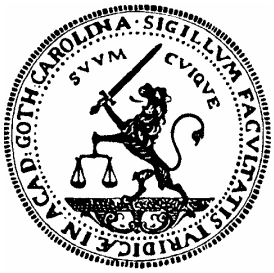

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The Reforms of the European State Aid Control -decentralisation as a new form of governance?

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Contents

Summary

The European state aid rules have always been one of the most centralised fields of Community law. In order to limit and control the Member States' ability to protect and support their national industry, the Commission has been entrusted with the task to enforce EC rules on different sorts of national aid measures. This has been realised through a far-reaching duty for the Member States to notify their planned aid measures to the Commission.

At the same time, the European Competition Law, has went through several reforms of decentralisation, where national competition authorities have been given wider responsibilities and the formerly strict rules have become subject to changes in forms of soft law instruments. These governance networks could, in theory, be included under the idea of new modes of governance for the European system. With these trends as reference point, the old system in state aid law has been widely criticised and the Commission itself has, in its latest action plan, opened the door for substantial changes.

This thesis analyses the current and potential changes in the balance of power between the Commission and the Member States in state aid matters. By starting in the Treaty itself and going through relevant secondary legislation and case law there appears to be a change of Commission control. In addition, the SAAP reveals the current institutional trends and it seems as the current financial crisis has implications for the governance system in state aid matters.

The latest developments cannot give any clear indication to whether or not there is an ongoing decentralisation in real terms or a governmentality-type of development. As the Member States seemingly receives a greater independency in regulating themselves, the Commission maintains mechanisms of surveillance and control. Both materially and procedurally there are signs of real decentralising ambitions but paradoxically the financial crisis might reinforce the Commission's position as a central procedural actor in the system.

Sammanfattning

De europeiska statsstödsreglerna har alltid hört till ett av de mest centraliserade områdena inom gemenskapsrätten. För att begränsa medlemsstaternas möjligheter att understödja sin egen industri på bekostnad av konkurrensen på den inre marknaden, har Kommissionen tilldelats den avgörande rollen i att kontrollera olika former av nationellt stöd. Detta har realiserats genom en långtgående plikt för medlemsstaterna att meddela nya stödåtgärder till Kommissionen innan de införs.

Samtidigt har den europeiska konkurrensrätten i stort genomgått en omfattande decentralisering där nationella myndigheter och mer generella riktlinjer hjälpt till att minska arbetsbelastningen och handläggningstiderna hos kommissionen. Liknande *governance networks* återfinns i flera rättsområden inom gemenskapsrätten och kopplas i teorin samman med en genomgående förändring av det europeiska styrelseskicket; *new modes of governance*. Dessa trender har gjort att det centraliserade systemet inom statsstöd har blivit alltmer ifrågasatt. Kommission har också i sitt senaste stora policydokument öppnat för att verka för mer decentralisering.

Denna uppsats utreder vilka förändringar i maktbalansen mellan Kommissionen och nationella organ som är under utveckling. Avstamp tas i fördraget med en utredning av gällande regler samt den senaste utvecklingen inom omfattande rättspraxis från EG domstolen och Förstainstansrätten. Till detta följer en analys av *SAAP* och vilka förändringar som är under uppsegling. Dessutom tycks den finansiella krisen ha haft stora implikationer på reformerna av systemet.

Den senaste utvecklingen kan inte sägas ge något ensidigt stöd för om det pågår en reell eller skenbar decentralisering. Även om trenden pekar mot en större involvering av medlemsstaterna och ett större självbestämmande behåller Kommissionen trots allt en betydande kontroll över systemet genom olika övervakningsmekanismer. Såväl materiellt som processuellt finns tecken på en decentralisering även om den finansiella krisen paradoxalt kan ha förstärkt Kommissionens processuella ställning.

Abbreviations

AG	Advocate General
BER	Block Exemption Regulation
CFI	Court of First Instance
EC	European Community
ECJ	European Court of Justice
ECN	European Competition Network
ECSC	European Coal and Steel Community
EEA	European Economic Area
EU	European Union
EUR	Euro
GBER	General Block Exemption Regulation
NCA	National Competition Agencies
OJ	Official Journal
PRODCOM	PRODucts of the European COMmunity Inquiry
SAAP	State Aid Action Plan
SGEI	Services of General Economic Interest
SME	Small- and Mediumsized Enterprise

1 Introduction

"With the current state aid rule Member States have a great tool-box with which to get to work to improve Europe's competitiveness while preserving a level playing field. The Commission will not get in the way of the measures necessary to help recovery. But nor will the Commission just step aside".[1]

In the light of the latest financial crisis, tormenting Europe, the division of competences in the state aid field is accentuated. The traditional prerogative of the European Commission, to monitor and target national measures liable of being state aid, has become an increasingly decentralised task where Member States, to some extent, can be self-regulated. The implementation of state aid rules has traditionally been one of the most communitarised issues, as the state would have difficulties in constraining themselves in state aid matters. Hence, it has been by consensus the view in the Union that, as an important instrument of keeping an undistorted competition, state aid surveillance belongs to the higher authority of the Commission.

Rigid control of the competition has been vital in creating an effective and coherent internal market. Therefore, the supranational authorities, as guardian of the strict Treaty rules, were given wide responsibilities in bringing order on the common market. The undistorted competition was set as a high priority and the Commission created many instruments by which it effectively could fulfil its obligations. In the field of competition, involving only private undertakings, the Commission quite early started to work on a more effects based approach, where the actual economic effect was taken into consideration. In state aid proceedings, where the state is one of the actors, such an approach was for a long time absent. Instead, the rules of the Treaty were applied stringently. It seemed evident that the Member States themselves could not be part of the monitoring system as they are the responsible parties in state aid proceedings.

[1] Speech/08/683 by Neelie Kroes, European Commissioner for Competition Policy – The Role of State Aid in Tackling the Financial and Economic Crisis – Introductory Remarks at Press Conference, Brussels, 8th December, 2008.

However, this position is no longer accurate. Not only due to the latest financial crisis, but also before, there have been strong tendencies of the Union trying to decentralise the state aid monitoring or at least to seek a better understanding and cooperation between national and union authorities. Since its action plan adopted in 2005[2] the Commission has engaged in a fundamental reform of its state aid regime where monitoring has the purpose of ensuring that aid that is given is less and better targeted. The Commission, at the same time, has launched a series of notices and guidelines in order to guide state actors in their behaviour. It may however, also have a rather binding effect upon the Commission itself, which could have implications for the effectiveness of their monitoring. Furthermore, the more economical approach, where some state aid measures are legal and escapes Commission control, could lead to a fundamental shift in the state aid regime. The question that arises is therefore obvious; is state aid prohibited per se and if not how can that be compatible with the general prohibition in Art. 87(1) EC?

1.1 Purpose and Questions

The state aid regime in the European Union is thus going through rapid changes. Having the assumption, that the state aid system is important in accomplishing a united market, it needs to be analysed what reforms are undertaken and what potential consequences they may have on the state aid procedures.

The purpose of this thesis will therefore be to analyse the material and procedural rules related to the Community's state aid regime and to see if those rules are under reform. Focus will be on what changes that is present and to what extent one is able to trace any trends, especially with regard to the balance of power between the Commission and the Member States. Substantially, this will be done by focusing on what ways there are for Member States to avoid the Commission control. In relation to this, one of

[2] Commission State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009.

the core ambits of the SAAP is to accomplish better governance by having a shared responsibility between the Commission and Member States. The notion of governance therefore needs to be better conceptualised in a theoretical way as to contribute to the final analysis. The thesis will therefore have analytical ambitions in the way that, actual and, even more so, potential effects of the formal changes will be scrutinized.

The thesis is therefore divided in three parts. The first one is outlining an overview of the material rules regarding state aids and the exceptions related to the classification of state aid. Consideration will also be taken to the procedural aspects, especially the extent of the obligation to notify new state aid measures. This part is generally of a descriptive character rather than an explanatory one but will nevertheless provide a deeper knowledge of the material rules in state aids.

The second part scrutinizes the reforms due to both the SAAP and the financial crisis and try to analyse the rationale for this reform and potential consequences.

The third part will, analyse the institutional landscape in the eyes of the reform and try to reveal how the power balance between the Commission and Member States has developed, if at all. Here the theoretical framework of governance is the analytical tool.

The questions related to this process are what changes have the state aid regime undergone in later years and whether this is a new form of governance.

Finally, some tentative explanations and the nature of the effects will be elaborated upon.

1.2 Method and Material

Various methods are applied in the proceeding analysis. Generally, a critical approach will be provided and the thesis will obviously have descriptive as well as explanatory aims. Even so, the analysis will not be too dependent on theories but rather explained in its own context. In the critical approach,

some comparative aspects will be provided, as the reforms on state aid will be compared with other fields of competition law. The primary focus can therefore not be on clarifying or falsifying different theories, but rather to offer a deeper knowledge of the current developments of state aid.

The first part of the thesis is largely a descriptive part where traditional dogmatic method will be used. That is to say that the most prominent sources will be analysed and compared in order to get an overarching picture of the law in this particular field. It is thus only the current valid law that will be analysed in a formal way. Hence, the methodological aspects are negligible. The materials that will be used for this part consist almost exclusively of legal sources, predominately case law from the Community Courts, complemented by important articles from the major European law journals. Some general textbooks and literature on state aid will also be helpful resources for this particular aim. Even so, this particular part of the thesis is not claiming that it is exhausting all plausible sources. The material on state aid in Europe is off course of immense character and only parts of them will be presented here. However, I believe that the materials chosen are beneficial in providing a comprehensive overview.

The second part will have similar methodological aspects even though a more critical approach will be presented. Not only valid law (de lege lata) will be of interest but also the rationale of current changes will be sought. Some speculative ambitions as tentative consequences will be analysed and proposed (de lege ferenda). The second part is therefore using a more structured approach, where the material in the first part is organised. Somewhat different kind of material will be used in this part. Naturally, only the most recent Commission documents and articles can be used but, by trying to differentiate them, a biased result is avoided.

In the third part, methodological aspects are crucial. By applying the theoretical framework inductively on the empirical material, the institute of governance will be explained. A sort of case study is performed where the SAAP is analysed from a governance perspective and to see what this

reform is a case of. Even so, it contains comparative aspects to other fields of competition in order to reveal the effects of the reforms on state aid.

