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# The Charter and EU State aid procedureby John Temple Lang[[1]](#footnote-2)\*

# Abstract

The Commission’s procedure in State aid cases has traditionally been regarded as being between the Commission and the State. The recipients of aid, and their competitors, have very limited rights to be informed, and to protect their interests.

The fact that the rights of companies are so limited is contrary to the rights to a fair trial and an effective remedy under the European Convention on Human Rights and the Charter of Fundamental Rights. The right to an effective remedy must include the right to get the evidence needed to make one’s case and to know the evidence for the Commission’s decision, whether the claim is against the Commission or against the State in accordance with the principle in *Francovich*.[[2]](#footnote-3) The parties’ limited rights are also contrary to the principle of “Good Administration” under the Charter.

A procedure that gives interested parties which have standing to challenge a Commission decision no right to be informed about the progress of the procedure, no right to know of developments on which they wish to comment, no right to defend their interests at the appropriate times, and no guarantee that they will receive the Commission’s decision promptly, cannot provide an *“effective remedy”*.

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# Introduction

The procedure of the European Commission in State aid cases has traditionally been regarded as a procedure between the Commission and the Member State concerned. Other Member States, beneficiaries and potential beneficiaries of the aid, and competitors of the beneficiaries, have not been regarded as parties. It is suggested here that this situation is contrary to the Charter of Fundamental Rights.

# State aid procedure – an outline

State aid procedure is based on two Regulations, Reg.659/1999 and Reg. 734/2013.[[3]](#footnote-4) In essence, the system is based on notification, by the Member State, of new aid measures. Aid measures may be general, applicable to a number of companies, or specific, benefiting only identified companies. The Commission carries out a preliminary examination. If the Commission concludes that there are doubts about the compatibility of the aid with EU law, the Commission begins the formal investigation procedure. The published decision to start this procedure explains the facts and the doubts, and calls on the State *“and upon other interested parties”* to submit comments.[[4]](#footnote-5) Interested parties include any undertaking whose interests might be affected by the granting of aid, in particular the beneficiary and competing undertakings. (This might presumably also include suppliers, customers, and technology licensors or licensees of the beneficiaries or their competitors). The Commission may request any other Member State or any undertaking or association of undertakings to provide *“all market information necessary”*, but only if the formal investigations are ineffective, and only if the State agrees to beneficiaries being asked for information. A new aid may not be put into effect until the Commission has authorized it, or is considered to have authorized it after two months from notification.[[5]](#footnote-6) New aid that is given without authorization is repayable. Aid that is not “new” is not repayable, but may be phased out. There is provision in the Regulations for complaints about alleged State aid. Companies that do not give information required by the Commission may be fined, as under Regulation 1/2003.

# Features of the State aid procedure under the Regulations – The position of beneficiaries and competitors

*“Interested parties”* (any company whose interests might be affected by the grant of aid, in particular the beneficiary and competitors) have a right to be informed only by the decision opening the formal procedure, and to know what the Commission has finally decided. The Regulations do not give interested parties any right to know what steps are being taken or what information is being obtained by the Commission, or any right to comment except on the decision to open the procedure. In the preliminary examination stage, interested parties have no rights at all, in spite of the fact that the Commission often imposes stringent conditions on the State, and so indirectly on the beneficiaries, during a preliminary examination. So interested parties have no right to get the information that they need to defend their interests while the procedure is going on, in spite of the fact that it may continue for months.

An aspect of the fact that interested parties have no statutory right to be kept informed is that the Commission regards itself as free to receive information, or under Regulation 734/2013 to seek information, from private parties, but apparently does not consider that it has any legal obligations to do so in an impartial and even-handed way.[[6]](#footnote-7) The Commission therefore may, and often apparently does, look for information from any party that seems likely to confirm views that have been provisionally reached by the Commission officials, without recognizing any obligation to give parties with potentially opposing views a corresponding opportunity to provide information or to make comments.

These flaws in the procedure are not cured or corrected by the fact that some of the interested parties may from time to time obtain information informally, either from the Commission or from the Member State primarily involved, which may enable the interested parties to make useful comments. This happens irregularly, and interested parties cannot rely on being given such opportunities or information. They certainly cannot rely on being given, at the right time, all the information that they need or that it would be useful for them to have to defend their interests. Not only does the Commission regard itself as free arbitrarily to inform some interested parties and not others, but the Member State (which apparently has no legal duty of impartiality) may choose to inform some companies and not others, depending on the State’s view of the result that it wishes to achieve or the interests that it wishes to favour. Unofficial and informal means of correcting serious defects, inconsistently applied, are not enough to legitimate the procedure.

Interested parties cannot even rely on being given an opportunity to know about or to comment on any conditions or compensatory measures that the Commission is considering imposing, or any other modification or addition that the Commission has told the Member State to make. (For example, a beneficiary may be prohibited from increasing its capacity or charging prices below those of its competitors). Nor are interested parties given any opportunity to comment or to defend their interests when the Commission intends to adopt a decision declaring the aid to be incompatible with the common market, except in the decision opening the procedure. *Netherlands v. Commission[[7]](#footnote-8)* suggests that beneficiaries should be entitled to rely on the principle that any company against which an unfavourable decision may be taken must have a chance to defend its interests before the decision is adopted. But that does not seem to be the practice. A beneficiary or potential beneficiary has apparently no right to notify the Commission in order to obtain a ruling as to the lawfulness of the supposed aid.[[8]](#footnote-9)

# New limits on the Commission’s power to obtain information

Regulation 734/2013 provides that the Commission may *“request”* information only in a formal investigation procedure and if that procedure has been identified as being *“ineffective”*, apparently because the information provided by the Member State concerned is *“not sufficient”*. Even more surprisingly, the Commission may request information from beneficiaries only if the Member State concerned agrees to the request. The Member State has no duty to give reasons if it refuses, and a refusal could be challenged, if it could be challenged at all, only under national law.

