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ECONOMIC ANALYSIS OF STATE AID RULES – CONTRIBUTIONS AND LIMITS –

PROCEEDINGS OF THE THIRD ANNUAL CONFERENCE
OF THE
GLOBAL COMPETITION LAW CENTRE (GCLC),
COLLEGE OF EUROPE

21–22 September 2006

PROCEDURE

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State aid in EC competition law is in the midst of recent reform efforts, and such opportunities for change should not be lost. Targeted areas of reform should include facilitating the use of enhanced economic analysis, and particularly in this regard, the cohesive strengthening of the crucial information gathering process for the assessment of State aid.

Indeed, State aid has not escaped the general tendency towards the use of economic tools as a means to obtain better implementation of competition policy. This movement, contemporaneous with the end of the *per se* rule, has already affected the enforcement of Article 81 EC and the EC merger control rules, and should also impact the application of Article 82 EC.

This trend is more than just a passing admiration for mathematical models. It reflects, in fact, a desire to create a more enlightened, more adapted and also more responsible use of the competition rules so as to enhance a market-based economy. This economy itself has met considerable change, due to such factors as the deregulation of utilities, the increasing significance of services, and the digitalization and subsequent dematerialization of all forms of communications associated with the globalization of all sectors.

The Lisbon Summit of March 2000, destined to address all these challenges, specifically mentioned the necessity to re-define the goals and operation of EC State aid policy³⁹⁶ Building on such mandate, the Commission published in June 2005 the State aid Action Plan³⁹⁷ (SAAP), which offers certain remedies and proposals for reform aimed at achieving the modernization mentioned in the Lisbon conclusions.

Less, but better-targeted, State aid is at the core of the reform³⁹⁸ This fundamental objective should, in turn, be supported by two main goals affecting both the substance and procedure of EC State aid control: the use of a refined economic approach and implementation of more efficient procedural rules.³⁹⁹

The present study focuses on the interaction of these two goals, via a questioning of the contribution and limits of economic analysis in relation to State aid procedural rules. The core issue raised by this interaction concerns the appropriate means which are already available and those which should be designed to efficiently gather and treat the relevant economic data required by use of a refined approach of State aid. More specifically, the strengthened economic approach necessarily implies that additional and more complex information be collected, treated and provided to the competent authority or judge entitled to decide, *inter alia*, on (i) the characterization of the contentious State measure, (ii) its compatibility with the common market, and (iii) requests for compensation to remedy the damage incurred by victims of illegal (*i.e.*, non-notified) or incompatible State aid granted. For this reason, the paper will not examine the issues related to the recovery of State aid. In addition, as the current study focuses on EC law, the private enforcement of State aid rules will also be set aside.

396 European Council of Lisbon, 23-24 March 2000, Conclusions of the Presidency, DOC/00/8, paragraph 17; Communication from the Commission to the Council and the European Parliament, Common Actions for Growth and Employment: The Community Lisbon Programme COM(2005) 330 final of 20 July 2005, pp. 4, 6 and 10.

397 State aid Action Plan, Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final.

398 See paragraphs 14, 15, 17 and 18 of the SAAP.

399 See paragraphs 18, 21-23 and 48 *et seq.* of the SAAP.

The purpose of this paper is therefore to assess where we stand in terms of the means to collect relevant data supporting a sound assessment of State aid, what is contemplated by the SAAP in this regard and, above all, how innovative changes in the procedural framework of State aid might be instrumental in reaching the intended objectives. Innovation is, however, not unlimited, as the scope of the planned reform only extends to the rules implementing Articles 87 and 88 EC, not the EC Treaty itself.

Thus, after describing the current State aid procedural framework and its shortcomings in terms of the information gathering process (1), we will closely examine the remedies envisaged by the SAAP (2). Based on the rather meager proposals made by the SAAP, we will set forth the procedural changes that we believe could be made without modifying the content of the EC Treaty, with a view to enhancing our market based economy, which remains the best guarantee for improving living conditions in the European Union (3).

I. INEFFICIENT INFORMATION GATHERING SYSTEM UNDER THE CURRENT STATE AID PROCEDURAL FRAMEWORK

The current State aid procedural framework derives, in large part, from the content and application of EC Regulation 659/1999⁴⁰⁰ which lays down detailed rules for the application of Article 88 EC, and thus provides the framework governing the Commission's powers in the State aid field. This framework is clearly flawed, as it does not permit the efficient gathering of pertinent information (in particular of an economic nature) to support a sound assessment of State aid.

This inefficient information gathering process has two main causes: (i) the limited powers granted to the Commission, which is the main actor in the current centralized State aid control system, and (ii) the inappropriate and unbalanced roles given respectively to the Member State concerned and interested parties, particularly with respect to beneficiaries.

1. Limited powers of the Commission to gather the relevant information in a procedure mainly centralized at the European level

The Commission has exclusive jurisdiction to decide on the compatibility of State aid and, in practice, very little power is granted to national authorities. Only national judges, because of their duty to apply EC law as first degree jurisdiction, may be involved in State aid proceedings⁴⁰¹. Even in this context, national jurisdictions have a role limited to specific issues, since

400 Council Regulation (EC) No 659/1999 of 22 March 1999, laying down detailed rules for the application of Article 93 of the EC Treaty, OJ (1999) L 83/1. This text was adopted on the basis of Article 89 EC whereby the Council may take appropriate measures (e.g., adopt any implementing regulation) for the application of Articles 87 and 88 EC.