1.3 Demarcations

Analysing the SAAP will have implications for the limits of the thesis. With the SAAP as a basis considerably large parts of the state aid regime is affected. It would be nearly impossible to study all these areas of sector specific rules in a thesis like this. Since it would risk a comprehensive understanding of the spectre, some parts of the regime are left out or simply touched upon, without further analysis. The rationale for this is simply that the purpose of the thesis is to provide an overview of current trends and changes with focus on the institutional balance. Hence, a too detailed analysis of different sectors would undermine the purpose and render it more blurry.

As one of the rationales of the SAAP is to make the monitoring of state aid subject to a more refined economic approach, this could imply a fundamental economic analysis of how this would play out in reality. As this is one of the most controversial and analysed changes it could certainly be of interest for an analysis. On the other hand, this thesis does not have the ambition to analyse the new environment economically. Purely economical considerations and elaborations will thus be left out of the ambit of this thesis. Potential consequences of the reform will be provided but in a broader sense than scrutinising potential economic market effects. Neither will any economic theory be applied in the investigation, which is fairly common in similar studies.

1.4 Disposition

The thesis will continue as follows. First, some theoretical aspects will be provided in order to create a framework applicable in the upcoming analysis (chapter 2). Then a comprehensive overview of the state aid regime will be presented, in a descriptive manner, with the Treaty as a starting point and

described through the immense case law on crucial points (chapter 3). Thereafter, a presentation of the SAAP with its both actual and potential consequences will be given. With a rather broad approach, the most significant changes will be analysed and elaborated upon and the institutional balance and changes will be in focus (chapter 4). In addition, some current reforms due to the financial crisis are elaborated upon briefly (chapter 5). Those considerations will be scrutinised and explained when the theoretical framework is applied, in order to understand the reforms from a governance perspective (chapter 6). Finally, some concluding remarks with a summary of the tentative consequences are given. In relation to this, some guidelines for further research will be speculated (chapter 7).

2 Theory

One of the main goals of the current revision of the state aid regime is to establish better practices and procedures. The Commission therefore draws conclusions from other fields of law in order to create and enhance what they call "better governance".[3]

2.1 Governance

The concept of good governance is expanding in the EU. For long the European institutions have strived to develop their governing methods to make the deliberation process more inclusive and in the end to reach better outcomes. There is extensive research on this point, meaning that the Community is moving away from hierarchical governing to more flexible forms of governance.[4] To this tendency come many discussions. Do new modes of governance mean that the old hierarchical structures disappear and that top-down steering by binding, acts of law have surrendered for a regime of soft law and decentralised governing? Probably not, but there are evidence that the main institutional bodies are sharing more of its powers with other actors on national and local levels and rather work in networks of governance. To this end, the Commission has launched several instruments on this topic, which reflects the governance management theories.[5] This includes methods of self-regulation, where the Commission retains a role in scrutinising self-regulatory practices to check whether they are compatible with Community law. Thus, the Commission is striving for more involvement, not least from Member States, in the policy shaping and greater flexibility in the implementation of Community measures.

Sabel and *Zeitlin* are elaborating further on the new modes of governance. They draw from the multi-level governance theory and claims that the EU connects national administrations with each other and the EU without establishing a hierarchy between them. This creates problems of

[3] *Ibid*., p.48.
[4] Craig, Paul - De Burca, Grainne, *EU Law: Text, Cases and Materials* (2007) p. 147.
[5] See e.g. Commission White Paper on Governance (2001).

coordination and in order to solve those, the central level is creating networks.[6] Those networks present new modes of governance, which is mostly, vivid in the newer fields of EC law, for instance social policy, but also in key areas of competition law. The authors refer to those networks as experimentalist governance since they are, to a less extent, regulated.[7]

Concerning state aid, they find that, even though state aid is generally prohibited, the Commission is striving for establishing similar networks as they have in competition policy. The Commission's monopoly of enforcement in the state aid field has been loosened up with introduction of guidelines and procedural regulations, which has created entire exceptions from the notification obligation at the same time as strict transparency has been introduced in the process.[8] It is likely that the SAAP is yet another contribution in this networked direction of decentralisation.

The shift from government to governance is not just present in the EU but is primarily a process within national contexts.[9] Governance network theory is commonly having national governments as basis but, for the sake of this analysis, the Commission will be the competent government. Therefore, there are many well-developed theories of this phenomenon in the national sphere. This thesis will draw on these existing theories of governance networks to analyse the actual shift in the European state aid regime.

2.2 Governance Networks

What is a governance network then? Governance can be defined as the conceptual coordination of social systems. Governance networks are non-hierarchical forms of governance based on negotiated interaction between a plurality of public and private actors. The institution of governance networks is defined as the attempt to achieve a desired outcome through networks that are no longer fully controlled by the government. This raises the immediate question of whether these networks are used as a way for the

[6] Sabel, Charles F. – Zeitlin, Jonathan, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU* (2008) p. 273.
[7] *Ibid*., p. 274.
[8] *Ibid*., p. 300.
[9] Craig *et al*., 2007, p. 145.

state to decentralise powers and thus benefit from the gains of that inclusive approach or if it is a way for the government to control its surroundings. In any event, this superficial definition of governance networks needs to be better conceptualised if operational. *Sørensen* and *Torfing* present five features of democratic governance networks of which a plurality of them must be present. According to them the network must be: 1) a relatively stable horizontal articulation of interdependent but operationally autonomous actors; 2) who interact through negotiations; 3) which take place within a regulative, normative, cognitive and imaginary framework; 4) that is self-regulating within limits set by external agencies and; 5) which contributes to the production of public purpose.[10]

If this definition is accurate, it contains an actual transfer of power and decentralisation down to these networks. This is increasingly seen as a suitable response to how to tackle complex policy problems that the government cannot handle on their own. Hence, there is substantial efficiency gains connected to the very institution of governance networks and they are to large extent seen as a crucial part of the notion of good governance. It provides a large potential for proactive governance as the networks are better positioned to identify complex policy problems and new opportunities at a relatively early stage. Networks can also function as instruments of information and facilitate better understanding and consensus building. It also has the effect of reducing the risk for implementation difficulties as the actors in the networks are part of the enforcement procedure.[11]

2.3 Governmentality

The second step is to offer a more problematic view to these decentralised networks. Poststructuralist institutionalism seeks to reveal the power effects of the networks, which can be categorised as governmentality theory.[12] It

[10] Sørensen, Eva – Torfing, Jacob, *Introduction: Governance Network Research: Towards a Second Generation* (2007a) p. 9.
[11] *Ibid*., pp. 12-13.
[12] Sørensen, Eva – Torfing, Jacob, *Theoretical Approaches to Governance Network Dynamics* (2007b) p. 38.

seeks to explain why and how networks are created and it conceives governance networks mainly as an attempt by the government to mobilize and shape outcomes by the actors in the networks. Hence, the central power is anxious to give the networks a particular direction and to ensure conformity with its decisions.[13] In other words, governmentality is the ability to govern at a distance without getting to closely involved in the detailed decisions and to reduce the workload.[14] This could also be described as an instrumentalisation of the regional level to the means of the state.[15]

How is this used in practice? What are the means by which the state can control the networks? As the government still holds the vital tool of creating public policy, it is able to keep a considerable channel of influence. The government can also construct norms, standards benchmarks and performance indicators, which in the end, work as control mechanisms of the networks. The central authorities also often have the best channels of information and can thus subject the autonomous actors.[16]

2.4 Operationalisation

With these theoretical observations, the notion of governance has become better conceptualised. The next step is, from this, to create an analytical framework that is workable on the European Commission and its "networks" in the field of state aid.

As a first step, it will be crucial to analyse to what extent there has been any decentralisation, if any at all. This can be both in ways of formally established networks and silent decentralisation through lines of case law, for instance if there is an increasingly wider margin of appreciation for Member States to grant aid measures.

[13] Sørensen *et al.*, 2007a, p. 19.
[14] Sørensen, Eva – Torfing, Jacob, *Theoretical Approaches to Metagovernance* (2007c) p. 178.
[15] Pierre, Jon – Peters, Guy B., *Governance, politics and the state* (2000) pp. 73-74.
[16] O'Toole, Laurence J., *Governing Outputs and Outcomes of Governance Networks* (2007) p. 224.

Secondly, the SAAP will be scrutinised through a governance perspective. The question will be asked whether there will exist new decentralised modes of network governance with a realisation of the action plan. Bearing in mind that networks similar to those in other fields of competition law is not yet present in the field of state aid, it will nevertheless be analysed whether this tentatively could be the case. In relation to this, questions of potential effects and consequences will be asked.

Finally, both in relation to actual and potential changes of governance methods in state aid regime, the problematisation of governmentality will be added. In what ways is the new reform trying to control the increasingly decentralised system? The goal is thus to reveal signs of the Commission trying to restrict the decentralised powers by ways of technologies of performance. Hopefully, this will reveal the nature of the ambition of better governance in the state aid regime. Is better governance implying governance networks, similar to those in other fields of law, or is it mainly a way for the Commission to reduce its workload but still controlling the networks working for them?

3 State Aid

Before analysing the changes of state aid enforcement, due to the SAAP and its connection to governance theory, the actual rules in the present stage is to be presented.

3.1 Material rules

The general prohibition of state aid is given in Art. 87(1) EC;

> "Save as otherwise provided in this Treaty, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market"

Even though the article seems very straightforward and seemingly contains a general prohibition, it does not have direct effect. It does however, give a good indication on the status of state aid in the Community legal order and by which severity the treaty founders looked upon it. In the ECSC Treaty, state aid was prima facie prohibited and still the basic rule is that state aid is incompatible with the common market.[17] The prohibition has indeed several purposes, of which an undistorted market is the most prominent, and potential breaches could have harmful effects. However, Art. 87(1) is neither unconditional nor absolute as the Commission may authorise aid measures as long as the common interest is not jeopardised.[18] With the common European interest as reference, the role of the Commission is vital in monitoring and enforcing the rules on state aid. Hence, the state aid regime is a considerably centralised field of Community law already by the wording of Art. 87(1).