These limitations seem impossible to justify, in particular because the companies usually have more relevant information than the Member State. They would enable the Member State concerned to prevent the beneficiary from giving the Commission information, if the State thought that the information might lead the Commission to question the need for the aid, or to question the information given by the State. These provisions would also enable the State to prevent the beneficiary from giving information that would justify the aid, if the Member State’s real objective were to have the aid prohibited or limited by the Commission. In short, in all cases in which there is a disagreement or a conflict of interest between the State aid and the beneficiary or beneficiaries, the State is able to control the information provided to the Commission, even when the Commission considers that the information is needed. This seems to be incompatible with the duties of cooperation of Member States under Article 4(3) TEU, and appears to be illegal for that reason. It must always be wrong to give an interested party the absolute right to suppress evidence.[[9]](#footnote-10)

# EU Case-law on procedural issues, and its limitations

The minimal rights given by the Regulations are slightly modified by the case-law of the EU Courts, and the practice of the Commission in some cases is better than the bare terms of the Regulations suggest.[[10]](#footnote-11) For example, it is apparently the practice to give competitors which object to a State aid an opportunity to comment before concluding, in a preliminary examination, that the measure is lawful. But the Commission is not obliged to examine objections that a complainant would certainly have made.[[11]](#footnote-12)

If the Commission authorizes an aid without opening a formal procedure, or states that an aid is a permissible existing aid, interested parties may challenge the authorization, in accordance with the *Cook* and *Matra* judgments.[[12]](#footnote-13) The Commission must not reveal confidential information about companies that may be involved in the procedure, as interested parties or otherwise. The rights of interested parties to be involved in the administrative procedure depends on the circumstances of the case, the Court said in the *NOS* case[[13]](#footnote-14): but this is so vague that it seems to be of little practical importance, although involvement must be *“in an adequate manner”* (*Athinaki* judgments[[14]](#footnote-15)). It has been suggested (in an Order in Case T-366/13, *France v. Commission*, 29 August 2013) that the Commission’s order to the State for repayment of aid has not got a direct legal effect on the beneficiary, which seems a very theoretical view.

The overriding principle seems to be that stated in the 2013 Regulation, that *“the provision of information by the beneficiary … does not constitute a legal basis for bilateral negotiations between the Commission and the beneficiary”*. (But the rights of the defence are not the same as *“negotiations”*). This principle is not significantly affected by the fact that the Commission sometimes sends interested parties and the State concerned a draft description of the essential facts, to confirm that it has correctly understood them. These descriptions are not draft decisions, and are not intended to give the recipients an opportunity to make legal arguments.

# Case-law of the European Court of Human Rights

Because there is so much case-law of the European Court of Human Rights on Article 6 of the Convention, which corresponds to Article 47 of the Charter, it is useful refer to at the judgments of the Strasbourg Court. That Court has said that *“the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively”*.[[15]](#footnote-16)

One of the principles used by the Strasbourg Court is the principle of “equality of arms”. This principle has also been recognized and accepted by the European Court of Justice.[[16]](#footnote-17) In essence, the principle means that in litigation one party, normally in practice a public authority, should not be allowed to take advantage of the fact that it has a large amount of evidence that is not available to the other party, and of which it could take advantage by selectively disclosing only evidence that supported its case. It has been said that the principle *“requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”*.[[17]](#footnote-18) Plainly, this requirement is not fulfilled when the companies have no access to the Commission’s file.

Another principle found in the Strasbourg case-law is the right to an adversarial trial, meaning the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the decision of the tribunal.[[18]](#footnote-19) This principle apparently differs from the principle of equality of arms because it requires access to be given to all relevant material, whether the other party has access to it or not.

Both of these principles suggest that the State aid procedure is open to serious criticism under the Convention, which would mean that the same criticisms could also be made under the Charter, because it must be interpreted so as to give at least as much protection for fundamental rights as is given by the Convention.

# Comparison with EU Anti-subsidy procedures

The objectionable nature of these features can be easily illustrated by comparing the procedure for considering State aid given by EU Member States with the procedure of the Commission for considering State aid or the equivalent given by non-EU States, in anti-subsidy proceedings under Regulation 597/2009. Although the State aid procedure has been in operation since the Community Treaties came into force in 1958, the rights given to interested parties are much less, and much less clearly established, than the long-standing rights of interested parties in anti-subsidy and countervailing duty cases. (Astonishingly, Regulation 659/1999 was the first ever Regulation on State aid procedure). The differences are striking.[[19]](#footnote-20)

In State aid cases, interested parties have no right to be informed that the Commission is investigating the supposed aid during the preliminary examination phase, although there is no time limit for the duration of that phase, and no limit on what may be done during it. Interested parties have not even got a right to know whether a complaint has been made or whether the aid has been notified. In anti-subsidy cases, the Commission publishes a notice of initiation of the procedure.

In State aid cases, interested parties have no right to submit comments in the preliminary phase (and if they wished to submit comments, they would have no right to know what to comment on). In anti-subsidy cases, interested parties may submit comments as soon as the investigation has been announced. In State aid cases, interested parties have no right to see the Commission’s file, but in anti-subsidy cases there is a right to see the file.

In State aid cases, interested parties have no right to be informed of the essential facts before a decision is adopted, even if the decision will clearly be contrary to their interests, and no right to be heard. (This, one would have thought, is contrary to the principle of the rights of the defence, established by the Court of Justice long ago in the *Transocean Marine Paint Association* judgment).[[20]](#footnote-21) In anti-subsidy procedures, interested parties have a right to be informed before a decision is adopted, and there is a right to be heard.

There is no Hearing Officer in State aid cases, while there is a Hearing Officer in anti-subsidy procedures (and of course in other competition cases). In State aid cases, companies can now be fined for failing to provide information demanded by the Commission under Regulation 734/2013, but in anti-subsidy cases the only sanction for failure to provided information requested is that the Commission will make use of whatever facts are available to it, even if they are known to be incomplete.

Another difference concerns the possible outcomes in the two types of cases. In anti-subsidy cases, the only forseeable formal outcome is either a favourable decision or a countervailing duty, and the interested parties know this clearly from the beginning. In a State aid case, the Commission may impose the repayment of a large amount of aid, or may impose a wide variety of different conditions, which might or might not be appropriate or proportional, and on which both beneficiaries and their competitors may need to be heard in order to see if the conditions are sufficient or justified.

These procedural differences are even more striking when the consequences of adverse decisions are compared. In State aid cases, the full amount of any unlawful new aid (not merely the net economic benefit, which might be much less) is usually considered to be repayable, or the potential beneficiary may be unable to obtain any aid, whatever the consequences may be for the survival of the company. If conditions or restructuring have been imposed by the Commission, the conditions may offset or cancel out much of the benefit that the beneficiary expected to obtain. In the case of anti-subsidy duties, the only effect of an adverse decision is that duties will be imposed on imports that are designed to cancel or offset the effect of the subsidy, or to prevent the injury to the EU industry.