401 Article 14 (3) of EC Regulation 659/1999; Notice on cooperation between national courts and the Commission in the State aid field, OJ (1995) C 312/8.

they only decide on (i) the repayment of illegal and incompatible State aid, and (ii) claims for damages. National competition authorities are totally excluded from the State aid field.

In spite of its prominent position in State aid control, the Commission has rather limited powers under the current procedural framework to gather relevant information.

This is the case, first of all, for its investigative powers. The Commission can only send requests for information to the Member State concerned⁴⁰² but no legal basis is available to effectively implement this power against either the interested parties or any other relevant source of information to soundly assess State aid. In addition, the Commission can deliver an information injunction to force a Member State concerned to answer a request for information⁴⁰³ However, this power can only be applied in case of unlawful State aid (and not for gathering information to assess the compatibility of a duly notified measure)⁴⁰⁴

Furthermore, no direct sanctioning power has been granted to the Commission against the Member State concerned. In particular, such a Member State is not subject to any sanction if failing to comply with the aforementioned information injunction.

2. Inappropriate and unbalanced roles granted respectively to the Member State concerned and the interested parties create hindrances to the information gathering

The current State aid procedural framework is based on the axis of the Commission-Member State concerned. It is the second main feature of this framework. A distinction is drawn between, on the one hand, the “real parties” *i.e.*, the Commission and the Member State concerned, and, on the other hand, the so-called “parties concerned” or “interested parties” *i.e.*, the beneficiary, all competitors, the complainant(s), various industry or consumer associations, as well as trade unions and institutions representing work personnel, that may be affected by the State aid granted⁴⁰⁵

This distinction appears artificial and inappropriate, principally with respect to the status of the beneficiary. The beneficiary is indeed the entity likely to suffer most from a negative decision (based on an illegal or incompatible State aid), as it will have to repay amounts which, more often than not, have been or still are critical to its development⁴⁰⁶ However, its power

402 Articles 5 and 10 (2) of EC Regulation 659/1999.

403 Article 10 (3) of EC Regulation 659/1999; see, for example, Joined Cases T-304/04 and T-316/04 Italian Republic v Commission [2006] not yet reported, point 11.

404 Article 10 (3) of EC Regulation 659/1999.

405 The „*parties concerned*” referred to in Article 88 (2) EC mirror the “interested parties” mentioned in the implementing EC Regulation 659/1999. Both relate, *i.a.*, to the State aid beneficiaries, their competitors and all other “person, undertaking or association of undertakings whose interests might be affected by the granting of aid” See Article 1 (h) of EC Regulation 659/1999; Case T-34/02 EURL Le Levant 001 v Commission [2006] not yet reported, points 77 et seq., Case T-69/96 Hamburger Hafen- und Lagerhaus a.o. v Commission [2001] ECR II-1037, point 40; Case 323/82 SA Intermills v Commission [1984] ECR 3809, point 16.

406 See, in particular, the European Parliament Report on State aid reform 2005-2009 (2005/2165(INI)) A6-0009/2006 final of 27 January 2006, paragraph 48, whereby the European Parliament „[e]xpresses its discontent that sanctions for non-notification are currently enforced only against beneficiaries and not against Member States”

to influence the conduct of the procedure, and ultimately the decision to be adopted by the Commission, is rather limited. The beneficiary has no right of access to the file, and no right to be heard. Its sole possible impact derives from its limited right to submit comments on the letter sent by the Commission to the Member State, which announces the opening of the procedure, following its publication in the Official Journal of the European Union⁴⁰⁷

This obviously represents a very limited intervention and minor opportunity to provide the Commission with the relevant information the beneficiary may possess to better assess a State measure under review and, therefore, limit the potential adverse consequences of the Commission's control⁴⁰⁸. This insufficient involvement in the State aid procedure constitutes a major inefficiency, since the beneficiary is best placed to provide evidence on the effects of State aid and, in some instances, to demonstrate to the Commission the positive impact of such measure.

By contrast, the Member State concerned is given a much more comfortable position. It is the true correspondent with the Commission, and is in charge of answering the various questions raised by the Commission, and of commenting on the most important elements of the file. Paradoxically, the Member State cannot be really coerced into answering, in a full and straightforward manner, the queries sent by the Commission:

First, while Article 10 (3) of EC Regulation 659/1999 grants the Commission the decision-making power to obtain information from the Member State concerned through information injunctions, no sanction is available which could allow the Commission to force the Member State to comply with that decision. In case it does not, the Commission may only end the administrative procedure on the basis of the only information given.

Second, the Member State has no obligation to involve the beneficiary when providing the Commission with all necessary information in order to enable the latter to make a decision.

As far as the situation of the other interested parties is concerned, these parties are granted the same opportunities as those given to the beneficiary to provide the Commission with the relevant information they may have, without, however, incurring the same risks. In short, interested parties benefit from a more favorable status than beneficiaries. Indeed, they retain not

407 Articles 6 (1) and 20 (1) of EC Regulation 659/1999.

408 In addition, the current situation does not provide the beneficiary with adequate rights of defense. See, for instance, Linklaters' Submissions on European Commission's State aid Action Plan Less and better targeted State aid: a roadmap for State aid reform 2005-2009, paragraph 22; Herbert Smith Gleiss Lutz Stibbe's Position paper on State aid reform, p. 5; Competition Law Association's Comments on the European Commission consultation document on the State aid Action Plan: a roadmap for reform 2005-2009, p. 5; Comments of AFEC on the State aid Action Plan of the Commission, paragraphs 46-48.

only the same limited rights as those granted to the beneficiary⁴⁰⁹ but are also entitled to file a complaint to the Commission and seek recourse before national jurisdictions where an illegal or incompatible State aid has caused them damage⁴¹⁰. However, unlike the beneficiary, these other interested parties are likely to be less immediately impacted financially by a decision characterizing State aid as illegal or incompatible⁴¹¹.