When analysing a measure, it is the effect and not the causes that are relevant. It does not matter for the Community law which national law or objective the measure is instituted for and it does not escape state aid control

[17] Quigley, Conor, *European State Aid Law and Policy* (2009) p. 4.
[18] Vesterdorf, Peter L. – Uhd Nielsen, Mogens, *State Aid Law of the European Union* (2008) pp. 3-9.

because it concerns a purely national sphere of policy.[19] What matters is that all four conditions of Article 87(1) must be cumulatively met.[20]

3.1.1 By the State or through State Resources

For a measure to be regarded as state aid, it must be granted by the state and financed through state resources. The state should however not be seen in strict terms. All public funds should be taken into consideration whatever source and destination.[21] Thus, other public authorities than the central state, such as regional and local authorities, are also entailed in this concept.[22] Also bodies that are appointed by the state for the purpose of the measure are regarded as being part of state resources and the state can therefore not circumvent the rules by creating independent institutions charged with allocating aid.[23] What is relevant is that the state is able to exercise some control over the resources and not that the funds are still permanent assets of the state budget. The control is an important requisite.[24]

Hence, two important parts must be cumulatively fulfilled.[25] The resources must be a direct or indirect transfer of state resources and the decision of transfer must be imputable to the state. The wording of Art. 87(1) EC, "by the state or through state resources" could thus be slightly misguiding. This two- parted test has raised considerable concern for the Community courts in different form. For instance, it is clear that aid should not be presumed only because an undertaking is under the influence of state

[19] Case 61/79 *Amministrazione delle Finanze dello Stato* v. *Denkavit Italiana* [1980] ECR 1205, para. 31. See also Case 57/86 *Greece* v. *Commission* [1988] ECR 1773, para. 9; Case 310/85 *Deufil GmbH* v. *Commission* [1987] ECR 901, paras. 7-8; Case C-126/01 *Ministre de l'économie, des finances et de l'industrie* v. *GEMO SA* [2003] ECR I-14243, para. 34.
[20] Case C-142/87 *Belgium* v. *Commission (Tubemeuse)* [1990] ECR I-959, para. 25.
[21] Opinion of AG Warner in C-173/73 *Italy* v. *Commission* [1974] ECR 709, at page 727.
[22] Case 248/84 *Germany* v. *Commission* [1987] ECR 4013, para. 17.
[23] Joined Cases 67, 68 & 70/85 *Van der Kooy* v. *Commission* [1988] ECR 219, paras. 35-36; Joined Cases C-52-54/97 *Viscido, Scandella, Terragnolo and Others* v. *Ente Poste Italiane* [1998] ECR I-2629, para. 13; Case C-482/99 *France* v. *Commission (Stardust Marine)* [2002] ECR I-4397, paras. 23-24.
[24] Case C-83/98P *France* v. *Ladbroke Racing Ltd and Commission* [2000] ECR I-3271, para. 50.
[25] Case C-482/99 *France* v. *Commission (Stardust Marine)* [2002] ECR I-4397, para. 24; Case T-351/02 *Deutsche Bahn AG* v. *Commission* [2006] ECR II-1047, para. 103.

control if the aid is not taken from the state's own resources.[26] Concerning the imputability, it is central to see that even if a company is integrated into the structures of the administration of the state, it does not have to be imputable to the state if it is done under normal market conditions.[27] However, if the actual funds is made up of a mixture of private and state resources it can be imputable to the state even if the state administration did not directly pose any direct control but nevertheless, involved a constant balance of state interaction.[28] The imputability should, at least, be seen in the context of the measure. *AG Jacobs* emphasised in the *Stardust Marine* case that it is not easy to decide on imputability, but reference must be taken to the scale and nature of the measure including a comparison with a private undertaking. In sum, he advocated a restrictive approach, avoiding risk for the state evading the rules.[29]

Concerning the other leg, direct or indirect through state resources, the measure must lead to a burden on the public funds.[30] That is to say that not only direct subsidies, which are fairly obvious, but also exemption to pay compulsory charges, will burden the public funds. However, there is a difference between such an exemption and general tax exemptions.[31]

The Commission has traditionally sought the wide application of Art. 87(1) and has been quite successful in doing so. In most cases it has been easy to establish imputability and difficult for the state to escape. However,

[26] Case 82/77 *Openbaar Ministerie* v. *Van Tiggele* [1978] ECR 25, paras. 24-25; Joined Cases C-72/91 & C-73/91 *Sloman Neptune et al*. [1993] ECR I-887, para. 19; Case C-379/98 *PreussenElektra AG* v. *Schhleswag AG,* in the presence of *Windpark Reußenköge III GmbH and Land Schleswig- Holstein* [2001] ECR I-2099, paras. 57-61.
[27] Case C-482/99 *France* v. *Commission (Stardust Marine)* [2002] ECR I-4397, para. 52.
[28] Case T-358/94 *Compagnie Nationale Air France* v. *Commission* [1996] ECR II-2109, paras. 66-68.
[29] Opinion of AG Jacobs in Case C-482/99 *France* v. *Commission (Stardust Marine)* [2002] ECR I-4397, paras. 66-67.
[30] Joined Cases C-72/91 & C-73/91 *Sloman Neptune et al*. [1993] ECR I-887, para. 19; Case C-379/98 *PreussenElektra AG* v. *Schhleswag AG,* in the presence of *Windpark Reußenköge III GmbH and Land Schleswig- Holstein* [2001] ECR I-2099, para. 56. See also Opinion of AG Jacobs in Joined Cases C-52-54/97 *Viscido, Scandella, Terragnolo and Others* v. *Ente Poste Italiane* [1998] ECR I-2629, paras. 9-11.
[31] Joined Cases C-72/91 & C-73/91 *Sloman Neptune et al*. [1993] ECR I-887, para. 21.

the ECJ has recently sharpened the argument for direct/indirect transfer of state resources.[32]

3.1.2 Selective Advantage

The advantage criterion should be seen from the recipient side. As held before, the advantage must be regarded in broad terms as the measure can be in "any form whatsoever", and certainly entails more than direct subsidies. Whether or not there is an advantage is compared with the point existing before the measure was instituted. It is thus, the pre-existing competitive position of the undertaking that is important and where, such a net financial position has improved or otherwise would have deteriorated, there has been an advantage. Hence, there is an advantage when the measure mitigates the charges normally included in the budget of undertakings and which is similar and have the same effect as a direct subsidy.[33]

However, two situations have given the Community Courts considerable concern in later years. The first one is when the state gets something in return for the advantage given, especially when undertakings are performing public service obligations and are compensated for that. The second one concerns the specificity, namely that only selective advantages are covered by 87(1) and not general ones, and to draw the borderline between the two. The first one will be dealt with in chapter 3.1.1, while the question of specificity will be handled here.

Selective measures should be differentiated from general measures that are perfectly legal in the Community legal order. This is for instance, general tax deductions or otherwise beneficial legislation, which is based on uniform and objective criteria. However, measures that seem to be objective might cover different selective elements. For instance, it has been established in case law that it does not matter that there are many

[32] Quigley, 2009, p. 19.
[33] Case C-387/92 *Banco de Credito Industrial SA, now Banco Exterior de España SA* v. *Ayuntamiento de Valencia* [1994] ECR I-877, para. 13; Case C-53/00 *Ferring SA* v. *Agencie Centrale des Organismes des Sécurité Sociale* ACOSS [2001] ECR I-9067, para. 15; Case C-126/01 *Ministre de l'économie, des finances et de l'industrie* v. *GEMO SA* [2003] ECR I-14243, para. 28.

beneficiaries if the aid still has a selective element.[34] Hence, the measure must cover all undertakings in the sector, in an equal way, so that it may be possible for them to obtaining the benefits. Even so, a scheme that is potentially open for all undertakings may be selective if the requirements are distinctively more favourable for certain undertakings, and de facto not objective.[35] However, there are examples in the case law where such sector wide measures have been exempted from selectivity by justification of the nature and structure of the system as a whole.[36]

3.1.3 Distortion of Competition

The requirement of distortion of competition has historically led to few problems especially as it periodically has been bundled with the affect on trade requirement.[37] In contrast with other competition law articles, it is the effect and not the object that comes into interest, when appraising if a measure is liable of distorting competition. Even so, it is sufficient to show that there is a potential distortion of competition if not a factual one, in order to come under the scope of Art 87(1).[38] Even if there is a sophisticated system where the aid is instituted in order to even out competitive failures or if aid is given to other competitors as well, it does not justify the measures' competitive flaws.[39] Hence, it seems that even if it is more likely that competition will gain from the state action, the potential nature cannot be excluded.

Neither is there any requirement for the Commission to engage in a careful investigation of the relevant geographical or product market.[40] Some

[34] Case C-75/97 *Belgium* v. *Commission* [1999] ECR I-3671, paras. 26-31; Case T-55/99 *CETM* v. *Commission* [2000] ECR II-3207, para. 39; Case C-143/99 *Adria- Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH* v. *Finanzlandesdirektion fur Karnten* [2001] ECR I-8365, para. 48.
[35] Case C-172/03 *Wolfgang Heiser* v. *Finanzamt Innsbruck* [2005] ECR I-1627, para. 42.
[36] Case 173/73 *Italy* v. *Commission* [1974] ECR 709, para. 15; Case C-431/07P *Bouygues SA* v. *Commission* [2009] , para. 42.
[37] See e.g. Joined Cases T-298/97, 312/97, 313/97, 315/97, 600/97, 607/97, 1/98, 3/98-6/98 & 23/98 *Mauro Alzetta* v. *Commission* [2000] ECR II-2319, paras. 95-96.
[38] Case C-148/04 *Unicredito Italiano SpA* v. *Agenzia delle Entrate, Ufficio Genova 1* [2005] ECR I-11137, para. 57.
[39] Case C-172/03 *Wolfgang Heiser* v. *Finanzamt Innsbruck* [2005] ECR I-1627, para. 53.
[40] However, this is not an absolute rule. See Joined Cases C-15/98 & 105/99 *Italy and Servizi Marittimi della Sardegna SpA* v. *Commission* [2000] ECR I-8855.

would even regard the Commission's investigation as a matter of presumptive analysis, where the distortion is nearly an effect of there being an advantage. This might not be exactly true, as the Commission is obliged to examine the effect on the market[41], though not under any careful scrutiny by the ECJ. As will be analysed later, there have been numerous suggestions of making the state aid regime, liable to a closer scrutiny of competitive effects. An effects based approach, with closer economic analysis of the market structure is also one of the ambits of the current SAAP. However, the Treaty itself indicates a centralised view in which the Commission does not need to investigate any details and the space for manoeuvre for Member States is limited.

