

# A CRITICAL ANALYSIS OF THE EUROPEAN UNION'S STATE AID POLICY IMPLEMENTATION.

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## **Abstract**

State Aid policy has been an integral part of competition policy and the European Commission is responsible for controlling aid, which distorts competition in the internal market to be granted by Member States. State Aid is usually defined as advantages given by the State to undertakings in the form of financial contributions, support, or other forms of special treatment. This thesis will examine state aid policy and regulation in the European Union. The research aims at critically analysing the implementation of the rules that compose the European state aid framework and conclude on whether the system for the control of state aid is set in an effective way to achieve the objectives of protecting competition and therefore the internal market by limiting aid levels and streaming aid towards more beneficial aid. This research is important because it can reveal the particular benefits and problems caused by state aid and help by making recommendations for the future application of the rules.

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### **List of abbreviations**

BRO	Business Reconstruction Organisation
CFI	Court of First Instance
DG	Directorate General of the European Commission
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	Treaty European Coal and Steel Community Treaty
ECST	European Coal and Steel Treaty
ECtHR	European Court of Human Rights
EEC	European Economic Community
EFSF	European Financial Stability Fund
EFTA	European Free Trade Association
EMU	European Monetary Union
EP	European Parliament
ESM	European Stability Mechanism
EU	European Union
EurAtom	European Atomic Energy Community
GBER	General Block Exemption Regulation
GDP	Gross Domestic Product
Ibid	immediately preceding footnote
MEIP	Market Economy Investor Principle
MEP	Member of the European Parliament
NYR	Case not yet reported
OECD	Organisation for Economic Cooperation and Development
OEEC	Organisation for European Economic Cooperation
OJ	Official Journal of the European Union
Para	paragraph
R&D	Research and Development
R&D&I	Research and Development and Innovation
R&R	Rescue and Restructuring
SAAP	State Aid Action Plan
SANI	State Aid Notification Interactive
SEA	Single European Act
SGEI	Services of General Economic Interest
SME	Small and Medium Sized Enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
TV	television
UK	United Kingdom
USA	United States of America
VAT	Value Added Tax
WTO	World Trade Organisation

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'1. Financial assistance, no matter in what form it is granted, is incompatible with the common market if it distorts competition and the distribution of economic activities by favoring certain enterprises or certain types of production.

The following exceptions are allowed:

a. Subsidies to individual consumers and to disinterested institutions (schools and hospitals) used as instruments of social policy.

b. Subsidies for the development of certain regions.'

**'Spaak Report', (unofficial translation of the Information Service of the High Authority of the European Community on Coal and Steel from French) June 1956.**

## CHAPTER 1

### INTRODUCTION

#### 1.1 INTRODUCTION

The TFEU, in general, prohibits the granting of aid by Member States to undertakings, because state aid has the effect of distorting competition and affects trade between Member States.<sup>1</sup> The TFEU sets the objective of state aid control to be the protection of competition in the internal market along with the other instruments of the European Union's competition policy, namely antitrust, merger control and abuse of dominance.

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<sup>1</sup> Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47.

The research aims at assessing the implementation of state aid control, by critically examining the powers and responsibilities of different actors at different levels of implementation in the legal order of the European Union and its Member States, without focusing on any individual State. Positive and negative characteristics will be highlighted through the analysis of the relevant state aid legislation, soft law and case law and conclusions are drawn about the shortcomings and suggestions to improve the implementation of the EU state aid policy.

Firstly, it is necessary to present the main and secondary research questions that will drive this thesis and then present the methodology, used by the researcher to conclude on the examination of the main problem. Apart from that, it is necessary to define the basic notions that will be used throughout this thesis, and the more specific legal framework of state aid control that is part of the Treaty on the Functioning of the European Union.

## 1.2 RESEARCH QUESTIONS AND METHODOLOGY

### 1.2.1 Main research question

The Commission has been awarded by the Treaty<sup>2</sup> exclusive competence to assess the compatibility of aid measures with the internal market. The Commission has also been given the competence to adopt legislation, based on Article 108(3) TFEU. The history of the implementation of the state aid policy shows that there is incoherence that affects all other aspects of the state aid policy. To be more precise, there are two choices when it comes to implementing state aid policy. Firstly, there is

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<sup>2</sup> Article 107(1) TFEU [2012] OJ C326/47.

a choice of rules versus discretion and a choice of form against the effects of aid.<sup>3</sup> The Commission's choices seem not to be persistent with a clear choice of one versus the other always. This leads to problems in the implementation of state aid. The main research question asks whether there is optimum implementation of the state aid policy and if not what are the problems and solutions. Some initial thoughts on the choices available for the control of state aid follow.

For the first issue of rules versus discretion: In the early years of state aid control there were no regulations in force and the control of subsidies<sup>4</sup> was primarily performed according to the case law of the Court of Justice of the European Union (henceforth the Court).

Then, in the late 1990's after a proposal by the Commission the Council adopted the Procedural Regulation,<sup>5</sup> which formalised the Commission's assessments. There was a clear choice of rules against discretion. Also, the Commission decided to implement a vast amount of soft law because of the Council's unwillingness to adopt secondary legislation for the control of subsidies.<sup>6</sup>

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<sup>3</sup> Allison Oldade and Henri Piffaut, 'Introduction to State aid law and policy' in Kelyn Bacon (ed), *European Community Law of State aid* (OUP, Oxford 2009) 16. More analysis on the benefits of the effects based assessment versus a form based one in paragraph 7.4 of the seventh chapter of the thesis.

<sup>4</sup> This thesis will use the term subsidy to mean state aid as a convention. The difference between subsidies and state aid is very laconically stated by J Almunia in speech 'Time for the Single Market to come of age' date 20/03/2013, SPEECH/13/243: 'State aid is only a province of all government interventions. A subsidy or other measure becomes State aid only when it gives an advantage to companies on a selective basis.

In addition, some interventions are exempted from our control because we know that government action is sometimes essential for a well-functioning and equitable economy.'

<sup>5</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>6</sup> M Blauberger, 'Of 'good' and 'bad' subsidies: European state aid control through soft and hard law' [2004] 32(4) West European Politics 719, 725

Next, for the issue of the choice of the effects versus the form of the measure as a better assessment method of aid measures: the Commission adopted the State Aid Action Plan of 2005<sup>7</sup> that introduced the more refined economic approach and tried to shift the focus from rules to the effects of the aid, which should be the basis for the compatibility analysis. If there is going to be an analysis of measures based on their effects on economic terms, surely the numerous soft law instruments for state aid control that have been introduced over the years would not be applicable any more.<sup>8</sup>

The thesis aims to identify the other problems that can be observed during the implementation of state aid control by all of its actors, national and supranational, in the following chapters.

In the first chapter, this thesis will present further research questions, will analyse how state aid policy is implemented through secondary legislation and soft law and define the legal framework which provides for the basic principles of state aid that are in force within the 28 Member States of the European Union. The European Union is the legal territory that is the subject of the analysis of the research.

### 1.2.2 Outline of the chapters and further research questions

The first research question arises from the fact that Member States grant aid to their undertakings, even though there is a general prohibition

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<sup>7</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final

<sup>8</sup> M Blauburger, 'Of 'good' and 'bad' subsidies: European state aid control through soft and hard law' [2004] 32(4) West European Politics 719, 725.

One can certainly argue against that point: that the rules do not necessarily contradict the effects based approach, if the rules contain details on the assessment based on the effects of the aid. However, the various soft law documents are not necessarily based on the assessment of economic criteria. Rather, the Commission tries through them to guide the Member States into the specific aid measures that it has decided do not harm competition, such as the approach to the less and better targeted aid.

since 1957. The question can be very laconically stated as why Member States grant state aid. Of course, the derogations from the prohibition are also in effect along with the prohibition, but the research shows that state aid is appealing to Member States for certain reasons. The answer to this question will be given in the second chapter, where this research will examine the economic factors that influence the need for state aid and the purpose of each kind of aid. Another reason why Member States grant aid is the financial crisis of 2008, which has transformed into a sovereign debt crisis more recently. Consequently, the second chapter critically examines the effects of the financial crisis on state aid regulation, which was chosen to be the basic vehicle of the Union's response to the crisis, and thus affected the rules temporarily, but substantially.

The examination of the Commission's procedures for the control of state aid will be the main topic of the third chapter. The research will be performed between two legal regimes: first is the supranational; this is comprised by the EU Treaty and the secondary legislation that generates the European Commission's competence to adopt decisions, implementing the Union's state aid policy. Also included in the supranational regime is the jurisdiction of the Court of Justice of the European Union to review the control of state aid implemented by the Commission. The research question that is dominating the supranational aspect of state aid rules and enforcement procedures is to try to identify the limits of the supranational regime that make the enforcement of state aid control inadequate to protect competition and allow the internal market to remain intact. This will be an analysis of positive and negative effects of the Commission's competences



in state aid control, and also, the Commission's power to order the recovery of unlawful aid will be examined.

Part of the third chapter will include analysis of the developments in the Commission's state aid control mechanisms and the changes that the Modernisation has brought forward, in relation to the handling of complaints and the Commission's powers to initiate investigations on its own initiative, which aim to refocus its resources to capturing distortive types of aid. Also, an analysis of the Commission's power to order recovery forms part of chapter three. The Commission has found that 'there is practically not a single case in which recovery was completed within the deadline set out in the recovery decision',<sup>9</sup> a statement that exposes the problems in its procedures. Furthermore, the Commission considers that the fact that '45% of all recovery decisions adopted in 2000-2001 had still not been implemented by June 2006',<sup>10</sup> demonstrates the problems and inadequacies of this procedure, which undermines the whole state aid Framework. Those figures triggered the adoption of the Notice on recovery, which provided more guidance to Member States and improved the implementation of recovery decisions.<sup>11</sup> The Commission's Decisions can be reviewed by the Court, whose powers will be analysed next.

The fourth chapter will conclude the supranational aspect of the implementation of state aid control by critically analysing the enforcement

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<sup>9</sup> Notice from the Commission - Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid [2007]OJ C272/04 para 3.

<sup>10</sup> Ibid .

<sup>11</sup> The most recent data published on 21/12/2012 show that there is still a lot to be accomplished in the implementation of recovery decisions: the percentage of illegal and incompatible aid that remains to be recovered has risen to 14.4% of all recovery decision on 30 June 2012, up from 11.1% in 2010. Data available on the latest edition of the State Aid Scoreboard – Autumn 2012 update, COM(2012) 778 final, para 5.2.

of state aid control in the Court of Justice of the EU. There can be both private and public enforcement of state aid rules in the Court. Private enforcement has been given significant attention by the Commission, recently, in every aspect of Competition law, whether it is state aid, or antitrust. In the future, private enforcement might become even more important but there are still many obstacles for private claims to be well founded and thus successful. Private enforcement can be pursued both before national and European Courts. The focus of the sixth chapter is the private and public enforcement of state aid rules, before the Court of Justice of the European Union (Court). The research will examine the reasons behind the problems of enforcement of state aid law in the Court. It is true though, that the Court's case law has provided state aid law with various solutions to problems over the years. However, there are still some problems that mainly have to do with the standing of third parties in the Court, other than the Member States, and with the obligation to prove causation in damages cases. Next, the thesis will critically analyse the powers and procedures of the national actors of state aid control.

The fifth chapter aims to examine how the Member States can increase compliance with correct application of state aid control, especially after the Commission's statement in the State Aid Modernisation that the 'responsibilities of Member States for ensuring the correct enforcement of state aid rules would increase'.<sup>12</sup> The Commission has highlighted a problem of compliance with state aid rules either at the stage of designing or

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<sup>12</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM) COM(2012) 209 final, para 21.

implementing state aid measures: Commissioner Almunia has said that ‘over 40% of the cases we have monitored are potentially problematic’.<sup>13</sup>

The reasons for non-compliance can be categorised as either lack of knowledge of state aid rules, or faulty analysis of the rules that leads to the decision that a measure is compatible with the TFEU, or lastly, deliberate infringement of state aid rules from Member States authorities that design and implement measures.<sup>14</sup> The Commission has sought compliance in the past with many ways: mainly by simplifying procedures, adopting guidance through soft law and the imposition of fines for non-compliance with its Decisions.

This fifth chapter will suggest the introduction of independent national authorities in the state aid control as an institutional change to achieve better compliance with state aid rules. After examining the benefits and inadequacies of the supranational level of subsidy control the focus will be shifted to the national level. The relevant research question is whether there is a need for a partial decentralisation of state aid control, and which competencies can the national authorities, involved in state aid control, ultimately have? Consequently, the focus of this chapter will be on the national mechanisms on state aid control. The analysis is based on the finding that there is a discrepancy at the level of involvement between different Member States, and that is something that should be resolved, in order to make state aid control implementation more effective.<sup>15</sup> The differences that exist will be analysed, and possible solutions for the future

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<sup>13</sup> J.Almunia, ‘The State Aid Modernisation Initiative (Brussels June 7, 2012) Speech at the European State Aid Law Institute’ SPEECH/12/424.

<sup>14</sup> Phedon Nicolaides, ‘State Aid Modernization: Institutions for Enforcement of State Aid Rules’ (2012) 35 (3) World Competition 457, 461.

<sup>15</sup> More analysis will be included in the fifth chapter of the thesis.

modernisation of state aid control at the national level are being examined in the fifth chapter. The analysis will be in the form of an examination of the positive and negative effects of a decentralised system of enforcement.

Another important step towards improvement of state aid control is the Commission's Notice on the enforcement of State aid law by national courts,<sup>16</sup> which aims 'to inform national courts and third parties of the remedies available and to provide them with guidance'.<sup>17</sup> The problem that has been identified is that enforcement at the national courts is still not effective enough, and the reasons behind that failure will be the main focus of the sixth chapter. An examination of a sample of national case law is included to determine how the national courts enforce state aid law. It is argued that engaging national courts in the enforcement of state aid rules can be beneficial to the Union's aim for less and better targeted state aid, because it provides an opportunity for private parties to secure their rights against illegal aid measures at a more familiar level to them. The Court has accepted that due to the absence of Union-wide rules to govern private claims for breach of Union rules on competition, it is up to the national legal systems of Member States to regulate these procedures. The only conditions applied by the Court in this are the principles of equivalence and effectiveness.<sup>18</sup>

Having analysed the competences and problems that appear in the implementation of state aid control by its different actors the seventh chapter critically examines the major reforms and modernisation of the state

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<sup>16</sup> Commission Notice on the enforcement of State aid law by national courts [2009] OJ C85/1.

<sup>17</sup> Ibid para 6

<sup>18</sup> For example see Case C-453/99 *Courage Limited v Bernard Crehan* [2001] ECR 6297.

aid policy: namely the SAAP, the reform of state aid rules for services of general economic interest, and the comprehensive modernisation of state aid policy that is underway. The final, seventh chapter aims to discover the benefits that each one of those reforms has brought to the implementation of state aid control. Also, it aims to find what should be the directions of the future modernisation, based on the findings of the research from the previous chapters of the thesis. The thesis will conclude that there is a need for a reform of state aid that will include fewer, simpler rules that apply horizontally to all state aid measures, irrespective of economic sectors and better targeted enforcement, both at the supranational and the national level, where there are discrepancies that need to be corrected.

The results of the analysis of this research show that the application of state aid rules in the European Union has to be performed by two groups of actors that need to work together for it to be more effective. The first being the European Union's institutions, namely the Commission and the Court; the second are the national governments of Member States, their independent competition authorities and the national courts. The collaboration of all those actors is needed, and the examination of past practises has proved that there is dysfunction.

This research attempts to provide possible suggestions for the optimisation of this collaboration. Especially, the research highlights the shortcomings of the different rules and procedures and suggests possible improvements. Next, the methodology of the research is presented.

### 1.2.3 Methodology

This research is a legal analysis of the effectiveness of state aid control in the European Union. This research follows a qualitative technique to provide its results. However, quantitative data are used throughout the thesis to support the arguments with evidence. The researcher's tools for this purpose will be the critical examination of the state aid framework; this includes primary and secondary EU legislation, soft law, national procedures and case law, produced by the Court of Justice of the EU in both of its compositions that have jurisdiction to rule on state aid cases, which are the Court Of Justice and the General Court, as well as the case law of national courts of Member States.

To establish whether the current state aid control implementation is effective, the research finds appropriate criteria in the Commission's documents that launch major modernisations of state aid control; namely, the State Aid Action Plan and the Speech of Vice-President Almunia at the 2012 European Competition Forum.<sup>19</sup> Those criteria are: firstly, the speed and applicability of the procedures that are in place to assess state aid measures<sup>20</sup> were tested. Secondly, the coherence<sup>21</sup> and transparency<sup>22</sup> of the legislation in force that implements state aid control was questioned. Third

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<sup>19</sup> First annual European Competition Forum, Brussels, February 2012. The Commission announced the comprehensive modernisation of the state aid policy.

<sup>20</sup> Vice President of the European Commission responsible for Competition Policy J Almunia, 'Priming Europe for Growth', speech at the European Competition Forum, Brussels, 2 February 2012 SPEECH/12/59: 'taking quicker decisions' and State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final para 50: 'The Commission will also reduce delays by encouraging a higher quality of notifications'.

<sup>21</sup> Vice President of the European Commission responsible for Competition Policy J Almunia, 'Priming Europe for Growth', speech at the European Competition Forum, Brussels, 2 February 2012 SPEECH/12/59: 'Our guidance will be rooted in a core set of common principles, which would address a consistency issue we have today;'.

<sup>22</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final para 53: 'request more transparency in the general principles of state aid control'.

criterion is the need to accompany the state aid rules with strong enforcement mechanisms<sup>23</sup> and procedures, in both the supranational and the national levels.<sup>24</sup> Those criteria will guide the analysis of the implementation of state aid control by its various actors and their relevant procedures. The first criterion is mainly applied in the first, third and fifth chapters, where the administrative procedure of the Commission and the administrative national procedures are being critically analysed. The second criterion is being applied throughout the thesis, on the relevant legislation that each chapter analyses. The last criterion is mainly applied in the fourth and sixth chapters where enforcement mechanisms both at the national and supranational level are being critically examined. These criteria will be applied to the implementation of state aid performed by the actors of the state aid policy, which are the Commission, the Court of Justice of the European Union, the Member States' governments and national authorities, and national courts.

However, due to the nature of Competition law, whose one part is state aid law, this legal research must include other aspects of scientific knowledge that contribute to the implementation of Competition law, which is the foundation of this research. The basic aim of European Union Competition law is that it 'exists to protect competition in a free market economy'.<sup>25</sup> Therefore, competition law affects the regulation of markets and the economy. This fact brings forward the need for an interaction of the

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<sup>23</sup> Ibid para 53: 'The effectiveness and credibility of state aid control presupposes a proper enforcement of the Commission's decisions'.

<sup>24</sup> Ibid para 51: 'the Commission will examine whether independent authorities in Member States could play a role as regards facilitating the task of the Commission in terms of state aid enforcement (detection and provisional recovery of illegal aid, execution of recovery decisions)'.

<sup>25</sup> A Jones and B Sufrin, *EC Competition law* (3<sup>rd</sup> edn OUP, Oxford 2007) 1.

law with economics. The European Commission notably, has declared its eagerness to ‘strengthen its economic approach to state aid analysis’.<sup>26</sup> This, in particular, has, in practice, come to mean that economic theories, which are incorporated into Competition law by secondary legislation,<sup>27</sup> have a role to play in the assessment of state aid cases by the Commission. Consequently, to some extent the scope of this research requires some economic analysis that will be performed in relation to the definition of state aid by the Treaty and the application of the enforcement procedures by the Commission and the Courts. Even so, this economic evaluation of state aid law will be as limited, as it is necessary, for the scope of this legal research.

Another interaction with the legal analysis will come from the fact that state aid control deals with the actions of supranational institutions, states, administrative competition authorities and private companies. Each group has its own rights to protect and its own policies to put into effect. Most of the times, those policies do not converge with one another, but rather they conflict, due to the different objectives each group aspires to achieve. Consequently, the analysis must involve aspects of political theory as far as State action is concerned and administrative law as far as institution’s and national authorities’ action is concerned. All of those compose the critical analysis of state aid control, which, for the purpose of this research, will be a legal analysis of all aspects of state aid law implementation.

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<sup>26</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final.

<sup>27</sup> I Lianos, ‘Judging economists: economic expertise in Competition law litigation: a European view’ in I Lianos and I Kokkinos (eds), *The reform of EC Competition Law- New challenges* (Kluwer law, The Netherlands 2010) 239.



#### 1.2.4 Defining the implementation, modernisation and decentralisation of the state aid policy

The hypothesis of the thesis is that apart from the current rules organising the European system of state aid control, there also needs to be effective implementation of those rules, in the sense that the public intervention in the form of state aid should be promoting the most effective measures, which are the ones that do not distort competition in a great degree.<sup>28</sup> The objective of evaluating the efficiency of the implementation of state aid rules is to establish, whether it achieves the aim of ‘less and better targeted aid’.<sup>29</sup> If the law and procedure proves to be ineffective, there needs to be modernisation of the state aid control policy.

Implementation means realisation of a policy. In the specific context of state aid, this research is important, because it can reveal the specific benefits and problems caused by state aid and help by making recommendations for the future application of the rules. The implementation of state aid policy is performed in two levels: first at a supranational level by the institutions of the European Union; secondly, at a national level by the various authorities of the Member States. This dual model will be followed as a method for performing the analysis.

Modernisation of the state aid policy is a term that the Commission has used, whenever it plans to reform the state aid rules, in a more horizontal approach that affects the implementation of all state aid measures, regardless of economic sectors and special state aid rules that

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<sup>28</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final para 18.

<sup>29</sup> Ibid para 18.

apply only to specific sectors. One significant modernisation package has been the 2005 state aid Action Plan<sup>30</sup> and the reforms that it initiated will be analysed in the final chapter of the thesis. In more recent times, the Commission used the term modernisation in its announcement of the comprehensive modernisation of the EU's state aid policy in the speeches during the European Competition Forum.<sup>31</sup> Both times the term has been used without providing some form of definition; instead, the basic elements of the modernisation are given. The rationale behind the need for modernisation according to the Commission is the need to refocus on the cases that impact on the internal market most. This objective will be reached by modernising rules and procedures in a simpler, more targeted way.

One possible specific form of the modernisation could be the decentralisation of the state aid policy. This term has been used before in Competition law, when Regulation 1/2003<sup>32</sup> modernised Competition law enforcement, by abolishing the system of notifications and replacing it with a system of shared enforcement between the Commission and Member States' authorities. For better coordination, a system of coordination was introduced, in the form of a European Competition Network. This type of modernisation could be introduced in state aid as well as the indication has been given by the Commission in its SAAP consultation documents and more recently at the European Competition Forum. This type of modernisation for state aid policy has been opposed, so far, because of the

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<sup>30</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final

<sup>31</sup> Vice President of the European Commission responsible for Competition Policy J Almunia, 'Priming Europe for Growth', speech at the European Competition Forum, Brussels, 2 February 2012 SPEECH/12/59.

<sup>32</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1

specific character of the state aid investigations, which are limited between the Commission and the Member States, whereas, antitrust and merger enforcement is performed against the undertakings and not the Member States.<sup>33</sup> Based on that reality, some feel that it is highly unlikely that a decentralisation, where the Commission will share the competence of evaluating the compatibility of measures with the Member State authorities will ever be the main event in a modernisation.<sup>34</sup> However, this research will conclude that there is some level of enforcement that could be performed by the Member States authorities, and the thesis will further discuss the benefits that could come from partial decentralisation of state aid control in the fifth chapter.

### 1.3 HOW STATE AID POLICY IS FORMED AND IMPLEMENTED

The European Council met in Lisbon in March 2000 and agreed a new strategy for the European Union to promote employment and social cohesion in what it was hoped to be a 'knowledge-based economy'.<sup>35</sup> The Presidency conclusions of that summit included goals for the state aid policy of the Union: state aid and competition were needed to secure a level playing field for all in the internal market. More particularly the summit called for the Union to reduce the level of state aid and to promote horizontal aid instead of benefiting individual companies or sectors.<sup>36</sup> This was opening a new dimension in the implementation of the state aid policy and certainly the Commission promoted those goals by adopting relevant

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<sup>33</sup> M Negenman, 'A state aid network?' [2011] 4 EstAL 621.

<sup>34</sup> Ibid 623.

<sup>35</sup> Presidency conclusions for Lisbon strategy, Lisbon European council 23 and 24 march 2000 available at < <http://www.consilium.europa.eu>> accessed on 13/5/2013

<sup>36</sup> Ibid, para 17

soft law measures aimed at limiting aid levels and that directed state aid to horizontal objectives.

In March 2001 the Stockholm European Council asked the Member States to reduce state aid as percentage of GDP by 2003 and thus set a standard by which the trend would be examined in the future through the publication of a Scoreboard.<sup>37</sup> The Lisbon Strategy, as those policies agreed in Lisbon were known as, had to be re-launched in mid-2000 because of disappointing results.<sup>38</sup> The 2001 Scoreboard<sup>39</sup> reports a decline of 30% in total aid between 1997 and 1999; however, four Member States had increased the levels. The 2002 Scoreboard reports that although total aid levels for the EU are falling there are disparities among Member States: total aid per Member State ranges between 0.46% of GDP in the UK to 1.44% in Finland.<sup>40</sup> Apart from the disparities, the 2005 Scoreboard which takes into account the Commission's mid-term review of the Lisbon Strategy reports that despite a slight decrease in aid levels the trend in total aid as a percentage of GDP is stable and not clearly downward.<sup>41</sup> The latest Scoreboard reports that the total aid levels for 2011 are 0.5% of GDP, although it concedes that this decline is probably due to strict budgets and not the will of the Member States to reduce aid levels. This number of course excludes aid to the financial sector, for which outstanding guarantees

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<sup>37</sup> State Aid Scoreboard 2001, second edition Brussels, COM(2001)782 final 4

<sup>38</sup> Thibaut Kleiner, 'Reforming state aid policy to best contribute to the Lisbon Strategy for growth and jobs'[2005] 2( Summer) Competition Policy Newsletter 29

<sup>39</sup> State Aid Scoreboard 2001, second edition Brussels, COM(2001)782 final

<sup>40</sup> State Aid Scoreboard 2002, Spring edition Brussels, COM(2002) 242 final 6

<sup>41</sup> State Aid Scoreboard 2005, Spring edition Brussels, COM(2005) 147 final 4

and other liquidity measures accounts to 5.7% of EU GDP,<sup>42</sup> which is still state aid after all.

The Commission's tools in order to push the objectives of the Lisbon Strategy in state aid have been, apart from the Scoreboard and an e-newsletter as governance instruments,<sup>43</sup> soft law instruments that contain rules on horizontal objectives. It is clear that neither the Treaty nor the Lisbon summit ask or allow the Commission to judge Member States' use of public funds.<sup>44</sup> The Commission has been given exclusive competence to assess measures that distort competition and trade between Member States and therefore 'needs to exercise caution'<sup>45</sup> when it is adopting soft law instruments that affect other policies of the Member States.

The Commission adopts Frameworks, Codes, Communications, Guidelines and Notices, which contain the rules that it will apply when it decides on the compatibility of aid measures with the Treaty. Those instruments are usually referred to as 'soft law', as opposed to a Commission Decision, which is legislation and a Commission Opinion or Recommendation that are legal acts. Soft law is part of the new governance procedures that were introduced into the EU legal order in the 1990's as an alternative to harder EU rules or as others have seen it as a 'half - way house between the Commission's discretion and EU legislation.'<sup>46</sup> Governance has

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<sup>42</sup> State Aid Scoreboard 2012, Autumn edition Brussels, COM(2012) 778 final 6

<sup>43</sup> Erika Szyszczak, *The regulation of the state in competitive markets in the EU* (Hart, Oxford and Portland, Oregon 2007) 25

<sup>44</sup> Thibaut Kleiner, 'Reforming state aid policy to best contribute to the Lisbon Strategy for growth and jobs'[2005] 2-Summer Competition Policy Newsletter 30

<sup>45</sup> Ulla Neergaard, 'The Commission's soft law in the area of services of General Economic Interest' in Erika Szyszczak, Jim Davies, Mads Andenaes, Tarjei Bekkedal (eds), *Developments in Services of General Interest* (Springer 2011) 53

<sup>46</sup> Michelle Cini, 'The soft law approach: Commission rule-making in the EU's state aid regime' [2001] 8 *Journal of European Public Policy* 192, 195

been defined as ‘collectively binding decisions [...] taken by elected representatives within parliaments and implemented by bureaucrats within public administrations’.<sup>47</sup>

Soft law acts do not contain legally binding rules and are published in the C section<sup>48</sup> of the Official Journal not the L, which publishes legislation. They do entail, though, ‘practical effects’<sup>49</sup> in the sense that they do bind the Commission in abiding with the interpretation of the law that they contain. The Commission has not been given power to issue ‘general rules of conduct’, such as the Guidelines in state aid control but some writers believe that over the years it will have acquired regulatory powers in its own name to limit itself by issuing soft law instruments.<sup>50</sup> The legal basis of secondary Union acts has been requested to be included explicitly by the Court;<sup>51</sup> the legal basis for the Commission’s soft law has been Article 108(1) of the Treaty on the Functioning of the European Union, which allows the Commission to take ‘appropriate measures’ for the control of state aid.<sup>52</sup> Even though soft law instruments are not legally binding the Commission seeks the widest possible approval from the Member States before the adoption of a new instrument. The procedure of adoption

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<sup>47</sup> Oana Stefan, ‘Hybridity before the court: a hard look at soft law in the EU competition and state aid case law’ (2012) 37(1) *European Law Review* 49,50

<sup>48</sup> Case C-94/91 *Wagner v Fonds d'intervention et de regularization du marché du sucre* [1992] ECR I-2765 para 16.

<sup>49</sup> Francis Snyder, ‘Soft law and institutional practice in the European Community’, in Steven D. Martin (ed.), *The Construction of Europe* (Kluwer Academic Publishers, 1994), 198

<sup>50</sup> Giacinto della Canacea, ‘Administration by Guidelines: The policy guidelines of the Commission in the field of state aid’ in Ian Harden(ed), *State aid: Community law and policy* (Cologne: Bundesanzeiger 1993) 70

<sup>51</sup> Case C-325/91 *France v Commission* [1993] ECR I-3283, para 26

<sup>52</sup> Michael Blauburger, ‘From negative to positive integration? European state aid control through soft and hard law’ (2008) Max Plank Institute for the study of Societies, Discussion Paper 08/4, 13 available online at < [http://www.mpifg.de/pu/mpifg\\_dp/dp08-4.pdf](http://www.mpifg.de/pu/mpifg_dp/dp08-4.pdf)> last accessed 3/10/2013

includes informal consultation at multilateral meetings and the circulation of written drafts.<sup>53</sup> If the majority of Member States accept the soft law instrument, then the Commission threatens the Member States that opposes with opening up the formal investigation procedure for all of the existing state aid measures that the said Member State implements in the sector or area that the new instrument refers to.<sup>54</sup> This is the legal status of state aid soft law, where the Commission and Member States are concerned.

From the point of view of the Court of Justice of the EU there is a difference between hard law and notices and guidelines; the Court differentiates between rules of law and rules of practice.<sup>55</sup> The Court though has undertaken the review of guidelines to establish whether they comply with the Treaty.<sup>56</sup> In fact, a quantitative study,<sup>57</sup> conducted in the case from 1953 to 2011, has revealed that soft law is referred to in 291 state aid judgments and that this case law refers to 73 different state aid soft law instruments. According to the findings of the study soft law is acknowledged by the Court as complementing and detailing hard law.<sup>58</sup> The Court examines soft law instruments and grants them limited legal effects by denouncing that soft law instruments cannot contrast general principles of law that are protected in the Treaty, such as the principle of legitimate

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<sup>53</sup> Frank Rawlinson, *The role of policy frameworks, codes and guidelines in the control of state aid* in Ian Harden(ed), *State aid: Community law and policy* (Cologne: Bundesanzeiger 1993) 60

<sup>54</sup> Michael Blauburger, 'State aid control from a political science perspective' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 31.

<sup>55</sup> Oana Stefan, 'Hybridity before the court: a hard look at soft law in the EU competition and state aid case law' (2012) 37(1) *European Law Review* 49,59

<sup>56</sup> Case 310/85 *Deufil GmbH and Co. KG v Commission* [1987] ECR 901, para 22.

<sup>57</sup> Oana Stefan, 'Hybridity before the court: a hard look at soft law in the EU competition and state aid case law' (2012) 37(1) *European Law Review* 49,51

<sup>58</sup> *Ibid*, 52

expectations.<sup>59</sup> Thus, soft law instruments are not considered legislation and there can be both positive and negative effects from the use of soft law instruments as a means of policy implementation.

Soft law can be adopted more easily, since there are no complex parliamentary procedures involved in its adoption process; it allows for rules to be adopted when the legislative procedure has failed to produce traditional legal instruments. That was certainly the case for state aid policy, when the Member States failed to agree on a Council Regulation for the implementation of state aid.<sup>60</sup> Another positive characteristic of soft law instruments is that they can be helpful as a guide for enforcers of policies, such as the Commission in state aid matters and the public.<sup>61</sup>

On the contrary, soft law can be criticised for often being vague, inconsistent with current legislation and not easily available to the public, especially since the formal legislative procedures have been by passed in its adoption process. Furthermore, policy implementation by soft law can lead to soft compliance,<sup>62</sup> which can undermine the whole policy goals. Finally, due to the informal character of its adoption procedure some smaller Member States consider themselves neglected,<sup>63</sup> since the normal voting rights in the Council do not apply.

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<sup>59</sup> Case C-189/02 *Dansk Rørindustri* [2005] ECR I-5425 para 211; Case T-357/02 *Freistaat Sachsen v Commission* [2007] ECR II-1261, para 118

<sup>60</sup> Michael Blauburger, 'State aid control from a political science perspective' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 31. More on the adoption process of soft law acts is included in paragraph 3.13.2 of the thesis as it forms part of the examination of positive and negative effects of the supranational aspect of state aid policy.

<sup>61</sup> Michelle Cini, 'The soft law approach: Commission rule-making in the EU's state aid regime' [2001] 8 *Journal of European Public Policy* 192, 194

<sup>62</sup> *Ibid.*

<sup>63</sup> M Aldestam, '*Soft Law in the State Aid Policy Area*' in U Mörth (ed.), *Soft Law in Governance and Regulation: an Interdisciplinary Analysis* (Cheltenham: Edward Elgar, 2004), 14.



In state aid, in particular, soft law is the main instrument of the Commission's policy implementation. It has been said that state aid policy was 'rule-based',<sup>64</sup> at least until the introduction of the effects-based approach with the 2005 State Aid Action Plan.<sup>65</sup> Soft law has many forms in state aid. Soft law has been distinguished into three categories: a) preparatory instruments, b) interpretative and decisional instruments and c) steering instruments.<sup>66</sup> In state aid control the second category applies the most and it contains Communications, Frameworks, Notices, Guidelines and Codes. Frameworks only apply to the industry sector that is clearly defined in them. They codify state aid rules applicable to that sector, they set the aid intensity limits and they define notions that are important for the Commission's control. Notices, Guidelines and Communications, are also not legislative documents and may not be immediately published. The Court has specifically stated that an informal policy framework 'constitutes guidelines setting out the course of conduct which the Commission intends to follow and with which it asks the Member States to comply'.<sup>67</sup> Moreover, when Guidelines codify previous case law it is the case law that is binding.<sup>68</sup>

It has been argued whether the legal form of the instrument, by which the policy is being implemented, reduces the Commission's discretion to decide on the compatibility of state aid measures, granted to it

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<sup>64</sup> Michelle Cini, 'The soft law approach: Commission rule-making in the EU's state aid regime' [2001] 8 *Journal of European Public Policy* 192,198.

<sup>65</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final.

<sup>66</sup> Ulla Neergaard, 'The Commission's soft law in the area of services of General Economic Interest' in Erika Szyszczak, Jim Davies, Mads Andenaes, Tarjei Bekkedal (eds), *Developments in Services of General Interest* (Springer 2011) 51

<sup>67</sup> Case 310/85 *Deufil GmbH and Co. KG v Commission* [1987] ECR 901, para 22

<sup>68</sup> Giacinto della Canacea, 'Administration by Guidelines: The policy guidelines of the Commission in the field of state aid' in Ian Harden(ed), *State aid: Community law and policy* (Cologne: Bundesanzeiger 1993) 69

by the Treaty. The form of the instrument should not have any effect on the matter; rather it is the content of the soft law that could minimise the Commission's 'margin of discretion'.<sup>69</sup>

Rawlinson<sup>70</sup> has indicated that the numbers tell the truth about state aid: at the end of 1989 the state aid Compilation of rules applicable to state aid, was 323 pages long, with a supplement of 172 pages.<sup>71</sup> His conclusion was that the Commission's state aid policy is rule based.<sup>72</sup> The alternative to state aid soft law acts would be more 'hard law'; legislative acts that would have been adopted by the ordinary legislative procedure of the European Union, possibly having the form of Council or Commission Regulations. The Commission feels that it would be 'inappropriate'<sup>73</sup> to have more Regulations for state aid matters, because it has been 'given responsibility to apply state aid rules'<sup>74</sup> by the Treaty.

To conclude, the effects of the use of soft law in such a large degree in state aid policy implementation has been that the Commission was able to lever an increasing amount of case load more effectively with limited resources. More importantly, though, implementation through secondary legislation and soft law has become a strong point for the Commission in its quest to control aid. Through the various soft law instruments and their

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<sup>69</sup> Frank Rawlinson, *The role of policy frameworks, codes and guidelines in the control of state aid* in Ian Harden(ed), *State aid: Community law and policy* (Cologne: Bundesanzeiger 1993) 59

<sup>70</sup> Ibid 52.

<sup>71</sup> Up to 3 September 2013 the Compilation of rules applicable to state aid is 934 pages long. Available online at [http://ec.europa.eu/competition/state\\_aid/legislation/compilation/index\\_en.html](http://ec.europa.eu/competition/state_aid/legislation/compilation/index_en.html) accessed on 2/10/2013.

<sup>72</sup> Frank Rawlinson, *The role of policy frameworks, codes and guidelines in the control of state aid* in Ian Harden(ed), *State aid: Community law and policy* (Cologne: Bundesanzeiger 1993) 52.

<sup>73</sup> Ibid 60.

<sup>74</sup> Ibid

interpretations of legislation the Commission has been able to lead Member States to granting less aid and aid that falls within what it is considered good aid. Through soft law the Commission has been able to resist political pressure from the Member States and has strengthened its dominant role in state aid policy-making.<sup>75</sup>

#### 1.4 EUROPEAN UNION RULES ON STATE AID

The Treaty of Lisbon was signed on 13 December 2007 by the Member States of the European Union and entered into force on 1 December 2009. It is the latest Treaty to come into effect, which provides the legal basis for the existence of the European Union in the legal world. The Lisbon Treaty amended the existing Treaties, namely the Treaty of the European Union<sup>76</sup> (TEU) and the Treaty establishing the European Community.<sup>77</sup> Under the old Treaties the European Union and the European Community were two separate legal personalities and Competition law was regulated within the EC Treaty. Under the Lisbon Treaty this system of dual legal personality has ended, and the European Union was given a single legal personality. Since 1 December 2009, the European rules on Competition are included in the amended Treaty establishing the European Community (EC Treaty), which is since then called Treaty on the Functioning of the European Union (TFEU).

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<sup>75</sup> Michael Blauburger, 'From negative to positive integration? European state aid control through soft and hard law' (2008) Max Plank Institute for the study of Societies, Discussion Paper 08/4, 13 available online at < [http://www.mpifg.de/pu/mpifg\\_dp/dp08-4.pdf](http://www.mpifg.de/pu/mpifg_dp/dp08-4.pdf)> last accessed 3/10/2013

<sup>76</sup> Treaty on European Union (Maastricht 1992) [1992] OJ C191/01.

<sup>77</sup> Treaty Establishing the European Economic Community (Rome 1957).

State aid is part of the rules on Competition, together with anti-trust and merger control. It should be mentioned that, similarly to the EC Treaty, Article 4(c) of the European Coal and Steel Treaty (ECST) prohibited state aid to industries, and aid was exceptionally permitted under secondary legislation adopted according to Article 95 ECST, due to the nature of the coal and steel industry, and its importance as the driving force of the European countries, and the need to control it completely.<sup>78</sup> The ECST has expired on 23 July 2002 and aid to the coal and steel industry is currently regulated by the provisions of the TFEU.<sup>79</sup>

The basic provisions for state aid in the European Union are currently contained in Articles 107, 108 and 109 of the TFEU (former Articles 87, 88 and 89 of the EC Treaty and 92, 93 and 94 before the amendment of the Treaty of Maastricht). The basic substantive provision is included in Article 107, which does not provide an explicit definition of aid; instead, it declares any aid from the state that distorts competition as ‘incompatible with the common market’.<sup>80</sup> The Court has accepted that the purpose of Article 107(1) TFEU contains a prohibition of aid, which ‘seeks in principal, as a rule of competition, to prevent aid granted by Member States from distorting competition or affecting intra- Community trade’.<sup>81</sup>

Incompatible state aid with the internal market is prohibited, as long as the aid measure cannot be categorised within the derogations and exceptions contained in Article 107 (2) TFEU and 107 (3) TFEU. Next, in

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<sup>78</sup> C Quigley, *European State aid Law and Policy* (2<sup>nd</sup> edn Hart, Oxford 2009) 177.

<sup>79</sup> K Bacon, ‘Compatibility of aid – general principles’ in K Bacon (ed), *European Community Law of State aid* (OUP, Oxford 2009) 145.

<sup>80</sup> Article 107 (1) TFEU[2012] OJ C326/47.

<sup>81</sup> Joined cases T-447/93, T-448/93 & T-449/93 *Associazione Italiana tecnico economica del cemento, British cement association and Titan cement company SA v EC Commission* [1995] ECR II-1971, II-2017 para 127.

the EU state aid rules, is Article 108 TFEU, which provides for the Member States' obligation to notify new aid measures to the Commission<sup>82</sup> and the enforcement powers of the Commission relating to state aid control. Apart from those general provisions, there is Article 109 TFEU, which enables the Council to adopt secondary regulation instruments that will enforce and implement the substantive and procedural rules contained in the Articles 107 and 108 TFEU. Those Council Regulations, together with the Commission's Notices and Communications, make up the secondary legislation that also forms part of the European Union's state aid rules.

In this chapter, this thesis will first present the different types of aid. Secondly, the research will analyse the elements of the notion of state aid, as they derive from Article 107(1) TFEU. Those elements in fact make up the four cumulative conditions that the Court requires to be fulfilled, in order to classify a measure as aid incompatible with the internal market in most state aid judgments.<sup>83</sup>

As it follows from Article 107(1) TFEU, those conditions are the following.<sup>84</sup> the first element requires that the state aid measure should be specific and not of a general nature. The second element clarifies that the aid must grant an advantage to the beneficiary of the aid. The third element instructs that the aid must come from the state or from state resources, and

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<sup>82</sup> Article 108 (3) TFEU [2012] OJ C326/47.

<sup>83</sup> Case C-142/87 *Belgium v Commission (Tubemeuse)* [1990] ECR I959, paragraph 25: 'Classification as aid, in the sense of state aid incompatible with the common market, requires that all the conditions set out in that provision are fulfilled.'

<sup>84</sup> Case C-482/99 *France v Commission* [2002] ECR I4397, paragraph 68; and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I7747, paragraph 74: 'It follows from Article 87(1) EC that those conditions are as follows. First, there must be an intervention by the State or through State resources. Second, the intervention must be likely to affect trade between Member States. Third, it must confer an advantage on the recipient by favouring certain undertakings or the production of certain goods. Fourth, it must distort or threaten to distort competition'.

the fourth element requests that the aid must affect trade between Member States and distort competition. Firstly, it is beneficial to examine what types of measures have been classified in the past as state aid, in order to clarify the substantial meaning of state aid.

## 1.5 TYPES OF STATE AID MEASURES AND THE DEFINITION OF AID

The Scoreboards published annually by the Commission refer to aid granted to industry and services. Then state aid is distinguished into types of aid for specific sectors and aid to horizontal objectives.<sup>85</sup> Sectoral aid is granted to the following sectors according to the Scoreboard: Aid to shipbuilding, which has decreased by more than 60%.<sup>86</sup> Aid to this sector is governed by the Framework on state aid for shipbuilding.<sup>87</sup> Another type is aid to the coal and steel industry, which since the expiration of the European Coal and Steel Community Treaty in 2002 is subjected to the general state aid rules. Also, relevant to this type is aid to the energy sector, which is traditionally influenced by government intervention. Thus, state aid in this type of aid is influenced by privatisations and also the environmental policy. Next, is aid to the Transport sector, which is governed by specific Treaty provisions and secondary legislation and soft law, only the purpose of which will be examined in chapter two of the thesis. Another type is aid to the agriculture sector and to fisheries, which are governed by the general Treaty Articles on state aid 107 and 108 TFEU and secondary legislation and

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<sup>85</sup> Commission staff working document Facts and figures on State aid in the EU Member States 2012 Update SEC(2012)443 final 11.

<sup>86</sup> Ibid 21

<sup>87</sup> [2011] OJ C364/9

guidelines. Finally, rescue and restructuring aid is governed by the 2004 Guidelines<sup>88</sup> that are under review to be replaced under the Modernisation initiative.

Aid to horizontal objectives includes primarily aid to regional development, which accounts for 26.4% of aid to industry and services. Next follows aid to environmental aid with 23.4% of all aid to industry and services. Third horizontal objective that is examined in the Scoreboards is aid to research, development and innovation, which account for 18.9% of aid to industry and services. Then follow aid to SMEs, aid to risk capital, training and development. Finally, block-exempted aid under several block exemption regulations is horizontal aid.<sup>89</sup>

Article 107(1) TFEU may not contain a definition for what is aid in the European Union; instead, it contains a list of what an aid measure must consist of in order to be considered incompatible with the internal market. The issue of a definition for aid has been an issue for the Court, since the early stages of state aid control. In a case, which involved aid under the ECST Treaty, the Court has accepted that: ‘the Treaty contains no express definition of the concept of subsidy or aid’.<sup>90</sup> Even today this perception for the absence of a specific definition is still valid for the Treaty establishing the European Community or the Treaty on the Functioning of the European

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<sup>88</sup> Community Guidelines on state aid for rescuing and restructuring firms in difficulty [2004] OJ C244/2.

<sup>89</sup> Block-exempted aid comprises aid granted under the individual block exemption regulations (BERs) for employment (Commission Regulation (EC) 2204/2002, [2002] OJ L 337/20), regional aid (Commission Regulation (EC) 1628/2006, [2006] OJ L 302/ 29), aid to SMEs (Commission Regulation (EC) 70/2001, [2001] OJ L 10/ 33) and training (Commission Regulation (EC) 68/2001, [2001] OJ L 10/20), which Member States have been phasing-out and aid granted under the General Block Exemption Regulation (Commission Regulation (EC) 800/2008, [2008] L 214/3).

<sup>90</sup> Case 30/59 *Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1, para 19.

Union as it was lately renamed, and which contain the basic state aid rules, after the expiration of the ECST. The European Treaties have used the term state aid, whereas other International Treaties refer to subsidies. It is important for the Court, even without a definition from the Treaty to establish whether a state measure constitutes aid in the meaning of the Treaty. In the same case, (*Steenkolenmijnen*) the Court has declared that:

‘the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect’.<sup>91</sup>

From the above extract one can observe that the Court compared the two notions of state aid and subsidies and came to the conclusion that they are not identical, but rather that state aid has a wider meaning than subsidies.<sup>92</sup> Subsidies are direct contributions from the public finances and are considered straightforward aid cases. However, aid is connected by the Court with its purpose: ‘an aid is a very similar concept which, however, places emphasis on its purpose and seems especially devised for a particular object which cannot normally be achieved without outside help’.<sup>93</sup>

This is an objective interpretation of Article 107(1) TFEU and leads to the interpretation of a measure as incompatible with the internal market regardless of its aims, or the reasons for granting the aid. What is important

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid and also Case C-200/97 *Ecotrade* [1998] ECR I-7907, para 34, Case C-143/99, *Adria-Wien Pipeline GmbH v Finanzlandesdirektion für Karnten* [2001] ECR I-8365, para 38.

<sup>93</sup> Ibid.



for the characterisation of a measure as aid is the effects of the measure.<sup>94</sup> Consequently, a measure, which has a social character, or has environmental objectives, is not automatically excluded from being incompatible state aid, if all the other conditions are satisfied; however, it should be noted that the causes of the measure are taken into consideration by the Commission when it analyses its compatibility with the internal market. At that stage of examination, the cause is the factor that categorises the measure in one of the derogations of Article 107(1) TFEU.<sup>95</sup>

Accordingly, the mainstream view of the Court and most of the writers is that ‘there is no ‘rule of reason’ or concept of ‘objective justification’ in the interpretation of Article 87(1)<sup>96</sup>, now 107 (1) TFEU. On the contrary, other authors question whether the rule of reason has been applied in the recent state aid decisions taken in the context of the Financial Crisis Framework. They believe that some elements of a reasonability test, which would balance the negative effects of rescue aid to financial institutions with positive effects on consumers and the economy might be applicable, depending on the ‘degree and structure of the state of necessity’.<sup>97</sup>

At this point it should be mentioned that the Treaty accepts that the aid measure can be ‘in any form whatsoever’.<sup>98</sup> A measure can be aid, if it is a payment of sums of money, or any other positive advantage, as well as the write-off of a debt, or any negative burden. The case law provides a wide range of measures that have been characterised as aid due to the fact that the

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<sup>94</sup> Case 173/73 *Italy v Commission* [1974] ECR 709; para 13

<sup>95</sup> Faul & Nikpay, *The EC law of competition* (2<sup>nd</sup> edn OUP, Oxford 2007) 1705

<sup>96</sup> For example see K Bacon, ‘The definition of State aid’ in K Bacon, *European Community Law of State aid* (OUP, Oxford 2009) 25.

<sup>97</sup> C Koenig, ‘Instant state aid law in a financial crisis, state of emergency or turmoil. Five essential and reasonable requirements under the rule of law’ (2008) 4 *EstAL* 627, 628-629

<sup>98</sup> Article 107(1) TFEU [2012] OJ C326/47.

notion of aid is interpreted broadly. Examples from the case law include direct financial transfers, such as recapitalisation, investments in the capital of the benefiting undertaking,<sup>99</sup> and loans in preferential interest rates.<sup>100</sup>

There are also indirect measures that have been assessed as state aid, such as state guarantees,<sup>101</sup> tax exemptions which give the beneficiary an advantage contrary to the others who do not satisfy the conditions of the measure, write-off of debts and exemptions from paying fines and taxes.<sup>102</sup> After having examined the meaning of the notion of aid in the Treaty, it is now constructive to analyse the elements of the aid that is incompatible with the Treaty according to Article 107(1) TFEU.

## 1.6 ELEMENTS OF ARTICLE 107(1) EC

### 1.6.1 Selectivity or specificity of the measure

Before this thesis critically analyses the Commission's procedures when assessing the compatibility of aid measures it is necessary to start the application of the research criterion, which questions the coherence of the legislation. Consequently, in this part, the thesis will scrutinise the state aid rules that are in force in the Union, which need to be proven in order for the Commission's administrative procedure to conclude on the compatibility of the aid measure in question with the internal market. According to Article 107(1) TFEU the first condition for the characterisation of a state aid measure as incompatible with the internal market is that the aid measure is distorting competition 'by favouring certain undertakings or the production

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<sup>99</sup> Case 323/82 *Intermills v Commission* [1984] ECR 3809.

<sup>100</sup> Case 57/86 *Greece v Commission* [1988] ECR 2855.

<sup>101</sup> Case C-288/96 *Germany v Commission* [2000] ECR I-8237.

<sup>102</sup> Case C-200/97 *Ecotrade* [1998] ECR I-7907.

of certain goods'.<sup>103</sup> This condition is the most important one of the four found in the Article and it derives from the word 'certain'. The case law has distinguished between *selective* measures, which are incompatible with the internal market, as long as the other three conditions are also fulfilled, and *general* measures that are not state aid.

The reason for this distinction is a practical one; it is supposed to leave out of the state aid control only the general measures, which do not distort competition.<sup>104</sup> As with the definition for state aid, again, there is no definition for either a selective or a general measure. The only relevant explanation for a general measure is to be found in a Notice on Taxation, where it is said that 'tax measures which are open to all economic agents operating within a Member State are in principle general measures'.<sup>105</sup>

Problems arise when there are preferential tax systems in one Member State and not in others. Currently, taxation remains a policy for the Member States to implement, with the Commission having no competence over it. However, through state aid regulation the Commission aims at harmonising tax systems, so that no aid can be passed through such channels in one Member State that would distort competition in the internal market.<sup>106</sup>

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<sup>103</sup> Article 107(1) TFEU [2012] OJ C326/47.

<sup>104</sup> Case C-143/99 *Adria-Wien Pipeline GmbH v Finanzlandesdirektion für Karnten* [2001] ECR I-8365, para 35; Case C-409/00 *Spain v Commission* (Spanish Trucks II) [2003] ECR I-1487, Opinion of AG Alber paras 60,65.

<sup>105</sup> Notice on the application of State aid rules to measures relating to direct business taxation [1998] OJ C384/3 para 13.

<sup>106</sup> H L Lopez, 'General thought on selectivity and consequences of a broad concept of state aid in tax matters', (2010) 4 *EstAI* 807, 817-818.

One defining case that dealt exclusively with the selectivity criterion is the *Adria-Wien*<sup>107</sup> case, where the Court was asked by a national court to give its ruling on whether a tax measure was selective or general, and thus not state aid. The Court formed a simple test for establishing the selective character of the measure. The State measure favours certain undertakings, or the production of certain goods, and thus is selective, if the comparison is made ‘with other undertakings, which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question’.<sup>108</sup>

The Court, in its judgment, went against the Opinion of the Advocate General which was to consider the tax measure general and not selective. He based his Opinion on a case law of the Court which accepts that a measure which is ‘justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity’.<sup>109</sup> This condition has been interpreted strictly in the case law,<sup>110</sup> and what needs to be proven is that there is a social, regional or environmental objective within the measure.

However, the Court decided in the specific case that ‘the criterion applied by the national legislation at issue’ was not justified by the nature or the general scheme of the particular legislation and categorised it as aid within the meaning of Article 92(1) of the Treaty (now 107(1) TFEU).<sup>111</sup>

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<sup>107</sup> Case C-143/99 *Adria-Wien Pipeline GmbH v Finanzlandesdirektion für Karnten* [2001] ECR I-8365,

<sup>108</sup> *Ibid* para 41.

<sup>109</sup> Case C-173/73 *Italy v Commission* [1974] ECR 709, para 33.

<sup>110</sup> K Bacon, ‘The definition of State aid’ in K Bacon (ed), *European Community Law of State aid* (OUP, Oxford 2009) 90

<sup>111</sup> Case C-143/99 *Adria-Wien Pipeline GmbH v Finanzlandesdirektion für Karnten* [2001] ECR I-8365, para 53.

Finally, it should be mentioned that, in the selectivity test formed in the *Adria-Wien* case, the comparison of the situation of the beneficiary before and after the relevant law, which granted the aid is not relevant; the comparison is only made between the undertakings in a similar and factual situation.

From the foregoing, it is clear that selectivity is easily established in measures where the aid is granted to individual undertakings. In contrast, it is established case law that the large number of undertakings eligible for the aid and the size of the sector to which the aid is granted do not automatically classify a measure as general.<sup>112</sup> Tax measures have proved difficult to be categorised as general measures or not. The Court has accepted that tax measures which give an advantage on certain undertakings at a national level are subject to the state aid control, and all the conditions of Article 107(1) TFEU must apply.<sup>113</sup> Consequently, ever since then, measures have been deemed selective, even in cases that the benefit was given to a whole sector of the economy, such as the ‘manufacturing of goods companies’ or ‘the service providers companies’ in *Adria-Wien*, or ‘large undertakings’ in *Ecotrade*<sup>114</sup>, or all companies involved in export trade in *Commission v France*.<sup>115</sup>

Selectivity can be both material, when the measure grants an advantage to companies based on their subject material characteristics and regional, when the advantage is granted to companies domiciled in certain regions. Even more problems arise out of measures that grant tax reductions

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<sup>112</sup> Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, para 32.

<sup>113</sup> Case C-173/73 *Italy v Commission* [1974] ECR 709.

<sup>114</sup> Case C-200/97 *Ecotrade v AFS* [1998] ECR I-7907

<sup>115</sup> Cases 6 and 11/69, *Commission v France* [1969] ECR 523

in autonomous regions of Member States. In a series of cases the Court has examined whether such measures can be considered state aid within Article 107(1) TFEU. In particular, in the case *Portugal v Commission (Azores)*,<sup>116</sup> where the examination concerned a tax reduction for all natural and legal persons in the Azores region of Portugal, the Court held that the crucial criterion for establishing selectivity in a measure granted by an authority of a regional autonomous region of a Member State was whether the authority enjoyed ‘sufficient’ fiscal, procedural and regional autonomy from the central government. The measure was found to be regionally selective, because it was found to be aid subsidised by the central Portuguese government.<sup>117</sup>

Until the *Azores* judgment, regional aid was usually considered selective, because the reference point for establishing selectivity of the relevant measure was the whole of a Member State’s territory.<sup>118</sup> After the *Azores*, the reference point could be a region of a Member State as the Court has reconfirmed in *Gibraltar*<sup>119</sup> and *UGT- Rioja*.<sup>120</sup>

The tax system of Gibraltar has been examined by the Commission in other occasions for being selective not only because of regional selectivity, which has been decided in the *Azores*<sup>121</sup> case: in 2004 the Commission found that a corporate tax reform for companies operating in Gibraltar was selective because it favoured certain undertakings, the off-shore companies, even though it appeared to be applicable to all

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<sup>116</sup> Case C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-7115 paras 58 and 62.

<sup>117</sup> *Ibid* para 77.

<sup>118</sup> *Gibraltar* Commission Decision 261/2005 [2005] OJ L85/1 para 104.

<sup>119</sup> Case C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-7115 para 78. Cases T-211 and T-215/04 *Gibraltar v Commission* [2008] ECR II-3745 paras 114-115.

<sup>120</sup> Case C-428 to 434/06 *UGT – Rioja* [2008] ECR I-6747 para 50.

<sup>121</sup> Case C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-7115.

undertakings domiciled in Gibraltar.<sup>122</sup> The measure thus was materially selective because it favoured certain companies based on their property and employees.<sup>123</sup> The General Court (then Court of First Instance) decided against the Commission for both the regional selectivity and material selectivity: regional selectivity was rejected because Gibraltar was autonomous from the UK and thus no comparison could be made to the normal system of the UK. Material selectivity of the measure was also rejected by the General Court because the Commission failed to define the normal regime based on which the derogation would be judged.<sup>124</sup> Under appeal in 2011 the Court of Justice<sup>125</sup> set aside the General Court's judgment of 2008.<sup>126</sup> The Court of Justice upheld the Commission's Decision that the corporate tax reform of Gibraltar would create a selective advantage for off-shore companies that do not occupy business properties of employees in Gibraltar.<sup>127</sup> Recently, the Commission<sup>128</sup> decided to open the formal investigation procedure for the Gibraltar Tax system, which was amended in 2013, to establish whether the exemption from paying corporate taxation in Gibraltar of profits from passive income such as royalties and interest from corporate tax is selective to those exempted companies or not. Thus, the Gibraltar case law is not completely over yet.

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<sup>122</sup> *Gibraltar* Commission Decision 261/2005 [2005] OJ L85/1

<sup>123</sup> John Temple Lang, 'The Gibraltar State Aid and Taxation judgment – A "Methodological Revolution"?' [2012] 4 EStAL 805

<sup>124</sup> Cases T-211 and 215/04 *Gibraltar v Commission* [2008] ECR II-3745 paras 114-115.

<sup>125</sup> Cases C-106/09 P and C-107/09 P *Commission and Kingdom of Spain v Gibraltar and United Kingdom* [2011] ECR I-11113.

<sup>126</sup> Cases T-211 and 215/04 *Gibraltar v Commission* (judgment of 18 December 2008) [2008] ECR II-3745

<sup>127</sup> Cases C-106/09 P and C-107/09 P *Commission and Kingdom of Spain v Gibraltar and United Kingdom* [2011] ECR I-11113 para 107.

<sup>128</sup> *Alleged aid granted to offshore companies – Gibraltar Income Tax Act 2010* (Case SA.34914) Commission Decision of 16/10/2013 [2013] C00 nyr

On the contrary, there are general measures, where the beneficiaries can potentially be all undertakings active in the national market, and thus are not selective, and are not considered aid according to 107(1) TFEU. Such measures are applicable to all, regardless of sector, or location that the undertaking is active. Some examples of general measures are economic policy measures such as uniform tax reductions, in particular a VAT reduction; such measures are not considered selective, if they are applicable without discrimination.<sup>129</sup>

The matter of material selectivity has been the issue of many judgments in tax cases where there was differential treatment. The Court repeats the criterion it constructed in *AdriaWien*,<sup>130</sup> which it applies to find if there is selectivity: a scheme that applies only to certain undertakings may not be state aid if it is based on legal and factual conditions, which distinguish the beneficiaries from the general scheme. In *BNP Paribas and BNL v Commission*<sup>131</sup> judging on appeal the Court of Justice held that the appraisal of the legal and factual conditions should be more rigorous by the General Court and that it should not rely on the Commission's justification. The Court of Justice reached the same conclusion as the General Court that the different treatment was not justified by the logic of the system, although it did so by not accepting the justifications of the double taxation system: the risk of avoiding double taxation was not properly confirmed by the Italian government and thus led the Court to reject it in this case as a viable justification for concluding that the measure is not selective.

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<sup>129</sup> Editorial, 'Weathering through the credit crisis: is the Community equipped to deal with it?', 46 CMLR, 2009, 3, 9

<sup>130</sup> Case C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365

<sup>131</sup> Case C-452/10 P *BNP Paribas and BNL v Commission* [2012] ECR O not yet reported.



In *NOx*<sup>132</sup> the Court of Justice held that the justification of the differentiation is up to the member state to prove that it is justified.<sup>133</sup> It held that the General Court in its previous judgment erred in law to put the burden of proof on the Commission to prove that the differentiation is justified by the nature and general scheme of the system. In this case the Court of Justice found the measure to be selective because the member state failed to justify it properly. Both of those judgments have been criticised for not bringing any clarity in the issue of selectivity in differential taxation.<sup>134</sup>

Furthermore, in *British Aggregates*<sup>135</sup> the issue was a Commission Decision which found that an environmental levy imposed by the UK government on aggregates produced from naturally occurring deposits on the soil did not constitute State aid within the meaning of Article 107(1) TFEU, because its scope was justified by the logic and nature of the tax system. The problem was that certain aggregates were exempted, such as aggregates of clay, slate, china clay, ball clay and shale aggregate, because the purpose of the levy was to encourage the use of those and to discourage the use of the others. This could be considered differential taxation if the normal taxation was the imposition to the levy and the question was whether there was selectivity and therefore state aid; the Court of First Instance (as the General Court was known in 2006) held that this levy was not an exemption from normal taxation and there was no selectivity or advantage; furthermore, it was a different case than that in *AdriaWien* in that the latter

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<sup>132</sup> Case T-233/04 *Netherlands v Commission* [2008] ECR II-591 and Case C-279/08 P *Commission v Netherlands* [2011] ECR I-07671

<sup>133</sup> Case C-279/08 P *Commission v Netherlands* [2011] ECR I-07671.

<sup>134</sup> Piet Jan Slot, 'NOx Emission Trading Rights: A Government Gift or Value Created by Undertakings?' [2013] 1 EstAL 61, 66

<sup>135</sup> Case T-210/2002 *British Aggregates v Commission* [2006] ECR II-2789

involved partial exemption from payment of the levy not complete lack of it. The case was referred by the Court of Justice back to the General Court after appeals<sup>136</sup> and the General Court held that there was different selective taxation for the exempted materials and that the purpose of the measure could not justify the differentiation. The General Court thus annulled the Commission decision.<sup>137</sup> The *British Aggregates* judgment creates an effect-oriented approach to finding selectivity in differential treatment. It does so by creating a competitive test: it places all competitors in a comparable situation and takes into account market conditions and costs to create it and thus concludes on the justification of the differentiation.<sup>138</sup>

#### 1.6.2 Advantage granted by the aid measure

##### I) *The elements of the legal meaning of advantage or benefit*

The second criterion for establishing that a measure is incompatible aid, according to Article 107(1) TFEU, is that it is ‘favouring certain undertakings’, with the key word this time being ‘favouring’.<sup>139</sup> The straightforward case would be a direct subsidy given to a firm in difficulty, which would undoubtedly benefit, or gain an advantage from that subsidy, against its competitors in the relevant market. In this classic aid case, and in every other type of aid, the Court examines the advantage granted in ‘normal market conditions’,<sup>140</sup> which is the first element of the notion of advantage. However, market conditions cannot be established every time, especially in cases where the State exercises its public powers in the field of

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<sup>136</sup> Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10505

<sup>137</sup> Case T-210/02 RENV *British Aggregates v Commission* [2012] ECR O (NYR).

<sup>138</sup> Gianni Lo Schiavo, ‘The General Court Reassesses the British Aggregates Levy: Selective Advantages “Permeated” by an Exercise on the Actual Effects of Competition?’ [2013] 2 EstAL 384, 390.

<sup>139</sup> Article 107(1) TFEU [2012] OJ C326/47.

<sup>140</sup> Case C-39/94 *SFEI and others v La Poste and others* [1996] ECR I-3547, para 60.

social security for example, among others, where there are no competitors. Consequently, in such cases, the advantage to the beneficiary of the aid can be found if one examines the effects of the State's Act that is granting the aid.<sup>141</sup>

The next problem in concluding if there is an advantage or not is that of the definition of the geographical area that comprises the market in which the advantage is going to be tested at. The Court has accepted that the advantage can be found even when the comparison is between competitors in other Member States.<sup>142</sup> Finally, it should be mentioned that the Court has held that the advantage does not have to be certain and quantifiable for the measure to be classified as aid. Insolvency proceedings that cannot be quantified, or their outcome predicted, have been deemed to grant an advantage, against non-beneficiaries.<sup>143</sup>

## *II) The legal meaning of an undertaking in state aid regulation*

Next, it is necessary to analyse the concept of undertakings in state aid law. The meaning of undertakings in Article 107(1) TFEU is similar to that contained in other Article of the TFEU on Competition law. Consequently, an undertaking is considered every legal entity that carries an economic activity.<sup>144</sup> The first observation that must be made is that undertakings can be either of the private law, or public corporations. Secondly, the meaning of economic activity includes both the sale of goods and the supply of services, regardless of whether the purpose of the undertaking is profit, or non – profit making. One characteristic example,

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<sup>141</sup> K Bacon, 'The definition of State aid' in K Bacon (ed), *European Community Law of State aid* (OUP, Oxford 2009) 30.

<sup>142</sup> Case 173/73 *Italy v Commission* [1974] ECR 709, para 12.

<sup>143</sup> Case C-200/97 *Ecotrade* [1998] ECR I-7907, para 31.

<sup>144</sup> Case 118/85 *Commission v Italy* [1987] ECR 2599, para 11.

from the Court's case law, of a non – profit making undertaking was the *Job Centre* case,<sup>145</sup> where it was held that the employment agency was within the meaning of an Article 107 TFEU undertaking.

Also, the Court has clarified that aid to individuals cannot be considered state aid as long as the benefit is not transferred to an undertaking. From the Court's analysis in relevant cases it has been accepted that aid given to consumers for the purchase of environmentally friendly products, or digital television equipment was state aid incompatible with the internal market because there was indirect benefit for the providers of those products and services.<sup>146</sup>

Contrary to the economic activities of undertaking, which can ignite the application of state aid rules, non- economic activities are outside the scope of the state aid control system. Such activities include those that are left in the exclusive competence of the state, and which cannot be offered by non – public bodies. Those activities usually have to do with national security, such as the armed forces, or the police and traffic police, customs services, or the education system which is exclusively financed by state resources, including vocational training, and finally the administration of justice. State aid rules do not apply to those non-economic activities.<sup>147</sup>

Having examined so far, the meaning of an advantage or benefit and the meaning of an undertaking according to Article 107 TFEU, next, this thesis will analyse the method that is used by the Commission and the Court in order to establish and prove that the second element of the definition of

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<sup>145</sup> Case C-55/96 *Job Centre coop* [1997] ECR I-7119

<sup>146</sup> *Aide sociale TNT* (Case N 546/2006) Commission Decision of 6 December 2006 [2007] OJ C23/01.

<sup>147</sup> P Nicolaidis et al., *State aid policy in the European Community: Principles and practice* (2nd edn Wolters Kluwer, The Hague 2008) 18-20

state aid is also fulfilled; for the purpose of determining that an advantage has been enjoyed by the undertaking that has received the aid, the Court has set up a Test, which is usually called the Market Economy Investor Principle (MEIP), or Test.

*III) The market economy investor principle*

The Commission has developed the MEIP and applies it in the form of a test for the aim of finding whether a transaction between the State and an undertaking involves state aid. Thus, the purpose of the MEIP is to safeguard effective competition within the internal market, as it establishes that state aid exists in a particular transaction, with terms that would be unacceptable to a private undertaking in normal market conditions. The definition of the MEIP is found in the case law:

‘the test is, in particular, whether in similar circumstances a private shareholder, having regard to the foresee ability of obtaining a return and leaving aside all social, regional – policy and sectoral considerations, would have subscribed to the capital in question’.<sup>148</sup>

Subsequently, according to the Court, the state is providing the undertaking with state aid when the undertaking would have been unable to obtain the same benefit from the market, under normal market conditions. It is easy to apply the test in a case of a direct subsidy, but the test applies to all other types of aid, such as guarantees, loans, sale of assets and share acquisition by the state and privatisation<sup>149</sup>. In such cases, it is more difficult to establish the existence of aid. Especially, for cases of state guarantees, the Commission’s early approach was that they always involved state aid, and

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<sup>148</sup> Case 234/84 *Belgium v Commission (Meura)* [1986] ECR 2263, para 824.

<sup>149</sup> Faul & Nikpay, *The EC law of competition* (2<sup>nd</sup> edn OUP, Oxford 2007) 1709

the application of the MEIP was not necessary. However, this approach has changed and the MEIP is applied in guarantee cases.<sup>150</sup> One of the first cases that the Court has applied the MEIP is in *Tubemeuse*,<sup>151</sup> where it declared that:

‘in order to determine whether such measures are in the nature of state aid, the relevant criterion is that indicated in the Commission’s decision, and not contested by the Belgian government, namely whether the undertaking could have obtained the amounts in question on the capital market’

Afterwards, it was applied in a large number of cases.<sup>152</sup>

The Test has been included in a number of Commission documents, such as the Notice on Cooperation between National Courts and the Commission. In the Notice it is said that investments from public funds constitute aid, when they are made in circumstances in which a private investor would have withheld support<sup>153</sup>.

The Commission and the Court do not need to apply the MEIP in a transaction between the State and an undertaking, whenever a private investor participates in the transaction with the State and under the same conditions.<sup>154</sup> However, when the contribution of the private participant is not equal to that of the state or not significant enough or whenever there is

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<sup>150</sup> G Abbamonte ‘Market economy investor principle: a legal analysis of an economic problem’ (1996) ECLR 17(4) 258 263.

<sup>151</sup> Case C-142/87 *Belgium v Commission* [1990] ECR I-959 para 26

<sup>152</sup> For example Joined cases C-278/92, C-279/92 and C-280/92 *Spain v Commission* [1994] ECR I-4103 para 28

<sup>153</sup> [1995] OJ C312/8, para 7

<sup>154</sup> Commission Communication concerning public authorities’ holdings in company capital, available at

<[http://ec.europa.eu/competition/state\\_aid/legislation/compilation/i\\_10\\_07\\_09\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/compilation/i_10_07_09_en.pdf)> para 3.2 accessed on 12/09/2013.

no private participation at all, the MEIP takes into account other parameters, such as the stock market prices and the percentage of the undertaking's debt with its gains. Finally, the MEIP is also applied for the quantification of illegally granted state aid,<sup>155</sup> which will eventually provide the amounts that the Commission will request to be repaid.

The Commission has been criticised by the General Court for not applying the test in one critical judgment. In *EDF V Commission*,<sup>156</sup> the General Court annulled the Commission's decision, which had previously declared aid by the French State to EDF incompatible with the internal market. The Court decided that the Commission erred in law and infringed state aid rules, by not applying the test. The Commission's view was the Test could not be applied in this case, because of the nature of the aid measures, which were fiscal and tax measures. The state, which was the single shareholder of EDF at the time, could never operate in a private manner, according to the Commission, when it is granting fiscal measures; consequently, the test is inapplicable in such cases. Some writers have criticised the Commission for having that opinion. The problem according to them is that the non-application of the test would potentially allow states to grant amounts of aid to the state owned companies, without control. The criticism focuses on the fact that the form of the aid should not be important in the decision of compatibility; what should matter are the effects and objectives of the measure.<sup>157</sup>

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<sup>155</sup> *Olympic Airways* Commission decision 94/696/EC of 7 October 1994 [1994] OJ L273/22

<sup>156</sup> Case T-156/04 *EDF v Commission* [2010] OJ C 37/32.

<sup>157</sup> A Bartosch, 'The EDF ruling – an electrifying enlightening', (2010) *EstAI* 2, 267.

The General Court<sup>158</sup> has said that granting fiscal benefits to undertakings is not possible for a private investor to do. So, there is difficulty in applying the MEIP in this case, because usually the comparison would be between a private undertaking and the state.<sup>159</sup> The *Ryanair*<sup>160</sup> case is relevant because there too the Court held that determining landing fees were an economic activity and not exercise of regulatory powers,<sup>161</sup> even though the advantage was granted by a contract, the nature of which was not examined by the Court and it assumed that is conferred an advantage through regulatory powers.<sup>162</sup> The General Court held that the MEIP can still be used.<sup>163</sup>

The Commission appealed the judgment claiming that the General Court erred in law in interpreting Article 107(1) TFEU. The Court of Justice upheld the General Court's ruling: according to the Court of Justice the General Court did not err in law and that the

'application of the private investor test would have made it possible to determine whether, in similar circumstances, a private shareholder would have subscribed, to an undertaking in a situation comparable with that of EDF, an amount equal to the tax due.'<sup>164</sup> Therefore, the conclusion should be that the EDF judgments have confirmed that the form of aid is irrelevant

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<sup>158</sup> Case T-156/04 *EDF v Commission* [2010] OJ C 37/32 para 232.