The procedure in anti-subsidy cases proves that there can be a satisfactory procedure on the basis of disclosure of the Commission’s file. There is no reason why there could not be a similar procedure in State aid cases.

# The Charter of Fundamental Rights

Article 47 of the Charter, which is headed *“Right to an effective remedy and to a fair trial”*, reads in part:

*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.*

The question arises whether, in the light of the features of the State aid procedure, beneficiaries and other interested parties have an *“effective remedy”* and a *“fair hearing”* if the Commission adopts decisions that are contrary to their interests.

# When is there a “right” to State aid?

The first question concerns the circumstances in which a company has a “right” to a State aid. If the State aid measure merely gives the State authority a discretion as to whether to grant aid, there would presumably be no “right” to the aid until there is a Member State decision to grant the aid to a given beneficiary. Until then, the companies concerned would be merely potential beneficiaries. However, it seems reasonable to say that, if the Member State has enacted measures allowing aid to be given, potential beneficiaries have a right to have the lawfulness of the aid determined by the Commission, so that they can apply for the aid if and when it has been determined to be lawful. Correspondingly, competitors of the potential beneficiaries have a right to have the lawfulness of the aid determined, so that they can be protected against the consequences of the aid if in fact it is unlawful. The provisional nature of the interests of interested parties at a stage before the potential beneficiaries are identified or selected does not seem to prevent their interests being regarded as *“rights”* within the meaning of Article 47. It is submitted that they would certainly be *“civil rights and obligations”* under Article 6 of the European Convention on Human Rights.

If the State aid were given by way of tax exemption or relief, there would be no doubt that the companies would have a *“right”* to benefit from the exemption, if the tax measure were a permissible State aid.

# Is there an *“effective remedy”* for beneficiaries or competitors?

The second question is whether the rights of at least some interested parties to challenge the Commission’s final decision in the General Court are sufficient to provide a *“fair trial”* and an *“effective”* remedy. The decision must give reasons for the conclusion reached, and it might be said that the defects in the procedure leading up to the decision are no longer relevant once the decision has been adopted. But this view does not stand up to examination. Whatever reasons may be given in a decision, if it has been adopted in violation of the rights of the defence, it should be annulled. The Commission’s decision cannot consider or deal with evidence or arguments that the interested parties did not know about or never had a chance to make. The General Court certainly cannot assume that the Commission has always made such thorough enquiries that it has discovered everything that it needed to discover, and considered thoroughly and objectively every argument that might have been made if the companies had been given an opportunity to make it. Even if the EU Courts were willing to consider all the evidence and arguments that could have been made to the Commission, the role of the Courts under Article 263 TFEU is not to re-try the case on the basis of the evidence and arguments that the Commission should have considered but the parties had no chance to make. The role of the Courts is to decide if the Commission’s procedure was lawful and the reasons given for its conclusions were sufficient. If only a re-trial with new evidence and argument can cure the defects of the administrative procedure, as seems to be the position, the remedy that the Courts can give is not *“effective”*, because a re-trial should not be necessary. A procedure that gives only the right to make one set of submissions on the basis of a description of the Commission’s views before it begins a formal investigation, and no right to submit further evidence or argument that might be relevant when further facts emerged, new assessments developed or further arguments were made, cannot reasonably be described as a *“fair”* or satisfactory procedure. A procedure in which the Commission apparently does not regard itself as being obliged to be impartial, and in which the interests of companies are defended (if at all) by a Member States which apparently has no duty of impartiality and whose own interests may not correspond to those of the companies[[21]](#footnote-22), cannot be considered adequate to disclose the true situation. A procedure in which pragmatic compromises may be made between the Commission and the Member State, in circumstances in which neither of those two parties has a duty or an interest to consult or to protect the interests of the companies concerned, cannot be considered satisfactory.

A procedure that gives interested parties no rights to be informed about the progress of the procedure, no right to know about developments on which they may wish to comment, no right to defend their interests at the appropriate times, and no guarantee that they will receive the final Commission decision promptly cannot provide an *“effective remedy”*. The right to a fair trial and an effective remedy must include the right to get the evidence needed to prove one’s case, if the evidence exists and is identifiable. The *Laboratoires Boiron* judgment[[22]](#footnote-23) confirms that. This principle applies both to challenges to the actions of the Commission, in the General Court, and to claims against a Member State that granted unlawful aid, under the *Francovich* principle, in the national courts.

In *Kadi[[23]](#footnote-24)* the Court said:

*“… having regard to the Court’s case-law in other fields… it must be held in this instance that the effectiveness of judicial review which it must be possible to apply to the lawfulness of the grounds on which… the name of the person or entity is included in the list… leading to the imposition on those persons of a body of restrictive measures means that the Community authority is bound to communicate those grounds to the person or entity concerned, so far as possible, either when that inclusion is decided upon or, at the very least, as swiftly as possible after that decision in order to enable those persons or entities to exercise, within the period prescribed, their right to bring an action. Observance of that obligation to communicate the grounds is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature… and to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty… given the failure to inform them of the evidence adduced against them and having regard to the relationship… between the rights of the defence and the right to an effective legal remedy, … their right to an effective legal remedy has also been infringed”*.

In cases under what are now Articles 101-102 the EU Courts established that defendant companies had a right of access to the Commission’s file.[[24]](#footnote-25) This right is recognised by Article 27 of Regulation 1/2003, and it is now based on the Charter. The same considerations apply in State aid cases. The interest of the recipient of State aid is at least as vital as the interest of a defendant in a cartel case.

The Member State might challenge a Commission decision, and the company receiving the aid might do so also. But the Member State would have full access to the Commission’s file, and the company would not. That would also be irrational and anomalous.

# The terms of Commission State aid decisions

The defects in the procedure can be seen to be even more serious when the terms of Commission decisions are considered. The decision opening the formal investigation almost never indicates the conditions that the Commission may ultimately impose. This means that, unless the Commission or the Member State has chosen to give the companies concerned enough information to enable them to comment, they will have had no opportunity of any kind to criticize or object to what may be the most important elements in the final decision.

This can be seen to be particularly inappropriate because of the Commission’s experience with commitment decisions under Article 9 of Regulation 1/2003, which in spite of some serious problems have proved to be a useful way of resolving difficult cases, in particular cases in which a practical modus operandi needs to be worked out with the companies directly involved. Since the Commission can negotiate commitments, it should be willing, where appropriate, to discuss the terms of restructuring or approval of State aid with the companies involved.