3.1.4 Affect trade

As with distortion of competition, the affect on intra-community trade only has to be of potential character.[42] As well established by the ECJ, when an advantage is given by a Member State that strengthens the position of an undertaking in relation to other undertakings with which it competes in trade on the common market, it must be assumed that trade will be affected.[43] If distortion of competition is proved, then it is highly likely that competitors abroad also will be affected.[44] It should not matter whether the recipient is a small undertaking or if the aid is small in amount, it can affect trade nevertheless. However, such consideration might have other implications (SMEs, de minimis) as we will see later on. The fact that the product in question is not subject to any trade between Member States is also irrelevant as it could raise the barriers for entering the market for potential competitors throughout the Union.[45]

[41] Case 248/84 *Germany* v. *Commission* [1987] ECR 4013, para. 22; Joined Cases 296 & 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV* v. *Commission* [1985] ECR 817, para. 19.
[42] Case C-148/04 *Unicredito Italiano SpA* v. *Agenzia delle Entrate, Ufficio Genova 1* [2005] ECR I-11137, paras. 57-58.
[43] Case 730/79 *Philip Morris Holland BV* v. *Commission* [1980] ECR 2671, para. 11.
[44] Joined Cases T-298/97, 312/97, 313/97, 315/97, 600/97, 607/97, 1/98, 3/98-6/98 & 23/98 *Mauro Alzetta* v. *Commission* [2000] ECR II-2319, para. 81.
[45] Case C-113/00 *Spain* v. *Commission* [2001] ECR I-7601, para. 30.

However, the test for affecting trade should not be taken too lightly despite the relative easiness to show a potential effect. Case law that is more recent has obligated the Commission to show substantial and legal facts that are of essential importance.[46] As some advantages would be kept out of the realm of the intra- community trade, some scholars believe that this requirement should be taken more seriously in the future and that the ECJ needs to develop a more clear jurisprudence on this point.[47] For instance in the famous Dorsten decision, which concerned a swimming pool, a more nuanced approach was taken by the Commission, as it was not likely that people would travel over borders to reach a certain swimming pool. Trade could therefore, not be affected.[48] Nevertheless, the Commission is in a good position to evaluate the existence of trade effects.

3.2 Administrative Procedure

From these rather strict rules of what constitutes state aid, it is also important to analyse how the procedure and monitoring of the rules operate. The EC Treaty has explicitly entrusted the Commission with the task of enforcing state aid rules. The Commission is thus responsible for monitoring, deciding on compatibility and empowered to order Member States to recover aid that is unlawfully implemented or incompatible with the common market. The Commission has also, subsequently been entrusted with the power of issuing new general exemptions to the state aid rules. The Commission has always been regarded as the most suitable body to perform these tasks. Furthermore, due to the seriousness, of which the founders regarded state aid measures, the Commission has a more direct way of go in front of the ECJ, in case of Member States non-compliance, under Art. 226 EC.[49]

[46] Case T-217/02 *Ter Lembeek International NV* v. *Commission* [2006] ECR II-4483, para. 246.
[47] Braun, Jens Daniel – Kühling, Jürgen, *Article 87 EC and the Community Courts: from Revolution to Evolution* (2008) p. 483.
[48] Commission Decision of 12 January 2001 on State Aid N 258/00, Germany, Leisure Pool Dorsten.
[49] Hancher, Leigh - Ottervanger, Tom – Slot, Piet Jan, *EC State Aids* (2006) p. 688.

The procedural rules are codified in the procedural regulation.[50] Before that, the practice of the Commission was developed through working standards and case law of the ECJ. Hence, the procedural regulation is mainly a codification of existing case law.[51]

3.2.1 Notification

According to Art. 88(3) EC and Art. 2(1) of the procedural regulation, all new aid must be notified to the Commission by the Member States. Art. 88(3) also contains the so called standstill obligation which means that aid implemented in breach of the obligation to notify, is rendered unlawful. In relation to this, it is also important to emphasise that Art. 88(3) has direct effect, which will have implications for the cooperation between the Commission and national courts, as we will see later on.

As a matter of principle, all forms of aid should be notified. With the most flagrant examples, this is of course unproblematic. However, when there are considerable doubts to whether or not it is aid, the duty is more blurry. Before the procedural regulation, the Commission had taken the view that the duty to notify should be as wide as possible and therefore encompass all forms that was likely to involve matters of state aid.[52] Now, only measures that fall under the scope of Art. 87(1) need to be notified,[53] which also entails changes of existing aid. Still, Member States who does not notify run a substantial risk of it still being aid and thus, be subject to considerable recovery proceedings. Even so, it seems as Member States have more influence over whether or not they should notify. The benefit of not notifying, lies in the possibility to escape the standstill obligation and thus, to put the scheme into immediate effect.

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[50] Council Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.
[51] Sinnaeve, Adinda, *State Aid Procedures: Development Since the Entry into Force of the Procedural Regulation* (2007) p. 965.
[52] Opinion of AG Slynn in Joined Cases 67, 68 & 70/85 *Van der Kooy* v. *Commission* [1988] ECR 219, para. 255; Case C-301/87 *France* v. *Commission (Boussac)* [1990] ECR I-307, para. 13; Case C-332/98 *France* v. *Commission* [2000] ECR I-4833, para. 31, otherwise undermining the effective control.
[53] See 2(1) and 1a of the Procedural Regulation, also Opinion of AG Jacobs in Case C-482/99 *France* v. *Commission (Stardust Marine)* [2002] ECR I-4397, para. 35; Case C-345/02 *Pearle BV* v. *Hoofdbedrijfschap Ambachten* [2004] ECR I-7139, para. 40.

A notification must contain all relevant information about the actual scheme, in order for the Commission to make a proper evaluation. In several recent cases, it has also been specified that, if an aid measure contains a specific method of financing, also this one needs to be notified properly.[54] However, regarding taxes, this has been modified in the way that the method of financing must have a direct impact on the amount of aid.

If an aid is duly notified, the Commission will undertake a preliminary examination of the aid in question. After a period (2 months) the Commission finds that the measure does not constitute aid or that it is clearly compatible with the common market, the Commission will take a decision pursuant to Art. 4(2) or 4(3) of the procedural regulation, which ends the procedure. If, on the other hand, the Commission finds it necessary to further investigate the implications of the measure, it will start a formal investigation procedure, according to Art. 4(4). The procedural regulation states, *in case of doubts*, while the ECJ usually uses a less strict terminology. Member States may bring action before the CFI against a decision not to initiate formal procedures.[55]

A formal investigation procedure is a deep evaluation of the aid scheme. The procedure is adversarial in the way that the Member State and other concerned parties are invited to submit comments.[56] There is also a possibility for interested parties to challenge the facts of the procedure, which the Commission has determined.[57] The adversarial nature of the proceeding is very important and the Member State concerned must be in a position to comment upon all relevant information, otherwise the Commission cannot use it.[58] The formal investigation procedure always

[54] See e.g. Joined Cases C-261-262/01 *Kingdom of Belgium* v. *Van Calster and Cleeren* v. *Openbaar Slachthuis NV* [2003] ECR I-12249; Case C-174/02 *Streekgeweest Westelijk Noord-Brabant* v. *Staatsecretaris van Financiën* [2005] ECR I-85; Case C-526/04 *Laboratoires Boiron SA* v. *URSSAF* [2006] ECR I-7529.
[55] Case C-198/91 *Cook* v. *Commission* [1993] ECR I-5799, paras. 22-26.
[56] Art. 6 and 20(1) Council Regulation (EC) 659/1999.
[57] Case T-318/00 *Freistaat Thüringen (Allemagne)* v. *Commission* [2005] ECR II-4179, para. 88.
[58] Case C-288/96 *Germany* v. *Commission* [2000] ECR I-8237, para. 100; Case C-301/87 *France* v. *Commission (Boussac)* [1990] ECR I-307, para. 19; Case T-73/98 *Societe chimique Preyon- Rupel SA* v. *Commission* [1998] ECR II-2769, para. 108.

terminates by way of a decision, pursuant to Art. 7 of the procedural regulation.

3.2.2 Recovery

As long as the procedure is followed, that is to say, when Member States notify their aid measures and refrain from putting them into effect, there is usually little controversy regarding the procedure. The Commission will decide by a decision whether the aid is compatible with the common market and as the measure has not been implemented, no further effects are present. The standstill obligation is simply replaced by a prohibition, in case of a negative decision. However, it is not uncommon that Member States do not notify their aid schemes and put them into effect without the Commission's consent. Since Art. 88(3) has direct effect, national courts might be required to examine whether the standstill obligation has been breached and order a recovery as a consequence of that. This evaluation involves a determination of the measure as aid, which should be the exclusive task for the Commission. Hence, it is a matter of overlapping functions between the national courts and the Commission especially as the matter of compatibility and lawfulness, is intertwined.[59] This leads to the fact that there is a great need of cooperation between the national and union level, not least through direct contact between national courts and the Commission but also through referrals to the ECJ.

In the event of unlawful aid that has, come to the knowledge of the Commission, the Commission shall undertake the same investigative measures as under notified aid. In the event of a negative decision of the aid's compatibility, the Commission, in principle, must decide that the Member State concerned shall take all necessary measures to recover.[60] The only reasonable exception to this rule is if recovery would breach a general principle of Community law.[61] Hence, the Commission can only order

[59] See Case 78/76 *Steinike und Weinlig* v. *Germany* [1977] ECR 595.
[60] Art. 14(1) Council Regulation (EC) 659/1999.
[61] Mainly legitimate expectations and legal certainty. If procedure has been followed it is difficult to claim such expectations, see Case C-148/04 *Unicredito Italiano SpA* v. *Agenzia delle Entrate, Ufficio Genova 1* [2005] ECR I-11137. However, it should not be totally excluded, especially under exceptional circumstances. Bank loan with indirect state

repayment of the aid in cases where it has deemed the measure incompatible with the common market. National courts however, can order a full recovery due to the unlawfulness. In both cases, the recovery should nevertheless, be executed in accordance with procedures of national law but should be immediate and effective. This is mainly because the purpose is to re-establish the situation that existed prior to the distortion of the market.