<sup>159</sup> Erika Szyszczak, 'The Survival of the Market Economic Investor Principle in Liberalised Markets' (2011) 10(1) *EstAL* 35, 38.

<sup>160</sup> Case T-196/04 *Ryanair* [2008] ECR II-03643, para 94

<sup>161</sup> *Ibid* 37.

<sup>162</sup> Martin Köhler, 'New Trends Concerning the Application of the Private Investor Test The EDF-judgment of the General Court and its Consequences' (2011) 10(1) *EstAL* 21, 23 fn 23.

<sup>163</sup> Case T-156/04 *EDF v Commission* [2010] OJ C 37/32 para 278.

<sup>164</sup> Case C-124/10 P *Commission v EDF* [2012] ECR00 (NYR) para 95.



in applying Article 107(1) TFEU and in doing so the Commission should apply the MEIP even in investments that have a form of a fiscal measure.<sup>165</sup>

### 1.6.3 Aid granted by the state or through state resources

#### *I) The dispute between aid granted by the state or state resources*

The third element found in Article 107(1) TFEU requests that the aid has to be granted by the Member State, or through State resources. The disjunctive conjunction in the wording of the Treaty's Article caused a debate on whether the two conditions (by the state and through state resources) were alternative criteria, or both of them had to apply cumulatively. According to the first opinion and the early case law,<sup>166</sup> the two conditions were not considered cumulative, and it was sufficient for the Court to prove that there was an advantage granted by the Member State to an undertaking, against its competitors. This effect was enough for the Court to accept that the measure constituted state aid according to Article 107(1) TFEU. The *Poor Farmers*<sup>167</sup> case is characteristic of this early approach. In this case the Commission did not find that the measure granting support to poor farmers was state aid. The Court however, came to the opposite conclusion and it held that: 'aid need not necessarily be financed from State resources to be classified as state aid'.<sup>168</sup> The opposing view was that the two conditions were cumulative and the most important one of the two was that the financing of the aid measure was made through State resources.<sup>169</sup>

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<sup>165</sup> Phedon Nicolaides, 'Taxes, the Cost of Capital and the Private Investor Principle' (2013) 12(2) EStAL 243, 245.

<sup>166</sup> For example Case C-57/86 *Greece v Commission* [1988] ECR 2855 paras 11-13.

<sup>167</sup> Case 290/83 *Commission v France (Poor Farmers)* [1985] ECR 439.

<sup>168</sup> *Ibid* para 14.

<sup>169</sup> Cases C-72 and C-73/91 *Sloman Neptun* [1993] ECR I-887 para 19.

This dispute was finally resolved in favour of the second and more restrictive opinion, in the judgment made by the Court in *PreussenElektra*.<sup>170</sup> The court held that ‘the obligation imposed on private electricity supply undertakings to purchase electricity produced from renewable energy sources at fixed minimum prices does not involve any direct or indirect transfer of state resources’.<sup>171</sup> The words direct or indirect transfer of state resources relate to the words through the state or state resources and the fact that the Court examined both simultaneously clarified that the transfer of state resources was a cumulative condition for the aid to be classified as state aid in the view of Article 107(1) TFEU. The wording of the Article simply signifies that the Treaty applies to aid measures granting both advantages given by the state directly and indirectly ‘by a public or private body designated or established by the state’.<sup>172</sup> This involves analysis of the notion of imputability of the aid measure to the State, which will be the next topic of this discussion.

One more point however, is that funds made from private contributions have been found to be aid through State resources. The Court has accepted that derogation in *Air France*.<sup>173</sup> The criterion for this derogation was the fact that the fund was at the disposal of the state.<sup>174</sup> Finally, the last type of aid that could be state aid through State resources is Community money; those resources are not considered state aid as long as they are not controlled by the Member State.

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<sup>170</sup> Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

<sup>171</sup> *Ibid*, para 59

<sup>172</sup> *Ibid*, para 58.

<sup>173</sup> Case T-358/94 *Air France v Commission* [1996] ECR II-2109, paras 63-67

<sup>174</sup> *Ibid*.

## *II) The measure must be imputable to the State*

Whenever the aid is transferred by the state's bodies that belong in the hard core of administration, such as ministries and if it is easy to establish that those bodies decided to grant aid, there is no problem of attributing the aid to the state. However, it is not clear if a decision can be attributed to the state, when it is taken by a public undertaking designated by the State. This attributability of the decision to grant aid to the State is called imputability, and it is a separate condition that the Court has incorporated in the elements of Article 107(1) TFEU through its case law. The imputability criterion was established in the *Stardust Marine*<sup>175</sup> case, which involved aid to a boat company given by a publicly owned bank. The Commission considered the aid to be granted through state resources, because the Bank was controlled by the State.

The Court however, introduced the imputability criterion, by examining if there were state resources involved, and decided that there was no state aid involved, because the aid could not be attributed to the state, simply by taking into account the legal personality of the public undertaking. The same approach was taken by the Court in the *Pearle* case, where it held that: 'for advantages to be capable of being categorised as aid within the meaning of Article [107(1)] of the Treaty they must, first, be granted directly or indirectly through state resources and second, be imputable to the state'.<sup>176</sup> Next, this thesis will analyse the last condition of Article 107(1) TFEU.

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<sup>175</sup> Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397, para 95

<sup>176</sup> Case C-345/02 *Pearl BV v Hoofdbedrijfschap Ambachten* [2004] ECR I-7139, para 35.

#### 1.6.4 Distortion of competition and effect on trade

The last element of Article 107(1) TFEU has to do with the effects of the aid on the internal market; effects which will deem the measure incompatible with the internal market, if they come about. The first effect that aid should have is that the measure must distort competition and the second effect is that it must affect trade between Member states. Those two conditions are two distinct ones; this means that both have to appear in an analysis of an aid measure according to Article 107(1) TFEU. If one of them is not established, then Article 107(1) does not apply and aid is not incompatible. Usually, though, in the case law those two conditions are examined together, since both effects need to occur for Article 107(1) TFEU to apply to the measure in question.

##### *1) Distortion of competition*

The Court has established the test for finding distortion of competition in the case *Philip Morris*.<sup>177</sup> According to its findings, the Court has accepted that there is distortion of competition when the aid strengthened the undertaking's position in the market.<sup>178</sup> However, the Court does not require that there has to be an analysis of the relevant market, such as the analysis needed whenever Articles 101 and 102 TFEU are applied.<sup>179</sup> Furthermore, there is no need to prove the actual distortive effects on competition because this is practically impossible for aid measures that have been notified but not yet implemented by the Member States. It is sufficient that the measure is capable to threaten to distort

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<sup>177</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671.

<sup>178</sup> *Ibid* para 11

<sup>179</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para 11.

competition.<sup>180</sup> The reference point for finding distortion in the application of the test is the competitive position in the market before the adoption of the measure, and whether it has improved afterwards,<sup>181</sup> similar to the test for finding the advantage granted by the measure.

## *II) The effect on trade between Member States*

The Court has examined the distortion of competition and the effects on intra-community trade together in the previously mentioned case of *Philip Morris*.<sup>182</sup> Consequently, this practice in the Court's case law might make the condition for an effect on intra-community trade to be rendered not very important. However, it exists to verify the jurisdiction of the Commission and the Court over the national authorities.<sup>183</sup> The national authorities would have jurisdiction, if the measure did not have an effect on trade between Member States and not the Commission, because it would be a completely internal matter.

This condition is self-proven, whenever the beneficiary undertaking is involved in inter-border trade across many Member States. However, it is not necessary to prove the actual effects on inter-community trade. In *Altmark*, the Court found that the Community trade had been affected even though the aid was granted to companies, which operate locally in one Member State and not in others,<sup>184</sup> because undertakings from other

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<sup>180</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para 12 and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, para 44.

<sup>181</sup> Cases 62 and 72/87 *Executif Regional Walon v Commission* [1988] ECR 1573, paras 14-15.

<sup>182</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para 11.

<sup>183</sup> K Bacon, 'The definition of State aid' in K Bacon (ed), *European Community Law of State aid* (OUP, Oxford 2009) 97.

<sup>184</sup> Case C-280/00 *Altmark Trans v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, para 78

Member States, operating in the same kind of business, would not be able to operate in that market easily.<sup>185</sup>

On the other hand, it has also been held by the Court that aid, which has effects on entirely local terms, does not affect trade between Member States and therefore is not incompatible with the internal market.<sup>186</sup> Lastly, it should be noted that the Court has established in its case-law that the existence of relatively small amounts of aid, or relatively small sizes of undertakings, which receive aid, does not *ex ante* exclude the likelihood of intra- Community trade being indeed affected, or competition distorted.<sup>187</sup>

## 1.7 DEROGATIONS FROM ARTICLE 107(1) TFEU

### 1.7.1 Synopsis

The prohibition contained in Article 107(1) TFEU does not mean that all state aid measures granted by Member States to undertakings in the European Union are incompatible with the internal market, in any case. The Treaty contains some exemptions, or derogations from the prohibition. Types of aid measures that can be categorised in one of the provisions in subparagraphs 107(2) and 107(3) TFEU are, or can be exempted from the prohibition. The legal basis for those derogations can be found in Article 107(1) TFEU: ‘Save as otherwise provided in this Treaty...’ This sentence allows the Commission to interpret the notion of state aid in Article 107(1)

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<sup>185</sup> C Quigley, *European State aid Law and Policy* (2nd edn Hart, Oxford 2009) 58

<sup>186</sup> Commission Notice, Guidelines on the effect on trade concept contained in arts 81 and 82 of the Treaty [2004] OJ C101/81 (the Effect on Trade Guidelines), paras 91, 96 and 98.

<sup>187</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraphs 11 and 12; Case C-142/87 *Belgium v Commission* (Tubemeuse) [1990] ECR I-959, paragraph 43; Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 42; Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 86, and Case C-113/00 *Spain v Commission* [2002] ECR I-7601, paragraph 30.

widely,<sup>188</sup> by applying its discretionary power. However, the exemptions contained in paragraphs (2) and (3) of Article 107 TFEU should be interpreted narrowly.<sup>189</sup> First of all, there are the categories of aid contained in Article 107(2) TFEU.

### 1.7.2 Derogations in Article 107(2) TFEU

The three subparagraphs of Article 107(2) TFEU contain three categories of aid measures that are automatically considered compatible with the internal market, as long as the preconditions set out in the Article, for each one of them, are satisfied. The first category in subparagraph (a) of the Article considers aid having a social character to be compatible.<sup>190</sup> According to the first condition of subparagraph (a) the aid must benefit final consumers. This exception has been applied to subsidisation of air routes to and from remote regions of a Member State.<sup>191</sup> Secondly, the aid measure must secure indiscriminate as to the origin of the service providers.<sup>192</sup> In this type of aid to individual consumers, the specificity criterion of Article 107(1) TFEU is always satisfied, so the exception is necessary for aid having a social character.<sup>193</sup>

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<sup>188</sup> P M Roth QC (ed) *Bellamy & Child European Community Law of Competition* (Sweet and Maxwell, London 2001) 1216.

<sup>189</sup> Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, para 2701.

<sup>190</sup> Article 107(2) (a) 'aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;'

<sup>191</sup> *Aides sociales passeport mobilité* (Case NN25/2005) Commission Decision of 20/4/2005 [2005] OJ C137/5.

<sup>192</sup> *Ibid* para 26 and Case T-116/01 and T-118/01 *P&O European Ferries v Commission* ECR II-2957, '...the commission was justified in concluding that the aid had not been granted to individual consumers without discrimination related to the origin of the products concerned and that, therefore, the conditions laid down in Article 87(2) (a) EC were not met' para 167.

<sup>193</sup> *Aides sociales passeport mobilité* (Case NN25/2005) Commission Decision of 20/4/2005 [2005] OJ C137/5 para 26: 'aid is limited to all carriers operating flights airlines scheduled between French departments overseas and mainland France. Although the scheme does not introduce any discrimination against firms in the aviation community, it "favors certain

The second subparagraph of Article 107(2) TFEU in its first part considers disaster aid to be compatible with the internal market.<sup>194</sup> The Commission and the Court have interpreted strictly<sup>195</sup> the meaning of ‘natural disasters’, and the provision has been applied mainly to agricultural products damaged by natural disasters; the meaning of those can be found in the Guidelines on state aid to the agricultural sector, and can include earthquakes, avalanches, landslides and floods,<sup>196</sup> and in general unforeseeable situations. The second part of the provision, refers to aid which is granted for making good damage caused by exceptional occurrences,<sup>197</sup> and according to the Commission is very difficult to establish what can be included in the notion ‘exceptional occurrence’, and what should be left out of the exception. In the same Guidelines for the agricultural sector it is said that:

‘exceptional occurrences which have hitherto been accepted by the Commission include war, internal disturbances or strikes, and with certain reservations and depending on their extent, major nuclear or industrial accidents and fires which result in widespread loss’.<sup>198</sup>

Contrary, a fire in an individual establishment, or animal diseases have not been characterised as exceptional circumstances, unless they are very

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undertakings, namely departments serving overseas from the metropolitan France. The specificity criterion is fulfilled’.

<sup>194</sup> Article 107(2)(b) TFEU [2012] OJ C326/47: ‘aid to make good damage caused by natural disasters...’.

<sup>195</sup> Case C-278/00 *Greece v Commission* [2004] ECR I-3997, para 4.

<sup>196</sup> Community guidelines for State aid in the agriculture and forestry sector 2007-2013 OJ 2006 C319/1 para 121.

<sup>197</sup> Article 107(2) (b) TFEU [2012] OJ C326/47: ‘...or exceptional occurrences’.

<sup>198</sup> Community guidelines for State aid in the agriculture and forestry sector 2007-2013 OJ 2006 C319/1 para 122.



widespread.<sup>199</sup> Another extremely important case that had Article 107(2)(b) TFEU as its legal basis was the cases concerning the compensations for losses that European airlines suffered from the events of the terrorist attacks of 11/09/2001 in New York.<sup>200</sup> In its relevant Communication,<sup>201</sup> the Commission accepted that the aid measures would be justified as compensation for the damage suffered by European airlines, because of the cancellation of flights between the period of 11 to 14 September 2001 only. However, in one case<sup>202</sup> the Court accepted that aid could be given to compensate for damages suffered beyond those dates; if a direct link between the damages and the 9/11 events could be proven.<sup>203</sup> In fact, there is established case law from the Court requesting Member states and the Commission to prove that there is a direct link between the ‘disaster or exceptional occurrence and the damage to be compensated’.<sup>204</sup> Moreover, this condition for the existence of a direct link is now also found in EU secondary legislation.<sup>205</sup> Finally, the case law does not request that the exceptional occurrences and the damage have to occur at the same time for Article 107(2)(b) TFEU to apply.<sup>206</sup>

At this instance, it should be mentioned that the financial crisis that started in 2008 could be considered as an ‘exceptional instance’, and aid to financial institutions that suffered injuries due to the occurrence of the crisis

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<sup>199</sup> *ibid.*

<sup>200</sup> Communication on the repercussions of the terrorist attacks in the United States on the air transport industry, COM (2001) 574

<sup>201</sup> *Ibid.*

<sup>202</sup> Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* [2008] ECR II-1091.

<sup>203</sup> Case comment- ‘Commission too restrictive with regard to aid to compensate for 9/11 losses’, EU Focus 2008, 237/238, 55

<sup>204</sup> Case C-278/00 *Hellenic Republic v Commission* [2004] ECR I-3997, para 81.

<sup>205</sup> Community guidelines for State aid in the agriculture and forestry sector 2007-2013 OJ 2006 C319/1 para 123.

<sup>206</sup> Case T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* [2008] ECR II-1091, para 68.

could be authorised under Article 107(2)(b) TFEU. The Commission, though, has implicitly accepted Article 107(3)(c) TFEU as the legal basis for the implementation of the aid schemes in the context of the 2008 financial crisis; this discussion will be further developed in the second chapter of this thesis.

Lastly, the last subparagraph of Article 107(2) TFEU concerns aid measures for the compensation of areas in Germany that were affected by the division after the Second World War, such as West Berlin. This provision was used in the past, but has lost its ground of application after the unification of Germany.<sup>207</sup>

### 1.7.3 Article 107(3) TFEU

The derogations under Article 107(2) TFEU are automatic, meaning that if the conditions laid down in the relevant subparagraphs are satisfied, then the Commission has no discretion but to find the aid measure compatible with the internal market. Contrary, the types of aid contained in Article 107(3) TFEU are discretionary derogations. This is derived from the word ‘may’, contained in the first sentence of Article 107(3) TFEU, and Article 88 TFEU. The legal consequence is that the Commission is allowed to apply its discretionary powers in the assessment of the compatibility of the aid measure with the internal market. According to the case law this broad discretionary power, which is conferred upon the Commission in relation to Article 107(3) TFEU assessments, includes ‘complex economic, social, regional and sectoral assessments’.<sup>208</sup> Those Commission

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<sup>207</sup> C Quigley, *European State aid Law and Policy* (2nd edn Hart, Oxford 2009) 131-132

<sup>208</sup> Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-0001, para 52; Case C-169/95 *Spain v Commission* [1997] ECR I-135, para 18, and Case C-355/95 *P TWD v Commission* [1997] ECR I-2549, para 26.

assessments are made ‘in a community context’, and can be reviewed by the Court, only for estimating the legality of the exercise of that freedom. This means that the Court cannot substitute the Commission’s reasoning, but can only examine that the Commission has not erred ‘by a manifest error or by a misuse of powers’ in its decision.<sup>209</sup>

First of all of the discretionary derogations is Article 107(3)(a) which allows aid ‘to promote the economic development of areas’. This derogation is used for the regional development of Union regions that suffer from serious underemployment or are underdeveloped. The standard for establishing which Union regions can be considered underdeveloped is the Union’s average, according to the Guidelines on National Regional aid.<sup>210</sup>

Secondly, there is subparagraph (b) of Article 107(3) TFEU, which contains two types of aid. The first one allows the Commission to justify aid given ‘to promote the execution of an important project of common European interest’, and the second aid ‘to remedy a serious disturbance in the economy of a Member State’. For the first type, the case law and the Commission’s practice request that the ‘project’ should be part of a transnational European programme, in which a number of governments of Member States are jointly involved, or is part of joint action by a number of Member States to fight a common threat, such as environmental pollution.

<sup>211</sup> As for the condition that the project must be of importance, it has been held that it is not sufficient for the measures to benefit a project that enables

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<sup>209</sup> Case C-278/00 *Greece v Commission* [2004] ECR I-3997, para 5.

<sup>210</sup> Community Guidelines on National Regional aid [2006] OJ C54/13.

<sup>211</sup> Case C-62 and C-72/87 *Executif Regional Wallon v Commission* [1988] ECR 1573, para 22.

the use of new technology;<sup>212</sup> there has to be advancement in Community Research and Development.<sup>213</sup>

The derogation contained in the second part of Article 107(3) (b) TFEU<sup>214</sup> has had limited application in the past and was used to restore a serious disturbance in a Member State's economy.<sup>215</sup> The precondition is that the disturbance must affect the whole of the economy of a Member State.<sup>216</sup> Article 107(3)(a) should apply in any other case that only a Member State's region economy is disturbed. From reviewing the case law that authorised state aid with Article 107(3)(b) TFEU one can conclude that situations that have been accepted as a serious disturbance have been the following: firstly, aid measures granted by Member States to rise above the recession of the 70's, following the oil crisis.<sup>217</sup> Also, due to the inherent structural problems in the whole of the Greek economy, Article 107(3)(b) TFEU has been considered a suitable legal basis for aid to contend with those problems. Thus, Article 107(3)(b) TFEU has been used to authorise a Greek rescue programme in the 80's,<sup>218</sup> for 'viable companies', 'which have run into difficulties'.<sup>219</sup> Furthermore, this Article was used in another Greek

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<sup>212</sup> Ibid para 25.

<sup>213</sup> Faul & Nikpay, *The EC law of competition* (2<sup>nd</sup> edn OUP, Oxford 2007) 1727

<sup>214</sup> Article 107(3)(b) '...or to remedy a serious disturbance in the economy of a Member State'.

<sup>215</sup> R D'Sa, 'Instant state aid law in a financial crisis- A U-turn?', (2009) 2 *EStAL Quarterly*, 140

<sup>216</sup> P Craig and G de Búrca, *EU Law text cases and materials* (4<sup>th</sup> edn OUP, Oxford 2008) 1095

<sup>217</sup> 'Weathering through the credit crisis: is the Community equipped to deal with it?', Editorial, 46 *CMLR*, 2009, 9

<sup>218</sup> R Luja, 'State aid and the financial crisis: overview of the crisis framework', (2009) 8(2) *EStAL* 145, 147

<sup>219</sup> *Concerning Law 1386/1983 by which the Greek Government grants aid to Greek industry* Commission Decision 88/167/EEC [1988] OJ L76/18 section V.

scheme for privatisation of a number of companies<sup>220</sup>. However, this subparagraph has seen unprecedented application in the context of aid measures that Member States have adopted to tackle the financial crisis that started in 2008. The Commission declared that Article 107 (3)(b) will be the basis for authorisation of aid granted to financial institutions until 31/12/2010, or as long as the crisis is present.<sup>221</sup> This will be further analysed in the next chapter.

Next, there is the derogation of subparagraph 107(3)(c) TFEU, which authorises ‘aid to promote the development of certain activities, or of certain economic areas’. This allows regional and sectoral aid to be compatible with the internal market as long as the ‘common interest’ criterion is satisfied.<sup>222</sup> This common interest condition may include objectives of ‘growth, employment, cohesion, and environmental protection’<sup>223</sup> and it can be established in each particular case through the assessment of the aid measure’s proportionality and its ‘adverse effects on trading conditions’.<sup>224</sup>

The last derogations in Article 107(3) TFEU are the ones of subparagraphs (d) and (e). The first subparagraph of the two authorises aid that aims to promote cultural heritage. This subparagraph entered into force

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<sup>220</sup> *Greek privatization aid* (case NN 11/91) Commission Decision of 31 July 1991[ 1993 ] OJ C88/6

<sup>221</sup> Commission Communication- the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis [2008] OJ C 270/02, para 9

<sup>222</sup> A Bartosch, ‘On competition or its leftovers’, Editorial [2009] 2 *EStAL Quarterly*, 111

<sup>223</sup> European Commission Directorate-General for Competition, *Vademecum Community law on state aid*, 30 September 2008 [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/studies\\_reports.cfm](http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.cfm), accessed on 10/07/2009, 11

<sup>224</sup> *Case 47/69 France v Commission* [1970] ECR 487, para 23

on 1 November 1993<sup>225</sup> and the Court has held that it cannot be used to authorise aid that has been implemented before that date.<sup>226</sup> Since the entry into force, this derogation has been used for aid in the publications and audio-visual sectors and the film industry.<sup>227</sup> Finally, Article 107(3)(e) TFEU allows the Council to declare categories of aid as compatible with the internal market. By following this procedure, the Council has adopted a Regulation authorising aid to shipbuilding<sup>228</sup> and another Regulation for the coal sector.<sup>229</sup> This provision has different application scope than the one in Article 108(2) TFEU, which allows the Council to consider specific aid measures as being compatible with the internal market, instead of categories of aid in Article 107(3)(e) TFEU.

Finally, it should be noted that other provisions of the Treaty, or rules contained in secondary EU legislation can be considered derogations from the general prohibition contained in Article 107(1) TFEU, because they have a similar effect: they provide for ways of exempting aid measures from the prohibition, by considering them compatible with the internal market, according to the conditions included in each one of them. The reference here is on the rules contained in Article 106(2) TFEU, which is used to authorise aid to Services of General Economic Interest within the internal market, Article 108(2) TFEU, subparagraphs 2 and 3, which allows

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<sup>225</sup> This subparagraph was inserted into the then EC Treaty by Article G of the Treaty on European Union (Treaty of Maastricht 1992) [1992] OJ C-191/01.

<sup>226</sup> Case T-348/04 *Société internationale de diffusion et d'édition SA (SIDE) v Commission of the European Communities* [2008] ECR II-00625 para 61.

<sup>227</sup> *Tax credit introduced by France for the creation of video games* (case C47/06 ex N648/05) Commission decision [2008] OJ L118/16 para 105.

<sup>228</sup> Council Regulation (EC) No 502/2004 of 11 March 2004 amending Regulation (EC) No 1177/2002 concerning a temporary defensive mechanism to shipbuilding [2004] OJ L 81/6.

<sup>229</sup> Council Regulation (EC) 1407/2002 on state aid to the coal industry [2002] OJ L205/1.

the Council to authorise specific aid measures that the Commission has found to be incompatible with the internal market, *De Minimis* aid<sup>230</sup> for relative small amounts that do not distort competition, and the exceptions contained in the Block Exemption Regulation,<sup>231</sup> which provides for conditions on excluding aid in whole sectors of the economy. All those will be examined in the next chapter of this thesis, because they have been connected with the development of the state aid rules, which will be the topic of the next chapter.

## 1.8 CONCLUSION

The broad problem that this thesis bases its critical assessment on is the implementation of state aid rules in the European Union. In particular, the research investigates the implementation of state aid rules in the European Union by applying the criteria that are set. In this first chapter the researcher has defined the aims of this thesis and clarified the reasons behind the choice of the specific research. Next, the researcher presented an outline of the following chapters of the study, which are connected with the relative problems and sub questions that follow from the initial topic. This chapter of the study also analysed the methodology used to drive conclusions and the techniques that the researcher utilised to reach those conclusions.

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<sup>230</sup> Commission Regulation (EC) 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379/5. This is the Regulation in force. The consultation period for the second draft of the future Regulation closed on 9/9/2013.

<sup>231</sup> Commission Regulation (EC) 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the Common Market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation), [2008] OJ L214/3

Furthermore, the research analysed the way that the state aid policy is implemented and in particular the characteristics of state aid soft law, which plays an important part in state aid policy implementation. Finally, there was an analysis of the basic provision for the control of state aid that forms part of the Union's Competition rules. Those rules are included in the Treaty on the Functioning of the European Union. The TFEU provides for the elements of state aid and also the derogations from the prohibition of aid, which are being applied for the assessment of compatibility of an aid measure with the Treaty.

Subsequently, the Treaty Articles on state aid are the legal basis that generates the present research. In the next chapter of this study, the research will scrutinise the rationale behind the existence of state aid, even though it is generally prohibited, and the political and economic factors that affect its implementation by the Member States' perspective. Special reference will be made to the financial crisis and the impact it had on EU state aid rules.



## **CHAPTER 2**

### **WHY MEMBER STATES GRANT STATE AID**

#### **2.1 INTRODUCTION**

It is necessary to examine the reasons behind the existence of state aid, before the research can really examine in detail the more specific aspects of state aid policy implementation. This chapter attempts to identify the reasons that make state aid so attractive to national governments of the Member States of the European Union. As any policy, it is possible for state aid to have both positive and negative effects. This chapter of the thesis will focus on the different kinds of aid measures and their purpose and analyse the positive effects that derive from the implementation of state aid measures by the Member States. Those positive effects are the main reason that drives Member States' governments to grant aid. The positive effects of aid will then be contrasted to the negative effects of subsidies. This analysis of the effects and the reasons behind the granting of aid is important because the Commission itself is balancing positive and negative effects when it is assessing the compatibility of measures with the internal market.

Furthermore, it is clear that no policy is independent of interactions with others, and for it to be effectively implemented, it needs to consider the current conditions, whether those are political, social or economic, and to interact with the other policies so that it will be efficient enough to face the challenges of the current market conditions. Otherwise, if the rules of state aid policy were to be implemented in a strictly legal way it would prove impossible to catch all illegal aid. This is why the interaction of the state aid

policy with other policies and factors will be examined, in order to make clear the effects of those policies and factors in the decision making process of Member States governments when granting aid.

In times of crisis though, the implementation of rules is under threat due to the need to provide solutions as quickly as possible. This hastiness might create more problems than it is supposed to solve. Member states have resorted to subsidies to tackle the financial crisis, and the crisis is another reason why governments grant aid. This is why an examination of the crisis framework for the implementation of state aid measures is also critical at this point of the research. It will help to better understand the nature of state aid policy and its implementation by the Member States.

## 2.2 THE TREND AND PATTERN OF MEMBER STATES' STATE AID EXPENDITURE

The Member States' expenditure on state aid is reported twice annually in the Commission's state aid Scoreboard. Analysis of the data contained in the Scoreboard reveals that the trend of state aid spending is in decline since the 1980s and it currently stands at 0.5% of EU GDP.<sup>1</sup> This decline is in line with the call of the Lisbon Council<sup>2</sup> for a reduction of state aid expenditure by the Member States' governments. The data also reveal that the decline over the years was not very steep and that there were peaks in 1997, 2002 and 2006,<sup>3</sup> which shows that Member States' governments find subsidies attractive and they cannot resist disobeying their commitment to keep levels of aid low. Also, the Scoreboard connects the recent low

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<sup>1</sup> See table 10 in the appendix

<sup>2</sup> Presidency conclusions for Lisbon strategy (Lisbon European Council 23 and 24 march 2000) available at < <http://www.consilium.europa.eu>> accessed on 13/5/2013

<sup>3</sup> See table 10 in the appendix

levels of non crisis aid to the budget constraints,<sup>4</sup> which means that the level of aid could be circumstantial and not based on real commitment. It remains to be seen from future reports if the trend has leveled out.

The Scoreboard data reports that Member States grant aid to industry and services, which includes horizontal and sectoral aid, excluding aid to agriculture, fisheries and transport, which have special rules. The data reveal another pattern in state aid expenditure: that the Member States grant aid to horizontal objectives more than to sectors of the economy. Specifically, aid to horizontal objectives has increased since 2006 by approximately 0.2% of GDP.<sup>5</sup> Horizontal aid, which can benefit all undertakings operating covered by the measure, regardless of sector, seems to be more attractive to Member States; although, there are disparities.

Only a few Member States grant large amounts of sectoral aid: Portugal with 69.4% is followed by Malta with 55.18%, which is due to the fact that large schemes that expired have not been renewed because of budget constraints.<sup>6</sup> There are disparities, however, to the level of aid that each member state grants to different horizontal objective, which can be justified by the individual economic conditions that each member state has and the fact that there are more underdeveloped regions in those countries. For example regional aid accounts to 50% of total aid to services and industry for Bulgaria, the Czech Republic, Greece, Lithuania and Slovakia.<sup>7</sup> Since Member States' governments grant aid to those objectives this chapter of the thesis focuses on different kinds of aid and their purpose but first, it

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<sup>4</sup> State aid Scoreboard Autumn 2012 COM (2012) 778 final para 2.

<sup>5</sup> State aid Scoreboard Autumn 2012 COM (2012) 778 final para 2.2

<sup>6</sup> Commission staff working document Facts and figures on State aid in the EU Member States 2012 Update SEC(2012)443 final para 2.2.2

<sup>7</sup> Ibid

would be fruitful to examine the interaction of political economy with state aid control.

## 2.3 THE INTERACTION OF COMPETITION LAW AND STATE AID CONTROL IN PARTICULAR WITH POLITICAL ECONOMY THEORIES

Competition law and economics are currently supplementing each other in the assessment of anti-competitive behaviour, within the European Union's Competition Framework. Nevertheless, it has not always been so obvious that economic theories could help competition authorities identify anticompetitive behaviour more efficiently, at least for the Commission. The theoreticians of economics were always more positive in competition law learning from economics. Also, state aid in particular has links with both the development of competition law in Europe and the development of Member State's economic and social policies.<sup>8</sup> Those two aspects explain the character of state aid from a political economy point of view. The analysis of specific economic instruments that have been incorporated into state aid control is in the seventh chapter of the thesis, because it forms part of the reform of the state aid policy.

### 2.3.1 The origins of European competition law and the novel goals of efficiency and consumer protection

In the first years after the signing of the Treaty of Rome the application of competition rules and mainly antitrust rules were influenced by the German Ordo-liberalism theory that was created in the Freiburg

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<sup>8</sup> D Lehmkuhl, 'On government, governance and judicial review: the case of the European Competition Policy' (2008) 28:1 *Jal. Publ. Pol.* 139, 143.

school. However, others believe that neither the Treaty of Rome, nor the transformation of the EEC to the EU have an ordo-liberal base.<sup>9</sup> Germany was the first country, Member of the European Communities to establish national competition law, at the time of the adoption of the Treaty of Rome. The German model continued to influence European Competition law in Europe for almost until the 1990's. Ordo-liberalism theory believed that law and economics should collaborate. Excessive market power concentrated in one undertaking in the market was anti-competitive for the ordo-liberals, because it could lead to less innovation and therefore, cause prices to rise.<sup>10</sup> The ordo-liberals sought to improve the rules, rather than improving the outcome of economic intervention. They believed that a higher system of law had the potential to protect individual freedom from being abused by either private and/or public economic powers.<sup>11</sup> Therefore, Competition was in the centre of their thought for the free social market, with the emphasis given to having appropriate rules for competition policy, which helped the market economy to function effectively.<sup>12</sup> State intervention should be used, according to this school, to sustain competition in the market.<sup>13</sup>

Later in the 1990's, the influences of the American Chicago School of thought were introduced in Europe, putting more emphasis on consumer welfare, as an objective of competition, rather than rules. The Chicago school places the achievement of market efficiency in the heart of

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<sup>9</sup> Francesco de Cecco *State aid and the European economic constitution* (Hart Oxford and Portland Oregon 2013) 13

<sup>10</sup> Clemens Kaupa, 'The More Economic Approach - A Reform Based on Ideology' [2009] 8(3) *ESTAL* 311, 312.

<sup>11</sup> D Gerber, 'Constitutionalising the economy, German neo liberalism competition law and the new Europe' [1994] 42 *American journal of Competition law* 25

<sup>12</sup> D Gerber, 'Constitutionalising the economy, German neo liberalism competition law and the new Europe' [1994] 42 *American journal of Competition law* 45

<sup>13</sup> G Monti, *EC Competition Law* (Cambridge University Press, 2007) 23

Competition control,<sup>14</sup> and has mainly influenced American antitrust control. For the neo-classicals, as the followers of this theory are known, the market creates efficient competitive results only when it is left without government intervention.<sup>15</sup> This transformation of European competition law started with the application of the Merger Regulation, but did not materialise by any legislative document, at first.<sup>16</sup> However, lately, it has been introduced into the European Union's antitrust system, by various Commission documents.

It is important to say that the TFEU itself does not include any indication that consumer welfare is a legitimate goal for Competition law and state aid more specifically. After all, the goal of total welfare, where every player in the market achieves efficiency is too costly to run. Hence, the Competition policy should protect competition and consumers and not competitors,<sup>17</sup> because by focusing on the effects of a conduct on consumers it is easier to establish a breach of competition law provisions.<sup>18</sup> For state aid in particular, it was only with the adoption of the S.A.A.P in 2005 that the Commission introduced consumer welfare, as a state aid objective.<sup>19</sup>

### 2.3.2 The character of state aid control

According to the theory of protectionism, the state actually intervenes in the operation of the market with various measures, such as tariffs, import quotas, anti-dumping measures and state aid. State aid

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<sup>14</sup> R Zach (ed) *The development of Competition Law* (ASCOLA, 2010) 6.

<sup>15</sup> Clemens Kaupa, 'The More Economic Approach - A Reform Based on Ideology' [2009] 8(3) ESTAL 311, 312

<sup>16</sup> A Weitbrecht, 'From Freiburg to Chicago and beyond – the first 50 years of European Competition Law', (2008) ECLR 29(2) 81, 85.

<sup>17</sup> Biondi *The law of State Aid in the EU* (OUP Oxford, 2004) 50.

<sup>18</sup> R Zach (ed) *The development of Competition Law* (ASCOLA, 2010) 6.

<sup>19</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final, para 6.

measures, as government intervention in the market, is a protectionist policy measure<sup>20</sup> but the TFEU prohibition of state aid is not absolute because it has both positive and negative effects. The effects of granting aid to undertakings are balanced in order to decide if the measure is compatible with the internal market according to Article 107(1) TFEU. State aid in economics is usually seen as a protectionist measure and therefore it leads to reluctance to use aid and a need to control it.<sup>21</sup>

For its part, the European Commission has made clear its view on the relation of state aid to protectionism. In the Annual Report on Competition of 1978<sup>22</sup> the Commission clearly connects the granting of State assistance with protectionism, which must be avoided. Protectionism, as an economic policy was rejected for what were then called the Communities, because it causes internal problems of unity between Member States, and it can also create anti-measures from non-members of the Communities.<sup>23</sup> This pattern follows in other Report on Competition Policy as well. In the XVIIth Report on competition policy the Commission states that it ‘must take even greater care to ensure that national aid policies do not become a new version of old protectionist measures.’<sup>24</sup> State aid control can be used by Member States to resist protectionism, if governments adopt

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<sup>20</sup> Commission, XXIIIrd Report on competition policy 1993, 418.

<sup>21</sup> Patrick A. Messerlin, ‘External aspects of State aids’ in European Commission, *European Economy, State aid and the single market* available at < [http://www.market-analysis.co.uk/PDF/Academic/european\\_economy\\_state\\_aids\\_0399en.pdf#page=31](http://www.market-analysis.co.uk/PDF/Academic/european_economy_state_aids_0399en.pdf#page=31)> accessed on 10/3/2013.

<sup>22</sup> Commission, VIIIth Report on Competition Policy, Brussels and Luxembourg April 1979, available at [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=CB2578687](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB2578687) <accessed on 1-3-2011>.

<sup>23</sup> Ibid 123.

<sup>24</sup> XVIIth Report on competition policy

measures that not only benefit individual companies and failing firms, but measures for horizontal objectives.<sup>25</sup>

In the XXIIIrd Report on competition policy European firms are urged to reduce costs that will increase productivity. Liberalisation of the European Union's industry is the way forward that will help the industry to achieve the goals of productivity and growth. The report encourages the use of private capital to participate in European projects.<sup>26</sup> This approach is clearly in favour of a liberalised economy, where government interventions, such as state aid must be controlled. It has been said that the current form of state aid control, after the shift from the form to the effects based approach and the inclusion of instruments, such as the balancing test and the Market Economy Investor Principle has implemented the basic 'demands of the neoclassical theory.'<sup>27</sup> The pre-formulated state aid rules (in a form based assessment of state aid measures) could not distinguish the pro and anti-competitive effects of a measure; now the priority is for the Commission to assess the economic efficiency of the measure.<sup>28</sup> From the analysis above it is evident that the choice to prohibit state aid in the European Union is not independent of economic and political considerations.

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<sup>25</sup> Ibid

<sup>26</sup> XXIIIrd Report on competition policy, 23.

<sup>27</sup> Clemens Kaupa, 'The More Economic Approach - A Reform Based on Ideology' [2009] 8(3) *ESTAL* 311, 312

<sup>28</sup> An. Renckens, 'Welfare standards, substantive tests, and efficiency considerations in merger policy: defining the efficiency defence' (2007) 3(2) *Journal of Competition Law and Economics*, 149, 165.



### 2.3.3 The state and the market

State aid is an instrument of government intervention in the market.<sup>29</sup> State aid is only one kind of government interventions. A subsidy or other measure ‘becomes state aid only when it gives an advantage to companies on a selective basis.’<sup>30</sup> Additionally, interventions other than state aid are exempted from the Commission’s control because government action can be necessary for a well-functioning and fair economy.<sup>31</sup> State aid is particularly used by Member States as a tool to change certain or expected market behaviour, to change prices and encourage or discourage certain activity.<sup>32</sup> The European Union’s economic constitution, part of which is state aid is more liberal in nature than protectionist, because it aims to create an internal market with free movement, in other words open up national markets to liberalism.<sup>33</sup> The economies of Member States rely on the market to decide on what goods and services should be produced and at what prices, what projects need to be funded by how much capital and what research and innovation is needed at any given sector. However, markets do not always produce efficient outcomes.

The main economic rationale for granting state aid is to correct market failures, the situation that occurs when the market does not achieve

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<sup>29</sup> S Lehner, R Meiklejohn, *Fair Competition in the internal market: Community state aid policy* (European Commission, Luxembourg 1991) 17

<sup>30</sup> Joaquín Almunia, ‘Time for the Single Market to come of age’ SPEECH/13/243 20/03/2013

<sup>31</sup> Ibid

<sup>32</sup> S Lehner, R Meiklejohn, *Fair Competition in the internal market: Community state aid policy* (European Commission, Luxembourg 1991) 25.

<sup>33</sup> Julio Baquero Cruz *Between Competition and Free Movement The Economic Constitutional Law of the European Community* (Hart 2002) 77-78.

efficient outcome.<sup>34</sup> Economic literature identifies five factors that cause market failures: firstly, external effects (externalities); secondly, public goods; thirdly, imperfect competition and monopolies as an extreme case of imperfect competition; fourthly, asymmetric information distribution and finally, coordination deficiencies.<sup>35</sup> In these cases, government intervention in the market can lead to economic improvements. State aid can correct a market failure by changing the market's or sector's behaviour: it changes the prices that consumers, producers and suppliers are prepared to pay.

The problem with government intervention in the market is that those that take the decisions to intervene (politicians, administrators) are not neutral; instead they are part of a political process, in which different actors can influence the decision making for their own benefit.<sup>36</sup> Therefore, state aid as a government intervention in the market, a protectionist instrument may cause more harm than good and it is for the Commission to make sure that that overall state aid measures do not distort competition or trade between Member States. However, from the Member States' perspective state aid control is seen as a limitation of their sovereign powers and their economic policies.<sup>37</sup> This view is based on the fact that state assistance has traditionally been one of a few policy instruments that governments use to 'protect national industries in an integrated market.'<sup>38</sup> Therefore, having

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<sup>34</sup> Phedon Nicolaides and Ioanna Eleonora Rusu, 'The "binary" nature of the economics of state aid' [2010] 37(1) *Legal Issues of Economic Integration* 25, 26

<sup>35</sup> Justus Haucap, Ulrich Schwalbe, 'Economic Principles of State Aid Control' [2011] Dusseldorf Institute for Competition Economics, Discussion paper No 17 available at <[http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche\\_Fakultaet/DICE/Discussion\\_Paper/017\\_Haucap\\_Schwalbe.pdf](http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/017_Haucap_Schwalbe.pdf)> accessed on 19/7/2013

<sup>36</sup> *Ibid* 25

<sup>37</sup> Erika Szyszczak, *The regulation of the state in competitive markets in the EU* (Hart, Oxford and Portland, Oregon 2007) 178

<sup>38</sup> *Ibid*

examined the general rationale behind state aid the thesis now moves to the specific and examines the different kinds of state aid that Member States use and their purpose.

## 2.4 DIFFERENT KINDS OF STATE AID, THEIR PURPOSE AND EFFECTS

In the "State Aid Action Plan — Less and better targeted state aid: A roadmap for state aid reform 2005-2009"<sup>39</sup> the Commission accepts that state aid measures have two types of positive effects. The first is that it can become an effective tool for achieving objectives of common interest, which will be analysed in this part of the research. The second type of positive effects is that in general, state aid can correct market failures, by improving the functioning of the market and improve competitiveness.<sup>40</sup> The first type of positive effects will be analysed here; the correction of market failures will be analysed in following chapters.<sup>41</sup> Accordingly, the first and most important factor that drives the granting of aid is that it can be used as a tool to promote certain policies, which provide benefits for the national economy. There have been in the past many sectors of the economy that have been under state control almost totally, such as the air transport sector or the postal services. Those sectors were later liberalised and this section will also analyse the role of state aid in market liberalisation.

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<sup>39</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final para 40.

<sup>40</sup> Also in A Zemplerova, 'The Community State Aid Action Plan and the challenge of developing an optimal enforcement system' in I Lianos and I Kokkoris (eds), *The reform of EC Competition law: new challenges*, (Kluwer law international, 2010) 533.

<sup>41</sup> The analysis of market failures follows in Chapter 7, paragraph 7.2.2 of the thesis, in connection with the critical analysis of the reform process that introduced them in the examination of State Aid measures.

#### 2.4.1. Positive effects from sectoral aid

Aid given to specific industry sectors has been used in the past, and more recently, as a tool to help advance the development of weak European industrial divisions. The scoreboard reveals that aid to individual sectors is in decline and in 2011 represented 10.3% of total aid to industry and services.<sup>42</sup> The support from the State in specific economic fields can help the Union's Market achieve the goals that have been set for a secure future development. This is especially true when the market on its own cannot reach the set goals in the desired timeframe, or with limited effects on the social structure of the community. Or even, at times that the market creates obstacles in the process of reaching the set goals.<sup>43</sup> As a result, State support is seen as a tool to speed up the necessary changes that need to be effected, in order to reach the goals, or to counterbalance the obstacles and negative effects on the social profile of the economy. The Commission has also set the criteria based on which Member States may grant aid to specific industry sectors that can be most beneficial. According to the Commission, the aid should be limited in intensity and time, and should be gradually phased-out altogether; after all, aid should help resolve problems and not maintain an undesirable market climate. Finally, it should not spill problems that exist in one country to other Member States.<sup>44</sup>

The Union frequently sets goals for its future development. Such a process was the Lisbon Strategy, whose goals were supposed to be reached by the year 2010. However, the completion of its targets was interrupted by

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<sup>42</sup> State Aid Scoreboard - Autumn 2012 Update COM(2012) 778 final 8.

<sup>43</sup> Commission, VIIIth Report on Competition Policy, Brussels and Luxembourg April 1979, 124.

<sup>44</sup> Ibid 124-125.

the Economic crisis of 2008. The process of overriding obstacles for the completion of the internal market and the creation of new jobs was too slow.<sup>45</sup> Afterwards, the Union set another timeframe and new goals in the Commission's Europe 2020 document,<sup>46</sup> which aspires to create smart, sustainable and inclusive growth for the Union. Within this context of tight timeframes and emerging crises, state aid policy has been used as a tool to correct the shortcomings and provide positive effects for the completion of the set aims.

Over the years, the Commission has introduced sector specific guidelines, concerning the conditions under which aid will be perceived justified and compatible with the internal market. It should be made clear though, that the Treaty itself provides for the legal basis for the justification of the granting of sectoral aid: the first part of Article 107(3) TFEU considers compatible with the internal market 'aid to promote the development of certain economic activities'.<sup>47</sup> However, the Article is not detailed enough, to provide specific criteria, according to which measures for specific sectors will be evaluated. It is this gap, or better yet, this shortfall of the primary EU law that the soft law can fill, or correct.

#### 2.4.1.1 Aid to agriculture and fisheries

The first sector to benefit from state aid is the agriculture sector.<sup>48</sup> The adoption of guidelines for state aid in the agriculture sector was

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<sup>45</sup> Commission staff working document, Lisbon Strategy evaluation document, Brussels 2.2.2010, SEC (2010) 114 Final, 5.

<sup>46</sup> Communication from the Commission, Europe 2020, Brussels 3.3.2010, COM (2010) 2020.

<sup>47</sup> Article 107(3) (c) TFEU [2012] OJ C326/47.

<sup>48</sup> Community Guidelines for State Aid in the agriculture and forestry sector 2007-2013, [2006] OJ C319/01; Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-

necessary because of the possible collusion caused by the interaction between national aid measures with state funding, and the Union's common agricultural and rural development policy, which is funded by the Union's budget.<sup>49</sup> The positive effects for this sector that the Guidelines recognise have to do with improving production, preserving the natural environment, increasing quality of agricultural products and to promote diversification of farm activities.<sup>50</sup>

In particular, the Member States' agriculture policy has been granted special status and aid in this sector is assessed by DG for Agriculture and Rural Development, because of the various roles that it can have: according to the Guidelines, aid to agriculture can assist the rural development of Member States. Member states can implement specific aid measures, and Articles 107, 108 TFEU should be applied to the assessment of aid.<sup>51</sup> Rural development aid can have the form of measures such as aid to agricultural holdings, aid to the processing of agricultural products, aid for the promotion of environmental and animal welfare and compensation from handicaps in certain regions.<sup>52</sup> In *Holland Malt* the Court of Justice upheld the General Court's judgment that the Commission was right to assess whether the measure constituted aid according to the 2000 Agriculture

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sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 [2006] OJ L358/3; Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid in the sector of agricultural production [2007] OJ L3337/35. Those instruments expire at the end of 2013 and are under revision, as part of the state aid modernisation.

<sup>49</sup> Community Guidelines for State Aid in the agriculture sector [2000] OJ C232/01 para 1.6.

<sup>50</sup> *Ibid* para 4.1.1.1.

<sup>51</sup> Council Regulation (EC) 1698/2005 on support for Rural Development by the European Agricultural Fund for Rural Development [2005] OJ L277/1, Article 88(1).

<sup>52</sup> Community Guidelines for State Aid in the agriculture and forestry sector 2007-2013, [2006] OJ C319/01, paras 25-111.

Guidelines that were in force then, and after finding that there was aid to assess the compatibility of the measure with the internal market according to Article 107 (3)(c) TFEU.<sup>53</sup>

Also, this sector can benefit from aid for early retirement of farmers, so that new farmers can enter the market, and aid to repair damages caused by natural disasters, or to combat and prevent animal diseases. The latter cases can be justified under Article 107(2)(b) TFEU, but the Commission and the Court have been cautious in the past. In a case concerning a Greek law that offered financial assistance to a dairy producer, agricultural cooperative called ‘AGNO’, as compensation for the damage it suffered from the Chernobyl nuclear accident in Ukraine, the Commission doubted that the compensation had a direct link to the damage caused by the accident that happened more than five years earlier. The result of this case was a negative decision, which means the aid was incompatible with the internal market, and therefore a recovery decision.<sup>54</sup> All of those measures are listed as special benefits in the before mentioned Guidelines. The agricultural sector is independently regulated from the fisheries sector to which different guidelines, other than those for agriculture apply.<sup>55</sup> The fisheries policy is under review to comply better with current environmental conditions but

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<sup>53</sup> Case C-464/09 P *Holland Malt v Commission* [2010] ECR I-12443

<sup>54</sup> Commission Decision of 1 March 2002 on the aid schemes implemented by Greece in favour of the settlement of debts by the agricultural cooperatives in 1992 and 1994 including the aids for reorganisation of the dairy cooperative AGNO (2002/459/EC) [2002] OJ L159/45.

<sup>55</sup> Community Guidelines for the examination of State Aid to fisheries and aquaculture, [2008] OJ C84/06.

Member States have agreed to retain state aid for scrapping of vessels and aid for temporary cessation and engine replacement.<sup>56</sup>

#### 2.4.1.2 Aid to transport

Another sector that has benefited from state aid is the Transport sector. There are Guidelines for Inland Transport,<sup>57</sup> Maritime Transport<sup>58</sup> and Air transport.<sup>59</sup> The last sector has proven especially susceptible to state aid. This can be explained by the fact that State monopolies existed as a Europe-wide phenomenon, and governments granted aid in various forms to their national carriers. The Commission decided to liberalise this sector in the 1980's, but the efforts to restructure the former national carriers, so that they could compete in the free market that was to be developed in this sector, led to even more aid;<sup>60</sup> rescue and restructuring aid measures were implemented.<sup>61</sup> The same situation has occurred in other markets, such as the telecommunications, postal services and energy. All of those sectors have produced litigation before the Court and actually helped develop state aid law significantly.

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<sup>56</sup> Jill Wakefield, 'The problem of regulation in EU fisheries' (2013) 15(3) *Environmental Law Review* 191, 198

<sup>57</sup> Regulation (EC) 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations 9EEC 0 1191/69 and 1107/70 [2007] OJ L 315/1 and Communication from the Commission -Community Guidelines on State Aid for railway undertakings [2008] OJ C184/13.

<sup>58</sup> Communication from the Commission providing guidance on State Aid to ship-management companies [2009] OJ C132/6 and Communication from the Commission providing guidance on State Aid complementary to Community funding for the launching of the motorways of the sea [2008] OJ C317/10. And Commission Communication C(2004) 43 – Community Guidelines on State Aid to maritime transport [2004] OJ C013/3.

<sup>59</sup> Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports [2005] OJ C312/1 and Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State Aids in the aviation sector [1994] OJ C350/5.

<sup>60</sup> S Stadlmeier, 'Comment: State Aid for Airlines?' [2010] 3 *EstAI*, 659.

<sup>61</sup> Lavdas and Mendrinou *Politics Subsidies and Competition* (Edward Elgar, Cheltenham 1999) 90-91.



In another case, the airline industry was in need of aid for entirely different reasons. After the 11<sup>th</sup> of September terrorist attacks in the USA, the Council of Finance Ministers agreed to support the European airlines, because of the risk that the private insurance sector would not be able to bear the costs after the attacks. In more recent times, state aid was again partly the solution to a problem that occurred to the European airline industry. In April 2010 a volcano erupted in Iceland and more than 100,000 flights were cancelled, and much of the European airspace was closed for weeks, due to the fear of safety issues with the volcanic ash that spread throughout the continent. The European Commission decided that it would be better for Member States to implement state aid measures compatible with Article 107(2)(b) TFEU, which is used to authorise measures that aim to offset the damages caused by natural disasters.<sup>62</sup>

State aid measures to the transport sector can often fall under the special conditions of the Altmark test because they relate to public service compensation. Aid can be declared compatible with the internal market, if it is granted to undertakings that have been entrusted with the operation of a particular service of general economic interest, so that it fulfills the conditions set out in Article 106(2) TFEU. It is not defined in the Treaty which services can be deemed as public service and each Member State can include any service, which will then be evaluated by the Commission. A Communication provides only a list of examples for SGEI: telecoms, posts,

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<sup>62</sup> Commission, 'Volcanic ash cloud crisis: Commission outlines response to tackle the impact on air transport', MEMO/10/152.

broadcasters, education, health services and water and waste management.<sup>63</sup>

The Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest<sup>64</sup> provides details as to the specific criteria that the Commission will examine when it will be evaluating measures that grant aid to public service operators. According to the *Altmark Trans*<sup>65</sup> judgment of the Court, the compensation granted by Member States for the operation of SGEI does not constitute prohibited aid, only if four cumulative conditions are fulfilled. These conditions are: a) a clear public service assignment, b) the existence of pre-determined compensation criteria, c) the compensation does not exceed the costs incurred in providing the public service and d) the beneficiary is chosen in an open tender, or in the absence of such a tender, the compensation does not exceed the costs of a well-run company.<sup>66</sup>

#### 2.4.1.3 The purpose of aid to the media and telecommunications sector

Another sector that has benefited from state aid is the media and telecommunications sector. The media and telecommunications sector has

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<sup>63</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C-8/4.

<sup>64</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L-7/3. Legislation and soft law instruments for SGEI have been adopted in the context of the reform of State Aid rules for SGEI. The new rules are analysed in chapter seven as they form part of the reforms and Modernisation.

<sup>65</sup> Case C-280/00 *Altmark* [2003] ECR-I7747

<sup>66</sup> Case C-280/00 *Altmark* [2003] ECR-I7747, paras 89-93.

been part of the Lisbon Strategy to create knowledge based economy.<sup>67</sup> State support helps operate public service broadcasting and achieve the aims of growth and innovation in the sector. It also promotes diversity, and helps satisfy people's cultural and social needs. The media market was also liberalised, but the Member States decided to retain public service broadcasters, together with the new privately owned media. Aid to public service broadcasters is evaluated under Articles 107 and 106 TFEU, which relates to competition rules applicable to services of general economic interest (SGEI). Public service broadcasting is important, because it provides wide access, without discrimination to the people. State aid has benefited public broadcasting by bringing to the public the 'new audiovisual and information services and the new technologies'.<sup>68</sup> State aid measures to public broadcasters have been found compatible with the internal market by the Commission because the Altmark criteria have been satisfied.<sup>69</sup> In another case, though, the problem was to identify whether there was public funding in the license fee that the BBC collects as compensation for the public service operation of digital channels in the UK. The Commission decided that the license fee involves state resources because of the agreement with the UK Government that allows the BBC to use the amounts collected although the measure did not constitute aid.<sup>70</sup>

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<sup>67</sup> Presidency conclusions for Lisbon strategy (Lisbon European Council 23 and 24 march 2000) available at < <http://www.consilium.europa.eu> > accessed on 13/5/2013

<sup>68</sup> Communication from the Commission on the application of State Aid rules to public service broadcasting [2009] OJ C257/1 .

<sup>69</sup> *Budgetary grant for France Télévisions* (Case C27/09 (ex N34/B/09) Commission Decision of 20 July 2010 [2011] OJ L59/44. This Commission Decision was recently upheld by the General Court in Case T-520/09 *TF1 and others v Commission* [2012] C250/12

<sup>70</sup> *BBC License fee* (Case N631/2001) Commission Decision of 22 May 2002 [2003] OJ C23/6

Also, subsidies have been used to develop and expand the European broadband networks in line with the Guidelines for state aid to broadband.<sup>71</sup> It was decided that public funds should be used to help high speed networks reach rural areas, to which private investors in the field might not want to invest to, if they decided on pure market terms. The rapid deployment of broadband is a priority for the Member States set by the Digital Agenda for Europe,<sup>72</sup> which is part of the Europe 2010 policy. The goal for Member States is to bring fast broadband to half of European households by 2020. This target led to an extraordinary increase of aid to broadband, with over 1.8 billion Euro of public money used for broadband investments in 2010 alone.<sup>73</sup> There is a number of cases where the Commission approved state aid measures for broadband networks.<sup>74</sup> The Commission allows the Member States to determine if broadband will be a SGEI, which would mean the application of the *Altmark* criteria in the assessment of the measure,<sup>75</sup> only if private operators are unable to provide coverage in the area, and the subsidised network is public, neutral and provides universal

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<sup>71</sup> EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks [2013] OJ C 25/1.

<sup>72</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Digital Agenda for Europe COM/2010/0245

<sup>73</sup> Press release of 20 January 2011, State Aid Commission approves record amount of State Aid for the deployment of broadband networks in 2010, IP/11/54.

<sup>74</sup> *Extension of high speed broadband in Spain* (Case SA.35834/2012/N) Commission Decision of 05/07/2013 [2013] OJ C256/08; *Local broadband network projects in Podlasie* (Cases SA.35027, SA.35028 & SA.35029/2012/N) – Commission Decision of 06/06/2013 [2013] OJ C206/1; *Metropolitan Area Networks (MAN)/Fibre to the Home (FTTH)*(Case SA.33641/2011/N) [2013] OJ C23/2; *National Broadband scheme for the UK* (Case SA 33671/2012) Commission Decision of 3/10/2011 [2013] OJ C13/2.

<sup>75</sup> EU Guidelines for the application of state aid rules in relation to the rapid deployment of broadband networks [2013] OJ C 25/1 para 18.

coverage, open to both individual and commercial customers, without discrimination.<sup>76</sup>

#### 2.4.1.4 What are the benefits from granting aid to the energy sector?

Finally, the last sector that needs to be identified in this section is the coal and steel and in general the energy sector, which will conclude the most important sectors of the European economy that are benefiting from aid. Coal and Steel in particular had been regulated until 2003 by the European Coal and Steel Community Treaty of 1951, which expired. Since then state aid in this sector is assessed under the normal rules of the TFEU. Aid for this sector has been justified in three cases: when there is need for the production of renewable energy, for compensation for stranded costs and rescue aid. For the first type, the benefits are self-evident: aid in this sector can increase the level of environmental protection, if Member States use financial assistance to create incentives on an undertaking level, to ‘achieve a higher level of environmental protection than required by Community standards, or to increase the environmental protection in the absence of Community standards’.<sup>77</sup> In the case of stranded costs, the state compensates for long term aid given to undertakings before the liberalisation of the sector.<sup>78</sup> Just like other sectors that have been examined in this section, the energy sector has been under state monopoly in the past, and has been liberalised recently. Therefore, it would be beneficial at this

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<sup>76</sup> Ibid paras 19-27.

<sup>77</sup> Community guidelines on State Aid for environmental protection [2008] OJ C 82/1 para 1.2(10).

<sup>78</sup> The liberalisation of the electricity market happened with the Directive 96/92/EC [1997] OJ L27/20.

point to briefly explain the connection between subsidies and market liberalisation.

#### 2.4.1.5 What is the role for state aid after a market has been liberalised?

The postal, energy and transport markets were privatised in the 1990's, or according to the term preferred by the Commission they were liberalised. Market liberalisation is an independent policy, within the DG Competition of the Commission, along with the divisions for antitrust, mergers and state aid. However, subsidy control and the liberalisation policies are interconnected, as we have already seen in the example of air transport.<sup>79</sup> After the opening of those markets to new competitors, there was still a need to maintain the providers of public services, as providers of a minimum amount of services that should be accessible to all, without discrimination or obstacles. State aid has been given to both new competitors in a market, such as aid to Ryanair to operate new air routes,<sup>80</sup> and to old monopolistic companies, to help them be present in the new competitive environment, after liberalisation. This process has produced benefits to both consumers and the industries themselves, who are the competitors: Open markets have allowed consumers to profit from lower prices, and the undertakings introduced new services, which are more developed than in the past, and generating more profit than before. In

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<sup>79</sup> Lavdas and Mendrinou *Politics Subsidies and Competition* (Edward Elgar, Cheltenham 1999) 91.

<sup>80</sup> Case T-196/04 *Ryanair v Commission* [2008] ECR II-3643, which annulled the Commission's Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to Ryanair for its establishment at Charleroi.

general, this process of liberalisation has benefited the European economy, by making it more competitive, both internally and to the outside world.

However, privatisation is not creating competitiveness, if it simply creates a private monopoly in the place of a previous state monopoly.<sup>81</sup> Then, the effects will be harmful to consumers, since there will be no control over prices and the absence of competition between players will not provide incentives for the further expansion of the market. In all of those occasions, state aid has produced positive effects for the sectors concerned in a time of need, change or crisis. There are however, other benefits that derive from state aid in other policies, which will be examined next. First, will be the effects on the regional policy.

#### 2.4.1.6 Positive effects on the regional policy of the Union and the Member States

Another policy that was characteristically supported by state aid was the regional policy. Underdeveloped regions of Member States have been the ground, where numerous state aid measures have been implemented in the past and at the present also. After all, it is still excluded from the prohibition of state aid by the Treaty.<sup>82</sup> The Commission's view is that the way to the future, for regional policy in relation to state aid, should be more in line with promoting horizontal measures in regions, such as promoting employment and innovation.<sup>83</sup>

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<sup>81</sup> S. Singham *A general theory of trade and competition trade liberalization and competitive markets* (Cameron May, London 2007) 30.

<sup>82</sup> Article 107 (3) (a) TFEU [2012] OJ C326/47.

<sup>83</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final para 40.

Member states can grant regional aid under the conditions laid down in the Guidelines for national regional aid 2007-2013,<sup>84</sup> whose application has been extended till 30 June 2014. After that date the newly adopted Guidelines will enter into force for the period 2014-2020.<sup>85</sup> The Member States can grant aid to underdeveloped regions to support economic development and employment while state aid control must ensure a level playing field between Member States.<sup>86</sup> The regional aid guidelines set out the rules under which Member States can grant state aid to companies to support investments in new production facilities in the less advantaged regions of Europe or to extend or modernise existing facilities. The guidelines also contain rules for Member States to draw up regional aid maps (the geographical areas where companies can receive regional state aid, and at which intensities). Regional aid can have adverse effects, such a subsidy race between regions that try to retain businesses in their geographical region, by preventing them from relocating.<sup>87</sup>

Member states may grant aid to SMEs in underdeveloped and remote regions, because they are most likely to be affected by the disadvantages of the region. On the contrary regional aid to large undertakings is unlikely to be accepted.<sup>88</sup> This kind of aid may in particular be operating aid that aims to reduce operating costs and it is prohibited in other situations. Operating aid can be administered to outermost regions, which are remote geographical areas that are either small in size and have difficult topography or climate, with special conditions and less restrictions

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<sup>84</sup> Guidelines for national regional aid 2007 – 2013 [2006] OJ C54/13.

<sup>85</sup> Guidelines for national regional aid 2014-2020 [2013] OJ C209/1

<sup>86</sup> Ibid para 3.

<sup>87</sup> Ibid.

<sup>88</sup> Guidelines for national regional aid 2014-2020 [2013] OJ C209/1 paras 14-15.



than in other cases, because it is used to offset the costs generated from the disadvantages of the region that the beneficiary operates in.<sup>89</sup>

In more recent times, however, the European Union has declared that it will advance the social model, first, by the Lisbon Strategy and more recently, by the aspirations declared in the strategy for ‘Europe 2020’<sup>90</sup> to become a smart, sustainable and inclusive economy, where employment, productivity and social cohesion will reach high levels. Consequently, it is expected that governments will continue to grant aid to undertakings or projects that promote those policies: that is employment, productivity, research and development, environmental projects and cohesion. Certainly, the Block exemption regulation includes Articles that exempt certain amounts of aid that aim to protect employability.<sup>91</sup> However, the protection of jobs in a single undertaking would be considered selective by the Court and the Commission and would not benefit the Member States employment policy.<sup>92</sup> All of those objectives are categorised as horizontal objectives of the internal market and will be analysed next.

## 2.4.2 Aid to horizontal objectives

### 2.4.2.1 Environmental aid

Ever since the Treaty of Amsterdam the Union has set environmental protection as a main objective. Article 191 TFEU (ex Article

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<sup>89</sup> *Dispositif d'exonération des cotisations patronales de sécurité sociale dans le secteur marchand* (Case N542/2006) Commission Decision of 23 October 2007 [2008] OJ C14/10 ; *Reduced excise duty for locally produced beer in Madeira* (Case N293/2007) Commission Decision of 10 October 2007 [2007] OJ C308/11.

<sup>90</sup> European Commission, ‘Communication from the commission Europe 2020 A strategy for smart, sustainable and inclusive growth’ Brussels 3.3.2010 COM (2010) 2020 final.

<sup>91</sup> Commission Regulation (EC) 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the Common Market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation), [2008] OJ L214/3.

<sup>92</sup> Rainer Palmstorfer and Thomas Eilmansberger, ‘Employment protection and State Aid’, (2010) *EStAL* 3 649, 657.

174 TEC) contains the objective to promote measures that aim at a high level of protection under the precautionary principle: according to this preventive action should be taken, the damage to the environment should be repaired at the source and following that the polluter should pay. Article 192 TFEU suggests the procedure to be followed for the adoption of legislation and measures that fulfill the objectives of Article 191 TFEU and also connects the environmental policy with the energy policies of the Member States.<sup>93</sup>

Part of the Union's environmental and energy policies is to reduce emissions<sup>94</sup> by at least 20% by 2020 and increase the use of renewable and sustainable types of energy to 20% of total EU energy consumption by 2020.<sup>95</sup> One way of achieving those goals is through state aid. The latest Scoreboard shows that 0.09% of EU GDP was used as aid to environmental protection objectives, which is the second highest amount of aid for horizontal objectives and reveals the commitment of Member States to pursue horizontal objectives of common interest.<sup>96</sup> The basic state aid soft law document that includes those objectives is the Community Guidelines on state aid for environmental protection.<sup>97</sup> The aim of the Guidelines is to balance the need for generous support measures that promote the environment and the protection of competition; in other words Member States grant aid to environmental projects because they are considered

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<sup>93</sup> Article 192.2(c) TFEU [2012] OJ C326/47

<sup>94</sup> Commission, An energy policy for Europe, COM (2007) 1 final.

<sup>95</sup> State aid Scoreboard Spring 2008 COM (2008) 304 final

<sup>96</sup> State aid Scoreboard Autumn 2012 COM (2012) 778 final

<sup>97</sup> Community Guidelines on state aid for environmental protection [2008] OJ C82/1

objectives of common interest. The State Aid Action Plan<sup>98</sup> also included guidance as to how to achieve those environmental objectives in line with the state aid policy: strict application of the balancing test will balance the positive and negative effects of the measure that will help identify environmental measures that involve aid and those that are compatible with the internal market.

The Guidelines contain guidance on the correct application of the polluter pays principle. The basic problem with the application of this principle was that environmental costs from pollution remained hidden costs and the Guidelines introduced Market Based Instruments (MBI) to overcome that problem. MBI is a general term that can have various forms: MBI can be taxes, charges or tradable permit schemes.<sup>99</sup> Their benefit is that they can be used to correct market failures and help achieve policy aims at the same time. The MBI that was introduced into the environmental policy is the EU's Emissions Trading System (ETS).<sup>100</sup> According to it those that emit more emissions than the amount permitted should buy allowance left from others that emit less. This is an example of the polluter pays principle, which can benefit the environment, by using the revenue from selling allowances to moderate climate change. This is an excellent example of how state aid benefits society and why Member States grant aid. However, the ETS has been criticised for not delivering on those positive effects: specifically, it created oversupply of allowances and so far the Union has

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<sup>98</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final

<sup>99</sup> State aid Scoreboard Spring 2008 COM (2008) 304 final 9.

<sup>100</sup> Directive (EC) 2003/87 of the European Parliament and of the Council, of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive (EC) 96/61, [2003] OJ L275/32.

failed to reduce it to achieve the goal of using the revenue to protect the environment. Instead the price of emitting one tonne of GHG (greenhouse gasses) has plunged.<sup>101</sup>

Even though environmental projects are objectives of common interest it does not mean that all measures can have positive effects and thus be compatible with the internal market. To establish the effects of environmental aid measures the Commission follows the following assessment: first, it examines if the measure falls within 107(1) TFEU and if the answer is yes then it examines if the distortion can be justified. The measures might not constitute aid if they are below the threshold of *de minimis* aid,<sup>102</sup> or if they are included in the General Block Exemption Regulation.<sup>103</sup> Apart from those provisions, the General Court initially held that it may be possible that an environmental measure might not be selective if the differential treatment is justified by the nature or general scheme of the system it is part of.<sup>104</sup> Recently, though, the Court had the opportunity to clarify its assessment of selectivity in measures that include tax exemptions and tax reductions by deciding on *renvoi* of the *British Aggregates* case, which included an environmental levy.<sup>105</sup> The Court held that the environmental objective of the measure should not have been taken into account to justify the differentiation in taxation and that the various

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<sup>101</sup> Dirk Bohler, 'The EU Emission Trading Scheme - fixing a broken promise' [2013] 15(2) Environmental Law Review 95.

<sup>102</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid [2006] OJ L 379/5

<sup>103</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) [2008] OJ L 214/3, Article 1.

<sup>104</sup> Case T-210 *British Aggregates v Commission* [2006] ECR II-2789, paras 122-138; Case T-233/04 *Netherlands v Commission* [2008] OJ C128/30.

<sup>105</sup> Case T-210/02 RENV *British Aggregates v Commission* [2012] ECR not yet reported.

aggregates were in a comparable situation, which led the Court to accept that the different taxation created a selective advantage after all.<sup>106</sup>

The Guidelines contain a more strict assessment for measures that have high levels of aid.<sup>107</sup> A key effect that the Commission examines in this procedure is the incentive effect created by the measure and its necessity. If the measure increases the beneficiary's willingness to invest more in environmental protection then the measure is likely to be accepted.<sup>108</sup> A criticism that the principles of incentive effect and necessity have received is that they are too hard to prove considering that in order for the Commission to establish the existence of it, it takes under consideration various factors, such as the market conditions, the level of risk and the level of advantages generated by the project versus the costs of the investment.<sup>109</sup>

The environmental guidelines are to be amended. The Commission indicated that the reason for this need is the intensification of the link between the energy and the environmental policy particularly through the mainstream use of renewable energy. Thus the Commission proposes to adopt new Environmental and Energy Aid Guidelines in order to include state aid to the energy industry, which was until now assessed directly by the TFEU Articles.<sup>110</sup> Finally it should be mentioned that the consultation, which the Commission initiated, produced some elements that the participants have criticised the application of the Guidelines so far. Those

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<sup>106</sup> Ibid para 75.

<sup>107</sup> Community Guidelines on state aid for environmental protection [2008] OJ C82/1, para 160(b) and 161

<sup>108</sup> Ibid, para 167.

<sup>109</sup> Ibid, paras 171- 173.

<sup>110</sup> Commission, Environmental and Energy Aid Guidelines 2014 – 2020 Consultation paper available at <[http://ec.europa.eu/competition/state\\_aid/modernisation/energy\\_environment\\_en.htm](http://ec.europa.eu/competition/state_aid/modernisation/energy_environment_en.htm)> accessed on 23/9/2013.

can be summarised as a need to simplify and clarify rules and procedures, which is a common theme with state aid control: according to the findings of the consultation there is a need for clarification of the counterfactual test with calculation of eligible extra investment costs because as it stands now is difficult; also, there is a need for more flexibility to allow for new market and technology development.<sup>111</sup>

#### 2.4.2.2 The purpose of training and employment aid

The latest Scoreboard reveals that of all horizontal objectives the Member States used less aid to SMEs and aid to promote employment and training.<sup>112</sup> This is rather unfortunate, considering that well targeted aid to those two objectives could help Member States to overcome rising unemployment and stagnating economies due to the ongoing financial and debt crisis. Rather, Member States prefer to direct aid to regional projects, aid to which accounts for 0.11% of EU GDP and is the largest amount spent on any other type of aid to industry and services.<sup>113</sup>

Aid to training and employment objectives can be altogether exempted from the application of state aid provisions, if it is granted to individuals, and that is due to the fact that Articles 107 and 108 TFEU only apply to undertakings and not individuals. The case law reveals issues with the selectivity of employment measures, which were authorised even though they only favoured certain undertakings or the production of certain goods.

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<sup>111</sup> Christof Schoser, 'Review of EU Guidelines on State Aid for Environmental Protection Results of the 2012 Public Consultation' (Workshop April 2013) available at <[http://ec.europa.eu/competition/state\\_aid/modernisation/energy\\_environment\\_en.htm](http://ec.europa.eu/competition/state_aid/modernisation/energy_environment_en.htm)> accessed on 12/10/2013

<sup>112</sup> State aid Scoreboard Autumn 2012 COM (2012) 778 final, para 2.2.

<sup>113</sup> *Ibid.*

They were cleared because they did not fulfil another element of Article 107(1) TFEU, they did not involve state resources.<sup>114</sup> The analysis of existence of aid is important in employment aid. Aid to training and employment can also be authorised under the *de minimis* Regulation,<sup>115</sup> the GBER,<sup>116</sup> or Article 107 (2) and (3) TFEU, if it falls outside the provisions of the *de minimis* and GBE Regulations.