Although the unfortunate division outlined above between “real parties” and the “interested parties” has been endorsed by the Court⁴¹² it cannot be put forth as the logical and necessary consequence of the terms of Articles 87 and 88 EC. Arguably, the wording leaves enough room for any implementing regulation to define more precisely and enlarge the rights of the parties concerned, including the State aid beneficiary.

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- 409 Article 6 (1) of EC Regulation 659/1999. See also 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, OJ (2001) L 145/43. It seems that EC Regulation 1049/2001 may also constitute a means for the interested parties to be granted an access, albeit limited, to the file. Still, in practice, such opportunity has been scarcely used in the State aid proceedings. This can be explained, *i.a.*, by Article 4 (5) of EC Regulation 1049/2001, whereby “[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement”. However, for a recent access to the file partially granted by the Commission to the complainant in State aid proceedings on the basis of EC Regulation 1049/2001, see the decision of the European Ombudsman of 11 July 2006, on complaint 3531/2004/(BB)/TN against the European Commission, available on the European Ombudsman website: <http://www.euro-ombudsman.eu.int/decision/en/043531.htm>.
- 410 For a discussion on that particular point, see M. Sousse, „La situation du concurrent du bénéficiaire d’une aide d’Etat devant les juridictions nationales“ *Petites Affiches*, 1^{er} août 2000, p. 11.
- 411 Nevertheless, State aid may have caused financial loss to competitors. However, while the State aid recovery has a direct and immediate impact on the beneficiary, the damage suffered by the competitor for the illegal/incompatible State aid granted is, at least, more spread over a period of time allowing, in particular, such competitor to adapt/change its strategy.
- 412 See Case T-354/99 *Kuwait Petroleum (Nederland) BV v Commission* [2006] not yet reported, points 80-82; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale a.o. v Commission* [2003] ECR II-435, points 122-125; Joined Cases C-74/00 P and C-75/00 P *Falck SpA a.o. v Commission and Italian Republic* [2002] ECR I-7869, points 80-83; Joined Cases T-371/94 and T-394/94 *British Airways plc a.o. v Commission* [1998] ECR II-2405, points 59-60; Case 323/82 *Intermills*, points 16-19.
- Add:* Case C-276/03 P *Scott SA v Commission* [2005] not yet reported. The ECJ, through rather far-reaching and somewhat inconsistent reasoning, narrowed down once again the rights of the interested parties and, in this case, those of the beneficiary. Its rights of defense were swept away as a result of the application of Article 15 of EC Regulation 659/1999, which grants the Commission the power to recover State aid within a limitation period of ten years. In casu, the Commission attempted to recover a State aid granted more than nine years before. The time limitation period was interrupted by a request for information sent to the Member State less than 6 months before the action was time barred. This request interrupted the limitation period which started running anew. The beneficiary was not informed, and his attempt to rely on the rights of defense, when the recovery of State aid was finally initiated, was useless. For a good illustration of the reasoning, and in particular the discrepancies with the approach taken by AG Jacobs in his Opinion for this case, see Hanns Peter Nehl, “The Imperfect Procedural Status of Beneficiaries of Aid in EC State aid Proceedings” *European State aid Law Quarterly*, 1/2006, p. 57.

II. INSUFFICIENT PROPOSALS OF THE SAAP ON THE ESTABLISHMENT OF AN EFFICIENT INFORMATION GATHERING SYSTEM

The SAAP addresses only part of the issues raised by the shortcomings of the current State aid control framework. The proposals clearly appear insufficient to allow an efficient information gathering process, and thus effectively contribute to the use of a refined economic analysis. Some of these proposals could even potentially conflict with the objective of adopting an enhanced economic approach to State aid.

1. Failure to address the core issue of the reformed interested parties' rights as a means to improve the current information gathering system

The SAAP fails to address the main issue which could have helped reinforce the economic approach to State aid. Indeed, no proposal has been made regarding a strengthening of the rights of State aid beneficiaries' and, more broadly, of the interested parties⁴¹³. This seems to suggest that the Commission is unwilling to change anything in the current axis of the Commission-Member State concerned.

The Commission simply limits its wish to increase "advocacy about State aid policy to allow undertakings, the academic world, competition specialists, consumers and the broader public to get involved and act against unlawful aid, in particular before national judges"⁴¹⁴. But the SAAP considers that the burden of providing the Commission with the necessary evidence supporting a refined economic analysis should remain with the Member State concerned⁴¹⁵ and that beneficiaries should continue to bear the entire risk that such Member State fails to provide all required and relevant information before the deadline fixed by the Commission⁴¹⁶.

413 See the Results of the consultation on the State aid Action Plan (SAAP) – Detailed Summary (09/02/2006), p. 26: „16 respondents (the majority from the private sector) commented on a subject, which was not mentioned in the SAAP: the need to increase rights for the beneficiaries of aid and other third parties“. Competition Law Association's Comments on the European Commission consultation document on the State aid Action Plan: a roadmap for reform 2005-2009, p. 5: "Crucially, [...] we think that the Commission has omitted the main area where we would wish to see a change to its practices and procedures [...] – that area is the rights of the recipient of aid". Comments of AFEC on the State aid Action Plan of the Commission, paragraphs 46-48; Response of the Law Society of England and Wales' EU Committee's on the European Commission's State aid Action Plan, paragraphs 25-26.