The difficulty of recovery and the duality of enforcement between national and union level arises particularly in one situation, namely when there is unlawful aid, which later on is decided as compatible. According to the main rule, national courts should uphold the standstill obligation; no unlawful aid may be implemented. At the same time, if a measure is deemed compatible, it must have been so from the start and a recovery could have adverse effects. This question has for long been debated in the doctrine and been subject to several decisions by the Community courts. The longstanding view has been that a compatibility decision of an unlawful aid could not have retroactive effect and that the Member State concerned could not benefit from a healing ex post facto. This was mainly so because this would have as a consequence that the standstill clause would be rendered meaningless.[62] This approach was confirmed by the *Transalpine* judgement[63] where a tax exemption not could be considered as being retroactively justified just because the state extended it generally. Some scholars also regarded the *Transalpine* judgement as a final word in this debate and the end of all confusions.[64]

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intervention, see Case T-55/99 *CETM* v. *Commission* [2000] ECR II-3207. Also in procedures where the Commission has taken exceptionally long time for its decision, Case 223/85 *Rijn- Schelde- Verolme (RSV) Machinefabrieken en Scheepswerven NV* v. *Commission* [1987] ECR 4617. Also situations where repayment is impossible, see Case C-485/03- 490/03 *Commission* v. *Spain* [2006] ECR I-11887; C-441/06 *Commission* v. *France* [2007].

[62] Joined Cases C-261-262/01 *Kingdom of Belgium* v. *Van Calster and Cleeren* v. *Openbaar Slachthuis NV* [2003] ECR I-12249, para. 63.

[63] Case C-368/04 *Transalpine Ölleitung in Österreich* v. *Finanzlandesdirektion für Tirol* [2006] ECR I-9957, para. 51.

[64] See e.g. Bartosch, Andrea, *Possibly the beginning of a long and winding road* (2007a) p. 433; Cheynel, Benjamin – Giraud, Adrien, *New Paradigm for Recovery of Unlawful Aid in the EU – National Judges and the 'Exception of Compatibility'* (2008) p. 557.

However, this belief did not last for long. In the recent *CELF* case,[65] the traditional view was tremendously altered. In its judgement the ECJ, in difference from the AG,[66] held that in cases where there is a final positive decision, or such a decision is not yet given, EC law does not impose an obligation on Member States to order recovery. However, the ECJ does not go so far as to say that a compatibility decision has a regularising effect ex post facto. Hence, Member States are not obligated to refrain from recovery either, but rather to make an own assessment. There still exist though, an obligation to order recovery of interest for the unlawful period. The size of this interest, which could be difficult to determine, is also up for the discretion of the national court.

The ECJ does in fact give very little guidance to when it is appropriate for national courts to order recovery and not and refers to the national law to decide. However, national provisions on state aid proceedings are poorly developed, which could lead to different treatments in different states.[67] As the state would be entitled to implement the measure again, even for past periods, the incentive for notifying would be less. This could in turn harm the ex ante control filter with the Commission, of which the obligation to notify and standstill obligation are the two utmost safeguards.[68]

3.2.3 Final Enforcement

As we have seen from the latest developments in case law, the cooperation and overlapping functions between the Union and Member States are crucial and arguably more blurry. It could be argued that the *CELF* judgement means a decentralisation to national courts and that those bodies' margin of discretion has increased on the expense of a weakening Commission control. However, it should be born in mind that the Commission, in the

[65] Case C-199/06 *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication* v. *Société internationale de diffusion et d'édition (SIDE)* [2008] ECR I-469,
[66] Opinion of AG Mazak in Case C-199/06 *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication* v. *Société internationale de diffusion et d'édition (SIDE)* [2008] ECR I-469, who draw from earlier case law that the national judge should take all necessary conclusions and order full recovery.
[67] Cheynel *et* al., 2008, pp. 561-562.
[68] *Ibid*., p. 562.

CELF case, argued for exactly this solution.[69] Torn between two objectives; the respect of procedure and respect for legal criteria, it argued for its prerogative to determine compatibility and that it should be given the broadest respect.[70] Some would see this as a pragmatic solution but there does not have to be an opposition between the two.

What could be the consequences of this decision in terms of balance between the Commission and Member States? It seems clear that the previous distinction between compatibility, which was governed by the Commission and procedural faults, governed by Member States has been mixed up. A recovery of all unlawful aid would allow more respect to the procedure and also facilitating the Commission's job of monitoring aid measures and scrutinise their compatibility. This could have the effect that the standstill obligation loses its effect and Member States could increase their risk taking. It is likely to see a situation where Member States notify their aid measures but implement it at the same time.[71]

In a wider perspective, this could affect the Commission's role as guardian and instead private enforcement will become centre of state aid control. Competitors should stay alert at all times and attack unlawful aid before it has come to the knowledge of the Commission. Hence, private enforcement will be the centre of state aid control, something that we will see, is foreseeable in the ambits of the SAAP.[72]

3.3 Exemptions to State Aid

Naturally, there are some exceptions to what constitutes state aid and those exceptions seem to have increased in later years. The Commission is entrusted in establishing general exceptions and has increasingly used this power, at the same time as exceptions have been clarified by the Courts case law. This thesis will not analyse all of those in detail but mainly giving an

[69] See Opinion of AG Mazák in Case C-199/06 *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication* v. *Société internationale de diffusion et d'édition (SIDE)* [2008] ECR I-469, para. 19.
[70] Cheynel *et* al., 2008, pp. 559-560.
[71] *Ibid*., p. 564.
[72] Commission State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009, points 55-56.

overview of some of the most significant ones. More recent ones, due to the SAAP, will be analysed in chapter 4.

3.3.1 Services of General Economic Interest

One of the most important exceptions to the state aid rules are certain kinds of government compensations to a company for discharging services in the public interest. However, it is far from as simple that all such compensatory measures are exempted from the state aid procedures and material rules.[73] In the purpose of protecting the competitors from the beneficiary or rather the undertaking discharging the obligations from being overcompensated, certain rules in relation to both Art. 87(1) and 86(2) have recently been instituted. It is also important to keep in mind the sensitivity of this issue as public services are determined exclusively in a national setting and that the treaty explicitly acknowledges the importance of such services.[74]

Before the important decisions by the ECJ in *Ferring* and *Altmark*, the view on services of general economic interest was that such a scheme of compensation did not escape classification as aid within the meaning of Art. 87(1), hence it had to be duly notified to the Commission.[75] The opposing view was taken in the *Ferring* judgement where aid only existed to the extent that the compensation went beyond actual costs incurred in discharging the service.[76] The important difference in those opposing views is the obligation to notify. With the latter approach, a large possibility occurred for Member States to escape notification and it would eventually depend on the national courts to assess whether the compensation was reasonable.[77]

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[73] However Case C-53/00 *Ferring SA* v. *Agencie Centrale des Organismes des Sécurité Sociale* ACOSS [2001] ECR I-9067, exempted all compensation from the state aid rules in Art.87(1) as long as there was no overcompensation.
[74] Art. 16 EC.
[75] This so called state aid approach was confirmed in cases such as Case C-387/92 *Banco de Credito Industrial SA, now Banco Exterior de España SA* v. *Ayuntamiento de Valencia* [1994] ECR I-877 and Case T-106/95 *FFSA* v. *Commission* [1997] ECR II-229.
[76] Case C-53/00 *Ferring SA* v. *Agencie Centrale des Orgaismes de Sécurité Sociale* ACOSS [2001] ECR I-9067, known as the compensation approach.
[77] Rizza, Cesare, *The Financial Assistance Granted by Member States to Undertakings Entrusted with the Operation of a Service of General Economic Interest* (2004) p. 69.

3.3.1.1 Altmark Case[78]

As a consequence of the reasoning above, a major decentralisation process was set in motion, as Member States could act more freely without scrutiny by the Commission. This view was however, rapidly criticised not least because it blurred the distinction between the classification of state aid and the issue of potential justifications.[79] As expected the *Altmark* case delivered a substantial clarification on this point even though it did not fall back to the old regime. The case held that financial compensation for additional costs does not *per se* constitute state aid and Member States can therefore be relieved from the obligation of notification. However, the *Ferring* judgement was criticised for leaving to wide discretion to Member States governments and the risk for overcompensation, with highly distortive market effects as a likely outcome. Therefore, the ECJ set up a four-tiered test in order to make the rules more stringent.

The ECJ started by quoting the *ADBHU* case,[80] by saying that a State measure to finance public service obligations is not state aid within the meaning of Art. 87(1), where it must be regarded as a compensation for the services provided, so that the recipient undertaking do not obtain a real advantage and is thereby not put in a more favourable position than other undertakings. In order to secure that no such advantage was the case, the ECJ clarified that:

1. The public service obligations must be clearly defined in national law.[81]
2. The calculation must be based on parameters which have been determined in advance, in an objective and transparent manner.[82]
3. The compensation cannot exceed the costs of the public service obligations, taking into account the relevant receipts and also a reasonable profit.[83]
4. The ECJ encourages states to select public service providers through a public procurement procedure. If not, the compensation shall be

[78] Case C-280/00 *Altmark Trans* v. *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.
[79] See e.g. Opinion of AG Léger in Case C-280/00 *Altmark Trans* v. *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, para. 76.
[80] Case 240/83 *Procureur de la Republique* v. *Association de Defense des Bruleurs d'Huiles Usagees (ADBHU)* [1985] ECR 531, para.3.
[81] Case C-280/00 *Altmark Trans* v. *Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747, para. 89.
[82] *Ibid*., para. 90.
[83] *Ibid*., para. 92.