Of particular importance for the Union is the promotion of employment of disabled and disadvantaged workers, which is why the Commission adopted a Communication,<sup>117</sup> a soft law instrument containing the criteria, by which it may accept aid measures to those categories of workers after notification. According to the Communication, state aid to this category of workers can have the form of wage subsidies but should be adopted only after the member state examines the use of general measures, such as reducing taxation for labour and increasing investment in training. Only after the measure is deemed to be appropriate should it be adopted. If that analysis is performed the measure can have positive effects: employers may consider disabled and disadvantaged workers, such as recent graduates with no experience or with lack of specific skills, as less productive. Subsidising their wages may provide an incentive for the employers to put those workers to work. Covering the extra costs that lower productivity generates the aid helps those workers to enter the labour market and

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<sup>114</sup> Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I- 887

<sup>115</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid [2006] OJ L 379/5

<sup>116</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation) [2008] OJ L 214/3

<sup>117</sup> Communication from the Commission — Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification [2009] OJ C 188/02

eventually, if enough of those categories of workers are employed there will be redistribution of income to a wider range of the work force.<sup>118</sup>

Finally, the Commission has also acknowledged the positive effects of training and employment aid to the society as a whole. Those benefits come from the fact that this type of aid can increase the skilled workers supply in the labour market. Thus more firms can find suitable candidates and as a result the competitive labour market will increase the competitiveness of the industry.<sup>119</sup>

However, wage subsidies for disabled and disadvantaged workers can have negative effects by causing distortions in the market as well: the subsidised workers can easily seem more attractive to the employers because of the reduced labour costs to them. This can lead to non-subsidised workers being replaced by subsidised workers and thus distort the labour market. Also, state aid for employing disadvantaged workers can affect the market entry and exit strategies of undertakings. If undertakings see that there is available support for a specific subsidised market then they might wish to enter that market, even if they would not make that decision without the existence of aid.<sup>120</sup> This is why all of those negative effects need to be balanced with the expected positive effects during the examination of a measure by the Commission.

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<sup>118</sup> *Ibid* para 2.

<sup>119</sup> *Ford Genk* Commission Decision 2006/938/EC [2006] OJ L366/32, para 30

<sup>120</sup> Communication from the Commission — Criteria for the analysis of the compatibility of State aid for the employment of disadvantaged and disabled workers subject to individual notification [2009] OJ C 188/02, paras 22-29.



#### 2.4.2.3 Aid to research, development and innovation (R&D&I) and its purpose

The EU's policy for R&D&I is being implemented mainly through the multiannual Frameworks.<sup>121</sup> The one that is currently in force is due to expire at the end of 2013 and the analysis concerning the modernisation of the next Framework is included in chapter 7 of the thesis; this paragraph is limited to the effects of aid for R&D&I. The Union has set the goal of promoting R&D&I as an objective of common interest. By promoting research the Union's scientific and technological base will strengthen and will subsequently encourage it to become more competitive internationally.<sup>122</sup> So, the goal is not only to encourage more research within the internal market but also for the Union to be more extrovert. After all, the challenges in the globalised economy lie in the Union being able to compete with countries that have advantages over the Union, such as a younger workforce and loose labour laws. This policy goal is in line with the Lisbon Agenda calls for the Union to be the most advanced knowledge based economy.

State aid can play a significant part in helping the Member States achieve the goals of the Union in R&D&I. In Economics it is perceived that there can be market failures in R&D&I, where there are no market incentives for investment in particular research or innovation. Public intervention in the form of state aid in such cases is needed, with

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<sup>121</sup> Community framework for state aid for research and development and innovation [2006] OJ C- 323/01

<sup>122</sup> Article 179 TFEU [2012] OJ C326/47

compatibility criteria that will identify the market failure and direct the aid to correct it.<sup>123</sup>

Therefore there are two important elements that must be present for the Commission to authorise aid in R&D&I, and which are constantly present in Commission decisions. The first is market failures. In *GENESIS*<sup>124</sup> the beneficiary claimed that there was a market failure that would justify the granting of aid to the beneficiaries. The Commission performed its analysis and accepted the market failure and authorised the aid. Furthermore, the Commission added in its evaluation that the project will have positive effects for the EU as a whole in terms of the dissemination of knowledge, given the fact that the materials that would be produced would be used in various applications, such as car components, energy storage, cables, composites, conductive inks and, finally, the environment.<sup>125</sup> State aid can correct those market failures, and thus the Union will achieve more investment in R&D&I.<sup>126</sup> Consequently, through state aid the Union achieves economic efficiency.<sup>127</sup> In particular more investment for R&D&I, through state aid, will produce new products and shift the demand towards them, which for the purpose of this market will be economic efficiency.

The second element that the Commission scrutinises in its decisions is the presence of incentive effect: in other words the purpose of aid in

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<sup>123</sup> Bernhard von Wendland, 'Public Funding for Research Infrastructure and EU State Aid Rules - Key Issues, Case Examples and State Aid Reform' [2013] 3 EStAL 523, 542.

<sup>124</sup> *Soutien de l'Aid en faveur du programme GENESIS* (Case N603/2007) Commission Decision of 4<sup>th</sup> June 2008 [2009] OJ C35/3.

<sup>125</sup> *Ibid.*

<sup>126</sup> Community framework for state aid for research and development and innovation [2006] OJ C- 323/01 para 1.1

<sup>127</sup> Economic efficiency means optimum total welfare in a particular market or economy as a whole.

R&D&I should be the change of behaviour on behalf of the beneficiary. In a recent Decision the Commission authorised the aid because it was satisfied that the ‘authorities will ensure that aid under the scheme for process and organisational innovation in services and for innovation clusters will have an incentive effect on the behaviour of the beneficiaries’.<sup>128</sup>

However, competitive markets should be able to invest in R&D&I without the need for state intervention in the market. Because of market failures state intervention can have the favourable effects of the previous paragraph. Those effects will only be achieved, though, if there also exist certain favourable conditions in the economy. Sufficient intellectual property protection is very important for the protection of rights of the products and innovations that will be the end result of aid to R&D&I.<sup>129</sup> Also, well designed national rules for the administration of investment and aid to R&D&I are needed for the most positive outcome.

#### 2.4.2.4 Risk Capital aid is a Union objective

A definition of risk capital is found in the Commission’s soft law instruments as equity financing of companies with perceived high-growth potential during their early growth years.<sup>130</sup> This defines start up aid for companies under conditions of growth forecasts. Therefore, Member States can use risk capital aid measures to support start up undertakings, which might have difficulty in raising capital from the financial markets. Risk

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<sup>128</sup> *Subsidies for growth. Innovation-aid scheme. Spain (Galicia) (Case SA33599)* Commission Decision of 26/4/2012 [2012] OJ C-206/1.

<sup>129</sup> Community framework for state aid for research and development and innovation [2006] OJ C323/01 para 1.2

<sup>130</sup> Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises [2006] OJ C194/02, para 1.1 and Risk capital: a key to job creation in the European Union, SEC (1998) 552 final.

capital aid can be authorised under the GBER<sup>131</sup> without notification or with notification under Article 107(3) TFEU. This kind of state aid can offset market failures for start up companies and SMEs in particular. The market failure that risk capital is used to help solve is the equity gap that exists in the Union market: there is a ‘persistent capital market imperfection’ that prevents supply to meet demand at acceptable pricing to both sides.<sup>132</sup> In certain circumstances state aid measures that support risk capital can be an effective measure to lift the identified market failures in this field, if properly targeted.

Risk capital’s importance was highlighted in the re-launch of the Lisbon Strategy where the Commission acknowledged the lack of risk capital funding for new and small businesses.<sup>133</sup> Also, a series of other documents have included risk capital as a priority for the Union.<sup>134</sup> In particular risk capital is connected with the creation of jobs and growth and the alleviation of the effects of the financial crisis to SMEs and start ups.<sup>135</sup>

Despite all those positive effects that risk capital can produce the Commission’s market failure assessment has been criticised as taken for granted and excluding a proper application of the Market Economy Investor

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<sup>131</sup> Commission Regulation (EC) 800/2008 on the application of Articles 87 and 88 of the Treaty declaring certain categories of Aid compatible with the Common Market (General Block Exemption Regulation) (‘GBER’) [2008] OJ L214/3

<sup>132</sup> Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises [2006] C-194/02

<sup>133</sup> Communication to the Spring European Council, Working together for growth and jobs — A new start for the Lisbon strategy COM(2005) 24

<sup>134</sup> Conclusions of the Lisbon European Council, 23–24 March 2000, paras. 20–21; Information from the Commission – State aid and risk capital, [2001] OJ C 235/3, “2001 Risk Capital Communication”, paras. 1.1 and 1.2;

<sup>135</sup> Communication from the Commission to the European Council – A European Economic Recovery Plan COM/2008/800 final, 6; Communication from the Commission – Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis, [2009] OJ C 83/1, 1

Principle,<sup>136</sup> even though the Guidelines<sup>137</sup> contain conditions upon which the risk capital measures will be assessed. In recent Commission decision this seems to be the approach for identifying the market failure. The Commission simply states that the measure facilitates the provision of risk capital to SMEs, which would otherwise not receive sufficient capital. The measure therefore confers an advantage.<sup>138</sup>

Due to the stated importance of risk capital aid for the Union's and the Member States' goals in fostering jobs and growth, the Modernisation initiative included the revision of the risk capital Guidelines as a priority. Currently, the Commission has published draft Guidelines<sup>139</sup> to replace the 2006 Guidelines. The main issues that have been identified and are put under review are; first, there is a need to broaden the scope of the GBER authorisation to include access to risk capital for SMEs at later stages of their development, (other than the start up and initial growth periods) and secondly, to design appropriate compatibility criteria for more substantive assessment of measures.<sup>140</sup>

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<sup>136</sup> Luís Morais and Miguel Sousa Ferro, 'Risk Capital as State Aid: Revising the Commission's Market Failure Approach' [2011] 3 EStAI 425, 426.

<sup>137</sup> Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises [2006] C-194/02

<sup>138</sup> *Modification of State Aid Scheme "Risk capital intervention on cooperative companies* (Case N 458/2007) Decision of 20 May 2008, [2008] OJ C150/1, para. 48; *Extension to the Western Investment Fund* (Case N 226/2008) Commission Decision of 5 February 2009, [2009] OJ C80/01, para. 44; *Cultuurinvest* (Case N496/2006 ) Commission Decision of 20 December 2006, [2007] OJ C45/01 para. 38;

<sup>139</sup> Paper of the services of Directorate General Competition containing the draft Union guidelines on State aid to promote risk finance investments available at <[http://ec.europa.eu/competition/consultations/2013\\_risk\\_capital/risk\\_capital\\_draft\\_guidelines\\_en.pdf](http://ec.europa.eu/competition/consultations/2013_risk_capital/risk_capital_draft_guidelines_en.pdf)> accessed on 2/10/2013.

<sup>140</sup> Revision of the State aid rules for SME access to risk finance Issues paper, available at [http://ec.europa.eu/competition/state\\_aid/modernisation/risk\\_capital\\_issues\\_paper\\_en.pdf](http://ec.europa.eu/competition/state_aid/modernisation/risk_capital_issues_paper_en.pdf) accessed on 2/10/2013

#### 2.4.2.5 The purpose of aid measures to SMEs

The importance of SMEs<sup>141</sup> for the European Union's economy is highlighted regularly. Commissioner Almunia emphasised the importance of state aid to private undertakings in the current conditions of sluggish growth when he presented the modernisation initiative; in particular, well-designed aid is needed that will address market failures. Such aid is state aid that will make access to finance easier for SMEs.<sup>142</sup>

From the Commissioner's speech and from Commission Decisions it is clear that Member States use state aid to SMEs to correct a market failure that does not provide adequate support to this kind of businesses. The Commission has accepted aid measures based on their objective: the Commission recognises that there is 'serious difficulty in gaining access to capital and credit.'<sup>143</sup> This difficulty is caused by the unwillingness of credit institutions to support SMEs that have difficulty in securing guarantees for the financial assistance they are seeking. This situation is the market failure that the Member States wish to correct when granting aid to SMEs. Other objectives that can be found in Commission decisions that authorise aid to SMEs is the fostering of entrepreneurship, innovations and employment.<sup>144</sup>

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<sup>141</sup> A definition for SMEs containing the relevant criteria that need to be fulfilled in order for an undertaking to be included can be found at Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) [2003] OJ L124/36

<sup>142</sup> Commissioner J Almunia, 'State Aid Modernisation' SPEECH/12/339

<sup>143</sup> *Regional aid scheme for SMEs* (Case XS29/2001) Commission Decision [2002] OJ C58/19.

<sup>144</sup> *Support and creation of innovative SMEs for the exploitation of RTD results* (Case XS 23/2001) Commission Decision [2002] OJ C58/19.

#### 2.4.2.6 The purpose of aid to Rescue and Restructuring firms in difficulty

State aid for rescue and restructuring firms in difficulty has produced controversy over the years, because Member States governments want to protect their national firms from going bankrupt and see the Commission's Decisions as interference in their national economic policies. In *British Energy (BE)*<sup>145</sup> the UK Government implemented aid measures before notification, for the rescue of British Energy, which was an energy company that had market share of 20% in England and Wales and 50% in Scotland. The company lost profits after market liberalisation and the introduction of a Government plan to bring down electricity prices. The UK Government decided that the company was too big to fail and granted rescue aid, whose purpose was for BE to cover operating costs, such as wages (notably, the rescue aid would secure 4 920 full time employees in the United Kingdom) and payments to suppliers, and to prevent default.<sup>146</sup>

The UK Government was criticised for not notifying the rescue measures in the Commission's decision. From the above it is evident that governments use rescue aid to secure other policies, such as the employment policy, or to correct failures created from their previous intervention, which might conflict with state aid control.

Currently, aid for rescue and restructuring is granted under the conditions of the 2004 Guidelines, which are in force.<sup>147</sup> There are two

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<sup>145</sup> *British Energy* (Case NN101/2002) Commission Decision of 27.11.2002 [2003] OJ C39/15.

<sup>146</sup> Letter to the Member State in case NN101/2002 available at <  
[http://ec.europa.eu/competition/state\\_aid/cases/138333/138333\\_461486\\_101\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/138333/138333_461486_101_2.pdf)>  
Accessed on 13/6/2013

<sup>147</sup> Community guidelines on state aid for rescuing and restructuring firms in

distinct stages of state aid granted to firms in difficulty: first is the rescue aid, which must be short term limited financial assistance up to six months and then follows the long-term restructuring plan, which contains elements of aid which helps the undertaking reorganise and return to financial stability. The two stage process and the limited time that the first stage applies are due to the highly distortive effects<sup>148</sup> of rescue aid to competition and the functioning of the market.

Even though rescue aid can be used as a horizontal objective it is included in sectoral aid in the Scoreboards, because it actually benefits an individual undertaking. This is in line with the Lisbon Council of 2000 asked the Member States to shift the emphasis from aid that supports individual companies.<sup>149</sup> The rescue phase of the aid should be short and limited as was mentioned. However, the 2004 Guidelines broadened the scope of rescue aid, because in some cases it was obvious that structural changes needed to be performed as soon as possible.<sup>150</sup> The main principle that governs the authorisation of rescue aid is the ‘one time, last time’ principle, which means that the same undertaking should not receive additional aid that keeps it afloat artificially.<sup>151</sup> Possible rescue measures can have the form of loan guarantees or loans with interest rates as low as those enjoyed by healthy firms, which is crucial for the success of the rescue

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difficulty [2004] OJ C- 244/02. The Commission is preparing a draft of the new Guidelines as part of the Modernisation initiative, which started in 2012 and is not yet completed.

<sup>148</sup> Ibid para 4.

<sup>149</sup> Presidency conclusions for Lisbon strategy (Lisbon European Council 23 and 24 march 2000) available at < <http://www.consilium.europa.eu>> accessed on 13/5/2013

<sup>150</sup> Community guidelines on state aid for rescuing and restructuring firms in difficulty [2004] OJ C- 244/02 para 6.

<sup>151</sup> Ibid.



plan.<sup>152</sup> In one case the Commission made an innovative judgment when it considered that public declarations of support to an undertaking made by the French Minister for Economic Affairs should be examined together with the subsequent transfer of a loan to the undertaking in order to determine if there is state aid. This overall assessment of a declaration to take necessary measures and the measures themselves would overstretch the notion of rescue aid and would create a precedent that the Court probably wanted to avoid.<sup>153</sup> Therefore, the Court annulled the Commission Decision for not having clear and definitive position on the existence of aid on the basis of this innovative argument.<sup>154</sup>

The restructuring phase's purpose is much more important because it contains the implementation of the plan that will bring the undertaking off support and back to operating under market conditions. There are strict conditions under which the restructuring aid should be granted: a restructuring plan to restore long term viability is needed; aid should be limited to the necessary and an own contribution to the restructuring costs is needed; aid should not be used for aggressive moves that alter conditions in the market; finally, capacity reductions may be imposed if the aid leads to the deterioration of the structure of the market.<sup>155</sup> Those strict conditions are in force because of the highly distortive nature of rescue and restructuring aid. Its purpose has to be protecting competition and the internal market,

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<sup>152</sup> Ibid 15.

<sup>153</sup> Cédric Kaczmarek, 'judgment of 13 September 2010 in France, France Télécom a.o. v Commission Comments on Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04' [2012] 3 EstAI 691, 693.

<sup>154</sup> Joined cases T-425/04, T-444/04, T-450/04 and T-456/04 *France, France Télécom and Others v Commission*, [2010] ECR II-2099

<sup>155</sup> Community guidelines on state aid for rescuing and restructuring firms in difficulty [2004] OJ C- 244/02 para 3.2.2

however, the last condition of capacity reductions and market share can be seen as protecting competitors.<sup>156</sup> In the case of restructuring aid it certainly seems that the purpose of the aid is to protect competition as well as competitors, which seems to be a legitimate aim for state aid control in general. The R&R Guidelines apply to all other sectors and industries except from the financial institutions sector since 2008. Ever since the financial crisis started there are detailed new rules applicable to R&R aid to financial institutions; the Member States can grant aid according to those rules, which needed to change for reasons that will be analysed next.

The ECOFIN Council of 7 October 2008 concluded that all necessary measures would be taken to ensure stability of the financial system and that such appropriate measure were among others recapitalisations of financial institutions. Such intervention would be decided at the national level, each Member State would submit individual state aid measures but they should all fall within a common EU wide framework of common principles.<sup>157</sup>

The Commission decided that once the crisis became systemic<sup>158</sup> the control of subsidies was in danger of becoming obsolete and the Member States would embark on a subsidy race to try to eliminate the effects of the crisis on their banking sectors first and to the rest of the economy as well. Even though there were rules in place that could be the base to implement

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<sup>156</sup> Claus Dieter Ehlermann, 'State Aid Control in the European Union: Success or Failure?' [1994] 18 *Fordham International Law Journal* 1212, 1224

<sup>157</sup> Commission Communication- the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, 13 October 2008 [2008] OJ C 270/02, para 3. The banking communication of 2008 was replaced by the Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') [2013] OJ C 216/01.

<sup>158</sup> *Ibid*, para 9.

crisis measures,<sup>159</sup> it was considered necessary to adopt even more detailed rules to address the crisis.<sup>160</sup>

The limitations of those guidelines were that they applied to all firms in all sectors, so they were not specifically drafted to be applied to the specific circumstances of failing financial institutions.<sup>161</sup> More specifically, the R&R Guidelines requested that as a condition for receiving aid the beneficiary would have to contribute 50% of the costs if they were a large corporation.<sup>162</sup> Based on the fact that during the banking crisis there was a liquidity shortage for the banks, the crisis framework adapted this principle of own contribution into the principle of burden-sharing, which placed the shareholders under an obligation to contribute through bans on dividend payments. Secondly another limitation of the R&R Guidelines was the compensatory measures to competitors, which under the Guidelines included capacity reductions and divestments.

Under the new crisis rules measures to limit distortions to competition were included in the Communications.<sup>163</sup> The new principle of limiting distortions of competition was better suited to be applied to banking institutions, because it placed ‘a greater focus on market competition conditions rather than compensation of competitors as well as the

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<sup>159</sup> Such rules for the ailing banking sector could be the Community Guidelines on state aid for rescuing and restructuring firms in difficulty [2004] OJ C244/2.

<sup>160</sup> An analysis of why Article 107(3)(b) TFEU was chosen as the legal basis for the crisis measures is included in paragraph 2.7 of the thesis.

<sup>161</sup> Mara Hellstern and Christian Koenig, ‘The European Commission's decision-making on state aid for financial institutions - good regulation in the absence of good governance?’ (2013) 34(4) ECLR 207,208.

<sup>162</sup> Community guidelines on state aid for rescuing and restructuring firms in difficulty [2004]OJ C -244/02, para 44

<sup>163</sup> Nicola Pesaresi and Geoffrey Mamdani, ‘Latest Developments in the Rules on State Aid for the Rescue and Restructuring of Financial Institutions in Difficulty’ (2004) 4 E.St.A.L. 767, 768.

development of behavioural measures for situations where sufficient divestments could not be found without threatening viability'.<sup>164</sup>

Moreover, the aid measures that were adopted during the crisis had little or none at all analysis based on their effects, as it will be further discussed in the second chapter of the thesis. Certainly, the counter-argument could be that any policy needs to be flexible enough to adapt to the new conditions that it faces, however, the Commission's state aid policy is too unstable. Even if the conditions change the key policy choices need to be clear so that the legal framework promotes transparency and legal certainty<sup>165</sup> to the stakeholders.

#### 2.4.3 Positive effects from granting state aid that counterbalance problems caused by external to the EU factors

Another important element that pushes European governments to grant aid to their undertakings is the increasing competition European companies face in the international field. In this part of the chapter, the focus is on external factors that influence state aid in Europe. Traditional competitors in the past were mainly American and Japanese companies, since those two were the world's biggest economies. The idea of creating the internal market had one main goal after all, and that was to help European enterprises to become bigger and compete with the giants from abroad. The most notable episode of a subsidy race between Europe and

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<sup>164</sup> Ibid.

<sup>165</sup> More analysis of the principle of legal certainty in connection with the recovery procedures is included in chapter 3 paragraph 3.7.2 of the thesis.

America is the Airbus – Boeing case. The European response to American commercial airplane manufacturers, which dominated the world market until the 1970's, was the creation of Airbus. Airbus is a joint venture of many European countries. Its main cross-Atlantic rival, Boeing suspected that European governments heavily subsidised Airbus's production, which led to a bilateral Trade Agreement that aimed to stop aid to airplane producers.<sup>166</sup> However, this lucrative industry has urged governments from both sides of the Atlantic to grant aid to their companies. The American Boeing accused the governments of France, Germany and the UK for granting illegal start up aid to Airbus for the production of its new A-380 project, and filed a complaint with the WTO's panel for the settlement of the dispute.<sup>167</sup>

Nowadays though, in the increasingly globalised world economy new competitors emerge from developing countries, which create new challenges for Europe and state aid. European companies move production facilities outside of Europe and into those developing countries that allow them to produce in lower costs. As a result, employment levels in Europe are decreasing and governments feel the pressure from the people to support production at home.<sup>168</sup> 2009 was a year of crisis for Europe, but the Chinese

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<sup>166</sup> Douglas Irwin and Nina Pavcnik, 'Airbus versus Boeing revisited: international Competition in the aircraft market' (2001) NBER working paper 8648 <http://www.nber.org/papers/w8648> accessed on 10 October 2010.

<sup>167</sup> The WTO's Dispute Panel found that the EU had heavily subsidised Airbus in the Panel Report of 30 June 2010. The EU have appealed the Panel's decision and the Appellate Body of the WTO found that the EU has paid repayable loans to Airbus, which consist elements of illegal subsidies. In the EU v US case the Appellate Body recently found that the US government has illegally subsidised Boeing and the EU now expects the US to comply with the decision by withdrawing measures.

<sup>168</sup> Commissioner N Kroes 'Challenges to the integration of the European Market: protectionism and effective competition policy', Speech at the Competition Law Association, London, 12 June 2006, press release SPEECH/06/369.

economy continued to grow. As a result unemployment rates in Europe rose in one year from 7.3% in October 2008 to 9.3% in October 2009.<sup>169</sup> At the same time the aid volume, which includes state aid measures introduced as a percentage of GDP, rose in 2008 to 2.2% of GDP from 0.52% of GDP in the Union.<sup>170</sup> From those figures it is clear that there is a relation between the rise in unemployment levels and the rise in state aid volumes. The Commission though feels that the internal market was not affected. Also, according to the Commission, globalisation need not be a threat to European markets, and governments should not resort to protectionism, otherwise known as unregulated aid, because that would isolate Europe from the world.<sup>171</sup> State aid can also have negative effects, which is why it is prohibited. Those negative effects will be examined next.

## 2.5 NEGATIVE EFFECTS OF STATE AID

Government intervention in the form of state aid may have the positive influences on the Union's policies that have been examined above, but they primarily affect the functioning of a free market. In a free market there should be free competition between players whereas, government subsidies distort free competition. This distortion of competition is considered a negative effect of state aid and this is why the prohibition exists in the first place. The different ways that state aid distorts competition are examined next.

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<sup>169</sup> Eurostat, 'news release' STAT/09/170.

<sup>170</sup> Commission, 'State Aid: Scoreboard shows strong increase of aid in response to the financial crisis but Single Market intact', press release IP/09/1884.

<sup>171</sup> Commissioner N Kroes, 'Competition must drive European competitiveness in a global economy', Speech at the Villa D' Este forum, Cernobbia, 3 September 2005, SPEECH /05/477.

### 2.5.1. Negative costs

Firstly, it should be noted that money for Subsidies comes from State budgets. Money for the public budget comes from taxation, which in turn comes from taxpayer's (that is people's) pockets. It is crucial, especially in times of tight budget calculations, that taxpayer's money should be spent wisely. A subsidy can turn out to be costly and not so effective, after some considerations.<sup>172</sup> In the end, the benefit coming from the aid should be greater than the cost of the public funding. This is not always true, since state aid might not always be the best way to deal with inefficiency in the market. The public funds could be more usefully invested in more general policy measures, instead of the funding of an undertaking. And even if the aid is well targeted, the impact might prove to be less efficient, than the granting authority originally intended.

Consequently, Member States should perform a cost-benefit comparison before granting aid. The costs that must be calculated are usually 'opportunity costs'. Those are funds that are dedicated to the subsidy amount. However, other costs must be included in the calculation: those are the funds that the state spends in order to design, plan and grant the aid. If the benefits overcome the costs of the subsidy then the outcome is positive.<sup>173</sup>

### 2.5.2. Negative externalities

Secondly, state aid can certainly generate other unwanted consequences: as it has already been mentioned, subsidies impact on the

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<sup>172</sup> N Zahariadis *State subsidies in the global economy* (Palgrave Macmillan Basingstoke, 2008) 7.

<sup>173</sup> Hans Friederiszick, Lars-Hendrik Röller and Vincent Verouden, 'EC state aid control regime: an economic perspective' in M S Rydelski, *The EC State Aid regime: distortive effects of State Aid on competition and trade* (Cameron May London, 2006) 160.

functioning of the market. This impact can cause anti-competitive outcomes in the market, which ultimately, can harm consumers. These consequences are sometimes felt only within the national market and are called externalities. But other times the consequences are felt in players from other countries as well. Those effects can be called cross - border externalities or negative spillovers.<sup>174</sup> They are called cross – border because the subsidy has effects across the border from the granting country, to other Member States. Since aid measures are planned nationally, they rarely take into account the effects in other Member States. This is why the international state aid control system is needed.<sup>175</sup>

The national authority planning an aid measure only takes into account the benefits that will generate for the national economy, without considering the counteractions of other Member States. When a subsidy affects many Member States, it is only natural that other countries will want to control the negative effects that a foreign subsidy is creating to their own markets, by designing their own state aid measures. As a result, governments are involved in a subsidy race, with no clear aim and prospect.<sup>176</sup> Subsidy races end up spending money unwisely, making state aid costly once again in relation to its potential benefits.

This situation of a subsidy race and in general aid that is not well targeted can create further problems in the internal market, the protection of

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<sup>174</sup> Phedon Nicolaidis and Sanoussi Bilal, 'An Appraisal of the State Aid Rules of the European Community: Do they Promote Efficiency?' [1999] 33(2) *Journal of World Trade* 97, 102

<sup>175</sup> *Ibid.*

<sup>176</sup> The notion of subsidy race appears first in the Commission's State Aid Action Plan of 2005 and then it is used again in the Communications for Aid in the Crisis framework.



which is a basic objective of the Treaty.<sup>177</sup> Competition rules are entrusted with securing the operation of the internal market. National measures such as subsidies distort the functioning of the internal market when they affect other Member States negatively. The market is not achieving the most efficient results because of the government interventions. A tool that is supposed to protect it can actually work against the internal market if abused.

### 2.5.3 Negative effects from political interaction with state aid policy

Unfortunately for the markets, governments are political institutions that do not operate in market conditions, or as efficient as the markets would want them to. Governments are made up from politicians who are keen on being re-elected to their office. This makes them susceptible to influence from voters, public opinion shapers, lobbyists and even donors to political campaigns. The situation when decision making might be influenced by those players is called government failure. The effect of a government failure in the state aid field is that state support might be directed to the wrong recipients. As a result, subsidies end up being a misused political tool that does not achieve what it is intending to, which is public welfare.<sup>178</sup>

A perfect example of state aid being used as a political tool for the government to intervene in the economy is the Greek Business Reconstruction Organisation: in the 1980's and shortly after the accession of Greece to the then European Communities, the new socialist Greek government implemented a programme for the restructuring of privately

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<sup>177</sup> Article 26 TFEU [2012] OJ C326/47.

<sup>178</sup> C Buelens et al., 'The economic analysis of State Aid: some open questions', (European Commission-DG for economic and financial affairs Brussels, 2007) 9.

owned companies that were considered too large to fail, because of their importance in terms of employment, production and exports in the total of the Greek economy.<sup>179</sup>

The specific measures contained in this law that were scrutinised by the Commission were recapitalisation schemes for companies that came under the control of the publicly owned Business Reconstruction Organisation, in the form of the conversion of the companies' debt into equity capital held by the Organisation and the National Bank of Greece. The European Commission authorised those schemes as compatible with Article 92(3)(b) EC,<sup>180</sup> (which is now Article 107(3)(b) TFEU), and acknowledged this vast restructuring programme under the condition that State aid measures would be individually notified and assessed.<sup>181</sup> This was one of the few cases that a State aid scheme was authorised under the provisions of Article 107(3)(b) TFEU, because the Commission favours the provisions of Article 107(3)(c) TFEU. The scheme was justified because of the 'problems and structure of the Greek economy' which 'indicated that the crisis was not a sectoral one but covered the whole economy'.<sup>182</sup>

The BRO was a clear attempt of state intervention in the economy, unprecedented in the recent history of Greece, because it allowed the state to intervene into failing private companies, by depriving the owners of their right to manage their company. It did not go as far as to deprive them of

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<sup>179</sup> Greek law 1386/1983 'Regarding the Business Reconstruction Organisation (BRO)' Government Gazette 107/8-8-1983 vol. A.

<sup>180</sup> *Concerning law 1386/1983 by which Greek Government grants aid to Greek industry* Commission Decision 88/167/EEC [1988] OJ L76/18.

<sup>181</sup> Commission of the European Communities, (EC) XVIIth Report on Competition 1987 in <[http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=CB5087340](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=CB5087340)> accessed on 14/11/10.

<sup>182</sup> *Ibid* para 186.

their ownership rights, because this would be clearly unconstitutional.<sup>183</sup>

The BRO was dismantled in the 1990's when more centre-right and centre-left governments started privatisation programmes of state owned companies. There are reports in the media though, nowadays, that a revival of this type of Organisation, probably adjusted to the current conditions would be a possible solution to the crisis that Greece is facing in recent years.<sup>184</sup> This is why the above analysis is not a relic of the past, but an important link in the chain of State aid measures in Greece.

Due to the inherent problems of the structure of the Greek economy, the State is obligated to intervene in the economy and provide solutions in sectors of the economy that the private sector failed to provide. The financial institutions sector is characterised of concentration among five big banks, in many of which the State was the main shareholder in the past, or still is nowadays in a lesser amount. This concentration led to inadequate issuing of new loans to undertakings or the substantial slowness of the approval process.<sup>185</sup> As a result, the liquidity problems in the market drive the State to grant aid.

Apart from the inherent structural problems, the Greek State's policies themselves have been hindering substantial growth of the economy that should be based on free and competitive market conditions and not aid.

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<sup>183</sup> A Gerontas *Public Financial law* (Ant. N. Sakkoulas, Athens- Komotini 1989) 339.

<sup>184</sup> Georgios Manetas, 'Eleourgiki, Atlantic, Enom. Klostoifantourgia: A government... crutch for bank loans' *Imerisia Online newspaper* (Athens, 15-11-2010) <<http://www.imerisia.gr/Article.asp?catid=12334&subid=2&pubid=76019148>> accessed on 15-11-2010: 'The current situation brings to many peoples' mind of the early 1980's, where the State through the famous Reconstruction Organization (BRO) acquired control of once-strong companies that collapsed. Then it was the explosive rise in interest rates over 20%, today is the economic crisis and lack of liquidity in the market forcing the state to stretch out a helping hand and help to save large corporations employing thousands of workers'. Researcher's own translation.

<sup>185</sup> A Gerontas *Public Financial law* (Ant. N. Sakkoulas, Athens- Komotini 1989) 329.

From being a mainly agricultural economy in the 1950's and much of the 1960's, Greece changed to become a mainly industry and services based economy in the 1970's, over a decade. The change did not happen smoothly but rather abruptly, and with lack of real plan for the confrontation of the consequences on the environment, which put the burden for providing solutions to the enterprises. But in order for them to do so, they were in need of capital, which was not always available from the financial institutions. Once again, the state needed to cover the gap it had created by its own actions, or failures.

#### 2.5.4 Other types of distortions of competition caused by state aid – Inefficiencies

The most distortive and thus negative effect comes from the granting of Rescue aid. A subsidy granted to a firm in financial difficulty keeps inefficient firms in existence. Without the aid they might have been forced to exit the market.<sup>186</sup> The effect on the market as a whole is the most dangerous one. Maintaining failing firms creates dynamic inefficiency. Dynamic inefficiency means that the normal market functioning is distorted, and thus the affected sector is prevented from achieving efficient outcomes in the future. If normal market conditions were applied, the failing firm, which received aid, will not exit the market when it should. On the contrary, it will survive, keep competing and possibly drive other undertakings out of the market before it, causing negative reactions to the industry as a whole.<sup>187</sup> Other companies might not be forced to exit the market, but they will

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<sup>186</sup> Cyrus Mehta, 'Rescue and restructuring aid' in K Bacon (ed), *European Community law of State Aid* (OUP Oxford, 2009) 210.

<sup>187</sup> A. Biondi (ed) *The law of State Aid in the European Union* (OUP Oxford, 2004) 50.

certainly be forced to react to the new market conditions that the subsidised firm has created. This situation can cause allocative inefficiency in the affected market, which basically means that the other firms will either diversify their spending to other products, or even other markets, or in general re-allocate their resources where competition is still in their favour, and this might harm welfare in the long run.

#### 2.5.5 Negative effects on market power

It is true that state aid can increase the market power of the subsidised firm. This may change the share that the companies have in the relevant market. If a company suddenly obtains higher market share it is easier for it to ignore its competitors and abuse this power. Companies may start charging higher prices, erect barriers for other companies to enter the market they control, and thus prevent healthy competition. The firm's behaviour is altered by the aid. Market entry decisions can be affected by subsidies and so can be market exit decisions.<sup>188</sup> Those negative effects can be felt in the national market and also affect trade in other Member States where the subsidised company has significant presence.

The subsidised firm may also want to use aided production to relocate some of its production facilities to areas that are eligible for regional aid. This will lead to an increase of production in the subsidised area, but will also lead to the decrease of production to the original region that the facilities were moved away from. Thus, regional cohesion might be

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<sup>188</sup> Commission Staff working paper 'Common principles for an economic assessment of the compatibility of State Aid under Article 87.3' box 1 page 5, <[http://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf)> accessed on 27-1-2011.

affected negatively in the Member States territory or the whole of the Union, if production is shifted from one country to the other.<sup>189</sup>

From the analysis that proceeded, it is evidenced that state aid has been used as a tool by governments. State aid is the most efficient tool in the government's political 'tool case' that helps it overcome social problems and financial difficulties. State aid is especially efficient in times of crises like the one that started in 2008 and all the other that occurred before it. The crisis is not a once in a lifetime event, according to this researcher. The causes behind crises are different each time, whether credit institutions or the oil crisis, or the housing market is to be blamed; it is rather the circle of capitalism, where bankruptcy is an inherent feature of a market, so that it will rise again. But unfortunately, sometimes subsidies might prove to be the easy way out of a problem; however, they don't 'come for free'.<sup>190</sup> It is crucial at this point to expand into the decision of Member States' governments to tackle the crisis with more state aid, and how that decision affected the relevant rules that existed and how they were amended to fit the crisis.

## 2.6 THE FINANCIAL CRISIS OF 2008 AND ITS INFLUENCE ON STATE AID

Up until 2008, the Union's main priority was to implement the objectives of the State Aid Action Plan for less and better targeted state aid.

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<sup>189</sup> Commission Staff working paper 'Common principles for an economic assessment of the compatibility of State Aid under Article 87.3' box 1 page 5, <[http://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf)> accessed on 27-1-2011.

<sup>190</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final para 8.

However, the occurrence of the financial crisis inevitably affected the Union's objective. The Commission issued Communications in 2008 and 2009 where it states that it considers that Article 107(3)(b) TFEU is available as a legal basis for aid measures to address the crisis.<sup>191</sup> Aid for firms in difficulty was usually assessed under Article 107(3)(c) TFEU, and according to the Rescue and Restructuring Guidelines in the past (henceforward R&R Guidelines).<sup>192</sup> However, Article 107(3)(b) TFEU has also been used in the past, even though quite scarcely. Article 107(3)(b) TFEU, then Article 92(3)(b) TEC, was eligible as a legal basis to assess measures taken by Member States to battle the recession caused by the 1973 oil crisis.<sup>193</sup>

The choice of 107 (3)(b) TFEU as a legal basis has been criticised because the Commission decided to justify its decision to adopt it after it characterised the crisis as systemic, which means that it affected the whole of the economy. However, some believe that there is no real justification for the choice of 107 (3)(b) TFEU as a legal basis.<sup>194</sup> Furthermore, it was rejected as a legal basis in the beginning of the crisis when the Commission was called to assess the measures taken in the Northern Rock case.<sup>195</sup> In those various Communications adopted during the crisis there is no

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<sup>191</sup> Communication on the application of State Aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, [2008] OJ C270/8 para 9. This Communication was replaced by Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ("Banking Communication") [2013] OJ C216/01, which is currently in force.

<sup>192</sup> Case T-349/03 *Corsica Ferries France v Commission* [2005] ECR II-2197 para 183; *Northern Rock* (Case C14/2008) Commission Decision of 7/5/2009 [2010] OJ L112/38.

<sup>193</sup> Commission, Vth report on competition policy April 1976 para 133.

<sup>194</sup> Rose M. D' Sa, 'Instant State Aid law in the financial crisis – a u-turn?' (2009) *EstAI* 2, 139, 142.

<sup>195</sup> Christopher Vajda QC, 'The banking crisis and the EC State Aid rules' (2009) 2 *JIBFL* 67, 69.

explanation of the term systemic and how it is viewed by the Commission: the question is whether the term ‘systemic’ refers to the banking sector alone, or the economy as a whole. If the crisis only affected one sector, Article 107(3)(c) TFEU would have been more applicable as a basis.

In the early stage of the current crisis, some European banks were affected by the spill over effects of the crisis in the US market and European Member States took *ad hoc* measures under Article 107(3)(c) TFEU and the R&R Guidelines, such as the ones in the *Northern Rock*,<sup>196</sup> or the *Bradford and Bingley*<sup>197</sup> and *Hypo Real Estate*<sup>198</sup> cases. However, even though the present crisis started from failing financial institutions, it soon became ‘systemic’<sup>199</sup> and the disturbance affected the whole of the economy of Member States, and the credit squeeze caused credit blocking, a drop in demand and recession.<sup>200</sup> This led to the relaxation of state aid rules, with the adoption of new soft law instruments by the Commission in 2008- 2009, which have been updated thrice since.<sup>201</sup> A Communication<sup>202</sup> that was

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<sup>196</sup> *Northern Rock* (Case NN70/2007) Commission Decision of 5.12.2007 [2008] OJ C43/01.

<sup>197</sup> Rescue aid to *Bradford & Bingley* (Case NN41/2008) Commission Decision of 1.10.2008 [2008] OJ C290/01.

<sup>198</sup> Rescue aid to *Hypo Real Estate* (Case NN44/2008) Commission Decision 2.10.2008 [2008] OJ C293/01.

<sup>199</sup> State Aid Scoreboard - Spring 2009 Update, COM(2009) 164, 8 .

<sup>200</sup> Communication on the temporary Community Framework for State Aid measures to support access to finance in the current financial and economic crisis [2009] OJ C16/01 para 1.1.

<sup>201</sup> Temporary crisis rules currently in force are: 1) Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ("Banking Communication") [2013] OJ C216/01, which replaced the Communication on the application of State Aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, [2008] OJ C270/8

2) Communication on the temporary Community Framework for State Aid measures to support access to finance in the current financial and economic crisis [2009] OJ C16/01

3) Communication on the recapitalisation of financial institutions in the current financial crisis [2009] OJ C10/2.

4) Communication on the treatment of impaired assets in the Community banking sector [2009] OJ C72/01.



adopted in 2011 keeps in force the four Communications of 2008 – 2009, which set the conditions for the compatibility of guarantees, recapitalisation and asset relief with the Treaty rules on state aid, as well as the requirements for a restructuring or viability plan (the Restructuring Communication).<sup>203</sup> The Commission's Communications are non-binding soft law instruments; however, they are a guide to the Commission's methodology and would certainly be taken into consideration by the Court.<sup>204</sup>

This brief analysis designates that the financial crisis was seen by the Commission as a systemic risk to the whole of the economy that could be avoided by state aid measures. This brings back the conflict between protectionism and liberalism in market regulation. During the crisis there is more protectionism and more regulation. However, each Member State's financial system is nationally regulated, even though all are interconnected. General guidelines from the supranational authority might be useful to prevent a subsidy race between Member States to save their own financial institutions, but there are various types of measures available,<sup>205</sup> and each Member State should be able to address the crisis with the measures and the intensity of aid that would be more suitable to each situation.<sup>206</sup>

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<sup>202</sup> Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis [2011] OJ C 356/7.

<sup>203</sup> Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules [2009] OJ C 195/9

<sup>204</sup> Mara Hellstern and Christian Koenig, 'The European Commission's decision-making on state aid for financial institutions - good regulation in the absence of good governance?' [2013] 34(4) ECLR 207, 208.

<sup>205</sup> Those State Aid measures proposed by the Union in the Commission's Communications are capital injections, the guarantees and the asset relief measures.

<sup>206</sup> A Mateus, 'The current financial crisis and State Aid in the EU', (2009) 5(1) ECJ 1, 2.

Finally, it should be mentioned that other types of competition policy instruments such as mergers have not been used enough.<sup>207</sup> Mergers between financial institutions might be adequate measures to address the crisis. There was no need to alter the rules on mergers because they ‘proved well equipped to withstand the crisis.’<sup>208</sup> Instead of injecting public money to failing banks, those that had sound economic figures could take over those that would be obligated to exit the market, due to their own bad management of risk related issues. Of course, this solution is only viable under the condition that there were sound banks, and that not all of them were affected by the crisis.

The results of the new crisis framework are contrary to the reform of the implementation of state aid envisaged in the SAAP, in which the Commission declared that its objective is to modernise state aid rules based on a ‘refined economic approach’ and ‘less and better targeted state aid’.<sup>209</sup> First of all, large amounts of state aid have been directed in one sector alone (the banking sector), completely disregarding previous objectives.<sup>210</sup>

Also in the SAAP, the Commission reaffirmed the need ‘to balance the positive impact of the aid measure against its potentially negative side effects’<sup>211</sup> in its assessment of the compatibility with the internal market. In Commission decisions that have been taken under the new rules, the

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<sup>207</sup> There was the acquisition of HBOS from Lloyds in the UK, and the merger of Commerzbank and Dresdner in Germany, BNP Paribas with Fortis in France and Anglo Irish with Irish Nationwide Building Society in Ireland.

<sup>208</sup> Neelie Kroes, ‘Competition policy and the crisis – the Commission’s approach to banking and beyond’ (2010) 1 Competition Policy Newsletter 3, 6.

<sup>209</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final, para 18.

<sup>210</sup> D’Sa R, ‘Instant State Aid law in a financial crisis- A U-turn?’, (2009) 2 EstAL Quarterly 139 143.

<sup>211</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final, para 20.

balancing test was practically absent. This is the result of the new faster procedure, which might help to clear a measure faster, but fails in the transparency condition.

Furthermore, no competitors were able, so far, to raise their objections in the pre-adoption of the measure stage,<sup>212</sup> and how could they be informed and prepared, when a measure is to be cleared in 24 hours. As for the refined economic approach envisaged in the SAAP, it was also limited, justified by the urgency of the situation. In a typically approved recapitalisation scheme, for example, any economic justification of the measure is lacking; instead it was said that:

‘The Commission found the scheme and the commitments to constitute an appropriate means to restore confidence in the creditworthiness of Italian financial institutions and to stimulate lending to the real economy. The measures are well-designed and interventions will be limited to what is necessary to achieve the stabilisation of the Italian financial sector’.<sup>213</sup>

Finally, one last major concern is the ability of the state aid control mechanism and the market to return to the pre-crisis regime; if however, this return will be desired in the future, once the crisis is over. When the new crisis framework was adopted, the new rules would only be applicable until 31 December 2010. The Commission though, has prolonged the implementation of the crisis framework until the end of 2011, with some

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<sup>212</sup> P Werner-M Maier, ‘Procedure in crisis? Overview and assessment of the Commission’s State Aid procedure during the crisis’, (2009) 2 EstAL 177, 183.

<sup>213</sup> Press release for *Italian recapitalization scheme for financial institutions* (Case N648/2008) [2009] OJ C88/52 available at <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/2059> > accessed on 8 November 2009.

stricter conditions,<sup>214</sup> and again prolonged beyond the end of 2011, without setting a new end of date.<sup>215</sup> This ongoing state support to the banks contradicts what the Commission was expecting or hoping in the early stages of the crisis: in 2009 Commissioner for Competition Kroes had declared that ‘there can’t be a second bail out. [...] there is no money left for a second bailout’.<sup>216</sup> The Commission also hopes to set more permanent rules for assessing state aid to financial institutions under the legal basis of Article 107(3)c TFEU ‘as soon as market conditions permit’,<sup>217</sup> which seems more than a hope than a reality at this point.

The Banking Crisis has largely reached the stage where more cases and more importance is being given to the restructuring of financial institutions that receive state aid. The new Banking Communication<sup>218</sup> adopts the principle that recapitalisations and impaired asset measures will only be authorised if the restructuring plan is accepted in advance.<sup>219</sup> Also, the Banking Communication increases the minimum requirements for burden-sharing.<sup>220</sup> This is required in current sovereign debt conditions because it minimises public intervention. According to the new rules, banks that seek state aid should try to raise capital from the market first and ask

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<sup>214</sup> Aided banks after June 2010 for example have to pay larger remuneration.

<sup>215</sup> Communication from the Commission on the application, from 1 January 2012, of state aid rules to support measures in favour of banks in the context of the financial crisis. [2011] OJ C-356/ 02.

<sup>216</sup> Commissioner N Kroes, ‘Did government interventions help in the crisis?’, Address at International Banking Conference of British Bankers Association, London 30 June 2009, Speech/09/324

<sup>217</sup> Communication from the Commission on the application, from 1 January 2012, of state aid rules to support measures in favour of banks in the context of the financial crisis. [2011] OJ C-356/ 02 para 4.

<sup>218</sup> Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (“Banking Communication”) [2013] OJ C216/01

<sup>219</sup> *Ibid* para 23.

<sup>220</sup> *Ibid* para 19.

contribution from their shareholders, and junior debt creditors.<sup>221</sup> In *Anglo Irish Bank*<sup>222</sup> the Commission authorised the restructuring plan, which involved the complete closing of operations, because it ensures that the Bank shares the burden of its rescue. However, it is noted in the Commission Decision that the ‘value of assets (to be contributed) is so depreciated that the proceeds of their sale is dwarfed by the capital injected into both banks.’<sup>223</sup> To make things even worse, the Commission admits that for the burden-sharing by stockholders the Bank was already completely nationalised and private stockholders were ‘wiped-out’.<sup>224</sup> This is an extreme case, which shows that the crisis rules certainly contain all the necessary conditions to secure the public, involvement, losses, though, for the tax payer will be inevitable in some cases.

The first case in the context of the crisis state aid framework to reach the Court of the EU is *ING*.<sup>225</sup> The case involved aid that the Netherlands granted to ING in 2008, which was declared compatible by the Commission under the conditions of a restructuring plan.<sup>226</sup> Part of the Commission’s Decision on the restructuring plan referred to the amendment of conditions for the repayment of the initial capital injection of 2008 as being additional state aid. The Netherlands challenged the Commission Decision claiming that repayment conditions were in conformity with the MEIP<sup>227</sup> and thus not

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<sup>221</sup> *Ibid.*

<sup>222</sup> *Anglo Irish Bank and Irish Nationwide Building Society* (Case SA.32504 (2011/N) and C 11/10 (ex N 667/09) Commission Decision of 29 June 2011 [2012] OJ L139/18

<sup>223</sup> *Ibid* para 162.

<sup>224</sup> *Ibid* para 165.

<sup>225</sup> Case T-29/10 and T-33/10 *Netherlands and ING Groep NV v Commission* [2012] ECR 00 (NYR)

<sup>226</sup> *ING’s Illiquid Assets Back Facility and Restructuring Plan* (Case C10/09 (ex N138/09) Commission Decision 2010/608/EC of 18 November 2009 [2010] L 274/139

<sup>227</sup> Market economy investor principle, which was analysed in chapter one.

state aid. The General Court held that the Commission failed to apply the MEIP. The General Court's judgment is interesting because it engages in a 'comprehensive review' of the economic assessments of the Commission, even though it did recall that the judicial review of cases where there is technical or complex<sup>228</sup> economic assessments is limited.<sup>229</sup> The Commission appealed the General Court's judgment on the grounds 'that there is no requirement in law to apply the market economy investor principle in relation to an amendment of repayment conditions for a measure that itself constituted State aid.'<sup>230</sup> The impact of the judgment of the Court judging under appeal, concerning the application of the MEIP<sup>231</sup> in similar cases, when delivered, could have an impact on the way Member States analyse state aid measures before notifying them; they might be required to perform detailed economic assessments, such as the ones that the Commission might be obliged to perform even when there are amendments of aid measures.<sup>232</sup>

## 2.7 STATE AID TO FINANCIAL INSTITUTIONS AND OTHER FAILING FIRMS AND THE THEORY OF MORAL HAZARD

The crisis state aid framework, which was put in force in 2008, is still in effect, even though it was supposed to be temporary. The

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<sup>228</sup> Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paras 10 and 11

<sup>229</sup> Case T-29/10 and T-33/10 *Netherlands and ING Groep NV v Commission* [2012] ECR 00 (NYR) para 101.

<sup>230</sup> Commission Notice: Case C- 224/ 12 P: Appeal brought on 11 May 2012 by the European Commission against the judgment delivered by the General Court (First Chamber) on 2 March 2012 in Joined Cases T-29/10 and T-33/10 *Netherlands and ING Groep v Commission* [2012] OJ C258/8

<sup>231</sup> Market economy investor principle, which was analysed in chapter one.

<sup>232</sup> Morten Qvist Fog Lund and Preben Sandberg Pettersson, 'The ING-Case - The First Court Ruling on Bank Bailouts and the Market Economic Investor Principle' [2013] 3 EstAL 561, 564

Commissioner for Competition has admitted that due to the lack of a concrete system of control for financial institutions at the European level, and due to the dangers that banks face from the sovereign debt crisis in the Eurozone, the temporary crisis package is the best instrument to manage the rescue and restructuring of EU banks.<sup>233</sup> Thus, until there is a new framework for regulating financial institutions, and assessing the risks that those activities may or may not take, state aid control will be the instrument that will continue to be applied.<sup>234</sup> The latest figures show that 13% of GDP was used by European governments to rescue their banks.<sup>235</sup> The amount of money used is ‘unprecedented’,<sup>236</sup> and will continue to rise. Therefore, the question is what happens to the danger that financial institutions might become even riskier in the future, if they know that, in the end, there will be the taxpayer that will save them? And what happened to the free-market economy theory, as it was presented earlier in this chapter, which should be able to regulate itself, and lead the failing banks out of the market?

There are questions whether the temporary measures adopted during the crisis were actually protecting competition, as state aid control aims to do, or whether there were other policies involved that influenced their

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<sup>233</sup> Commissioner J Almunia, ‘Restructuring EU banks: the role of state aid control’, Speech at the CEPS Lunchtime meeting Brussels, 24 February 2012, SPEECH/12/122.

<sup>234</sup> On 1<sup>st</sup> January 2011 the EU has put in place a European System of Financial Supervision (ESFS), which includes the European Banking Authority, the European Securities and Markets Authority and the European Insurance and Occupational Pensions Authority. The aim and hope is that if those institutions supervise the financial sector effectively there will be no need for state aid to be granted to banks in the future. More and better regulation seems to be the answer to the crisis for the future, instead of any more subsidies that have negative effects on failing firms as this research will analyse in this paragraph.

<sup>235</sup> Commissioner J Almunia, ‘Restructuring EU banks: the role of state aid control’, Speech at the CEPS Lunchtime meeting Brussels, 24 February 2012, SPEECH/12/122.

<sup>236</sup> Commission staff working paper, ‘The effects of the temporary state aid rules adopted in the context of the financial and economic crisis’ October 2011, SEC(2011) 1126 final, page 17.

adoption. For example, the Communication for restructuring banks that receive state aid during the crisis acknowledges that the asset-write off and the divestment of branches or subsidiaries are measures that need to be taken by those benefiting from aid, authorised under the temporary frameworks. The Communication acknowledges that the reductions of the banks' balance sheets cannot reduce the banks' market share, and therefore should not be 'taken into account when assessing the need for structural measures'.<sup>237</sup> However, in reality, banks that received aid were ordered to drastically reduce their balance sheets, as part of the restructuring plans, something that cannot be explained on competition terms.<sup>238</sup> Rather, it is the political concerns that lead to the adoption of such measures.<sup>239</sup>

Another politically influenced measure in the restructuring Communication is the obligation imposed to beneficiaries not to pay dividends; instead, those amounts could be used for the bank's own contribution to the restructuring costs.<sup>240</sup> All of those measures are put in place to reduce the danger of moral hazard, instead of protecting competition.

The restructuring Communication<sup>241</sup> also acknowledges the danger of moral hazard from the banks that do receive aid, and, in particular, it

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<sup>237</sup> Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the state aid rules [2009] OJ C-195/04, para 35.

<sup>238</sup> H Gilliams, 'Stress testing the regulator: review of state aid to financial institutions after the collapse of Lehman' [2011] 36(1) ELR 3, 20-21.

<sup>239</sup> D Zimmer M Blaschczok, 'The role of competition in European state aid control during the financial markets crisis', [2011] 32(1) ECLR 9, 16.

<sup>240</sup> H Gilliams, 'Stress testing the regulator: review of state aid to financial institutions after the collapse of Lehman' [2011] 36(1) ELR 3, 18.

<sup>241</sup> Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the state aid rules [2009] OJ C-195/04.



recognises that aid ‘prolongs past distortions of competition’, ‘which may create a moral hazard for the beneficiaries’.<sup>242</sup> To add to that, the scale of the aid granted to banks is unprecedented, and it may create even greater moral hazard.<sup>243</sup>

The economic notion of moral hazard is used by economists to define the danger of the state granting support to a failing firm that cannot acquire it from the market on purely market terms, which will lead to distortions of competition by abolishing the beneficiary’s incentives to compete.<sup>244</sup>

The answer to the problem of the creation of moral hazard to the beneficiaries of crisis aid is to force them to impose tough restructuring measures, such as divestments and deleveraging, and also by forcing the beneficiaries to share some of the burden.<sup>245</sup> In particular, the restructuring Communication adopts burden sharing of the aid between the state and the beneficiary; this should be beneficial, because when there is greater burden sharing, and the contribution of the beneficiary is higher, the negative effects created by moral hazard are limited.<sup>246</sup> The beneficiaries’ contribution is to be made to the restructuring costs, and can have the form of absorbing losses, through their capital, or acquiring capital from the markets.

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<sup>242</sup> Ibid para 28.

<sup>243</sup> Ibid para 29.

<sup>244</sup> Commission staff working paper, ‘The effects of the temporary state aid rules adopted in the context of the financial and economic crisis’ October 2011, SEC(2011) 1126 final, page 13.

<sup>245</sup> Commission staff working paper, ‘The effects of the temporary state aid rules adopted in the context of the financial and economic crisis’ October 2011, SEC(2011) 1126 final, page 10.

<sup>246</sup> Commission Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the state aid rules [2009] OJ C-195/04

The theory of moral hazard is widely commented on, and some elements of hazard certainly exist when it comes to saving the doomed. However, it does seem to some that it is a notion that has been abused in the past and it was ill-used, based on flawed analyses that have misleading results.<sup>247</sup> The creation of a moral hazard argument should not stop government intervention, when it is needed; instead, better targeted regulation and enforcement will ultimately reduce the risks of state aid on competition.

## 2.8 THE EFFECTS OF THE EUROZONE'S SOVEREIGN DEBT CRISIS ON STATE AID CONTROL

The fact that each Member State is different when it comes to its economy and financial markets, and that the market failure in each country needs to be addressed on its own is evident from the effects of the crisis in the Greek, Portuguese, Irish and Cypriot economies. In those economies, the crisis has evolved into a sovereign debt crisis,<sup>248</sup> which of course has various reasons that have caused it, other than state aid, but once again the financial sector is involved. The same financial institutions that were given aid by the Member States' budgets refuse to lend, not only private companies and individuals, but Sovereign states as well.

In turn, the bad finances of the Member States' once again endanger the financial institutions in those three (for now) countries that need to be further aided. This creates a vicious circle of aid and lending shortage in the

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<sup>247</sup> Ha-Joon Chang, 'The hazard of moral hazard: Untangling the Asian Crisis' [2000] 28(4) *World Development* 775, 788.

<sup>248</sup> Commissioner J Almunia, 'Restructuring EU banks: the role of state aid control', Speech at the CEPS Lunchtime meeting Brussels, 24 February 2012, SPEECH/12/122.

European Union. More specifically, Member States have adopted state aid measures, such as recapitalisation of financial institutions and guarantees taken under the new crisis framework. In some Member States though, the crisis was transformed into a sovereign debt crisis, and as a consequence there was further need for support to financial institutions operating in those Member States and possibly all others, depending on the spill-over effects to the whole of the Eurozone, in case any Member State defaulted on its debts. The result is the establishment of the European Financial Stability Fund (henceforward EFSF), which will operate as an additional safeguard for financial institutions, to the measures already in place since 2009. The EFSF is established by the Eurozone countries as a private company, having as an objective to preserve financial stability.<sup>249</sup> Part of its activity is to grant loans to Member States' governments, which then use the funds to finance recapitalisations of financial institutions. This is the only activity of the EFSF that fulfils the conditions of Article 107(1) TFEU and has to be controlled under state aid rules. Once again, the legal basis for the clearance of the aid measures under the EFSF is Article 107 (3) (b) TFEU.

Recapitalisation schemes have been approved in 2010 under the EFSF. In a recent case, the Commission considers the proposed measure by the Greek government to be aid granted by an authority, the EFSF, which satisfies the imputability criterion and that state resources are used. The compatibility analysis is performed under Article 107 (3) (b) TFEU, as in the recapitalisation scheme already in place since 2008, because of a serious

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<sup>249</sup> See  
<[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/misc/114977.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/misc/114977.pdf)> accessed online on 22/02/2011.

disturbance in the economy.<sup>250</sup> Also, 35 billion Euro out of the total 85 billion Euro that the EFSF loaned to Ireland were granted as state aid to Irish financial institutions. It becomes clear that the Member States that entered the financial programmes funded by the EFSF will need more support in the future, and also other Member States may need support, consequently, the EFSF, which was established as a temporary fund, will be replaced by a permanent fund, the European Stability Mechanism (henceforward ESM). This permanent mechanism will have the same activities in the state aid field as the temporary mechanism had, and will enter into force once it is ratified by Eurozone Member States' parliaments; however, it will be established as an intergovernmental organisation of the Eurozone Member States under public international law, rather than being a private company that is the EFSF.<sup>251</sup>

The adoption of those measures has been criticised, of course, due to the fact that the EFSF is considered as a 'bailout fund'; however, it is forbidden by the Treaty for Member States to bailout other Member States,<sup>252</sup> and the legal basis of the fund is considered at least controversial.<sup>253</sup> Despite the controversy, the Regulation that established the EFSF<sup>254</sup> has put aside the criticism, by adopting the view that Article 122(2) TFEU is the legal basis for the EFSF, which allows the Union to provide

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<sup>250</sup> *Recapitalisation of credit institutions in Greece under the Financial Stability Fund (ESF)* (Case N328/2010) Commission Decision of 3/9/2010 [2010] OJ C316/5.

<sup>251</sup> Articles 1 and 31 of the Treaty establishing the European Stability Mechanism <<http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>> accessed on 30-7-2012.

<sup>252</sup> Article 125(1) TFEU [2012] OJ C326/47.

<sup>253</sup> P Athanassiou, 'Of past measures and future plans for Europe's exit from the sovereign debt crisis: what is legally possible (and what is not) [2011] 36(4) ELR 558, 560.

<sup>254</sup> Regulation No 407/2010 establishing a European financial stabilisation mechanism [2010] OJ L118/1.

financial assistance to Member States, when they face difficulties caused by ‘exceptional occurrences beyond its control’.<sup>255</sup> Apart from the legal basis considerations the EFSF and the financial assistance have also been criticised for creating even more moral hazard, both for the financial institutions that keep being rescued, and for the governments themselves that receive aid; the last part though, is outside the scope of the current thesis. To conclude, there needs to be a return to normal market conditions as soon as possible, as far as financial institutions are concerned, and more support should be directed towards the real economy, by subsidising SMEs, R&D&I, infrastructure and networks and SGEI, instead of banks; such measures for the real economy will have positive effects towards improving the financial situation of Member States.

## 2.9 CONCLUSION

In this chapter, the focus has been on the reasons that make state aid measures so attractive to Member States of the European Union. Specific attention was given to the influences of basic economic ideologies that shaped competition law, part of which is state aid. First, there was an analysis of the wider positioning of state aid control according to political economy theory; state aid is considered a protectionist instrument that is used by Member States’ governments to promote their industrial and economic policies. The research showed that state aid is not an independent procedure; it is shaped and transformed according to the special needs of the Member States’ economic policies, and is an instrument that is found in the

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<sup>255</sup> Article 122(1) TFEU [2012] OJ C326/47.

middle of the conflict of those in favour of protectionism and those that favour a more liberal economy.

Secondly, there was an analysis of the objectives of state aid, which is used to correct market failures and to promote objectives of common interest. The chapter concludes that state aid is appealing to governments because of the positive effects on objectives of common interest, such as Research, Development and Innovation projects and others which promote environmental objectives. The research analysed the different kinds of state aid that the Member States have implemented in the past and their objectives; through the analysis of the data from the Scoreboards the conclusion is that Member States grant more aid to horizontal objectives that are considered less anti-competitive. Those types of state aid are closely connected with the economic, social and industrial policies of the states and also the availability of public resources; they are also used in conjunction with each other: for example, regional aid can benefit underdeveloped regions and promote employment as well in a certain area, or innovation aid can create new products and drive down prices as well, through intensified competition between technology companies. However, the positive effects were contrasted with the negative effects and the conclusion is that the positive and negative effects of state aid need to be balanced, in order for the outcome to be ultimately positive. This is the evaluation that the Commission has the power to perform in its investigations of aid measures, which will be the topic of the next chapter.

Thirdly, state aid is not a static framework of rules, but it needs to be adapted to the current political and market conditions. There was a need for

a simplification of state aid rules in order to make them more effective in crisis conditions. The benefits and shortcomings of the implemented simplification were analysed, and also the effects of the financial crisis on the implementation of state aid rules. The conclusion is that simplification was necessary, but was not performed without problems. The fact is that state aid no matter how well targeted it is, always tends to distort competition and affect the functioning of a market, even when it is used to correct market failures. This is why it is now time to return to normal market conditions, as far as financial institutions are concerned, provide more support for the real economy and promote growth policies.

## **CHAPTER 3**

### **THE LIMITS OF THE COMMISSION'S SUPERVISION POWERS**

#### **3.1 INTRODUCTION**

The Treaty on the Functioning of the European Union (hereinafter TFEU) apart from, and in addition to the substantive rules on state aid, contains the basic procedural rules as well, without which the supranational state aid control regime would be incomplete. The Treaty rules on state aid seem to be constructed around the idea of a centralised control of subsidies, by one institution for the whole of the Union, as the most effective way to control state aid in the Member States. However, in more recent years there is a trend to decentralise state aid control and competition control in general.

This thesis will analyse and compare the centralised and decentralised aspects of state aid control. In this chapter, the focus will only be in the centralised implementation of state aid policy of the European Union. This control consists of an administrative process that is usually called supervision by the Commission. It can be called the supranational aspect of state aid implementation, because it involves supranational authorities, namely the Commission, and supranational legislation, such as the Treaty and the secondary legislation adopted by the Union's Institutions. In the beginning of this chapter, it is necessary to introduce the basic provisions of the Treaty that provide the powers of the Commission that place it in the heart of this policy's implementation. The Treaty also provides for the adoption of more detailed legislation, as a way of enhancing the



implementation. This chapter will critically analyse the most important legal provisions that regulate the Commission's competence to control subsidies. In other words in this chapter of the thesis the first research criterion will be applied: the thesis will test the speed and applicability of the state aid investigation procedures. Furthermore, the second research criterion will also be tested: the chapter will examine whether the rules that govern the Commission's administrative procedures of state aid control fulfill the transparency requirement.

This process consists of phases according to the type of aid that will be implemented. The control of subsidies at this stage involves two parties that both need to follow the relevant procedures, according to the type of aid. Those parties are the Member State that plans to grant aid and the Commission. The obligations of each party will be examined and the possible outcomes of the different phases will be distinguished. This is necessary in order to understand the structure of the supranational state aid regime, the powers of its players and their limits.

Another characteristic of the supranational regime that will be included in this chapter is the recovery provision. Special focus should be placed on the issues concerning the Commission's recovery Decisions because the weak spot of state aid policy implementation is the enforcement of recovery Decisions.<sup>1</sup> The types of aid that the recovery decision is applicable to, will be made distinct from other types of aid that are not subjected to that

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<sup>1</sup> Mihalis Kekelekis, 'Financial Penalties on a Member State for Failing to Fulfil its Obligations - Effective and Efficient Means of State Aid Enforcement Annotation on the judgment of the Court of Justice (Third Chamber) of 17 November 2011 in Case C-496/09 *Commission v Italy*' [2013] 3 EStAL 554, 558.

‘penalty’. Furthermore, it will be very crucial for the thesis to critically analyse how recovery actually works and the powers of the Commission and the Member States in this process, because it is the main method used to enforce decisions that declare aid to be incompatible. Finally, the chapter will critically analyse the defenses that have been invoked by the parties in recovery cases and their possible outcomes.

Next, the chapter will embark on the distinction between public and private enforcement, by analysing the characteristics of the public enforcement. State aid can be enforced both by the state and state authorities, and then it is called public enforcement of state aid; also, it can be enforced by private individuals, and then it is called private enforcement. This chapter is limited to the critical analysis of the enforcement powers of the supranational authority. Some general remarks on enforcement theory will also be examined so far as they are applicable to state aid enforcement.

An examination of all aspects of the supranational state aid implementation regime means that this research will critically analyse the positive and negative characteristics of the administrative procedure of the Commission, whenever it examines state aid measures and also the Commission’s public enforcement powers. The analysis will begin with those characteristics that make the existence of the supranational control most necessary and effective, such as the unified procedures in a Union of 28 Member States and contrast them with the inadequacies of this process, such as the realistic inability of one authority to control vast amounts of aid. The chapter will conclude on the limits of the Commission’s supervision

powers and procedures and introduce the research to the following chapter, which will continue to research the effectiveness of state aid control at the supranational level. The enforcement of state aid rules at the European Courts will follow in the next chapter.

### 3.2 CHARACTERISTICS OF THE PUBLIC ENFORCEMENT OF STATE AID

For the purpose of the analysis of the effectiveness of the state aid policy implementation, this thesis examines in this chapter the supranational part of the implementation of state aid law and policy, which is the European Union's state aid regime. This part will be contrasted with the national aspect of the implementation of European state aid Control in chapters five and six. For the purpose of this research the supranational regime includes the public enforcement by the Commission and the judicial review by the Court of Justice.

The national aspect which is the theme of the fifth and sixth chapters will include the powers of national authorities that deal with state aid at the national level and also the enforcement before national courts of the Member States. The research is not performed between public and private enforcement, but rather in a wider approach, between the supranational implementation and the national one.<sup>2</sup> This gives the research a more thorough approach for the purpose of measuring the effectiveness of the implementation of state aid control.

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<sup>2</sup> As it was already presented in chapter 1 of the thesis, paragraph 1.2.

### 3.2.1 Public enforcement by the Commission

Public enforcement of state aid law at the supranational level is awarded to the Commission. Thus, the Commission is the ‘governmental’ bureau that has the ability to detect and ‘punish’ breach of state aid rules. The Commission, of course, is an institution of the supranational organisation of the European Union, and its powers come from the Treaty on the Functioning of the European Union. It is organised into Directorate Generals, and the one responsible for state aid control in most sectors of the economy is the DG for Competition.

However, there are other DGs that share responsibility for the control of subsidies because some few sectors of the economy have different rules on state aid. Those sectors are the Agricultural sector, with responsibility for the control of subsidies in that sector belonging to the DG for Agriculture and Rural Development, and the Fisheries sector, with the responsibility belonging to the DG Fisheries of the Commission. In the past, aid to the transport sector was controlled by the DG Transport, but now it has passed to the DG Competition, because many of the general rules (GBER,<sup>3</sup> *de minimis* rules<sup>4</sup>) are also applicable to aid in the Transport sector. This thesis, as was mentioned in the first chapter, has limited itself and excluded examination of the special rules for Agriculture and Fisheries.

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<sup>3</sup> Commission Regulation (EC) 800/2008 on the application of Articles 87 and 88 of the Treaty declaring certain categories of Aid compatible with the Common Market (General Block Exemption Regulation) (‘GBER’) [2008] OJ L214/3. The Commission has opened a consultation to extend the period of application of the GBER until 30 June 2014.

<sup>4</sup> Commission Regulation (EC) 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379/5. Currently, the consultation for the second draft of the new Regulation has closed and the document has not been adopted yet as part of the Modernisation initiative.

The Commission makes decisions as a body or it can authorise one Commissioner to make a decision.<sup>5</sup> However, we can make the criticism that in the case of state aid implementation the Commission plays the role of investigator, prosecutor and judge at the same time. For those reasons it is crucial to secure the rights of the parties within such a centralised enforcement procedure.

The other important point in the topic of public enforcement of state aid is the protection of human rights, which is central in any type of enforcement procedure. The Commission has wide powers to investigate state aid cases, given to it by the Procedural Regulation, if it has doubts that one of its decisions is not implemented properly.<sup>6</sup> The ‘Procedural Regulation’ empowers the Commission to ‘enter premises,[...] to ask for oral explanations[...] and to examine books’ and other documents.<sup>7</sup> The new Procedural Regulation extends the Commission’s powers to perform inquiries in a whole sector of the economy, across various Member States or for a specific aid instrument, if there is reasonable suspicion that it materially distorts competition and the internal market. Those new powers of inquire place the Commission under an obligation to state the reasons for the inquiry and the choice of addressees.<sup>8</sup> At the same time the Member State is under an obligation to assist the Commission’s officials and experts with

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<sup>5</sup> Currently the president is J M Barroso. J Almunia is the Commissioner who has the Competition portfolio and the Head of DG Comp is Alexandre Italianer. P Craig and G de Búrca, *EU Law text cases and materials* (5<sup>th</sup> ed OUP, 2011) 35

<sup>6</sup> PM Roth QC (ed), *Bellamy and Child European Community Law of Competition* (5<sup>th</sup> ed. Sweet and Maxwell, London 2001) 1262.

<sup>7</sup> Article 22 of Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>8</sup> *Ibid.*

their onsite investigation. All of those activities can potentially be highly infringing to individual's human rights. Such powers are used in Cartel investigations already,<sup>9</sup> but its application to state aid cases remains to be seen.

At the same time, though, that the Commission officials are exercising those powers, the Commission is also under an actual obligation to examine the case in a diligent and impartial manner, according to the Court's case law.<sup>10</sup> During this examination, it is under the general obligation to respect the party's right to a fair trial and a speedy procedure, which is provided for by the European Convention on Human Rights (ECHR) and by Article 47 of the recently adopted by the Union 'Charter of Fundamental rights of the European Union'<sup>11</sup> that is already binding. As a result, the Commission has to respect both the Charter and the Convention, and the parties can invoke them in a state aid investigation.

Also, another important point in respect of human rights protection in public enforcement of state aid is the right to access files, which are held by any institution.<sup>12</sup> The Procedural Regulation does not include a specific Article securing the parties access to the Commission files, as does Regulation 1/2003 for Competition cases.<sup>13</sup> Instead, the Commission's practice is to actually restrict the parties' right to access files from a state aid

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<sup>9</sup> Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1

<sup>10</sup> Case C-367/95 *Commission v Sytraval* [1998] ECR I-1719 para 62.

<sup>11</sup> Charter of Fundamental rights of the European Union [2010] OJ C83/02.

<sup>12</sup> Article 42 of the Charter *ibid.*

<sup>13</sup> Article 101 and 102 TFEU [2012] OJ C326/47

investigation, by claiming possible infringement of ‘business, or professional secrecy’. The Court has ruled in favour of protecting business secrets in state aid investigations, in line with previous case law.<sup>14</sup> Such case law is the *AKZO* judgment, where it was held that a third party may not be provided with documents that contain business secrets, and that the relevant company may act to prevent that. This, of course, has practical implications for the third parties, and potentially infringes their human rights.