414 Paragraph 17 of the SAAP. See also paragraph 18, third and fourth indents, of the SAAP.

415 Paragraph 19, in fine, of the SAAP: „It is for Member States to provide the necessary evidence in this respect, prior to any implementation of the envisaged measure“

416 Paragraph 58, first indent, of the SAAP.

2. Insufficient proposals on subsidiarity and the powers of the Commission to improve the current information gathering system

a) *Insufficient proposals on subsidiarity*

First, the SAAP recommends establishing a network of State aid authorities or contact points so as to «facilitate the flow of information and exchange of best practices»⁴¹⁷ Unfortunately, no specific details are given about this network and, in particular, its components, its mandate, or its mode of operation.

Second, the SAAP suggests an enhanced role for the national jurisdiction “in controlling whether measures deemed to fall under a block exemption or under the de minimis thresholds, and which have therefore not been notified to the Commission, actually fulfil the necessary criteria”⁴¹⁸ *Consistency in the enforcement of the State aid rules requires that control of the application of a block exemption regulation to a given State aid also be based on a refined economic analysis. National jurisdictions should therefore also be granted powers to efficiently collect and treat the relevant economic data. However even though this issue resorts to the Member States domestic law, the SAAP suggests nothing in relation to this matter*

Third, it seems that all other proposals on decentralisation do not concern the collection and treatment of the relevant economic information that is helpful to decide on the State aid compatibility, but rather relate to recovery or private enforcement, which are not at stake here.

In particular, the SAAP proposes granting some powers to “operationally independent monitoring authorities”⁴¹⁹ and the national courts of auditors. However, the role assigned to these authorities and courts is loosely defined, and the involvement of said authorities and courts in the collection and treatment of the refined economic data is not expressly envisaged. Rather, the role of such “operationally independent monitoring authorities” appears more geared at enhancing the cooperation between the Commission and the Member States, and helping the former on (i) the detection and provisional recovery of illegal State aid, and (ii) execution of the recovery decisions⁴²⁰

As far as the national courts of auditors are concerned, their role in a recast procedural framework is limited to that of (i) advisor to assist the Member State to design the most appropriate measure that it plans to grant⁴²¹ and (ii) whistleblower in recovery and private enforcement actions⁴²² Here again, nothing is suggested in the SAAP to involve the courts of audi-

417 Paragraph 53, second indent, of the SAAP.

418 Paragraph 56 of the SAAP.

419 Paragraph 51 of the SAAP.

420 *Ibid.*

421 Paragraph 54 of the SAAP: „The Commission will [...] encourage Member States to engage in benchmarking to verify that State aid is achieving the objective and is the best type of state intervention for any given objective. This could be done in partnership with national Courts of Auditors“

422 Paragraph 55 of the SAAP.

tors in the data gathering and treatment process, or to grant them the power to provide the Commission with such data.

b) Insufficient proposals on increasing the Commission's powers

The SAAP suggests a «shared responsibility between the Commission and Member States; [since] the Commission cannot improve State aid rules and practice without the effective support of Member States and their full commitment to comply with their obligations to notify any envisaged aid and to enforce the rules properly»⁴²³ To reach this objective, the Commission proposes an increase in its powers towards the Member States⁴²⁴ Some of these enhanced powers could undoubtedly facilitate the use of a refined economic analysis by improving the information collection system. Unfortunately, what is proposed remains rather vague.

First, the Commission could be granted additional investigative powers to (i) consult the market participants, and (ii) gather relevant sectoral information⁴²⁵ In particular, the SAAP considers that “Member States should engage more actively to ensure that the conditions for the exemptions are fully respected and that necessary information is kept in accordance with the relevant rules, in order to enable the Commission to verify the compatibility in case of doubts or complaint”⁴²⁶ This proposal, which could clearly help the Commission improve its economic approach of State aid, must be approved as a clear legitimate target. However, more details should have been provided in order to show how it could be efficiently implemented.

Second, the Commission is seeking to enhance the Member States' commitment regarding “their obligation to enforce State aid rules”⁴²⁷ and, in particular, to comply fully with the notification requirement⁴²⁸ In doing so, it is willing to more systematically use the information injunction provided by Article 10 (3) of EC Regulation 659/1999⁴²⁹ This measure may certainly represent an efficient tool to collect the relevant economic data, provided, however, that enforcement means are granted to the Commission vis-a-vis the Member State concerned. However, the SAAP does not suggest (i) any direct sanction for the Member State failing to comply with such injunction, and/or in such case, (ii) an increase in the State aid beneficiary's rights⁴³⁰ As a result, the proposed renewed application of the information injunction is likely to remain as inefficient as the current one.

423 Paragraph 18, last indent, of the SAAP.

424 In particular, the SAAP intends to increase the Commission's *ex post* control on the Member States' compliance with the compatibility decisions subject to conditions (paragraph 54 of the SAAP) and the national jurisdictions' recovery decisions (paragraph 53 of the SAAP).

425 Paragraph 58, third indent, of the SAAP.

426 Paragraph 52 of the SAAP (emphasis added).

427 Paragraph 17 of the SAAP.

428 Paragraph 58 of the SAAP.

429 Paragraph 50 of the SAAP.

430 A more intensive use of the non-compliance action provided by Articles 88 (2), 226 and 228 EC is recommended by the SAAP, but only in case of (i) absence of notification (paragraph 58, second indent, of the SAAP), and (ii) non-execution or improper execution of recovery decisions (paragraph 53, first indent, of the SAAP).