# Fundamental defects in State aid procedure

In short, the State aid procedure suffers from several fundamental defects. It is entirely non-transparent: the companies cannot be sure of finding out what is being said or done. It is entirely discretionary: the Commission claims a right to make whatever enquiries it chooses, and to take whatever action it wishes, without regard to any legal principles. The conduct of the Member State involved is regarded as being entirely at its discretion, and not subject to any constraints of any kind. The procedure entirely disregards the rights of the defence: no opportunity is guaranteed to the companies to comment on proposals that may seriously harm their interests. The procedure is inappropriate, because it is regarded as primarily a dialogue or negotiation between the Commission and the Member State, rather than the companies that have a direct financial or other interest of their own in the outcome. Negotiation and litigation by proxy is fundamentally bad litigation, and is wholly inappropriate when the interests of the companies could be perfectly well defended by the companies themselves. Worse still, the Member State may have a conflict of interest between its presumed (but not invariable) wish to defend its own State aid measure, on the one hand, and its financial interest in minimizing the cost of the aid to its budget, on the other. Companies cannot be expected to be confident when defended by such schizophrenic advocates. The procedure is bureaucratic and autocratic: Commission officials claim the power to give orders that are not subject to any supervision or control. The procedure is conducted between officials, none of whom are in necessarily direct touch with the companies directly and financially affected.

It is important to stress that no justification has been or could be suggested for withholding from the interested parties the information that is in the Commission’s possession (except insofar as it may be confidential). In fact the only explanation for the State aid procedure is that it has developed primarily for the convenience of the Commission, without regard for due process, and with the assent of Member States who like the informality, secrecy, and flexibility, which allows them to pursue objectives and make compromises that they might not necessarily wish to discuss or disclose openly. This convenience cannot be a sufficient justification for a failure to allow a fair trial.

State aid cases also suffer from the two basic and well known flaws of the Commission’s procedure in all competition cases, which are that the same officials write both the criticism of the practice or proposal and the decision that may prohibit it, and that the decision is formally adopted by Commissioners none of whom have seen the evidence, read the arguments, or attended the hearing. These defects may not be enough by themselves to make the Commission’s procedure illegal in all competition cases, but they certainly contribute still further to the likelihood that State aid procedures are contrary to both the Charter and the Convention.

# Claims against the State in accordance with the *Francovich* principle

When a competitor of a company that received an illegal aid sues the State that paid the aid, for compensation in accordance with the *Francovich* principle (essentially for lost profits), the competitor will almost always need access to the Commission’s file, in order to have an *“effective remedy”* under Article 47 of the Charter.[[25]](#footnote-26) The same basic principle applies: the right to an effective remedy must include the right to get the evidence needed to prove one’s case. The right to a *“fair hearing”* must include the right to get and to use the important evidence.

If it were clearly recognised, as it is suggested here that it must be, that interested parties have a right to see the Commission’s file, that would greatly increase the effectiveness of EU State aid policy, since it would facilitate claims for compensation against States that have paid illegal aid. It would create, for the first time, a financial cost for a State that grants an illegal aid. At present there is none. It is not clear why the Commission has not understood this, because State aid control is the most difficult area of EU law to enforce, and the Commission needs to use all the means of enforcement that EU law provides. The Commission therefore has a strong and clear interest in complying with its obligations under the Charter. This is one of the relatively few ways in which EU State aid policy could be made more effective.

# The right to “Good administration”

The question also arises whether the State aid procedure is compatible with the principle of good administration under Article 41 of the Charter, which reads *Every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time by the institutions, bodies, offices and agencies of the Union*. This raises several issues.

It seems that the principle of good administration, because it is stated in the Charter, is a principle that has Treaty force and can override and invalidate EU secondary legislation such as the State aid Regulations.[[26]](#footnote-27) In any case the Charter clearly imposes duties on the Commission, and presumably also on Member States under Article 4(3) TEU when they are (or should be) cooperating with the Commission in the implementation of EU law. These duties are legally binding and must be respected insofar as the secondary legislation allows (assuming that it is valid).

Several provisions of the Regulations may be contrary to the principle of good administration, as well as to the right to an *“effective remedy”*:

* Article 6a(2), inserted by Regulation 734/2013, insofar as it restricts the powers of the Commission to investigate facts that it considers that it needs to know. As this provision gives the Member State a veto on the Commission obtaining information, it seems to be contrary to Article 4(3) TEU, and if this is so, the question whether it is also contrary to the principle of good administration may not arise.
* Recital (4) of Regulation 734/2013 says that *“the provision of information by the beneficiary of the aid measure in question does not constitute a legal basis for bilateral negotiations between the Commission and the beneficiary in question”*. However, what is required by the Charter is not a “negotiation” but disclosure of the evidence on which the Commission takes its decision. To describe this as “negotiation” is seriously to misunderstand the legal position.

# The Commission’s obligations of “Good Administration”

The right to good administration as stated in Article 41 of the Charter includes the right to have one’s case treated *“impartially, fairly”*, which has several consequences.

The principle, insofar as it is relevant to State aid procedure, clearly imposes several obligations on the Commission. First, it imposes a legal obligation of objectivity and impartiality. The Commission must treat both sides of a controversy (in a State aid case, typically the beneficiary and its competitors) in the same way, giving them the same information (subject to confidentiality requirements) and the same opportunities to defend their interests. The Commission must not, by asking questions to one side without sending the questions and the answers to the other side, give better opportunities to be heard to one side of the controversy than to the other.

Second, it imposes on the Commission a legal obligation to investigate the facts thoroughly, in order to find out all that it needs to know in order to reach a correct result.[[27]](#footnote-28) A superficial investigation cannot be sufficient or *“fair”*.

Third, it imposes on the Commission a legal obligation to allow and enable interested parties to make their views known, and for this purpose there must be a legal obligation to give the interested parties the information and evidence that they need in order to form their views and make their arguments on whatever issues are relevant.[[28]](#footnote-29) The Commission (and the Member State) must not determine or limit what the interested parties may say, or the questions on which they may express their views. This is particularly important insofar as the Commission is considering imposing conditions on the structure or conduct of the beneficiary.

The European Ombudsman’s publication The European Code of Good Administrative Behaviour says that officials should be *“impartial, open-minded, guided by evidence and willing to hear different viewpoints”*.