> determined on the basis of what a typical undertaking, well run and with the adequate resources to provide the service, would need to cover the costs incurred.[84]

If these four conditions are not fulfilled the measure in question shall be regarded as state aid within the meaning of Art. 87(1) EC. Seemingly, the *Altmark* case made the *Ferring* judgement more stringent on the point of compensation. Especially, the efficiency criterion in the fourth condition, was a novelty that would safeguard the frames for overcompensation.[85]

3.3.1.2 Post Altmark Developments

The ruling in *Altmark* has later been incorporated in several Community instruments. Except, the changes that where the *Altmark* case requirements are fulfilled and the measure falls outside the scope of 87(1), the Commission has issued a decision on the application of Art. 86(2),[86] which is clearly influenced by the *Altmark*-case.[87] The decision states that also under Art. 86(2) the Member State needs to clearly define the parameters for calculation. Furthermore, there are detailed rules for compensation and the Member State is required to carry out regular checks, as a follow up to safeguard that there is no overcompensation. The only thing that is seemingly missing is the efficiency requirement in the fourth *Altmark* condition. If a measure falls under the scope of the Decision, it is exempted from the obligation to notify and is regarded as compatible state aid. Moreover, if the decision is not fulfilled there is a possibility that the aid is compatible under the Community Framework.[88] If so, the measure is regarded as compatible with 86(2), but it needs to be notified first.

The Decision and the Framework Directive could have as effect to enhance legal certainty and simplifying the legal framework for Member States' financing of SGEI.[89] However, it decreases the obligation to notify

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[84] *Ibid*., para. 93.
[85] Louis, Frédéric - Vallery, Anne, *Ferring Revisited: the Altmark Case and State Financing of Public Service Obligations* (2004) p. 69.
[86] Commission Decision 2005/842/EC on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest.
[87] Vesterdorf *et al*., 2008, p. 278.
[88] Community Framework for State aid in the form of public service compensation. 2005/C 297/04 O.J. C 297/4 29.11.2005.
[89] Müller, Thomas, *Efficiency Control in State aid and the Power of Member States to Define SGEIs* (2009) p. 42.

and imposes Member States to have regular checks on their own, in order to detect overcompensation. This kind of self-constraint could be a sign for decentralisation.

However, this must not be so. *Müller* claims that the efficiency criterion opened the door to the Community's influence on SGEI, but it did not define how it should apply in practice. For instance, he upholds that there might be situations in which benchmarking on the basis of a typical undertaking is not present. A hypothetical reference company will be very difficult to apply, which might lead to that the freedom for Member States to define SGEI will be broad.[90] This wide discretion is confirmed by both recent and new case law.[91]

With this in mind, it seems that Member States do have a wider discretion in determining and form their SGEI. This could be very important, especially since the obligation to notify also has decreased. The only exception is in sectors governed by Community rules and even so, the role of the Commission is to intervene in the case of a manifest error. The Commission is trying to retain some control[92] but instead it seems as also the other conditions of the *Altmark* case have been modified from later case law.

In the case *Chronopost,*[93] the limitations to the stringent *Altmark* test were revealed. Where no actual market exists, the *Altmark* test is not possible to follow and the appreciation made by the Member State must be respected. Furthermore, in the case *Enirisorse*,[94] only the first two criteria were applied. Perhaps the best example of deviation from *Altmark* is the *BUPA* case. There it said that the *Altmark* criteria should be modified to the facts of the case[95] and the efficiency criteria was substantially relaxed.[96] It also gave

[90] *Ibid*., p. 40.
[91] For instance: Case T-17/02 *Fred Olsen SA* v. *Commission* [2005] ECR II-2031, para.5.
[92] Müller, 2009, p. 43.
[93] Joined Cases C-83/01P, C-93/01P, C94/01P *Chronopost SA, La Poste and French Republic* v. *Union français de l'express (Ufex), DHL International, Federal express international (France) and CRIE* [2003] ECR I-6993 (delivered weeks before Altmark).
[94] Joined Cases C-34 & 38/01 *Enirisorse SpA* v. *Ministero delle Finanze* [2003] ECR I-4243, para. 38.
[95] Case T-289/03 *British United Provident Association Ltd (BUPA), BUPA Insurance Ltd and BUPA Ireland Ltd* v. *Commission* [2008] ECR II-81, para. 246.

wide discretion for the Member State concerned to define the amount that was needed to compensate, as it was part of national public policy. The CFI also held that the third and fourth criteria were up for the national court to decide as it was closely linked to the facts of the case. Such a view has also been confirmed in the case law of the ECJ.[97]

It could be suggested that *Altmark* is a *lex generalis* and *Chronopost* and *BUPA* is a *lex specialis*.[98] However, one cannot escape the fact that the efficiency is affected by the definition of the SGEI in the first *Altmark* condition. As Member States have been given a wide discretion in determining their public service obligations, they can define the quality of the service and thereby circumvent the efficiency rules in the ECJ's sense. On the other hand, can the efficiency test be a regulator of quality by the Community towards the Member States.[99] However, this interplay is dependent on a steady flow of notifications, which is undermined by the post *Altmark* development and new Community instruments. Hence, a *de facto* decentralisation can be the outcome.

3.3.2 GBER[100]

One of the aims of the SAAP was to collect all the horizontal exemptions to the state aid rules in one general block exemption. Such a regulation was issued in August 2008. One of the main objectives of the GBER is to create a simple and coherent legislative system of which state aids that are compatible with the common market.[101] It is also a transparent tool for knowing what types that fall under the scope of Art. 87(3).[102]

The GBER applies to the following sorts of aid; regional aid; SME investment; aid for the creation of enterprises by female entrepreneurs;

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[96] *Ibid*., para. 249.
[97] Case C-451/03 *Servizi Ausiliari Dottori Commercialisti srl* v. *Giuseppe Calafiori* [2006] ECR I-2941.
[98] Müller, 2009, p. 45.
[99] *Ibid*., p. 46.
[100] Commission Regulation (EC) No.800/2008 of August 6, 2008 declaring certain categories of aid compatible with the common market in application of Arts. 87 and 88 of the Treaty (General Block Exemption Regulation) (OJ L 214, August 9, 2008, p.3)
[101] Vetserdorf *et al*., 2008, p. 92.
[102] Deiberova, Kristyna – Nyssens, Harold, *The New General Block Exemption Regulation (GBER): What changed?* (2009) p. 27.

environmental aid; aid for consultancy for SMEs, risk capital aid; R&D; training aid; aid for disadvantaged or disabled workers.[103] The SMEs are of particular importance and the GBER allows different types of aid in order to help SMEs to overcome market failures, which is in line with the objectives of the Lisbon Strategy. The GBER also contains a number of general conditions apart from the specific ones, for every individual type of aid. Such conditions are, for instance transparency, which enables a calculation *ex ante* of the measures. The Member State is subject to formal rules of how the aid should be made official, which allows equal treatment and effective monitoring.[104]

If a measure fulfils the requirements in the GBER, it is considered as compatible with the common market. Hence, there is no need to notify the measure to the Commission and it obviously does not require a positive decision from it. On the contrary, if a measure is not caught by the GBER, it can still be compatible according to notices and guidelines, but then needs to be notified. According to Art. 3 notification is exempted but there still needs to be a reference to the relevant provision of the GBER and publication in the OJ. It is also essential that the thresholds in Art. 6 are complied with in order to escape notification.

The GBER is to a large extent a collection of pre-existing guidelines and notices for the different categories. However, there are some differences that will have potential consequences. First of all, the new regulation is self-standing, which means that no other instruments need to be consulted.[105] Moreover, as a regulation, it has general application and is directly applicable in all Member States, by national administrations and national courts.[106] The exemption from notification could be seen as a matter of decentralisation. Member States are now free within the boundaries of the regulation to put into effect state aids. However, to prevent the Member States from abusing the rules, instruments have left some control for the Commission. For instance, Member States are obliged to forward a

[103] Art. 1(1) General Block Exemption Regulation 800/2008.
[104] Vesterdorf *et al*., 2008, p. 99.
[105] Deiberova *et al*., 2009, p. 29.
[106] Vesterdorf *et al*., 2008, p. 92.

summary of information regarding its measures within 20 days. They are also under a duty to publish a full list of its aid measures with the conditions laid down in the national law, which ensure compliance with the GBER.[107] According to Art. 10, the Commission is also under a duty to monitor on a regular basis aid measures that it has been aware of. In relation to this, the Commission has the right to investigate further, by requesting additional information and control compliance with the GBER.

Thus the GBER, implies a significant transfer of powers from the Commission to Member States.[108] However, unlike other BER, there are considerable constraints on the Member States. It remains to be seen what effect the Commission's monitoring powers will have and to what extent the Art. 9 obligations will be complied with.

[107] Art. 9 General Block Exemption Regulation 800/2008
[108] Deiberova *et al*., 2009, p. 32.

4 Reforms of the State Aid Regime

As we have seen in the development of case law in the state aid field, it has included far reaching changes, both materially as well as procedurally. Even so, the rules concerning state aid have, for considerable time, been under constant attack for being too stringent and poorly adapted to reality. The treaty rules' general prohibition is not reflected in the needs of the contemporary market but rather for the post- war market integration. With increasingly liberalized markets and an enlarged Union of 27 states, the general prohibition of all kinds of state aid, with few justifications would be untenable. This has, according to the critics, led to inconsistency in the state aid rules and the wide application has endangered the system due to increasingly longer application times with the Commission.

Except from the trends in the courts' case law, depicted above, there is also an ongoing legislative trend towards decentralisation and reform in the state aid field. The clearest example of this is perhaps expressed in the SAAP, which therefore needs to be thoroughly analysed. Before going into the details, it is interesting to observe the general shift, demonstrated by the former and current Commissions' diverged views on the matter. While former Commissioner *Monti* expressed that, a strict state aid policy was a political priority and therefore the Commission was determined to keep firm control,[109] the SAAP is striving towards more partnerships with Member States and is pointing towards the benefits of state aid in overcoming market failures.[110]

[109] Rehbinder, Maria, *Recent Developments in Commission State Aid Policy and Practice* (2004) p. 118.
[110] See e.g. Commission State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009, points 1 and 23.

4.1 State Aid Action Plan

The Action Plan states that due to specific challenges there is need for a comprehensive reform of the state aid policy at this moment.[111] These challenges can be summarised as adapting to the Lisbon Strategy, meet the new challenges of the European market, adjust in light of the enlargement to 27 Member States and the need to become more transparent. In order to meet these challenges, four elements[112] for reform are presented; less and better targeted state aid; a refined economic approach; more effective procedures, better enforcement, higher predictability and enhanced transparency; a shared responsibility between the Commission and the Member States.