Third, the Commission “*encourage[s] Member States to engage in benchmarking to verify that State aid is achieving [its] objective[s] and is the best type of state intervention for any given objective*”⁴³¹ While such benchmarking could indeed require a more careful economic analysis of the measure that the Member State concerned intends to grant, the SAAP merely suggests that “[t]his could be done in partnership with national Courts of Auditors”⁴³² There again, no concrete means of action is proposed to help these courts of auditors to carry out this benchmarking.

3. Potential conflicts between certain proposals and the establishment of an efficient information gathering system

Last, but not least, some of the SAAP proposals could conflict with the establishment of an efficient information gathering system, and therefore with the objective of using a refined economic analysis for State aid.

In particular, it is questionable whether a more sophisticated economic approach, supported by such efficient information gathering system, necessarily fits with the declared aim to have a more transparent and, above all, user-friendly procedure⁴³³ Greater complexity will necessarily be associated with an increased use of economics to define State aid and assess its compatibility. Indeed, such use requires that more complex information be collected and treated and, as a consequence, that more people and authorities intervene in the proceedings.

In addition, recourse to a refined economic analysis should mean more time to collect, treat, and therefore transmit, the relevant data to the competent authority or jurisdiction. In this context, streamlining the timetable of the State aid procedure might be a difficult goal to achieve⁴³⁴

Finally, due to the increased complexity that necessarily derives from the use of economics, the objective of reducing bureaucracy/administrative burden in general does not seem realistic⁴³⁵ What is no longer done by the Commission (and the Member States) will be done by others. The reform could therefore lead to an overall increased administrative burden for other actors, such as the beneficiaries and other interested parties which, under the new scheme, could be called upon to provide relevant economic data.

In conclusion, the SAAP proposals on State aid procedural reform remain too vague, theoretical, and insufficient to ensure the creation of an efficient information gathering system to secure a refined economic approach to State aid. A more ambitious reform of the State aid control procedure must therefore be envisaged.

431 Paragraph 54 of the SAAP.

432 Ibid.

433 See paragraphs 18, third indent, and 58 of the SAAP.

434 See paragraph 57 of the SAAP.

435 See paragraph 17 of the SAAP.

III. MORE AMBITIOUS PROPOSALS FOR THE ESTABLISHMENT OF AN EFFICIENT INFORMATION GATHERING SYSTEM

The Commission's suggestions should be completed and/or developed so as to contribute to the establishment of an efficient information gathering system. In particular, State aid reform on such procedure should lead to (i) extended rights for interested parties, (ii) significant involvement of national sources of information in a State aid network, and (iii) additional responsibilities and powers for the Commission to efficiently gather and treat relevant information.

1. Extended rights for interested parties

Enhancing the legal and economic analysis, as advocated by the SAAP, means having access to greater specificity about both the positive and negative impacts of the concerned measure. However, Member States are neither best placed, nor the best equipped technically, to provide valuable information on either aspect of such impact. Thus, more diverse and reliable sources of information should be relied upon. This may necessitate the adoption of a revamped procedural regulation, which would accord enhanced rights to the various interested parties⁴³⁶. A distinction should, however, be drawn between State aid beneficiaries and other interested parties.

a) Extended rights for State aid beneficiaries

Beneficiaries are undoubtedly best placed to demonstrate the positive impact of a State measure to the Commission. First, they are best equipped to supply information on the main features of the market on which they operate. Second, it is their own accounts (presuming their accuracy and transparency) that will provide the appropriate information to allow measurement of the impact of State aid on their costs and price structure. Third, beneficiaries have the available knowledge to allow the Commission to make an accurate determination of the incentive/seminal value of State aid.

Thus, beneficiaries should be fully involved in the proceedings with the Commission, once the latter has given notice to the Member State concerned of the opening of the procedure, and, for that reason, beneficiaries should be clearly identified in the decision to open the procedure⁴³⁷. In other words, the possibility mentioned in Article 88 (2) EC for them "to submit

⁴³⁶ This would not mean modifying the EC Treaty. No doubt, Article 88 (2) EC is silent on the meaning of „*parties concerned*”. At the same time, this provision is extremely laconic on their rights and responsibilities (it merely mentions the right for these parties “to submit their comments”). Examples are numerous where, in similar situations, the European institutions (i.e., not only the ECJ and the CFI) have shown themselves capable of appropriately supplementing the EC Treaty, without undergoing the extreme challenge of an actual amendment process (see, e.g., the adoption of EC merger control rules in 1989 and the Modernization Package implementing Articles 81 and 82 EC in 2004). A thorough reform of the procedural rules laid down in EC Regulation No 659/1999 could be the response needed.

⁴³⁷ Case T-34/02 *Le Levant*, points 82-91.

their comments” should be interpreted broadly in the revamped EC Regulation 659/1999, to enable them to provide the Commission with all relevant information in their possession that is deemed appropriate to communicate.

A distinction should, however, be made between the beneficiaries of individual State aid and beneficiaries of State aid schemes.

aa) Extended rights for the beneficiaries of individual State aid

Without being accorded the status of party (which would imply a reform of the EC Treaty), beneficiaries of individual State aid should be among the official recipients of the letter opening the procedure. They should also receive a copy of all requests for information sent by the Commission to the Member State concerned. In addition, the Member State replies to these requests should also be signed by the beneficiary, as proof of appropriate cooperation between the Member State concerned and the beneficiary. In this regard, the revamped EC Regulation 659/1999 would codify the current cooperation which, in practice, must take place between the beneficiary and the Commission.