Fourth, the Charter imposes on the Commission a legal obligation to be consistent, and to do in one case what it does in other similar cases. It would be contrary to the principle for the Commission to give the companies full information in one case, and little or no information in another. This would be illegal even if the Commission had never formally stated its policy.

Fifth, it seems reasonable to say that *“good administration”* also obliges the Commission to recognise the possibility of conflicts of interest in the cases with which it is concerned, and to avoid or prevent them as far as possible. This would require the Commission to recognise that the interests of the Member State granting the aid and the beneficiary may be in conflict. The Commission should be careful to avoid being misled or incompletely informed as a result of such a situation, and should not rely on information given by a party which is or may be in a conflict of interest. It would not be good administration to insist on a party being represented by someone who might have interests adverse to the party represented. If it is said that the Member State is not “representing” the recipient of the aid, that merely confirms that the interests of the recipient are not being defended at all, except insofar as its interests and those of the State may coincide.

Sixth, Article 41 requires a result to be reached *“within a reasonable time”*. This the Commission plainly fails to provide, in many cases. If proceedings for the Commission’s failure to act, under Article 265 TFEU, were clearly available, this could be corrected.

Seventh, Article 41 obliges the Commission to facilitate parties who wish to claim their legal rights, by making evidence available. This is so in particular because national courts will ask the Commission for information, when they are dealing with claims for compensation by competitors of recipients of illegal aid, under the *Francovich* principle. The Commission has a duty under Article 4(3) TEU to provide readily available information to national courts when they are applying EU law, and could hardly refuse to provide it.[[29]](#footnote-30)

# The Regulations allow the Commission to comply with the requirements of “Good Administration”

Although the Regulations clearly do not oblige the Commission to comply with these obligations under the Charter, it would be possible for the Commission to comply with them without infringing the Regulations, except for Article 6a(2)(b) of Regulation 734/2013. It is true that the Regulations do not regard the procedure as one in which the interested companies are parties, but as they are clearly the persons whose financial and economic positions are most directly affected by the result of the procedure, it is the interested parties which are most relevant for clarifying the obligations of the Commission under the Charter and the principle of good administration. Regulations could not deprive private parties of their rights under the Charter merely by saying that they are not the primary parties to the State aid procedure. In short, the principle of good administration requires transparency and impartiality in the procedure, and these are allowed, though not required, by the Regulations (except, once again, by Article 6a(2)(b)). It will be seen that the Commission’s practice does not comply with these obligations, although it could be modified in order to do so.

If the Commission were to modify its procedure and practices to comply with these principles of good administration, the question of how far Member States are also obliged to comply with them in State aid procedures would become less important. But the Charter binds Member States when they are implementing Union law, under Article 52 of the Charter. In addition, Member States have a legal duty under Article 4(3) TEU to cooperate with the Commission so as to enable it to fulfil its obligations under the Charter. Member State could not object to the Commission disclosing its file when that is required by the Charter: the Charter is also binding on them, in the sphere of EU law.

# The European Economic Area

The practice of the EFTA Surveillance Authority (“ESA”) in State aid cases under the European Economic Area Agreement seems to be essentially similar to the Commission’s procedure under the TFEU. Strictly, the procedure of ESA and the EFTA Court are subject to the European Convention on Human Rights but not the Charter, while the procedure of the Commission is subject to both. However, this does not seem to make any significant difference, since the Charter and the Convention contain similar provisions on fair trial, and the Charter must be interpreted so as to give protection to fundamental rights at least as effective as under the Convention.[[30]](#footnote-31) The Convention does not include an Article on good administration, but the analysis above of Article 41 of the Charter suggests that, as far a State aid procedure is concerned, Article 41 may not add very much to the effect of Article 47, although it undoubtedly confirms it.

It follows that the question whether the procedures in EU and EEA State aid cases are compatible with fundamental rights may arise either in the EFTA Court or in the General Court and the Court of Justice. The question might ultimately arise, of course, before the European Court of Human Rights.

There does not seem to be anything in the practice of ESA that corresponds to Article 6(a)(2) of Regulation 734/2013. If there were, it would presumably be contrary to the duty of sincere cooperation under Article 3 EEA, which corresponds to Article 4(3) TEU, for the reasons given above.

# Strict Judicial review is necessary

It is now generally understood that the administrative stage of procedures of this kind is compatible with the Charter and the Convention only if there is sufficiently strict judicial scrutiny. This is confirmed by the judgment of the Court of Human Rights in *Menarini Diagnostics v. Italy[[31]](#footnote-32)*, by the judgment of the Court of Justice in *KME[[32]](#footnote-33)*, and by the judgment of the EFTA Court in *Posten Norge*.[[33]](#footnote-34) The case-law of the Court of Human Rights (in particular *Bryan v. United Kingdom[[34]](#footnote-35)*) suggests that the fairer the administrative procedure is, the less judicial scrutiny is required. However, even strict and thorough judicial review of Commission State aid decisions could not make them legal under the Charter, because interested parties have no right of access to the Commission’s file, and therefore cannot be sure of being able to know all the relevant facts or to make the arguments that they need to make.[[35]](#footnote-36) It would not be enough for the Commission’s file to be disclosed to the General Court, even if that were the practice.

# The limited scope for Judicial review in practice

These defects in the administrative procedure are particularly serious because the scope for effective review of the Commission’s decisions by the General Court is inevitably limited. If a Commission decision orders repayment of an aid, the beneficiary may be able to obtain an Order suspending the duty to repay. But the company may have to give a bank guarantee for repayment if necessary, and will in any case have a contingent liability to repay, until the EU Courts ultimately decide. If, as may be the case, the State aid was essential to keep the company in business, the Commission’s decision may be fatal. If the company challenges the conditions imposed by the decision, the Court may suspend the conditions, but the uncertainty will continue until the case is finally decided by the Court. In some monitoring cases, the Commission gives orders directly or through the monitoring trustee that are not contemplated in its formal decision, and on which the company has had no opportunity to comment. These orders, even if they clearly constitute decisions that could be separately challenged, cannot be suspended quickly enough to avoid serious inconvenience or loss to the companies involved.

Another limitation on the extent of judicial review should be mentioned. Although it is the Commission which orders repayment, it is the Member State that is responsible for calculating how much should be repaid, and its decision can be challenged only in the national court. The General Court has not got full jurisdiction (*pleine juridiction*) to determine the amount of the refund. If the Commission has chosen to give detailed instructions about the amount to be repaid, its decision could be challenged, but that is unusual.

