

## Summary

1. This treatise deals with the protection of competing entities against state aids in tax matters, based on the prohibition of their implementation in Article 88 (3), 3rd sentence EC Treaty. Article 87 (1) EC Treaty provides that „save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market“. As regards plans to grant or alter aids, Article 88 (3) EC Treaty requires, first, that the Commission must be informed early enough to allow it to submit its comments. Article 88 (3) then requires the Commission to initiate, without delay, the procedure provided for in Article 88 (2) if it considers that the plan it has been notified of is not compatible with the Common Market. Finally, the last sentence of Article 88 (3) EC Treaty unequivocally prohibits Member States from putting the proposed measure into effect until the Commission has completed the procedure and reached a final decision.

2. Tax benefits can constitute such state aids prohibited under Article 87 (1) EC Treaty: Tax benefits are a kind of state support and are not always part of general economic programmes, but may, in some instances, benefit only particular undertakings or the production of specific goods. If the effect of the benefit is strong enough, the reduction of or exemption from taxes can also distort or threaten to distort competition and affect trade between Member States. If a tax benefit is specific and relevant in the above mentioned manner, it has to be regarded as a prohibited state aid under Article 87 (1) EC Treaty and may not be introduced until the Commission has reached its final decision according to Art. 88 (3) EC Treaty. This prohibition on implementation referred to in the last sentence of Article 88 (3) has direct effect and gives rise to individual rights, especially for competing entities. National courts are obliged to safeguard these rights. If a tax relief has been implemented before the Commission has reached a final decision or without it having been notified of such a measure in the first place, a national court requested to order the repayment of aid must grant that application. It is for the internal legal system of every Member State to determine the legal procedure leading to this result.

3. From the outset, German tax law and fiscal proceeding rules are able to safeguard the legal interests of trade competitors, but, in practice, proceedings by third parties in tax matters are rarely effective. The main reason for this is that third parties have no legal standing if the violated law does not protect third parties' interests. Provisions protecting third parties' legal interests are hard to find in German tax law. Trade competitors can usually only base an action on their constitutional rights under the German Basic Law. However, the German Basic Law barely protects the freedom of competition. It only deals with certain aspects of economic life, such as the guaranteed rights to property and freedom of occupation or profession. In the opinion of German finance courts and administrative courts, basic rights protect third parties only against public interference that endangers the very existence of the affected enterprise, but not against any other forms of impairment of free competition.

4. The prohibition on implementation of planned aid laid down in the last sentence of Article 88 (3) EC Treaty substantially facilitates the protection of legal interests of competing entities against tax concessions which are prohibited state aid under Article 87 (1) EC Treaty and have been put into effect without the Commission's approval. The prohibition on implementation creates an individual right that protects those entities obviously competing with the favoured undertakings. This follows from the conception clarified in the jurisdiction of the European Court of Justice that provisions with direct effect are not only favourable to individuals but – if they deal with person related matters – also aim to protect individuals. Furthermore, the Court has approved an actionable right of competitors to participate in the Commission's procedure provided for in Article 88 (2) EC Treaty. This requires that Member State courts cede an actionable right in respect of the prohibition on implementation of unnotified aids to these competitors. Otherwise, the right to participate in the Commission's procedure would be circumvented. As a result, Article 88 (3), 3rd sentence EC Treaty gives standing to afflicted competitors. Thus, they can base an action against not notified aids on an infringement of the prohibition on implementation, which leads to the recovery of granted tax benefits.

5. Legal protection of third parties' interests against tax provisions under German law seems easier to achieve in the Constitutional Court than in finance courts, because, according to the practice of the Federal Constitutional Court, the admissibility of a constitutional complaint in competition matters does not depend on a threat to the existence of the affected enterprise. Consequently, constitutional complaints by com-

peting entities who had not benefited were held to be admissible in a few cases. However, it is not possible to foresee whether a constitutional complaint against a tax law will be admissible, because the so-called subsidiarity of the constitutional complaint – which requires that, unless this would place an unreasonable hardship on the applicant, legal protection must be sought in the finance courts before a constitutional complaint can be lodged with the Federal Constitutional Court – is handled differently in each individual case.

6. At present, the Federal Constitutional Court is not examining whether German law and Community law are compatible, because the Federal Constitutional Court has decided that it shall not use Community law as standard of review. Therefore, individual rights arising from Community law are not protected by the Federal Constitutional Court. In the opinion of the author, although this practice does not violate Community law, it does not do full justice to the German Basic Law, which is open to integration. The avowal of a united Europe in the Preamble of the Basic Law and the newly amended article on European integration call for a greater influence of fundamental ideas of Community law on the interpretation of the Basic Law. In order to secure the future of a united Europe, common European constitutional values must be developed in a sustained process of discourse and comparison of Community law and national constitutional law. For that reason, the basic ideas of Community law concerning free commercial activity of the individual need to be reflected in national constitutional law. Therefore, trade competitors' defensive rights against unlawful state aids which distort competition and affect trade between Member States in an obvious manner should become part of the freedom of competition under German Basic Law.

7. Insofar as the Federal Constitutional Court applies Community law to ascertain basic principles of the EC Treaty, it is entitled to and, due to the non-appealability of its decisions, obliged to refer questions of interpretation to the European Court of Justice.

8. Conclusions/Outlook: German courts will not be spared having to implement Article 88 (3), 3rd sentence EC Treaty and having to protect the rights of individuals arising from it. There is little doubt that the prohibition on implementation gives legal standing to trade competitors. There are first signs that Article 88 (3), 3rd sentence is accepted to contain an individual right, even if a dogmatic basis for this acceptance is lacking. This book should encourage the persons whom it may concern to play their role in the implementation of state aid law in the EC-Treaty by seeking legal protection of their rights. Concerning the pro-

tection of constitutional rights, it remains to be seen whether the Federal Constitutional Court will shoulder its responsibility and start a new era of common European constitutional discourse. It cannot be forced to do so, but the signs of the times call for such action.