However, the public enforcement of state aid reserves a more favourable approach for the Member State, which is involved in the state aid decision making process. The case law accepts that if the Member State has not been heard, it is possible to annul the Commission’s decision, because this right is provided for in the Procedural Regulation,<sup>15</sup> and it is an essential part of the procedure.

The new Procedural Regulation recognises the right of interested parties to submit complaints in a specific form. The purpose of this new procedure is to inform the Commission of any alleged use of unlawful aid or misuse of aid.<sup>16</sup> The complainant, though, is placed under strict conditions to comply with a specific form; otherwise the Commission may not examine the complaint. The handling of complaints is a big innovation of the new Procedural Regulation,<sup>17</sup> and it allows the Commission to focus on the most

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<sup>14</sup> Case 142/84 *BAT and RJ Reynolds v Commission* [1987] ECR 4487 paras 20-21.

<sup>15</sup> Article 6(2) of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>16</sup> Article 20 (2) *ibid.*

<sup>17</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM) COM(2012) 209 final, para 23 (b).

potentially distortive measures; along with the new investigation powers into sectors or aid instruments. Those new investigative powers are considered *ex officio*,<sup>18</sup> which means that they start on the Commission's initiative, unlike complaints, after it becomes aware of significant distortions of competition that can potentially harm the internal market.

### 3.2.2 Public enforcement by the Council

The Council has some powers in relation to authorising aid. Article 108(2) TFEU provides that the Council can declare aid that a Member State plans to grant as compatible with the internal market, after an application by the Member State. This power of the Council is restricted though, from the condition that the decision has to be made unanimously, and that there should be exceptional circumstances that justify this decision. Usually, this provision has been used for aid in the agricultural sector, but overall it has not been extensively used.

The problems that might arise from such a decision on compatibility by the Council derive from the possibility of conflicts that might occur from a Commission decision on the same aid. The court has accepted that the Commission is the central player for the control of aid, and that the power of the Council is exceptional.<sup>19</sup> The Council does not have the power to disregard a previous Commission decision of incompatibility on the same aid plan and decide that it is compatible. Nor can it decide after the time

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<sup>18</sup> *Ibid.*

<sup>19</sup> Case C-110/02 *Commission v Council* [2004] ECR I-6333, para 31.



limit of three months, set by the Treaty Article 108, if the Commission has started the examination of the measure.

Another issue that might arise has to do with aid that was given as ‘compensation’ for aid that was previously declared incompatible by the Commission and recovered. According to the case law, the Member State applied to the Council asking it to declare aid of the same amount and to the same recipient as compatible; aid that was previously declared incompatible by a Commission decision and that had been recovered. The Court, in that case, held that the Council lacked competence to declare the new aid compatible, because it would render the recovery ineffective.<sup>20</sup>

### 3.3 THE ROLE AND POWERS OF THE COMMISSION IN STATE AID ENFORCEMENT

Article 108 TFEU provides for the system of implementation of the procedural rules of state aid, otherwise known as enforcement procedures. Other important legislative documents, in this context of implementing the procedural aspect of state aid, are the ‘Procedural Regulation’ No 734/2013<sup>21</sup> and the ‘Implementing Regulation’ 794/2004<sup>22</sup>, which provides details for the Commission’s competences. In addition Regulation 734/2013 is directly applicable to the Member States, so there is no need for national

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<sup>20</sup> Ibid para 44-45.

<sup>21</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>22</sup> Commission Regulation (EC) 794/2004 Implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (implementing Regulation) [2004] OJ L140/1, as amended.

implementing measures for them to become applicable; the direct effect of Regulation 734/2013 makes its application easier and enforceable by the national courts as well.<sup>23</sup> Also, the Procedural Regulation is applicable to all aid regardless of the sector of the economy that the aid is implemented.<sup>24</sup>

Finally, it is expressed in the foreword of the amended Procedural Regulation that there was a need for amending certain procedures in order to make ‘the Commission more effective’,<sup>25</sup> which is also similar to the aim of this research, which is to critically examine the effectiveness of the implementation of the state aid policy. Before the adoption of the Regulation, the procedures on state aid control were established by the Commission’s practice and the Court’s review; a practice which did not secure ‘transparency’ or ‘legal certainty’.<sup>26</sup> Securing those two conditions has always been the goal of any reform, and the lack of them has been the main criticism for the Commission’s supervision.

### 3.3.1 *Ex ante* control of state aid and *ex post* monitoring of aid

It should be mentioned, from the forefront, that the Commission has the power to control aid both before it is implemented by the Member State and during and after its implementation. Article 108 TFEU grants the following types of powers to the Commission in relation to controlling aid: first, to control new aid that is notified to it and second, to monitor aid that has

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<sup>23</sup> Article 288 TFEU [2012] OJ C326/47.

<sup>24</sup> Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L204/15.

<sup>25</sup> Point 1 of the foreword of Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>26</sup> *Ibid.*

already been implemented. This is a dual system of control: *ex ante* supervision of aid means examination of the proposed measure before any aid is granted. *Ex post* means monitoring of existing aid. The latter *ex post* monitoring means that the Commission is under an obligation and ability, at the same time, to make sure that cleared compatible aid remains compatible, and does not change, so that it produces negative results and distorts the market. It is possible for Member States to alter aspects of existing aid but also to defy the conditions, upon which the measure was declared compatible, by the Commission's conditional decision. If there was no *ex post* control the whole system of supervision by the Commission would be undermined. Member states would be capable of having their aid measures approved and then altering them to become anticompetitive, if there was lack of control during their implementation.

The measures that are in force, under the Procedural Regulation, to support the Commission in its powers to perform *ex post* monitoring of aid consist of the Member States' obligation to submit annual reports to the Commission.<sup>27</sup> There are detailed rules as to the content and form of those reports,<sup>28</sup> so that those are effective in their purpose to help the Commission identify possible breaches of its positive decisions, on state aid measures. Also, the Commission has powers to make on site examinations,<sup>29</sup> whenever

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<sup>27</sup> Article 21 of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>28</sup> Articles 5,6,7 of the Commission Regulation (EC) 794/2004 Implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (implementing Regulation) [2004] OJ L140/1

<sup>29</sup> Article 22 of Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

it has doubts as to whether the Member State complies with the obligations to notify aid, and to provide all the necessary details for the Commission to make its decisions on compatibility with the internal market. The Commission declared that the benefits of monitoring aid are important, because monitoring contributes to the ‘development of the single market.’<sup>30</sup>

### 3.3.2 Types of aid

According to the supervision system set up by Article 108 TFEU and the Procedural Regulation aid is categorised into four different types. Each type has differences in the supervision procedure. The types are: *new aid* that is granted after accession to the Union; *existing aid*, which was first granted by a member State before its accession to the Union; *unlawful aid*, which is granted without prior notification to and approval by the Commission, and *misused aid*, which is authorised aid that has violated terms of its approval.<sup>31</sup>

#### 3.3.2.1 Aid schemes

Another distinction, which is made by the Regulation, is that of aid schemes and individual aid measures.<sup>32</sup> According to the Procedural Regulation both new and existing aid can be granted in the form of either an aid scheme or individual aid. A scheme can be approved as a whole, in advance, and particular aid measures to specific undertakings that form part

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<sup>30</sup> European Commission, XXVIIIth Report on Competition Policy 1998 (Brussels Luxembourg 1999) 20.

<sup>31</sup> Article 1 of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>32</sup> Art 1(d) of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

of a scheme need not be notified to the Commission, unless the Commission's approval decision requires the contrary, which means that the measure should be notified as new aid.<sup>33</sup> However, the Court held<sup>34</sup> that when a member state grants individual aid as part of an approved aid scheme, it must make sure that the aid follows the criteria of the approved scheme.<sup>35</sup>

The scoreboard shows that Member States grant more aid measures (in numbers of measures adopted) in the form of block exempted aid under the GBER and less individual measures that are individually scrutinized by the Commission.<sup>36</sup> Though, when the criterion based on which the distinction is being made is the volume of aid, then the Member States grant more aid in volume through aid schemes: in 2011 aid granted through schemes reached 55.1% of total aid to industry.<sup>37</sup> This means that the Commission resources can focus on assessing ad hoc individual measures that are more distortive potentially.

The State Aid Modernisation aims at orienting scarce public finances to growth generating measures. In this context state aid control can achieve the objective 'to do less with more' by modernising a number of soft law instruments, streamlining procedures with the amendment of the Procedural

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<sup>33</sup> Case C-47/91 *Italy v Commission* [1994] ECR I-4635, para 26: 'Conversely, where the Commission finds that the individual Aid is not covered by its decision approving the scheme, the Aid must be regarded as new Aid.'

<sup>34</sup> Case T-357/02 *RENV Freistaat Sachsen v Commission* [2011] ECR00 (NYR)

<sup>35</sup> Julia Lipinsky, "Fine-Tunings" Regarding the Assessment of Aid Schemes' [2012] 4 *EstAL* 833, 844

<sup>36</sup> Commission staff working document Facts and figures on State aid in the EU Member States 2012 Update SEC(2012)443 final 45

<sup>37</sup> *Ibid* 46

Regulation and introduce the evaluation of aid schemes.<sup>38</sup> The introduction of evaluation is deemed important because larger aid schemes can potentially be more distortive in the internal market<sup>39</sup> and because of deficiencies in the implementation of aid schemes, highlighted by the Commission's monitoring.<sup>40</sup> Evaluation means the measured impact of aid schemes.<sup>41</sup> The objectives of evaluating the impact of aid schemes in the market are: to assess the effectiveness of aid schemes, to verify the assumptions that led to ex ante approval of the scheme, to assess negative results and propose solutions and lead to better designed measures.<sup>42</sup> This is a very interesting factor of the State Aid Modernisation initiative, because it will lead to better implementation of state aid control, which is what this thesis researches.

### 3.3.2.2 New aid

The classification of aid as new is an objective assessment. According to the Court all aid that is not existing in the sense that the procedural Regulation defines it must be considered new aid and the preliminary

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<sup>38</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM), COM(2012) 209 final.

<sup>39</sup> Commission, 'Evaluation in the field of State aid, Issues paper' available at <[http://ec.europa.eu/competition/state\\_aid/modernisation/evaluation\\_issues\\_paper\\_en.pdf](http://ec.europa.eu/competition/state_aid/modernisation/evaluation_issues_paper_en.pdf)> accessed on 23/10/2013

<sup>40</sup> Gert-Jan Koopman, 'Modernising State Aid through better evaluations' (Workshop on Evaluation in the field of State aid Brussels, 23 April 2013) available at <[http://ec.europa.eu/competition/state\\_aid/modernisation/evaluation\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/evaluation_en.html)> accessed on 23/10/2013

<sup>41</sup> Commission, 'Evaluation in the field of State aid, Issues paper' 2, available at <[http://ec.europa.eu/competition/state\\_aid/modernisation/evaluation\\_issues\\_paper\\_en.pdf](http://ec.europa.eu/competition/state_aid/modernisation/evaluation_issues_paper_en.pdf)> accessed on 23/10/2013.

<sup>42</sup> Gert-Jan Koopman, 'Modernising State Aid through better evaluations' (Workshop on Evaluation in the field of State aid Brussels, 23 April 2013) available at <[http://ec.europa.eu/competition/state\\_aid/modernisation/evaluation\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/evaluation_en.html)> accessed on 23/10/2013

examination procedure should be set in motion.<sup>43</sup> When it comes to the first of those types, which is new aid, the main problem that occurs, in practice, is to distinguish between a new aid measure and an existing one. And that is difficult because according to Article 1(c) of the Regulation any existing aid that has been altered, since the approval decision, must be considered and dealt with as new aid. Changes of the granting bodies, or the recipients of the aid, and changes in the granting period, or the amounts of aid must be considered serious alterations that justify the aid measure to be considered new aid. In *Keller and Keller*, for example, the Court held that an ‘increase in the number of recipients’ of the aid that was approved was significant alteration that constituted new aid that should have been notified.<sup>44</sup>

New aid according to Article 108 (3) TFEU has to be notified to the Commission, prior to implementation by the Member State granting it. This notification obligation is the basis of the Commission’s control powers. Without it, it would not be in the centre of state aid control. However, it is clear that the volume of aid measures in 28 Member States is too high for one institution to control. This is why the scope of notification has been limited over the years, by introducing the following exemptions.

Only aid that fulfils all of the criteria of Article 107(1) TFEU has to be notified, which is by itself a limitation to the notification obligation, since it excludes aid that does not fulfil all of the criteria. Also, another limitation to the scope of the notification obligation was materialised,

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<sup>43</sup> Case C-295/97 *Rinaldo Piaggio* [1999] ECR I-3735, para 48.

<sup>44</sup> Case T-35/99 *Keller and Keller Meccanica v Commission* [2002] ECR II-261, para 62.

through the adoption of the *De minimis* regulation,<sup>45</sup> which automatically exempted from the notification obligation a large number of measures. The *De minimis* Regulation was adopted by the Commission, not the Council, and the legal basis for its adoption was Article 2 of the Procedural Regulation. The Commission has established, through its experience in dealing with state aid cases, that small amounts of aid do not distort competition, and thus should be deemed as not fulfilling all of the criteria in Article 107(1) TFEU. However, the real reasons behind the adoption of the *De minimis* Regulation is to relieve the burden of investigating all measures as it seems to be the wording of Article 108(3) TFEU, which would be impossible today.<sup>46</sup>

### 3.3.2.3 Block exempted aid

The other exception from the notification obligation is the General Block Exemption Regulation (henceforward GBER),<sup>47</sup> which consolidated previous sector specific Block Exemption Regulations. Once again, the main reason for the adoption of the GBER has to do with practical considerations, rather than legal ones. The Commission was and still is the receiver of hundreds of notifications of state aid measures each year that aim at commonly acceptable objectives. Such objectives have to do with the benefits of state aid that have been analysed in the previous chapter, and which do not harm competition. It is preferable that such measures are approved as quickly as possible, and the notification procedure would halt

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<sup>45</sup> Commission Regulation (EC) 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379/5

<sup>46</sup> L. O. Blanco (ed) *EC Competition procedure* (2<sup>nd</sup> edn, Oxford OUP 2006) para 21-85.

<sup>47</sup> Commission Regulation (EC) 800/2008 on the application of Articles 87 and 88 of the Treaty declaring certain categories of Aid compatible with the Common Market (General Block Exemption Regulation) ('GBER') [2008] OJ L214/3.



their application. The benefits of the GBER are mainly focused in guaranteeing growth and the creation of jobs for the Europeans. Among others, the GBER benefits aid to SMEs, the protection of the environment, the protection of disadvantaged regions, research and innovation and the promotion of equality between men and women, through incentives for women entrepreneurs.

However, it should be noted that aid that has not been notified, due to its implementation according to the provisions of the GBER, is being monitored by the Commission after its implementation, for securing that the Member State is complying with the rules of the Regulation. Article 10 of the Regulation provides for an *ex post* monitoring of such aid schemes on a sample basis, so that proper enforcement of state aid is maintained. The Commission has performed such sample tests in an intensified way for the period 2011/2012 according to the Scoreboard.<sup>48</sup> The findings are cause for concern. Even though in previous versions of the Scoreboard the Commission claimed that the system of the Block Exemption implementation of state aid cases is functioning in a satisfactory manner, without giving further evidence,<sup>49</sup> it now says that ‘there seems to be an overall increase in the number of problematic cases.’<sup>50</sup> More than one-third of the cases monitored in 2011/2012 had problems<sup>51</sup> either of non-notified modifications, compatibility conditions that had not properly been transcribed in the national legislation implementing the measure and others.

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<sup>48</sup> State Aid Scoreboard Autumn 2012 update, COM(2012) 778 final para 5.4.

<sup>49</sup> State Aid Scoreboard Autumn 2010 update, COM(2010) 701 final 68.

<sup>50</sup> State Aid Scoreboard Autumn 2012 update, COM(2012) 778 final para 5.4.

<sup>51</sup> *Ibid.*

Another worrying factor that arises from the monitoring of exempted aid measures is the varying level of compliance rates across Member States.<sup>52</sup>

The last category of aid that has been exempted from the notification obligation, which is added to the growing list of exemptions, is aid granted as compensation for performing public service obligations; specifically, aid in this field is exempted either for certain categories of services (such as for hospitals and social housing), or for all other categories of public service compensation up to a certain amount of aid (currently, compensation up to fifteen million euro to providers).<sup>53</sup> Again the justification for the exemption comes from the fact that such aid does not confer advantages to the receiving undertaking,<sup>54</sup> and therefore can be exempted. It is clear from all those exemptions that, as the number of Member States rises, the Commission is eager to alleviate some of its implementing duties, in favour of targeting other, more harmful aid measures.<sup>55</sup>

Another problem with the notification obligation is that only aid that can be deemed to be incompatible with the internal market should be notified. However, it lies in the Commission's exclusive right to make that decision on compatibility, according to Article 107(1) TFEU. Member states and their authorities of any kind lack that competence. Thus, the question

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<sup>52</sup> Commission staff working document Facts and figures on State aid in the EU Member States 2012 Update SEC(2012)443 final

<sup>53</sup> This exemption is provided for in the Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L-7/3, Article 2.

<sup>54</sup> Case C-280/00 *Altmark* [2003] ECR I-7747.

<sup>55</sup> Annette Matthias-Werner, 'Reform of procedural rules for State Aid cases' [2004] 2 Competition Policy Newsletter 91

that arises is how is a Member State able to conclude that a plan to grant aid would be considered incompatible, and for this reason to go ahead with the notification, to secure that the aid will not be subsequently characterised unlawful, if it is not properly notified?<sup>56</sup> The answer to this problem is logically the pre-notification procedure, where a Member State can make an informal pre-notification, after which the Commission issues informal guidance on features of the measure that may be considered incompatible, and for this reason, eligible for notification.

Under the State Aid Modernisation the Commission has adopted the Enabling Regulation,<sup>57</sup> which allows the Commission to amend the GBER and add categories of aid to be exempted from notification in the future. Those categories are: aid for innovation, culture, natural disasters, sport, certain broadband infrastructure, other infrastructure, social aid for transport to remote regions and aid for certain agriculture, forestry and fisheries issues. The inclusion of those categories will broaden the application of the GBER<sup>58</sup> further more, and more and more measures will escape the Commission's *ex ante* scrutiny. This means that it is very important to have proper implementation of the *ex post* control and also, better understanding

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<sup>56</sup> A Sinnaeve et al, 'The new regulation on State Aid procedures' (1999) 36 CMLRev 1153

<sup>57</sup> Council Regulation No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [2013] OJ L204/ 11

<sup>58</sup> Commission Regulation (EC) 800/2008 on the application of Articles 87 and 88 of the Treaty declaring certain categories of Aid compatible with the Common Market (General Block Exemption Regulation) ('GBER') [2008] OJ L214/3

of the state aid rules by the Member States,<sup>59</sup> which are criteria of this thesis for the evaluation of state aid control implementation.

#### 3.3.2.4 Altered aid

However, the other crucial point is whether after the alteration it was necessary to notify the whole of the scheme from the beginning, or the altered part as a new aid measure. The consequence is that, if the whole of the scheme is not notified, the whole turns into unlawful aid. The Court has accepted that there should be notification of the whole scheme, except for cases, where the altered measure does not influence the decision, made by the Commission, and thus, when the altered measure can be separated from the whole scheme and notified individually.<sup>60</sup>

This, of course, is a very fluid criterion by the court that can be interpreted rather widely in each case, especially, since the Procedural Regulation itself takes no position on the subject of altered aid notification obligations. The Implementing Regulation provides for a definition to what altered aid means to the Commission,<sup>61</sup> which somewhat provides for some guidance as to whether there is need to notify; nonetheless a direct provision for the obligation to notify the whole scheme, after alteration, would be more favourable, for legal certainty. The definition of altered aid in the Implementing Regulation is very broad; The Implementing Regulation

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<sup>59</sup> Mihalis Kekeleakis, 'Financial Penalties on a Member State for Failing to Fulfil its Obligations - Effective and Efficient Means of State Aid Enforcement Annotation on the judgment of the Court of Justice (Third Chamber) of 17 November 2011 in Case C-496/09 *Commission v Italy*' [2013] 3 EStAL 554, 557

<sup>60</sup> Case 91/83 *Heineken Brouwerijen* [1984] ECR 3435, para 21 and more recently Case T-195/01 *Gibraltar v Commission* [2002] ECR II-2309 para 113.

<sup>61</sup> Commission Regulation (EC) 794/2004 Implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (implementing Regulation) [2004] OJ L140/1, as amended, Article 4.

defines alteration of existing aid as ‘any change other than modifications of a purely formal or administrative nature’<sup>62</sup> however, it also allows for an increase of up to 20% of the amount authorised under the Commission’s decision. Such an increase should not be considered alteration and does not have to be notified individually.<sup>63</sup> The Court held that alteration of the field of the beneficiary’s activity is not alteration of existing aid<sup>64</sup> and also that guarantees from a different public body than the one that initially was included in the authorisation of the aid should not be notified.<sup>65</sup>

### 3.3.2.5 Existing aid

New and altered aid is distinguished from existing aid because the last category has different treatment in this implementing mechanism. Existing aid is all aid measures that were introduced before the entry into force of the Treaty for each member state, which is the date of its accession to the Union. Also existing aid the aid though must have been first granted by States before accession to the Union, and must continue to exist after accession. The treaty rules, in particular, do not apply before accession, so the Commission has no control over existing aid measures. The only power the Commission has on existing aid is for the future application of it.<sup>66</sup> The most significant consequence of this is that there is a danger of not having the same standard of control to all EU Member States, because some aid, that is existing aid, cannot be subjected to the penalty of a recovery order by

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<sup>62</sup> Commission Regulation (EC) 794/2004 Implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (implementing Regulation) [2004] OJ L140/1, as amended, Article 4(1)

<sup>63</sup> Ibid Article 4(4)

<sup>64</sup> Case T-35/99 *Keller and Keller Meccanica v Commission* [2002] ECR II-261, para 61.

<sup>65</sup> Case T-318/00 *Freistaat Thüringen v Commission* [2005] ECR II-4197 para 281

<sup>66</sup> To ask the alteration of it for example.

the Commission, and is exempted from a notification obligation with everything that follows it.<sup>67</sup> Also existing aid is aid that has been authorized by the Commission or the Council. The Procedural Regulation<sup>68</sup> considers as existing aid, aid that would not fulfill the criteria of state aid when it was first put into effect but became state aid due to the ‘evolution’ of the internal market. The Court held that this must be interpreted as a change in either the economic or the legal framework of the particular sector.<sup>69</sup> If the Commission alters its assessment method due to more rigorous state aid control the market has not evolved.<sup>70</sup>

The Union rules on existing aid are really important during the pre-accession period, when negotiations are taking place between the applicant State and the Commission, for the closing of the Chapter on Competition. In order not to allow the favourable handling of existing aid, against the interests of existing Member States, it was particularly important for the Commission, at the accession of Austria, Finland and Sweden in 1994, to control existing aid, in a manner that was credible. That was easy then, because those three countries were all Members of the EEA which is a supranational organisation that applies state aid rules, similar to the EU ones.<sup>71</sup>

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<sup>67</sup> L. O. Blanco (ed) *EC Competition procedure* (2<sup>nd</sup> edn, Oxford OUP 2006) 893.

<sup>68</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>69</sup> Joined opinion of Mr AG Léger delivered on 9 February 2006 in Joined Cases C-182/03 *Kingdom of Belgium v Commission* [2010] ECR I-5479 and C-217/03 *Forum 187 ASBL v Commission of the European Communities* [2006] ECR I-5479 para 213

<sup>70</sup> *Ibid.*

<sup>71</sup> Georg Roebing, ‘Existing Aid and enlargement’ (2003) 1 Competition Policy Newsletter 33, 34

However, ten new Member States acceded in 2004 that had no previous state aid laws, or equal supranational control mechanisms. The Commission established a two tier system for the control of existing aid at the pre-accession stage of those ten countries. The applicant States, by establishing national state aid authorities, examined existing aid measures and submitted lists of those measures to the Commission; lists that were included in the Accession Treaties. Also, they recognised the power of the Commission to raise objections to those decisions of recognising existing aid by the national authorities, and thus, the supranational mechanism was again present to provide its high status of state aid control experience, as part of their pre-accession obligations.

If a member state alters existing aid then it must be treated like new aid and follow the notification procedure, which obligation the Court held that it should be interpreted strictly.<sup>72</sup> If alteration is established then everything that applies to altered aid should be observed.

### 3.3.3 The Standstill clause and its consequences.

Articles 108(3) TFEU and 3 of Regulation No 734/2013 provide for the 'standstill clause'. What this provision requires is that the Commission must first decide on the compatibility of the measure, or must fail to make such a decision, within specific timeframes, after notification, and then the Member State is allowed to grant the aid. This requirement is the 'standstill clause', and it forms part of the notification procedure. The reason behind the adoption of this obligation is to secure the competencies of the

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<sup>72</sup> Opinion of AG Wagner in Case 177/78 *Pigs and Bacon Commission v McCarren* [1979] ECR 2161, p 2204

Commission, at the centre of the state aid control implementation mechanism. It also has a wider consequence, which is the protection of this mechanism itself.<sup>73</sup>

The practical implication of this standstill clause is of course the fact that aid measures are not put into effect, and do not produce their possible distortive effects in the functioning of the internal market.<sup>74</sup> It is a preventive measure, without which an incompatible state aid would have caused its harmful effects; effects that a coercive measure, such as the recovery decision would not repair.

What happens to the standstill clause depends on the Commission's decision. If it does not decide within two months, which is the timeframe of Article 4 of the Procedural Regulation, the measure can be implemented, because it is considered cleared. If the Commission reaches a negative decision, after the examination of the measure, the standstill clause is no longer in force, and the measure's implementation is prohibited. If the Commission reaches a positive decision, the standstill obligation's effect is terminated, and the measure can be implemented according to the decision.

A problem that arises from the obligation not to put into effect a planned aid measure, until the Commission decides on it, or omits a decision, is to determine what can be considered an act of implementation of the measure by the Member State. This, of course, is important; because the

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<sup>73</sup> Martino Ebner and Edoardo Gambaro, 'The notion of State Aid' in Alberto Santa Maria (ed) *Competition and State Aid: an analysis of the EC Practice* (Kluwer Law The Netherlands 2007) 155

<sup>74</sup> Case 171/83 R *EC Commission v France* [1983] ECR 2621, para 12



Member State may invoke that it has not implemented the measure in Court, in order to avoid the repercussions of a possible breach of the standstill obligation. The Regulations or the Treaty include no indication, but the Court has dealt with this issue a number of times. According to the Court, an act of implementation is the administrative or legislative act that enables the aid to be performed, even at a draft stage, and it is not necessary to prove that public money have been transferred to the receiving undertaking.<sup>75</sup> This is certainly a wide interpretation of the scope of the act of implementation, which aims at securing the conformity of Member States with their notification obligations.

A consequence of the standstill clause is that Article 108 (3) TFEU, which provides for the standstill obligation, also provides for the distinct competences of the Commission and the national courts, with regard to their powers to implement Articles 107 and 108 TFEU. According to established case law of the Court, the Commission and the national courts have complementary and separate roles in supervising member State's compliance with their obligations, under Articles 107 and 108 TFEU.<sup>76</sup> The Member State is obligated to enforce the standstill clause, because Article 108(3) TFEU has direct effect, and does not require additional national measures to incorporate it into the national legal order. This means that the national courts can also directly enforce Article 108(3), when they rule on an aid measure, and make appropriate decisions to suspend the application of a measure, which is found to be in breach of the standstill clause.

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<sup>75</sup> Case 169/82 *EC Commission v Italy* [1984] ECR 1603 paras 9-11

<sup>76</sup> See Case C-39/94 *SFEI and others v La Poste and others* [1996] ECR I-3547 para 41 and case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957 paras 37 - 39

In relation to the distinction between the competences of the Commission and the national courts, which derives from Article 108(3), as was explained above, it should be said, in brief, that the Commission's most important competence is to assess the compatibility of the aid measure with Articles 107 (2) and 107(3) TFEU. The national courts, on the other hand, do not have competence to perform such compatibility assessment. Their role is to protect rights of those individuals, harmed by the implementation of unlawful aid, or in cases of recovery of unlawful aid.<sup>77</sup>

#### 3.4 DISTINCTION BETWEEN THE PRELIMINARY AND FORMAL INVESTIGATION PROCEDURES

The Commission after notification of a member State's plans to grant aid, or after a complaint by a competitor of a firm that received non notified aid, starts the process of the preliminary examination of the measure.<sup>78</sup> The Commission is under an obligation to decide on the compatibility of the measure within two months. This time limit has been adopted by the Procedural Regulation, and it incorporates the previous case law of the Court that has been followed, ever since the *Lorenz*<sup>79</sup> case. If the Commission, after the preliminary examination, finds that the measure does not constitute aid, or if the measure is aid, according to Article 107(1)

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<sup>77</sup> More information on the competences of the national courts is examined in the sixth chapter of this thesis.

<sup>78</sup> Article 108(3) TFEU and Article 4 of the 'Procedural Regulation'.

<sup>79</sup> Case 120/73 *Gebr Lorenz GmbH v Germany* [1973] ECR 1471 para 4

TFEU, but compatible, according to the same *Lorenz*<sup>80</sup> case, it is not bound to issue a decision.<sup>81</sup>

After the expiration of the two month period with a positive decision or without any decision the Member State may implement the planned measure. However, this implementation cannot happen automatically. The State must give notice to the Commission that it plans to implement the measure and wait for 15 days before it actually does for the possibility that the Commission may raise objections. This second notification obligation has raised questions in the past as to what are the appropriate means for notification, such as fax or post.<sup>82</sup> Nevertheless, the Commission and the Member States have adopted the online system for notifications, so those kinds of problems must have been minimised. Since 1<sup>st</sup> January 2006 all notification are to be performed electronically through the Commission's electronic State Aid notification system (State Aid Notification Interactive - SANI).<sup>83</sup> If, during the preliminary examination, the Commission has doubts about the measure's compatibility, it initiates the formal investigation procedure.<sup>84</sup>

At this second stage, the Commission requests full information from the Member State concerning the facts of the particular case and gives notice to interested third parties to submit their comments. After the formal

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<sup>80</sup> *Ibid* para 6

<sup>81</sup> Possible outcomes of the preliminary examination are a) that the measure is not Aid, b) that the Commission will not raise objections to the notified Aid and c) that it will initiate the formal investigation procedure according to Article 4 of the Procedural Regulation.

<sup>82</sup> Case C-398/00 *Spain v Commission* [2002] ECR I-5643

<sup>83</sup> Commission Regulation (EC) 794/2004 Implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (implementing Regulation) [2004] OJ L140/1, as amended, Article 3(6).

<sup>84</sup> Article 108(2) TFEU [2012] OJ C326/47

investigation, the Commission may issue<sup>85</sup> a positive decision or a no aid decision. The first means that there is aid, but is considered compatible with the internal market and the second means that the elements of aid have not been all fulfilled, according to Article 107 (1) TFEU. Also, it may decide to issue a negative decision or a conditional decision. According to the first, there is incompatible aid that must not be implemented and according to the second, the aid will be compatible, only if certain conditions are satisfied. The time limit for a Commission decision, after the formal investigation procedure is much longer than that of the preliminary examination, set to 18 months.<sup>86</sup>

Apart from the differences in time limits and procedural preconditions for the start and different outcomes of each stage, the main difference between the two phases was outlined by the Court: in the preliminary phase the Commission forms a first opinion on the measure, but during the formal investigation it requests full information from the member State, which must comply otherwise the notification will be deemed as withdrawn.<sup>87</sup> Also, the preliminary phase is informal and it does not involve dialogue with ‘interested parties’, but only with the member State that has notified the measure. Third parties can put their complaints forward in the formal investigation only.<sup>88</sup> However, third parties have a time limit to put forward their complaints at the start of the formal phase, only as one of the sources of material information for the case concerned. Afterwards, the Commission

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<sup>85</sup> Article 6 of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>86</sup> Ibid Article 7

<sup>87</sup> Case C-367/95 *Commission v Sytraval* [1998] ECR I-1719 para 38

<sup>88</sup> Ibid para 59.

is not obligated to engage in exchange of conversations with the ‘interested parties’.<sup>89</sup>

The final issue that arises from this analysis of the formal and the preliminary investigation procedures is who exactly can be considered as an ‘interested party’? This ‘title’ is found in Court judgments and the ‘Procedural Regulation’.<sup>90</sup> It is awarded to any member State and any person [...] whose interests might be affected by the granting of aid’.<sup>91</sup> This is not interpreted widely by the Court but only includes third parties whose competitive position in the market is affected.<sup>92</sup>

The fact that there are two different subsequent procedures that may be implemented until the Commission reaches a final decision on a single state aid measure has proven to be a very lengthy process. The initial period for a decision after the preliminary procedure is two months<sup>93</sup> and the period for a decision after the conclusion of a formal investigation procedure is eighteen months,<sup>94</sup> if no extensions are agreed between the Commission and the Member State involved and no more information is sought. This means that at best a final decision will be delivered almost two years after notification,

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<sup>89</sup> Ibid.

<sup>90</sup> Article 1(h) of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>91</sup> Ibid.

<sup>92</sup> Case T-188/95 *Waterleiding Maatschappij ‘Noord-West Brabant’ v Commission* [1998] ECR II-3713 para 67. In this case the Court rejected that the complainant should be awarded the status of a third party in the case simply because it was a tax payer, which would be a rather wide interpretation in the researcher’s opinion.

<sup>93</sup> Article 4 of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>94</sup> Article 7 of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

or after initiating the procedure on its own, this is a lengthy process not very business-friendly, because it leaves the potential recipient in limbo for two years, expecting to receive aid that may never be received after all. According to the first research criterion timely procedures are necessary and the Commission seems to have failed so far to deliver timely decisions.

The Commission attempted to simplify its procedures by adopting the Notice on a simplified procedure for certain types of state aid<sup>95</sup> and the Best Practices Code.<sup>96</sup> The Notice will be applied to notified state aid measures that comply with previous established decision making within the same framework, or guidelines. This of course pre-supposes a pre - notification contact<sup>97</sup> of the Member State with the Commission, which will help it provide all the information necessary. This new pre – notification phase replaces the preliminary investigation at large and thus the Commission hopes to achieve the goal of delivering a decision within the Simplification package within twenty working days!<sup>98</sup>

### 3.5 CRITIQUE FOR THE SIMPLIFIED PROCEDURE

The code of Best Practice,<sup>99</sup> which was adopted as part of the reform package envisaged in the SAAP in 2009, establishes another stage in this assessment procedure by the Commission. Indeed, section 3 of the code introduces the pre-notification stage, where the Commission and the Member State before notification can discuss notification matters and also

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<sup>95</sup> Commission Notice on a Simplified Procedure (2009) OJ C136/3

<sup>96</sup> Code of Best Practices [2009] OJ C 136/13

<sup>97</sup> Commission Notice on a Simplified Procedure (2009) OJ C136/3, point 13.

<sup>98</sup> Commission Notice on a Simplified Procedure (2009) OJ C136/3, point 2.

<sup>99</sup> Code of Best Practices [2009] OJ C 136/13.

substantial issues of the measure.<sup>100</sup> This new phase has been criticised because it leads to an informal non-binding ‘decision’ by the Commission, but one that influences the final decision, and which does not add to the efficiency of the process, because it can substantially delay the final decision by adding another step.<sup>101</sup>

On the other hand, the Notice on the Simplified Procedure<sup>102</sup> is a welcome step in the right direction for the purpose of making State aid implementation more effective and simple. It introduces a simplified procedure of control for cases that are based on standardised Guidelines or well established Commission decision making. It introduces a simplified procedure, which will lead to a decision in 20 working days, according to the Notice.

### 3.6 THE DIFFERENCES IN THE ADMINISTRATIVE PROCEDURE IN MISUSED AND UNLAWFUL AID

The first comment that seems worth mentioning in the case of unlawful and misused aid is that of the initiation of the procedure. In the case of new aid, the procedure starts with the notification by the Member State. In the case of misused aid, the notification happened before the aid was first implemented, but a change in the way the aid was used by the beneficiary undertaking has turned it into a new category. In the case of unlawful aid, there was no notification from the beginning of its implementation. The

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<sup>100</sup> Code of Best Practices [2009] OJ C 136/13.

<sup>101</sup> Fabio Filpo, ‘The Commission 2009 Procedural Reform from a private party perspective: two steps forward, one step back?’ (2010) 2 EstAL 323, 326.

<sup>102</sup> Commission Notice on a Simplified Procedure (2009) OJ C136/3.

answer to the question of what sets off the procedure in those two types of cases is any source of information given to the Commission.<sup>103</sup> If such information is received, usually from a competitor, the Commission initiates the procedure of examination.

The most notable difference is the absence of a specific time limit for the Commission to reach a decision, probably because it is more difficult for the investigators to acquire the information they require, since there is no notification with all the facts of the case in hand. This, though, has led in the past in considerable lengthy procedures that last more than six months, which has been allowed by the Court.<sup>104</sup> During this long period of investigation the Commission can ask for interim measures to be enforced: the suspension of the use of the aid and the recovery injunction. A rare example for such a suspension injunction for unlawful aid was given by a case concerning the rather complicated and not so efficient Greek tax system.<sup>105</sup> Also, more recently, a suspension injunction was issued for a Romanian privatisation plan of Tractorul, which was a tractor producer owned by the State. The Commission thought that the sale conditions constituted aid and ordered the Romanian government to suspend the aid.<sup>106</sup>

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<sup>103</sup> Point 15 of the preamble of the Procedural Regulation and several cases such as T-167/04 *Asklepios Kliniken v Commission* [2007] ECR II-2379 para 86.

<sup>104</sup> *Ibid* para 91.

<sup>105</sup> In *Tax exempt reserve fund* (Case C-37/2005(ex case NN11/2004)) Commission Decision 2008/723/EC of 18 July 2007 [2006] OJ L244/11 the Commission issued a suspension injunction against the continuation of a tax exemption measure that was not notified by Greece and the Commission eventually, and after the preliminary procedure, found it to be unlawful Aid that should be recovered.

<sup>106</sup> *Privatisation of Tractorul* (Case C-41/07) Commission Decision 2008/767/EC [2007] OJ C263/5.



The recovery injunction<sup>107</sup> is another interim measure that should be distinguished from the recovery decision. The injunction can be issued by the Commission in cases where it has no doubt that an unlawful aid<sup>108</sup> is aid according to the criteria of Article 107(1) TFEU, but it has still not decided on its compatibility. In addition, there must be a ‘serious risk of substantial and irreparable damage to a competitor’.<sup>109</sup> Of course, this last condition makes it very difficult to apply the injunction, because it is very difficult to prove that there can be irreparable damage from aid to another undertaking.<sup>110</sup> The final decision by the Commission in both unlawful and misused aid is that it can lead to a final recovery decision, which is taken after the formal procedure has concluded with a negative decision. This brings the chapter to its next step in the analysis of the administrative implementing procedure of state aid, which is the recovery obligation of illegal aid.

### 3.7 WHAT ARE THE CHARACTERISTICS OF RECOVERY?

The legal basis for the recovery decision is currently Article 14 of the Procedural Regulation, which leaves the Commission with no discretion, than to order recovery. The wording of the Article: ‘Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to

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<sup>107</sup> Article 11(2) of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>108</sup> The recovery injunction is not applicable to misused Aid.

<sup>109</sup> Article 11(2) of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>110</sup> Up to October 2013 the recovery injunction has not been implemented by the Commission.

recover the aid from the beneficiary'<sup>111</sup> leaves no discretion; in case the Commission reaches a negative decision for unlawful aid, it shall order the recovery. That is contrary to the situation before the adoption of the Regulation. In the past, recovery was only recognised by the Court as an option, available to the Commission, which could ask for the repayment of the unlawfully paid aid. That is the meaning of the phrase 'may include an obligation to require repayment', which can be found in the first ever case to recognise such powers to the Commission.<sup>112</sup>

The two characteristics, not notified aid and incompatible aid are the necessary preconditions for the issuing of a recovery decision. More specifically, it is not possible to order recovery, just because the aid was not notified; it has to be declared incompatible too.<sup>113</sup> Recovery can be ordered for both unlawful and misused aid, because misused aid is also not notified aid. However, the Commission is obligated not to order repayment if the facts of the specific case make recovery contrary to a general principle of Community law.<sup>114</sup>

The Procedural Regulation accepts that the Commission cannot order recovery if that decision would go against a general principle of Union law. Hence, it is only natural to examine which those principles might in fact be.

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<sup>111</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15, Article 14

<sup>112</sup> Case 70/72 *Commission v Germany* [1973] ECR 813 para 13.

<sup>113</sup> Case C-183/91 *Commission v Greece* [1993] ECR I-3131 para 16.

<sup>114</sup> Article 14(1) of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

### 3.7.1 Recovery and the principle of legitimate expectations

It has been held that the repayment obligation imposed by the Commission for incompatible aid that was not notified does not breach the principles of legitimate expectations and legal certainty.<sup>115</sup> This principle of legitimate expectations has been declared a superior rule of law by the Court, and if breached, during any procedure, by any institution, it can lead to the institution being liable for that breach, and possibly annulling the relevant decision on the ground of that breach. This is why it is almost always invoked in recovery hearings. But for it to apply there must be some conditions met: firstly, there must be a union act or conduct that allows one to have a legitimate expectation and secondly, the prudent trader could not foresee the decision that affects his business.<sup>116</sup>

Because of the mandatory nature of the procedure of state aid control laid down in Article 108 of the TFEU, specifically imposing the notification obligation, the Court, in most of the cases that it has been invoked before it, held that there is no legitimate expectation that the aid is lawful, if the procedure of Article 108 TFEU was not followed.<sup>117</sup> And the test for determining if the procedure should have been known and if it was followed is the diligent businessman who should know, if it was followed or not.<sup>118</sup> This means that almost whenever there is no notification the beneficiary should expect a possible recovery decision, after the negative decision.

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<sup>115</sup> The analysis of the argument that recovery goes against the principle of legal certainty follows in part 3.7.2 of this chapter.

<sup>116</sup> Case C-37/02 *Di Lenardo and Dilexport v Ministero del Commercio* [2004] ECR I-6911 para 70.

<sup>117</sup> Opinion of Mr Advocate General Darmon delivered on 8 May 1990 in Case C-5/89 *Commission v Federal Republic of Germany* [1990] ECR I-3437 para 24

<sup>118</sup> Case C-301/87 *France v Commission* [1990] ECR I-307, para 104.

In a series of cases the principle of legitimate expectation has been rejected again. In particular, the Commission had given three successive positive decisions for aid given by the French State to CELF, which is a company promoting French culture worldwide. All of those three positive Commission decisions were annulled by the Court of First Instance (CFI)<sup>119</sup> and the ECJ (now the General Court and the Court of Justice of the Union), when it was called to judge the case held that the succession of three positive decisions and their annulments cannot allow the recipient to have legitimate expectations that the aid is eventually compatible. On the contrary, the Court held it should raise doubts about its compatibility.<sup>120</sup>

### 3.7.2 Recovery and the principle of legal certainty

Another conflict that may arise from a recovery decision is that with the obligation to respect the principle of legal certainty. The question that arises is if Member States do not notify, can they rely on the principle of legal certainty to annul a recovery decision? Usually, the court decides that they cannot rely on the principle of legal certainty and they will have to enforce the recovery decision, even in atypical measures.<sup>121</sup> In one case though, the recipient invoked the principle of legal certainty before the Court, against a Commission decision to recover aid, because the Commission had taken more than 26 months to reach that decision, and it claimed that this delay had created a certainty and an expectation that the

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<sup>119</sup> Case T-49/93 *SIDE V Commission* [1995] ECR II-2501, Case T-155/98 *SIDE V Commission* [2002] ECR II-1179, Case T-384/04 *SIDE v Commission* [2008] ECR II-625.

<sup>120</sup> Case C-1/09 *CELF v SIDE* [2010] ECR I-02099 para 2 of the operative part of the judgment.

<sup>121</sup> Case C-5/89 *Commission v Germany* [1990] ECR I-3437 opinion of Mr A G Darmon delivered on 8 May 1990 para 26.

aid was legal. The Court accepted that argument, and declared the Commission's decision void as a whole.<sup>122</sup>

The only argument that the Commission and the Court can accept as a valid reason for which a Member State has not complied with the recovery obligation of unlawful and incompatible aid is the defence that it was absolutely impossible to implement the decision.<sup>123</sup> However, that argument alone does not stand in the Court. In addition, the Member State has to demonstrate that it has taken any necessary steps to implement the decision, and has proposed to the Commission any alternative steps to overcome the difficulties that it faced in its efforts to realise the recovery.<sup>124</sup>

### 3.7.3 Efficient implementation is a precondition of repayment.

From the last analysis it is evident that recovery of illegal aid has to be implemented in the most efficient way possible. The Commission's decision would be without substance, if it did not include strict conditions for its implementation. Especially, since there is no supranational procedure, its implementation is largely left to the competence of national authorities and their national laws and administrative procedures.<sup>125</sup>

There may be no supranational procedure for repaying unlawfully paid amounts of aid to the State budget, but the Procedural Regulation lays down the rules. According to the Procedural Regulation, the procedure to refund the aid should achieve recovery from the beneficiary without delay and should respect national legal procedures, only if those achieve 'immediate and effective execution' of the Commission's recovery

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<sup>122</sup> Case 223/85 *RSV V Commission* [1987] ECR 4617 para 17.

<sup>123</sup> Case C-348/93 *Commission v Italy* [1995] ECR I-673 para 16.

<sup>124</sup> Case C-378/98 *Commission v Belgium* [2001] ECR I-5107 para 32.

<sup>125</sup> Case C-24/95 *Land Rheinland – Pfalz v Alcan Deutschland GmbH* [1997] ECR I-1591 para 24.

decision.<sup>126</sup> It was said that this Article ‘is an expression of the principle of effectiveness’<sup>127</sup> in Union law, which limits the autonomous character of the national provisions, if they are not effective to achieve the results envisaged in the Union law. This Article is the legal basis behind the Commission’s practice to include in every recovery decision a phrase that basically reproduces the text in Article 14(3) of the Procedural Regulation, but it does not impose specific time limits, within which the recovery must be completed at the national level.<sup>128</sup>

### 3.8. PROBLEMS WITH THE IMPLEMENTATION OF RECOVERY DECISIONS

Notoriously, recovery has not been a successful procedure in state aid enforcement. The Commission’s Scoreboard shows that the situation is improving in the implementation of the recovery decisions. The table 1 at the Appendix shows that between 2000 and 2012 the Commission adopted 172 recovery decisions for the total of Members States. In 30/6/2012, 128 of those cases were closed, which means that aid in 44 cases is still to be recovered.<sup>129</sup> The number of recovery cases, still pending in 31.12.2004,<sup>130</sup> was 93,<sup>131</sup> which shows the progress that was made. Table 3 is even more

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<sup>126</sup> Article 14(3) of the Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>127</sup> F-E Gonzalez Diaz, ‘Community Report’ in P Nemitz (ed), *The effective application of EU State Aid procedures* (Kluwer law 2007) 78.

<sup>128</sup> *Ibid* 79.

<sup>129</sup> State Aid Scoreboard Report on state aid granted by the EU Member States - Autumn 2012 Update COM(2012) 778 final

<sup>130</sup> The year 2004 was chosen to make the comparison because that is when the Commission started implementing its reform of State Aid rules and decided to pursue better implementation of its decisions.

<sup>131</sup> State Aid Scoreboard Spring 2005 update, COM(2005) 147 final, 37.

revealing perhaps because it shows the percentage of illegal and incompatible aid that has yet to be recovered. At 2012, that figure stands at 14.4%.<sup>132</sup> Compared to the almost 50% that was still pending to be recovered at the end of 2004,<sup>133</sup> it shows that there have been steps in the right direction, when it comes to enforcing state aid recovery decisions. Even though the situation is improving it is necessary to examine the problems that hinder implementation of recovery decisions.

When it comes to enforcing state aid recovery decisions a lot is left to the competence of Member States, under some conditions of course. In many cases, the Member States have been unwilling or unable to effectively and timely conclude the repayment of the illegal aid that was instructed by the Commission in a negative decision. Member states usually argue that they have difficulties, with problems relating to the issue of who should be held responsible for making the repayment, especially in large aid schemes. Other problems have been encountered with provisions of national laws and the appropriate form of the repayment. More particularly in *Commission v Greece*<sup>134</sup> the Court rejected the argument of the Greek government that repayment of illegal tax exemptions should be made by a form of retroactive tax, and favoured repayment in amounts of cash equivalent to the illegal aid.

Years after the previous case, *Commission v Greece*,<sup>135</sup> the Court returned on the matter of suitable form of repayment and clarified whether forms other than cash are suitable. In *Commission v Germany*<sup>136</sup> the Court

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<sup>132</sup> State Aid Scoreboard Report on state aid granted by the EU Member States - Autumn 2012 Update COM(2012) 778 final, para 5.2

<sup>133</sup> State Aid Scoreboard Spring 2005 update, COM(2005) 147 final,39.

<sup>134</sup> Case C-183/91 *Commission v Greece* [1993] ECR I-3131 para 17.

<sup>135</sup> *Ibid.*

<sup>136</sup> Case C-209/00 *Commission v Germany* [2002] ECR I-11695 para 43.

affirmed that repayment of illegal aid can be made by means, other than cash payments. In that case, Germany was required to recover aid which consisted of the difference in the amounts of remuneration actually paid, with the ones that would have been paid in market conditions, for the transfer of a state bank to the WestLB bank. Germany proposed that the surplus of the WestLB should be distributed to the shareholders, and that should be considered as completion of the recovery obligation. The Court set the criteria for finding compliance with the recovery obligation, when means other than cash payments are to be implemented by the Member States: the measures must be transparent so that the Commission can assess their ability to eliminate the distortion of competition.<sup>137</sup> In *Commission v Germany* the conditions that the Court set were not met so the Court rejected the proposed measure of ‘recovery’ as unsuitable.<sup>138</sup>

Also, there have been significant delays in the implementation of Commission recovery decisions in the past and the Commission tried to overcome those delays by inserting Article 14(3) in the Procedural Regulation.<sup>139</sup> However, it did not go far enough and it did not establish specific timeframes even after the amendment of the Procedural Regulation in the context of the 2012 Modernisation initiative. The Court though, in most cases, has accepted such time-frames, which are included in Commission recovery decisions, as a time limit for the execution of the

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<sup>137</sup> *Ibid* para 44.

<sup>138</sup> *Ibid* para 62.

<sup>139</sup> ‘The regulation also lays an obligation in principle on the Commission to require the recovery of aid unlawfully granted which is not compatible with the common market.’ In European Commission, XXVIII th Report on Competition Policy 1998 (Brussels Luxembourg 1999) 83



decision.<sup>140</sup> In *Commission v Greece* the Commission requested to be informed, within two months, of the measures Greece has taken to enact the recovery, and the Court accepted that Greece had failed to comply with the recovery decision ‘within the prescribed period’.<sup>141</sup>

Another problem may arise for the recovery if the national administrative procedures that implemented the Commission Decision are annulled. In *Scott v Ville D’Orleans*,<sup>142</sup> the Administrative Court of Nantes in France sent a preliminary question to the Court, asking it whether annulment of national assessments done for the repayment of aid were compatible with Article 14(3) of the Procedural Regulation that provides for recovery without delay and effectively by the national authorities. The problem would be that, if the national assessments were to be annulled for procedural reasons, the recovery would have no legal basis and would have to be reversed.

The Court replied that the national measure could be annulled, if it did not have as a consequence the repayment of the illegal aid to the beneficiary. If on the contrary, the annulment resulted in the beneficiary regaining the illegal aid, even provisionally, it would mean that the anticompetitive advantage would be reinstated and thus, annulment of national measures would be incompatible with Article 14(3) of the Procedural Regulation that would prevail as a supranational rule of law.

The whole system of implementing state aid law by the Commission is an *ex ante* system, that tries to prevent illegal aid from being granted, so

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<sup>140</sup> Case C-207/05 *Commission v Italy* [2006] ECR I-00070 para 31-36.

<sup>141</sup> Case C-415/03 *Commission v Greece* [2005] ECR I-3875 para 46. Greece was subsequently taken before the Court again for failure to comply with this decision in Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703.

<sup>142</sup> Case C-210/09 *Scott SA v Ville d’Orleans* [2010] ECR I-04613

that it does not produce the negative results that have been presented in the previous chapter of this research. It is based on the notification of a plan to grant aid. This is how the implementation procedure should be ideally. However, the positive effects of state aid in the national economies of Member States and the lack of knowledge or capability as to the correct procedure contribute to the fact that a lot of aid still escapes the Commission's control. Consequently, this is a big inefficiency of the supranational state aid regime, which was acknowledged by the Commission in its Notice on recovery.<sup>143</sup>

### 3.9 THE NOTICE ON RECOVERY AND HOW IT AIMS TO OVERCOME THE PROBLEMS

The most notable novelties in the implementation of recovery decisions brought by the Notice on Recovery are the following: firstly, the Commission has recognised that the two month limit that it used to set for the execution of its recovery decisions has proved in practice to be unenforceable as being too short. Therefore, it introduces a four month limit divided in two separate phases. In the first phase, all the relevant information from the Member State concerning the plans for implementation of the recovery must have reached the Commission, within two months of the decision. Afterwards, there is another two months, in addition, for the Member State to actually execute those notified plans.<sup>144</sup>

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<sup>143</sup> Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State Aid [2007] OJ C272/4 see para 3.

<sup>144</sup> *Ibid* para 42.

This of course is a small but inevitable retreat by the Commission, which instead will focus its attention on what could be done, after it has found that a Member State is unwilling to comply.

The next most important step in improving the implementation of aid recovery decision attempted by the Notice is the application of the ‘Deggendorf’ principle. By virtue of the Court’s findings in the case *TWD Deggendorf v Commission*,<sup>145</sup> the court has allowed the Commission to order the suspension of new compatible aid aimed at a recipient that still has to repay an older illegal aid. This new ability for the Commission has been translated into a principle that the Commission intends to enforce with added determination, since it can prove rather efficient for the purpose of persuading Member States and aid recipients to repay incompatible aid.

Last, and most importantly, the Notice declares the determination of the Commission to make use of Article 228 of the EC Treaty (now Article 260 TFEU).<sup>146</sup> According to the Treaty, if a Member State is found by the Commission to be infringing one of its decisions, it can lodge proceedings in the Court according to the Article 226 EC (now Article 258 TFEU). If the Member State is found not to be complying by the Court, then the Commission can bring another case before the Court, this time based on Article 228(2) EC (now 260 TFEU), if it considers that it continues to not comply with the Court’s judgment. According to Article 260 TFEU (228 EC), the Court, if it once again finds non-compliance by the Member State can impose ‘a lump sum or penalty payment’.

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<sup>145</sup> Case T-244/93 and T-486/93 *TWD Deggendorf v Commission* [1995] ECR II-2265.

<sup>146</sup> Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State Aid [2007] OJ C272/4 para 74.

This punishment can be rather harsh, and can be imposed for any kind of breach of Union decisions, not only in the field of state aid. Enforcement of Member States' obligations under the TFEU can be reinforced by the application of Article 260 TFEU.<sup>147</sup> After the adoption of this practice, there was the first case, where both a lump sum and a periodic penalty have been imposed on a Member State for non-compliance with the recovery decision. This is the case *Commission v Greece*,<sup>148</sup> which will be commented next, as it marks the start of strict enforcement of recovery decisions in certain cases. Following that first judgment, a periodic penalty and a lump sum penalty of €30 million were imposed on Italy on the basis that it did not recover employment aid, which means that this instrument will be used to achieve compliance from the Member States with Commission Decisions.<sup>149</sup>

### 3.10 CRITIQUE ON THE CASE *COMMISSION V GREECE*<sup>150</sup>

From the beginning it should be mentioned that the wording of the Article 260 TFEU 'may impose a lump sum or penalty payment', if interpreted literally, means that it is only possible to impose one punishment or the other. However, the interpretation of the Court in a previous case<sup>151</sup> has resulted in accepting the cumulative application of both punishments, for the same infringement, and thus, both punishments were imposed on Greece in the specific case. The Court rejected the argument that both

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<sup>147</sup> Marc van der Woude and Laura Olza Moreno, 'Overview of the Case Law in State Aid Matters: June 2011 to June 2012' (2013) 12(2) EStAL 246, 256.

<sup>148</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703

<sup>149</sup> Case C-496/09 *Commission v Italy* [2011] ECR I-11483.

<sup>150</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703.

<sup>151</sup> Case C-304/02 *Commission v France* [2005] ECR I-6263 para 83.

punishments would be disproportionate, because of the duration of the infringement and the severity of the distortion of competition.<sup>152</sup> The decision in this case was adopted by the Court in 7 July 2009 but the application against Greece was filed in 3 August 2007, two years before the financial crisis hit the country, so it would have been impossible for the country to argue that it faces difficulty in paying the financial sanctions, imposed on it, due to the country's financing problems.<sup>153</sup> However, it might have been possible for the Court to take the current situation in consideration, if the crisis was present at the time of the judgment.<sup>154</sup>

Moreover, in the past the Court has accepted that, when making its decision on calculating penalties, it is not bound by the Commission's recommendation on the sums of cash to be recovered. Instead, it has discretion to fix the sums, taking into consideration and into proportion the breach and the ability of the Member State to pay.<sup>155</sup> One can argue that this has not happened in *Commission v Greece* given the dire state of the Greek public finances, or that the Court's decision should be challenged in the future on that ground.

More recently though, in case T-52/12R,<sup>156</sup> the President of the General Court temporarily suspended a Commission Decision<sup>157</sup> ordering recovery of illegal aid that Greece granted to farmers that suffered damage

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<sup>152</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703 para 143.

<sup>153</sup> Miriam Bechtel, 'Commission v Greece – the end of the Olympic Airways saga?' (2010) 1 *EstAL* 119, 126.

<sup>154</sup> R M D'Sa and S Drake, 'Financial penalties for failure to recover State Aid and the relevance to State liability for breach of union law' (2010) 1 *EstAL* 33, 46.

<sup>155</sup> Case C-278/01 *Commission v Spain* [2003] ECR I-14141 para 41.

<sup>156</sup> Order of the President of the Court of 19 September 2012 in Case T-52/12 R *Greece v Commission* [2012] ECR 0 (NYR)

<sup>157</sup> *Compensation payments made by the Greek Agricultural Insurance Organisation (ELGA) in 2008 and 2009* (2012/157/EU) Commission Decision of 7 December 2011 (notified under document C(2011) 7260) [2012] OJ L-78/21

from natural causes. The reason for granting interim relief from recovery was the financial and social situation in Greece: the Court held that due to the exceptional circumstances that the member state (Greece) is facing priority should be given to preserving the economic and social peace and concentrating government tax collection resources to their tax collecting task.<sup>158</sup>

After this Order the question is whether other Member States will successfully overturn recovery orders by claiming social and economic unrest before the Court? The Order of the President of the Court in Case T-366/13<sup>159</sup> rejected the French Republic's motion to apply the Opinion in Case T-52/12 R, because the circumstances were not similar. It has been said that since the Court seems, from the above Order, reluctant to assist the Commission to focus its resources to serious distortions, which is a priority under the State Aid Modernisation, maybe this will lead to a two-speed state aid control: less disturbed economies might have to endure more severe judgments, if disturbed ones can avoid recovery.<sup>160</sup>

The other noteworthy characteristic in the case *Commission v Hellenic Republic*<sup>161</sup> is that Greece has successfully argued that the defence of set - off is valid, as a possible method of implementing recovery decisions in state aid cases. It only failed to prove that defence, for certain amounts of aid that it had been ordered to recover. In other words, it failed to prove that sums of the aid had in fact been set-off, with other sums that

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<sup>158</sup> Order of the President of the Court of 19 September 2012 in Case T-52/12 R *Greece v Commission* [2012] ECR O (NYR) para 54.

<sup>159</sup> Order of the President of the Court in Case T-366/13 R *France v Commission* [2013] ECR O (NYR) para 51.

<sup>160</sup> Leigh Hancher, 'Editorial - State Aid Recovery – A New Public Order?' [2013] 1 EstAL 1, 4

<sup>161</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703

the Hellenic Republic owed to Olympic Airlines, according to the provisions of national law. Even so, it still did not execute the recovery decision for those sums four years after it was first issued.

The Court accepted the Commission's proposal to impose both a lump sum and a periodic penalty, and that the calculation of the sanctions should be based on the criteria of the serious nature of the infringement, the duration of the infringement and the need to set a deterrent for the future.<sup>162</sup> All of those criteria are set in a Commission Communication<sup>163</sup> that applies to all cases of application of Article 228 EC (260 TFEU), not just state aid cases. In the specific case, the Court exercised its discretion rather harshly, and ordered Greece to pay a lump sum of two million Euro,<sup>164</sup> even though the Commission's recommendation was 10,512 Euro,<sup>165</sup> which is a huge increase. Even so, the Commission's method of calculating the fine, as it is set out in the relative Communication<sup>166</sup> has been criticised because it includes in its conditions the Member State's Gross Domestic Product (GDP) and the voting rights in the Council, which is a political and not an economic factor, likely to raise the fines in some cases.<sup>167</sup> Those are the basic points of concern raised by this key case according to this research.

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<sup>162</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703.

<sup>163</sup> Communication from the Commission – Application of Article 228 EC, SEC (2005) 1658 para 6.

<sup>164</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703, para 3 of the Ruling.

<sup>165</sup> *Ibid* para 133.

<sup>166</sup> See Communication from the Commission – Application of Article 228 EC, SEC (2005) 1658 para 6.

<sup>167</sup> R M D'Sa and S Drake, 'Financial penalties for failure to recover State Aid and the relevance to State liability for breach of union law' (2010) 1 *EstAI* 33, 39.

### 3.11 THE POSITIVE EFFECTS OF THE SUPRANATIONAL ADMINISTRATIVE PROCEDURE OF STATE AID CONTROL

In this chapter, so far, this thesis examined the competences of the Commission in implementing EU state aid law. The Commission is in the centre of the control of state aid at the Union level. It is an institution of a supranational organisation that has the competence to adopt legislation on state aid, an ability deriving from the Treaty on the Functioning of the European Union. This system of state aid control, as it has been presented so far, is characterised as a centralised system, with the Commission having powers to adopt legislation and to enforce that legislation. It is opposed to the decentralised, where each Member of the supranational organisation has established national authorities, which have competencies similar to the Commission. It is true that there are positive effects from having such a centralized system of state aid control. Those positive characteristics are:

#### 3.11.1 Same standard of implementation of state aid rules in 28 Member States.

The biggest benefit of a centralised system of implementation of legal rules is that it ensures that the same standards are being applied to all Member States, regardless of their individual characteristics, or their status as a new or old Member of the Union.<sup>168</sup> It also ensures that the same standard is applied to all cases that have common legal and factual characteristics, regardless of their ‘nationality’, or whether they affect small or large countries, small or multinational corporations.

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<sup>168</sup> G Roebing, ‘Existing Aid and enlargement’ (2003) 1 Competition Policy Newsletter 33.



The importance of this same standard of implementation is highlighted even more, when it is contrasted with 28 different national procedures that currently exist for the purpose of recovery of unlawful and incompatible aid. It has already been mentioned that those different national procedures have appeared as problems, which bring obstacles to the execution of recovery decisions. Such systems have ultimately been criticised by the Court, because of their complications and delays.<sup>169</sup> On the other hand, the part of the recovery process that is left to the Commission's competence has specific timeframes that need to be followed.

### 3.11.2 The centralised control of state aid strengthens the internal market.

The centralised character of the control of state aid has also been considered beneficial for the implementation of the internal market.<sup>170</sup> State aid is planned and implemented by national governments, which, as we have seen in the previous chapter, have their own national economic agendas to execute. Agendas that sometimes might clash with the policies of other Member States, or even with the common goal that should be the effectiveness of the internal market.

The basic economic characteristic that the Union is founded on is the creation and preservation of the internal market. This achievement has demolished the barriers between the Member States and created an internal market for trading across the 28 Member States. It is necessary to keep

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<sup>169</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703, para 67

<sup>170</sup> F E Gonzalez Diaz, 'Community Report' in P Nemitz (ed), *The effective application of EU State Aid Procedures*, (Kluwer Law International 2007) 66.

competition running in the internal market and for that to happen there needs to be a supranational authority that can control and coordinate the national authorities whose action may harm competition; by having supranational state aid control the national state aid measures are limited and their effects on the market can be controlled. Thus competition increases and the undertakings can achieve economic growth. In return, the internal market is becoming more integrated<sup>171</sup> and the benefits are seen in the growth of the Union's economic indicators.

### 3.11.3 The Commission as an independent examiner and decision maker in state aid cases.

Moreover, the supranational authority that is the Commission is not easily influenced by local interest groups that need to promote their interests; interests, which might be more easily realised through subsidies. Even though, in modern times, lobbyists are particularly targeting authorities such as the Commission to achieve their goals, it still must be easier to influence a national authority, than a supranational one, which employs thousands of employees.

The Commission at the centre of a supranational regime is independent of such national goals and has the power vested in it by the Treaty to take decisions of incompatibility, and even impose sanctions in the case of recovery for example. All of those actions can limit the Member States' freedom to implement their fiscal and industrial policies, but at the same

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<sup>171</sup> Hans Friederiszick, Lars-Hendrik Röller and Vincent Verouden, 'EC state aid control regime: an economic perspective' in M Sanchez Rydelski (ed), *The EC state aid regime: distortive effects of state aid on competition and trade* (Cameron May, 2006) 164.

time can benefit the evolution of the Union by maintaining a fair and effective internal market.<sup>172</sup>

3.11.4 Cooperation between the Commission and the parties results in better decisions.

Furthermore, the control of state aid that is performed by the Commission sets higher standards of implementation and of handing-over justice. The Commission's process ensures that non – State actors of the state aid implementation mechanism get the chance to put their comments forward, even with the limited scope that we have seen in the preliminary and final investigation processes.

Those non – State actors are 'players', other than the state planning to implement the specific aid project, and include the 'interested parties,'<sup>173</sup> namely, competitors and other Member States with interests in the case. The information they provide is helpful for the Commission to reach a fair decision and actually helps it along the process of enforcement and judicial review of its decisions.<sup>174</sup> The Court has accepted this obligation of the Commission to 'engage in talks with [...] third parties' in order to overcome difficulties.<sup>175</sup>

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<sup>172</sup> Michelle Cini, 'The soft law approach: Commission rule-making in the EU's state aid regime' [2001] 8 *Journal of European Public Policy* 192, 198

<sup>173</sup> Article 10 of Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>174</sup> M Smith, 'Autonomy by the rules: the European Commission and the development of State Aid policy' (1998) 36, 1 *Journal of Common Market Studies* 71.

<sup>175</sup> Case T-73/98 *Société Chimique Prayon – Rupel SA v Commission* [2001] ECR II-867 para 45.

3.11.5 The supranational authorities have more experience and ability to be more flexible in state aid cases.

Beyond the legal and political benefits that the supranational implementation of state aid brings for the Union, there are practical issues that need to be mentioned. The Commission and the Court have been adopting legislation and implementing the control of subsidies for decades now. It is a well-established fact that the supranational authorities have accumulated much experience and are better qualified to examine complex issues of state aid matters, especially when detailed economic analysis is needed. This is why the examination of compatibility lies in the exclusive competence of the Commission and not in the competence of the national courts.<sup>176</sup>

Furthermore, there is also a network of national contact points that co-operate with the Commission and provide information for individual state aid cases that help the Commission to make its assessments on compatibility. Those assessments need to be sound because they are crucial from the start of the investigation, with the preliminary examination and even after the final decision and into the possibility of recovery.

More importantly, the Commission has the ability to be more flexible than a court and much more flexible than a national authority that may be influenced by a number of political factors and by possible social implications that derive from subsidies. The supranational mechanism's

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<sup>176</sup> More on the decentralised implementation of the rules on State Aid control is included in the fifth and sixth Chapters.

most significant benefit was highlighted recently: it can be adapted swiftly to tackle new market conditions, such as a pan- European or even a worldwide systemic crisis. Without the supranational rules and procedures on state aid, the European governments might have been unable to reach an agreement on a common solution to the problem. And even with the criticism that was made to the crisis framework in the previous chapter, the fact remains that the Commission did react swiftly and possibly prevented a subsidy race.

Finally, the supranational implementation of state aid takes under consideration wider implications of aid on the internal market, such as consumer protection that the national courts are not obliged to protect when judging state aid cases. The Commission's soft law is constantly adapted, expanded and improved to include the respect of Union objectives from state aid rules, such as the promotion of employment in the Union and the promotion of the environment and of the Union's objective to become the most advanced knowledge based economy by 2020.<sup>177</sup> Specific rules and Block exemptions<sup>178</sup> that have been adopted at the supranational level help target state aid to those objectives, rather than the most harmful measures. By way of national legislation and procedures the benefits would not come fast enough, or in the best way possible for all Member States, given some economic divergences that would hinder new ideas to be implemented.

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<sup>177</sup> Communication from the Commission Europe 2020 A strategy for smart, sustainable and inclusive growth COM(2010) 2020 final

<sup>178</sup> Regulation No 800/2008 on the application of Articles 87 and 88 of the Treaty declaring certain categories of aid compatible with the common market (General Block Exemption Regulation) [2008] OJ L214/3

In practice, the benefits of recent Commission priorities, such as the adoption of the new General Block Exemption Regulation are evident in the wider implementation of state aid control. Throughout 2009 and 2010, there has been significant increase in the number of block exempted measures,<sup>179</sup> which means that there was more space left for other more distortive measures to be scrutinised by the Commission. However, the centralized control of subsidies has negatives effects too.

### 3.12 THE NEGATIVE CHARACTERISTICS OF THE SUPRANATIONAL STATE AID MECHANISM

#### 3.12.1 Practical difficulties for the supranational authority.

Article 108 TFEU requires that all aid measures should be notified to the Commission, before being implemented by Member States, save for the aid in the exempted cases that have been examined earlier in the chapter.<sup>180</sup> In general, those exemptions from the notification obligation can be confined into three categories; *de minimis* aid, measures that fall into the provisions of the GBER and finally individual measures that can be covered by an authorised scheme. This gives the power to the Commission to be the authority in state aid control. It also obliges it to examine all new aid measures that the Member States plan to introduce. Having a Union of 28 Member States, this means that the Directorate General for Competition of the Commission would have to have an army of employees, working exclusively on notified and not notified state aid cases. It is revealing that from 2000-2011 the Commission took 986 decisions on unlawful aid

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<sup>179</sup> State Aid Scoreboard Autumn 2010 update, COM(2010) 701 final 12.

<sup>180</sup> See Chapter 3, part 3.3.2.3

alone.<sup>181</sup> The latest data released by the Commission about numbers of notifications of aid measures indicate that the numbers range from 595 in 2010, when national budgets were rationalised to 912 in 2006, which was pre- crisis.<sup>182</sup>

This data shows a significant increase in the numbers of measures that the Member States are implementing, which means that the Commission is faced with a workload that it would not be possible to address effectively. The effective implementation of state aid cases requires not only clear proceedings but speedy ones too. With such a workload it would be impossible to deliver quality decisions, within the time limits. This is the biggest disadvantage of the supranational regime. Given that the numbers of Member States have increased significantly over the past decade, with the expansions of the Union in 2004 and 2007 and more countries on their way to accession,<sup>183</sup> those numbers of state aid measures will certainly increase in the future.

It should be added at this point that state aid was chosen as a means to tackle the financial crisis in 2008, which is drawn from the fact that there were additional measures worth up to 353.9 billion euro only during 2009,<sup>184</sup> though, that number has dropped significantly; in 2011 crisis aid is

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<sup>181</sup> State Aid Scoreboard Autumn 2012 update, COM (2012) 778 final 51.

<sup>182</sup> See table 8 in the Appendix. Table 8 refers to notifications of aid measures to the Commission.

<sup>183</sup> Three countries have currently the status of a candidate country: the Former Yugoslav Republic of Macedonia, Turkey and Iceland. More are considered potential candidate countries.

<sup>184</sup> Commission staff working document 'facts and figures on State Aid in the Member States accompanying the State Aid Scoreboard – Autumn 2010 edition, SEC (2010)1462 final 10.

worth €31.7 billion.<sup>185</sup> Somehow, though, the supranational mechanism still managed to overcome the practical difficulties and emerged on top of the situation, even with the crisis in full effect. Of course, this happened because the Commission had already acknowledged that the numbers imposed a limit to its competences quite early.

In the Report on Competition for 1998 the Commission basically admits that ‘Given the high number of aid measures the Commission has to assess, it must inevitably concentrate on major cases involving large amounts of aid or new legal issues’.<sup>186</sup> This need prompted the adoption of the Procedural Regulation, which was adopted after a political settlement with the Council in order to help modernise state aid monitoring.<sup>187</sup>

To overcome those practical difficulties the Commission started introducing legislation and soft law instruments that would enable it to distinguish between the least anticompetitive forms of aid and the ones that distort competition and affect the internal market the most. Those instruments have been the Notice on *de minimis* aid, the General Block Exemption Regulation and other simplified procedure documents that have already been presented. The aim of all of those is to help relief the supranational authority with the overload it was facing.

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<sup>185</sup> State Aid Scoreboard – Autumn 2012 update COM (2012) 778 final para 1.2

<sup>186</sup> European Commission XXVIIIth Report on Competition Policy (1998) 22.

<sup>187</sup> *Ibid.*



3.12.2 Limits to the abilities of the Commission imposed by the primary, secondary legislation and soft law and conflicts with other Union Institutions.