Whether the Commission’s decision can be challenged successfully on procedural grounds in any particular case may depend on the exact facts. In a very simple case, in which all the issues were clear from the decision opening the formal investigation, the Charter might be complied with. But the more complex the case becomes, the more serious the parties’ ignorance of the progress of the case becomes, and the more likely it is that the procedure will become contrary to the Charter. This means that the more trouble the Commission takes over a case, the more likely it is that the decision will be contrary to the Charter. This is an irrational result that the Commission would be wise to avoid. In many State aid cases there is a failure to respect the rights of the defence of the companies, and this fact cannot be brushed aside by saying that the procedure does not concern their rights, and that the only rights of defence are those of the Member State.

# Steps towards a solution

The procedures in anti-subsidy cases, and the procedures in merger cases and in commitment cases under competition Regulation 1/2003, show that it would be perfectly possible to adopt a procedure that would adequately respect and safeguard the interests of the companies primarily involved. *The Netherlands PTT* judgment[[36]](#footnote-37) shows that it may be important to ensure that the interests of the companies most directly concerned are safeguarded, even in cases in which the primary parties are the Member State and the Commission. It cannot seriously be said that no better solution than Regulation 659/1999 can be imagined.

Many of the defects in the State aid procedure could be corrected by two simple but fundamental reforms. First, every document in every State aid investigation, at both the provisional investigation and the formal stage, should be open to inspection by *“interested parties”*, subject only to protection of confidential information. Every written submission received and every communication from the Commission to any party should be available on the Commission’s file, at all stages in the procedure.

Second, the Regulation should explicitly recognize a legal obligation on both the Commission and the Member State in question to act impartially throughout the investigation and to give full and equal opportunities to make submissions to interested parties whose interests may be opposed. This may be obvious, but it clearly needs to be said formally.

Changes in Regulations 659/1999 and 734/2013 would be desirable to implement these changes fully. This presents a difficulty. There are good reasons, not always understood, for the “Community Method” of legislating, under which only the Commission may make proposals for adoption by the Parliament and Council. But the method has one weakness. Measures that would inconvenience the Commission are less likely to be proposed. Member States that have assented to Regulation 734/2013 may not be in favour of more important changes. That is why it may be necessary, if no improvements are made, to challenge the entire State aid procedure as incompatible with the Charter, and with the principle of good administration.

But the present position is indefensible. The confidence of the business community in the Commission’s State aid procedures would be greatly increased if the procedures were made transparent and impartial, and if Member States were not allowed to prevent the Commission from obtaining information that it needs. More transparent procedures should reduce substantially the number of State aid cases coming before the General Court. Of the 1237 cases pending at the start of 2012, 152 concerned State aid.[[37]](#footnote-38) During 2012, 36 new State aid cases were filed.

Reform is long overdue, and it is very regrettable that the opportunity was not taken to carry it out when Regulation 734/2013 was being discussed.

# Why has reform taken so long?[[38]](#footnote-39)

There are several reasons why criticism of State aid procedures has taken so long to develop. The first procedural Regulation was adopted only in 1999. The great majority of State aids have always been approved. Group exemptions were under consideration. The secret, flexible, pragmatic procedures suited both the Commission and the Member States, and the interests of the companies were not seen clearly. “Modernisation” of State aid policy and practice was initiated only in 2005, and the financial crisis preoccupied everyone after that. It was due to the crisis that the Commission began frequently to impose onerous conditions. The possibility of conflicts of interest between the Member State and the beneficiaries were seen clearly only recently.[[39]](#footnote-40) Before that, beneficiaries tended to assume that the State aids rules were unclear, both in law and in economics, so companies were not sure what arguments could be made even if they could exercise procedural rights. Economists were slow to analyse State aid policy seriously. It is only when EU competition law is looked at as whole that it becomes clear that the State aid rules are much less clear, much less based on economics, and much more unsatisfactory procedurally, than the other areas of competition policy.[[40]](#footnote-41) Regulation 734/2013 introduced new express and clearly unsatisfactory limitations on the investigating powers of the Commission. The implications of the Charter have not yet been seen clearly.

The history of EC/EU State aid policy is unfortunately an example of the well-recognised phenomenon of “regulatory capture”, the tendency of regulatory authorities to get too close in their thinking and analyses to the entities that they are intended to regulate. This is particularly likely to occur when, as in the case of State aid policy, the principles on which the regulators are supposed to act were never clear. The close relationships between the Commission and the Member States have led the Commission to sympathise unduly with the political reasons for which aid is often given, and to apply inadequately whatever economic principles it should be applying. This problem is much wider than the questions of procedure discussed here, but if the procedure were more transparent, the analysis of aid cases would become clearer and more consistent with principle.

1. \* Cleary Gottlieb Steen & Hamilton LLP, Brussels: Senior Visiting Research Fellow, Oxford: Professor, Trinity College Dublin. The author has made a complaint to the European Ombudsman about the Commission’s procedure, and this complaint is being investigated. [↑](#footnote-ref-2)
2. Joined Cases C-6/90 and C-9/90, *Francovich*, [1991] E.C.R. I-5357. [↑](#footnote-ref-3)
3. The Commission published the State Aid Manual of Procedures in 2013. See Ortiz Blanco, EU Competition Procedure (3rd ed., 2013) ch.21-ch.27: Bacon, European Union Law of State Aid (2nd ed., 2013, Oxford): Quigley, EU State Law and Policy (2nd ed., 2009) ch.16-ch.17: Hancher, Ottervanger and Slot, EU State Aids (4th ed., 2012) pages 17-23 and chs. 25-27: Schütte, Procedural aspects of EU State aid law and practice, in Szyszczak (ed.), Research Handbook on European State Aid Law (2011, Elgar) 336-353. [↑](#footnote-ref-4)
4. Bacon, European Union Law of State Aid (2nd ed., 2013, Oxford) at p.442 says *“The Member State does not... have to make its notification known to interested parties: this is the task of the Commission where it decides to open the formal investigation procedure”*. [↑](#footnote-ref-5)
5. Case 120/73, *Lorenz v. Germany*, [1973] E.C.R. 1471. [↑](#footnote-ref-6)
6. See however Case T-198/01 R, *Technische Glaswerke Ilmenau*, [2002] E.C.R. II-2153, para.85 *“The Commission…. may have, at least prima facie, an obligation to communicate to the recipient [of the aid] observations which it has expressly requested from a competitor”*. It is not clear whether this leads to a general duty for the Commission to treat beneficiaries and complainants impartially and so to provide them equally with information, but that is not the Commission’s practice. Beneficiaries, competitors, and complainants do not have a right of access to documents: Case C-139/07 P, *Technische Glaswerke Ilmenau*, [2010] E.C.R. I-5889, para.61. See Hancher, Ottervanger and Slot, op. cit., p. 953, 984-986. But that case concerned the situation before the Charter came into force, and now needs to be reconsidered for that reason. The Charter was apparently not referred to, and the company was claiming the general right of any member of the public under the freedom of information Regulation 1049/2001, rather than the right of a party to an *“effective remedy”* when its rights are in question.