Furthermore, the beneficiary should normally be de plano entitled to attend all meetings between the Commission and the Member State concerned. In addition, and in certain cases, the Commission should be entitled to hold separate meetings with the beneficiaries⁴³⁸

bb) Extended rights for the beneficiaries of State aid schemes

The above-mentioned proposed cooperation between beneficiaries and the Member State concerned may, however, prove difficult to implement in practice where beneficiaries are numerous. This is the case, for instance, of beneficiaries of State aid schemes.

Thus, such beneficiaries’ rights should at least comprise, if so requested, the right of access to the non-confidential version of the file, and a right to be heard by the Commission.

b) Extended rights for other interested parties

As actors in the relevant market, competitors are also quite well placed to know such market and supply the Commission with accurate information on the characteristics of the market likely to be impacted by the State aid. The same can be said for other well-informed agents, such as consumer associations, trade unions, institutions representing work personnel, economic experts, etc. which may also possess relevant economic data. In this regard, inspiration can

⁴³⁸ Certain beneficiaries may be almost institutionally deprived of sufficient independence from their Member State where the latter intervenes, for example within the general framework of a government control/administrative supervision akin to what is known as „*la tutelle*” in France, which in turn may cause all types of reverential fears or even Government reprimands and resulting unwanted restraint on the part of said beneficiaries.

be sought in the involved parties' and third persons' rights granted by the EC merger control procedural rules⁴³⁹

A different approach, however, should be adopted regarding (i) complainants (especially those who compete with the beneficiary), and (ii) ordinary competitors (i.e., as opposed to the complainants) and the aforementioned other well-informed agents. The former should be granted additional rights as compared to the latter.

aa) Extended rights for complainants

Complainants can undoubtedly provide the Commission with the best possible economic information on the «negative side effects» of State aid, i.e., its harmful impact on competition, especially when they compete with the beneficiary on the same market.

For this reason, complainants should be granted rights equivalent to those given to the beneficiary of a State aid scheme. As a result, they should benefit from automatic access to the non-confidential version of the file when requested. This access “rewards” complainants for drawing the Commission’s attention to a violation of the law, which otherwise may have gone unnoticed and therefore unpunished⁴⁴⁰ In addition, the complainants should benefit from a right to be heard by the Commission, if requested.

When anonymous complaints are filed, it could be suggested that the Commission automatically lift anonymity as a condition for granting access to the file to the complainant. However, one may consider that, in exceptional (and fully justified) circumstances, the complaint should remain anonymous, e.g., when the complainant is an actual or potential client or supplier of the State aid beneficiary.

bb) Extended rights for ordinary competitors and other well-informed agents

In its pursuit of strengthened economic analysis, the Commission should also consider giving an enhanced role to ordinary competitors and other well-informed agents, such as consumer associations, economic experts willing to intervene for the benefit of competition, or trade unions and other institutions representing employees⁴⁴¹ etc., as they may also undoubtedly help the Commission to better understand the market.

In this regard, such interested parties could also be granted access to the file in order to assist them in commenting on the planned State aid. However, as with “other involved parties” in the EC merger control procedure, such access would only be granted where sufficiently

439 Article 18 of Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings, OJ (2004) L 24/1; Articles 14, 16 and 17 of Commission Regulation (EC) No 802/2004 of 7 April 2004, implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ (2004) L 133/1.

440 See Competition Commissioner Neelie Kroes, „Reforming Europe’s State aid Regime: An Action Plan for Change“ Wilmer Cutler Pickering Hale and Dorr/ University of Leiden Joint conference on European State aid Reform, Brussels, 14 June 2005, SPEECH/05/347, whereby Competition Commissioner Kroes recalls that „private complainants may be [the Commission’s] best friends”

441 For instance, in the case of an industrial reshuffle such as in the *Alstom* case which may involve thousands of jobs, the representatives of the employees could certainly represent an invaluable source of information on the positive or negative (social) consequences of maintaining, withdrawing or amending a State aid.

motivated (*cf.*, *i.a.*, (i) quality and quantity of the information that these informed agents can provide to the Commission, and (ii) if jobs are at stake (especially when access to the file is requested by trade unions)). Such access would, of course, be restricted to non-confidential documents of the file.

Ordinary competitors and other well-informed agents could also be granted a right to be heard, but again provided that the request to be heard is sufficiently motivated.

2. Significant involvement of national sources of information in a State aid network

Reliance on subsidiarity should take on a more significant role in the recast State aid control framework. Indeed, while the current legal framework is based on a Commission-Member State axis, neither the Commission (given its lack of resources), nor the concerned Member State (given both its distance from the market and its own vested interests) are the best-placed entities for having access to and analyzing the most relevant information on the market from a State aid perspective. However, there may be alternative (and still unused) ways of utilizing the capacities of the Member States to assist the Commission in conducting stronger economic analysis.

One of these alternatives can be found in the mandate granted to members of the European network of State aid authorities or contact points, which is rather loosely envisaged in the SAAP⁴⁴². This network could, indeed, directly facilitate, accelerate, and better process the information necessary to support a refined economic State aid control analysis. However, the elements of this network must still be clearly defined, as well as its specific mandate and mode of operation.

a) *Components of the State aid network*

The SAAP does not clearly identify the “State aid authorities or contact points”⁴⁴³ composing the State aid network. Furthermore, a better use of national resources may require the involvement of the national competition authorities and the national courts of auditors in the information gathering and treatment process. It therefore appears advisable that the State aid network should involve (i) the Commission, (ii) national competition authorities, and (iii) the national courts of auditors⁴⁴⁴. The SAAP’s broad wording would seem to permit such involvement.