The Commission has faced other problems concerning the implementation of state aid rules. The Treaty Articles on state aid have not been detailed enough to be implemented on increasingly more complex state aid measures that have been introduced by Member States. Therefore, the Treaty itself that empowers the Commission has been a limit to it as well. To overcome those problems, the Commission once again resorted to adopting more detailed legislation to clarify and make the implementation of state aid more transparent. In most preambles of new legislation documents the Commission justifies their adoption as a means of promoting effectiveness and transparency in state aid control.<sup>188</sup>

Moreover, the nature of the legislative process in the European Union has been a limit on the supranational state aid regime. The Commission might have powers and autonomy to implement soft law legislation nowadays. However, its powers to adopt legislation has not always been a given, as it will be evidenced from the following incident, between the Commission and the Council. It is true that the Commission's competence to adopt rules on state aid lies in the Treaty, but the extent and length of those powers are unclear. In 1966 and in 1972 the Council rejected the Commission's proposals for draft regulations on the Procedure of State aid

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<sup>188</sup> See for example point 2 of the preamble of the 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 [2001] L10/30.

control and to exempt certain categories of aid from notification.<sup>189</sup> Then in 1990 it was the Commission that rejected proposals from the Council President of the time for the Commission to submit a proposed regulation that would give powers to the Council to set criteria for the evaluation of state aid cases. The Commission felt that the Council was overstepping its powers, and interpreted its own powers for the first time, as giving it the exclusive authority to specify Articles 107 and 108 of the TFEU (then Articles 92 and 93 of the EC Treaty).<sup>190</sup> From the analysis that preceded it is clear that the Commission's powers in state aid control were challenged in the past by other institutions. This challenge forced the Commission to concentrate all the decisive power where state aid is concerned, which paved the way for the adoption of all the soft law legislation that has fragmented the state aid policy. This section again has been a case where the second research criterion of coherent legislation has not been fulfilled.

3.12.3 The supranational implementation of state aid policy is extremely concentrated into one authority.

However, one other negative characteristic of the supranational mechanism is the powers of the Commission. Because the members of the Commission are not elected<sup>191</sup> by the European people, it can be said that the institution of the Union that is the Commission lacks democratic legitimisation. The Commissioners are appointed by the governments of the

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<sup>189</sup> M Blauberger, 'From negative to positive integration? European state aid control through soft and hard law' (Max Plank Institute for the Study of Societies Cologne, 2008) 13. The issue of the procedure of adopting soft law documents is discussed in Chapter 1.

<sup>190</sup> M Smith, 'Autonomy by the rules: the European Commission and the development of State Aid policy' (1998) 36, 1 *Journal of Common Market Studies* 73.

<sup>191</sup> A Jones, B Sufrin, *EC Competition Law*, (3<sup>rd</sup> ed, OUP 2008) 99.

Member States, and are currently being approved by the European Parliament, in an effort to bring more democracy in the institutions of the Union. This lack of democratic legitimisation affects state aid control especially, because of the centralised character of the mechanism foreseen by the Treaty. The Commission has gathered too many powers related to the implementation of the Union's state aid policy.

As it was already analysed in this chapter, the Commission has the power to adopt new legislation concerning the future application of state aid rules. This includes the regular proposals to other institutions for the adoption of Union legislative acts, such as Regulations; this power also includes the adoption of its own soft law legislation, such as guidelines and Frameworks, which are increasing in quantity but also in importance. The problem with soft law is the ambiguity of its legal status. It does not have the status of Directives and Regulations, which can be directly applicable. Some of the soft law instruments are only binding on the Commission and not the Member States. Although, the Commission has found ways to make the Member States accept its Notices and Guidelines and thus make them binding on them.<sup>192</sup> Also soft law is only adopted by the Commission without it having to consult with the other institutions as in the regular legislative procedure for the adoption of Regulations for example. This creates the problem that the Commission can guide the policies of the Member States through its soft law and also force them to accept them, without anyone having any control over this process.

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<sup>192</sup> M Blauberger, 'From negative to positive integration? European state aid control through soft and hard law' (Max Plank Institute for the Study of Societies Cologne, 2008) 17.

In addition, the Commission has the power to investigate specific measures adopted by the Member States, when it initiates the preliminary or the subsequently the formal investigation procedures. As we have seen, those powers can even take the form of a proper enforcement agency, with rights to access individual premises and even e-mail accounts. Consequently, and most importantly, apart from making the rules, the Commission is the enforcer of those rules as well. It has the power to make decisions on individual cases, which may reach as far as penalties, such as the penalty in *Commission v Greece*.<sup>193</sup> Being the legislator, examiner and judge is never good in a democracy, especially when third party rights are not always being enforced successfully.<sup>194</sup> It is, however, beneficial that other institutions, such as the Court have the power to review Commission decisions to ensure the rights of the individuals involved in state aid cases.

#### 3.12.4 Problems with the rights of third parties in the investigation procedures of the Commission

With regard to the respect of private party rights, it should be noted that the Union procedures, in general, have been criticised, because they are not open to the public and more importantly to the interested parties themselves. This is another problem in the implementation of state aid rules.<sup>195</sup> According to consistent case law from the Court, the parties to a state aid investigation under Article 108(2) TFEU are the Commission and the

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<sup>193</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703

<sup>194</sup> The analysis follows in the next paragraph of the Thesis.

<sup>195</sup> ECLF working group on state aid in the banking crisis, 'Recent developments in the application of state aid rules' [2010] 6(2) *European Competition Journal* 491,502.

Member State implementing the aid measure;<sup>196</sup> even the beneficiary of the aid has not been given the status of the party in the Commission's investigation procedures.<sup>197</sup> The investigation is performed between the Commission and the Member states. This has negative consequences to everyone else affected by the aid, since everyone, other than the Member State granting the aid, has no access to the Commission's files for reasons of professional secrecy.

The CFI (now General Court), though, has passed a judgment<sup>198</sup> that could potentially give a solution to the problems occurring from the fact that the Procedural Regulation does not allow 'parties', other than the Member State, to access the Commission's files regarding a specific case that the 'party' has a legitimate interest in. The Court has applied, in a state aid case, the Transparency Regulation,<sup>199</sup> which is applicable to all EU cases, not just state aid. This Regulation forces the Commission to give reasons for restricting the party's access to file documents. In the same case, the Court has basically overridden the shortcomings of the Procedural Regulation, in relation to its poor treatment of third parties, by applying a more general rule of law. If that principle would be applied in the future, in state aid cases it would be a step forward.<sup>200</sup> However, the CFI's judgment (now General Court) was annulled, and the Court held that the third parties under the

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<sup>196</sup> For example joined cases C-74/00 *Falck SpA and Acciaierie di Bolzano v Commission* [2002] ECR I-7869 para 82.

<sup>197</sup> *Ibid* para 83.

<sup>198</sup> Case T-237/02 *Technische Glaswerke Ilmenau GmbH v Commission* [2007] ECR II-5131 para 77

<sup>199</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

<sup>200</sup> A Bartosch, 'The procedural regulation in State Aid matters' (2007) 3 *EstAL* 474, 478

Procedural Regulation do not have rights to access files in the administrative procedure of state aid control, run by the Commission.<sup>201</sup> After this first judgment, the Court confirmed the Commission's Decision to reject the requested access to documents in the Commission's files for the alleged state aid that Ryanair received.<sup>202</sup> The reasoning of the Court was that the investigation was still ongoing.<sup>203</sup> The second research criterion that requires transparency in the Commission's procedures has not been fulfilled in this context of state aid control.

The Commission is not obligated to hear the concerned parties' comments in the preliminary stage, under Article 20 of the Procedural Regulation.<sup>204</sup> Consequently, if a case is closed at that stage, as it happened in *Athinaiki techniki AE v Commission*<sup>205</sup>, without opening the formal investigation procedure, the complainant, which in that case was a competitor, did not have the opportunity to be heard, which affected his right to challenge the no aid decision by the Commission. It is true that, at the preliminary stage, the right of defense is not recognised to third parties in state aid cases, and some believe that this is a negative aspect of the Procedural Regulation that should be revised in a future amendment of this Regulation.<sup>206</sup>

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<sup>201</sup> Case C-139/07 P *European Commission v Technische Glaswerke Ilmenau GmbH, Republic of Finland, Kingdom of Sweden* [2010] [2010] ECR I-05885 para 63.

<sup>202</sup> Gaëtane Goddin, 'Access to Documents in Competition Files: Where do we Stand, Two Years after TGI?' (2013) 4(2) *Journal of European Competition Law and Practice* 112, 119.

<sup>203</sup> *Joined Cases T-494/08 to T-500/08 and T-509/08 Ryanair* [2010] ECR II-5723, para 70

<sup>204</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>205</sup> Case C-521/06 P *Athinaiki Techniki AE v Commission* [2008] ECR I-5829.

<sup>206</sup> M Munoz de Juan and J M Panero Rivas, 'The ECJ'S backlash on Access to documents in the Commission's file on State Aid cases by Private Parties' (2010) 4 *EstAL* 871, 880.

### 3.12.5 What problems can arise from conflict of interests between the Commission and the Member States?

Also, another limit put to the supranational regime are of course the Member States and their interests, which might not always match the interests of the supranational authorities. The Member States' governments are democratically elected representatives of the people of Europe, whereas the Commission is an administrative authority that is constantly being criticised for not having a democratic basis. Ministers, as politicians, want their plans to be approved, so that they can show to the electorate that they have represented them well and have served their interests. Whereas, the Commission is, or should be concerned with applying the policies it has set for itself.

The Commission's policies and the Member State's own national economic policies have not always been compatible. After Lisbon<sup>207</sup> and the adoption of the State Aid Action Plan<sup>208</sup> the Commission set as an objective of the state aid policy to have 'less and better targeted' state aid in the future. The State Aid Action Plan is a soft law document that is not binding on the Member States. It is only providing guidance for the way that the Commission will pursue the examination of aid measures in the future.

However, this objective of state aid control might interfere with the Member States' economic policies. As it was introduced in the first chapter

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<sup>207</sup> Presidency conclusions for Lisbon strategy, Lisbon European council 23 and 24 march 2000 available at < <http://www.consilium.europa.eu> > accessed on 13/5/2013

<sup>208</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final.

of the thesis,<sup>209</sup> the Council adopted the position for less aid to be granted to undertakings. Nevertheless, the Commission cannot force Member States governments' to grant state aid to specific purposes.<sup>210</sup> The decision to grant aid to any undertaking is still a power that lies with the Member States. If it will be compatible with the internal market is for the Commission to decide according to the Treaty. What the Commission can do is to give guidance as to which measures are deemed to be considered more competition friendly and thus approved by its examination.

Furthermore, it should be noted that in trying to avoid state aid rules, Member States have introduced new forms of aid measures, such as tax exemptions, which have made it difficult for the Commission to capture all illegal or unlawful aid. In its pursuing of transparency and legal certainty, the Commission has adopted numerous soft law documents, such as guidelines and sector frameworks. The result though, today, is that the soft law adopted by the Commission is too much and too detailed,<sup>211</sup> and might clash with the purpose it was supposed to serve. Legal certainty could be compromised in aid measures, such as a scheme that would require the application of many different sets of rules, substantive and procedural. It is evident from the above analysis that the Commission's choice of implementing state aid control through soft law has not benefited the

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<sup>209</sup> Paragraph 1.3 of the first chapter of the thesis.

<sup>210</sup> M Blauberger, 'From negative to positive integration? European state aid control through soft and hard law' (Max Plank Institute for the Study of Societies Cologne, 2008) 22.

<sup>211</sup> It is indicative that the compilation of Rules Applicable to State Aid that the Commission publishes and updates regularly on its website currently contains 934 pages full of primary and secondary rules applicable to State Aid.  
<[http://ec.europa.eu/competition/state\\_aid/legislation/compilation/state\\_aid\\_01\\_09\\_13\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/compilation/state_aid_01_09_13_en.pdf)> Accessed on 24-10-2013



coherence and transparency of the state aid rules and procedures, so the second research criterion has not been fulfilled in this case either.

A further negative aspect of the supranational mechanism has to do with the ability of the Commission to be autonomous again, but not against other EU institutions; this time against Member States. The Commission is required under the Treaty to propose to the Member States all the necessary measures that it considers are required, in order for it to implement its obligations to State aid control, as transparent and effectively as possible.<sup>212</sup> Those measures (usually in the form of guidelines and frameworks) are introduced and altered, according to the evolution and the changes that happen in the internal market, which is the ultimate goal of the Union and all of its policies. Sometimes, the Member States have not been willing to co-operate with the Commission in respect of the adoption of those guidelines and frameworks.

The process of adopting those soft law documents is as follows: the Commission proposes them to the Member States, and then they have to accept them, in order for them to be considered valid. If a Member State does not accept a proposed Framework for the control of aid, in a particular sector of the economy that is accepted by all others, and that Framework subsequently enters into force, the Commission opens the formal investigation procedure for all aid in that sector by that Member State, in order to make it accept it.<sup>213</sup> This procedure can be considered to be

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<sup>212</sup> Article 108(1) TFEU [2012] OJ C326/47.

<sup>213</sup> C Quigley, *European State Aid Law and Policy* (2nd edn Hart, Oxford 2009) 282

bordering with a threatening behaviour, which should not have any place in a democratic process of adopting new legislation, even soft law.

This is exactly what happened when Sweden had rejected a Framework for the application of state aid in the motor vehicle industry. It was the only Member State to reject it. The Commission then initiated the formal investigation procedure for all existing aid in the motor vehicle industry in Sweden, which could have resulted in decisions against the interests of Sweden. Eventually Sweden accepted the Framework and the case was closed.<sup>214</sup> The Court has also accepted the legal character of such guidelines and Frameworks in the state aid control, as ‘measures of general application’<sup>215</sup> that are in force, for as long as they are adopted for, or prolonged by Commission decisions. As such, they cannot be considered altered by individual decisions on specific state aid cases, but must be changed with a specific decision by the Commission on their existence.<sup>216</sup>

### 3.12.6 Limits imposed by inefficiencies of the enforcement mechanism

Lastly, and more importantly, the effective implementation of state aid policy by the supranational regime presupposes effective enforcement of the Commission decisions. This means that Member States that have been found in breach of its decisions should be forced to implement the necessary measures to enforce those decisions. Enforcement of decisions for illegal aid as we have seen means repayment of the amounts that have been paid into the beneficiary of the aid. It is also true that enforcement of recovery

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<sup>214</sup> European Commission XXVIIIth Report on Competition Policy (1998) 227.

<sup>215</sup> Case C-313/90 *CIFRS v Commission* [1993] ECR II-1125 para 44.

<sup>216</sup> *Ibid* 42-44.

decisions has encountered many problems in the past; a fact that sets another limit to the effectiveness of the implementation capabilities of the supranational state aid regime.

To overcome those difficulties the Commission proposed a three step approach: firstly, it will monitor more closely the application of recovery decisions, and when it finds that recovery does not comply with the conditions of effectiveness and timely manner, it will activate the procedures under Articles 258 and 260 TFEU, that have been examined in the *Commission v Hellenic Republic*<sup>217</sup> case. Secondly, it will further promote transparency in its decisions and procedures, something that has started to happen through the adoption of the Simplification package,<sup>218</sup> for example, and also help establish national state aid authorities or contact points in Member States. Thirdly, it will co-operate with national authorities and ‘train’ them in having a better knowledge of state aid rules, so that they can design better national measures.<sup>219</sup>

From the last three points made by the Commission itself, it is evident that the supranational regime recognises its own shortcomings and limits. Those can be distinguished and summarised in legal limits from gaps in the relevant legislation, such as the inadequacies of the Procedural Regulation, in limits imposed by players in the supranational state aid law mechanism,

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<sup>217</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703

<sup>218</sup> The Simplification package consists of the Commission Notice on a Simplified procedure for the treatment of certain types of state aid [2009] OJ C-136/3 and the Commission Notice on a best practices Code on the conduct of state aid control proceedings [2009] OJ C-136/13.

<sup>219</sup> Commission staff working document ‘Facts and figures on State Aid in the Member States accompanying the State Aid Scoreboard – Autumn 2010 edition, sec (2010)1462 final 13.

and finally in limits that occur in the implementation of the rules and procedures in real life conditions. The conclusion is that the answer to those problems might be in further reform of the relevant rules, which will correct some of the gaps. However, it becomes apparent that the implementation of state aid law and policy might need to always include national laws, authorities and courts as equal partners with the supranational ones.

### 3.13 CONCLUSION

This chapter sought to discover the limits of the supranational mechanism of state aid control. The results provide the thesis with the problems that need to be dealt with, in order to make the implementation of state aid more efficient within the European Union.

The legislation of the Union both primary and secondary, that is the Treaty and the legislation adopted by the Union's institutions, complete the supranational administrative procedure for the control of state aid, as it is dictated by the Treaty. This legal framework has evolved over the years, and has codified the Court's case law, aiming at making Union law more certain and transparent. Those two characteristics are constantly set by the Commission as the conditions for improving the supranational regime with the aim to make it more efficient. The State Aid Modernisation has improved the handling of complaints but has not reinforced the position of third parties during the preliminary and formal investigation procedures. The Modernisation has also improved the rules for the evaluation of larger aid schemes, which potentially are more distortive than individual aid measures. The Modernisation has also potentially exempted more types of

aid from the notification obligation, which means that there is need for better designed measures on behalf of the Member States and more effective ex post monitoring from the Commission, so that illegal aid is recovered.

Through the application of the first research criterion, which was set as the speed and applicability of the state aid procedures the thesis performed a critical analysis of legislation, case law, procedures and powers of the 'players'. This chapter has found the positive characteristics of the supranational state aid regime, such as the strengthening of the internal market and the ability to bring flexibility to the rules when needed by market conditions. The negative characteristics of the supranational control of state aid were also analysed, which explain why the supranational regime has not always been considered successful enough. The conclusion of this chapter has been that the rules on state aid have become too complicated in trying to serve the need for transparency and legal certainty. As it has been analysed in paragraph 3.6 of this chapter, the absence of a time limit by which the Commission's administrative procedure should have been finished has led in the past in considerable lengthy procedures that last more than six months, which has been allowed by the Court. The procedures and the enforcement of the rules do not address the complexity of the aid measures implemented by Member States; there is further need for reform of the implementation of state aid law at the supranational level, and also there is a need for co-operation with the Member States. The Commission's decisions can be reviewed in the European Courts and the Courts' jurisdiction will be critically evaluated in the next chapter of the thesis.

**CHAPTER FOUR**

**ENFORCEMENT OF STATE AID RULES IN THE COURT OF  
JUSTICE OF THE EUROPEAN UNION**

4.1 INTRODUCTION

The Commission and the Court of Justice of the European Union (henceforward Court) are the two institutions that share competence in enforcing state aid rules at the supranational level. Both of those institutions have distinct competences, awarded to them by the Treaty and the secondary legislation; however, both comprise the supranational mechanism for the control of state aid. In the previous chapter, the thesis analysed the enforcement powers of the Commission and the problems that arise from those Commission procedures in the field of state aid; This chapter will critically examine the powers of the Court in enforcing state aid control, and thus complete the supranational aspect of state aid control, which comprises one aspect of this thesis; the other being the national aspect of state aid control.

In this chapter, the thesis will mainly apply the third research criterion, which seeks to evaluate the robustness of the enforcement of state aid law at the Court of Justice of the European Union. The chapter will perform a brief analysis of the general status of the Court in the European Union, in order to better understand its powers in the field of state aid, which is a Union policy. Also, the different types of actions that the Court has jurisdiction to hear will be analysed, which will help the research to conclude on the way the Court's case law can affect and possibly direct or

even shape state aid policy. Another issue that will be raised in this chapter will be the difficulty in gaining standing in the Court. This is a substantial problem for competitors and third parties that may want to defend their rights in the European Court. The difficulty in gaining standing might explain the low levels of state aid cases that are being brought before the Court. Finally, the last issue that will be raised is the Court's problems to order interim relief, as a way of restoring the damage suffered temporarily, until there is a final judgment.

#### 4.2 THE STATUS OF THE COURT IN THE EU LEGAL ORDER.

Article 2 of the Treaty of Lisbon,<sup>1</sup> which is the latest amendment to the Treaties, introduced some changes to the establishment of the Court. It is now officially called the Court of Justice of the European Union and consists of three courts: the Court of Justice, the General Court (first established in 1988 as the Court of First Instance) and the Civil Service Tribunal (established in 2004).<sup>2</sup> Only the Court of Justice and the General Court have jurisdiction to rule on state aid cases. The subject matter of the Civil Service Tribunal is limited to cases concerning disputes between the Union and its civil servants.

The mandate of the Court, given to it by the TEU, is to 'ensure that in the interpretation and application of the Treaties the law is observed'.<sup>3</sup> More specifically, the Court of Justice has jurisdiction in the following cases: when a national court submits reference for a preliminary ruling by

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<sup>1</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C-306/1.

<sup>2</sup> Article 19 of the TEU [2010] OJ C83/13.

<sup>3</sup> Article 19 TEU *ibid*.

the Court;<sup>4</sup> when a Member State fails to comply with an obligation under Union law;<sup>5</sup> when the annulment of an act, adopted by a Union institution, is sought;<sup>6</sup> when an action is brought against a Union institution for failure to act,<sup>7</sup> and finally when actions for damages are lodged against Union institutions, for non-contractual liability, caused by the enactment of the Institution's duties. Also, the Court decides on appeals on points of law, against decisions of the General Court.<sup>8</sup> Contrary, The General Court has jurisdiction to rule, in first instance, on several of those cases, such as the review of the legality of acts of the institutions, a Member State's action against an institution for failure to act and the award of compensation for damages caused by Union's institution decision.<sup>9</sup>

#### 4.3 THE SPECIFIC JURISDICTION OF THE COURT IN RELATION TO STATE AID CASES.

The Court may be called to judge a case concerning the implementation of a state aid measure. The first type of state aid case before the Court can be a reference to the Court by a national court, for a preliminary ruling. Another type of case can be an action from the Commission against a Member State, for failure to comply with an obligation, conferred upon it by the Treaty Articles on state aid; thirdly, an action for annulment of a Commission decision on state aid may be brought before the Court. Fourthly, actions for damages against the Commission

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<sup>4</sup> Article 267 TFEU [2012] OJ C326/47.

<sup>5</sup> Articles 258, 259 and 260 TFEU [2012] OJ C326/47.

<sup>6</sup> Articles 263 and 264 TFEU [2012] OJ C326/47.

<sup>7</sup> Articles 265 and 266 TFEU [2012] OJ C326/47.

<sup>8</sup> Article 257 TFEU [2012] OJ C326/47.

<sup>9</sup> Article 256 TFEU [2012] OJ C326/47.



may be brought, for harm caused by the performance of its duties, concerning state aid; a Member State may bring an action against another Member State for failing to comply with a state aid obligation, and finally, an action may be brought against the Commission for failing to act in a state aid case.

All of those forms of actions are possible and admissible by the Court, but all of them do not appear frequently in the case law. Each individual action will be critically analysed in the next paragraphs, and then the possible problems in the Courts proceedings will also be examined, which might explain why some types of actions are not that common in enforcing state aid before the Court of Justice.

#### 4.4 STATISTICS OF THE JUDICIAL ACTIVITY OF THE COURT OF JUSTICE AND THEIR EFFECTS ON STATE AID ENFORCEMENT

In the last five years (2008-2012) that data exist, the Court of Justice has had a stable number of new cases, ranging from about 562 to 688.<sup>10</sup> Throughout the five year period, the trend is that the number of references for a preliminary ruling filed by national courts is rising. Additionally, it is the most common type of case that the Court of Justice deals with, (regardless of the subject matter), whereas, the number of direct actions is dropping.<sup>11</sup> This means that the Court has less chances of making direct rulings on EU law cases, and thus fewer opportunities to directly influence the development of EU law with its case law. Certainly, preliminary rulings

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<sup>10</sup> All statistical data concerning the Court's judicial activity can be found on the Court's 2010 Annual Report, which is available online < [http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010\\_stat\\_cour\\_final\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-05/ra2010_stat_cour_final_en.pdf) > accessed on 14/1/2012.

<sup>11</sup> See table 5 in the appendix.

are to be respected by the national courts that request them, but it is for the national court to ultimately judge, and possibly interpret the Court's preliminary ruling.

More specifically, out of the 632 new cases that were admitted in the Court of Justice in 2012, which was the most recent year that such data was published at the time of writing, only 28 had state aid as the subject matter of their action.<sup>12</sup> In the same year (2012), the number of cases that were admitted in the General Court that had state aid as their subject matter was 36 out of a total of 617 new cases,<sup>13</sup> which amounts to roughly 5.8 per cent of the total number of new cases. Those numbers can lead to two assumptions: first, that the enforcement of state aid in the Court is at a low level in quantity, and that the General Court is currently more involved in state aid enforcement than the Court of Justice.

The reasons for such a small amount of enforcement will be examined in the following paragraphs of this chapter. This observation is important because the Commission is currently promoting enforcement of state aid at national courts, but enforcement in the Court of the European Union is not exactly thriving. Either everything is running smoothly in state aid policy, or there are problems that force interested parties to turn away from seeking enforcement of state aid decisions more vigorously. The results of the research that have been presented so far and the problems that occur in the implementation of the state aid policy show that more changes need to happen.

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<sup>12</sup> See table 5 in the appendix.

<sup>13</sup> See table 6 in the appendix.

## 4.5 TYPES OF ENFORCEMENT ACTIONS OF STATE AID RULES IN THE COURT OF JUSTICE OF THE EU.

State aid cases can be brought before the Court in many forms of actions. Some are more common than others: the most common ones are actions against Member States, preliminary rulings and actions for annulment of Commission decisions in the state aid field. Those types of actions will be analysed next, in the context and the specific needs of state aid control.

### 4.5.1 Commission actions against Member States

Member states have certain obligations under EU law; primary law and secondary law imposes those obligations to Member States, which have to comply with the provisions of Union legislation, in areas where the Union has competence, exclusive or shared with the Member States. Competition law, whose one part is state aid, is an area of exclusive competence of the Union, which means that the Union has power to adopt legislation, or empower Member States to legislate in the field of Competition law.

In the context of state aid, the Commission has powers to safeguard the Treaties and the application of EU law. However, Member States for various reasons sometimes fail to comply with the provisions of certain EU legislation. When a Member State fails to comply, the Commission has power to bring infringement proceedings before the Court. According to Article 17 (1) TEU (which has effectively replaced former art. 211 TEC, which awarded the Commission with the title of Guardian of the Treaties), the Commission has the obligation to ensure proper application of Union law. This Article is the legal basis for the Commission's powers to seek

enforcement actions against Member States. However, due to limited until recently investigative powers and resources the Commission had to rely on complaints in order to initiate enforcement procedures against Member States in the field of state aid.<sup>14</sup> The new Procedural Regulation<sup>15</sup> aims to grant more investigative powers to the Commission by way of introducing for the first time a legal basis for launching investigation into sectors or certain instruments, across Member States.<sup>16</sup> At the same time, the State Aid Modernisation aims to enhance complaint handling by setting out a detailed procedure, by which complaints will be dealt with.<sup>17</sup> The application of those provisions and their effects on state aid control remains to be seen.

#### 4.5.2 What are the consequences of infringement of State Aid rules?

In general, all enforcement procedures against Member States for failure to fulfil an obligation under the EU treaty are brought before the Court by the Commission, having as a legal basis Article 258 TFEU (former Article 226 TEC),<sup>18</sup> regardless of subject matter. This Article applies for failures to fulfil Commission state aid decisions, but it has been criticised in

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<sup>14</sup> Richard Rawlings, 'Engaged elites Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6(1) European Law Journal 4, 5.

<sup>15</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>16</sup> Article 20a of Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>17</sup> Article 20(2) of Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>18</sup> Consolidated version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47 art 258: 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.'

the past for creating a rather complex enforcement system:<sup>19</sup> the Commission may become aware of infringements of state aid law from complaints made by third parties; subsequently, it must filter those complaints, and decide to act on the most distortive infringements.<sup>20</sup> It sends a letter to the Member State asking it to comment on the complaint.<sup>21</sup> Article 20(2) of the Procedural Regulation<sup>22</sup> also applies to complaint handling. According to it, if the Commission decides that the facts and points of law put forward by the complainant interested party are not sufficient enough to open a *prima facie* examination, the Commission must ask the party to submit comments within a month. If no comments are submitted the complaint is deemed to have been withdrawn. The handling of complaints must be diligent and impartial<sup>23</sup> and this requirement is connected with the principle of sound administration that the Commission, just like any other administration in a state governed by the rule of law, must obey.

If the Commission does not open the formal investigation procedure after all this procedure has been performed, then the complainant can pursue enforcement in the Court, by challenging the Commission's failure to act. The Court has held that it is sufficient that the applicant's interests might be

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<sup>19</sup> R Rawlings, 'Engaged elites citizen action and institutional attitudes in Commission enforcement' (2000) 6(1) ELJ 4.

<sup>20</sup> Commission Notice on a best practices Code on the conduct of state aid control proceedings [2009] OJ C-136/13, para 48.

<sup>21</sup> *Ibid* para 51.

<sup>22</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>23</sup> Eric Morgan de Rivery and Liliane Gam, 'Judgment of 13 September 2010 in *Greece et al. v Commission*, Comments on Joined Cases T-415/05, T-416/05 and T-423/05' [2011] 10(4) EStAL 725, 728.

affected and it is a rather broad definition, which includes any number of competitors.<sup>24</sup>

This initiation of the enforcement procedure by the Commission is considered to be centralised and not the most efficient at all times.<sup>25</sup> The reasons for that, as this thesis has already presented in chapter three, is that the Commission has neither the necessary resources or the time to detect all infringements; additionally, it might be influenced politically, or through lobbying by economic actors and favour certain Member States or certain cases.<sup>26</sup> The procedure under Article 258 TFEU (former Article 226 EC) has been criticised for being politicised<sup>27</sup> due to the nature of the procedure, according to which there are negotiations with the member state before a Decision is made by the College of Commissioners, if there is a Decision at all. Usually the Commission rejects the political character of the procedure by saying that there was no infringement in the first place. Those negative effects of the centralised enforcement affect the Court's performance as well. It is evident from the small numbers of state aid cases that not all infringements of state aid law are subjected to the judicial review of the Court.

However, apart from Article 258 TFEU (former art. 226 TEC) there is another legal basis available to bring an action before the court, which applies only to infringements of state aid law. This is the procedure available to the Commission to bring an action against a Member State

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<sup>24</sup> Case C-78/03P *Commission v ARE* [2005] ECR I-10737, paras 35 and 36.

<sup>25</sup> P Craig and G de Búrca, *EU Law text cases and materials* (3<sup>rd</sup> ed OUP 2003) 401.

<sup>26</sup> For further analysis on the issue of the negative characteristics of centralised enforcement procedures see chapter three, paragraph 3.12.

<sup>27</sup> Melanie Smith, 'Enforcement, monitoring, verification, outsourcing: the decline and decline of the infringement process' (2008) 33(6) E.L.Rev 777, 791.

according to Article 108 (2) TFEU.<sup>28</sup> There are some differences in the procedure of each action and the scope of application of the two different legal bases available for actions against Member States, in cases of state aid law infringement. Firstly, the procedure of Article 108(2) TFEU requires more formalities,<sup>29</sup> than a simple letter to the Member State as the procedure of Article 258 TFEU requires. Those formalities included in the procedure of Article 108(2) TFEU are the following; firstly, all interested parties must submit observations and therefore the Commission is fully informed of the facts of the case. Secondly, Article 108(2) TFEU results in a faster application to the Court, without having to go through the stage where the Member State has to submit its ‘observations’ to the Commission and the Commission has to adopt a reasoned opinion. This faster process is a much easier administrative process for the Commission.<sup>30</sup>

The question is whether the Commission is free to choose whichever legal basis for any type of infringement of state aid law or is it bound by any provision to choose one over the other? Article 23(1) of the Procedural Regulation<sup>31</sup> seems to dictate that the Commission should follow Article 108(2) TFEU, whenever the Member State does not comply with a conditional or a negative Commission decision, which orders recovery of unlawful aid.

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<sup>28</sup> Consolidated version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47 art 108(2): ‘If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.’

<sup>29</sup> See chapter three, paragraph 3.4.

<sup>30</sup> Kasper Ullerup Bach, ‘A Small Step Towards Stricter Practice in Cases of Breach of the Treaty under Article 108(2) TFEU? Annotation on Case C-331/09 *Commission v Poland* [2011] ECR n.y.r.’ [2012] 3EStAL 667, 670.

<sup>31</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

What happens though in all other cases? It seems more appropriate to always use the more specific procedure of Article 108(2) TFEU in all state aid cases, since it is *lex specialis* compared to Article 258, which is *lex generalis* for all EU law infringements. Especially, whenever the compatibility of the aid measure with the internal market is in question, the Court has held that the Article 108(2) TFEU procedure should be followed, because of the guarantees that it offers to all parties, which is specifically designed to overcome the problems created by the compatibility issues; however, the Court does state that the Article 258 TFEU procedure is not precluded even in this type of cases.<sup>32</sup> The case law, though, suggests that whenever there is failure to notify new aid the procedure in Article 258 could be more beneficial, but not obligatory.<sup>33</sup> The assumption is made by the wording of the Court's conclusion: 'the Commission may avail' from Article 258 and it is not obliged to bring an action under that Article rather than 108(2) TFEU.

#### 4.5.3 The procedure and effects of a Court judgment finding failure to comply either under Article 108(2) TFEU or 258 TFEU.

Once proceedings have been initiated before the Court, regardless of the legal basis used in actions against Member States for failure to comply with state aid decisions, the remedies available for the Member State and the defences are largely the same for both. First of all, it should be noted that the vast majority of cases have to do with the Member State not complying with a recovery order by the Commission. In trying to justify its failure to comply with a recovery decision the Member State cannot plea before the

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<sup>32</sup> Case 290/83 *Commission v France* [1985] ECR 493, paras 16-17.

<sup>33</sup> Case C-35/88 *Commission v Greece* [1990] ECR I-3125, para 34.



Court of Justice that national provisions or practices made it impossible to comply.<sup>34</sup> The only plea that would be admissible if proven will be that it was absolutely impossible for it to comply.<sup>35</sup>

In all possible cases of failure to comply with state aid law, the Member State cannot plea in a proceeding against it that the Commission decision, with which it failed to comply, is illegal.<sup>36</sup> In other words, an indirect plea over the validity of a Commission decision is not admissible in proceedings for breach of Union law by Member States. The Court had the opportunity to state the reasons for that inadmissibility many times: the Treaty distinguishes between the remedies offered for Article 258 and Article 260 proceedings (which provides for actions against the validity of Union institutions' acts). Those remedies have 'different objectives and are subject to different rules'.<sup>37</sup>

It is rather unfortunate that usually an action against a Member State and an action against the validity of a Commission decision are brought before different courts. The first action is brought before the Court of Justice and the second before the General Court. Advocate-General Ruiz-Jarabo Colomer makes an interesting point: before the establishment of the General Court the problem was non-existent, since both actions could be brought

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<sup>34</sup> Case C-5/89 *Commission v Germany* [1990] ECR I-3437, para 18.

<sup>35</sup> Case 52/84 *Commission v Belgium* [1986] ECR 89, para 14; Case 94/87 *Commission v Germany* [1989] ECR 175, para 8, and Case C-183/91 *Commission v Greece* [1993] ECR I-3131, para 10.

<sup>36</sup> P Vesterdorf and M U Nielsen, 'State aid law of the European Union' (Steven Harris tr, Sweet & Maxwell, 2008) 350.

<sup>37</sup> Case 226/87 *Commission v Greece* [1988] ECR 3611, para 14; Case C-74/91 *Commission v Germany* [1992] ECR I-5437, paragraph 10; Case C-404/97 *Commission v Portugal* [2000] ECR I-4897, para 34.

before the same court and the Court heard both actions at the same day.<sup>38</sup> Now that there are two Courts, the answer to this problem could not be for the Court of Justice to stay proceedings until judgment for the validity is reached by the General Court, because the Article 278 TFEU actions before the Court of Justice of the European Union do not have suspensory effect.<sup>39</sup>

The only situation that the Court has accepted that the invalidity of a Commission decision is the reason for a Member State's non-compliance is when there are 'serious and manifest defects' in the decision, which would render it non-existent.<sup>40</sup> Only then can the Court rule on the validity of a state aid decision, in a case where the state is being sued for failure to comply with that very same decision. Otherwise, the only valid plea, in a case concerning non-compliance, would be that it has been absolutely impossible for the Member State to implement the decision. However, that is difficult to prove in Court; the Court has rejected reasons, such as badly drafted Commission decisions, or that the state does not know what to recover since there was no transfer of state funds in its case law.<sup>41</sup>

After the Court has reached a judgment that accepts that a Member State is in breach of state aid law, the Member State must take action to comply with that judgment, as soon as possible. Article 260 (1) TFEU (former Article 228 TEC) provides for the obligation of the Member State to comply with the Court's judgments. Compliance of the infringing Member

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<sup>38</sup> Opinion of Mr. Advocate General Ruiz-Jarabo Colomer delivered on 28 October 1999 in case C-404/97 *Commission V Portugal* [2000] ECR I-4897, para 36.

<sup>39</sup> Article 278 of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

<sup>40</sup> *Ibid.*

<sup>41</sup> Case C-404/97 *Commission V Portugal* [2000] ECR I-4897

State should go as far as the practical elimination of the infringements and the consequences past or future.<sup>42</sup>

#### 4.5.4 Financial penalties in the Court of Justice of the EU as a means of enforcement

The Member State must take all necessary measures to comply with the judgment of the Court. What are the options if it does not comply with the judgment though? Then, according to Article 260(2) TFEU the Commission can bring another action before the Court, asking it to impose financial penalties on the non-complying Member State. The financial penalties can take the form of a lump sum or a periodic penalty for the time that the infringement lasted. Article 260 TFEU has been adopted by the Commission as the most effective way of enforcing recovery decisions against reluctant Member States.<sup>43</sup>

The Court on its part has endorsed the Commission's stance to pursue the persistent non-compliance with recovery decisions and condemned Greece to pay both a lump sum and a penalty for each day of delay in its *Commission v Greece*<sup>44</sup> case, for the first time; furthermore, the Court increased the amounts that the Commission was asking for in its action.<sup>45</sup> By doing so, the Court and the Commission, according to some

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<sup>42</sup> Case 70/72 *Commission v Germany* [1973] ECR 813, para 13.

<sup>43</sup> For further analysis on the Commission's approach towards Article 260 TFEU financial penalties and the criticism it has generated see chapter three of the thesis, paragraphs 3.9 and 3.10. Here, the analysis will be limited to the Court's interpretation of financial penalties as a means of state aid enforcement.

<sup>44</sup> Case C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703. The case has been analysed in chapter three of the thesis.

<sup>45</sup> R M D'Sa and S Drake, 'Financial penalties for failure to recover State Aid and the relevance to State liability for breach of Union law' (2010) 1 EStAL 33, 45.

writers, established ‘a more credible State aid control system, at least as far as public enforcement of its decisions is concerned.’<sup>46</sup>

According to others though, the financial penalties as a means of enforcing EU law have been criticised: the ‘draconian treatment by the EU institutions of the recipients of unlawfully granted State aid is to try to transform potential grantees of State aid into policemen,’<sup>47</sup> on the contrary, there is no penalty against the Member State that grants unlawful state aid. Financial penalties should be examined more for their effectiveness. Certainly, this is more relevant for poorer Member States. If they are called to pay multimillion penalties into the EU budget, that money would have to be saved from other actions. National actions that would be considered more urgent by the people of those poorer states, than the infringement of EU law would ever be. Especially now, that the financial position of some Member States is at risk.<sup>48</sup> Consequently, having to pay penalties in the EU budget might not prove to be the most effective way to optimise state aid enforcement. This financial sanction should be used with great caution especially when a Commission decision to impose penalties is being reviewed by the Court.

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<sup>46</sup> Michela Angeli, ‘The European Commission’s “new policy” on state aid control: some reflections on public and private enforcement of recovery of illegal aid’ (2009) 30(11) ECLR 535, 538.

<sup>47</sup> Sir Jeremy Lever, ‘EU State Aid Law – Not a Pretty Sight’ [2013] 1 EStAL 5, 7.

<sup>48</sup> Ian Kilbey, ‘The interpretation of Article 260 TFEU (ex 228 EC)’ (2010) 35(3) ELR 370, 385.

#### 4.6 REFERENCES FROM NATIONAL COURTS FOR PRELIMINARY RULINGS

According to Article 267 TFEU (ex 234 TEC), the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of the Treaty and on the validity and interpretation of secondary legislation, adopted by the Union's institutions. The importance of this jurisdiction of the Court is founded on two facts: first of all, the statistics of the Court prove that an equal number of direct actions and references for preliminary rulings are filled in the Court that have as a subject matter state aid cases.<sup>49</sup> The second point that proves the importance of this jurisdiction in state aid cases is the fact that references for preliminary rulings connect the national jurisdictions with the supranational jurisdiction, and eventually can promote uniform application of state aid law. Due to the fact that enforcement before national courts is promoted, even though enforcement of state aid law is still in early stages, the national courts have this instrument to use at their disposal, to clarify unclear aspects of Union state aid law that might not be clear to every single national judge, especially an inexperienced first instance judge.

The ruling of the Court interpreting the Union law is binding on the national court that requested it. However, there are limits as to what the question referred to the Court of Justice can actually include. In state aid

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<sup>49</sup> See table 6 in the appendix: for example the table shows that in year 2012 five new state aid cases were direct actions and three references for preliminary rulings. From previous Annual Reports it is found that: in the year 2011 two new state aid cases were direct actions and three references for preliminary rulings. In year 2010 four new state aid cases were direct actions and four references for preliminary rulings. In 2009 the numbers were 10 to 5. In 2008 there were one direct action and six references for preliminary rulings. In 2007 three direct actions and four preliminary ruling references.

matters, the national court can request the interpretation of Articles 107 (1) TFEU and 108 TFEU; it can also inquire about the validity and interpretation of Commission decisions, concerning specific state aid cases. Due to the fact that the concept of aid causes so many ambiguities, it is a privilege to have a supranational authority that will guide national courts to the right direction. The one thing that the Court of Justice cannot answer, though, is the issue of compatibility of an aid measure with the internal market, since that interpretation is the exclusive competence of the Commission and not the national courts.<sup>50</sup>

The importance of the references for preliminary rulings in the state aid field has been reiterated by the Court of Justice in its *GIL insurance*<sup>51</sup> judgment. The case concerned an Insurance Premium Tax for services and goods that was considered to be state aid by all the United Kingdom Courts because of its difference with the VAT rate. The Court of Justice was asked to interpret whether there was sufficient effect on trade between Member States, but it was not asked to interpret whether that Tax was actually state aid, because the referring UK court was convinced it was. The Court of Justice though, examined whether the questions that it received were actually hypothetical, and went on to examine the real issue of whether the tax was within the scope of Article 107(1) TFEU.<sup>52</sup> The fact that the Court of Justice was able to determine the real issues of the case and correctly

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<sup>50</sup> Further discussion on the issue of the national courts' competences as opposed to the Commission's exclusive competence in state aid see paragraph 6.5 of the sixth chapter of the thesis.

<sup>51</sup> Case C-308/01 *GIL Insurance v Customs and Excise Commissioners* [2004] ECR I-4777.

<sup>52</sup> *Ibid* paras 78-79.

interpret EU law, when national courts failed, reaffirms the importance of preliminary questions.<sup>53</sup>

#### 4.7 ACTIONS AGAINST THE COMMISSION IN STATE AID CASES

There are two types of actions that can be brought against the Commission in the Court of Justice of the European Union in the state aid field of law. Article 263 TFEU provides for the Court's jurisdiction to rule on the legality of the Commission's state aid decisions. Whereas, Article 265 TFEU provides for the Court's jurisdiction to rule on the Commission's failure to act in state aid cases. Those two types of actions will be critically examined in the following paragraphs of the chapter. Both of those types of action of course can be used to challenge acts of other Community institutions in the state aid field, such as the Council's decisions under Article 108(2) TFEU. However, due to the central role of the Commission in state aid control, the focus in state aid cases is actions against the Commission.

##### 4.7.1 Actions for annulment of state aid decisions in the Court- legal basis

In chapter three of the thesis the research presented the various steps that the Commission takes in its administrative procedure of exercising state aid control. Mainly those steps are the preliminary examination and if there are grounds for it the Commission opens the formal investigation. Both of those steps end with Commission Decisions, according to the findings of the relevant examination procedure. Those Decisions, though, according to

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<sup>53</sup> A Robertson, 'State Aid and reference policy after GIL Insurance' (2004) 25(10) ECLR 603, 606.

Article 108 TFEU and the Procedural Regulation No 734/2013, have different legal statuses and effects. The parties in those procedures may need to challenge the validity of any of those decisions and the procedures that led to them. Therefore, Article 263 TFEU provides for the legal basis for actions against institutional decisions in the state aid field. Due to the different nature of those Decisions made by the Commission, not all of them can be the subject of judicial review in the Court of Justice.

#### 4.7.2 Admissibility of acts that can be subject to annulment

Article 263 TFEU makes a distinction between acts of the institutions that can be subject to actions for annulment, and only includes acts that produce ‘legal effects *vis-à-vis* third parties’.<sup>54</sup> Therefore, the admissibility of acts, which are open to challenge before the Court is usually contested. The acts of the Commission that produce legal effects are certainly the final decisions, either after the preliminary phase or the formal investigations procedure. Those can be decisions that the measure is not state aid,<sup>55</sup> or that the measure is state aid but compatible with the internal market.<sup>56</sup> Also, the negative decision, which does not allow the implementation of the aid measure is admissible, and can be challenged before the Court. Finally, conditional decisions, which authorise aid, to be implemented, under certain conditions, are challengeable before the Court.<sup>57</sup>

Article 263(4) TFEU, after the Lisbon amendment, has made it possible for private parties to challenge acts that are “regulatory,” under the

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<sup>54</sup> Consolidated version of the Treaty on the Functioning of the European Union [2010] OJ C 83/47

<sup>55</sup> Case C-367/95 *Commission v Sytraval* [1998] ECR I-1719, para 45.

<sup>56</sup> *Ibid.*

<sup>57</sup> U Soltesz and H Bielez, ‘Judicial review of state aid decisions – recent developments’ (2004) 25(3) ECLR 133, 134.



condition (Lisbon criterion) that they are of direct concern to them and that they do not entail implementing measures. The TFEU does not include a definition of what is a regulatory act, regrettably for some,<sup>58</sup> due to the significance of the notion to the outcome of proceedings; however, the Court held that it is to be a non-legislative act of a general nature.<sup>59</sup> In state aid cases many acts can be characterised as non-legislative. This part of the Lisbon criterion will not be difficult to prove before the Court, however, the lack of implementing measures:<sup>60</sup> usually, Commission Decisions in the field of state aid can be classified as regulatory, but they are followed by implementing measures such as recovery Decisions, which make the satisfaction of the Lisbon criterion difficult.<sup>61</sup> Even after the changes that the Lisbon Treaty has brought to locus standi the problems with proving standing in any particular case remain.<sup>62</sup>

However, there are Commission decisions which produce different effects according to whether the aid in question is new or existing aid: thus, Commission decisions that open the formal investigation procedure for existing aid do not produce legal effects and therefore, are not admissible before the Court of Justice for annulment. Conversely, Commission decisions to open the formal investigation procedure for new aid produce

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<sup>58</sup> S Balthasar, 'Locus Standi Rules for Challenges to Regulatory Acts by Private Applicants: The New Article 263(4) TFEU', (2010) 35(4) *European Law Review* 542, 548.

<sup>59</sup> Order of the General Court (Seventh Chamber, extended composition) of 6 September 2011 in Case T-18/10 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2011] ECR 00 (NYR)

<sup>60</sup> Albertina Albers-Llorens, 'Remedies against the EU institutions after Lisbon: an era of opportunity?' [2012] 71(3) *CLJ* 507, 525.

<sup>61</sup> Case T-221/10 *Iberdrola SA v European Commission* [2012] ECR 00 (NYR) paras 44-48

<sup>62</sup> M Barennes, "The Standing of Competitors of the Aid Recipient in State Aid Cases" in H. Kanninen, N Korjus and A Rosas (eds.) *EU Competition law in Context* (Oxford 2009), 321, 332-333

legal effects and are admissible for annulment.<sup>63</sup> This diversification is justified, because the decision to open the formal investigation for measures classified as new aid alters the position of both the measure and the beneficiaries. The change is found in that the perception of new aid means that there is an element of doubt, whether the measure is legal or not.<sup>64</sup>

From the examination of the case law, concerning cases that an annulment of a state aid decision is sought, the issue of the nature or the form of the act that is being challenged seems to appear quite often. The issue has to do with the distinction of the final decision that can be challenged, from various preparatory acts that the Commission issues at the lengthy preliminary or formal investigation procedures, such as preparatory acts that inform the Member State of the different stages of the examination, which might not be admissible. In the *Athinaiki Techniki*<sup>65</sup> case, the General Court was asked to annul a letter addressed by the Commission to the complainant, *Athinaiki Techniki*, during an exchange of information. In the letter, the Commission informed the undertaking that its complaints against another competitor were not sufficient enough, and that the Commission would not continue with the examination of the case. The General Court ruled that the letter was not a decision that could be admissible for annulment before the Court, according to Article 263 TFEU, because a final decision would follow, which would be admissible for annulment.<sup>66</sup>

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<sup>63</sup> Case C-312/90 *Spain v Commission* [1992] ECR I-4117, para 17; and Case C-47/91 *Italy v Commission* [1992] ECR I-4145, para 25 .

<sup>64</sup> Case C-400/99 *Italy v Commission* [2001] ECR I-7303, para 59.

<sup>65</sup> Case C-362/09 P *Athinaiki Techniki AE v European Commission* [2010] ECR I-13275.

<sup>66</sup> Order of the Court of First Instance of 26 September 2006 in Case T-94/05 *Athinaiki Techniki AE v Commission* [2006] ECR II-73.

The Court of Justice, though, judging the same case, under appeal, held against the General Court that the contested letter was indeed a definite position by the Commission on the complaint of the Athinaiki Techniki; the Court of Justice held that the letter produced legal effects, because it precluded Athinaiki Techniki from taking part in the subsequent formal investigation, and therefore it was admissible for annulment under Article 263 TFEU.<sup>67</sup> The Court by overturning the General Court's judgment reaffirmed that annulment is available to all acts of the institutions regardless of their nature or form. The important criterion to decide on the admissibility is the legal effects that the act produces that changes the legal position of the applicant.<sup>68</sup>

Another type of act that presents special interest in relation to its admissibility for annulment is the different injunctions that the Commission issues, during the administrative procedure, according to the Procedural Regulation,<sup>69</sup> which have been analysed in chapter three. More particularly, the Court has held that the injunctions, provided for in Article 11 of the Procedural Regulation, which constitute an order by the Commission to the Member State to suspend the implementation of the aid measure<sup>70</sup> or to provisionally recover aid<sup>71</sup> already granted, are admissible for annulment. Those types of injunctions do have legal effects, in the meaning of Article 263 TFEU.

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<sup>67</sup> Case C-362/09 P *Athinaiki Techniki AE v European Commission* [2010] ECR I-13275 para 66.

<sup>68</sup> E J Hinchy, 'Case comment: European Union: procedure – judicial review' (2011) 35(5) ECLR N86.

<sup>69</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>70</sup> Case C-400/99 *Italy v Commission* [2001] ECR I-7303, para 51.

<sup>71</sup> Case C-301/87 *France v Commission* [1990] ECR I-307, para 22-23.

Lastly, the Court had the opportunity to rule on the admissibility of information injunctions issued by the Commission, according to Article 10 (3) of the Procedural Regulation.<sup>72</sup> In the recent *Deutsche Post*<sup>73</sup> judgment, the Court overturned the General Court's judgment; the Court held that the information injunction was not admissible for annulment, according to Article 263 TFEU. Instead, it held that the decision produced binding legal effects and after it annulled the decision, it referred the case back to the General Court to rule on the merits of the case.<sup>74</sup>

#### 4.7.3 Who is eligible to bring an annulment action before the Court?

The issue of who is eligible to bring an action for annulment against a Union act has produced abundance of case law and controversy in theory. The problems have to do with standing before the Court, especially before the entry in force of the Lisbon Treaty.<sup>75</sup> Standing before any court refers to the ability to prove sufficient connection with the contested act in that the rights of the applicant are affected by it. If the applicant is successful in proving that, the Court would allow the applicant to challenge the validity of the act and overturn its results. Otherwise, standing is known as *locus standi*. Article 263 TFEU provides for the *locus standi* of the different applicants in cases of annulment of state aid decisions. However, Article 263 TFEU distinguishes between two types of applicants: privileged applicants and non-privileged ones. The effects of this distinction between applicants will be analysed next.

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<sup>72</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>73</sup> Case C-463/10 P *Deutsche post v Commission* [2011] ECR I-09639.

<sup>74</sup> Case comment, 'Information injunctions open to challenge' (2011) 289 EU Focus 31.

<sup>75</sup> A. Arnall, "Private Applicants and the Action for Annulment since *Codorníu* " [2001] 38 C.M.L.Rev. 7; J. Usher, "Direct and Individual Concern: An Effective Remedy or a Conventional Solution?" [2003] 28 E.L.Rev. 575

In actions of annulment of state aid decisions, the privileged applicants are the Member States, according to Article 263(2) TFEU. In chapter three of the thesis it was scrutinised that the administrative procedure of the examination of state aid measures takes place between the Commission and the Member State that plans to grant aid; interested parties especially at preliminary stage cannot submit their comments, which means that they cannot be heard. In addition, Article 25 of the Procedural Regulation<sup>76</sup> considers that the addressee of Commission decisions is the Member State. The two Articles, combined, place Member States in a more favourable position. Consequently, Member States can bring actions for annulment of Union decisions, without having to prove any conditions that would render their action to be admissible. The non-existence of conditions for Member States was established in the case law, long before the adoption of the procedural regulation in fields other than state aid.<sup>77</sup>

The beneficiary of the aid and its competitors in contrast, are legal persons, other than the Member State, and they must bring actions for annulment of state aid decisions, according to Article 263(4) TFEU. This paragraph of Article 263 TFEU provides for the conditions, under which non-privileged applicants can lodge actions for annulment. Those conditions are that the individual applicants must prove that the decision under challenge is of direct and individual concern to them. The literature has been

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<sup>76</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>77</sup> Case 131/86 *United Kingdom v Council* [1988] ECR 905, para 6.

critical of the Court's strict interpretation of the conditions set above.<sup>78</sup>

Those conditions were first defined by the court in its *Plaumann*<sup>79</sup> case.

#### 4.7.3.1 Difficulty in gaining *locus standi* after *Plaumann*

The wording of Article 263(4) TFEU does not allow non-privileged applicants 'unfettered access' to the Court.<sup>80</sup> Furthermore, the *Plaumann* case concerned an action for annulment of a customs duty case and not state aid, however, it is of importance for any annulment action, because for the first time the Court interpreted Article 263(4) TFEU for non-privileged applicants. The Court held that the individual concern of applicants, others than those to whom the decision is addressed to, is proven, if the decision 'affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons'.<sup>81</sup> According to the Court, those attributes or circumstances distinguish them from all others, just like the addressee.

The *Plaumann* test, as those conditions are now known in theory, has been criticised for causing problems for individuals on two fronts: first in reality the number of competitors might be restricted to two, or very few competitors, and how is one of them going to distinguish themselves from the other, since they both compete in the same field? Secondly, the concept

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<sup>78</sup> See for example: P. Craig, 'Standing, Rights, and the Structure of Legal Argument', [2003] 9 European Public Law 493; S. Enchelmaier, 'No-One Slips through the Net? Latest Developments, and Non-Developments, in the European Court of Justice's Jurisprudence on Art. 230(4) EC' [2005] 24 Yearbook of European Law 173

<sup>79</sup> Case 25/62 *Plaumann v Commission* [1963] ECR 199.

<sup>80</sup> P Craig, 'Legality, standing and substantive review In Community Law' (1994) 14 OJLS 507, 508.

<sup>81</sup> *Ibid.*

of individual concern made it practically impossible for private parties to bring enforcement actions before the Court of Justice.<sup>82</sup>

More specifically, in state aid cases the ability of private parties to prove direct concern is not that difficult. The contested decision is not addressed to the individual, but rather to the Member State, which may need to adopt national measures, in order to implement the Commission decision. However, the Court has held that if the Member State has demonstrated that it intends to implement the decision, and there is no doubt about it from the documents of the procedure, then any beneficiary or competitor may be directly concerned.<sup>83</sup>

In contrast, proving individual concern, when third parties ask for an act to be annulled, is hindered by other factors in state aid cases. The fact that the administrative procedure is so centralised and particularly the fact that the preliminary investigation procedure is basically only performed between the Commission and the Member State<sup>84</sup> causes problems to third parties, if they wanted to annul a Commission decision of that stage.

Also, another problem might be that the individual might not have all the information it needs from the preliminary stage, because the Commission does not request, or publishes full information at this stage. This limited information available might cause problems to a third party having to prove individual concern, in order for its action for annulment to be declared admissible before the Court.<sup>85</sup>

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<sup>82</sup> P Craig and G de Búrca, *EU Law text cases and materials* (5<sup>th</sup> ed OUP 2011) 495.

<sup>83</sup> Case 11/82 *Piraiki – Patraiki v Commission* [1985] ECR 207, paras 1-10.

<sup>84</sup> See chapter three, paragraph 3.12.4

<sup>85</sup> K Jurimae, 'Standing in state aid cases: what's the state of play?' (2010) 2 *EstAI* 303, 304.

The beneficiary of an individual aid measure can be easily accepted to have direct and individual concern.<sup>86</sup> However, another factor that hinders the application of the individual concern test in state aid cases emerges when the contested decision refers to an aid scheme, rather than individual aid. Aid schemes are intended for general application, and the recipients are not individually concerned. The Court has held, in that respect, that an undertaking cannot prove individual concern solely because it operates in the sector that the aid scheme is intended for.<sup>87</sup> However, the situation changes, according to the Court, if the undertaking is the actual beneficiary of aid in an aid scheme, which was ordered to repay that aid from the Commission. The beneficiary of the aid is individually concerned to challenge the validity of the Commission's recovery decision.<sup>88</sup>

According to the *TWD* judgment<sup>89</sup>, which involved recovery of unlawful aid, the Court held that the fact that the recipient of aid did not bring an action for annulment of the Commission's recovery decision meant that the decision became definitive vis-a-vis the recipient of the aid. Furthermore, the decision could not be challenged later in a national court, during the challenge of the national measures implementing that decision, and therefore the recipients of aid have lost standing.

After the Treaty of Lisbon, which amended Article 263 TFEU, there is now a new condition on standing for actions for annulment in addition to the older conditions, which required the applicant to be either the addressee

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<sup>86</sup> U Soltesz and H Bielez, 'Judicial review of state aid decisions – recent developments' (2004) 25(3) ECLR 133, 139.

<sup>87</sup> Case C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855, para 33.

<sup>88</sup> *Ibid*, para 34-35.

<sup>89</sup> Case T-244/93 and T-486/93 *TWD Deggendorf v Commission* [1995] ECR II-2265 para 26 and 17.



of the contested act or being directly and individually concerned. According to the new Article 263(4) TFEU, if the applicant is concerned by an act that does not entail implementing measures, that is sufficient to gain standing. This new provision has widened standing, by making certain measures of general application challengeable.<sup>90</sup>

However, does the TWD principle apply to measures of general application? The answer seems to be against the application of the TWD principle, which makes an act definitive, if the time limit has passed. The rationale is that the time limit for challenging a general measure will start from the day of publication, notification or made known to the interested party, which does not secure legal certainty.<sup>91</sup>

The Court has established that there is a general principle of effective judicial protection, which underlies in the common constitutional traditions of the Member States.<sup>92</sup> This principle is also included in the Convention for the protection of human rights<sup>93</sup> and the Charter of fundamental rights.<sup>94</sup> This principle is directed towards the national courts; however, the European Courts should follow this principle as well, since they apply EU law just like the national courts do. Otherwise, if the principle of effective judicial protection was only intended to apply to the national courts, there would have been a division in the European system of judicial control, where one part of it, which is the national courts are

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<sup>90</sup> S Peers and M Costa, 'Judicial review of EU acts after the Treaty of Lisbon' [2012] ECL Review 8(1) 82.

<sup>91</sup> R Schwensfeier, 'The TWD principle post Lisbon' [2012] ELR 37(2) 156.

<sup>92</sup> Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18.

<sup>93</sup> Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>94</sup> Article 47 of the Charter of Fundamental Rights of the European Union [2010] OJ C83/02

subjected to different, stricter rules than the European Courts. The issue was raised in the Court of Justice: in the *Ocalan*<sup>95</sup> case it was claimed that the strict interpretation of the rules on gaining *locus standi*, before the Court, according to Article 263 (4) TFEU, breached Article 6 of the Convention on Human Rights. The case was not successful, and, although, it did not have state aid as its subject matter, is important for all annulment actions since Article 263 (4) TFEU is applied in every case for annulment, no matter what its subject matter is.

#### 4.7.3.2 The rationale for the strict interpretation of the ‘direct and individual concern’ criterion in standing before the Court of Justice

The interpretation of the individual concern criterion for third parties has been rather hostile in the early case law, which has been examined so far in this part of the chapter. The Court has almost restricted the rights of third parties to gain standing in actions of annulment of Institutional decisions. Some writers and the Court attribute that strictness in the intention of the Treaty itself: the wording of Article 263(4) TFEU presupposes that private parties should not be free to challenge Union decisions, which are addressed to Member States.<sup>96</sup>

However, that is not entirely true. Other writers have made the distinction between the subject matter of the annulment cases. In the state aid and competition cases the administrative procedure sometimes is initiated by a complaint from a competitor. This exchange of information between the Commission and the complainant has led to the granting of

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<sup>95</sup> Case C-229/05 P *Ocalan v Council* [2007] ECR I-439, para 76.

<sup>96</sup> C Harding, ‘The private interest in challenging Community action’ (1980) 5 ELR 354.

standing for competitors more easily,<sup>97</sup> than in cases with different subject matter, such as the Common agricultural policy; that was the subject matter of the initial judgment that created the Plaumann test; the *Plaumann* case itself.

Whatever the reasons for that strict interpretation of the individual concern criterion may be, the Union's state aid control has recently changed course somewhat, in that the private enforcement is so eagerly promoted by the Commission. It should be reminded, at this point, that private enforcement is part of the decentralisation of state aid, which will allow private parties to challenge state aid decisions both before national courts and also before the Union's Courts. There is no real benefit, if the Commission promotes the enforcement before national courts, but does not act to resolve the issues that appear in enforcement before the Court of Justice, such as the problems with *locus standi*; after all, the Court of Justice currently delivers more judgments on state aid than the national courts do.

#### 4.7.3.3 How has the case law on actions for the annulment of state aid decisions evolved?

Due to the problems caused by the strict interpretation of the *locus standi* rules in Article 263 (4) TFEU proceedings and the criticism it has generated from the academics, the Court has recently shown signs that the interpretation of standing for non-privileged applicants might be relaxed. In cases *Cook*<sup>98</sup> and *Matra*,<sup>99</sup> the Court established another test, less strict than the one in *Plaumann*: third parties or competitors that were denied the right

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<sup>97</sup> P Craig and G de Búrca, *EU Law text cases and materials* (5<sup>th</sup> ed OUP 2011) 502.

<sup>98</sup> Case C-198/91 *Cook v Commission* [1993] ECR I-2487, paras 22-26.

<sup>99</sup> Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paras 16-18.

to challenge an Article 108(2) TFEU decision, because the Commission did not open the formal investigation procedure of Article 108(2) TFEU, should be given the right to challenge that Commission decision as concerned parties, whose rights might have been affected by the aid.<sup>100</sup> The new test found difficulties in its application before the Court though. In some cases the Court rejected the applicant's action as inadmissible, because the applicants had not explicitly stated that they wanted to secure their procedural rights that were denied by not opening the formal investigation procedure.<sup>101</sup>

The Court clarified in subsequent judgments that the applicant, whose rights were violated by the Commission's decision not to open the formal investigation procedure, should *not* be considered to be individually concerned by the mere fact that it demonstrates that it is a party concerned, within the meaning of Article 108(2) TFEU. Therefore, the competitor's annulment action was inadmissible, according to Article 263(4) TFEU.<sup>102</sup> This judgment set aside the opposing ruling at first instance, which considered the action for annulment admissible on more relaxed conditions.

Even more recently, the competitors rights to challenge Commission decisions on state aid seem to have been strengthened by two judgments: in *Athinaiki Techniki*<sup>103</sup> the Court considered a letter, which stated that there was no sufficient evidence to open the formal investigation procedure to be a challengeable act; therefore, allowing the competitor to bring an action of

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<sup>100</sup> It should be reminded, here, that the preliminary examination of Article 108(3) does not secure the rights of third parties, as does the preliminary examination procedure, during which the Commission is fully informed.

<sup>101</sup> Case C-313/90 *CIRFS and others v Commission* [1993] ECR I1125, para 18.

<sup>102</sup> Case C-78/03 P *Commission v A.R.E* [2005] ECR I-10737, paras 68-69 and 73.

<sup>103</sup> Case C-362/09 P *Athinaiki Techniki AE v European Commission* [2010] ECR I-13275.

annulment of that ‘decision’ before the Court, according to Article 263(4) TFEU.

The case law is still not settled in the matter of admissibility of third party actions of annulment of Commission decisions; it is affected by the interpretation of the individual concern criterion that the Court adopts each time. The criticism and the uncertainty concerning the issue could end, and the rights of third parties strengthened, if the relevant Articles of the procedural regulation are amended.<sup>104</sup>

#### 4.7.4 Time limits and scope of review

Article 263(6) TFEU imposes a time limit by which the action for annulment must be brought before the Court. The limit is two months from the time of publication of the contested act or the notification of it to the applicant, if it is an act that needs to be notified; or from the day the applicant became aware of it, if it was neither published nor notified. After that two month limit has passed, the action will be inadmissible.

Contrary, Article 263(2) TFEU limits the Court’s jurisdiction. The Court performs judicial review of acts adopted by the institutions of the European Union. Thus, the grounds available to it for review are substantive matters, such as lack of competence, or misuse of powers, or breach of the Treaties or secondary legislation and procedural grounds such as infringement of procedural rules.

In the field of state aid the Court can rule on the concept of aid, according to the rules of Article 107 and 108 TFEU, if called to do so by the applicant. Due to the fact that the Commission enjoys wide discretion in its

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<sup>104</sup> A Bartosch, ‘Procedural rights denied for too long; is legal conservatism finally heading for its “Gotterdammerung”?’ [2011] 4 EStAL 579.

assessment of aid measures, the Court has some limits to what it cannot review: the Commission especially enjoys wide discretion in its assessment of compatibility, according to Article 107(3) TFEU, which involves assessments of economic and social nature,<sup>105</sup> which will be further analysed in the seventh chapter of this thesis, because their form part of the previous modernisations of state aid control. In those areas that the Commission enjoys discretion, the Court cannot substitute its own assessment for that of the Commission. The Court is restricted when reviewing such a decision, to examine if the Commission has misused its powers or erred manifestly.<sup>106</sup>

However, in other judgments, the Court has made a distinction between the judicial review it performs on whether it is examining the application of Article 107(1) TFEU or 108(3) TFEU. At first instance, the General Court held that the Union's judicature may review the criteria chosen by the Commission, when it is assessing whether a measure falls under Article 107(1) TFEU;<sup>107</sup> in other words, when assessing the concept of aid. The reason for that is that the criteria applied to analyse the concept of aid are objective.

Contrary, the Commission enjoys discretion in assessing the compatibility of aid, according to Article 108(3) TFEU, but relies on complex economic and social assessments, which are not objective; therefore, the Court should perform a 'comprehensive review as to whether

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<sup>105</sup> Case C-303/88 *Italy v Commission* [1991] ECR I-1433, para 34; Case C-156/98 *Germany v Commission* [2000] ECR I-6857, para 67; Case C-310/99 *Italy v Commission* [2002] ECR I-2289, para 45.

<sup>106</sup> Case C-310/99 *Italy v Commission* [2002] ECR I-2289, para 46; Case C-169/95 *Spain v Commission* [1997] ECR I-135, para 34; Case C-288/96 *Germany V Commission* [2000] ECR I-8237, para 26.

<sup>107</sup> Case T-67/94 *Ladbroke Racing Ltd v Commission* [1998] ECR II-1, para 52.

a measure falls within the scope of Article 92(1) [now 107(1) TFEU] of the Treaty’, according to those assessments.<sup>108</sup>

This distinction however, is not yet settled case law; in a more recent judgment the Court has returned to its settled case law, as it called it: whenever the Court reviews a Commission decision, which has applied complex economic analysis to establish the concept of aid, according to Article 107(1) TFEU, the Court must confine itself in reviewing the rules of procedure, whether the facts where have been accurately stated and whether there was not any manifest error or misuse of powers.<sup>109</sup>

#### 4.7.5 Actions for failure to act against the Commission

The next available action against the Union’s institutions in the state aid field is an action for failure to act. This action is provided for in Article 265 TFEU. It should be noted that the actions before the Court can only be admissible, if the applicant has previously asked the institution to act, and a time limit of two months has passed from the time it was asked to act.<sup>110</sup> In the state aid context, this action would appear possible, whenever the Commission fails to adopt a decision terminating the preliminary or formal investigation procedures.<sup>111</sup>

Another possible case that an action for failure to act would be permissible in the state aid field would be that against the Commission’s failure to open the formal investigation procedure. The interested party, which would usually be a competitor that filed the complained with the

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<sup>108</sup> Case C-83/98 *France v Ladbroke Racing Ltd and Commission* [2000] ECR I-3271, para 25.

<sup>109</sup> Case C-341/06 *Chronopost SA and La POSTE V UFEX and others* [2008] ECR I-4777, para 143

<sup>110</sup> Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, para 34.

<sup>111</sup> Case C-302/99 P and C-308/99 P *Commission v TF1* [2001] ECR I-5603.

Commission in the first place, should be allowed to bring an action acknowledging that failure to act.<sup>112</sup>

The judgment on an action for failure to act against the Union's institution can only determine the failure. Nevertheless, the Court cannot go further and issue direction to the Commission, as to what action is needed for compliance. It is up to the institution to take the necessary measures to comply with the Court's judgment.<sup>113</sup>

Article 265 (1) TFEU classifies Member States and other institutions as privileged applicants, for the purpose of bringing actions for failure to comply with obligations under EU law. Whereas, Article 265(3) TFEU classifies natural persons or legal persons as non-privileged applicants, in same way as the Treaty classifies applicants of actions for annulment. In analogy, everything that was analysed in paragraph 4.7.3 of this chapter, in relation with admissibility of applicants, is relevant for actions for failure to act as well. Indeed, the Court has held that Articles 263 and 265 TFEU 'prescribe one and the same remedy'.<sup>114</sup> The Court has also held that just as Article 263(4) TFEU allows third parties to challenge the validity of acts if they are directly and individually concerned, the same interpretation must be given for the purpose of Article 265(3) TFEU.<sup>115</sup>

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<sup>112</sup> U Soltesz and H Bielez, 'Judicial review of state aid decisions – recent developments' (2004) 25(3) ECLR 133, 145.

<sup>113</sup> Case T-74/92 *Ladbroke v Commission* [1995] ECR II-115, para 75, and Case T-127/98 *UPS Europe v Commission* [1999] ECR II-2633, para 50

<sup>114</sup> Case T-395/04 *Air one v Commission* [2006] ECR II-1343, para 25.

<sup>115</sup> Case C-68/95 *T. Port* [1996] ECR I-6065, para 59.



#### 4.8 ACTIONS FOR DAMAGES BEFORE THE COURT

Article 340 TFEU provides for the liability of the Union's Institutions if damage is caused by the performance of their duties. In the field of state aid, the potential liability of the Commission, during the performance of its duties regarding state aid control, or against the Council, when authorising aid according to Article 108(2) TFEU, will be non-contractual liability; consequently, Article 340(2) TFEU will be applicable to state aid cases. The action for damages against the Commission for a damage caused by the performance of its state aid control will be brought before the Court of Justice, according to Article 268 TFEU. However, this Article is interpreted in conjunction with Article 256 TFEU, which awards jurisdiction at first instance to the General Court; therefore, the case for damages will reach the Court of Justice on appeal only.<sup>116</sup>

4.8.1 The criteria for awarding damages in the Court of justice in state aid cases.

Article 340, paragraph 2 TFEU contains a condition that the claimant has to prove in Court, in order for his claim for damages to be successful. This condition is that the claim will be judged in accordance to the principles, which are common to the laws on non-contractual liability of the Member States. So the question that arises is which are those conditions and where can they be found? Due to the fact that there is no European tort law in force in the European Union, the Court must look at the individual national laws of the Member States, and accept the principles that appear in

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<sup>116</sup> The same stands for all other types of actions in this chapter as well. According to Article 256 TFEU the General Court has jurisdiction at first instance and the Court of Justice on appeal.

most jurisdictions as common between Member States; then the Court can apply them in each case for damages.

The case law of the Court provides a list of principles that are common in all Member States: the Court held that three conditions must be met to prove non-contractual liability of its institutions. Firstly, that ‘the rule of law infringed must be intended to confer rights on individuals;’<sup>117</sup> secondly, that ‘the breach must be sufficiently serious;’<sup>118</sup> and thirdly ‘there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.’<sup>119</sup>

To establish sufficient breach of Union law, which is the second condition the applicant, according to the Court, must prove that the Institution manifestly and gravely disregarded the limits of its discretion.<sup>120</sup> Since the Commission has wide discretion it should be difficult to prove sufficient breach in state aid cases. Out of the three conditions the most difficult to prove in state aid must be the direct link between the decision on the aid measure and the damage suffered by the applicant, which is the third condition. In *BAI V Commission*,<sup>121</sup> the applicant BAI claimed for compensation for the damage allegedly suffered because of the delay on behalf of the Commission in communicating to it the text of a decision terminating the procedure under Article 108(2) TFEU, concerning aid to a competitor. The Court rejected both claims from the applicant that it suffered material damage or alternatively non-material damage from the

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<sup>117</sup> Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, para 51.

<sup>118</sup> *ibid*

<sup>119</sup> *ibid*.

<sup>120</sup> Case C-472/00P *Commission v Fresh Marine* [2003] ECR I-7541, para 25.

<sup>121</sup> Case T-230/95 *BAI v Commission* [1999] ECR II-123.

delay of the notification of the Commission's decision. The Court based its findings to the fact that the cause of any damage should have been the decision and not the delay in notification. Since the applicant did not prove the existence of a link between the alleged damage and the Commission's decision the claim was dismissed.<sup>122</sup>

#### 4.8.2 Cases for damages in the Court for breach of state aid law.

The search in the Court's case law database<sup>123</sup> returned just twenty damages cases in the field of state aid control. The number of course is small, and the reasons for this are probably that the burden of proof lies with the applicant<sup>124</sup> and the conditions cannot be proven easily by the applicant. In relation to the third condition, the Court has held that even if the conduct of the Institution is such as to cause the damage, it is the possible negligent actions of the applicant that can break the causal link with the Institution, and thus the condition will not be satisfied. The Court suggests that if the applicant did not use the available interim measures, in order to reduce the loss that he allegedly suffered, this could be considered negligent action.<sup>125</sup> This connection of the claim for damages by the Court with interim relief seems like a rather unfair imposition on the plaintiffs.