4.1.1 Less and Better Targeted State Aid

In order to face the new challenges for the state aid control, less and better targeted state aid is one of the politically desirable objectives of the reform package. In fact, it could be claimed that it is the overarching goal of the state aid regime. Some scholars even identify the current state aid control to be cast increasingly wide and that the over-inclusion and the absence of a workable intellectual framework have led to considerable legal uncertainty.[113] The main goal of the SAAP is therefore to reduce the overall level of state aids but at the same time simplify the legislative framework for aid that is needed and enviable. It is thus clear that some involvement from the Member States in form of state aid are beneficial to the common market and that clearly defined objectives of common interest could be achieved by state aid.[114] However, it is not always clear what those objectives are and the action plan itself is rather silent on what kinds of aid that generally should be acceptable. Generally, aids should be in the

[111] *Ibid*., point 1.
[112] *Ibid*., point18.
[113] Ahlborn, Christian – Berg, Claudia, *Can State Aid Control Learn from Antitrust? The Need for a Greater Role for Competition Analysis under the State Aid Rules* (2004) p. 47.
[114] Commission State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009, point 10.

common interest and be installed in order to promote social and territorial cohesion.[115]

At the same time as some aid is permitted it is crucial that it does not affect the level playing field on the Single European Market and that the measure does not decrease the overall European competitiveness.[116] Even though some aid measures will not affect the level playing field and not harm the competitiveness, on the market, it might not be beneficial to the same. Hence, aid measures should be granted only when it is appropriate, suits a well-defined objective and is proportionate. Instead of having a general prohibition, it seems that the rules on state aid should be scrutinised through a general proportionality test, normally used in the Community legal order. If so, it is possible for a measure to be distortive as long as the objective is accurately strong and no other means could be as effective. Similar reasons are found in the action plan, which states that a measure should distort competition to the least possible extent.[117]

Another reason for striving towards less and better targeted state aid is from the receiving side, namely to decrease the workload on the Commission. As the net of state aid control is too wide, the number of cases for the Commission to deal with is increasingly high. As many cases are routinely granted, the idea is to increase the legal certainty and let the Member States themselves manoeuvre their state aid projects without the formalism in notifying them. Guidelines and notices have helped to clarify and limit the political influence in state aid control.[118] However, this could have as a consequence that distortive aids will escape the Commission's control. In other words, it does not necessarily mean that less state aid torments the common market but merely that less state aid is under the direct control by the Commission.

The thought however, is that the Commission should only be involved in the most distortive kinds of state aid in specific markets while certain sector specific aid or aid with some general characteristics will be exempted from

[115] *Ibid*., point 10.
[116] *Ibid*., point 7.
[117] *Ibid*., point 11.
[118] Ahlborn *et al*., 2004, p. 41.

the *ex ante* filter. This is mainly done by way of extending the block exemptions, a process that has been effectively progressing, particularly with the insertion of the GBER.

It is difficult to assess what effect these new instruments will have, if any. The Commission has always had a wide margin of discretion to approve aid measures that contributes to common objectives and they have also had the ability to legislate on the matter and to govern through soft-law instruments.[119] However, the change lies in the fact that previously did the Commission still retain the control and did only offer exemptions after careful scrutiny and now some types of aid are directly compatible without the *ex ante* control. Thus, the general trend is a development towards a more transparent and rule based system, in which Member States and beneficiaries can construct schemes that are compatible.[120] Even so, there is a serious risk that the transparency will only work one way. By exempting the aid in certain fields from the procedural rules, it will become more difficult for the Commission to appraise the nature of the aid scheme and endanger an effective supervision. In relation to this, it is crucial to remember that the Commission is perhaps still in the best position to verify the level playing field and whether or not a measure is distorting the common market. Hence, with the current development the *ex ante* control is largely replaced by an *ex post* verification.[121] One can also speculate that this development will make it further difficult to engage in recovery proceedings in case of misapplications of one of the exemptions, as the Member State in question could claim that they were in good faith applying the regulation.

Moreover, there is a risk that many aid schemes of a common objective do not fit in general block exemptions. The use of such regulations requires that the criteria which, allows the aid compatibility, can be expressed in a very precise manner in a legal text.[122] If not, it can still be deemed compatible with the common market but it requires a notification to the Commission

[119] Rehbinder, 2004, p. 117.
[120] *Ibid*., p. 118.
[121] *Ibid*., p. 125.
[122] *Ibid*.

first. It remains to be seen if there will be any discrepancies between the aid that are automatically exempted and the ones that requires a prior notification. In the light of legal certainty, which was one of the objectives of the reform, it is questionable that those two types will have the same treatment.

The goal of less and better targeted state aid, and the insertion of block exemptions, might also clash with the other goals of the SAAP. As we will see, a more economic approach is also one of the aims. If combining these goals, it is crucial to translate these economic values of affect on market, to legal terms. As economic criteria are more facts based it is difficult to see how this will play out without the prior scrutiny by the Commission. Furthermore, the success of block exemptions and less state aid control *ex ante* will put higher demands on monitoring and *ex post* control with the Commission.[123] This might be difficult as one of the other goals of the SAAP will be to work through new modes of governance, which might lead to decentralising the control powers to Member States. This could have the effect of loosing the monitoring abilities if no constraining instruments are inserted in the relation with those bodies.

4.1.2 A Refined Economic Approach

Another element of change in the SAAP is a refined economic approach, something that for long has been suggested in the doctrine. The rationale behind this trend of reform is that the Commission wants to get away from legal formalism and to engage in a deeper analysis of the actual effects on the market of different aid measures. This involves a stricter cost/benefit analysis and a stricter test whether or not there is a market failure or a cohesion justification.[124]

As stated above, the current legal requirement, of a potential aid measure to distort competition and affect trade between Member States, is easily satisfied. For this latter requirement, it is for instance sufficient if it can be

[123] *Ibid*., p. 130.
[124] Commission State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009, para 18.

shown that the beneficiary is involved in an economic activity and that he operates in a market in which there is trade between Member States.[125] Concerning the competition analysis, it was first handled by the ECJ in the *Philip Morris* case.[126] The Court held that the Commission was not subject to the same duty to investigate the market position of the company as it is under Art. 81 EC. However, it was later clarified that the Commission could not rely on the presumption that aid that was an advantage also distorted competition. It was the duty of the Commission to provide sufficient reasons that competition was affected,[127] even though the standard was never put substantially high. It was certainly not meant as any far-reaching competition analysis and it was expressly differentiated from the requirements in other fields of competition policy.[128] That has led to that, the requirement on distortion of competition rarely has been regarded as an independent criterion but is highly dependent on the other requirements of 87(1). This has periodically been criticised, as the undistorted market is the primary aim of state aid policy.

Recent case law however, has increased the burden on the Commission to state sufficient reasons for its assessments.[129] The CFI has obligated the Commission to carry out a deeper analysis where the Commission needs to define the relevant market and the beneficiary's relative market position and how it will be affected. Still, it is a comparison with the status quo as model but the tendency is similar to the one described in the SAAP. The previous formal approach is also similar to how it used to work in Art.81 EC procedures, which the Commission subsequently changed into an effects-based approach.

One of the reasons for changing into a more economic approach is that the Commission wants to avoid having aid measures of little impact or with positive effect, being caught in their net. Therefore, it is suggested that the distortion of competition requirement should become an independent

[125] Vademecum Community Law on State Aid 30/9/2008 at page 7.
[126] Case 730/79 *Philip Morris Holland BV* v. *Commission* [1980] ECR 2671.
[127] Joined Cases 296 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek BV* v. *Commission* [1985] ECR 817, para. 24.
[128] Ahlborn *et al*., 2004, p. 45.
[129] Case T-34/02 *Le Levant 001* v. *Commission* [2005] ECR II-267, para.123.

criterion, which is analytically workable. However, there could be a risk that the Commission would loose focus and deviate too far from the wording of 87(3) by interpreting market failure into it.[130] Another critique against the Commission's presumption that competition is distorted is that national aid which, clearly does not affect other Member States, are under the Commission's scrutiny, making the workload excessively heavy. If the Commission would investigate the actual effects, some measures could be dealt with on a national level.[131] A necessary precondition is that the measure in question does not create negative spillovers into neighbouring markets. With a deeper analysis, as is pursued in other fields of competition law, such spillovers could be investigated mainly through defining the relevant markets in a more sophisticated way.[132]

How is then the economic approach going to be instituted? *Roeller* and *Stehmann* suggest that the state aid control is becoming more economical in relation both to Art. 87(1) and 87(3). In 87(3) a balancing test based on economic criteria is developed, which includes a deeper assessment of the facts of the case.[133] Others mean that the SAAP has not yet been completed in this matter, even though small steps are taken, which suggests a new paradigm in state aid policy.[134] Even though 87(1) and even more rarely 87(3) has involved any deeper coherent economic analysis, a few cases mark a different view.[135] However, since the SAAP it remains a lot of work to clarify how the effects based approach is going to work practically, especially considering that it has not been realised through any major legislative measures.[136]

As the refined economic approach is still little developed, it can be interesting to analyse how it would work and what consequences it would

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[130] Braun *et al*., 2008, p. 493.
[131] Crocioni, Pietro, *Can State Aid Become more Economic Friendly?* (2006) p. 90.
[132] *Ibid*., p. 101.
[133] Roeller, Lars-Hendrik – Stehmann, Oliver, *The Year 2005 at DG Competition: The Trend towards a More Effects-Based Approach* (2006) p. 290.
[134] Crocioni, 2006, p. 108.
[135] See e.g. Commission Decision of 12 January 2001 on State Aid N 258/00, Germany, Leisure Pool Dorsten
[136] Heidhus, Paul – Nitsche, Rainer, *Comments on State Aid Reform- some Implications of an Effects-based Approach* (2006) p. 24.

have for the state aid control. Today the Commission is almost invariably using the EEA as the relevant geographical market and PRODCOM as the relevant product market definition. This leads to the fact that the actual effects are rarely analysed with any precision. If the relevant market would be more accurately analysed, a better appreciation of the distortion of competition could be reached and the aid measure would be set in a more accurate context. Even so, the presumption that competition is distorted is working as a good screening device even though it is to the detriment of a sufficient analysis. Moreover, it is doubtful if such a refined economic approach accurately would enclose the potential effects on the market, for instance to consider the entry barriers.