The Court in para 61 referred to *“the existence of a general presumption that disclosure of documents on the administrative file in principle undermines protection of the objectives of investigation activities”*. It added however that interested parties may demonstrate that a given document, disclosure of which has been requested, is not covered by that presumption, or that there is a higher public interest justifying disclosure, under Art. 4(3) of Reg. 1049/2001. This *“general presumption”* seems to be little more than the Commission’s convenience. In any case, it is normally not possible for a company to request *"a given document"* if it does not know what documents are on the file, and it can hardly show that a document that it has not seen is not covered by the presumption. So the exception envisaged by the Court cannot be enough to satisfy the requirements of the Charter.

Bacon, European Union Law of State Aid (2nd ed., 2013, Oxford) at page 448 summarises the practice clearly: *“Third parties do not enjoy the same rights as member States in the preliminary review proceudre. Rather, the right of a complainant has thus been described as the more limited right to be ‘associated’ with the preliminary review procedure ‘in an adequate manner taking into account the circumstances of the case at issue’. The same is true of a beneficiary, whose right is likewise only to be involved in the administrative procedure ‘to the extent appropriate’ in the third parties as part of its duty of sound administration. But it is not under any obligation in general to give third parties an opportunity to state their views, or to conduct an exchange of views and arguments. Similarly, while in some cases the Commission might send a complainant the comments submitted by the Member State concerned, it is not bound to do so by any principle of ‘transparency’. Nor is it, in negotiating appropriate measures in respect of existing aid, required to discuss with a complainant the appropriateness and scope of proposed commitments by the Member State. Greater protection is given, however, where following a complaint of unlawful or misused aid the Commission intends to close the case without a decision”*. In short, the Commission behaves as if it has complete discretion, with no guiding principles, and no safeguards for companies’rights. [↑](#footnote-ref-7)
7. Cases C-48/90 and 66/90, [1992] E.C.R. I-565, paras. 50-51 [↑](#footnote-ref-8)
8. If a supposed State aid has been notified to the Commission, the intended recipient may have a right to bring proceedings under Article 265 TFEU against the Commission for failure to decide whether the aid is lawful. Article 265 envisages a duty to adopt a decision addressed to the party claiming failure to act, and formally the Commission’s decision is addressed to the Member State. However, if the recipient can show that it would be directly and individually concerned by the decision, it can bring proceedings for failure to act: Case C-68/95, *T. Port*, [1996] E.C.R. I-6065, para. 59: Case T-95/96, *GesTevisión Telecinco*, [1998] E.C.R. II-3407, para. 58: Cases T-79/96 and others, *Camar and Tico*, [2002] E.C.R. II-2139, paras. 72-84: Case T-395/04, *Air One*, [2006] E.C.R. II-1343, para. 25. [↑](#footnote-ref-9)
9. Case C-536/11, *Bundeswettbewerbsbehörde v Donau Chemie*, [2013] E.C.R. I-\_\_\_, paras 32, 35, 38, 39. [↑](#footnote-ref-10)
10. The Commission has adopted a number of Notices as guidelines to its practice. Although the Commission has sometimes argued that it is not bound to respect these Notices, the EU Courts have always held that it must. See generally the State Aid Manual of Procedure (2013). [↑](#footnote-ref-11)
11. Case C-367/95 P, *Sytraval*, [1998] E.C.R. I-1719, paras 60-61. [↑](#footnote-ref-12)
12. Case C-198/91, *Cook*, [1993] E.C.R. I-2487: Case C-225/91, *Matra*, [1993] E.C.R. I-3203: Case E-1/13, *Míla v EFTA Surveillance Authority*, [2014 EFTA Court Report. [↑](#footnote-ref-13)
13. Joined Cases T-231/06 and T-237/06, *Netherlands and Nederlandse omroep Stichting*, [2010] E.C.R. II-5993, para.36: See Quigley, EU State Aid Law and Policy (2nd ed., 2009) pp.408-410.. [↑](#footnote-ref-14)
14. Cases C-521/06 P, [2008] E.C.R. I-5829 and C-362/09 P, [2010] E.C.R. I-13275. [↑](#footnote-ref-15)
15. *Perez v. France*, 2004 I, 40 EHRR 909 para. 64 GC. [↑](#footnote-ref-16)
16. See Ortiz Blanco, EU Competition Procedure (3rd ed., 2013) p.21-23: Case C-199/11, *Otis and others*, [2012] E.C.R. I-\_\_\_\_: Joined Cases C-514/07 P and others, *Sweden and API*, [2010] E.C.R. I-8533, para. 88. [↑](#footnote-ref-17)
17. *Neumeister v. Austria*, A 8 (1968) 1 EHRR 91. [↑](#footnote-ref-18)
18. *Vermuelen v. Belgium*, 1996-1: 32 EHRR 313 para. 33GC: *Barberà messegué and Jabardo v. Spain*, A 146 (1988) II EHRR 360 para. 78 PC. [↑](#footnote-ref-19)
19. The first EC Regulation on anti-dumping and countervailing duties was Reg. 459/68. This Regulation has been repeatedly revised since then. [↑](#footnote-ref-20)
20. Case 17/74, *Transocean Marine Paint Association v. Commission*, [1974] E.C.R. 1063. In general, if a decision is of direct and individual concern to a private party under Article 265, it has a right to defend its interests before the decision is adopted: see Cases C-48/90 and C-66/90, *Netherlands v. Commission*, [1992] E.C.R. I-565, paras. 50-51. [↑](#footnote-ref-21)
21. If aid must be repaid, it is repaid to the State. The Commission cannot assume that the State has an interest in minimising the amount to be repaid: Case T-366/00, *Scott*, [2007] E.C.R. II-797, para.59.