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<sup>122</sup> Ibid, para 37.

<sup>123</sup> Court of Justice of the European Union website available at <  
[http://curia.europa.eu/juris/liste.jsf?pro=RESP%252C&nat=&oqp=&dates=&lg=&language=en&jur=C%2CT&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=ALL&pcs=O&avg=&page=1&mat=AIDE%252Cor&jge=&for=&cid=396710](http://curia.europa.eu/juris/liste.jsf?pro=RESP%252C&nat=&oqp=&dates=&lg=&language=en&jur=C%2CT&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=ALL&pcs=O&avg=&page=1&mat=AIDE%252Cor&jge=&for=&cid=396710)> accessed on 29/10/2013

<sup>124</sup> Joined Cases C-363/88 and C-364/88 *Finsider and Others v Commission* [1992] ECR I-359, para 25; Case C-362/95 P *Blackspur DIY and Others v Council and Commission* [1997] ECR I-4775, para 31, and Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, para 98.

<sup>125</sup> Case T-344/04 *Denis Bouychou commissaire à l'exécution du plan de cession de la société Stardust Marine v Commission* [2007] ECR II-91, para 41-43.

In a successful case of state aid, where the applicant was actually awarded damages against the Commission, the Court accepted that the publication of confidential information on the Official Journal, included in a decision by the Commission on a state aid measure, caused harm to the reputation of the applicant, and therefore it accepted the causal link between the Commission's decision and the harm to the undertaking.<sup>126</sup> Certainly, there is need for more transparency from the Commission and such decisions do not promote transparency; on the contrary, they withhold information from the Commission's communications to the public. The second criterion that seeks more transparency in the implementation of the state aid policy has failed in this example.

One possible benefit for the applicant claiming for damages in state aid cases might come from the comparison of the conditions contained in Article 340 (2) TFEU with those contained in Article 263(4) and 265(3) TFEU. The applicant for damages does not have the obligation to prove direct and individual concern as those applicants that seek to annul Commission decisions or declare that the Commission failed to act. So, even if the causal link is difficult to prove, at least the standing requirements are more relaxed in this procedure.<sup>127</sup> Lastly, it has been said that private enforcement actions for damages do not actually restore observance of EU state aid law; this is due to the fact that they only directly benefit the applicant and restoration of the observance of EU law is only achieved

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<sup>126</sup> Case T-88/09 *Idromacchine Srl v European Commission* [2011] ECR II-07833.

<sup>127</sup> K Bacon, 'Enforcement in the European Court' in K Bacon (ed), *European Community law of state aid* (OUP 2009) 531.

when illegal aid is successfully prohibited from being granted or recovered.<sup>128</sup>

#### 4.9 MEMBER STATES' ACTIONS AGAINST OTHER MEMBER STATES IN THE STATE AID FIELD

The Treaty allows the possibility for a Member State of the European Union to bring an action against another Member State for failing to fulfil its obligations under the Treaties. Article 259 TFEU (former 227 TEC) grants that privilege to Member States. The Treaty, though, imposes the obligation for the matter to pass through the Commission first. The Commission must be informed and it must provide its opinion first, then the Member State can turn to the Court. Indeed, the Commission's opinion is not substantial after three months from the time it received the complaint.

From the research in the Court's database of case law, no action of a Member State against another has turned up in the field of state aid.<sup>129</sup> Clearly, the Member States do not consider it practical to enforce state aid rules through that procedure. After all, if a complaint reaches the Commission it will most likely start the administrative procedure, which may or may not lead to the judicial review of its decisions before the Court of Justice.

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<sup>128</sup> Martin Köhler, 'Private Enforcement of State Aid Law – Problems of Guaranteeing EU Rights by means of National (Procedural) Law' [2012] 3 EStAL 369, 371.

<sup>129</sup> The search was performed in the Court's database of cases, which is available on the internet < <http://curia.europa.eu/juris/recherche.jsf?language=en> > accessed on 20-5-2012.

#### 4.10 PROBLEMS WITH THE COURT'S JURISDICTION TO ORDER INTERIM RELIEF.

Article 278 TFEU provides that the actions before the Court have no suspensory effect. Hence, the institution's act continues to produce its effects until the final judgment, unless the applicant asks for a suspension. Also, according to Article 279 TFEU the Court may order interim measures. The jurisdiction to order interim measures derives from the principle of effective judicial protection.<sup>130</sup>

Cumulative conditions must be satisfied before an order for interim measures can be adopted by the Court: 'such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests'.<sup>131</sup>

Those conditions are scrutinised by the Court, thus applications for interim measures are not successful in state aid cases.<sup>132</sup> If the applicants, though, are deterred from applying for interim measures, this might affect the outcome of other possible procedures, such as the action for damages. In some cases the Court connects the award of damages with a previous filing for interim relief by the applicant for damages. In *BAI V Commission* for example, the Court notes that the applicant never asked the suspension of execution of the Commission's decision that allegedly caused it damage. The Court seems to advise that if the applicant had asked for a suspension

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<sup>130</sup> Order of 31 July 2003 in Case C-208/03 P-R *Le Pen v Parliament* [2003] ECR I-7939, paras 78 to 88.

<sup>131</sup> Case C-445/00 R *Austria v Council* [2001] ECR I-1461, para 73.

<sup>132</sup> U Soltesz and H Bielez, 'Judicial review of state aid decisions – recent developments' (2004) 25(3) ECLR 133, 151.

the alleged damage would have been reduced;<sup>133</sup> however, the applicant would still need to prove the conditions for the award of damages.

The General Court accepted interim relief in a series of orders, having to do with repayment of aid after negative Commission decisions; however, the Court of Justice, judging on appeal dismissed those orders. The Court based its decision on the fact that the decision that was asked to be suspended had already been judged by the Court in an action for annulment, and the application was found to be unfounded; thus the condition that the order was justified *prima facie*, in fact and in law was not satisfied.<sup>134</sup>

#### 4.11 SHOULD THERE BE A EUROPEAN COMPETITION COURT?

Ever since the Court of First Instance [now renamed as the General Court] was established, it was awarded with the jurisdiction to hear competition law and state aid law cases at first Instance. The appeals against the General Court's judgments are heard by the Court of Justice. This was introduced for two reasons; first, to relief the Court of its workload and secondly, the appeals in substance were necessary, in order to bring the European Judicial system for competition and state aid in line with the European Convention on Human Rights.<sup>135</sup>

Looking at table 7 in the Appendix, it is clear that the number of Competition law cases is, as expected, much higher than state aid cases. Together, the two subject matters, combined, make up about one fourth of

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<sup>133</sup> Case T-230/95 *BAI v Commission* [1999] ECR II-123 para 36.

<sup>134</sup> Order of the President of the Court of 29 April 2005 in Case C-404/04 P-R *Technische Glaswerke Ilmenau GmbH v Commission* [2005] ECR I-3539, para 19.

<sup>135</sup> OECD, 'Competition law and policy in the European Union' available on line <<http://www.oecd.org/dataoecd/7/41/35908641.pdf> > 42-43, accessed on 26-01-2012.

all new cases introduced before the General Court every year. The number is substantial but not as high as, for example, cases introduced concerning intellectual property matters.

It has been debated, whether a Competition Court should be established.<sup>136</sup> This would be possible, since according to the Treaty<sup>137</sup> the Council and the Parliament have the competence to set up specialised courts, attached to the General Court.<sup>138</sup> The benefits of such a reform would be that a specialised Court might be more efficient in delivering judgments in competition cases, where complex economic and social analysis is required, at some extent; also, the time required to reach a decision would be reduced significantly, and that would help deliver justice more promptly, without the now usual delays. If such a reform was to happen the benefits would influence the enforcement of state aid law in the European Court in a positive way. It would be a welcome reform from the researcher's opinion, and a recommendation of this part of the thesis.

However, most writers believe that the Court and especially the General Court 'has done well since it was set up'.<sup>139</sup> Some changes to the Procedural Regulation, with the aim at improving the standing conditions of third parties would be more beneficial for state aid control, given the small numbers of cases. Besides, it is true that the Court has the ability to call for experts to submit their expert opinions, if that is considered to be needed in

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<sup>136</sup> James Flynn, 'Has Europe got the Competition Court it needs?' in Carl Baudenbacher (ed) [et al] *Liber Amicorum in honour of Bo Vesterdorf* (Bruylant 2007) 375.

<sup>137</sup> Article 257 of the TFEU [2012] OJ C326/47.

<sup>138</sup> D Slater, S Thomas, D Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?' College of Europe - GCLC working paper 04/08 available online < <http://www.gclc.coleurop.be> > accessed on 26-11-2011.

<sup>139</sup> *Ibid.*



some cases. More use of that provision might also be more beneficial, instead of a new Competition Court.

#### 4.12 CONCLUSION

The Commission's decisions are subject to judicial review by the General Court and the Court of Justice. The Commission has the power to ask the Court to enforce its decisions in cases that the Member State does not comply with its decision or the conditions within that. Also, Member States and individuals can ask the Court to review the validity of institution's decisions and further ask for damages, when the Union's institutions actions cause loss to them.

The effects of the structure of the administrative procedure between the Commission and the Member state planning to grant aid, as it is established in the Procedural Regulation reach the judicial review by the Court. The Treaty itself distinguishes applicants for state aid cases in privileged and non-privileged ones. This distinction creates problems for beneficiaries of aid and competitors of beneficiaries that are subjected under strict conditions of admissibility, in case they want to bring any action against a Commission decision or the failure of the institution to act. This situation jeopardises the rights of those third parties, placing them in a discriminating situation, which affects the whole efficiency of the judicial review system of state aid decision by the Court of Justice of the European Union.

A more liberal interpretation of the conditions that awards standing to non-privileged applicants before the Court has been introduced in some

cases; however, the case law is not yet settled, and many writers have debated the need for the Court to adopt more liberal judgments in the state aid field. If that would to happen, many problems would be resolved, and the enforcement of state aid in the Court would be more appealing to individuals. The research applied the third criterion and tested the enforcement of state aid control in the European Courts. The conclusion is that there are many problems that explain the little numbers of cases before the European Courts. Those problems mainly have to do with the difficulty for third parties to fulfil the condition of having direct and individual concern, in order for them to gain standing before the Court and challenge a Commission state aid decision. Additionally, in damages cases the difficulty mainly lies in proving the direct link between the Commission's decision and the alleged damage suffered by the competitor or beneficiary of the aid. Finally, in state aid cases the Court has rejected interim relief orders because it does not consider them *prima facie* justified. Ultimately, having effective enforcement will benefit the state aid policy, in achieving the aim of less and better targeted aid. Next, the thesis critically analyses the powers and procedures of the national actors of the implementation of the state aid policy.

## CHAPTER FIVE

### IS THERE A NEED FOR MORE EFFICIENT ENFORCEMENT OF STATE AID CONTROL AT THE NATIONAL LEVEL?

#### 5.1 INTRODUCTION

At the supranational level, the Commission has a dual role regarding state aid control in the European Union. First, the Commission has the power to shape state aid policy by introducing new legislation and secondly, it has the competence to enforce this state aid policy by applying its *a priori* and *ex post* control<sup>140</sup> of state aid measures, and by ordering recovery of illegal state aid. Those powers were the subject matter of the third chapter. EU state aid rules can also be enforced by national authorities of each Member State. The TFEU does not involve a harmonisation of national laws and procedures that allow them to grant aid.<sup>141</sup> It does not affect Member States' powers to design and grant state aid; this is a national competence.<sup>142</sup>

However, there is a problem of misapplication of state aid rules at the national level: there are irregularities, particularly with non-notified aid, that have been identified as non-compliance on behalf of the Member States

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<sup>140</sup> The Commission's control can be characterised as *a priori* when a measure is notified to the Commission before its implementation by the Member State and the Commission can decide on its compatibility before it is applied. On the other hand, the *ex post* control of state aid by the Commission occurs whenever the Commission has not been notified of a state aid measure that has been applied, or when a previously cleared measure is challenged for not complying with the conditions of its pre-approval.

<sup>141</sup> C Quigley, *European State aid Law and Policy* (2<sup>nd</sup> edn Hart, Oxford 2009)

<sup>142</sup> Michael Blauberger, 'From negative to positive integration? European state aid control through soft and hard law' (2008) Max Planck Institute for the study of Societies, Discussion Paper 08/4, 14 available online at < [http://www.mpifg.de/pu/mpifg\\_dp/dp08-4.pdf](http://www.mpifg.de/pu/mpifg_dp/dp08-4.pdf) > last accessed 3/10/2013

with the state aid rules at the national level<sup>143</sup> that make the analysis of the national aspect of state aid control necessary. The Scoreboard reveals that negative Decisions with recovery represent about 23% of the 986 Decision that the Commission took for unlawful aid between 2000-2010. This intervention by the Commission in the form of negative Decisions is nine times higher in non-notified cases.<sup>144</sup> This problem has led some to say that ‘either at the design stage and/or implementation stage of a State aid measure is that competition and the interests of the rest of the Member States are likely to be harmed to a disproportionate degree.’<sup>145</sup> This chapter therefore aims at providing for the possible solutions to the problem of non-compliance at the national level, which has been highlighted by the Modernisation initiative, by analysing the possible solutions: the institutional changes that Member States can adopt, if they want to better comply with state aid control in the future.

The first question that arises from the fact that state aid control can be performed at both the supranational and national level is which national authorities have been entrusted with the control of state aid. The second question that follows from the first is which provisions are applicable at the national level? Finally, the last question has to do with the assessment of the level of state aid control at the national level and the conclusions on the shortfalls and positives of the national aspect of state aid enforcement. In this chapter the first research criterion will be applied: the thesis will test the

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<sup>143</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM) COM(2012) 209 final para 21.

<sup>144</sup> State aid Scoreboard Autumn 2012 COM (2012) 778 final para 5.1.

<sup>145</sup> Phedon Nicolaides, ‘State Aid Modernization: Institutions for Enforcement of State Aid Rules’ (2012) 35 (3) World Competition 457, 460.

speed and applicability of national procedures that relate to the implementation of state aid control.

## 5.2 ACTIONS FOR STRENGTHENING CONFORMITY WITH EU STATE AID RULES AT THE NATIONAL LEVEL.

The problem of non-compliance with state aid rules has its roots in the reluctance of Member States' governments to give up control of their national industrial policies. In the past the Commission has sought to overcome that with improving the procedures that were examined in previous chapters or amending and introducing new soft law instruments that would clarify issues and provide guidance. Detailed rules can make enforcement less costly but can also make economic policies and state aid control less flexible.<sup>146</sup> Both of those changes were meant to incentivise Member States to comply and help the Commission to monitor state aid better. However, the Court of Auditors<sup>147</sup> reported that the Commission failed to perform ex post monitoring of non-notified measures, as well as measures that were adopted by Member States under the *de minimis* Regulation.<sup>148</sup>

There are actions that can be implemented to achieve the goals of the Modernisation: which is to have effective national systems accompanied by increased commitment and delivery on the part of the national authorities in

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<sup>146</sup> Phedon Nicolaides, 'Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both?' (2003) 26(2) *World Competition* 263, 269.

<sup>147</sup> European Court of Auditors, Special Report 15/2011: Do the Commission's Procedures Ensure Effective Management of State Aid Control? Available at <<http://eca.europa.eu/portal/pls/portal/docs/1/10952771.PDF>> accessed on 11/8/2013 paras 17-18

<sup>148</sup> Commission Regulation (EC) 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379/5

terms of compliance.<sup>149</sup> To achieve the goal of information gathering from individuals and undertakings the Procedural Regulation has included the option of imposing fines and periodic penalties to those that do not comply with the Commission's information requests.<sup>150</sup> This provision does not apply to Member States because they are under an obligation to cooperate with the Commission;<sup>151</sup> an obligation that derives from Article 4 of the TEU.<sup>152</sup> This provision could be extended to cover not only information requests but also non-compliance with state aid rules of procedure and substance, such as the standstill obligation. If sanctions for granting illegal state aid outweigh the gains from granting it, by adding the costs for penalties and other administrative costs then Member States might be more compliant with state aid law.<sup>153</sup> However, the imposition of fines and penalties as a means of enforcement has been criticised in the previous chapters, in relation to fines for not enforcing recovery Decisions; it is not the best possible deterrent, especially in the current crisis.

Another proposal for achieving 'commitment and delivery on the part of the national authorities in terms of compliance'<sup>154</sup> with state aid control rules is training the national authorities that are involved in

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<sup>149</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM), Brussels 8.5.2012 COM(2012) 209 final para 21.

<sup>150</sup> Article 6(b)1 of Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>151</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15 para 9.

<sup>152</sup> Consolidated version of the Treaty on European Union [2008] OJ C-115/17

<sup>153</sup> Phedon Nicolaides, 'Control of State Aid in the European Union Compliance, Sanctions and Rational Behaviour' (2002) 25(3) World Competition 249, 259.

<sup>154</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM), Brussels 8.5.2012 COM(2012) 209 final, para 21

designing and granting state aid. The Commission already operates schemes for training national Judges. The programme started in 2002 and has already trained 7000 national Judges in the Member States aiming to promote better enforcement of state aid in national Courts.<sup>155</sup> However, the role of the Commission is not to train national administrators and even if training was an option it would be a very expensive and large scale operation. The only viable option for training members of the national administration systems is through the annual Competition Forums that the Commission initiated in 2012. However, training will not automatically lead to better compliance: if an authority has better knowledge of the state aid rules it might use this knowledge to make measures seem compatible, even if it still intends to bend the rules.<sup>156</sup>

Lastly, another proposal for achieving better compliance with state aid control at the national level has been put forward and is less costly than training. The certification of national authorities that design and grant block exempted state aid measures could be an option. The certification involves external verification that the authority has effective internal procedures and that its reports are credible.<sup>157</sup> According to that proposal, certification of national authorities is a requirement for other EU policies, such as the payments of the Common Agricultural Policy that cannot be implemented by authorities that have not been certified for their institutional capacity.<sup>158</sup> This practice could be implemented to state aid control, although it does

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<sup>155</sup> Available data from the Commission at <http://ec.europa.eu/competition/court/training.html> accessed on 4/11/2013.

<sup>156</sup> Phedon Nicolaides, 'State Aid Modernization: Institutions for Enforcement of State Aid Rules'. (2012) 35(3) *World Competition* 457, 462.

<sup>157</sup> Phedon Nicolaides, 'State Aid Modernization: Institutions for Enforcement of State Aid Rules'. (2012) 35(3) *World Competition* 457, 466

<sup>158</sup> *Ibid.*

involve willingness from the Member States' governments to agree to such external certifications for such an important industrial policy instrument that is state aid. The research suggests that the introduction of independent national state aid authorities is a viable option that will enhance compliance with state aid control rules. This position will be further analysed next.

### 5.3 THE PRINCIPLE OF SUBSIDIARITY AND ITS APPLICATION TO STATE AID CONTROL.

#### 5.3.1 The principle of subsidiarity in the Treaty

The competences of the Union institutions are either exclusive, or shared with the Member States (otherwise, non-exclusive). The allocation of shared competences is facilitated by the principle of subsidiarity. The principle of subsidiarity was introduced in EU law by Article 5 of the then EC Treaty, after its amendment by the Maastricht Treaty.<sup>159</sup> Before the adoption of the Lisbon Treaty, the principle of subsidiarity was applied in areas, where the Community did not have exclusive competence. The Community could take action in non-exclusive areas of competence, only if the action was needed at the Community level, because the effects of that action would better serve the purpose, or if the Member States could not achieve the objectives of the required action on their own. After the entry into force of the Lisbon Treaty the principles of subsidiarity and proportionality have been reinforced.

The Lisbon Treaty includes the principle in Article 5 TEU and the protocol on the application of the principles of subsidiarity and

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<sup>159</sup> Treaty establishing the European Community (TEC) [2002] OJ C325/33, Article 5.



proportionality, which accompanies the Treaty. The powers of the Union and its institutions are conferred upon them by the Treaties. How these powers are exercised should be judged according to the principles of subsidiarity and proportionality. When the Union has exclusive competence, the principle of subsidiarity cannot be applied; it is only applicable when the Union shares competence with the Member States. However, those who call for a limitation of Union competences and the reinstatement of national powers can make use of the principle of subsidiarity; others, though, think that the principle is not adequate to promote their cause of reallocation of powers, because subsidiarity cannot provide for the optimum allocation of competence between the Union and the Member States.<sup>160</sup>

### 5.3.2 Is there scope of application of the principle of subsidiarity in the implementation of the EU's state aid policy?

In state aid control the Union has exclusive competence to decide on the compatibility of aid measures with the Treaty, because the Treaty confers that power to the Commission exclusively.<sup>161</sup> Subsequently, as the rules stand, there is no scope for the application of the principle of subsidiarity, when the Commission decides on the application of the compatibility criteria of Article 107 TFEU. However, the Member States can decide on the application of the Block Exemption Regulation and the *de minimis* aid, without having to consult the Commission, beforehand.

Consequently, there is scope for the application of the principle of subsidiarity, whenever the Member States decide on the correct enforcement of state aid in the form of the observation of the standstill obligation and the

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<sup>160</sup> P Craig and G de Búrca, *The evolution of EU Law* (2<sup>nd</sup> edn, OUP 2011) 59.

<sup>161</sup> Article 107 of the Treaty.

implementation of the recovery orders by the Commission. According to the Commission's President: 'the EU works better, when it focuses on its core business.'<sup>162</sup> The principle of subsidiarity can help the Union allocate its resources efficiently, and focus on where the Union can offer more value, leaving Member States to complement the Union institutions at the national level. There is no need to consider the Union's institutions and the Member States' governments and public bodies as rivals, rather, it would be best to clearly define their competences and allow them some space in state aid control.

In the current climate that the Eurozone debt crisis has taken control over politics all over the European Union, there is a heightened debate about the powers and competences of the EU, in general. Due to the fact that the rules on the implementation of the Euro have failed, partly because of a design flaw, where the monetary union was achieved before establishing a fiscal and financial union, and partly because of the Member States' governments not respecting the stability pact rules that required them to keep budget deficits and public debt low, many European leaders, economists and the markets call for a change in the Treaty.

There is one trend that desires closer cooperation, in new areas that had been left in the competence of the Member States before the crisis, such as taxation and pensions. On the other hand, there is another trend that seeks to restore powers at the national level, because they feel that the Union has failed, and since it is not producing better results as the principle of

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<sup>162</sup> President J M Barroso, 'Political Guidelines for the next Commission' available online < [http://ec.europa.eu/commission\\_2010-2014/president/pdf/press\\_20090903\\_en.pdf](http://ec.europa.eu/commission_2010-2014/president/pdf/press_20090903_en.pdf) > accessed on 23/2/2012.

subsidiarity requires, Member States could have more powers over the Union institutions. Whatever happens in the future, it is now certain that there is going to be another amendment to the Treaties. The right balance is needed between Union powers and national implementation of state aid rules and the principle of subsidiarity can help prove who does what more efficiently.

#### 5.4 THE ROLE AND POWERS OF NATIONAL AUTHORITIES IN STATE AID ENFORCEMENT.

Currently, there are different realities within the 28 Member States, in relation to the existence of national state aid authorities: some Member States have independent national administrative bodies, with some powers to implement state aid rules and some do not; or are relying on national competition authorities, or just the departments within the ministries of economics.

Out of the 28 current members of the Union, twenty<sup>163</sup> rely on ministries or departments within ministries to assist and coordinate granting authorities. Their main responsibilities include assistance with the notification of aid measures, monitoring of state aid and sending annual reports on state aid of *de minimis* or exempted from notification measures that have been implemented within their national jurisdictions. Six Member States<sup>164</sup> rely on their national competition authorities whose primary role is to enforce Articles 101 and 102 of the TFEU and merger control, to perform

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<sup>163</sup> Those are Austria, Belgium, Bulgaria, Estonia, Germany, Greece, Finland, France, Hungary, Ireland, Italy, Latvia, Luxemburg, Netherlands, Portugal, Slovenia, Slovakia, Spain, Sweden and the United Kingdom.

<sup>164</sup> Namely, Croatia, the Czech Republic, Denmark, Lithuania, Poland and Romania.

the notification and reporting of state aid measures to the Commission. Finally, two Member States, namely Malta and Cyprus have introduced two new independent state aid administrative authorities. There is interconnection between Competition authorities and state aid control in some Member States, therefore it is beneficial to examine the enforcement powers of national Competition authorities of competition law and conclude on whether their practice can be extended in state aid enforcement as well.

5.4.1 Comparisons between the status of national competition authorities that enforce Articles 101 and 102 TFEU and the status of state aid national authorities.

The enforcement of Articles 101 and 102 TFEU by Member States' authorities is provided for in the Treaty: Article 104 TFEU granted powers to competent national authorities to apply Articles 101(1) TFEU and 102 TFEU, until the necessary implementing Regulation where adopted by the Council. However, even after the adoption of the implementing Regulations the Member States' authorities powers to enforce Articles 101 and 102 TFEU still remain: Council Regulation (EC) no 1/2003 clearly abolishes the notification system which would lead to exemption of the application of Articles 101 of the Treaty, previously set up by Regulation 17 of 6 February 1962, which was the first implementing Regulation of Articles 101 and 102 TFEU.<sup>165</sup>

Ever since the entry into force of the Regulation 1/2003 the national competition authorities and the national courts have been granted powers to directly apply Articles 101(1) and 102 and also 101(3) TFEU, which leads

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<sup>165</sup> Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L1/2003, Paragraph 4.

to exemption from application of the prohibition imposed on agreements by Article 101(1) TFEU. The enforcement system of Articles 101 and 102 TFEU is clearly a decentralised system of enforcement, where the Commission and the national authorities share powers and competence, which of course should not be overlapping one another's competences.<sup>166</sup> This is achieved by setting up timeframes, which dictate when each one can act and by ensuring the supremacy of EU over national competition law. Those reforms that were introduced in antitrust were a 'source of inspiration'<sup>167</sup> for the reforms that are being implemented in state aid control, which is why the comparison is necessary. Also, others believed that the reforms of state aid control may have involved the decentralisation powers that have been adopted in the procedures of Articles 101 and 102 TFEU,<sup>168</sup> which is another reason why the comparisons between the two reforms need to be analysed here.

In the state aid field the status of national authorities is not so clear or uniform as the analysis of Member States' practices indicates. Some national competition authorities have powers to control state aid, but not all of them, and the legal basis of their powers is not clear, but does exist into national laws or accession agreements. The EU legislation for state aid is still highly centralised with regard to enforcement of the rules. The Treaty reserves for the Commission the primary role in state aid, both in legislation and enforcement. Letting aside national courts, whose role in enforcing state aid law is clearer and will be examined in the following chapter, there seems

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<sup>166</sup> Phedon Nicolaidis, 'Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both?' (2003) 26(2) *World Competition* 263, 264.

<sup>167</sup> Thibaut Kleiner, 'Modernization of state aid policy' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 9

<sup>168</sup> John Grayston, 'State Aid Policy runs aground' [2003] 26 *Euro.Law.* 8, 9

to be two different approaches towards the role of national state aid authorities among Member States, depending on their time of accession.

#### 5.4.2 Different types of national state aid authorities in the European Union.

Starting from the SAAP of 2005<sup>169</sup> the Commission has considered that it may be useful to expand the application of the Notice on Cooperation with national Judges to other national bodies, as well. The Commission did not clarify its intentions on that matter, nor has the Commission acted on this declaration, since the adoption of the SAAP. The amended Notice of 2009<sup>170</sup> only refers to national courts and did not include other national authorities in its scope of application.

Public enforcement of state aid law is performed by national competition authorities in some Member States that have set up divisions within them to monitor national state aid measures. The Member States that acceded to the union after the expansion of 2004<sup>171</sup> were under an obligation to establish national state aid authorities, before accession to the Union. After all, most applicant countries do not usually have detailed national provisions for state aid in their legal systems, since state aid control exists to safeguard the internal market, which those countries are applying for membership of. This obligation was included in the Association

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<sup>169</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final.

<sup>170</sup> Commission Notice on the enforcement of state aid law by national courts OJ [2009] C85/01

<sup>171</sup> Namely, Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia.

Partnerships agreements, signed by applicant countries and the EU Member States.<sup>172</sup>

Those new types of agreements were introduced for the first time, in order to help acceding countries to fulfil their obligations to adopt the *acquis communautaire*, the eighth chapter of which included competition law. The Association Agreements contain a similar provision, calling for candidate countries to ‘further reinforce the administrative capacity (both with respect to antitrust and state aid control); ensure enforcement of the rules in antitrust and state aid; maintain a comprehensive state aid inventory and annual report’.<sup>173</sup> There is no specific obligation to establish an independent state aid authority and some countries chose to include divisions within their newly established competition authorities.

The competences of those national authorities include coordinating, advising and monitoring powers. Mainly, they have the obligation under national laws to coordinate the different public authorities that are involved in the granting of aid, and advise them on how to draft the notification forms, according to the Commission’s requirements. The competition authorities send the notification documents to the Commission and also, national authorities should keep a register of all existing aid. The experience of those national authorities was successful and proves that a mixed system of state aid control is feasible.<sup>174</sup>

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<sup>172</sup> Accession partnership documents for the fifth enlargement can be found online <[http://ec.europa.eu/enlargement/archives/key\\_documents/accession\\_partnerships\\_2001\\_en.htm](http://ec.europa.eu/enlargement/archives/key_documents/accession_partnerships_2001_en.htm) > accessed on 2-11-2011

<sup>173</sup> Council Decision of 28 January 2002 on the principles priorities intermediate objectives and Association Partnership with Cyprus OJ[2002] L44/12.

<sup>174</sup> Phedon Nicolaides, ‘Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both?’ (2003) 26(2) World Competition 263, 272.

### 5.4.3 Powers of national authorities that perform state aid enforcement.

The extent of the powers of the national competition authorities entrusted with state aid control varies slightly in some Member States: the Czech Office for the Protection of Competition has the power to impose fines to both granting authorities and beneficiaries of aid for not submitting to the office the requested documents concerning an aid measure.<sup>175</sup> Similar powers to impose fines, for not complying with requests for appropriate information, are featured in the competences of the Polish Office of Competition and Consumer Protection.<sup>176</sup> In Denmark, the Competition Council may order the termination or repayment of aid that is unlawful or distorts competition, after a decision on the lawfulness made by the relevant minister.<sup>177</sup>

Some national Competition authorities include detailed data for aid granted by public authorities in their annual reports to the Commission, with information about the volume of aid and the specific sectors that received higher amounts of aid each year.<sup>178</sup> Finally, some national competition authorities have been entrusted with the power to carry out the necessary procedures according to national laws for repayment of illegal aid.<sup>179</sup> However, two Member States have chosen to establish independent state aid

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<sup>175</sup> < <http://www.compet.cz/en/state-aid/competence-in-the-area-of-state-aid/> > accessed on 2-11-2011.

<sup>176</sup> < [http://www.uokik.gov.pl/state\\_aid\\_system\\_in\\_poland.php](http://www.uokik.gov.pl/state_aid_system_in_poland.php) > accessed on 2-11-2011.

<sup>177</sup> Part 3a of the Danish Competition Act No 1027 of 1 October 2010  
<[http://www.kfst.dk/fileadmin/webmasterfiles/konkurrence/Fusionskontrol/Consolidated Act No. 1027 of 21 August 2007 as amended as of 1 October 2010.pdf](http://www.kfst.dk/fileadmin/webmasterfiles/konkurrence/Fusionskontrol/Consolidated_Act_No._1027_of_21_August_2007_as_amended_as_of_1_October_2010.pdf) > accessed on 2-11-2011.

<sup>178</sup> See for example the Report by the Lithuanian Competition Commission  
<[http://www.konkuren.lt/en/annual/2010\\_eng.pdf](http://www.konkuren.lt/en/annual/2010_eng.pdf) > accessed on 2-11-2011.

<sup>179</sup> For example the polish Office of competition and consumer protection  
<[http://www.uokik.gov.pl/state\\_aid\\_system\\_in\\_poland.php](http://www.uokik.gov.pl/state_aid_system_in_poland.php) > accessed on 2-11-2011.



authorities, in order to fulfil their obligation to comply with the state aid *acquis*. Those are Cyprus and Malta, which established respectively the Office of the Commissioner for State Aid Control and the State Aid Monitoring Board. Their competences extend to the point where the authority has powers to pass binding opinions on the application or not of the General Block Exemption Regulation, for any national measures that fall into its criteria, and also non-binding opinions on the compatibility of all other measures with the EU state aid rules.

## 5.5 ARE SPECIALISED NATIONAL ADMINISTRATIVE AUTHORITIES FOR STATE AID NEEDED IN ALL MEMBER STATES OF THE EU?

Firstly, and before this thesis critically analyses the benefits of a decentralised national system for the control of state aid, there needs to be a distinction between the competences of the national state aid authorities, before any candidate country's accession to the EU, and the competences it eventually has after accession.<sup>180</sup>

### 5.5.1 Powers of national authorities at the pre-accession stage.

During the pre-accession stage, the state aid national authorities in candidate states play the role that the Commission has for the Union's Member States, with regard to the control of subsidies. It has been said that

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<sup>180</sup> It was mentioned earlier in this chapter that countries that acceded to the Union during the fifth enlargement of 2004 had specific obligation with regard to establishing national authorities for the control of subsidies and introducing national laws, which in large extent copied the Treaty provisions on state aid. Ever since then the subsequent accession followed the same path concerning the obligations of candidate countries for state aid control.

establishing independent national state aid authorities at this stage because such authorities are probably ‘better suited’ than Ministries to implement state aid control, since they could resist political pressure.<sup>181</sup> Their primary competence is to make sure that all the requirements that the EU Commission had set for the closing of the Chapter on Competition were satisfied and secondly, the national authorities had the competence to assess existing and new aid and to decide whether it was compatible with their national state aid laws and subsequently with the Treaty of Rome provisions on state aid.<sup>182</sup> It is evident that the national authorities were replacing the duties of the EU Commission for as long as it had no competence in candidate countries.

#### 5.5.2 Powers of national state aid authorities after accession to the Union.

Following accession the Treaty fully applies and is incorporated into national law, which has as a consequence that the powers and competences of the national authorities need to be adjusted to the new conditions. Thus, the national authorities, regardless of whether they are in the form of a competition authority or an independent state aid authority, they lose the ability to declare aid compatible with the internal market. That is because Article 107(1) TFEU is not directly applicable to the Member States. The Article, though, that is directly applicable in the national legal order is 108 (3) TFEU, which provides for the standstill obligation. The standstill

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<sup>181</sup> Alexander Birnstiel and Helge Heinrich, ‘State Aid in the Accession States’ in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 59

<sup>182</sup> See for example Commission, Enlargement Strategy Paper < [http://ec.europa.eu/enlargement/archives/pdf/key\\_documents/2000/strat\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/strat_en.pdf) > accessed on 10/3/2012.

obligation is still observed by national state aid authorities (and national courts), even after accession.

## 5.6 BENEFITS OF THE DECENTRALISED IMPLEMENTATION OF STATE AID CONTROL BY NATIONAL STATE AID AUTHORITIES.

Having analysed the state of play with regard to competences of the national authorities, the thesis will now examine the benefits that a decentralised implementation of state aid control can bring to the European wide target of less and better targeted state aid; in other words, can the national authorities implement state aid policy effectively, and what should their position be in the future?

### 5.6.1 The modernisation of state aid control in relation to national state aid authorities.

According to the Commission the State Aid Modernisation aims to exclude more types of aid from the notification obligation, namely: making good the damage caused by natural disasters; social aid for transport for residents of remote regions; certain broadband infrastructure; innovation; culture and heritage conservation; sports and multifunctional infrastructure.<sup>183</sup> Also, the Commission proposes<sup>184</sup> to establish a national *de minimis* state aid register in every member state, which will include aid measures that fall under the thresholds of the *de minimis* Regulation.<sup>185</sup>

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<sup>183</sup> Draft GBER II available at <  
[http://ec.europa.eu/competition/consultations/2013\\_second\\_gber/index\\_en.html](http://ec.europa.eu/competition/consultations/2013_second_gber/index_en.html)>  
accessed on 3/11/2013.

<sup>184</sup> Article 6(1) of the Draft Commission Regulation of 17.7.2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid C(2013) 4448 draft.

<sup>185</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid [2006] OJ L 379/5

Therefore, the responsibilities of Member States for ensuring the effective implementation of state aid control have increased.<sup>186</sup>

Before the State Aid Modernisation of 2012, the proposal to establish national state aid authorities was part of the State Aid Action Plan of 2005 and the consultation with the stakeholders that followed the adoption of the SAAP document.<sup>187</sup> The Commission also summarised the results of the consultation in a document published online, which gives a clear view of how both Member States and private stakeholders consider the possibility of the Commission pressing for the establishment of independent state aid authorities.<sup>188</sup> The conclusion though is that the Commission was not able to eliminate differences between Member States in this matter and it did not succeed in achieving support for the creation of a network of state aid national authorities similar to the European Competition Network of national antitrust authorities.<sup>189</sup> State aid seems to be an unsuitable ground form harmonisation among Member States.<sup>190</sup>

Before analysing the views of the stakeholders, it is necessary to mention that the Member States enjoy the principle of institutional

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<sup>186</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM) COM(2012) 209 final para 21.

<sup>187</sup> The individual responses to the consultation on the SAAP from the stakeholders, both public and private entities can be found on the Commission website <[http://ec.europa.eu/competition/state\\_aid/reform/comments\\_saap/index.html](http://ec.europa.eu/competition/state_aid/reform/comments_saap/index.html)> accessed on 15-11-2011.

<sup>188</sup> European Commission, Results of the consultation on the state aid action plan (SAAP) - detailed summary (09-02-2006) <[http://ec.europa.eu/competition/state\\_aid/reform/comments\\_saap/saap.pdf](http://ec.europa.eu/competition/state_aid/reform/comments_saap/saap.pdf)> accessed on 15-11-2011.

<sup>189</sup> Thibaut Kleiner, 'Modernization of state aid policy' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 23

<sup>190</sup> Thibaut Kleiner, 'Modernization of state aid policy' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 23

autonomy.<sup>191</sup> This means that the Commission cannot impose its views to the Member States' institutions and authorities, and that Member States' national institutions do not have to follow the Commission's views on how national administration should be performed. They are obligated however, to follow and to fully apply EU law, due to the supremacy of EU law over national law, if there is contradiction.

The consultation produced a highly negative result towards national state aid authorities. Most of the respondents disapprove of the creation of such authorities, or at least require more information and clarification from the Commission about it.<sup>192</sup> Only 15 respondents support the idea, whereas, 28 respondents do not support it. What is really interesting from the results presented by the Commission is that the private sector generally favours the creation of independent national state aid authorities, whereas, the public sector does not endorse the idea.<sup>193</sup>

Obviously, Member States' governments and public bodies that grant state aid do not want another level of control between the granting of aid and the control already performed by the Commission and the Courts, whether national or Union courts. The reason behind this rejection of independent national authorities could be that they want to use state aid to promote their policies, according to the analysis in the second chapter of the thesis. Independent authorities might create obstacles in the realisation of

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<sup>191</sup> The Principle of the Member States institutional autonomy derives from the old Article 249 TEC, which has now been replaced by Article 291 TFEU.

<sup>192</sup> Ibid 26.

<sup>193</sup> For example the OFT Response to the Action Plan suggests that any national state aid authorities should only be in the form of providing support or advice to the government departments that provide subsidies. See OFT response to the Commission's Action Plan para3.2 <[http://ec.europa.eu/competition/state\\_aid/reform/comments\\_saap/index.html](http://ec.europa.eu/competition/state_aid/reform/comments_saap/index.html)> accessed on 15-11-2011.

government policies. This fact alone should be an argument in favour of creating some type of independent national state aid authorities. The discussion ever since this consultation in 2006 has been stalled, and this thesis aims at contributing to this debate and reviving the debate, if possible, by providing for the benefits of such a move, in contrast with the problems that may occur also.

#### 5.6.2 National state aid authorities can enhance compliance with state aid control.

The number of notifications after the reforms of state aid is still high because ‘the thresholds for de minimis aid are fairly low.’<sup>194</sup> However, at the same time, Member States’ fail to notify all measures that should have been notified to the Commission before implementation, which makes the aid unlawful. According to the Scoreboard<sup>195</sup> the Commission took 986 Decisions from 2000 to 2012 for unlawful aid and took negative Decisions on their compatibility in 224 cases (about 23%). National state aid authorities could have made an economic analysis of the impact of the measure and could have delivered an opinion about the notification necessity of each measure.<sup>196</sup> National state aid authorities can help deliver more efficient state aid control, at the national level, in many ways. Possible areas where they could have competence, without jeopardising the Commission’s exclusive competence to deliver Decisions on the compatibility of measures with the internal market are the areas that the

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<sup>194</sup> Thibaut Kleiner, ‘Modernization of state aid policy’ in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 20

<sup>195</sup> Commission staff working document Facts and figures on State aid in the EU Member States 2012 Update SEC(2012)443 final para 5.1

<sup>196</sup> Phedon Nicolaides, ‘Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both?’ (2003) 26(2) *World Competition* 263, 274

national state aid authorities that do exist, have competence.<sup>197</sup> Some argue,<sup>198</sup> in fact, that there is no specific need for granting the control of subsidies to a supranational authority from an economic point of view. Even if specialised state aid authorities are not established, national authorities like Courts of Auditors could act as the controllers of aid. What is important for the national controllers of aid, whatever their form, is the need for sufficient independence from national political pressures.<sup>199</sup>

5.6.3 Better implementation of the control of measures that are already exempted from notification.

The reason behind the adoption of a General Block Exemption Regulation and the *de minimis* aid, which exempts certain aid from notification to the Commission, is to relieve the Commission from examining certain measures.<sup>200</sup> Those measures are the ones that will probably have limited effects on competition and intra-community trade, because of either their amount and scale, or their overall benefits towards the accomplishment of a common European policy, like the promotion of environmental projects. With the prospect of having even more areas of aid exempted from notification, in the future, and losing the *a priori* control, it would be useful, if a national authority had the competence to examine the facts of the measure and pass a binding opinion over the compliance of the

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<sup>197</sup> Those areas are the implementation of the standstill obligation and the recovery decisions.

<sup>198</sup> M Dewatripont P Seabright, 'Wasteful public spending and state aid control' [2006] 4(2-3) Journal of the European Economic Association 513, 521

<sup>199</sup> Ibid.

<sup>200</sup> Phedon Nicolaidis, 'Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both?' (2003) 26(2) World Competition 263, 271.

measure with those mentioned regulations, namely the Block Exemption Regulation<sup>201</sup> and the *de minimis* Regulation.<sup>202</sup>

5.6.4 National state aid authorities can assist state aid granting bodies more directly than the Commission.

The other possible area where there is potential scope for national authorities to implement state aid control is the advisory services to Ministries and bodies that plan and design aid measures. Having a national contact point where each national and regional authority can turn to for information, concerning the law and the procedures around state aid implementation could be very beneficial, as it would domesticate state aid law in a sense.<sup>203</sup> Especially, since, sometimes, national granting bodies would not be familiar with specialised knowledge about economic notions that the Commission uses during its investigations of measures.

It will be further discussed in the seventh chapter that a refined economic analysis has been introduced in the examination of state aid measures, analysis that requires specialised economic knowledge; this kind of knowledge will not be available to every single civil servant that drafts aid measures on behalf of its employer. A national coordination authority will help deliver better drafted notifications that will save time and make the overall notification obligation more effective.

5.6.5 In what way can information gathering help adopt more pro-efficient aid measures?

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<sup>201</sup> Commission Regulation (EC) 800/2008 on the application of Articles 87 and 88 of the Treaty declaring certain categories of Aid compatible with the Common Market (General Block Exemption Regulation) ('GBER') [2008] OJ L214/3

<sup>202</sup> Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid [2006] OJ L 379/5

<sup>203</sup> Phedon Nicolaidis, 'Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both?' (2003) 26(2) *World Competition* 263, 273.



The national state aid authorities can work more closely with the local beneficiaries in any subsidy, and make the assessments that are needed without the beneficiary being able to withhold information as easily as it would be to do so against the Commission.<sup>204</sup> For the Commission to perform the economic analysis of the impact of the measure on competition it relies on data concerning the market involved, the market shares of the undertakings involved, the market prices for the service that will be subsidised and the eventual effects on competition within that market.

National state aid authorities can provide information through cooperation channels with the Commission and help it deliver robust economic analysis, which will in turn result in stronger decisions by the Commission, on the compatibility of aid. More efficient control of subsidies can come from the sharing of information, both ways.<sup>205</sup> A former deputy Director General of the DG for Competition has acknowledged the need for cooperation in saying that the Commission and the Member States are ‘partners in a learning by doing process’,<sup>206</sup> and that there is no ‘Commission monopoly’ in implementing ‘the refined economic analysis in schemes and cases.’

The communication and exchange of information between the Commission and the Member States’ authorities will ultimately lead to the

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<sup>204</sup> Natalia Fiedziuk, ‘Towards Decentralization of State Aid Control: The Case of Services of General Economic Interest’ (2013) 36(3) *World Competition* 387, 389

<sup>205</sup> A Zemplerova, ‘The Community state aid action plan and the challenge of developing an optimal enforcement system’ in I Lianos and I Kokkoris (eds), *The reform of EC Competition Law: New challenges* (2010 Kluwer) 527.

<sup>206</sup> Deputy Director General, DG Competition, L Evans, Concluding remarks 5<sup>th</sup> experts forum on new developments in European State aid law Speech, Brussels 21-22 May 2007 < [http://ec.europa.eu/competition/speeches/text/sp2007\\_03\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2007_03_en.pdf) > accessed on 18-11-2011.

creation of a ‘common state aid culture’<sup>207</sup> for all Member States, even for those that do not traditionally have the culture of controlling state funds in the Union. In comparison with antitrust where the exchange of information after the adoption of the new regulation in 2003 is more enhanced, cooperation between national authorities and the supranational authorities is still underdeveloped.

5.6.6 Can the reduction of the overload that the supranational authority faces result in the control of more distortive aid measures?

The most positive effect of having national authorities in each Member State to deal with the *ex-ante* control of aid measures is the relief of the Commission workload, of having to deal with measures that will not eventually harm competition. The Commission’s focus should be placed on larger projects that can have effects in intra-community trade, and provide advantages for undertakings that will ultimately distort competition and harm consumers. Having a level of control before the measure is examined by the Commission, or even better exempting measures according to the EU rules from Commission control, will lead to better and faster enforcement of state aid law.<sup>208</sup> The *a priori* control of subsidies at the national level can help national authorities plan better designed national measures and stop the implementation of harmful subsidies like rescue aid and redirect the aid that Member States grant to projects that can produce positive outcomes, like innovation and research and development.

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<sup>207</sup> Ibid.

<sup>208</sup> A Mateus T Moreira(eds), *Competition law and economics: advances in competition policy and antitrust* (2005 Kluwer law international) 381.

Moreover, national granting bodies often lack experience, knowledge about the latest EU rules and resources into designing appropriate and benefit producing measures. According to a writer the Member States are not ignoring state aid law, but the law ‘is not understandable and its procedures are cumbersome.’<sup>209</sup> National authorities can help them deliver exactly that, by being an advisory body at the planning stage as well, not only having powers at the enforcement stage.

The Commission, on its own, cannot be effective and timely in its decisions to prevent distortions of competition, unless it bends the rules, as it happened with the crisis package for the fast track examination of measures for credit institutions. Instead of bending or altering the rules, in each crisis, it would be more efficient and transparent to allow the Commission’s resources to focus on what is really harmful and leave less harmful measures to be controlled by national authorities. This partially decentralised state aid control will be more judicious and efficient.

#### 5.6.7 Provide for transparent and straightforward recovery procedures at the national level.

The most important competence that national state aid authorities could be completely entrusted with has to do with securing the repayment of unlawful and misused amounts of aid. In other words, they could perform the enforcement of Commission recovery decisions. Different laws in all Member States have hindered the repayment of illegal aid, because of complex and diverse national laws and procedures that are involved in recovery. Having a central agency that can coordinate procedures, according

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<sup>209</sup> Thibaut Kleiner, ‘Modernization of state aid policy’ in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 11.

to national laws that would have to be applied and coordinating granting bodies, the recipient and possible national court procedures can lead to greater success of repayment being made on time.

To further enhance the repayment process, national state aid authorities could be entrusted with the power to impose fines for those that stall the repayment process, which in turn provide for the incentive or the coercion factor needed into pursuing recovery more vigorously in the future. The provision to impose fines to both the granting body and the beneficiary undertakings has already been adopted by the Czech national competition authority with regard to the violation of obligation to provide the office with information. The Czech Office in 2010 has already imposed fines for violations of the *de minimis* rules in 23 out of 29 decisions taken.<sup>210</sup> This best practice could be copied in other Member States for enforcing compliance with a number of state aid rules including the obligation to recover aid after a decision from the Commission.

This last possible competence to impose fines exposes one negative aspect of not having an independent authority and instead relying on the hard shell of the national administration to secure the recovery. Only having ministries involved in state aid control, at the national level, means that the same authority that might design the measure, should also grant the aid and at the end have to apply the enforcement rules on repayment.<sup>211</sup> This is certainly not going to lead to an efficient outcome, since the controller is

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<sup>210</sup> Office for the protection of competition, Annual report 2010 available at: <[http://www.compet.cz/fileadmin/user\\_upload/VZ\\_EN/AR\\_2010\\_EN.pdf](http://www.compet.cz/fileadmin/user_upload/VZ_EN/AR_2010_EN.pdf)> accessed on 19-11-2011.

<sup>211</sup> This is also criticised as a conflict of interest in the European Commission – DG Competition, ‘Study on the enforcement of state aid law at national level available online < [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493)> accessed on 30-7-2012

actually the one being controlled by itself or by others in the same level of administration.

## 5.7 NEGATIVE EFFECTS FROM THE CREATION OF INDEPENDENT NATIONAL STATE AID AUTHORITIES.

It is true that the creation of national state aid authorities has met opposition more than favourable advocacy. This is because such a step in state aid law can create problems and not only solutions. The possible negative aspects of creating independent national state aid authoritative in all Member States were highlighted by the respondents of the consultation on the objectives set out by the SAAP. Next the thesis will analyse those negative effects and propose ways that might help overcome the problems.

### 5.7.1 Conflict of interests and competences. Roles and powers.

Having another level of control alongside the competences of the commission, the Court of Justice and the national courts of the Member States, whose role will be analysed in the following chapter of this thesis, may create conflicts of interest and conflict of competences between all those bodies. National administrative authorities that could perform some powers of enforcement at the national level might be susceptible to political and economic pressure by national governments and markets to promote their interests. Another concern is that national competition authorities in the state aid field would have to go against their own governments, because of the government granting the aid, whereas in merger control the

government involvement in little if none at all.<sup>212</sup> For the efficient enforcement of state aid rules the independence of those new national bodies would have to be secured.

Also, secondary legislation at Union level should distinguish the allocation of competences between the Commission and the national courts and also the precedence rules among the decisions made by the different bodies, at different levels. If national authorities adopt decisions for state aid measures, it should be clearly defined in Union legislation that one should hold judgment for the other authority to decide first, in case both the national and the supranational authorities examine the same measure at the same time. Because of the exclusive competence of the Commission, the national authorities should be obligated by the legislation to hold judgment in such a case for the Commission to decide first.

Lastly, another issue that probably makes the establishment of national authorities problematic is the cost of running such an authority. Member states have to keep the costs relating to public administration in control. Consequently, a cost-benefit analysis should be performed before deciding to establish any new independent body. However, the outcome of such an analysis depends on what will be considered as a benefit. The cost certainly includes the staffing and operational expenses. If having efficient measures is the result of the establishment of national authorities, then the benefits will overcome the costs, because the consequences of illegal aid,

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<sup>212</sup> Raymond Luja, 'Does the Modernisation of State Aid Control Put Legal Certainty and Simplicity at Risk?' [2012] 4 EStAL 765

such as recovery and possibly penalties, will not be such a big problem anymore.

#### 5.7.2 Concerns about the legal basis for the establishment of national state aid authorities

Due to the fact that the Treaty rules do not provide for a legal basis to establish such national authorities, there needs to be a legal basis that will secure the transparency and independence of their establishment and competence. Consequently, their establishment should be legally enacted by way of secondary Union legislation or better yet, by way of national laws.

However, due to the principle of institutional independence the Union cannot force the Member States to establish any national authority. Union legislation though,<sup>213</sup> has allowed the Member States to create the National Competition Authorities and this example can be used to resolve the issue of the legal basis for state aid authorities. Furthermore, it is true that the existence of national state aid authorities in the Member States that chose to maintain them after membership relies on national state aid laws<sup>214</sup> and there does not appear to be any conflict with the Treaties, although their powers now are more limited than before accession.

#### 5.7.3 Concerns about jeopardising the uniform enforcement of state aid law

A major concern of most participants in the consultation was the fear that establishing authorities and granting them more powers to enforce state aid at the national level could lead to more confusion, bureaucracy and

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<sup>213</sup> Namely Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1.

<sup>214</sup> Law 30(I) of 2001 of the Republic of Cyprus as amended by law 108(1) of 2009 concerning the control of state aid. Also, Article 57 of the Business Promotion Act established the Maltese State Aid Monitoring Board.

‘uneven application of state aid control’ across the Union.<sup>215</sup> There has been criticism that the complexity of the state aid rules may lead to some authorities to implement rules ‘erroneously’.<sup>216</sup> Or even that national authorities might ‘chose not to notify aid measures to test the limits of state aid rules’.<sup>217</sup>

All of those issues of uneven application are possible, but they are also true currently, since every single Member State chooses to enforce the same rules on state aid control with different bodies, different procedures, their own national procedures and at a different level and quality of implementation, since this thesis has shown the disparities between successes and failures to different aspects of state aid enforcement in different Member States.

Furthermore, any issues of uneven application were successfully overcome by applicant Member States that enforced state aid rules, prior to their accession, with the help and supervision by the Commission. Lastly, lessons could be learnt from the enforcement of antitrust at the national level, and a Network of state aid authorities could be established among Member States, similar to the European Competition Network, which will become a forum of exchange of ideas and best practices that can help all members to implement state aid control more efficiently.<sup>218</sup>

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<sup>215</sup> European Commission, Results of the consultation on the state aid action plan (SAAP) - detailed summary (09-02-2006) 27  
<[http://ec.europa.eu/competition/state\\_aid/reform/comments\\_saap/saap.pdf](http://ec.europa.eu/competition/state_aid/reform/comments_saap/saap.pdf)> accessed on 15-11-2011.

<sup>216</sup> F-E G Diaz, ‘Community Report’ in P Nemitz (ed), *The effective application of EU state aid procedures* (Kluwer law 2007) 49

<sup>217</sup> *Ibid* 50

<sup>218</sup> M Negenman, ‘A state aid network?’ [2011] 4 *EstAL* 621.



## 5.8 POSSIBLE DISRUPTION TO THE FUTURE DECENTRALISATION AND MODERNISATION OF THE STATE AID POLICY IN THE EUROPEAN UNION

In the current economic and political climate, though, is it really possible to achieve efficient levels of decentralised state aid control? The current on-going financial crisis, which started as a banking crisis in 2008, and has turned to a sovereign debt crisis from 2009 onwards in the Union has caused many to argue that more centralised control is needed in the European Union and more particularly in the 17 member strong Eurozone.<sup>219</sup>

The faithful of a more centralised governance in the Eurozone call for the Union's institutions, such as the European Central Bank to be given more powers in relation to the implementation of the fiscal policies of Member States that currently enjoy independent fiscal and taxation policies. Even stronger centralised fiscal policy means that the Union's institutions will have more control over national budgets, which in turn means that the Union's institutions might acquire more powers, in relation to government spending; of course, part of that government spending is state aid, since aid must come from the state or state resources, which means the state budget. This is contrary to the calls made by the Commission itself for a more decentralised implementation of competition policy and enforcement.

Currently, it is not possible for the Treaties, namely the Treaty on the Functioning of the European Union and the Treaty for the European

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<sup>219</sup> The members of the European Union that use the Euro as their currency are Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Spain, the Netherlands.

Union to be amended, due to lack of agreement between the EU Member States. Instead, the Member States opted for an intergovernmental Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG),<sup>220</sup> which is open to all EU Member States, not just the ones that use the Euro. This Treaty did not amend state aid policy, which is provided for in the TFEU. The discussion for the amendment of the Treaties, though, has started among the Member States, because of the harmful effects of the sovereign debt crisis to the Union's economy. Next, the thesis will examine the principles that grant distinct competences to the Commission and the Member States' authorities.

The State Aid Modernisation<sup>221</sup> has made changes that allow the Commission to focus on more distortive measures but puts more responsibilities to Member States. The Commission expresses its expectations of better coordination from Member States in terms of quality and timely notification information but makes little changes to the notification procedures that might assist Member States. Instead, the State Aid Modernisation forces Member States to create a Register for *de minimis* aid that according to most Member States responses to the Commission's consultation creates an unwelcome bureaucratic burden that will entail significant costs for its set up and establishment.<sup>222</sup>

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<sup>220</sup> Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) adopted on 1-2 March 2012, available online < [http://www.european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://www.european-council.europa.eu/media/639235/st00tscg26_en12.pdf) > accessed on 10/3/2012.

<sup>221</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM), Brussels 8.5.2012 COM(2012) 209 final

<sup>222</sup> See for example both the responses of the UK and the German Government that are negative for the creation of the central Register at <[http://ec.europa.eu/competition/consultations/2013\\_second\\_de\\_minimis/index\\_en.htm](http://ec.europa.eu/competition/consultations/2013_second_de_minimis/index_en.htm) > accessed on 3/11/2013.

## 5.9 CONCLUSION

The Commission has competence to adopt rules relating to the implementation of the state aid policy within the European Union and its Member States. Additionally, Member States have already been entrusted with certain aspects of state aid control and enforcement of state aid rules at the national level, such as notification and recovery procedures. The two actors in the state aid field, the national and the supranational authorities have had successful cooperation during the last two enlargement procedures, with the first performing efficient state aid control, supervised by the Commission. However, the monitoring data show that there is non-compliance from Member States with their obligations to observe state aid rules before the adoption of state aid measures, as well as observance of conditions that accompany Commission Decisions for the authorisation of aid.

For the purpose of achieving better compliance, this research has indicated the benefits of creating independent state aid authorities in all Member States and contrasted them with the problems that might arise from such a shift in the status of powers and competences of state aid enforcement. The debate has been going on since the adoption of the SAAP but there has been no clear path as to which should be the way forward. This thesis advocates that there certainly is space for more enforcement powers to be given to national state aid authorities that will work alongside the Commission in implementing state aid policy. This chapter has presented other possible action, such as imposition of fines for non – compliance,

training of national administrators in the same context as national Judges are being trained and finally a system of external certifications of national authorities that might be available as solutions to the problem, in the current state aid context.

This chapter of the thesis applied the first research criterion, which questions the speed and applicability of state aid procedures. The criterion was applied on the national procedures of the Member States that relate to state aid control. The test has proven that there is an uneven European wide level field, with each Member State having a different institutional approach towards the control of subsidies at the national level, mainly affected by the time of accession. The establishment of national state aid authorities may be controversial. However, as the Commission pushes more and more measures into the exemption from notification, either by way of expanding the General Block Exemption Regulation,<sup>223</sup> or by raising the thresholds of *de minimis* aid<sup>224</sup> the a priori control of subsidies is in jeopardy. National authorities can replace that control and the research has presented the benefits that can come from establishing state aid authorities at the national level. Next, the thesis will examine the powers of the other actors in state aid enforcement at the national level, which are the national courts of the

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<sup>223</sup> In paragraph 20 of the State Aid Modernisation Communication the Commission clearly refers to both of those options as a possible amendment. See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM), Brussels 8.5.2012 COM(2012) 209 final, para23

<sup>224</sup> The Commission aims to maintain the current *de minimis* thresholds in its Article 6(1) of the Draft Commission Regulation of 17.7.2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid C(2013) 4448 draft. There are, though, responders to the consultation that believe that raising the threshold to €500.000 would be wise, as the crisis Temporary Framework has indicated that aid exempted from notification up to that level does not distort competition or the internal market. See for example the German Government's response at <[http://ec.europa.eu/competition/consultations/2013\\_second\\_de\\_minimis/de\\_permrep\\_de.pdf](http://ec.europa.eu/competition/consultations/2013_second_de_minimis/de_permrep_de.pdf)> accessed on 3/11/2013.

Union's Member States and their contribution to efficient state aid enforcement.

## CHAPTER SIX

### HOW EFFICIENT IS THE ENFORCEMENT OF STATE AID RULES IN NATIONAL COURTS?

#### 6.1 INTRODUCTION

There are other significant ways to achieve decentralisation of the state aid policy, besides establishing national state aid authorities. Decentralisation or rather partial decentralisation of the European Union's state aid control can also be achieved by enforcement of state aid rules in the national courts of the Member States. Enforcement in national courts can have two forms. One is actions taken by Member States against, for example, the recipient of aid; the other form is a classical private enforcement initiated by individuals.<sup>1</sup> Private enforcement has been the major reform attempt of the Commission's competition policy in the 1990s, in contrast with the 'administrative centralised enforcement' by the Commission, whose powers to control anticompetitive agreements and abuses of dominant position were absolute, before the reform.<sup>2</sup> For state aid policy though, this reform started later, in 2005 and is not completed yet.

The efficient enforcement in national courts of state aid decisions is the main analysis of this chapter. The analysis will be performed by applying the third research criterion, which seeks to test the robustness of the enforcement of state aid. In this chapter the criterion will be applied to the enforcement powers and procedures of national courts that relate to state

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<sup>1</sup> Martin Köhler, 'Private Enforcement of State Aid Law – Problems of Guaranteeing EU Rights by means of National (Procedural) Law' [2012] 3 EStAL 369, 370.

<sup>2</sup> B Rodger and A McCulloch, *Competition law and policy* (Routledge, 2009) 83.

aid control. The analysis is not limited to private enforcement, but will include all possible actions before national courts. The main issues that will be addressed in this chapter of the thesis are: the research will identify the cases that the national courts have competence to judge and the way that their competence is shared with the Union's institutions. Also, the analysis examines the legal bases that are available to individuals in order for them to enjoy the protection of the national courts. Another research question will concern the laws that national courts apply when they judge cases of state aid. Finally, the procedural issues that have arisen, so far, from private litigation in national courts will be examined and also the benefits and problems from promoting private enforcement.

All of those questions will be answered by reviewing the current legal framework, concerning the enforcement in national courts. The Commission sought to promote private litigation before national courts, as a means of achieving 'full respect of state aid rules', in the SAAP.<sup>3</sup> Private enforcement occurs, when an action for infringement of the law is brought before the competent court, by a private individual,<sup>4</sup> who alleges that his rights have been breached by the infringer. The Commission's view was that private litigation could support the need for better effectiveness and credibility of state aid control. This could only be achieved by proper enforcement, in areas, where there were problems identified before, such as the enforcement of recovery decisions at the national level, and the protection of rights of interested parties. If all of those goals are achieved,

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<sup>3</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final.

<sup>4</sup> P Craig and G de Búrca, *EU Law text cases and materials* (5<sup>th</sup> ed OUP, 2011) 181

the greater goal of less and better targeted aid would be better achieved according to the Commission.

However, enforcement in the national courts was first introduced before the adoption of the SAAP in 2005. The first attempt to settle the competence of national courts was the adoption of the Notice on cooperation between national courts and the Commission in the state aid field in 1995.<sup>5</sup> Moreover, another turning point in the area of litigation before Member States courts', concerning state aid, was the 2006 study on enforcement at national level, which was updated in 2009;<sup>6</sup> this study resulted in the adoption of the 2009 Notice on the enforcement of state aid law by national courts.<sup>7</sup> All of those legal documents, together with the Treaty Articles on state aid, comprise the legal framework for the enforcement in national courts and will be analysed next.

## 6.2 BENEFITS FROM ENFORCEMENT OF STATE AID RULES IN NATIONAL COURTS

### 6.2.1 Award of damages in national courts

The first and most important benefit that comes from private enforcement of state aid law is that the Commission, which initiates the public enforcement of state aid, cannot award damages. The competitor or

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<sup>5</sup> Notice on cooperation between national courts and the Commission in the state aid field [1995] OJ C312/8.

<sup>6</sup> The 2009 version of the study on enforcement of state aid rules at national level was commissioned by the Commission to a private law firm and it does not necessarily reflect the views of the Commission. It is a tool though for the Commission to draft its legal documents and it is available online < [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/enforcement\\_study\\_2009.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf) > accessed on 22-11-2011.

<sup>7</sup> Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01.



any third party, who alleges it has suffered damage from an illegal aid, cannot ask the Commission to award damages, because the Treaty does not grant such powers to the Commission.

In addition, national laws on damages or any other state aid claim can be used as a legal basis by national courts to award damages, for breach of EU state aid law that is directly applicable in the national legal order.<sup>8</sup> It is certainly more beneficial to have two legal bases for claim, both national laws and EU law and only the national court can enforce both legal systems.

#### 6.2.2 National courts may have better access to information concerning the case than the Commission

Secondly, private enforcement of state aid law can be more effective, in certain cases, than public enforcement because the party that claims that its rights have been breached, by an illegal state aid, will probably hold vital information concerning the facts of the injury. Usually, competitors are in a position to have first-hand knowledge about the market in which they operate, which will probably be a national market, and the characteristics of the specific sector of the economy. This information would not be available to the Commission on a first-hand basis, and it would have to seek information from the parties to the case, namely the Member State and the beneficiary. The third party can easily use the information it possesses, before the national court proceedings, and prove the damage it claims it has suffered.

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<sup>8</sup> More on damages claims for illegal state aid in the following paragraphs of this chapter.

### 6.2.3 Litigation in national courts can promote social welfare

Further, private enforcement can provide for the maximisation of social welfare. The maximisation of social welfare occurs when the private enforcer initiates proceedings that will result in a court decision, which will correct the damage that has been caused by the illegal state aid. This judgment, though, has both a corrective and a deterrent effect.<sup>9</sup> It will eventually deter the perpetrators of the damage to cause a similar harm, again, in the future. This way, the private enforcement produces results that benefit the welfare of society in general, not only the injured individual in a specific case. The benefits that the individual can achieve from private enforcement will be higher than the ones it will achieve by public enforcement, by the Commission or national competition authorities. There could be breaches of state aid law that the Commission and national state aid authorities might not act against, for example, for reasons of limited information or resources.<sup>10</sup> Consequently, the damage to competition in this case will remain, unless a private enforcer decided to initiate private proceedings.

Accordingly, the benefits that will be achieved through private litigation include the award of damages, for harm caused to a competitor, usually through the grant of illegal state aid, and the subsequent distortion of the market, in which both were competing against each other and against all other competitors. Thus the outcome of private enforcement can provide

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<sup>9</sup> R Mashall, M Meurer, JF Richard, 'Litigation settlement and Collusion' [1994] 109(1) The quarterly Journal of Economics 211.

<sup>10</sup> European Commissioner Mario Monti, 'Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new merger regulation' Speech/04/403 2.

more substantial benefits for the individual company that will seek action before national courts, against illegal state aid.

#### 6.2.4 Litigation in national courts will lead to better compliance with the state aid rules at the national level.

Moreover, private enforcement and the possibility of having to compensate for granting illegal state aid if ordered by the national court will eventually lead to a better level of compliance with the rules.<sup>11</sup> It is often being said that it is not enough to have good rules on any aspect of the law; it is also necessary for every legal order to have proper enforcement mechanisms that will create deterrent effects to possible infringers of those good rules. This is certainly true for state aid control as well. National courts are seen in the Modernisation as a way of achieving compliance with state aid rules: effective private enforcement in national courts can ensure that the exempted measures from the ex ante notification requirement are being observed.<sup>12</sup>

Competitors of the original infringer are more likely to follow court judgments from their national courts, rather than the judgments of the European Courts. Those individual judgments on state aid cases, if held consistently, will become case law and everyone involved in state aid law at the national level will be more familiar with national case law that will lead to better compliance with the state aid framework. Apart, from benefits,

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<sup>11</sup> Ibid.

<sup>12</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM), Brussels 8.5.2012 COM(2012) 209 final, para 21

enforcement of state aid law in national courts has produced some problems, which will be examined next.

### 6.3 THE DOCTRINE OF DIRECT EFFECT OF UNION LAW AND WHICH STATE AID RULES HAVE DIRECT EFFECT

In brief, all Union legislation, primary, which is the Treaty on European Union and the Treaty on the Functioning of the European Union and secondary, which is Decisions and Regulations can in principle have direct effect. The meaning of private enforcement and direct effect was established by the Court's case law: in *Van Gend en Loos*<sup>13</sup> the Court interpreted the Treaty and held that it did not forbid the possibility of private enforcement, even though the Treaty explicitly refers to public enforcement of Union law, by the Commission in Article 258 TFEU (then Articles 169 and 170 of the EC Treaty). Consequently, it was this judgment that first established the legitimacy of private enforcement of EU law in general, because of the broad interpretation of the Treaty by the Court: It held that 'the Community constitutes a new legal order of international law' [...] 'and the subjects of which comprise not only Member States but also their nationals'.<sup>14</sup>

Additionally, the Court established the principle of direct effect: first, it means that a Union provision that has direct effect can be invoked by individuals before national courts and secondly, in its broader interpretation, direct effect confers a right to individuals that can be enforced before

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<sup>13</sup> Case 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 13.

<sup>14</sup> *Ibid.*

national courts.<sup>15</sup> Later, the Court in its case law clarified the conditions, under which direct effect is to be given to a Treaty Article or secondary legislation; the conditions are that the provision must be clear and unconditional.<sup>16</sup> It must be pointed that the Treaty does not refer to direct effect, rather it is a doctrine created by the Court, and direct effect is granted to Treaty Articles and secondary legislation if the conditions are fulfilled by the Court in a case by case basis.

Specifically, state aid provisions that have direct effect are the Article 108 (3) TFEU, which provides for the standstill obligation and the notification obligation,<sup>17</sup> which, if not followed, can be considered a breach of EU law, which can be invoked before national courts by individuals. In a case before the national courts of Romania the Romanian court confirmed for the first time in the Romanian legal order<sup>18</sup> that based in the direct effect of Article 108(3) TFEU the national court has competence to draw all effects with regard illegal aid, including the power to annul the measure that granted illegal aid, even though there were no national laws to serve as a legal basis for the annulment.<sup>19</sup>

However, there are national laws in some Member States that require local national authorities to notify aid to the national central government. Nevertheless, this obligation is derived from national law and is not an obligation of EU law. Consequently, national courts have held that the

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<sup>15</sup> Ibid: 'It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.'

<sup>16</sup> See P Craig and G de Búrca, *EU Law text cases and materials* (5<sup>th</sup> ed OUP, 2011)186.

<sup>17</sup> More about the standstill obligation in chapter three (3.3.3) of the thesis.

<sup>18</sup> Anca Ioana Jurcovan, 'State Aid Private Enforcement – Beginning of a New Era' [2013] 1 EstAL 34.

<sup>19</sup> Decision of Pitești Court of Appeal dated 14 November 2012, no. 1735/30/2011, (NYR).

national laws on implementation of state aid were applicable, and not the Treaty provisions on notification to the Commission.<sup>20</sup>

On the contrary, Article 107 (1) TFEU, which provides for the conditions, under which a measure can be considered state aid,<sup>21</sup> does not have direct effect. The decision on the compatibility of aid with the Treaty criteria remains an exclusive competence of the Commission. This is what distinguishes the powers of the two actors of state aid control, the Commission and the national courts, and provides for distinct, yet, complimentary competences.

The other legal provision that has direct effect and therefore the national courts are expected to apply it, when they judge cases concerning the correct application of state aid rules is the General Block Exemption Regulation (GBER) of 2008.<sup>22</sup> Furthermore, all the Block exemption regulations that were replaced by the GBER had direct effect in the past. Consequently, if the conditions concerning the exemption of notification of aid measures that are exempted by way of the application of the GBER are to be found to have been breached, by the national court, the individuals that have been harmed, by this breach, can ask for reparation by the national court. The legal basis for the reparation would be the breach of the GBER

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<sup>20</sup> Judgment of the Swedish Administrative Court, 'Regeringsrätten', of 10 December 2010, Case 2597/09, AA v Arjängs kommun in Ida Otken Eriksson, 'Two new state aid rulings from the Swedish Supreme Administrative Court' [2011] ESTAL 2, 203

<sup>21</sup> For the conditions see the first chapter of the thesis.

<sup>22</sup> Regulation No 800/2008 on the application of Articles 87 and 88 of the Treaty declaring certain categories of aid compatible with the common market (General Block Exemption Regulation) [2008] OJ L214/3.

provisions. The national court cannot assess the compatibility of a measure with the GBER; that remains a competence of the Commission.<sup>23</sup>

#### 6.4 WHO HAS POWER TO INTERPRET 107(1) TFEU

It follows from the Court's case law that Article 107 (1) TFEU does not have direct effect. But does that mean that the national courts cannot apply the criteria about the definition of aid. And if that was true, then how could they overcome the obstacle of deciding for the first time for new aid measures, for example, whether any specific measure constitutes aid according to the Treaty? Wisely, the Court provided for a solution to the problems that the lack of direct effect of Article 107(1) TFEU could cause and hinder the enforcement at the national level.

In *Steinike & Weinlig*<sup>24</sup> the Court held that the national courts can interpret and apply the concept of aid, in order to determine, whether a measure can be classified as state aid within the Treaty, but refrain from deciding on the compatibility of the measure with the internal market. This judgment allows national courts to apply the concept of aid and if they decide that there is aid according to the notion of the Treaty, they should then decide if that aid measure has been properly notified or not and from then on take the appropriate action. The national court's power to apply the concept of aid does not extend to the compatibility of that aid with the internal market, which is the exclusive competence of the Commission.

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<sup>23</sup> Article 16 of the Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01.

<sup>24</sup> Case 78/76 *Steinike & Weinlig* [1977] ECR 595, para 14; and from then on constant case law, for example see Case C-143 *Adria - Wien Pipeline* [2001] ECR I – 8365, para 29. Also this case law has been transferred as a legal rule in Article 10 of the Notice on enforcement.

