Community Law, A Facilitating Role of Dutch General Administrative Law', *Transylvanian Review of Administrative Sciences* 2008, pp. 5-33.

55 An example in the Netherlands is the public funding of a fibre access network in Appingedam, a town in the north of the Netherlands, without prior notification to the Commission. For a ruling of the local court in this case, see the District Court decision of Groningen 3 September 2004, LJN AQ8920. The Commission has declared the State aid measure incompatible with the common market. See Commission Decision of 19 July 2006 on the measure No C 35/2005 (ex N 59/2005) which the Netherlands are planning to implement concerning a broadband infrastructure in Appingedam, OJ 2007, L 86/1.

56 Parliamentary Papers II 2003/04, 21 109, no. 138. See also Parliamentary Papers 2005/06, 30300 VII, no. 65.

57 Wet naleving Europese regelgeving medeoverheden. Parliamentary Papers II, 2007/08, 21 501-30, no. 178.

58 On this topic, see 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*, June 2006, pp. 91-110.

59 Parliamentary Papers II 2007/08, 31 418, no. 5.

purpose of effective enforcement of European State aid law in the Netherlands, whilst research has shown that such powers do not exist in other Member States.⁶⁰ They wondered whether this does not weaken the competitive position of Dutch undertakings unnecessarily. The relevant studies indeed showed that the legal systems of Germany, France, Belgium, Sweden and Malta, which had been examined, lacked specific recovery powers even though these countries were coping with implementation problems similar to those in the Netherlands.⁶¹ A more recent description and analysis of the applicable law concerning State aid in twenty Member States shows, however, that with the present legislative proposal, the Netherlands is no longer at the forefront.⁶² For example, Poland has amended its national legislation to bring it in line with the *acquis communautaire* and to provide for the statutory rules allowing the implementation of the Commission's recovery decisions.⁶³ In the process leading to their accession to the European Union, many 'new' Member States already enacted special statutory provisions, mainly geared towards the exercise of supervisory powers (including recovery) by the State aid authorities in these Member States. We expect that in the near future, several Member States will have the intention to further adapt their national law to Community law obligations and requirements relating to State aid law.

This is why we are of the opinion that the Dutch Government's initiative is commendable, because in recent years, the Netherlands has been confronted with serious legal problems in the recovery of unlawfully granted State aid. The bill offers solutions for these problems. It is understandable that the Dutch Government has chosen to embed the new rules into the general civil, tax and administra-

tive law codifications rather than embody them in a separate single Dutch 'State Aid Act'. An important advantage of this approach is that explicit attention is paid to the relationship with the other provisions of these codifications. In addition, there is usually greater general knowledge of these general rules, which means that in all likelihood, actors concerned will be well aware of the existence of the national State aid rules which, consequently, increases the chance of the use of these rules.

The proposal is capable of improvement on some points, however. Most important, we believe that the requirement that court decisions must be final and no longer open to appeal before administrative bodies may exercise the power to recover State aid, as provided for in the legislative proposal, should be dropped. Further, in view of recent European case law, the power to take a recovery decision in the case of unlawful State aid and the claiming of interest at national level had better be disconnected. But in general, the conclusion can be drawn that with the entry into force of the proposed provisions, the most serious problems affecting the implementation of State aid in the Netherlands will be eliminated.

60 Parliamentary Papers II 2007/08, 31 418, no. 5, pp. 3-4.

61 B.W.N. de Waard, A.J.C. de Moor-van Vugt et al., *Terugvordering van staatssteun, een rechtsvergelijkend onderzoek* [Recovery of State Aid. A Comparative Law Study], Nijmegen: WLP 2005. See also Parliamentary Papers II 2007/08, 31 418, no. 3, p. 2.

62 For a thorough overview of State aid law and practice in 20 Member States, see P.F. Nemitz (ed.), *The Effective Application of EU State Aid Procedures. The Role of National Law and Practice*, Alphen a/d Rijn: Kluwer Law International 2007.

63 Polish Act of 30 April 2004 on the Procedural Issues concerning Public Aid, Dz.U. No. 123, item 1291. See also S. Dudzik, 'Chapter 18 Poland', in Nemitz 2007, pp. 323-343.