See Case C-290/07 P, *Scott*, [2010] E.C.R. I-7763, Opinion of Advocate General Mengozzi para. 55, where the fact that the recipient of aid is only an *“interested party”* with no right to participate in the procedure is described as *“markedly formalistic”*. The Advocate General also referred to the principle of good administration: paras. 59-66, 73-77. The Court did not refer to the Charter.

Sir Jeremy Lever (op. cit. p.9) also points out that the Member State may not be fully informed if *e.g.* the aid was given by a regional or local authority. The State may not wish to be completely frank, even when it is fully informed. In addition, the Member State, by accepting that aid is “new” rather than “existing” aid, may make the recipient liable to repay the aid to the State, without the recipient being consulted or informed. [↑](#footnote-ref-22)
22. Case C-526/04, *Laboratoires Boiron*, [2006] E.C.R. I-7529. [↑](#footnote-ref-23)
23. Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al-Barakaat*, [2008] E.C.R. I-6351, paras 336-337, 349, 351. See also Case C-67/13 P, *Groupement des cartes bancaires*, [2014] E.C.R. I-\_\_\_\_, paras 43, 91. [↑](#footnote-ref-24)
24. Joined Cases C-204/00 P and others, *Aalborg Portland*, [2004] E.C.R. I-123, paras. 100-106: Case C-109/10 P, *Solvay*, [2011] E.C.R. I-\_\_\_\_, paras. 51-70. The Charter was referred to in both these judgments. [↑](#footnote-ref-25)
25. The Commission’s Notice on the enforcement of State aid Law by national courts, O.J. No. C-85/1, April 9, 2009, para. 83 envisages claims against the State for compensation in accordance with the principle of State liability stated in Joined Cases C-6/90 and C-9/90, *Francovich*, [1991] E.C.R. I-5357. The Notice envisages that the national court may ask the Commission for “factual data, statistics, market studies and economic analysis”. But the Notice does not say that the Commission will disclose its file to the court, or that it will help claimants directly. This is unfortunate, because if the Commission has made a thorough investigation, the Commission’s file can be expected to include evidence that the claimant could use to show that the aid caused loss to it, and to indicate the amount of the loss, both of which are essential in State liability cases. The Commission has always been slow to encourage *Francovich* claims. [↑](#footnote-ref-26)
26. Some “General Principles” such as the principle of good administration clearly have the same status as the Treaties and can invalidate secondary legislation: Temple Lang, Emerging European General Principles in Private Law, in Bernitz, Groussot & Schulyok (eds.), General Principles of EU Law and European Private Law (2013, Wolters Kluwer) 65-117. However, Article 41 seems to give Treaty status to all the principles of “good administration”. Handling affairs “fairly” must mean more than handling them “impartially”, because it must include a duty to be thorough and a duty to listen. Both words must be given a meaning. [↑](#footnote-ref-27)
27. The General Court has ruled that the Commission must carry out *“a diligent and impartial examination”*: Case T-395/04, *Air One*, [2006] E.C.R. II-1343, para.61, and so must not *“prolong indefinitely”* its preliminary investigation: Cases T-228 and 233/99, *Westdeutsche Landesbank*, [2003] E.C.R. II-435, para.167. [↑](#footnote-ref-28)
28. This would imply reconsideration of the judgment in Case C-139/07 P, *Technische Glaswerke Ilmenau*, [2010] E.C.R. I-5885, para.61. As already mentioned, that case concerned a situation that arose before the Charter came into force, and the Charter was apparently not relied on. See Jaeger, A Wish-List for Commissioner Almunia, 9 European State Aid Law Quarterly (2010), 1-3. [↑](#footnote-ref-29)
29. See Case C-2/88, *Zwartveld*, [1990] E.C.R. I-3365. [↑](#footnote-ref-30)
30. Charter, Article 52. [↑](#footnote-ref-31)
31. No. 43509/08, 27 September 2011. [↑](#footnote-ref-32)
32. Case C-272/09 P, *KME Germany*, [2011] E.C.R. I-\_\_\_\_. [↑](#footnote-ref-33)
33. Case E-15/10, *Posten Norge*, [2012] EFTA Court Report. [↑](#footnote-ref-34)
34. *Bryan v. United Kingdom*, A 335-A (1995), 21 EHRR 352 para. 45. [↑](#footnote-ref-35)
35. This is the result of the judgment of the Court of Justice in Case C-367/95 P, *Sytraval v. Commission*, [1998] E.C.R. I-1719 which ruled that the Commission neither needs to inform complainants in the preliminary stage or to raise the arguments that they could be expected to make if they were informed. But the Commission has a duty to carry out a diligent and impartial examination of a complaint, and this may oblige it to consider issues not expressly raised by the complainant. If a formal investigation is begun, the decision opening it gives the complainant some information. [↑](#footnote-ref-36)
36. Joined Cases C-48/90 and 66/90, [1992] E.C.R. I-635. [↑](#footnote-ref-37)
37. Annual Report of the Court of Justice. Of the 28 references on competition law under Article 267 TFEU pending in January 2014, eleven concern State aid. [↑](#footnote-ref-38)
38. Heimler, European State Aid Policy in Search of a Standard: What is The Role of Economic Analysis? in Hawk (ed.), International Antitrust Law and Policy (2010) 91-120, at pp. 93-94. *“Besides an OECD roundtable on subsidies held in 2001 and two papers written a year or two earlier, one by Tim Besley and Paul Seabright and the other one by Damien Neven and Lars Hendrick Röller, there was not much else”* (p. 94). Jenny, Competition and State Aid Policy in the EU, in Hawk (ed.), 1994 Fordham Corporate law Institute (1995) 75-98 said (p. 96) *“this apparent lack of interest in the European State aid policy is not unique to lawyers. Economists, even economists specialized in market mechanisms and competition, have been largely silent on the issue. This is all the more perplexing because there are hundreds of decisions taken each year by the Commission on State aids”*. It is in part because *“any sizable aid is considered to threaten or distort competition”* (p. 96). *“State aid decisions …. do not always appear to be grounded on a predictable economic analysis”* (p. 97) and expectations of a consistent approach are not always met. [↑](#footnote-ref-39)
39. It was mentioned by Advocate General Mengozzi in Case C-290/07 P, *Scott*, [2010] E.C.R. I-7763 at para. 55. [↑](#footnote-ref-40)
40. Temple Lang, The evolution of EU Competition Law and some current issues, in Beck and Sheehy Skeffington (eds.), The Impact of European Law on the Corporate World (2010, Irish Centre for European Law) 87-114. [↑](#footnote-ref-41)