In a German case<sup>25</sup> the national court correctly applied the elements of aid in the particular measure that was brought before it. The national court was called, by a competitor, to judge whether an agreement between a German airport and Ryanair that allowed Ryanair to pay less tariffs than other airlines constituted unlawful aid and to order recovery. The national court reached the conclusion that the agreement constituted aid because the Ryanair agreement granted a selective advantage against competitors operating in the market and it involved state resources because the airport was operated by a public body.<sup>26</sup> Therefore, the national court held that the competitor was entitled to request recovery of the unlawful aid and claim damages, which the national court can order according to the case law.<sup>27</sup> This judgment was not endorsed by the national regional court that was called to assess the same benefits granted to Ryanair. The Court rejected the previous judgment and held that only the European Commission can decide that aid is unlawful and order recovery.<sup>28</sup> This analysis proves the confusion that exists between national courts of the same legal order, at different levels about the lengths of their jurisdiction when state aid cases are concerned.

In another case<sup>29</sup> the UK Court of Appeal referred to the *Steinike*<sup>30</sup> judgment. The Court of Appeal had to decide whether a fiscal measure, such as the 1982 Finance Act, created a favourable fiscal regime for BP, ESSO

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<sup>25</sup> Kiel District Court ("Landgericht Kiel 1. Kammer für Handelssachen"), 27.07.2006, 14 O Kart. 176/04, "Ryanair 1"

<sup>26</sup> Ibid paras 85-86.

<sup>27</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, [2008] ECR I-469 paras 45-46.

<sup>28</sup> Coblenz Higher Regional Court ("Oberlandesgericht Koblenz, 2. Zivilkammer"), 25/02/2009, 4 U759/07, "Ryanair 4"

<sup>29</sup> *R v Attorney General, ex parte ICI plc* ([1987] 1 CMLR 72 (Court of Appeal))

<sup>30</sup> Case 78/76 *Steinike & Weinlig* [1977] ECR 595



and SHELL for the production of ethylene in the UK against their competitor ICI. The Court of Appeal held that there was no aid; even though such a fiscal Act could well be state aid in other cases and went on to say that it is for the Commission to say whether a measure is compatible with the internal market.<sup>31</sup>

This case law concerning the national courts' power and obligation even to 'interpret and apply' the concept of aid, but refrain from making decisions on compatibility, can cause problems in its application by national courts. For example, the Greek Council of State, which is the Supreme Administrative Court in Greece and has regularly judged state aid cases, has consistently held that Article 107 is not directly applicable in national procedures and thus has refused to examine the substantive elements of each case, since its view is that it cannot decide on the concept of aid.<sup>32</sup>

## 6.5 THE ROLE OF THE NATIONAL COURTS IN STATE AID ENFORCEMENT

The 1995 Notice<sup>33</sup> gave guidance on cooperation between the Commission and the national courts. The new Notice of 2009<sup>34</sup> is much broader and provides for the specific role that the national courts have in state aid enforcement. This role has been established in the Court's case law, which will be included in the analysis that follows. The national courts

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<sup>31</sup> *R v Attorney General, ex parte ICI plc* ([1987] 1 CMLR 72 (Court of Appeal)) para 102.

<sup>32</sup> See cases 1093/1987, 3905/1998 and 3910/1988 of the Greek Council of State.

<sup>33</sup> Notice on cooperation between national courts and the Commission in the state aid field [1995] OJ C312/8

<sup>34</sup> Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01.

can be called to judge on a number of types of cases that would involve enforcement of state aid rules.

Those types of cases have been grouped in categories: first category is when the national court has to enforce recovery of illegal aid; the proceedings can either be initiated by the Member State's authorities or by a competitor, or even the beneficiary. Second, the national court may be called to judge on a discriminatory imposition of tax that has state aid elements. Third, the national court may have to decide on public procurement cases with state aid involvement. Fourth, the national court may be called to decide on actions for damages, initiated by competitors. Finally, the national court may be called to resolve disputes between national authorities; either central government against local authorities or the opposite; in the last case it would not be private enforcement, but public since proceedings would be between two administrative bodies.<sup>35</sup>

The national court can adopt the following remedies to redress the claimants. Certainly, the remedy that will be decided by the court depends on the type of claim that the claimant makes. For the types of cases that have been presented in the previous paragraph the available remedies, according to Article 26 of the Notice on enforcement<sup>36</sup> are the following: the court can prevent the payment of aid that is found to be unlawful; the

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<sup>35</sup> European Commission – DG Competition, 'Study on the enforcement of state aid law at national level available online < [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493)> accessed on 30-7-2012 39.

<sup>36</sup> Article 26 of the Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01

court can order the recovery of illegal aid;<sup>37</sup> the court can award damages and finally can adopt interim measures until the final decision on the aid measure.

The most important issues of those categories will be addressed in the following paragraphs of the thesis. The chapter is limited to an examination of state aid enforcement at national courts in a European-wide context. Issues concerning the application of specific national laws, such as rules on procedure are excluded from the scope of the thesis.

#### 6.5.1 Enforcement of Commission Decisions in national courts

The primary role that national courts can play in state aid enforcement could be that Member States' authorities can ask for the national court to enforce a negative Commission decision for unlawful or misused aid. The consequence of such a decision is of course an order by the Commission for the Member State to recover aid, as it was analysed in the third chapter of the thesis. The recovery must take place according to national procedures, and the Court held that the national provisions are not to be applied, if recovery is rendered to be impossible because of a national law.<sup>38</sup>

The 2009 update of the enforcement study<sup>39</sup> has found that the actions against unlawful aid are increasing. The remedy for unlawful aid is

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<sup>37</sup> Case C-199/06, *CELF and Ministre de la Culture et de la Communication*, [2008] ECR I-469 paras 45-46.

<sup>38</sup> Case C-142/87, *Belgium v Commission* [1990] ECR I-959.

<sup>39</sup> Lovels, '2009 update of the 2006 study on the enforcement of state aid rules at national level' available online <  
[http://ec.europa.eu/competition/state\\_aid/studies\\_reports/enforcement\\_study\\_2009.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf)  
> accessed on 30-7-2012.

either recovery or interim measures by the national court. The main issues in recovery cases have to do with the action that the national courts should take, in case there is a Commission procedure pending. The national court can order recovery;<sup>40</sup> as long as the Commission has not yet taken a decision that the aid is compatible with the internal market. After such a decision, the national court cannot order recovery. If there is a pending Commission procedure, though, the national court that has been asked to rule on recovery should not leave the interests of the claimant unprotected; Article 62 of the Notice advises that the national court can order interim measures that will be in-place, until the final decision by the Commission on compatibility.

In a German case, the German Federal Court of Justice<sup>41</sup> held that the requirement to fulfill a Commission recovery Decision supersedes any national laws that may impede the full compliance with that Commission Decision. In particular, the German insolvency laws classify Member States authorities that have to recover aid after the recipient has become insolvent as subordinate creditors. This provision of the national law was held by the German court to be insufficient to achieve full recovery in insolvency proceedings.<sup>42</sup> Therefore, the court recalled the member state's obligation to take all measures necessary to implement the recovery Decision without

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<sup>40</sup> The Italian Supreme Court ordered recovery of unlawful aid in case Supreme Court, Fiscal Division ("SC") ("Corte di Cassazione, sezione tributaria"), 15.05.2008, 12168, Amministrazione delle Finanze v. Cassa Risparmio di Ravenna S.p.A.

<sup>41</sup> Federal Court of Justice (FCJ) ("Bundesgerichtshof (BGH), 9. Zivilsenat"), 05.07.2007, IX ZR 221/05, Insolvency procedure v. State aid law 2

<sup>42</sup> Daniel von Brevern, 'German Federal Court of Justice clarifies that State aid law supersedes German bankruptcy law (SKL)', 5 July 2007, e-Competitions Bulletin July 2007, Art. N° 14825 available at < <http://www.concurrences.com/Bulletin/News-Issues/July-2007/German-Federal-Court-of-Justice-14825?onglet=1&lang=en> > accessed on 20/9/2013.

delay<sup>43</sup> and ruled that the provision in the German insolvency law does not satisfy that obligation. As a consequence, the member state had to be classified as a preferred creditor, so that its claim in the proceeds of the insolvency procedure would be satisfied first and thus recovery would be achieved.

#### 6.5.2 Public procurement rules as an example of new rules for the enforcement of state aid control before national courts.

The Directive<sup>44</sup> on procurement for the award of contracts on public works, supply and services recognises the interaction between public procurement and state aid and Article 34 TFEU, which is applied by the Court of Justice in public procurement cases, is directly applicable before national courts.<sup>45</sup> There is an undisputable presumption derived from the Commission's practice and the case law that compliance with the EU Public Procurement Directive in the tendering of a contract presumes compliance with state aid rules about compatibility.<sup>46</sup> This way, public procurement rules can 'cure' otherwise illegal state aid. This presumption can only be disproved if the tenderer received an unjustified economic advantage due to the contractual term not reflecting normal market conditions.<sup>47</sup> This is established by applying the market economy buyer principle, which is

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<sup>43</sup> Case C-277/00 *Germany v Commission* [2004] ECR I-3925, para. 75

<sup>44</sup> Directive 2004/18/EC of the European parliament and of the council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134/114

<sup>45</sup> Alik Doern, 'The interaction between EC rules on public procurement and state aid' [2004] 3 P.P.L.R. 97-98

<sup>46</sup> Albert Sánchez Graells, *Public Procurement and the EU Competition Rules* (Oxford, Hart Publishing, 2011) 120.

<sup>47</sup> Albert Sánchez Graells, 'Public Procurement: An Overview of EU and National Case Law (from an EU Competition Law Perspective)' (November 1, 2011). e-Competitions: National Competition Laws Bulletin, No. 40647, December 8, 2011. Available at SSRN:<<http://ssrn.com/abstract=1968371>> accessed on 10/09/2013 page 7.

applied similarly to the market economy investor principle in competition cases.

Article 55 (3) of the Directive provides that when a tender from a candidate for a public contract is abnormally low, then the contracting authority must exclude that tender from the procurement procedure on the ground that there is illegal state aid, unless the tenderer can prove that the aid is legal only after negotiations with the tenderer. Also, the authority must notify the Commission to take further steps. However, in 2011 the Commission has proposed an amendment to the Procurement Directive that aims to simplify the procedures and introduce direct negotiations with tenderers before the award of contracts.<sup>48</sup> According to specialised research, the new negotiations will shift policy from the ‘very restrictive approach to negotiations that has dominated the EU public procurement rules from their inception’.<sup>49</sup> This could significantly affect the assessment of state aid in abnormally low tenders, which would need more detailed criteria for the application of the market economy buyer concept that leads to the compatibility of the contract with Article 107(1) TFEU.<sup>50</sup>

It is true that the enforcement of public procurement contracts has independent procedural rules, from the enforcement of state aid rules; the procurement rules are enforced through the Remedies Directive<sup>51</sup> that aims

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<sup>48</sup> Proposal for a Directive of the European Parliament and of the Council on public procurement 2011/0438 (COD) COM/2011/0896 final

<sup>49</sup> Albert Sánchez Graells, ‘Public Procurement and State Aid: Reopening the Debate?’ (April 10, 2012). Public Procurement Law Review, Forthcoming. Available at SSRN: <<http://ssrn.com/abstract=2037768>> accessed on 8/11/2013 page 12.

<sup>50</sup> Ibid 17.

<sup>51</sup> Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures

to harmonise the review of national procedures of procurement contracts. It is an example of the EU intervening at the national level to harmonise national laws, by securing that national laws respect the requirements it sets for specific remedies, in cases of breach of procurement rules.<sup>52</sup>

The Remedies Directive for procurement procedures has introduced national review bodies, responsible with the enforcement of public procurement rules.<sup>53</sup> The status of those bodies, which have been introduced into Member States, as independent public authorities and not courts, may cause problems, when they are called to enforce state aid rules. When they have to decide, if there is state aid in an abnormally low bid, will they be able to ask for the Commission of an opinion, according to the Notice on Enforcement? The Notice only refers to Courts and not bodies that have that ability. One solution could be that the term ‘courts’ in the Notice on Enforcement includes national review bodies for procurement contracts. Therefore, they can apply the Notice, and ask for a Commission opinion concerning the existence of aid.<sup>54</sup>

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to the award of public supply and public works contracts [1989] OJ L 395/33 as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31 (the Remedies Directive).

<sup>52</sup> G Skovgaard Olykke, ‘The legal basis which will probably never be used: enforcement of state aid law in a public procurement context’ [2011] 3 EStAL 457, 463.

<sup>53</sup> Article 2(2) of the Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L 395/33 as amended by Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [2007] OJ L 335/31 (the Remedies Directive).

<sup>54</sup> *Ibid.*

This paragraph of the thesis adopts the view that the Remedies Directive can be used as an example of harmonising national laws or administrative procedures. Consequently, the comparisons are made on the particular topic of enforcement of state aid cases before national courts and the enforcement of procurement contracts from national bodies in the Remedies Directive. Such a type of EU legislation could be introduced into state aid enforcement at the national level to harmonise remedies available at national courts for state aid cases. Such legislation respects the enforcement of EU rules from national authorities, such as courts or national independent bodies, and harmonises national rules, by applying the standards that national legislation and procedures must respect, so that the enforcement of EU rules is efficient. The Enforcement Study<sup>55</sup> proposes the adoption of a Remedies Directive for the enforcement of state aid rules. The benefit would be that it would harmonise the available remedies for breach of state aid rules in national legal orders; in addition, it would enhance private enforcement in the state aid field.<sup>56</sup> This paragraph, based on specific literature<sup>57</sup> and the Enforcement study, proposes a legal transplant from the Remedies Directive to be used in State Aid control.

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<sup>55</sup> European Commission – DG Competition, ‘Study on the enforcement of state aid law at national level available online < [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493)> accessed on 30-7-2012

<sup>56</sup> 2006 study on enforcement page 45 available at < [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493) > accessed on 28-11-2011.

<sup>57</sup> G Skovgaard Olykke, ‘The legal basis which will probably never be used: enforcement of state aid law in a public procurement context’ [2011] 3 EStAL 457



### 6.5.3 Legal problems in tax cases involving state aid before national courts

The enforcement study<sup>58</sup> has found that the majority of cases where private parties try to enforce state aid rules in national courts involve the imposition of a tax burden on them. The table 9 in the Appendix shows that 50% of cases of enforcement before national courts deal with discrimination in the imposition of a tax burden, which the claimants allege it involves state aid to one of their competitors.<sup>59</sup>

The cases involve, either the imposition of a tax burden on one company, whereas others in the same class are exempted, or a tax benefit for some companies, but not others. The claimant, usually the competitors, may ask for the benefit or burden to be lifted and the aid to be repaid. The legal basis for such claims is the selective nature of the measure, which makes it incompatible state aid. Such was the case brought before the Constitutional Court of Italy:<sup>60</sup> the national Constitutional Court submitted a preliminary ruling to the Court of Justice asking it whether tax legislation adopted by regional authority that imposed tax only on vessels that made stopovers in Sardinia but were domiciled outside of the Sardinia region constituted state aid, because it exempted regional vessels and thus granting them an advantage. The Court of Justice held that tax legislation in this case

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<sup>58</sup> Ibid.

<sup>59</sup> See table 9 in Appendix.

<sup>60</sup> Constitutional Court ("CC") ("Corte Costituzionale"), 15.04.2008, 102/08 and related case No. 103/08 (same date and same subject), Regione Sardegna v. Presidenza del consiglio dei Ministri

constitutes state aid because it favours undertakings established in the area of Sardinia.<sup>61</sup>

However, in one national case<sup>62</sup> the competitor asked for the benefit to be granted to all competitors in the same class. In that case, the national court of Austria has accepted that the extension of the benefit solves the problem of the existence of aid, and no repayment had to be made.<sup>63</sup> Nevertheless, the Notice on Enforcement makes clear that ‘extending an illegal tax exemption to the claimant is no appropriate remedy for breaches of Article 88(3) of the Treaty’ (now Article 108(3) TFEU);<sup>64</sup> thus, this national ruling would go against the Notice and the Court of Justice’s case law, since it was its judgment that the Commission adopts in its Notice on enforcement.<sup>65</sup>

There are however, other issues as well, that have to do with the ability to claim repayment of taxes in state aid cases before national courts. The Court has declared that a third party (any tax payer) can only ask for the repayment of a tax imposed on them, if the tax revenue that he paid was used to fund the illegal aid.<sup>66</sup> It will be very difficult to prove standing in

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<sup>61</sup> Case C-169/08 Judgment of the Court (Grand Chamber) of 17 November 2009. *Presidente del Consiglio dei Ministri v Regione Sardegna*. Reference for a preliminary ruling: Corte costituzionale – Italy [2009] ECR I-10821 para 64

<sup>62</sup> Austrian Constitutional Court decision of 13 December 2001 in Case *energy tax rebate* VfSlg. 15.450/2001.

<sup>63</sup> Page 62 of the 2006 study on enforcement available at < [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493) > accessed on 28-11-2011.

<sup>64</sup> Article 75, Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01

<sup>65</sup> Joined Cases C-393/04 and C-41/05, *Air Liquide*, [2006] ECR I-5293, paragraph 45.

<sup>66</sup> Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 19.

such cases, because ‘the national authorities enjoy discretion as to the allocation of taxes to various purposes’.<sup>67</sup>

#### 6.5.4 Problems concerning claims for damages in national courts

It must be rather disappointing for the Commission that the 2009 update of the enforcement study<sup>68</sup> concluded that actions for damages before the national courts of the Union are still very limited in numbers. Furthermore, the most disappointing finding of the study is that there still has been no case, which actually resulted in a competitor being awarded monetary compensation. This is a drawback for the future decentralisation and modernisation of state aid control. After all, the Commission has declared that it believes that private enforcement actions can bring benefits to state aid control.

##### 6.5.4.1 Who can be held liable for damages from unlawful aid?

The Court of Justice has also held that the national courts have the power to hold judgment for damages claims, when competitors and third parties have suffered loss by unlawful state aid.<sup>69</sup> The acknowledgement of liability for damage to competitors, by unlawful aid, was first held at the *SFEI and others*<sup>70</sup> case; the authority that granted the aid can be held liable, according to the judgment. The same judgment did not find a legal basis in Community law to bring actions against the beneficiary, but it did not

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<sup>67</sup> Hans-Jörg Niemeyer, ‘Proceedings before national courts’ in M Heidenhain (ed), *European State Aid law Handbook* (CH Beck-Hart-Nomos 2010) 780.

<sup>68</sup> *Ibid.*

<sup>69</sup> See Case C-39/94 *SFEI and Others v La Poste and others* [1996] ECR I-3547, para 75; Case C-199/06 *CELF and Ministre de la Culture et de la Communication v Société internationale de diffusion et d’édition* [2008] ECR I-469, paras 53 and 55; Case C-368/04, *Transalpine Ölleitung in Österreich*, [2006] ECR I-9957, para 56;

<sup>70</sup> Case C-39/94 *SFEI and Others v La Poste and others* [1996] ECR I-3547

preclude national law as the basis. In subsequent judgments, the Court reaffirmed the *SFEI* judgment. Additionally, in the *CELF* judgment the Court held that ‘it may be required to uphold damages claims’ against the beneficiary as well.<sup>71</sup> However, there are identified problems in relation with the actual application of those judgments before national courts.

#### 6.5.4.2 Lack of legal basis

The first and foremost drawback is the lack of a clear legal basis in national laws for claimants to base their claim. The Court has established that the basis for such claim could be national laws on non-contractual liability<sup>72</sup>: which is tort laws. The Commission also adopts this solution in its Notice on Enforcement.<sup>73</sup>

The basis for actions for damages from Union law is the standstill obligation of Article 108(3) TFEU, which is directly applicable. The breach of directly applicable EU rules can be the basis for damages, according to the *Francovich* judgment of the Court of Justice.<sup>74</sup> This is the guidance of the Commission to national courts in its Notice on Enforcement, as well.

#### 6.5.4.3 Difficulty in proving causation and calculation of damages

The *Francovich*<sup>75</sup> case requires that there must be *serious* breach and that there should be *direct causal link* between the Member State’s breach of the obligation not to grant aid before it is declared compatible and the damage suffered. The 2009 Notice on enforcement advises that the serious

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<sup>71</sup> *CELF and Ministre de la Culture et de la Communication*, [2008] ECR I-469, para 55.

<sup>72</sup> Case C-39/94 *SFEI and Others v La Poste and others* [1996] ECR I-3547, paragraph 75.

<sup>73</sup> Article 55.

<sup>74</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

<sup>75</sup> *Ibid.*

breach criterion can be met in state aid cases, because Member State authorities are under an obligation to notify a measure according to Article 108(3) TFEU and not to implement it, before the Commission has reached a decision on its compatibility. If they do not abide, they are in serious breach for not conforming to their obligations.<sup>76</sup> It is more difficult, though, to prove the direct link between the breach of the standstill obligation and the damage to competitors or third parties. Also, problems may arise with the calculation of the loss suffered in order to award damages.

#### 6.5.4.4 Possible solutions to the problems concerning damages claims

The possible solutions to the calculation problems for actions for damages before national courts can be overcome: national legislation can be used by the national court to quantify the damages, according to ‘reasonable estimates’, instead of actual quantification.<sup>77</sup> The reasonable award does not have to be based on the actual loss suffered; it is rather based on what the injured party would have received, if there was an agreement between the parties.<sup>78</sup> However, the damages have to be paid by national governments, and it would be unlikely that Member States’ governments would introduce laws that would allow the use of reasonably estimated damages to be awarded in state aid cases, in order to overcome problems.

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<sup>76</sup> Article 47 of the Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01

<sup>77</sup> Article 51 of the Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01

<sup>78</sup> M Honore et al, ‘Damages in state aid cases’ [2011] 2 EStAL 265, 282.

It is, therefore, necessary for the Commission to either adopt new legislation that will specifically address the issues that have been described for damages in state aid cases, similar to the White paper on damages in antitrust cases.<sup>79</sup> Also, the Commission has adopted a draft Guidance paper on the quantification of harm in actions for damages based on Articles 101 and 102 TFEU. The draft paper is not going to be binding on national courts and it is purely informative, due to the lack of Union legislation in the context of damages. It does, however, point towards the direction of quantifying damages in antitrust cases, according to market prices,<sup>80</sup> which is similar to the call for ‘reasonable estimates’, instead of actual losses in state aid damages cases. Again the example of the development of antitrust rules can be adjusted to fit the modernisation of state aid control.

## 6.6 PROBLEMS THAT MIGHT ARISE FROM CROSS-BORDER DISPUTES CONCERNING STATE AID AMONG PRIVATE PARTIES.

It is evident, from the data provided, that private enforcement of state aid rules and especially claims for damages from individuals caused by illegal aid has not yet reached satisfactory levels. Neither has national litigation been endorsed equally by all Member States of the Union. Some

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<sup>79</sup> White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, available on line < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF> > accessed on 4 December 2011.

<sup>80</sup> Article 7 of the Guidance paper: ‘national courts, in a particular case, can use pieces of direct evidence relevant for the quantification of harm, such as documents produced by an infringing undertaking in the course of business regarding agreed price increases and their implementation or assessing the development of its market position.’ Available on line < [http://ec.europa.eu/competition/consultations/2011\\_actions\\_damages/draft\\_guidance\\_paper\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf) > accessed on 4-12-2011.

Member States are more proactive in this respect than others. However, it is possible to have a dispute that concerns the application of EU state aid law between parties that compete in different Member States. That would create a cross-border dispute, and there are a number of issues that arise from the application of private law, in several jurisdictions.

It was already mentioned in this chapter that enforcement before national courts can be initiated when a competitor, company or individual, but certainly a private party files an action, against the beneficiary of alleged illegal aid. The competitor can either claim damages from the beneficiary, or interim relief. The number of actual cases that have been brought before Member States courts' is small;<sup>81</sup> however, a number of issues might arise from such disputes.

Due to the lack of uniform substantial EU private law, two things need to be determined, before any proceedings are initiated: first, the claimant must determine the jurisdiction that is competent to hear the case and secondly, the court must decide on which substantive law will be applied, to resolve the cross-border dispute that is based on state aid law. The answers to questions of applicable jurisdiction and law are given by national private international laws, whenever the cross-border dispute involves members and non-members of the European Union.

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<sup>81</sup> The 2006 study on enforcement has shown that only 23 out of 357 cases involved direct actions from competitors against beneficiaries of aid. Table 1 of the 2006 study available at < [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493) > accessed on 28-11-2011.

For the purpose of resolving conflict of laws in private cross-border disputes between Member States, the EU has adopted a specific package of rules that apply. Those are the Brussels I,<sup>82</sup> the Rome I<sup>83</sup> and Rome II<sup>84</sup> Regulations, which are only applicable to relations between private parties and not state bodies and individuals. Next, this chapter will analyse the possible issues that might arise in state aid cross border disputes between individuals and also the possible solutions.

### 6.6.1 The legal framework to determine jurisdiction

The following consideration must be made by the national court to determine whether it has jurisdiction to hear a cross-border state aid case: If the claimant and the accused are domiciled in different Member States, then the court that has jurisdiction to hear the claim will be determined by the Brussels I Regulation, Article 2.<sup>85</sup> According to it, jurisdiction will have the court of the place, where the accused is domiciled. If, however, the legal basis for a claim against the beneficiary in state aid cases is a tort, since there are no contractual obligations in state aid cases, then the more special Article 5(3) of the Brussels I Regulation would have to be applied. Thus, according to Article 5(3) the court where the harmful event took place will have jurisdiction to hear the case; that place will most likely be the place where the illegal aid was granted.

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<sup>82</sup> Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1.

<sup>83</sup> Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

<sup>84</sup> Regulation (EC) No 864/2007 of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

<sup>85</sup> Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) [2001] OJ L12/1.



### 6.6.2 The legal framework that determines the substantive law which will be applied

After having determined the court that has jurisdiction to hear a cross-border case, concerning the application of state aid rules among private parties, the court needs to determine next, the law that will be used to review the facts of the case. The answer to this problem is given in the EU context by the Rome II Regulation.<sup>86</sup> Because there could be no contractual obligations in state aid disputes before national courts, the Rome II regulation could only be applicable and not the Rome I Regulation,<sup>87</sup> which is used to determine substantive law in contractual relations in cross-border disputes.

The legal basis for the action against the competitor in an illegally granted aid would probably be unfair competition laws; that being a tort means that Article 6 of the Rome II regulation would be applied. According to Article 6(2) of the Rome II Regulation the law of the country in which the damage occurs will be applicable as the substantive law that would be used to decide the claim against the competitor that received illegal state aid.

### 6.6.3 Problems with cross-border litigation in state aid cases before national courts

Some national courts however, are reluctant to apply the legal basis of their national tort laws, whenever a competitor seeks reparation from the beneficiary of illegal aid. In *Betws Anthracite Ltd v DSK Anthrazit*

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<sup>86</sup> Regulation (EC) No 864/2007 of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

<sup>87</sup> Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

*Ibbenburen GmbH*<sup>88</sup> the claimant, which was a UK company brought an action for damages against a German competitor, which had received aid that the Commission declared illegal before the High Court of London. The basis for the claim in this cross-border case was the anti-competitive behaviour of the German company.

However, the UK court held that there was ‘no applicable Community law tort’ and dismissed the action. It also stated that the European Court of Justice<sup>89</sup> should rule, first, on the issue of which law was applicable. The High Court, though, could have applied the Brussels Regulation to determine its jurisdiction, because the loss occurred in the UK, where the UK company was established and competed with the German competitor. Further, even if the Rome II regulation was not in effect in 2003, which was the year that the case was heard (since it was adopted in 2007), the English court could have applied the English conflict of laws rules and determine whether the English or German law on torts was applicable. Thus, the decision would be reached according to the applicable law.<sup>90</sup>

#### 6.6.4 The solution to the problem of applicable law in state aid cases against the beneficiary

Ever since the 2003 High Court judgment<sup>91</sup>, the Commission adopted the Notice on Enforcement, which has clarified the issue. Because

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<sup>88</sup> *Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH* [2003] EWHC 2403 (Comm)

<sup>89</sup> Now it is called the Court of Justice of the European Union.

<sup>90</sup> 2006 study on enforcement page 48 available at < [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493) > accessed on 28-11-2011.

<sup>91</sup> *Betws Anthracite Ltd v DSK Anthrazit Ibbenburen GmbH* [2003] EWHC 2403 (Comm)

of the lack of Union Tort law, Article 55 of the Notice<sup>92</sup> clearly advises the national courts to base actions against beneficiaries of illegal aid to national laws. Also, the Notice advises them that they should apply the Rome II Regulation<sup>93</sup> for non-contractual liability, when it is necessary to determine which national law would be applicable. This is important whenever the parties of the conflict come from different Member States.

## 6.7 IS IT POSSIBLE TO HAVE FORUM SHOPPING IN STATE AID CASES?

Even after the adoption of the Regulations that resolve conflict of laws issues in private law cases, is it possible to have forum shopping in cross-border state aid cases? There are two conflicting interests involved in this matter. One is the interests of the competitor and its legal advisers that will seek to secure their breached rights with as much benefit as possible. The other is the interests of the Union and the Commission as the Union's executive body that aim to restrict forum shopping strategies. This is why the Union has adopted the Brussels I and Rome I and II Regulations, and specifically, in state aid cases, the Notice on Enforcement instructs that the Rome II Regulation should decide the applicable law issue. This instruction is given in order to limit, slightly, the choice of jurisdictions. However, when there are damages involved, the claimant and its advisers will always look into the possibility of choosing the jurisdiction that treats them most

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<sup>92</sup> Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01.

<sup>93</sup> Regulation (EC) No 864/2007 of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

favourably.<sup>94</sup> Consequently, the answer is that in theory at least it is possible to have forum shopping strategies in state aid cases.

## 6.8 PRINCIPLES THAT THE NATIONAL COURT MUST APPLY

Article 22 of the Notice on enforcement dictates that the national courts must take full account of the effectiveness of the direct effect of Article 108(3) TFEU. What is the consequence of this Article then, and what does effectiveness mean in this case? The principle of effectiveness means that national courts must balance the effectiveness of national rules that could undermine the application of EU rules on state aid and the rights of individuals given to them by Article 108(3) TFEU.<sup>95</sup> The national laws and procedures must not render impossible or excessively difficult in practice the exercise of those rights. The principle of equivalence that the national courts must also follow, means that procedures and laws in national courts that apply the EU law of Article 108 (3) TFEU must secure that the remedies will not be less favourable, than the remedies that would be given to restore rights attached to breaches of national laws.

The national court has an obligation to secure the examination of all possible remedies that the direct effect should produce. If the validity of the measure is found to be broken by the national court, then the court must ensure that the individual, whose rights have been breached by the

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<sup>94</sup> P Krauskopf and others, 'Competition law violations and private enforcement; forums shopping strategies' [2011] 4(1) Global Competition Litigation Review 26, 38.

<sup>95</sup> Article 108(3) TFEU, last sentence.

invalidity, must be able to secure recovery of the illegal aid and interim measures, until the final reparation for the damage suffered.<sup>96</sup>

However, the obligation of the national courts to secure the effectiveness of a EU rule, the direct effect of the Article 108(3), could be seen as jeopardising the independence of the national courts. The Notice on enforcement clearly states that its aim is to assist the national courts with the application of state aid rules. It is not affecting their independence.<sup>97</sup> However, some believe that the procedural autonomy of the Member States has been ‘superseded’ by the case law and the Notice on enforcement, because it specifies the remedies in Articles 24 to 62.<sup>98</sup> The Notice, though, is only for guidance, and it is not directly applicable before national courts.

## 6.9 PROBLEMS WITH COOPERATION BETWEEN THE COMMISSION AND THE NATIONAL COURTS

By this point of the thesis the roles of the Commission and the national authorities have been critically analysed, and the overall conclusion is that their powers and competences are distinct but supplementary. The one is not there to replace the other, but they need to work together to achieve a more efficient enforcement of state aid rules. Therefore, to achieve that, there needs to be close cooperation between them. It is, nonetheless, an obligation of the Commission to support the national courts; a principle of sincere cooperation is provisioned in Article 4 of the TEU (former Article 10 EC), according to which the Union institutions and the

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<sup>96</sup> Case C-39/94 *SFEI and others v La Poste and others* [1996] ECR I-3547 para 40.

<sup>97</sup> Article 99, Notice on enforcement.

<sup>98</sup> Hans-Jörg Niemeyer in Martin Heidenhain (ed), *European State Aid law Handbook* (CH Beck-Hart-Nomos 2010) 774.

Member States have an obligation to assist each other to fulfil their tasks.<sup>99</sup> Moreover, the case law of the Court of Justice has also adopted this obligation: the Commission must assist the national courts, when they apply any Union laws.<sup>100</sup>

The Notice on Enforcement certainly provides for the support that the Commission must provide to the national courts, when they ask for its assistance, in applying state aid law. This option, of asking for assistance, was already in force from the time of the adoption of the Notice on cooperation, but has not been used considerably. Thus, the Commission has clarified the procedure in its current Notice on enforcement. It is interesting that the Commission revealed that the current form of available cooperation is inspired from the Cooperation Notice with the national courts in the field of antitrust.<sup>101</sup> Borrowing best practices from the modernisation of antitrust that could be used as an example for the modernisation of state aid is something that this thesis adopts as the way forward to decentralise state aid control.<sup>102</sup> The lessons from the decentralisation process of antitrust enforcement are valuable to the most extent, if decentralisation is the way forward for more efficient state aid enforcement, at both the supranational and the national levels.

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<sup>99</sup> L Ritter et al., *European Competition law: a practitioner's guide* (3<sup>rd</sup> ed Kluwer law 2004)

<sup>100</sup> Case C-39/94 *SFEI and Others v la Poste and others* [1996] ECR I-3547, paragraph 50.

<sup>101</sup> Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C 101/54, paragraphs 15 to 30

<sup>102</sup> See also comparisons in chapter five (5.4.1) of the thesis concerning the decentralisation of antitrust enforcement by way of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

Returning to the topic of cooperation, the Commission can assist national courts in two ways; but only after they ask for its assistance in both situations: firstly, the national court may ask for information about the Commission's procedures concerning an aid measure and secondly, the national court may ask the Commission for an opinion on a case it is investigating. Before the adoption of the Notice on Enforcement in 2009, the possibility for a Commission opinion was not available. Therefore, the option of requesting information has not been used much by the national courts. This is rather unfortunate, because if the national courts had this opportunity, issues about the concept of aid might have been clarified in specific aid cases; cases that the national courts have decided not to engage with, as it was examined in previous parts of this chapter.<sup>103</sup>

In a national case<sup>104</sup> the court decided to take advantage of the provision and ask the Commission for guidance on the particular issue of whether a UK Government Department's assumption of environmental costs concerning the regeneration of an area in Northern Ireland, where a private company was developing a shopping centre, constituted aid. The Commission replied to the Northern Irish High Court that in its view general infrastructure measures that did not benefit end users do not constitute aid, but it did not want to prejudge on the effect on trade between the Republic of Ireland and Northern Ireland. The national court applied the four cumulative criteria of Article 107(1) TFEU and dismissed the application for judicial review because the criteria were not met. It held that there was

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<sup>103</sup> See paragraph 6.9 of this chapter.

<sup>104</sup> *Peninsula Securities Ltd Re application for judicial review*, the High Court of Justice in Northern Ireland, Queens Bench Division (Crown Side), judgment of 11 June 1998 [1998] Eu.L.R 699.

no advantage given from the regeneration and that trade between the Republic and Northern Ireland could not have been affected by the infrastructure works that allowed better access to the area for citizens of the Republic. This case is an example of how the Commission can cooperate with national judges effectively.

One explanation, for the reluctance of the national courts to engage in information sharing with the Commission, might be that they want to appear that they are in command of Union law, as they should be, but another reason has been pointed out. Before the adoption of Notice on Enforcement, the national courts could only ask, and the Commission could only provide information about the *procedure* that it is following concerning a specific state aid case and not about the *substance*.<sup>105</sup>

This is likely to change in the future, because the national courts, ever since 2009 and the adoption of the Notice on enforcement have the option of asking for a Commission opinion. Still, the national courts cannot ask for the Commission to give opinions on the compatibility of an aid measure, because this lies in the exclusive competence of the Commission.<sup>106</sup>

## 6.10 CONCLUSION

The value of effective enforcement before national courts has been acknowledged by the Commission and the Court of Justice, in its extensive case law over the years. Effective enforcement of state aid decisions at the

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<sup>105</sup> J-G Westerhof, 'State aid and 'private litigation'; practical examples of the use of Article 88(3) EC in national courts' (2005) 3 Competition policy newsletter 100, 102.

<sup>106</sup> Article 92 of the Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01



national level is what the third research criterion is trying to establish in this chapter of the thesis. Enforcement of state aid rules before national courts is an important part in the decentralisation and modernisation of state aid control.

There are distinct yet complimentary competences given to the Commission and the national courts. Neither can replace the other. However, both actors are necessary in state aid control, because they have exclusive powers. The Commission has exclusive competence to examine the compatibility of aid measures with the internal market according to Article 107 TFEU, whereas the national courts cannot judge on compatibility. The national aspect of enforcement was put to the test in this chapter, in line with the application of the third research criterion and the conclusion is that there are problems that drive interested parties away from seeking enforcement of state aid decisions in national courts: problems such as the interpretation of Article 107(1) TEU, the availability of remedies in national law and the lack of a legal basis to claim damages for infringement of state aid decisions. There are benefits that can be drawn from further enhancement of the powers of the national courts. It is in the Commission's initiative to identify the problems that have occurred over the years, ever since the first Notice on cooperation with the national courts had been adopted, and provide for the adequate solutions.

Some solutions have been suggested in this chapter, influenced by comparisons with other competition law rules and procedures. For example, a useful loan from the antitrust enforcement could be the adoption of guidance on the quantification of damages in state aid cases, similar to the

Paper for antitrust cases, which solves a lot of issues concerning claims for damages before national courts. The latest Notice on enforcement has clarified some issues, but still more changes are necessary, in order for enforcement before national courts to become more effective and produce more positive results.

**CHAPTER SEVEN**  
**THE REFORM AND MODERNISATION OF EU STATE AID**  
**CONTROL**

7.1 INTRODUCTION

Throughout the previous chapters of this thesis, the research revealed the problems that occur during the implementation of the Commission's state aid control and the enforcement of state aid rules before European and national courts. Although, implementation of the state aid policy has been in the Commission's competence ever since the adoption of the original Treaties in the 1950's, enforcement of the state aid control rules has been lagging. The Commission as the guardian of the Treaties has acknowledged this on many occasions, and has attempted many times to introduce reforms into the state aid regime of the European Union. Those reforms have been rather fragmentary, and were not entirely successful in promoting more effective procedures and enforcement of state aid control.

The main reforms of the state aid policy that are more recent will be critically examined in this chapter, with emphasis placed on the justifications and effects that each one of them has generated. Namely, those reforms, will be the 2005 State Aid Action Plan reform (henceforward SAAP), the 2011 reform of state aid rules for Services of General Economic Interest (henceforward SGEI) and the State Aid Modernisation (SAM) of 2012.

The aim of this chapter is to enhance the idea that there are still elements of state aid control that need to change, but also to propose that the

future of state aid control does not lie on one actor, that is either the Commission or the national authorities or one enforcement procedure, either public or private, or at the European or national Courts; it rather lies in the cooperation of all actors; cooperation which will benefit from partial decentralisation and overall modernisation of enforcement competencies and procedures.

## 7.2 THE REFORM OF STATE AID UNDER THE STATE AID ACTION PLAN OF 2005

The SAAP started a reform process of the European Union's state aid framework. It was introduced by the Commission in 2005, as a consultation document, presenting a roadmap for the changes that would be introduced in state aid until 2009. The main feature of those changes was an introduction of an economics focused state aid policy by the Commission. Commissioner Neelie Kroes, at the time, recognised that economic analysis was lacking in state aid in comparison to other competition law areas.<sup>1</sup> In the SAAP, the Commission sets the objectives of the reform as follows: there should be less and better targeted aid, a refined economic analysis should be used by the Commission, and finally, better enforcement, more effective procedures and predictability will improve transparency.

Economic analysis of state aid was included in the Commission's assessment of measures, even before the SAAP.<sup>2</sup> The former Commissioner

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<sup>1</sup> Commissioner N. Kroes, 'The State Aid action plan – delivering less and better targeted aid', Speech at the UK Presidency seminar, London 14 July 2005, SPEECH/05/440.

<sup>2</sup> S Bishop, *The economics of EC Competition law: concepts application and measurement* (2<sup>nd</sup> edn Thomson Sweet & Maxwell London, 2002) 1.

in charge of DG Competition, Neelie Kroes, has said that ‘economics did not suddenly drop out of the sky [...] economics have always been there’.<sup>3</sup> Economics have been there, either in the form of a balancing of the positive and negative effects of a measure, when assessing its compatibility with the internal market, even though not formulated into a test.

#### 7.2.1 The balancing test

The main novelty that the new refined economic approach brought in the appreciation of state aid was the adoption of the balancing test. It is also the core of the new efficiency based approach.<sup>4</sup> The Commission applies the balancing test only in the second stage of its assessment of state aid measures: the examination of compatibility of the measure with the provisions of Article 107 (3) TFEU. It has even been introduced in some of its Guidelines for the assessment of specific types of aid.<sup>5</sup> According to the SAAP, it is used to establish if a measure constitutes aid but ‘in particular to determine when state aid can be declared compatible with the Treaty’. From this part some writers assume that the test is not to be used in the evaluation of the measure’s effect on trade and distortion of competition, under Article 107(1) TFEU.<sup>6</sup> Also, others have noted that there is no ‘rule of reason’ or concept of ‘objective justification’ in the interpretation of Article 87(1)’,

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<sup>3</sup> Neelie Kroes, ‘The law and economics of State Aid control- a Commission perspective’, in J Sierra, B Smulders, ‘The limited role of the refined economic approach’, in G Inglesia et al. (eds) *EC State Aid law* (Kluwer law The Hague, 2008) 15.

<sup>4</sup> Commission Staff working paper ‘Common principles for an economic assessment of the compatibility of State Aid under Article 87.3’ para 4, <[http://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf)> accessed on 27-1-2011.

<sup>5</sup> Guidelines on State Aid to promote Risk Capital investments in SMEs[2006] OJ C194., the Guidelines on State Aid for environmental protection[2008] OJ C82 and the Framework for State Aid for Research and Development and Innovation[2006] OJ C323.

<sup>6</sup> M Farley, ‘The role of Economics – based Approaches when analysing effects on trade and distortions of competition after Wam’, (2010) 2 EstAI, 369.

now Article 107(1) TFEU.<sup>7</sup> A more refined economic approach might be well needed in the first part of the Commission's assessment of the aid measure as well.

The Court has accepted that it is not enough for the Commission to rely on declarations that an aid measure affects trade and distorts competition. It is not enough to simply demonstrate that the receiving undertaking is active in inter-community trade. The Commission should: 'have carried out a more detailed analysis of the potential consequences of the aid at issue on intra-Community trade and on competition and should have given additional information'.<sup>8</sup> The balancing test, as it has been incorporated in Commission decisions includes the assessment of the following points:

First question that needs to be answered is if the aid measure aimed at a well-defined objective of common interest; namely, if the proposed aid addresses a market failure or other objective? Second question is if the aid is well-designed to deliver the objective of common interest? In particular:

- (a) Is the aid measure an appropriate instrument, which means are there other, better placed instruments?
- (b) Is there an incentive effect, for example, does the aid change the behaviour of firms?
- (c) Is the aid measure proportional, for example, could the same change in behaviour be obtained with less aid?

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<sup>7</sup> C Koenig, 'Instant State Aid law in a financial crisis, state of emergency or turmoil. Five essential and reasonable requirements under the rule of law' (2008) 4 *EstAI* 627, 628-629.

<sup>8</sup> Case C-494/2006 *Commission v Italy and Wam SpA*, [2009] ECR I-3639 para 64.

And finally, the third question that needs to be answered is if the distortions of competition and the effect on trade are limited, so that the overall balance is positive?<sup>9</sup>

The questions were introduced by the Commission for the first time in a document,<sup>10</sup> published after the adoption of the SAAP, and they were subsequently included in its later decision-making practice. The test is useful for the Commission to evaluate the benefits of aid in relation to its costs. This is the analysis that is based on the effects of the measure, rather than its form, envisaged in the SAAP.

#### 7.2.2 The role of market failures in the refined economic approach

The analysis of market failures will be placed in the centre of the Commission's assessment of state aid measures, according to the SAAP. A market failure is another purely economic term adopted by the Commission. It is contrasted with the term efficiency. Efficiency is the goal of every market as a situation where welfare is optimal. A market failure occurs when the market does not achieve the optimal outcome; in other words, the market does not achieve efficiency.<sup>11</sup> Thus, by this the Commission introduces efficiency, as an objective of state aid control.

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<sup>9</sup> *Metropolitan Area network broadband program* (Case N284/2005) Commission Decision of 8 March 2006 [2006] OJ C207/2 , para 58.

<sup>10</sup> Commission Staff working paper 'Common principles for an economic assessment of the compatibility of State Aid under Article 87.3' para 9, <[http://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf)> accessed on 27-1-2011.

<sup>11</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final page 7.

A market failure is defined in the SAAP as ‘a situation where the market does not lead to an economically efficient outcome’.<sup>12</sup> State aid can have positive effects for objectives of common interest, such as the horizontal objectives presented in chapter two.<sup>13</sup> Additionally, state aid can produce positive effects whenever is used to ‘correct market failures, thereby improving the functioning of markets and enhancing European competitiveness’.<sup>14</sup> The positive effects on objectives of common interest, such as social and regional cohesion, sustainable development and cultural diversity can appear irrespective of the correction of market failures.<sup>15</sup> Also, the Commission in the same document identifies the most important forms of market failures that it will analyse.

Firstly, a market failure can occur in the form of externalities. They appear when the market players do not take into account the effects of their actions. Externalities can be negative and positive, according to the outcome of the action on society. Secondly, the market is not interested in providing certain forms of services and goods, such as defence and basic education to all, without discrimination. This can lead to a failure of the market to provide the so-called public goods. Thirdly, the Commission identifies imperfect information as a market failure. Imperfect information occur when one of the counterparties in a market transaction does not have all the necessary information needed to make a decision, which leads to the wrong decision being made, or no decision being made at all, to the harm of the

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<sup>12</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final page 7.

<sup>13</sup> See chapter 2.

<sup>14</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final para 10.

<sup>15</sup> *Ibid.*



other party. Fourthly, there may be coordination problems between players in the market and finally, the existence of market power can lead to a failure, since there will be no efficient outcome for the market.<sup>16</sup>

The list of market failures is much broader, though, in economic literature of market failures, which might include unemployment.<sup>17</sup> Apparently, this limitation of ‘eligible’ types of market failures to be corrected by state aid was intentional according to a writer, who draws the conclusion from a statement of the Chief Economist at the time of the adoption of the SAAP, who wrote that: ‘State aid control should however concentrate on a small set of well-defined market failures.’<sup>18</sup>

In a recent relevant case the Commission had the opportunity to clarify on the issue of the use of market failures, as general public interests that justify the granting of state aid. In a case concerning the switchover to digital TV broadcasting in the region of Berlin in Germany, the Commission accepted that a number of market failures could be considered general public interests that justify public intervention:<sup>19</sup> those include coordination problems, the need to produce positive externalities, the strengthening of competition between competitors of one sector, and the promotion of innovation. The existence of those criteria has been extensively examined in the Commission’s Decision, and the Commission’s assessment examined in particular, if there were true market failures, and if the aid measure was

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<sup>16</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final, page 7.

<sup>17</sup> C Kaupa, ‘The more economic approach- a reform based on ideology?’ (2009) 3 EstAI 311, 313.

<sup>18</sup> Ibid, 314.

<sup>19</sup> Commission Decision 2006/513/EC of 9 November 2005 on the state aid which the Federal Republic of Germany has implemented for the introduction of digital terrestrial television (DVB-T) in Berlin – Brandenburg, [2006] L200/14, paras 101-119.

appropriate to remedy the market failures. In that case, the aid was considered incompatible and the General Court dismissed actions for annulment of that decision, accepting the Commission's extensive economic assessment.<sup>20</sup>

Market failures can occur in various sectors in the economy, and the most common ones are the financial services, the SMEs, R&D and activities with environmental concerns. The Commission, though, acknowledges what some writers indicate, which is that state aid has to be the second choice for correcting a market failure, when it has been identified.<sup>21</sup> Consequently, the first step in economic analysis is to identify, if a market failure exists.

At this point it is important to examine if the definition of the relevant market is necessary in state aid control. Fingleton, Ruane and Ryan have demonstrated the differences in the definition of the market in state aid as opposed to antitrust analysis.<sup>22</sup> On this issue, the Court has rejected pleas from defendants that the Commission has not defined the relevant market, which makes the decision inadequately reasoned. Furthermore, the Court accepted that economic analysis is part of the Commission's wide discretionary powers,<sup>23</sup> which means that the Commission can decide on the use of the economic analysis in each specific case.

In the SAAP though, the Commission accepts that state aid might not be the most appropriate way to correct a market failure and this is where

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<sup>20</sup> D Ababou, 'The General Court confirms the Commission's economic approach of state aids' [2011] 1 EStAL 149, 151.

<sup>21</sup> P Nicolaides and S Bilal, 'An appraisal of the state aid rules of the European Community: Do they promote efficiency?' [1999] 33(2) Journal of World Trade 97, 98

<sup>22</sup> Fingleton, Ruane and Ryan, 'Market definition and State Aid control', in Meiklejohn (ed), *State Aid and the Single Market*, (European Commission – DG for economic and financial affairs Brussels, 1999).

<sup>23</sup> Case C-730/79 *Philip Morris v Commission* [1980] ECR 2671, paras 13 and 24.

the balancing of positive with negative effects has an important role to play in the overall economic assessment of an aid measure. Thus, if the existence of a market failure has been established, state aid has to be the second solution.<sup>24</sup> Member states should not use state aid in the first instance to correct a market failure, if there is no positive outcome from the balancing exercise. For example, whenever there are two or more types of market failure that need to be addressed in the same industry, state aid may resolve one of them but it will not be the first-best solution for the other, thus the overall balance of effects will not be positive. In another situation, national aid measures may create cross-border externalities and a similar state aid measure in another Member State.<sup>25</sup> Thus, state aid will actually affect trade between Member States, when it was supposed to correct a market failure. This is why the analysis of effect on trade and competition is still important, even if there is an identified market failure to correct.

What needs to be considered in order to make this decision about the suitability of aid to remedy the particular failure each time are the following: other more appropriate measures have to be considered before implementing state aid. Such measures are the usual tools in a government's disposal, namely legislation and tax measures.<sup>26</sup> The granting Member State has the burden to prove to the Commission that it has taken into account the previous consideration and to demonstrate that the aid measure is the most

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<sup>24</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final page 7.

<sup>25</sup> P Nicolaides and S Bilal, 'An appraisal of the state aid rules of the European Community: Do they promote efficiency?' [1999] 33(2) Journal of World Trade 97, 101

<sup>26</sup> Commission Staff working paper 'Common principles for an economic assessment of the compatibility of State Aid under Article 87.3' para 30, <[http://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf)> accessed on 27-1-2011.

suitable instrument to tackle the inefficiency of the market.<sup>27</sup> Secondly, the amounts of aid to be granted should remain limited according to the call for ‘less (and better targeted) state aid’. To this goal, the Commission has adopted secondary legislation that aims to maintain levels of aid to the minimum required, such as the *de minimis* rules,<sup>28</sup> the Block exemption regulations,<sup>29</sup> and other Guidelines. All of those legislative instruments help to identify aid amounts that do not regularly harm competition.

Finally, it is true that the form in which the aid measure is implemented is not important for the aid to be considered incompatible with the internal market. Some writers, though, believe that the form of aid to be chosen is important, in deciding which measure to use for correcting a market failure. Some measures might prove more effective than others in different types of market failures. For example, subsidising loans for SMEs can correct a market failure in the lending shortage those companies might face from the credit market.<sup>30</sup> However, SMEs have not benefited much from direct recapitalisation of financial institutions.

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<sup>27</sup> Commission Staff working paper ‘Common principles for an economic assessment of the compatibility of State Aid under Article 87.3’ para 31, <[http://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf)> accessed on 27-1-2011.

<sup>28</sup> Commission Regulation (EC) 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379/5

<sup>29</sup> Commission Regulation (EC) 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the Common Market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation), [2008] OJ L214/3

<sup>30</sup> C Buelens et al., ‘The economic analysis of State Aid: some open questions’, (European Commission-DG for economic and financial affairs Brussels, 2007) 13-14.

### 7.3 IS A MORE ECONOMIC APPROACH NEEDED IN THE ASSESSMENT OF STATE AID MEASURES?

The adoption of those new objectives for state aid in the form of efficiencies and the new test to help with the refined economic assessment of state aid measures by the Commission triggered a reform process of state aid secondary legislation. By the end of this process, a number of new documents were introduced in the state aid framework that incorporate the new methods and approaches: the General Block exemption,<sup>31</sup> the simplification package of procedures,<sup>32</sup> the Best Practices Code,<sup>33</sup> and the Notice on the enforcement in national courts.<sup>34</sup> All those are instruments to achieve efficient enforcement of state aid, because they aim to speed up and streamline procedures.

Firstly, it is true that the Commission has broad discretionary powers when it comes to state aid regulation; a power given to it by the Treaty, and acknowledged by the Court. The Commission decided to use the achievement of efficiency as a justification for aid. The Treaty itself though, does not contain such criteria. Article 107 (3) (c) TFEU justifies aid based on its common policy objectives, not efficiency. An aid measure might have positive social effects in a region. Would they always correspond to positive efficiency outcomes? And if they do not, which ones would go first, the social effects or the efficiency objectives? The balance between the different

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<sup>31</sup> Commission Regulation (EC) 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the Common Market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation), [2008] OJ L214/3

<sup>32</sup> Commission Notice on a Simplified procedure for the treatment of certain types of state aid [2009] OJ C-136/3.

<sup>33</sup> Commission Notice on a best practices Code on the conduct of state aid control proceedings [2009] OJ C-136/13

<sup>34</sup> Commission Notice on the enforcement of state aid law by national courts, [2009] OJ C85/01.

effects of the measure is a difficult task that needs experienced staff. And the Commission might be well staffed, or not, but what about Member States authorities and national judges that would have to work out complex economic terms?

Secondly, the effects based approach has a target of ‘less aid’? Again, one might argue that the Commission has discretion in decision making but does that discretion reach political decisions of how much aid is permissible by Member States or is that a decision for them to make? Certainly, some writers do believe that there should be a fine line between what the Commission should be protecting, which is competition and what the Member States can decide for themselves, which is how to spend their budgets.<sup>35</sup> This discussion is particularly important after the financial crisis that started in 2008, which saw the amounts of aid rising, instead of declining. Furthermore, if state aid will correct a market failure, how much aid will be suitable to correct the specific failure will be decided from the particular assessment of that market failure.

Finally, is state aid a political or an economic tool, or both? National governments make the decisions to grant aid based on political and social considerations, not on economic theories. The economics have some role to play, though, in this supranational regime that has been created, because of the existence of the internal market. In other words, effects - based analysis has some positive consequences that need to be considered.

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<sup>35</sup> D. Zimmer and M. Blaschczok, ‘The role of competition in State Aid control during the financial markets crisis’, (2011) 32(1) ECLR 9.

#### 7.4 THE BENEFITS OF ECONOMIC ANALYSIS VERSUS A FORM BASED APPROACH IN STATE AID CONTROL.

The refined economic approach has brought something that was lacking in state aid control and that is clarity of the rules. After all, both the Member States and the undertakings that have been the beneficiaries of such measures, have been asking for more transparency, which is a benefit that the economic approach can bring.<sup>36</sup> Economic analysis has the advantage of not being affected by policy considerations and is much more tangible than an assessment of pure legal notions that can be quite unclear and ambiguous; legal notions can have two or more interpretations. This is not true about economic analysis.

Furthermore, the analysis of state aid measures that focuses on the effects of the measure, rather than its form, is more effective to distinguish between aid that produces more benefits and aid that is more distortive. The more refined economic analysis of aid measures can explain more clearly the effects of the aid through the balancing test analysis. The negatives and the positives will be clearer for both the Commission and the Member State.<sup>37</sup> This analysis of positives and negatives can help establish, whether the specific measure is effective to remedy the market failure and if it is affordable to the national economy according to the expected benefits. The ‘revelation’ of the exact cost of the aid can make Member States rethink about granting vast amounts of aid, and help achieve the goal set by the Commission for less and better targeted state aid.

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<sup>36</sup> C-D Ehlermann and L L Laudati, ‘European Competition Law Annual 1997: Objectives of Competition Policy’ (Hart 1998) 16.

<sup>37</sup> Hans Friederiszick, Lars-Hendrik Röller and Vincent Verouden, ‘EC state aid control regime: an economic perspective’ in M Sanchez Rydelski (ed), *The EC state aid regime: distortive effects of state aid on competition and trade* (Cameron May, 2006) 179.

## 7.5 THE REFORM OF STATE AID RULES FOR SERVICES OF GENERAL ECONOMIC INTEREST

Another critical step towards modernisation of the state aid control was the reform of the SGEI framework. In 2011 the previous package of rules for state aid granted to SGEI<sup>38</sup> expired and thus had to be amended. Whether that reform was successful will be better decided in its future application; however, there is some criticism that can be applied to the newly adopted rules.

In this chapter, the focus will be placed on the justification of the recent reform and a critique to the newly adopted legislation, by the Commission. In absence of a definition of what is a SGEI in the Treaty, the Member States have wide discretion in defining services as SGEI,<sup>39</sup> and the Commission is limited in examining whether there is not a manifest error in the definition of a SGEI.<sup>40</sup>

The case law provides some examples of what has been accepted as a manifest error in the Member States' definition of certain services as public services. The loading and unloading of shipments, as well as storage within ports, cannot be considered that it has special characteristics that can attribute to them the character of a service of general interest; the court held that there was a manifest error in the Member State's definition of port

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<sup>38</sup> For the purpose of this thesis SGEI and 'public services' will mean Services of General Economic Interest as those are provided for by the case law and the TFEU.

<sup>39</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4, para 46.

<sup>40</sup> Case T-289/03 *BUPA and Others v Commission* [2008] ECR II-81, paras 166-169 and 172; Case T-17/02 *Fred Olsen* [2005] ECR II-2031, para 216.



operations as a SGEI.<sup>41</sup> Also, the commercial and advertising uses within the audiovisual public service, like sponsoring and the use of premium call numbers in television programs ‘is a manifest error of assessment of what is a SGEI from the Member States’.<sup>42</sup>

#### 7.5.1 The *Altmark* package of rules for state aid granted to SGEI.

Initially and before the adoption of any legislation it was the Court that clarified the conditions under which the aid granted to operators as compensation for the operation of public services will be considered compatible with the internal market in its *Altmark* judgment.<sup>43</sup> Those cumulative conditions are:

the public service obligations should be clearly defined;

the details of the compensation are objective, transparent and established in advance;

the compensation must not exceed the costs incurred in the exercise of the public service obligations, plus a reasonable profit;

If the company has not been chosen through public tender procedure, the company should be compensated on the basis of the costs of a typical well-run company.

The Court in the *Altmark* ruling departed from the compensation approach that was followed before. According to the compensation

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<sup>41</sup> Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, para 27; Case C-242/95 *GT-Link* [1997] ECR I-4449, para 53; and Joined Cases C-34/01 to C38/01 *Enirisorse* [2003] ECR I-14243, paras 33-34.

<sup>42</sup> Communication from the Commission on the application of State aid rules to public service broadcasting, [2009] OJ C-257/1.

<sup>43</sup> Case C-280/00 *Altmark* [2003] ECR-I7747, paras 89-93. See also chapter two of the thesis.

approach there is no aid if a Member State simply compensates an undertaking for providing a public service.<sup>44</sup> That was the approach decided in *Ferring*<sup>45</sup> and followed by the Commission ever since. AG Léger<sup>46</sup> though, and subsequently the Court, in *Altmark* adopted the conditional compensation approach,<sup>47</sup> they confirmed *Ferring* but added the introduction of the four criteria.

### 7.5.2 Critique for *Altmark*

The *Altmark* judgment has historical importance for the compensation of undertakings that provide public service obligations. The judgment introduces strict criteria that include the assessment of the efficiency of the measure and make the notification obligation of Article 106(2) TFEU inapplicable,<sup>48</sup> if the criteria are met.

The *Altmark* judgment has been criticised mainly because it did not provide an answer for how the advantage should be interpreted in SGEI but it created new problems in the application of this interpretation.<sup>49</sup> The first condition requires a clear definition of the public service obligation and this is to the benefit of the recipient of aid as well as possibly national courts that

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<sup>44</sup> Adinda Sinnaeve, 'State Financing of Public Services: The Court's Dilemma in the *Altmark* Case' (2003) 3 *EStAL* 351, 355.

<sup>45</sup> Case C-53/00 *Ferring* [2001] ECR I-9067 para 60.

<sup>46</sup> Case C-280/00 Opinion of Mr Advocate General Léger delivered on 19 March 2002. *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht* [2003] ECR I-7747.

<sup>47</sup> Adinda Sinnaeve, 'State Financing of Public Services: The Court's Dilemma in the *Altmark* Case' (2003) 3 *EStAL* 351, 356

<sup>48</sup> Erika Szyszczak, 'Introduction' in Erika Szyszczak and Johan Willem Gronden (eds), *Financing Services of General Economic Interest: Reform and Modernization* (Asser Press – Springer 2013) 7.

<sup>49</sup> Orla Lynskey, 'The Application of Article 86(2) EC to Measures Which do Not Fulfil the *Altmark* Criteria; Institutionalising Incoherence in the Legal Framework Governing State Compensation of Public Service Obligations' (2007) 30 (1) *World Competition*, 153

may be called to judge a challenge of the act that awards the compensation.<sup>50</sup> Therefore the first criterion promotes transparency.<sup>51</sup> The second criterion requests that it is established that the parameters of the compensations were established before in an objective and transparent manner. This is difficult for the national authorities and national courts to prove.<sup>52</sup> The third criterion adds a reasonable profit to the compensation for the public service obligation and the criticism has been that national authorities may exploit the generality of the term reasonable and the lack of any guidance in the judgment and grant more aid than necessary.<sup>53</sup>

The main problems are created by the fourth criterion: it provides for two solutions to determine the compensation needed. Option one is to organise a public procurement procedure and thus follow the EU rules on procurement to avoid overcompensation. It has been explained that even though following the public procurement rules creates a presumption of compatibility with state aid rules, it has been analysed in paragraph 6.5.2 of the thesis that unlawful state aid is not always precluded. The second option is to consider the costs that a well run undertaking would have incurred if it provided the public service and thus determine the compensation. Because of the nature of public service it is not easy to compare to a market investor, which operates in different conditions.<sup>54</sup> Even more problems arise when the compensation is calculated based on the costs of the recipient of the aid and

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<sup>50</sup> Noel Travers, 'Public Service Obligations and State Aid: Is all really clear after Altmark?' [2003] 3 EstAL 387, 390.

<sup>51</sup> Adinda Sinnaeve, 'State Financing of Public Services: The Court's Dilemma in the Altmark Case' [2003] 3 EstAL 351, 357

<sup>52</sup> Noel Travers, 'Public Service Obligations and State Aid: Is all really clear after Altmark?' [2003] 3 EstAL 387, 390

<sup>53</sup> Noel Travers, 'Public Service Obligations and State Aid: Is all really clear after Altmark?' [2003] 3 EstAL 387, 390.

<sup>54</sup> *Ibid* 392.

public service operator and not based on the costs of the well run undertaking, which might be lower. The excess amount would have to be considered state aid not satisfying the *Altmark* criterion, but could be found compatible according to Article 106(2) TFEU.<sup>55</sup> All those issues that may arise prove that the *Altmark* judgment created additional problems to those that it was supposed to solve.

After that landmark ruling the Commission adopted a set of rules applicable to aid for SGEI known as the post-*Altmark* package, or the ‘Monti - Kroes’ package of July 2005, named after the names of the Commissioners that introduced the new legislative documents. Those documents consisted of a Decision<sup>56</sup> and a Framework<sup>57</sup>, which included further conditions, which are also assessed in the examination of the compatibility of the measure with the internal market. The introduction of those soft law instruments has not increased legal certainty in state aid for SGEI.<sup>58</sup> Also, it is questionable whether those soft law instruments have increased the effectiveness and transparency of state aid control for SGEI. And the following analysis may explain why.<sup>59</sup>

There is a complicated compatibility system that was put in place after the adoption of the 2005 package, according to which the following situation can occur in the assessment of a measure’s compatibility: if one of

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<sup>55</sup> Adinda Sinnaeve, ‘State Financing of Public Services: The Court’s Dilemma in the *Altmark* Case’ [2003] 3 *EstAL* 351, 359

<sup>56</sup> Commission Decision of 28 November 2005 (Decision) on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2005] L312/67

<sup>57</sup> Community Framework for state aid (Framework) in the form of public service compensation [2005] C297/4.

<sup>58</sup> Ulla Neergaard, ‘The Commission’s soft law in the area of services’ in Erika Szyszczak et al (eds), *Developments in Services of General Interest* (Springer 2011) 58.

<sup>59</sup> *Ibid.*

the four cumulative *Altmark* criteria is not met and the Article 107(1) TFEU conditions for the existence of aid are met, then there needs to be an examination of the conditions set in the Decision and the Framework: those conditions are: first, there should be an act of entrusting the public service to the undertaking,<sup>60</sup> secondly, the compensation should only cover the costs for the operation of the service and a ‘reasonable profit’;<sup>61</sup> and third, there should be checks after implementation to secure that the compensation does not exceed the amount of compensation agreed in the act of entrustment.<sup>62</sup> The measure is compatible, if all of those conditions are met.

There is always a very complicated relationship between public authorities and public undertakings when it comes to their financial relations. Therefore, the Transparency Directive<sup>63</sup> aims at helping the Commission with controlling the state aid that public authorities may grant to public undertakings entrusted with the operation of services of general interest. It is doing so by requesting that public undertakings keep separate and distinct accounts for different activities that are performed within the same entity.<sup>64</sup> The objective is that the Member States and the Commission

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<sup>60</sup> Commission Decision of 28 November 2005 (Decision) on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2005] L312/67, Article 4.

<sup>61</sup> *Ibid*, Article 5.

<sup>62</sup> *Ibid*, Article 6.

<sup>63</sup> Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L318/17

<sup>64</sup> Pierre Bauby, ‘From Rome to Lisbon: SGIs in Primary Law’ in Erika Szyszczak et al (eds), *Developments in Services of General Interest* (Springer 2011) 34.

have detailed data about the financial and organisational structure of public undertakings and using the data to control state aid.<sup>65</sup>

### 7.5.3 The justification for the reform of the state aid rules for SGEI

The post – *Altmark* package was set to expire in 2011,<sup>66</sup> so the Commission set forward the reform procedures, in the means of a consultation with the stakeholders: Member States, national authorities involved in the public services and competition law, legal professionals and the undertakings that provide public services. The Commission justified the reform in the necessity for public services to meet the needs of the people of Europe.<sup>67</sup> The new rules should fulfil the following conditions: the public services should become ‘easier to operate at the appropriate level, adhere to clear financing rules, are of the highest quality and actually accessible to all.’<sup>68</sup> The Monti Report found that there is room for strengthening the approach to compensation for the provision of public service obligation that was adopted in the 2005 package.<sup>69</sup> The reform of the package according to the Monti Report should be in the direction of making rules more flexible so that public service operators can fulfil their mission.<sup>70</sup>

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<sup>65</sup> Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L318/17 paras 15-16.

<sup>66</sup> Article 5 of the Commission Decision of 28 November 2005 (Decision) on the application of Article 86(2) of the EC Treaty to state aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2005] L312/67

<sup>67</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a Single Market Act, COM(2010) 608 final, 20

<sup>68</sup> *ibid*, 21

<sup>69</sup> Mario Monti, ‘A new strategy for the single market at the service of Europe’s economy and society Report to the President of the European Commission José Manuel Barroso’ available at <[http://ec.europa.eu/bepa/pdf/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf)> accessed on 11/9/2013.

<sup>70</sup> *ibid*.

Another reason causing the reform necessary was the fact that liberalisation has been introduced in many industry sectors throughout the European Union, but it has been performed in different levels and different speeds among different Member States, according to their individual economic realities and needs.<sup>71</sup> Those differences create problems in the appreciation of what can be considered a SGEI, since the inclusion of a service into the SGEI framework requires to determine the fact that there is or not an economic activity involved. As with the power to define SGEI, which is left to the discretion of Member States, there is no definition of what can be considered an economic activity in the Treaty. The new legislation provides a non-exhaustive list of services that could be included in the notion of an economic activity, for the purpose of SGEI, and those that are excluded, because they are considered exercise of sovereign powers, such as policing and the army.<sup>72</sup>

There is also a fresh issue that has risen because of the current economic crisis. The public services are compensated from the public budgets, and currently many Member States have introduced cuts in public spending, which affects the financing of those public services.<sup>73</sup> At the same time due to the cuts, more people are relying on public services, which make their performance more important than ever.<sup>74</sup> The current reforms should be well designed to serve this double cause: to secure that public money is

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<sup>71</sup> Commissioner J Almunia, 'SGEI reform: Presenting the draft legislation', Speech/11/618

<sup>72</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C8/4, paras 8-30.

<sup>73</sup> Commissioner J Almunia, 'SGEI reform: Presenting the draft legislation', Speech/11/618

<sup>74</sup> Commission staff working paper 'Reform of the EU rules applicable to State aid in the form of public service Compensation SEC(2011) 1581 final, 2.1.1

well spent and that the public services remain efficient, even when there is less funding.<sup>75</sup>

Furthermore, it should be mentioned that there were practical issues that appeared during the implementation of the post - *Altmark* package that have also been raised by the participants during the consultation: those issues are another reason that justifies the need for reform. The main problem raised during the consultation was the fact that the notions concerning the application of state aid rules on compensation for public services are very complicated for national authorities to apply. Some of those notions are complex economic terms, such as the notion of the existence of economic activity and the notion of social public services that needed to be defined.<sup>76</sup>

This problem of low awareness of the rules, which led to low implementation of the post -*Altmark* package was especially severe when local authorities had to apply the 2005 Decision.<sup>77</sup> The Committee of the Regions, which has offered its opinion to the proposed reform of the 2005 package, believes that local situations are difficult to be defined by the terms of the 2005 Decision.<sup>78</sup> The case law of the Court of Justice introduced such notions, in the first place, in the assessment of the compatibility of the compensation granted to undertakings for the provision of public services.

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<sup>75</sup> E Regner, 'Reform of the legal framework for services of general interest: where do we stand? What should a reform look like?' [2011] 4 EStAL 597, 598.

<sup>76</sup> Commission staff working paper 'The application of EU state aid rules on services of general economic interest since 2005 and the outcome of the public consultation' SEC(2011) 397

<sup>77</sup> Committee of Regions, Opinion of the Committee of Regions on the Reform of the State aid rules on Services of General Economic Interest COM (2011) 146 final, paras 28-29.

<sup>78</sup> Committee of Regions, Opinion of the Committee of Regions on the Reform of the State aid rules on Services of General Economic Interest COM (2011) 146 final.



Finally, the other problem that has been identified during the public consultation and has to do with the comprehension of the rules is the interconnection of state aid rules for SGEI with public procurement rules. When a public tender procedure was not used to decide which undertaking will be awarded with the public service, the fourth *Altmark* criterion<sup>79</sup> provides for the calculation of the compensation. The conditions under which such public tender procedure would be compatible with state aid rules for SGEI were unclear, in the sense that, if there is a public tender, then does that mean that there is no aid automatically, and no need to examine the existence of the other three *Altmark* criteria?<sup>80</sup> The fact is that the four criteria are cumulative, which means that all of them must occur and must be examined.

#### 7.5.4 Critique of the new SGEI package

The reform consultations and procedures have resulted in the adoption of a new set of documents that will replace the post – *Altmark* package. The Commission adopted a new Communication,<sup>81</sup> a Commission Decision<sup>82</sup> and a new Framework,<sup>83</sup> together with the revision of the Transparency Directive<sup>84</sup> and a press release of a Frequently Asked

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<sup>79</sup> Case C-280/00 *Altmark* [2003] ECR-I7747, paras 89-93.

<sup>80</sup> A Sinnaeve, 'The report and communication on services of general economic interest: stocktaking and outlook for reform' (2011) 2 *EStAI* 211, 222

<sup>81</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C-8/4.

<sup>82</sup> Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L-7/3

<sup>83</sup> Communication from the Commission, European Union framework for State aid in the form of public service compensation [2012] OJ C-8/15

<sup>84</sup> Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings [2006] OJ L318/17

Questions document<sup>85</sup> that aims at clarifying issues with the control of compensation for providing a public service obligation.<sup>86</sup> The Communication attempts to clarify the key notions that are used in the assessment of whether the compensation for public services is state aid or not. Those notions include the definitions of an undertaking for competition law; also the definition of an economic activity; the definition of an act of entrustment of a public service and what is considered overcompensation, which leads to existence of incompatible state aid. Furthermore, the Communication clarifies key concepts of Article 107(1) TFEU, such as state resources and effect on trade. Also, the Communication reaffirms the four criteria adopted by the Court in its *Altmark*<sup>87</sup> judgment, which are still in force during the examination of state aid measures to providers of public services.

Many of those concepts and conditions, such as the *Altmark* criteria and the notion of economic activity have been ‘shaped’ by the Court of Justice, through its case law.<sup>88</sup> Furthermore, the criteria of aid according to Article 107(1) TFEU can be found in the Treaty and have also been extensively analysed in theory and the case law of state aid. Consequently, it is fair to say that such secondary legislation seems more like a compilation of rules and case law that should be avoided, because it causes unnecessary

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<sup>85</sup> State aid: Commission adopts new package on State aid rules for services of general economic interest (SGEI) – frequently asked questions MEMO/11/929 of 20/12/2011 available at < [http://europa.eu/rapid/press-release\\_MEMO-11-929\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-929_en.htm?locale=en) > accessed on 15/11/2013

<sup>86</sup> Erika Szyszczak, ‘Introduction’ in Erika Szyszczak and Johan Willem Gronden (eds), *Financing Services of General Economic Interest: Reform and Modernization* (Asser Press – Springer 2013) 9.