442 See paragraph 53 of the SAAP.

443 *Ibid.*

444 One may fear that national competition authorities and courts of auditors provide biased information to the Commission. However, things have started to change for the better in many Member States (*e.g.*, in France), where these national authorities and courts have started to adopt a much more objective posture and have clearly shown that they accept and recognize the (positive) impact of competition. Furthermore, the risk that national competition authorities and courts of auditors offer biased data could be counterbalanced with the new opportunity for the Commission to collect more and better information from additional sources, such as the interested parties other than the beneficiaries.

As far as the “State aid authorities” are concerned, it is unclear whether the Commission assimilates these authorities to the so-called “independent monitoring authorities”⁴⁴⁵ to be set up in each Member State⁴⁴⁶. Indeed, the exact contours of such monitoring authorities remain rather vague. In particular, it should be considered whether these authorities are to be settled *ex nihilo*, or whether they could be an emanation of the national competition authorities, or, more simply, if these national competition authorities could be appointed as “independent monitoring authorities”.

Clearly, instead of creating *ad hoc* national authorities entrusted with powers in State aid control, it would be more sensible to entrust such powers with existing national competition authorities, or specific divisions of these authorities. Such authorities are, indeed, significantly versed in the analysis of economic information in antitrust and merger cases and already well-equipped to conduct, if necessary, the appropriate investigations to collect this kind of information. In particular, these authorities may be in a good position to provide valuable analysis on their national markets and develop better evidence on how State aid measures may lead to distortions in competition.

As for the “contact points” involved in the State aid network, this broad notion could comprise, *i.a.*, the national courts of auditors⁴⁴⁷. These courts could be kept easily informed of State aid proceedings initiated against their Member State, upon publication of the letter to initiate these proceedings in the Official Journal of the European Union. Once informed of such proceedings, they could help the Commission better to understand and use the refined economic information supporting an assessment of the compatibility of a given State aid.

b) Mandate given to the various components of the State aid network

aa) Mandate given to State aid authorities/national competition authorities

The mandate given to State aid authorities/national competition authorities, with a view to facilitating the use of a refined economic analysis, could first consist of advising the Commission. Once the Commission commences a review of a State aid measure (either upon the notification proceedings, or in the course of proceedings against illegal State aid), these authorities could supplement the Commission’s assessment by providing market information and/or previous competition assessment that they may have undertaken on the same market (exist-

⁴⁴⁵ Paragraph 51 of the SAAP.

⁴⁴⁶ However, pursuant to paragraph 51 of the SAAP, these independent monitoring authorities are deemed to „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)“ Their involvement in the collection and treatment of the relevant information necessary to assess the compatibility of State aid is therefore not envisaged.

⁴⁴⁷ See the European Parliament Report on State aid reform 2005-2009, paragraph 45: the European Parliament „[s]trongly supports the idea of forming a closer network of supervisory authorities, such as courts of auditors, in the Member States, which could facilitate the objective of consistency in the application of State aid rules“

ence of market failures, existence of barriers to entry, market shares, level of innovation, maturity of the market, etc.).⁴⁴⁸

Second, and beyond submitting any available information, these authorities could also conduct investigations on behalf of the Commission in State aid matters and, for example, be entrusted with the power to request information from Member States, from State aid beneficiaries and from other interested parties.

It should further be considered whether such authorities should also be entrusted either with an *ex officio* power to conduct sector inquiries in their national territory (like the Commission pursuant to Article 17 of EC Regulation 1/2003), or to perform such inquiries on the basis of a mandate given by the Commission. EC guidelines or Best Practices could urge Member States to reform their domestic law accordingly.

bb) Assignment given to the contact points/national courts of auditors

As suggested by the SAAP, the national courts of auditors could act as (i) advisors to Member States in order to assess the compatibility of State aid, as well as (ii) whistleblowers when aware of illegal or potentially incompatible State aid granted by their Member State⁴⁴⁹

The effective enforcement of the second of these powers may require enabling the courts of auditors to use the *ex officio* investigation powers granted by their domestic law. EC guidelines could provide a reminder of such possibility.

Such guidelines could also deal with the broader issue of cooperation between the Commission and the national courts of auditors.

Finally, said guidelines should provide that the national courts of auditors could act as advisors/*amicus curiae* of the so-called State aid authorities (whether these emanate from the national competition authorities or not) and of the national judges when deciding on State aid matters.

c) Mode of operation of the State aid network

The mode of operation of the contemplated State aid network remains unclear. Inspiration could certainly be sought in the European competition network (ECN) and its related enforcement of Articles 81 and 82 EC⁴⁵⁰ (however, the purpose of the State aid network would be limited here to efficiently gathering relevant information and granting the Commission exclu-

⁴⁴⁸ The State aid authorities could also advise the concerned Member State at the pre-notification stage, when it plans to grant a State aid. These authorities could assist in structuring a less restrictive scheme for competition. They could also be given a systematic right of review to ensure that the notification is made in an appropriate format and includes the kind of information useful/necessary for the Commission to issue an enlightened decision. To the extent that this issue refers to national law, the EC guidelines or Best Practices could at least encourage the State aid authorities to assist their Member State.

⁴⁴⁹ See paragraphs 54-55 of the SAAP.