<sup>87</sup> Case C-280/00 *Altmark* [2003] ECR-I7747, paras 89-93.

<sup>88</sup> For example the notion of economic activity was examined in Case 118/85 *Commission v Italy* [1987] ECR 2599, para 11.

repetition and confusion in legislation. It is interesting that the reason for the adoption of such instruments is to provide guidance and clarification, which is what many of the participants in the consultation have asked for.<sup>89</sup> Nonetheless, the Commission is bound by the Treaty and its interpretation by the Court, consequently, it could not offer anything more in this case; the results, though, are probably repetition and fragmentation of state aid control legislation.<sup>90</sup> Notions, such as the economic activity and the meaning of aid that apply in every type of state aid measure should not be repeated in every single horizontal framework. There should be one document that can be applied uniformly. This will make the state aid policy more compact and easy to follow.

The new Decision<sup>91</sup> and the Framework<sup>92</sup> contain the amended conditions under which the compensation for providers of public service obligations will be compatible with the state aid rules of the TFEU. The scope of the Decision has been altered: compensation granted to hospitals and social providers in relation to social housing, emergency services, long-term care, childcare, access to labour, and the care and social inclusion of vulnerable groups is exempted from notification, because of its limited

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<sup>89</sup> Commission staff working paper 'The application of EU state aid rules on services of general economic interest since 2005 and the outcome of the public consultation' SEC(2011) 397

<sup>90</sup> Georgios Kamaris, 'The reform of EU state aid rules for services of general economic interest in times of austerity', (2012) 33(2) ECLR 55, 59.

<sup>91</sup> Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L-7/3

<sup>92</sup> Communication from the Commission, European Union framework for State aid in the form of public service compensation [2012] OJ C-8/15

impact on competition and trade.<sup>93</sup> This broadening of the exemption is positive, since it does not affect competition.

However, for all other fields the Commission decided to lower the thresholds of compatible compensation for public services, which therefore is excluded from notification. From 30 million Euro to 15 million Euro and the turnover threshold has been eliminated altogether.<sup>94</sup> This change in the thresholds has been justified as an attempt to place undertakings of different sizes under more equal conditions, and trying to catch subsidisation of multinational providers that operate in many Member States.<sup>95</sup> However, the stricter limits mean that there will be more measures caught in the Commission's control, which could dissatisfy small regional public authorities that grant aid to service providers locally.

The most important change in the evaluation of the compatibility of the compensation for public service providers with the state aid rules has been the introduction of efficiency incentives over the life of the contract. The 2005 Decision included a provision that the calculation of the reasonable profit, allowed under the *Altmark* criteria<sup>96</sup> to be included into the compensation, could include the gains in productive efficiency as incentive criteria, relating to the quality of the service.<sup>97</sup> However, there was no obligation for the Member State to align the compatibility of the

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<sup>93</sup> Commission Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L-7/3, Article 2.

<sup>94</sup> *Ibid*, Article 2.1(a).

<sup>95</sup> *Ibid*, paragraph 10.

<sup>96</sup> Case C-280/00 *Altmark* [2003] ECR-I7747, paras 89-93.

<sup>97</sup> Commission Decision of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2005] L312/67, Article 5(4).

compensation with the gains in efficiency for the beneficiary. An inefficient undertaking could well be awarded state aid for a public service as well as an efficient one.

What has changed is that the new Framework<sup>98</sup> includes a detailed mechanism for incentivising efficiency improvements over the life of the contract, so now the Member States have two options by which they can calculate efficiency gains in SGEI contracts: first, to have an upfront fixed compensation that includes the efficiency gains for the life of the contract, or the new option under which the compensation (which means the state aid) could increase through the life of the contract, depending on whether the targets in efficiency made for the beneficiary are met or not.<sup>99</sup>

Consequently, the introduction of such ‘incentivised efficiency’ could jeopardise the quality of the service, because the providers might be tempted to reach the efficiency targets by lowering the standards of the quality of the service provided to consumers. It is true that the Framework includes a provision<sup>100</sup> that the efficiency gains should not be reached by jeopardising quality, but it is hard to see how that will be enforced in practice. This introduction of incentivised efficiency might be considered as interfering with the Member States discretion in defining SGEI and organising and funding public services. The Committee of the Regions has raised concerns over the connection of efficiencies with the compensation for SGEI, because according to them there is no legal basis available for the Commission to legislate on the efficient allocation of Member States

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<sup>98</sup> Community Framework for state aid (Framework) in the form of public service compensation [2005] C297/4, paras 39-46.

<sup>99</sup> Communication from the Commission, European Union framework for State aid in the form of public service compensation [2012] OJ C-8/15 paras 40 – 41.

<sup>100</sup> *Ibid* para 43.

resources.<sup>101</sup> The Commission though, did not go as far as to introduce a new test of efficiency, which would lead to state aid granted only to efficient public service providers. That would be too intrusive to Member States' discretion, and would impose a huge burden on the local authorities to prove such efficiency.<sup>102</sup>

The new package includes a *de minimis* Regulation.<sup>103</sup> Aid up to 200,000 Euro per beneficiary, over three fiscal years, is automatically exempted and considered compatible with Article 107(1) TFEU. This limit is lower, than what was anticipated from the participants of the consultation.<sup>104</sup> However, it does prove that the Commission wants to treat large scale public projects with more scrutiny, and allow small scale local projects that do not distort competition in the Union. This diversified approach is consistent with the principle of solidarity, which should be also taken into consideration when the costs of local social services, such as housing and health services are being examined.<sup>105</sup> Also another problem would be the coexistence of the *de minimis* Regulation<sup>106</sup> for SGEI and the *de minimis* Regulation<sup>107</sup> that applies horizontally to all industries.

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<sup>101</sup> Opinion of the Committee of the Regions on 'Reform of the EU State Aid rules on services of general economic interest' [2011] C259/40 paras 22-24.

<sup>102</sup> Commission staff working paper 'Reform of the EU rules applicable to State aid in the form of public service Compensation SEC (2011) 1581 final, 5.5.3.

<sup>103</sup> Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L 114/8

<sup>104</sup> The French Government for example proposes a raised threshold of 450,000 Euro over three years. See 'French response to the future reform of European Union rules applicable to State aid in respect of services of general economic interest (SGEI)' para 2.2, available at <[http://ec.europa.eu/competition/consultations/2011\\_sgei/france\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_sgei/france_en.pdf)> accessed on 12/9/2013.

<sup>105</sup> N Jaaskinen, 'The new rules on SGEI' [2011] 4 EstAL 599, 600.

<sup>106</sup> Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis*

In whole, the reform of the state aid rules for SGEI by the Commission has improved the legislation concerning the application of state aid rules to public services. It also satisfies the need for coherent legislation within the same horizontal sector of the economy, which in this case is SGEI.<sup>108</sup> But the new package of 2012, which will be fully and fairly judged by its implementation, seems to revolve around what has previously been introduced by the case law; it does not go further as much as anticipated by the consultation.

## 7.6 THE STATE AID MODERNISATION (SAM)

The SAAP was the first attempt to introduce a wider modernisation that was not targeted to a specific sector of the economy. However, the SAAP was incomplete because the Commission lacks investigative powers, which hinders the effects-based assessment of measures.<sup>109</sup> Therefore, is a need for a reform that will include more horizontal legislation, instead of legal instruments that are aimed to sectors, or even an overall modernisation of the state aid policy?

The Commission believes so, and has initiated the State Aid Modernisation in 2012. In 2005 the context of the reform was the Lisbon Strategy; in 2012 the context for the modernisation is given by the economic

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aid granted to undertakings providing services of general economic interest [2012] OJ L 114/8

<sup>107</sup> Commission Regulation (EC) 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379/5

<sup>108</sup> N Fiedziuk, 'Services of general economic interest and the Treaty of Lisbon; opening doors to a whole new approach or maintaining the 'status quo' (2011) 36(2) ELR 226, 238.

<sup>109</sup> Thibaut Kleiner, 'Modernization of state aid policy' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 20

crisis.<sup>110</sup> In his speech in the European Competition Forum of 2012 Vice-President of the Commission Almunia made the announcement that the control of state aid will be modernised. This research reaches also the conclusion that there is a need for modernisation of the state aid policy, in the direction of decentralisation and streamlining the different mechanisms into a more effective regime with multiple actors. The Vice-President also revealed the rationale for the modernisation that will follow. The basic argument is the effects of the on-going crisis on state aid control: the Member States have limited resources, but the need for efficient state aid is greater now. As a result, state aid control should help the limited public spending so that it is still effective. This can be achieved only when public expenditure addresses genuine market failures; otherwise, public spending will be ineffective and wasted. Finally, the effective control of public spending is the goal and state aid control can have the objective of controlling public spending, in addition to protecting competition.<sup>111</sup>

State aid modernisation has three targets: to streamline the rules and lead to faster decisions, to foster growth and to focus the Commission's ex ante control to the most distortive measures.<sup>112</sup> The SAM has revised the Procedural<sup>113</sup> and Enabling Regulations,<sup>114</sup> is currently revising the *de*

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<sup>110</sup> Maria J. Segura Catalán, Marianne Clayton, 'State aid modernisation: another reform?' (2013) 14(1) ERA Forum 21, 22

<sup>111</sup> Vice President of the European Commission responsible for Competition Policy J Almunia, 'Priming Europe for Growth', speech at the European Competition Forum, Brussels, 2 February 2012 SPEECH/12/59.

<sup>112</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM), Brussels 8.5.2012 COM(2012) 209 final, para 6.

<sup>113</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>114</sup> Council Regulation No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid [2013] OJ L204/ 11



*minimis* Regulation<sup>115</sup> and the General Block Exemption Regulation.<sup>116</sup> All of those changes have been presented in previous chapters of the thesis.

The modernisation focuses on reforming guidelines, some of which are conveniently expiring at the end of 2013, such as the Guidelines on national regional aid<sup>117</sup> and the Framework for R&D&I.<sup>118</sup> Apart from those two documents the Guidelines that have been included in the Modernisation are: the Guidelines for Rescue and Restructuring aid,<sup>119</sup> the Guidelines for environmental aid,<sup>120</sup> the Guidelines for Risk Capital,<sup>121</sup> the Guidelines for Broadband<sup>122</sup> and the Guidelines for Aviation.<sup>123</sup> The main elements of state aid for those objectives have been examined in the second chapter of the thesis. Therefore, this chapter only examines, indicatively, the rationale behind the reform of the R&D&I Framework as an example, because of the significance of this horizontal objective for the future growth and development of the Union, and to examine the priorities of the Commission in the revision of Guidelines.

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<sup>115</sup> Commission Regulation (EC) 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, [2006] OJ L 379/5.

<sup>116</sup> Commission Regulation (EC) 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the Common Market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation), [2008] OJ L214/3

<sup>117</sup> Community Guidelines on National Regional aid [2006] OJ C54/13.

<sup>118</sup> Community framework for state aid for research and development and innovation [2006] OJ C- 323/01

<sup>119</sup> Community Guidelines on state aid for rescuing and restructuring firms in difficulty [2004] OJ C244/2.

<sup>120</sup> Community guidelines on State Aid for environmental protection [2008] OJ C 82/1

<sup>121</sup> Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises [2006] C-194/02

<sup>122</sup> EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks [2013] OJ C 25/01

<sup>123</sup> Guidelines on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector [1994] OJ C 350/07 and Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports [2005] OJ C 312/01.

### 7.6.1 Justification of the need to reform the R&D&I Framework

The revision of the R&D&I Framework is underway, part of the reforms of the SAM. The first reason, which makes the amendment of the R&D&I Framework necessary, is the fact that the European Union has set the need to create an ‘Innovation Union’ by 2020, as one of its most important priorities for the future.<sup>124</sup> This policy aims to fill the gap between the European Union’s spending for R&D&I and the US and Japan, which spend more for R&D&I; therefore, the Union set the target to three per cent of GDP to be spent on R&D&I.<sup>125</sup> The main purpose of the reform is how Member States intervene to reach the target and what should be the role of state aid.<sup>126</sup> As the European Union is right now concerned about promoting growth, which seems to be stalling, R&D&I projects could foster growth in the Union. But for that to happen there needs to be a comprehensive review of the R&D&I Framework, to make it more effective.

However, the Commission also recognises that there is a market failure when it comes to private investment in R&D&I in the Union.<sup>127</sup> That market failure, according to the analysis in the previous parts of this chapter,<sup>128</sup> could be corrected, if there was state intervention in R&D&I. Nonetheless, the private sector’s investment in R&D&I is important,

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<sup>124</sup> Commission, Communication from the Commission Europe 2020 A strategy for smart, sustainable and inclusive growth COM (2010) 2020 final.

<sup>125</sup> Ibid 10.

<sup>126</sup> Commission, ‘Revision of the state aid rules for research and development and innovation Issues Paper of 12/12/2012 available at <[http://ec.europa.eu/competition/state\\_aid/legislation/rdi\\_issues\\_paper.pdf](http://ec.europa.eu/competition/state_aid/legislation/rdi_issues_paper.pdf)> accessed on 12/10/2013.

<sup>127</sup> Commission, Communication from the Commission Europe 2020 A strategy for smart, sustainable and inclusive growth COM (2010) 2020 final 12: ‘Innovation: R&D spending in Europe is below 2%, compared to 2.6% in the US and 3.4% in Japan, mainly as a result of lower levels of private investment.’

<sup>128</sup> Section 7.2.3.

especially now that public spending is rationalised in many Member States, in an attempt to cut spending and reduce debt. Therefore, the balancing test will prove to be an extremely helpful tool in designing R&D&I measures that respect the need for public spending to be efficient. Furthermore, private funds could be encouraged to be used for the promotion of R&D&I by promoting other policies, such as the employment and business policies of Member States.

As a result of granting aid for R&D&I there could be issues on effect on trade and competition between undertakings that receive too much aid to R&D&I and those that do not. This assumption has to do with the negative effects of aid to R&D&I: apart from draining public resources aid for R&D&I has the potential to distort competition by distorting the competitors' incentives to invest, creating market power for the recipient and maintaining inefficient companies in the market.<sup>129</sup> Those negative effects of state aid to R&D&I should be more clearly addressed in the next Framework possibly by strengthening the use of tests that come from economic theory, such as the balancing test, which safeguards that the measure is the most effective to address the specific problems.

Another possible reason that leads to the reform of the current Framework is the need, once again, for transparency and clarification of the rules. The current Framework includes some examples of measures that can be considered compatible with the internal market; however, it does not include the basic definitions of what can be an R&D project and what is an

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<sup>129</sup> P Nicolaidis, 'Distortion of Competition in the field of state aid: from unnecessary aid to unnecessary distortion'[2010] 31(10) ECLR 402, 408.

Innovation project.<sup>130</sup> This is particularly important, because the older version of the Framework explicitly excluded Innovation projects from its scope of application. Innovation was not considered eligible for state aid, rather it was considered to be a market activity that was fundamental for a company that wanted to remain competitive.<sup>131</sup> That appreciation of Innovation, though, changed with the adoption of the 2007 Framework, and now there is a need for better distinction of the different measures.

The last reason that makes the reform necessary is the strengthening of the economic analysis of R&D&I measures. The mid-term review document shows that the Commission applies the refined economic approach to notified R&D&I projects, which is something positive that needs to be further enhanced into the new Framework that will be adopted. However, the figures show that after the economic assessment of the measures most of them get finally approved, even if they have to be somewhat modified according to the findings of the assessment.<sup>132</sup>

In conclusion, it is clear from the analysis that preceded that the priorities of the Commission in revising and streamlining the existing Guidelines are mainly the need to make public spending as efficient as possible and the clear identification of market failures and the potential

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<sup>130</sup> Commission staff working paper, 'Mid-term review of the R&D&I Framework' available online

<[http://ec.europa.eu/competition/state\\_aid/legislation/rdi\\_mid\\_term\\_review\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/rdi_mid_term_review_en.pdf)> accessed on 10/2/2012.

<sup>131</sup> T Kleiner, 'The New Framework for Research, Development and Innovation, 2007-2013' [2007] 2 *EstAL* 231, 233.

<sup>132</sup> Commission staff working paper, 'Mid-term review of the R&D&I Framework', 3.1 available online

<[http://ec.europa.eu/competition/state\\_aid/legislation/rdi\\_mid\\_term\\_review\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/rdi_mid_term_review_en.pdf)> accessed on 10/2/2012 page 5.

negative impact of the proposed state aid measures.<sup>133</sup> The real important issue that needs to be strengthened in the future Guidelines is the evaluation of the actual existence of the market failure and the type of the failure for the specific innovation or research that needs state funding. If there is a real market failure, then the state's intervention can produce positive outcomes by introducing something new and innovative. However, there needs to be in depth analysis of the type of failure that exists, because different types of state intervention create different incentive effects.<sup>134</sup>

#### 7.6.2 Critique for the State Aid Modernisation.

The revision of such a large amount of secondary legislation and soft law is welcome. However, the amount of documents that are being amended will not evaluate the success or failure of the current Modernisation. Specifically, the revision of soft law instruments is out of necessity, since some of them are outdated or expiring. The main critical reforms include the identification of common principles that will be used to assess the compatibility of measures with the internal market. Those common principles should be found across different Guidelines and could clarify issues such as 'the definition and assessment of genuine market failures, the incentive effect and the negative effects of public interventions.'<sup>135</sup> The revision of the Guidelines has already concluded for some of them, and the

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<sup>133</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM) COM(2012) 209 final, para 18 (b).

<sup>134</sup> Commission staff working paper, 'Mid-term review of the R&D&I Framework', 3.1 available online  
<[http://ec.europa.eu/competition/state\\_aid/legislation/rdi\\_mid\\_term\\_review\\_en.pdf](http://ec.europa.eu/competition/state_aid/legislation/rdi_mid_term_review_en.pdf)> accessed on 10/2/2012.

<sup>135</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM) COM(2012) 209 final, para 18.

Commission included the common principles in the new Guidelines for Regional Aid<sup>136</sup> and aid for the rapid deployment of broadband.<sup>137</sup> In the past, the Commission has identified common principles for the economic assessment of the compatibility of aid under Article 107 (3) TFEU.<sup>138</sup> This document aimed at detailing and clarifying the methodology used by the Commission in the assessment under the balancing test. The common principles apply to measures that are not covered by any particular Guidelines and if a measure is covered by Guidelines then the assessment criteria formulated in those Guidelines apply.<sup>139</sup>

This time, the Commission chose to include the common principles in every newly adopted Guidelines under the SAM,<sup>140</sup> which makes the soft law instruments more coherent and consistent and avoids any confusion as to which document applies each time. Every measure must comply with the following common principles in order to be declared compatible with the internal market: a) contribution to the achievement of objectives of common interest, b) absence of market delivery due to market failures or important inequalities, c) appropriateness of State aid as a policy instrument, d)

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<sup>136</sup> Guidelines on regional State aid for 2014-2020 [2013] C 209/01

<sup>137</sup> EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks [2013] OJ C 25/01

<sup>138</sup> Common principles for an economic assessment of the compatibility of state aid under Article 87.3 available at <[http://ec.europa.eu/competition/state\\_aid/reform/economic\\_assessment\\_en.pdf](http://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf)> accessed on 15/10/2013.

<sup>139</sup> *Ibid* para 6.

<sup>140</sup> See Draft Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, para 39; draft Union Guidelines on State aid to promote risk finance investments, para 38; and draft Aviation Guidelines para 72 all available at <[http://ec.europa.eu/competition/state\\_aid/modernisation/index\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/index_en.html)> accessed on 15/11/2013.

existence of incentive effect, e) aid limited to the minimum necessary, f) limited negative effects, g) transparency.<sup>141</sup>

Also the Modernisation aims to produce a document that will clarify the notion of aid contained in Article 107(1) TFEU. The Commission has indicated that this clarification will only explain how the Commission ‘understands and applies the provisions of the Treaty, as interpreted by the Court of Justice’.<sup>142</sup> This clarification can be of particular concern. The interpretation of legal notions and Articles of the Treaty lie in the jurisdiction of the Court of Justice of the EU, they are not a Commission competence. According to critics the Commission should not include in its clarification not yet fully settled legal positions by the Courts, or positions that have been contrary to previous case law.<sup>143</sup>

The thesis has presented the reforms that the Procedural Regulation aims to bring to enforcement of state aid control by the Commission. The current proposal for the revision and expansion of the General Block Exemption Regulation will inevitably require more measures to be examined ex post by Member States. Concerns have been expressed as to the limited scope of the revision of the Procedural Regulation; it would be more beneficial for the reforms to be more substantial. It does not address a number of issues. For example, although it strengthens complaint handling, it does not mean that it will help diligent businessmen to address their reasonable doubts about measures already implemented through the GBER

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<sup>141</sup>EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks [2013] OJ C 25/01, para 33.

<sup>142</sup>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM) COM(2012) 209 final, para 23 (a).

<sup>143</sup>Raymond Luján, ‘Does the Modernisation of State Aid Control Put Legal Certainty and Simplicity at Risk?’ [2012] 4 EStAL 765.

that Member States fail to notify after implementation.<sup>144</sup> This might explain why so many measures under the GBER are found to be problematic at the samples that are being *ex post* assessed by the Commission.

Furthermore, the new Procedural Regulation has reinforced the bilateral character of state aid measures assessment between the Commission and the Member State involved. Other interested participants can only intervene in the formal investigation stage, restricted to submitting comments.<sup>145</sup> And it has already been mentioned in previous chapters of the thesis that limited participation in the Commission procedure equals to limited access to the Court. This thesis adopts the position that expansion of participation rights similar to antitrust rules should have been included in the SAM, however, the Commission has diminished hopes early in its presentation of the objectives of the SAM, which would not ‘expand participation rights.’<sup>146</sup> What the Regulation does do is to add to their obligations to provide information and for failure to do so imposes fines on them, which is a provision inspired by Articles 17 and 18 of Regulation 1/2003.<sup>147</sup> The Procedural Regulation singled out obligations and sanctions from antitrust for third parties and excluded sanctions for Member States. As a consequence, it has been said that the SAM has unbalanced rights and obligations for private participants and public authorities,<sup>148</sup> which is not

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<sup>144</sup> Ibid 766.

<sup>145</sup> Thomas Jaeger, ‘The Inquisition retakes Brussels (via the new Procedural Regulation) (2013) 12(3) EStAL 441.

<sup>146</sup> Proposal for a Council Regulation amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty COM(2012) 725 final para 2.2.1.

<sup>147</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1

<sup>148</sup> Thomas Jaeger, ‘The Inquisition retakes Brussels (via the new Procedural Regulation) (2013) 12(3) EStAL 441, 442.



something that is imposed by the TFEU. In conclusion, the public interest's importance is heightened and justifies the imposition of legal obligations and financial sanctions to private participants.<sup>149</sup>

## 7.7 CONCLUSION

There have been reforms of state aid control in the past. Every decade or so, different legal instruments of state aid control have to be readjusted based on the results of their implementation. Lately, though, there have been more comprehensive reform processes that lead to the introduction of new tools into the investigation of cases and the enforcement of decisions. The most important such reform has been the SAAP<sup>150</sup> the reform of SGEI and the SAM.<sup>151</sup>

The focus of the State Aid Action Plan was to incorporate the refined economic assessment into state aid control. The new rules for the control of aid for the provision of SGEI incorporate the case law of the Court and aim to address issues that arise from the economic crisis and Member State's budget restraints, by only allowing aid that brings efficiency gains. The aims of the State Aid Modernisation were broader, and turned the focus into revisions of Guidelines that aim to streamline the procedures horizontally across sectors of the economy and foster growth through stricter *ex ante* control of most distortive state aid measures. The focus of state aid as a whole has been shifted from sectoral aid to address more horizontal objectives such as the environmental measures and the

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<sup>149</sup> Ibid 443.

<sup>150</sup> State Aid action Plan: Less and better targeted State Aid: a roadmap for State Aid reform 2005-2009, COM(2005) 107 final

<sup>151</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM) COM(2012) 209 final

R&D&I Framework, which are considered to be more beneficial for the purpose of driving the Union into growth and employment.

Despite the recent efforts, the research has identified problems in state aid control that have yet to be resolved, even in recent reforms. The good elements should be preserved and strengthened; elements such as the refined economic assessment of measures by the Commission. However, it is necessary to modernise the state aid policy to make it more effective. The need for a more comprehensive modernisation has been acknowledged by the Commission, which has the power to implement it. The process is underway and was supposed to be completed by the end of 2013<sup>152</sup> but this target will be missed.<sup>153</sup> The documents that have been presented and those that have been adopted have positive signs, such as the analysis of measures based on their effects rather than on their form, the adoption of common principles in horizontal guidelines have helped in streamlining Commission procedures. However, issues with participation rights have not been included in the Commission's revision of the Procedural Regulation, which creates unbalanced rights and obligations for private and public actors based on the need to protect the public interest.

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<sup>152</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM) COM(2012) 209 final para 27.

<sup>153</sup> The Commission has not presented draft Guidelines for Environmental Aid, or Research, Development and Innovation yet or a clarification on the notion of aid.

## **Conclusion of the research**

This research critically analysed the implementation of the state aid policy and rules in the European Union, aiming to answer the main research question: whether optimum implementation of the state aid policy is achieved and if not what are the problems and solutions. The research identified the shortcomings and provides solutions for the optimisation of state aid control. To measure the effectiveness of the state aid policy's implementation three basic criteria were introduced by the researcher: the speed and applicability of the procedures that are in place to assess state aid measures were tested. Secondly, the coherence of the legislation in force that implements state aid control was questioned. Third criterion is the need to accompany the state aid rules with strong enforcement mechanisms and procedures in both the supranational and the national levels. The criteria have been applied throughout the chapters of the thesis, depending on the relevance of the research question of each chapter to each criterion. The focus of each chapter did not lie in any specific criterion; it was rather on one of the group of actors that implements state aid control. The results of this analysis have been summarised in the following paragraphs of this concluding chapter.

Concluding on whether state aid control is implemented effectively or not, would not be sufficient enough, without further action: the final chapter of the thesis includes proposals for the future form of state aid control. Those proposals, which can be the thesis' practical application, were reached after the research arrived to the conclusion that there is a need

for modernisation of the core of state aid policy, by strengthening the powers of all of its actors, and not relying on the Commission as the major enforcer of state aid control. The research has indicated that there are two levels of implementation in the Union: a national and a supranational. Each contains a group of actors with distinct competences in state aid policy implementation. At the supranational level it is the Commission, the European Courts and with limited powers the Council. At the national level, it is the various forms of national authorities and the national courts. Their powers need to be clarified and reinforced and the procedures need to be streamlined and become more transparent. Other research questions that derive from the main question were addressed in each chapter of the thesis, and the answers that were given contributed to the final research conclusion.

The research tested the first research criterion and concluded on the speed and applicability of the procedures, both the administrative control of the Commission and the powers of the other actors, such as the national authorities that implement state aid control in their various forms. The Commission's administrative procedure is not regarded as a speedy one due to the two stage investigation procedure and additionally the new pre-notification stage added by the Simplification Package. The implementing procedures are not streamlined enough, and furthermore at the national level there is confusion and different levels of administrative authorities that implement state aid control. The second criterion tested the coherence of the legislation and the finding is that the state aid framework is fragmented, due to the large amount of soft law documents and the lack of basic definitions about the concept of aid that apply horizontally to all sectors and markets.

The State Aid Modernisation has included common principles that are incorporated into Commission soft law that is being reviewed and should therefore allow the state aid rules to be more coherent and straightforward. The third research criterion tested the enforcement of state aid law in the European and national courts and found that the problems that start from the limited rights of participation for third parties, other than Member States in the administrative procedures affect their standing in the courts. Overall, the implementation of the state aid policy is too centralised and the legislation fragmented, which makes the objective of protecting competition and the internal market a difficult task for the different actors. More specialised findings for each one of the secondary research questions can be summarised in the following paragraphs.

In the first chapter, the research presented the basic definitions about the subject matter of this thesis, such as the notions of state aid implementation, decentralisation and modernisation of the policy; also, the Treaty framework that is the foundation of the prohibition of state aid was introduced. The research concludes that the European Union's state aid policy is implemented through a collection of Treaty provisions, secondary legislation and a large amount of soft law instruments. The adoption of soft law instruments has two functions: it clarifies the Commission's interpretation of the rules and the way it applies them in the assessment of state aid measures. Soft law is not binding on the Member States although the Commission seeks the Member States' acceptance by opening the formal investigation procedure whenever there is resistance. The effect of the use of soft law is that the Commission to some extent limits the

discretion it enjoys when assessing the compatibility of state aid measures with the internal market. However, the use of soft law has allowed state aid control to be flexible and easily adjustable to changing market conditions. It has not always promoted legal certainty, mainly due to the large amount of soft law documents that have been introduced, which is why the Modernisation attempts to correct the incoherencies by introducing the common principles that were presented in chapter seven of the thesis.

The prohibition, though, is not absolute, which means that amounts of aid around 0.5% of GDP are still being granted. This is why state aid control is so important today, as it was in 1957, when it was first introduced, by the Treaty of Rome. Other factors that give the research special importance today were also examined, factors like the credit and financial crisis of 2008, the Eurozone sovereign debt crisis and the need to sustain the internal market. The Member States' have competence to decide to implement state aid measures. Consequently, the thesis examined the main reasons behind the Member States' propensity to grant aid to their undertakings. There are several actors into state aid implementation and each has distinct powers and responsibilities concerning the control of state aid. The driving force behind the adoption of state aid measures are the Member States, and the reasons for the existence of aid were examined first.

Consequently, the next research question had to do with the rationalisation of state aid granted by the Member States. To answer this question the thesis analysed the reasons that drive Member States to grant subsidies to their undertakings. The economic theories of liberalism and

protectionism were introduced first because they conflict with each other, since the first desires a market free of government intervention and the second allows some government control of the functioning of the market, such as state aid.

Secondly, state aid is used by Member States to correct market failures and to promote objectives of common interest. Therefore the thesis examined the purpose of aid to different kinds of sectoral and horizontal aid, such as the benefits to Services of General Economic interest, the positive effects for regional coherence and the benefits on the European Economy that aim to counterbalance external negative influences from a globalised world economy. The research concluded that state aid does not come without negative effects and those negative effects might offset the positive outcomes that state aid can have. Aid is principally prohibited because of those negative effects that it produces. The final outcome of state aid should remain overall positive and this can be achieved through better implementation of the cost versus benefit analysis of aid measures.

Lastly, vast amounts of state aid were granted to financial institutions. State aid was chosen as the most effective tool to overcome the financial crisis. However, the crisis also exposed that the state aid framework was not flexible enough to manage extreme circumstances, and thus had to be amended, to be more adaptable to the new crisis conditions. The effects of crisis aid for the financial sector were in general positive: state aid helped the Union and its Member States to control a general meltdown of the financial system, but questions remain on whether other

forms of competition law should also be used, to help overcome the crisis, such as mergers between sound and ailing financial institutions; or even allow failing banks to exit the market, instead of saving them at the expense of the public finances.

The research also applied the financial theory of the moral hazard that might be created from the constant ‘bailing out’ of financial institutions that failed to restrain themselves into sound investments only. However, the application of the theory of moral hazard risks not acting at all, in pursuit of punishing the perpetrator of the failure, rather than making an effort. That would be really dangerous at a time when clearly something has to be done to overcome a very difficult situation, with consequences to the whole economy not just the perpetrator. Finally, the thesis examined the effects of the sovereign debt crisis of the Eurozone into state aid control: the conclusion is that state aid was chosen as the solution to the problems created by the debt crisis to financial institutions. Recapitalisations and guarantees are still in place to support banks that are affected by the lack of cash flow into the European banking system. Eventually, though, the financial institutions should be able to support themselves, because state aid should only remedy a market failure for a short time; otherwise, financial institutions might become too relied on aid and it will be impossible to return to normal conditions.

State aid control is implemented at two levels: one level is the supranational actors; the other level contains the actors at the national level. The specific procedures that are used by each one of them and their competence to implement state aid control were critically examined in



chapters three to six of the thesis. The aim was to discover the possible shortcomings in the implementation of state aid control that make it ineffective.

The first actor of state aid control is the Commission. The research concluded that the Commission as the guardian of the Treaties enjoys a special role in state aid control. The Commission's choice to implement state aid policy by adopting soft law instruments, such as Notices and Communications has created a fragmented framework for state aid that creates problems for all the other implementing partners, as well. The adopted state aid rules thus fail at the application of the second research criterion, which is the need for coherent legislation. However, its role as the major enforcer of state aid control is hindered by the negative characteristics that a highly centralised supranational control mechanism has: the numbers of measures that the Commission needs to examine because of the current notification system distract it from the examination of the most distortive measures that might escape its control. It is necessary to establish a more effective system than the one currently in force.

Apart from the quantitative negative characteristics the supranational regime has other limits too: it is too centralised and it does not allow other parties, such as beneficiaries and competitors to intervene. The supranational authority's procedures need to be reformed; this can only be implemented if the Procedural Regulation<sup>154</sup> is amended, in the direction of partial decentralisation that will allow the Commission to focus its control better. If the Procedural Regulation is to be amended there needs to be more

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<sup>154</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

flexibility in the Commission's administrative procedure. The system of notifications as the most common way of starting the state aid investigation is outdated, and does not allow the implementation of state aid control to be more targeted to the most distortive measures. The adoption of the amended Procedural Regulation<sup>155</sup> has created more investigative powers for the Commission and more obligations for the interested parties to supply information, which is why the new Procedural Regulation has created a more unbalanced procedure between public and private parties in state aid control.

The example that could be used for the decentralisation of the state aid control system is the decentralisation that was enacted in Competition law, after the adoption of Council Regulation 1/2003.<sup>156</sup> There are some differences in state aid control, such as the role that the Treaty awards to the Commission, which is the main enforcer of state aid; however, there are lessons to be learnt from the decentralisation of Competition law, in particular from the abolition of the notification obligation.

Furthermore, the Procedural Regulation<sup>157</sup> causes other problems as well. In particular, the participation of the third parties in the preliminary investigation is still limited, if not non-existent; third parties should be allowed more access to the investigation process, should be allowed to submit comments that will help the Commission reach decisions more swiftly. More transparent procedures should be implemented, especially

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<sup>155</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

<sup>156</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1

<sup>157</sup> Council Regulation (EU) No 734/2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L-204/15

concerning the rights of third parties and the handling of complaints as a way of starting a state aid investigation. The lack of participation of third parties in the preliminary examination causes the failure of the second research criterion, which seeks transparent legislation.

As for the first research criterion, which seeks speedy procedures, the Commission may need more than eighteen months to reach a final decision on a state aid investigation, and that clearly is a failure. To overcome the problems the Commission introduced the Simplified procedure,<sup>158</sup> which creates a new pre-notification stage that is supposed to resolve problems with the notification process, but in the end it adds another unnecessary stage at which parties, other than the Member States, cannot intervene.

During the financial crisis the Commission adopted the express procedures of the crisis framework, which saw a radical change in the procedures. The positive aspect of the crisis framework is the high level of cooperation between the Commission and the Member States, which should be an example of the future form of investigations. However, negative effects of the crisis framework's practice should be avoided. Third party rights should not be overlooked and the refined economic analysis should still be performed. The sound analysis should not be put aside in favour of extremely speedy decision making, such as the crisis decisions that were adopted over a weekend. Effective procedures need to deliver decisions within reasonable timeframes, but speed is only one parameter of

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<sup>158</sup> Commission Notice on a Simplified procedure for the treatment of certain types of state aid [2009] OJ C-136/3 and the Commission Notice on a best practices Code on the conduct of state aid control proceedings [2009] OJ C-136/13.

effectiveness; there needs to be transparency and effects based analysis of measures as well.

To conclude on the supranational aspect of state aid control, the jurisdiction and case law of the Union's Courts were critically examined in the fourth chapter of the thesis. A case having state aid as its subject matter initiates from a notification or a complaint, but is finally resolved before the Court of Justice of the European Union. The Union Courts have introduced a large number of novel principles and tests that have had a positive influence in state aid control over the years, and they have helped clarify notions and shape state aid as it is today.

The overall effects of the Union Courts in state aid enforcement are positive: they have jurisdiction to annul decisions in their judicial review process, and also assist Member States and the Commission to achieve better compliance with state aid rules. The third research criterion that seeks strong enforcement mechanisms is largely achieved at the Union Courts. The Court has proved to be overzealous, when it comes to sanctioning Member States for non-compliance with Commission decisions, and it has increased the penalties that the Commission has originally suggested that Member States should be forced to pay for not complying with its recovery procedures. This might not be efficient. It might seem that the Court is stepping into the policy aspect of state aid. The design of the state aid policy, though, is awarded to the Commission, not the Court.

The main ill-effects of the Court's enforcement mechanism have to do with the powers awarded to third parties, such as competitors and beneficiaries of aid, elements that can be easily rectified by the reform of

procedural rules. Also, they have to do with low numbers of some actions, such as damages actions, which prove that there are still some aspects of the state aid framework that need to be improved and clarified; those are the legislation over causation and the link between the aid and the damage caused. Overall, the performance of the Court has positive effects in state aid enforcement.

Apart from the Commission, which plays central role in state aid control, and the Court, which enforces state aid law at the supranational level, national institutions of the Member States already have been given powers to implement and enforce state aid control. However, the data presented in the fifth chapter reveal that there is a problem of limited compliance on behalf of the Member States with state aid control. Furthermore the Member States' ex ante control of exempted measures is going to increase as a result of the modernised General Block Exemption Regulation, which means that now more than ever it is necessary to seek ways to promote compliance at the national level. In the past the Commission sought compliance by streamlining rules and simplifying procedures but this thesis proposes the introduction of national state aid authorities.

The research concluded that there is a discrepancy when it comes to national authorities that implement state aid control, between older Member States and those that acceded to the Union after 2004. The latter are required to establish some form of national state aid control system, which is not included in the *acquis communautaire*, because the pre-2004 Member States did not have this obligation. This discrepancy needs to be corrected in the

future modernisation of state aid control, because the research concludes that uniform implementation of state aid control at the national level will optimise the Union's state aid policy. Consequently, at the national level, the first research criterion, which requests that there should be applicable procedures in place for the control of subsidies, fails, since there are no uniform procedures. The Member States' national authorities could be given powers to control aid exempted from notification and more powers for the ex-post monitoring, thereafter.

Finally, regardless of whether new national authorities for state aid are created, or powers to control subsidies are given to national competition authorities, there also needs to be a European Network of state aid authorities. The successful model of the European Competition Network could be the example for state aid control. The new network will act as a forum of exchange of information, experiences and best practices, which will benefit Member States. Writers<sup>159</sup> believe that there is confusion of powers and competences among the public administration and lack of knowledge of state aid basic provisions that creates problematic measures. The network can facilitate the exchange of best practices and the better distribution of information; it can even serve as training facility for the national administration.

The other aspect of the national state aid control comes from the powers of the national courts to enforce state aid control in their national jurisdictions. The jurisdiction was given to the national courts, as an attempt

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<sup>159</sup> Thibaut Kleiner, 'Modernization of state aid policy' in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) 11

to promote private litigation and enforcement at the national level, which is lagging. The research concluded that the reasons behind this are problems that have to do with the competence granted to national courts; competence that is not always clear, such as their powers to interpret Article 107(1) TFEU, and problems concerning causation in damages cases. Thus, the application of the third research criterion that seeks strong enforcement fails at the national courts, which have not been able to fully support the parties, when it comes to claiming damages and proving the link between the aid and the loss suffered.

The research though concludes that enforcement at the national level will be, in general, beneficial for the optimisation of state aid control; because it promotes decentralisation and because national courts can better protect individual interests and rights than the supranational authority, by additionally granting damages for example. The Commission does not have the powers to award damages, and this is something that possibly forces the private enforcers to turn away from pursuing enforcement of state aid before the Court.

Lastly, the research concluded that the recent trend in reforms of state aid legislation with a horizontal objective and not a sectoral approach is a positive trend that needs to be further strengthened in the future. The reforms of the SAAP that introduced the refined economic approach to state aid control is a positive step that fulfils the criterion set from the beginning of this research that effectiveness should be judged based on coherence and clarity of the rules. Horizontal rules apply to all sectors of the economy, and thus make state aid legislation more coherent. The introduction of the

refined economic analysis that applies horizontally to all types of measures should be the example of the future modernisation of the state aid policy; consequently, there will be fewer rules, which will be more comprehensive to those that need to follow them at every level.

The research concludes that the positive aspects of the State Aid Modernisation that started in 2012, such as the introduction of general principles should be acknowledged. However, there are the negative aspects that preserve the bilateral character of state aid control between the Member State and the Commission, for the sake of public interest. This bilateral character does not derive from the Treaty, which simply awards the Commission with powers to control state aid, so the Treaty is not the obstacle that prevents the changes that have been suggested in the previous paragraphs.

State aid law is constantly evolving. It is at the forefront of developments in the European Union, affected by the financial crisis and the need of the Member States to overcome it and at the same time preserve competition and the internal market. The Commission has already amended soft law instruments and legislation and more is to be adopted in the coming months. Those new rules and proposals for new version of state aid control will introduce the current research to new material that will need to be evaluated.

Future research could include the analysis of effects of the application of the new Procedural Regulation, and the issues that may arise. Also, critical new research can be performed once a new document is adopted, which will endeavour to clarify the notion of aid. Finally, the new



horizontal guidelines that have been amended can be the focus of new research papers. The current research identifies problems and offers some proposals, which may lead to some solutions. However, the Modernisation offers the opportunity for further constructive critical research in the state aid field of competition law.

## APPENDIX

**Table 1**

**Trend in the number of recovery decisions (aid to industry and services) and amounts to be recovered (1) 2000-2012 (state of play: 30.06.2012)**

	Date of Decision													Total
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	
Number of decisions adopted	15	19	26	10	24	13	8	10	13	7	6	12	9	172
Total aid known to be recovered (in mio €)	358	1602	2120	1131	4983	429	256	167	2610	76	149	198	1717	15796
<b>Amounts recovered (with out interest, in mio €) of which:</b>														
(a) Principal reimbursed /or in blocked account	352	1351	2068	997	4976	400	245	56	2057	51	120	0	847	13520
(b) Aid lost in bankruptcy	137	1263	2000	954	4105	400	200	54	1075	51	120	0	847	11206
Aid and interest registered in	215	88	68	43	871	0	45	2	982	0	0	0	0	2314
	0	11	3	5	0	8	0	216	415	20	29	85	237	1029

bankruptcy															
Amount outstanding (2)	6	251	52	134	7	29	11	111	553	25	29	198	870	<b>2276</b>	
% still pending to be recovered (2)	1,70%	15,60%	2,50%	11,80%	0,10%	6,80%	4,30%	66,50%	21,20%	32,90%	19,50%	100,00%	50,70%	<b>14,40%</b>	

Notes: (1) Only for decisions for which the aid amount is known.

(2) Total aid known to be recovered less principal reimbursed and aid lost in bankruptcy. Amount excluding interest.

**Table 2.**

**Pending recovery cases by Member State, 30 June 2012**

	Situation 31.12.2011	01.01-30.06.2012		Situation 30.06.2012
		New cases	Cases closed	
Italy/Italia	16			16
Spain/España	11	1		12
Greece/Ελλάδα	7	1		8
France	6	1		7
Germany/Deutschland	4	2		6
Portugal	4		1	3
Poland/Polska	2			2
Netherlands/Nederland	2			2
Austria/Österreich	1			1
Slovakia/Slovensko	1			1
United Kingdom	1			1
Bulgaria/България	1			1
Finland/Suomi	1	1		2
Belgium/Belgique/België	0	1	1	0
Hungary/Magyarország	0	1		1
Sweden/Sverige	0	1		1
<b>TOTAL</b>	<b>57</b>	<b>9</b>	<b>2</b>	<b>64</b>

Source: DG Competition

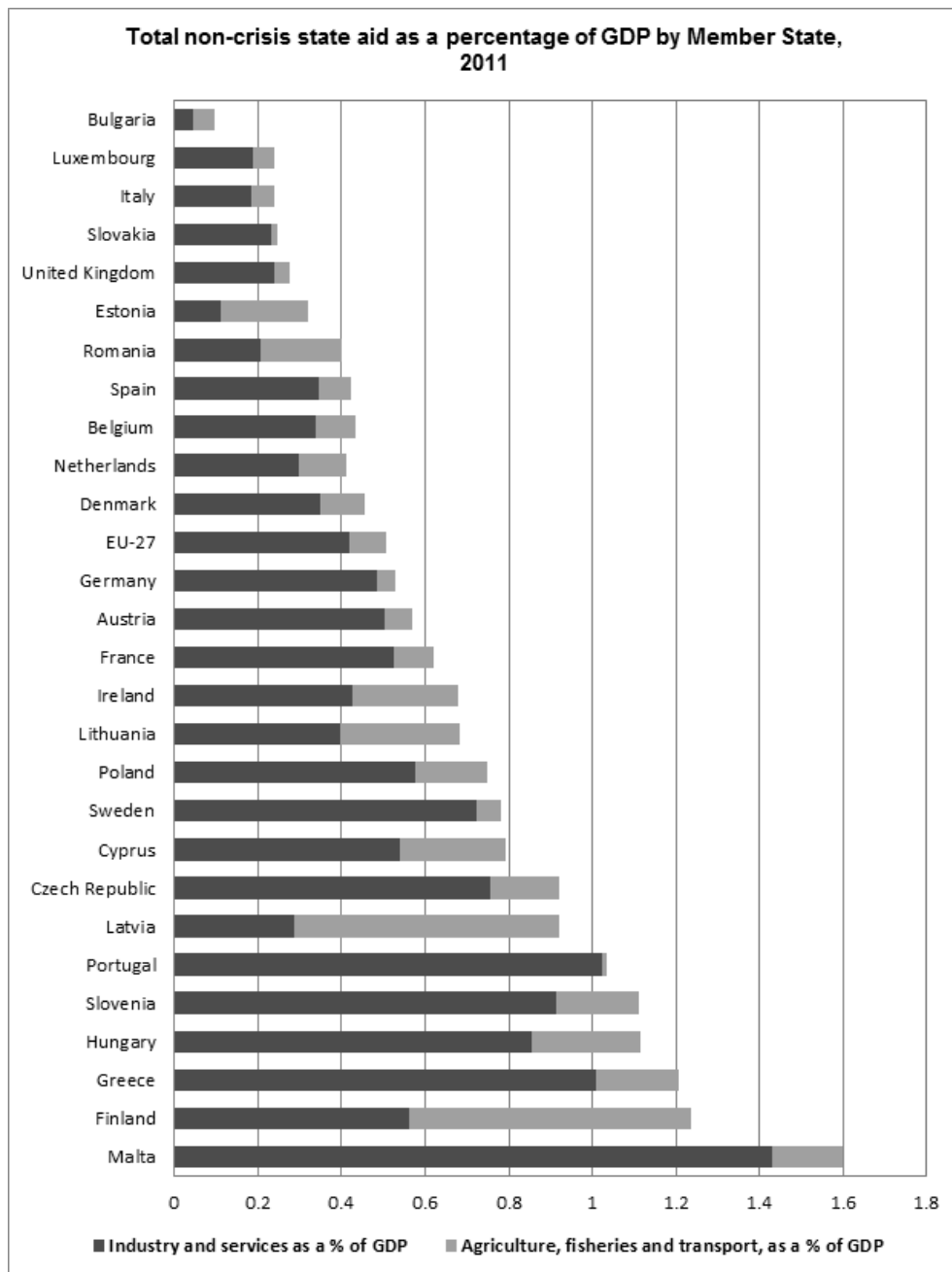
**Table 3**

**Trend in the number of recovery decisions  
(aid to industry and services)\***

	Date of the Decision													Total
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	
Number of decisions adopted	15	19	26	10	24	13	8	10	13	7	6	12	9	172
Number of cases closed	15	13	25	9	22	12	6	7	9	3	3	3	1	128

\*state of play - 30.06.2012;  
Source: DG Competition

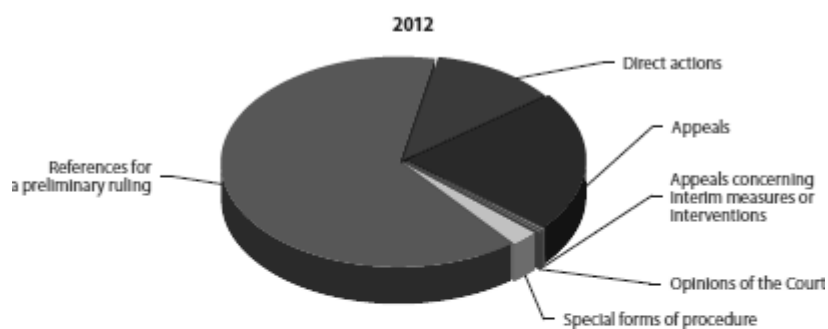
**Table 4**



**Source: DG Competition.**

**Table 5**

**2. New cases — Nature of proceedings (2008–12) (¹)**



	2008	2009	2010	2011	2012
References for a preliminary ruling		302	385	423	404
Direct actions	143		136	81	73
Appeals		105	97	162	136
Appeals concerning interim measures or interventions		2	6	13	3
Opinions of the Court		1			1
Special forms of procedure (²)		9	7	9	15
<b>Total</b>		<b>562</b>	<b>631</b>	<b>688</b>	<b>632</b>
Applications for interim measures		2	2	3	

Source: Court of Justice of the European Union, ‘Annual Report 2012’ available online, [http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685\\_2012\\_6020\\_cdj\\_ra\\_2012\\_en\\_proof\\_01.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf) > accessed on 26-06-2013.

**Table 6**

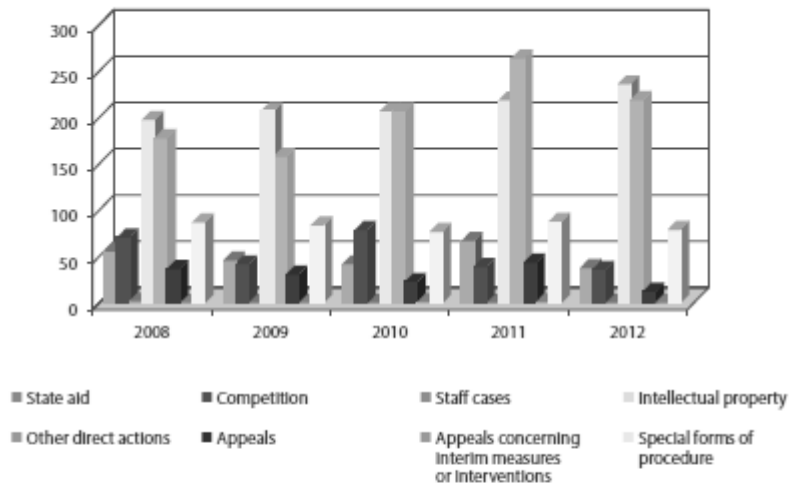
**3. New cases — Subject-matter of the action (2012) (1)**

	Direct actions	References for a preliminary ruling	Appeals	Appeals concerning interim measures or interventions	Total	Special forms of procedure
Access to documents			3		3	
Agriculture	1	15	5		21	
Approximation of laws	6	30			36	
Area of freedom, security and justice	1	56			57	
Citizenship of the Union		11			11	
Commercial policy	1	1	5		7	
Common fisheries policy	2		1		3	
Common foreign and security policy			4	2	6	
Company law		4			4	
Competition		6	23	1	30	
Consumer protection	1	22	1		24	
Customs union and Common Customs Tariff		11	2		13	
Economic and monetary policy	1	1	1		3	
Economic, social and territorial cohesion		2	3		5	
Energy	3				3	
Environment	14	19	5		38	
External action by the European Union	2	1			3	1
Financial provisions (budget, financial framework, own resources, combatting fraud and so forth)	1	1			2	
Free movement of capital	2	9			11	
Free movement of goods	2	1			3	
Freedom of establishment		10			10	
Freedom of movement for persons	1	21			22	
Freedom to provide services	2	8			10	
Industrial policy	4	12			16	
Intellectual and Industrial property		16	43		59	
Law governing the Institutions	3	3	15		21	4
Principles of European Union law		21			21	
Public procurement	3	8	1		12	
Research, technological development and space		2			2	
Social policy	2	34	2		38	
Social security for migrant workers		8			8	
State aid	5	3	20		28	
Taxation	2	57	1		60	
Transport	10	11			21	
<b>TFEU</b>	<b>69</b>	<b>404</b>	<b>135</b>	<b>3</b>	<b>611</b>	<b>5</b>
Procedure						11
Staff Regulations	4		1		5	
<b>Others</b>	<b>4</b>		<b>1</b>		<b>5</b>	<b>11</b>
<b>OVERALL TOTAL</b>	<b>73</b>	<b>404</b>	<b>136</b>	<b>3</b>	<b>616</b>	<b>16</b>

Source: Court of Justice of the European Union, ‘Annual Report 2012’ available online, <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685\\_2012\\_6020\\_cdj\\_ra\\_2012\\_en\\_proof\\_01.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf)> accessed on 26-06-2013.

**Table 7**

**2. New cases — Nature of proceedings (2008–12)**



	2008	2009	2010	2011	2012
State aid	56	46	42	67	36
Competition	71	42	79	39	34
Staff cases	2	2	2	34	10
Intellectual property	198	207	207	219	238
Other direct actions	178	158	207	264	220
Appeals	37	31	23	44	10
Appeals concerning interim measures or interventions			1	1	1
Special forms of procedure	87	84	77	88	78
<b>Total</b>	<b>629</b>	<b>568</b>	<b>636</b>	<b>722</b>	<b>617</b>

Source: Court of Justice of the European Union, ‘Annual Report 2012’ available online, <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685\\_2012\\_6020\\_cdj\\_ra\\_2012\\_en\\_proof\\_01.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf)> accessed on 26-06-2013.



**Table 8**

**Number of state aid measures notified by Member States; by year and all sectors included, except railways (2000 - 2011)**

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
<b>EU-27</b>	<b>872</b>	<b>819</b>	<b>807</b>	<b>636</b>	<b>614</b>	<b>663</b>	<b>912</b>	<b>769</b>	<b>640</b>	<b>729</b>	<b>595</b>	<b>553</b>
Belgium	35	26	28	30	23	14	23	24	11	26	10	19
Bulgaria	0	0	0	0	0	0	0	17	4	9	11	5
Czech Republic	0	0	0	3	12	41	77	23	24	12	19	16
Denmark	29	25	14	18	22	18	16	18	18	18	20	30
Germany	143	143	159	112	76	64	96	98	111	120	76	67
Estonia	0	0	0	0	1	11	7	11	6	3	9	0
Ireland	47	24	9	8	15	10	13	19	13	20	17	19
Greece	21	16	18	11	10	11	11	11	13	16	14	24
Spain	159	123	122	53	52	57	76	92	80	78	80	40
France	98	93	105	75	57	38	80	73	45	54	41	41
Italy	150	154	139	158	184	122	167	117	91	78	65	62
Cyprus	0	0	0	0	1	5	11	8	4	7	4	5
Latvia	0	0	0	0	6	15	9	18	15	20	18	10
Lithuania	0	0	0	0	5	14	8	20	6	9	13	7
Luxembourg	2	3	3	1	7	0	1	1	9	8	0	7
Hungary	0	0	0	0	3	6	20	31	21	20	15	28
Malta	0	0	0	0	0	0	5	5	3	7	1	1
Netherlands	49	61	72	54	32	45	49	32	25	38	27	34
Austria	39	37	22	11	10	17	30	27	26	38	21	19
Poland	0	0	0	0	12	57	53	32	37	29	48	45
Portugal	22	19	21	12	13	11	16	8	8	5	13	10
Romania	0	0	0	0	0	0	0	5	3	11	10	4
Slovenia	0	0	0	0	5	3	6	6	2	4	1	5

Slovakia	0	0	0	0	2	30	53	5	13	14	11	6
Finland	27	15	14	12	16	5	14	11	10	20	11	13
Sweden	8	9	11	10	11	15	17	10	7	12	13	10
United Kingdom	43	71	70	68	39	54	54	47	25	43	15	26

Source: DG Competition, DG Agriculture and Rural Development, DG Maritime Affairs and Fisheries

**Table 9**

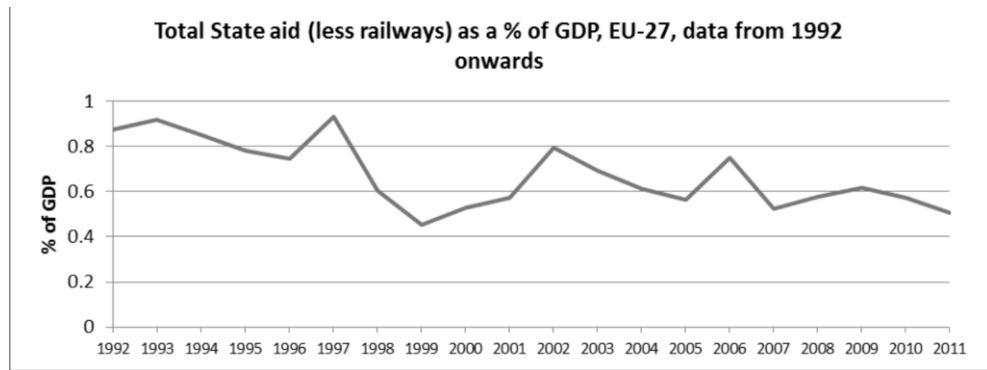
**Table I**

The summary of our analysis is shown in the following table:

	Total cases	A	B	C	D	E	F	G	H	I
		Recovery actions by Member State authorities	Discriminatory imposition of burden (tax)	Institutional disputes (central government /region)	Competitor against Member State: injunction and/or recovery	Competitor against Member State: damages	Competitor against beneficiary: injunction and/or recovery	Competitor against beneficiary: damages	Public Procurement cases	Successful competitors
AUT	7		3		2		2			
BE	28	12	9		2		4		2	1
DK	0									
FIN	3				3					
F	62	3	35	0	5	4	3	5	5	2
GER	70	18	42		7	1	2		1	
GR	9	1	2		6					
IRL	0									
IT	78	0	59	8	3		3	1	7	
LUX	1	1								
NL	45	7	19		15	2	1		2	
POR	2				1				1	
SP	32	3		16	12		1			
SWE	1			1	1					
UK	19	1	10	1	5	1		1		0
Total	357	46	179	25	62	8	16	7	18	3
	100%	12.89%	50.14%	7.0%	17.37%	2.24%	4.48%	1.96%	5.04%	0.84%

**Source:** European Commission – DG Competition, ‘Study on the enforcement of state aid law at national level available online < [http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en\\_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493](http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD7506493)> accessed on 30-7-2012

**Table 10**



Source: European Commission, State Aid Scoreboard Autumn 2012

update COM (2012) 778 final

Numerical and chronological table of Court of Justice cases

1. 30/59 *Gezamenlijke Steenkolenmijnen in Limburg v. High Authority*, [1961] ECR 1
2. 25/62 *Plaumann v Commission* [1963] ECR 199
3. 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I.
4. 6 and 11/69 *Commission v France* [1969] ECR 523
5. 47/69 *France v Commission* [1970] ECR 487
6. 70/72 *Commission v Germany* [1973] ECR 813
7. 120/73 *Gebr Lorenz GmbH v Germany* [1973] ECR 1471
8. 173/73 *Italy v Commission* [1974] ECR 709
9. 78/76 *Steinike and Weinlig v. Germany* [1977] ECR 575
10. 177/78 *Pigs and Bacon Commission v McCarren* [1979] ECR 2161
11. 730/79 *Philip Morris v Commission* [1980] ECR 2671.
12. 11/82 *Piraiki – Patraiki v Commission* [1985] ECR 207
13. 169/82 *EC Commission v Italy* [1984] ECR 1603
14. 323/82 *Intermills v Commission* [1984] ECR 3809
15. 91/83 *Heineken Brouwerijen* [1984] ECR 3435
16. 171/83 *R EC Commission v France* [1983] ECR 2621
17. 290/83 *Commission v France (Poor Farmers)* [1985] ECR 439
18. 52/84 *Commission v Belgium* [1986] ECR 89
19. 142/84 *BAT and RJ Reynolds v Commission* [1987] ECR 4487
20. 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651
21. 234/84 *Belgium v Commission (Meura)* [1986] ECR 2263
22. 118/85 *Commission v Italy* [1987] ECR 2599
23. 223/85 *RSV V Commission* [1987] ECR 4617
24. 310/85 *Deufil GmbH and Co. KG v Commission* [1987] ECR 901
25. 57/86 *Greece v Commission* [1988] ECR 2855
26. 131/86 *United Kingdom v Council* [1988] ECR 905
27. 62 and 72/87 *Executif Regional Walon v Commission* [1988] ECR 1573
28. 94/87 *Commission v Germany* [1989] ECR 175
29. 226/87 *Commission v Greece* [1988] ECR 3611
30. C-142/87 *Belgium v Commission (Tubemeuse')* [1990] ECR I959
31. C-301/87 *France v Commission* [1990] ECR I-307
32. C-35/88 *Commission v Greece* [1990] ECR I-3125
33. C-303/88 *Italy v Commission* [1991] ECR I-1433
34. C-363/88 and C-364/88 *Finsider and Others v Commission* [1992] ECR I-359
35. C-5/89 *Commission v Germany* [1990] ECR I-3437
36. C-6 & C-9/90 *Francovich and others v Italy* [1991] ECR I-5357
37. C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889

38. C-312/90 *Spain v Commission* [1992] ECR I-4117
39. C-313/90 *CIFRS v Commission* [1993] ECR II-1125
40. C-47/91 *Italy v Commission* [1994] ECR I-4635
41. C-72 and 73/91 *Sloman Neptun* [1993] ECR I-887
42. C-74/91 *Commission v Germany* [1992] ECR I-5437
43. C-94/91 *Wagner v Fonds d'intervention et de regularization du marché du sucre* [1992] ECR I-2765
44. C-183/91 *Commission v Greece* [1993] ECR I-3131
45. C-198/91 *Cook v Commission* [1993] ECR I-2487
46. C-225/91 *Matra v Commission* [1993] ECR I-3203
47. C-325/91 *France v Commission* [1993] ECR I-3283
48. C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103
49. C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029
50. C-56/93 *Belgium v Commission* [1996] ECR I-723
51. C-348/93 *Commission v Italy* [1995] ECR I-673
52. C-39/94 *SFEI and others v La Poste and others* [1996] ECR I-3547
53. C-24/95 *Land Rheinland – Pfalz v Alcan Deutschland GmbH* [1997] ECR I-1591
54. C-68/95 *T. Port* [1996] ECR I-6065
55. C-169/95 *Spain v Commission* [1997] ECR I-135
56. C-242/95 *GT-Link* [1997] ECR I-4449
57. C-355/95 *P TWD v Commission* [1997] ECR I-2549
58. C-362/95 *P Blackspur DIY and Others v Council and Commission* [1997] ECR I-4775
59. C-367/95 *Commission v Sytraval* [1998] ECR I-1719
60. C-55/96 *Job Centre coop* [1997] ECR I-7119
61. C-288/96 *Germany v Commission* [2000] ECR I-8237
62. C-75/97 *Belgium v Commission* [1999] ECR I-3671
63. C-200/97 *Ecotrade* [1998] ECR I-7907
64. C-295/97 *Rinaldo Piaggio* [1999] ECR I-3735
65. C-404/97 *Commission V Portugal* [2000] ECR I-4897
66. C-83/98 *France v Ladbroke Racing Ltd and Commission* [2000] ECR I-3271
67. C-156/98 *Germany v Commission* [2000] ECR I-6857
68. C-378/98 *Commission v Belgium* [2001] ECR I-5107
69. C-379/98 *PreussenElektra* [2001] ECR I-2099
70. C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855
71. C-143/99 *Adria-Wien Pipeline GmbH v Finanzlandesdirektion fur Karnten* [2001] ECR I-8365
72. C-302/99 P and C-308/99 P *Commission v TFI* [2001] ECR I-5603
73. C-310/99 *Italy v Commission* [2002] ECR I-2289
74. C-400/99 *Italy v Commission* [2001] ECR I-7303

75. C-453/99 *Courage Limited v Bernard Crehan* [2001] ECR 6297.
76. C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397
77. C-53/00 *Ferring* [2001] ECR I-9067
78. C-74/00 *Falck SpA and Acciaierie di Bolzano v Commission* [2002] ECR I-7869
79. C-113/00 *Spain v Commission* [2002] ECR I-7601
80. C-209/00 *Commission v Germany* [2002] ECR I-11695
81. C-277/00 *Germany v Commission* [2004] ECR I-3925
82. C-278/00 *Greece v Commission* [2004] ECR I-3997
83. C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I7747
84. C-398/00 *Spain v Commission* [2002] ECR I-5643
85. C-409/00 *Spain v Commission* [Spanish Trucks II [2003] ECR I-1487
86. C-445/00 *R Austria v Council* [2001] ECR I-1461
87. C-34/01 to C38/01 *Enirisorse* [2003] ECR I-14243
88. C-278/01 *Commission v Spain* [2003] ECR I-14141
89. C-308/01 *GIL Insurance v Customs and Excise Commissioners* [2004] ECR I-4777
90. C-37/02 *Di Ienardo and Dilexport v Ministero del Commercio* [2004] ECR I-6911
91. C-110/02 *Commission v Council* [2004] ECR I-6333
92. C-174/02 *Streekgewest* [2005] ECR I-85
93. C-189/02 *Dansk Rørindustri* [2005] ECR I-5425
94. C-304/02 *Commission v France* [2005] ECR I-6263
95. C-345/02 *Pearl BV v Hoofdbedrijfschap Ambachten* [2004] ECR I-7139
96. C-78/03 *P A.R.E. v Commission* [2005] ECR I-10737
97. C-88/03 *Portugal v Commission (Azores)* [2006] ECR I-7115
98. C-182/03 *Kingdom of Belgium v Commission* [2010] ECR I-5479
99. C-208/03 P-R *Le Pen v Parliament* [2003] ECR I-7939
100. C-217/03 *Forum 187 ASBL v Commission of the European Communities* [2006] ECR I-5479
101. C-415/03 *Commission v Greece* [2005] ECR I-3875
102. C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957
103. C-393/04 and C-41/05 *Air Liquide* [2006] ECR I-5293
104. C-404/04 P-R *Technische Glaswerke Ilmenau GmbH v Commission* [2005] ECR I-3539
105. C-207/05 *Commission v Italy* [2006] ECR I-00070
106. C-229/05 P *Ocalan v Council* [2007] ECR I-439

107. C-199/06 *CELF and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition* [2008] ECR I-469
108. C-341/06 *Chronopost SA and La POSTE V UFEX and others* [2008] ECR I-4777
109. C-428 to 434/06 *UGT – Rioja* [2008] ECR I-6747
110. C-521/06 P *Athinaiki Techniki AE v Commission* [2008] ECR I-5829
111. C-139/07 P *European Commission v Technische Glaswerke Ilmenau GmbH, Republic of Finland, Kingdom of Sweden* [2010] ECR I-05885
112. C-369/07 *Commission v Hellenic Republic* [2009] ECR I-5703
113. C-279/08 P *Commission v Netherlands* [2011] ECR I-07671
114. C-1/09 *CELF v SIDE* [2010] ECR I-02099
115. C-106/09 P and C-107/09 P *Commission and Kingdom of Spain v Gibraltar and United Kingdom* [2011] ECR I-11113
116. C-210/09 *Scott SA v Ville d'Orleans* [2010] ECR I-04613
117. C-362/09 P *Athinaiki Techniki AE v European Commission* [2010] ECR 00, (NYR).
118. C-464/09 P *Holland Malt v Commission* [2010] ECR I-12443
119. C-496/09 *Commission v Italy* [2011] ECR I-11483
120. C-124/10 P *Commission v EDF* [2012] ECR00 (NYR)
121. C-452/10 P *BNP Paribas and BNL v Commission* [2012] ECR 0 not yet reported
122. C-463/10 P *Deutsche post v Commission* [2011] ECR I-09639

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1. T-74/92 *Ladbroke v Commission* [1995] ECR II-115
2. T-49/93 *SIDE V Commission* [1995] ECR II-2501
3. T-244/93 and T-486/93 *TWD Deggendorf v Commission* [1995] ECR II-2265
4. T-447/93, T-448/93 & T-449/93 *Associazione Italiana tecnico economica del cemento, British cement association and Titan cement company SA v EC Commission* [1995] ECR II-1971, II-2017 para 127.
5. T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-0001
6. T-358/94 *Air France v Commission* [1996] ECR II-2109
7. T-188/95 *Waterleiding Maatschappij 'Noord-West Brabant' v Commission* [1998] ECR II-3713
8. T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739
9. T-230/95 *BAI v Commission* [1999] ECR II-123
10. T-17/96 *TFI v Commission* [1999] ECR II-1757



11. T-73/98 *Société Chimique Prayon – Rupel SA v Commission* [2001] ECR II-867
12. T-127/98 *UPS Europe v Commission* [1999] ECR II-2633
13. T-155/98 *SIDE V Commission* [2002] ECR II-1179
14. T-35/99 *Keller and Keller Meccanica v Commission* [2002] ECR II-261
15. T-318/00 *Freistaat Thuringen v Commission* [2005] ECR II-4197
16. T-116/01 and T-118/01 *P&O European Ferries v Commission* ECR II-2957
17. T-195/01 *Gibraltar v Commission* [2002] ECR II-2309
18. T-17/02 *Fred Olsen* [2005] ECR II-2031
19. T-210/2002 *British Aggregates v Commission* [2006] ECR II-2789
20. T-210/02 *RENV British Aggregates v Commission* [2012] ECR 0 (NYR)
21. T-237/02 *Technische Glaswerke Ilmenau GmbH v Commission* [2007] ECR II-5131
22. T-357/02 *Freistaat Sachsen v Commission* [2007] ECR II-1261
23. T-289/03 *BUPA and Others v Commission* [2008] ECR II-81
24. T-349/03 *Corsica Ferries France v Commission* [2005] ECR II-2197
25. T-156/04 *EDF v Commission* [2009] ECR II-4503
26. T-167/04 *Asklepios Kliniken v Commission* [2007] ECR II-2379
27. T-196/04 *Ryanair v Commission* [2008] ECR II-3643
28. T-211 and 215/04 *Gibraltar v Commission* [2008] ECR II-3745
29. T-233/04 *Netherlands v Commission* [2008] ECR II-591
30. T-344/04 *Denis Bouychou commissaire à l'exécution du plan de cession de la société Stardust Marine v Commission* [2007] ECR II-91
31. T-348/04 *Société internationale de diffusion et d'édition SA (SIDE) v Commission of the European Communities* [2008] ECR II-00625
32. T-395/04 *Air one v Commission* [2006] ECR II-1343
33. T-425/04, T-444/04, T-450/04 and T-456/04 *France, France Télécom and Others v Commission*, [2010] ECR II-2099
34. T-94/05 *Athinaiki Techniki AE v Commission* [2006] ECR II-73
35. T-268/06 *Olympiaki Aeroporia Ypiresies v Commission* [2008] ECR II-1091
36. T-494/08 to T-500/08 and T-509/08 *Ryanair* [2010] ECR II-5723
37. T-88/09 *Idromacchine Srl v European Commission* [2011] ECR II-07833
38. T-520/09 *TFI and others v Commission* [2012] ECR 0 (NYR)
39. T-29/10 and T-33/10 *Netherlands and ING Groep NV v Commission* [2012] ECR 00 (NYR)

40. T-221/10 *Iberdrola SA v European Commission* [2012] ECR 00 (NYR)
41. T-52/12 R *Greece v Commission* [2012] ECR 0 (NYR)
42. T-366/13 R *France v Commission* [2013] ECR 0 (NYR)

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1. *Adria-Wien Pipeline GmbH v Finanzlandesdirektion für Karnten* (C-143/99) [2001] ECR I-8365
2. *Air France v Commission* (T-358/94) [1996] ECR II-2109
3. *Air Liquide* (C-393/04 and C-41/05) [2006] ECR I-5293
4. *Air one v Commission* (T-395/04) [2006] ECR II-1343
5. *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00) [2003] ECR I7747
6. *Asklepios Kliniken v Commission* (T-167/04) [2007] ECR II-2379
7. *Associazione Italiana tecnico economica del cemento, British cement association and Titan cement company SA v EC Commission* (T-447/93, T-448/93 & T-449/93) [1995] ECR II-1971, II-2017 para 127.
8. *Athinaiki Techniki AE v Commission* (C-521/06 P) [2008] ECR I-5829
9. *Athinaiki Techniki AE v Commission* (T-94/05) [2006] ECR II-73
10. *Athinaiki Techniki AE v European Commission* (C-362/09 P) [2010] ECR I-13275.
11. *Austria v Council* (C-445/00 R) [2001] ECR I-1461
12. *BAI v Commission* (T-230/95) [1999] ECR II-123
13. *BAT and RJ Reynolds v Commission* (142/84) [1987] ECR 4487
14. *Belgium v Commission* (C-56/93) [1996] ECR I-723
15. *Belgium v Commission* (C-75/97) [1999] ECR I-3671
16. *Belgium v Commission (Meura)* (234/84) [1986] ECR 2263
17. *Belgium v Commission (Tubemeuse')* (C-142/87) [1990] ECR I959
18. *Blackspur DIY and Others v Council and Commission* (C-362/95 P) [1997] ECR I-4775
19. *BNP Paribas and BNL v Commission* (C-452/10 P) [2012] ECR 0 not yet reported
20. *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93) [1996] ECR I-1029
21. *British Aggregates v Commission* (T-210/02 RENV) [2012] ECR 0 (NYR)
22. *British Aggregates v Commission* (T-210/2002) [2006] ECR II-2789
23. *BUPA and Others v Commission* (T-289/03) [2008] ECR II-81
24. *CELF and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition* (C-199/06) [2008] ECR I-469
25. *CELF v SIDE* (C-1/09) [2010] ECR I-02099

26. *Chronopost SA and La POSTE V UFEX and others* (C-341/06) [2008] ECR I-4777
27. *CIFRS v Commission* (C-313/90) [1993] ECR II-1125
28. *Commission v A.R.E.* (C-78/03 P) [2005] ECR I-10737
29. *Commission and Kingdom of Spain v Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P) [2011] ECR I-11113
30. *Commission v Belgium* (52/84) [1986] ECR 89
31. *Commission v Belgium* (C-378/98) [2001] ECR I-5107
32. *Commission v Council* (C-110/02) [2004] ECR I-6333
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