⁴⁵⁰ Articles 11, 12 and 22 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, OJ (2003) L 1/1; Commission Notice on cooperation within the Network of Competition Authorities, OJ (2004) C 101/43.

sive jurisdiction to determine the compatibility of State aid, and would not include the allocation of State aid cases, as in the ECN).

3. Additional obligation and powers granted to the Commission to efficiently gather and treat relevant information

Finally, the effective use of a refined economic analysis calls for increased Commission investigatory powers to gather relevant information, as well as an additional obligation on the Commission to clarify/better target the information it requests. Unfortunately, no additional enforcement powers can be granted to the Commission against the Member State concerned, without amending the EC Treaty.

a) Additional investigatory powers for the Commission

The Commission should, first, be entrusted with the power to request information from the beneficiary, competitors, or any other person or entity it deems appropriate, with a view to collecting pertinent data.

In addition, it should also be entitled to investigate, i.e., consult market participants and gather economic information, in the various sectors of the economy, and thus improve its economic competition analysis. Such power could mirror that granted to the Commission under Article 17 of EC Regulation 1/2003.

Finally, the scope of application of the information injunction could be extended to the assessment of notified State aid and no longer be limited to unlawful State aid.

b) Additional obligation to clarify the information requested

The Commission should also clarify the information it may request from the Member State concerned and the interested parties, if the latter are becoming more implicated in the reformed State aid procedure⁴⁵¹ The Commission's questions should therefore be better targeted⁴⁵² This additional obligation to clarify the information requested seems all the more necessary that economic data is concerned by the Commission's requests.

Taking an economic approach for State aid cases means balancing market failures against distortions of competition. For the latter, other areas of competition policy could serve as a potential basis for detailing information requests. In particular, a systematic parallel could be made with the analysis of the effect of anticompetitive practices on competitors. Indeed, just as in the case of predatory behaviour for example, one is worried here not about the short-term effect on consumers but on its longer-term effect, due to hardship imposed on competitors.

451 Results of the consultation on the State aid Action Plan (SAAP) – Detailed Summary (09/02/2006), p. 23.

452 In particular, the requests for information sent to the Member States concerned should always enclose questions enabling the Commission to assess whether the four conditions set forth by Article 87 (1) EC are fulfilled. See in this regard, Case T-34/02 *Le Levant*, points 109 *et seq.*

As for market failures, this can be inherently complicated, since they can arise in a variety of context (they can relate to credit-market failures, to intellectual-property-right failures, etc.). However, guidelines on the various categories of State aid can help systematize information requests for individual cases⁴⁵³ This is important if one wants to help ‘organize’ the process of evaluation of State aid requests.

c) No additional enforcement powers can be granted to the Commission against the Member States concerned without reforming the EC Treaty

The effective use of improved economic analysis would appear to require giving the Commission enforcement powers to require Member States to provide the Commission with all the relevant economic data requested and, in particular, to comply fully and promptly with the information injunctions they receive⁴⁵⁴

Indeed, an efficient enforcement system should enable the Commission to impose (i) procedural fines on the State concerned⁴⁵⁵ in case of failure to completely, correctly and/or promptly respond to the requests for information addressed to it, and (ii) periodic penalty payments⁴⁵⁶ to a Member State that fails to comply with an information injunction.

However, in order to impose a genuine duty of compliance with the Commission’s injunction and/or real means to ensure the efficiency of the State aid administrative procedure, a mere re-working of EC Regulation 659/1999 might turn out to be insufficient and may call for an actual reform of the EC Treaty.

At present, the Commission’s only enforcement mechanism is the existing action for failure by the Member States to fulfil its EC obligations. However, this judicial remedy is not the appropriate tool in this case:

First, direct referrals to the ECJ for Member States’ non-compliance with their obligations concern only cases of failure to comply with (i) non-compatibility decisions⁴⁵⁷ and (ii) suspension and recovery injunctions⁴⁵⁸ For this reason, Article 23 of EC Regulation 659/1999 cannot be extended to direct referrals to the ECJ for cases of Member State non-compliance with procedural decisions and, in particular, with information injunctions.

453 See, for instance, Draft Community framework for State aid for research and development and innovation, 8 September 2006, paragraph 6.1, whereby „Member States are invited to provide all the elements that they consider useful for the assessment of the case. The Member States are, in particular, invited to rely on evaluations of past State aid schemes or measures, impact assessments made by the granting authority, risk assessments, financial reports, internal business plans that any company should realise for important projects, expert opinions and other studies related to R&D&I.”

454 See the European Parliament Report on State aid reform 2005-2009, paragraph 48, whereby the European Parliament „supports the Commission [...] in exploring new deterrent mechanisms with a view [to] addressing the incorrect implementation of the State aid rules by Member States, and invites the Commission to provide for appropriate sanctions in this regard“

455 Such as those applying pursuant to Article 23 (1) of EC Regulation 1/2003.

456 Such as those applying pursuant to Article 24 (d) of EC Regulation 1/2003.

457 Article 88 (2) EC.

458 Article 12 of EC Regulation 659/1999.

Second, recourse to Articles 226 and 228 EC against Member States failing to comply with information injunctions would be inappropriate and over-burdensome.

Various hurdles clearly exist against a true reinforcement of the Commission's sanctioning power. Nonetheless, closer involvement of the State aid beneficiaries (at least when granted an individual State aid) could lead to more rapid and complete responses to Commission requests for information. As advocated in this paper, this could be achieved through enhanced cooperation between these beneficiaries and the Member State concerned.