It is also doubtful how an effective economic approach would view the competition as a phenomenon, something that the SAAP is silent upon. *Heidhues* and *Nitsche* suggest that competition should be seen from a social welfare perspective. This includes that the rules shall have as their object to protect consumers and not primarily competitors, a difference that could be of utmost importance, for instance in cases where services of general economic interest are involved. In such cases, the welfare must be one of the components in the analysis of the market failures and the aid instrument must stand in relation to the actual market failure. Hence, the appropriateness of the measure is central in this appreciation.[137]

If the distortion of competition and affect on trade requirements should be seen independently, it is likely that also the other criteria of 87(1) will be affected. If also those requisites are being interpreted in light of an effects based approach there is a serious risk that the state aid control will be substantially loosened instead of making the control more strict.[138] This would stand in stark contrast to the view that state aid control would be stricter if the economic approach is fully applied.[139] It also puts into question whether it is possible to combine a strict rule based approach with

[137] Heidhus *et al*., 2006, p. 27.
[138] Ahlborn *et al*., 2004, p. 65.
[139] Braun *et al*., 2008, p. 492.

the flexibility to consider economic assessments, which is needed under a refined economic approach.[140]

With the abovementioned in mind, it is clear that the economic approach does not come without difficulties and serious risks to the state aid control. *Bartosch* claims that the economic approach already has been haltered as some of its elements runs counter to the fundamental purpose of state aid control. With the insertion of a balancing test of positive and negative competitive effects, more sophisticated aid forms will occur. Member States will take the opportunity to develop forms of aid that will give positive effects and make way through the balancing of interests.[141] If the economic approach abolishes the presumption that aid is distortive, the Commission will face serious problems. Since it still has a wide margin of discretion in approving aid measures and as they have to trust in the Member States' analysis of market failures, the definition of the competitive climate will be lost and more aid measures are likely to be approved.[142] Hence, there is a serious risk that governments will plead market failures excessively in order to legitimise discriminatory subsidies. They will probably also have the possibility to do so as market failures as a concept are difficult to translate into law.[143]

4.1.3 More Effective Procedures

In the SAAP, the Commission puts forward some tentative reforms of the procedural regime for state aid. The aim is primarily to reduce the time-period for treatment of cases in which the Commission has opened a procedure and to enhance efficiency, monitoring and enforcement. Furthermore, the Commission aims at making more stringent the obligation to notify and, in case of non-compliance from the Member States, to pursue

[140] Rehbinder, 2004, p. 119.
[141] Bartosch, Andrea, *The more Refined Economic Approach- Still some Room for Fine-tuning?* (2007b) p. 587.
[142] *Ibid*., p. 588.
[143] Koenig, Christian – Füg, Oliver C., *How to Put the EC State Aid Action Plan into Action- Rendering the Market Failure Test Operational* (2005) p. 591.

referrals to the ECJ under Articles 226 and 228 EC.[144] Even so, one of the main ambits with the action plan is to involve more parties in the enforcement, such as national courts and potentially also, national authorities. So far, prominent examples of how the SAAP has been translated in practice are missing on this point and no major reforms of the procedural regulation have occurred. However, in combination with the other reforms undertaken by the Commission, it is possible to speculate on tentative changes to the procedural regime.

As described in previous sections the procedural order is built on a system in which Member States are obligated to notify all their aid measures to the Commission prior to putting them into effect. Failure to comply with this should automatically lead to a complete recovery. With the recent *CELF* case though, this fundamental rule has been questioned in its very essence. It is too soon to draw any far-reaching conclusions of how this line of case law will affect the general incentive to notify, but it is questionable how this will work with the ambition in the SAAP that aims to ensure that aid measures are duly notified. Furthermore, analysts are suggesting that the present regime is not discouraging Member States governments from granting state aid. The procedural rules today is a win-win situation for the states as a recovery will only bring the initial disbursements back to the state, even with interest. This could imply that there are situations where Member States will gain from a recovery, which would go against the jurisprudence that litigants should not profit from its own unlawful conduct, where such can be proven.[145]

With this in mind, the calls for reform of the procedural rules have been many. When putting the state aid rules in a larger context, following other fields of competition, enforcement procedure should shift from an a priori notification to a system of ex post facto control.[146] To strengthen the notification requirement even further it is reasonable to claim that the state

[144] Commission State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009, para 57-58.
[145] Lever, Jeremy Sir, *The EC State Aid Regime: The Need for Reform* (2004) p. 315.
[146] Ross, Malcolm, *Decentralization, Effectiveness, and Modernization: Contradictions in Terms?* (2004) p. 85.

that has made an error should recover, at least the interest, to the Community instead of gaining from the mistake itself.[147] This would fulfil the requirements in the SAAP, of more stringent notification and recovery enforcement but at the same time, it would be difficult to combine with the other aims of the SAAP, not least the tendency towards decentralisation and new modes of governance.

With the new system of an ex post control of state aids, it will require a lot more cooperation between the Commission and national courts as well as with national authorities. Again following the example of Art. 81 and 82 EC, it is obvious that also national competition authorities must be involved in the enforcement in order to have an effective procedure.[148] Already now, it increasingly falls on national courts to make judgements of whether or not a measure constitutes state aid, in proceedings between private parties. With an increased use of horizontal exemptions to the state aid rules, this tendency is likely to grow. It will be an obvious task for the national judicial authorities to decide whether a measure falls within the scope of the block exemptions.[149] This is something that is realised by the Commission, why it announces that more transparency and cooperation is necessary in order to facilitate the task for the national courts.[150] This new type of networking brings us closer to the question of how those will be organised and if such a decentralisation will work in practice.

4.1.4 A Shared Responsibility Between The Commission and Member States

The SAAP is focusing a lot on that the Commission should develop closer partnerships with the Member States in order to modernise the practices and procedures of state aid control. The Commission is framing it as a question of *better governance*, in which the Member States participate in the

[147] Lever, 2004, p. 315.
[148] Communication from the Commission to the European Parliament and the Council – Report on the Functioning of Regulation 1/2003, 2009: 574, points 25-26 describe the cooperation between the Commission and NCA's as a success.
[149] Ross, 2004, p. 88.
[150] Commission State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009, para 58. Realised partly through the Commission Notice on the Enforcement of State Aid Law by National Courts 2009/C 85/01.

enforcing tasks. This includes internal guidelines of how to increase efficiency and a pledge to the Member States to cooperate and comply with Community decisions.[151] More interestingly, the Commission is considering issuing best practices guidelines, a type of benchmarks between the Member States realised by better flow of information.[152] Furthermore, the Commission will examine whether independent authorities in the Member States could play a role as regards facilitating enforcement by detecting state aid, order provisional recovery of illegal state aid and execution of actual recovery decisions.[153] This is largely following the model of competition law where the system of NCAs has been a great success.[154] It is the role of the NCAs that will be further analysed and their consequences for state aid control.

The first obvious question is why a decentralised state aid control is beneficial. The Commission's control of Art. 87 was instituted to address concerns of excessive export subsidies from certain Member States to the detriment of the others. Therefore, it was essential with a supranational control. Today however, state aid often have different characteristics, as it is a way for national governments to realise national public policy objectives and does not substantially harm other Member States.[155] Moreover, as state aid becomes more codified, as central concepts are clarified by the Community Courts and as state aid rules are modernised, the case for decentralisation becomes stronger.[156] It would also be natural with a decentralisation, as it would follow the tendency of other fields of competition law. Local enforcement agencies which, are integrated into a mature system based on established legal principles and clear parameters for Community action, are reality in those fields of law.[157]

[151] *Ibid*., para. 48-49.
[152] *Ibid.*, para. 50, 53.
[153] *Ibid*., para. 51.
[154] Communication from the Commission to the European Parliament and the Council – Report on the Functioning of Regulation 1/2003, 2009: 574, point 28.
[155] Heidhues *et al*., 2006, p. 30.
[156] Nicolaides, Phedon, *Decentralised State Aid Control in an Enlarged European Union: Feasible, Necessary or Both?* (2003) p. 263.
[157] Ross, 2004, p. 85.

According to many scholars, NCAs could have a significant position in implementing state aid rules. However, this role will be limited as long as the market thresholds are held on a very low level, which favours Commission control.[158] Therefore, the subsidiarity view suggests that, with a development of the effect on trade and distortion of competition, a filter would be created, which leaves national aid measures to the Member States.[159]

The idea of decentralisation would thus include more agencies into the state aid control. Except from the NCAs, the role of the national courts would be reinforced. As we have seen, national courts are already vested in obligations, mainly due to the direct effect of Art. 88(3) EC. With the current development would the national judiciary also be responsible for evaluation of block exemptions and calculation of de minimis. Parallel with the reinforcement of the national courts goes the rights of third parties. As state aid procedure has been regarded as a matter between the Community and the Member States, third parties has traditionally been viewed as sources of information. With the new approach however, there are arguments that third parties should be more closely involved.[160] Private litigants could challenge state action before national courts, who subsequently, under its procedural autonomy, would decide matters of state aids. However, as the law stands now, in absence of a revised legal position at EC level concerning duties of private beneficiaries, different legal protection and opportunities are dependent on national law.[161] This problem is mainly solved by the case law on the principle of equivalence and effectiveness, even if it is doubtful if this would remedy national procedural failures.[162] Finally, it should be added that this decentralisation to the national courts, is far from complete. At this point, there is a very low frequency of national courts involvement in state aid matters and few

[158] Crocioni, 2006, p. 97.
[159] Heidhues *et al*., 2006, p. 31.
[160] Bartosch, Andrea, *The End of Procedural Reform: the Commission, the Member States and Third Parties = the teams that lose* (2008) p. 1.
[161] Ross, 2004, p. 97.
[162] See e.g. Case C-453/99 *Bernard Crehan* v. *Courage Ltd and others* [2001] ECR I-6297; Case C-6/90 & 9/90 *Francovich and Bonifaci* v. *Italy* [1991] ECR I-5357.

referrals are made to the ECJ. Even if there might have been a slight improvement in the latest years, it could be a signal that those bodies can only play a limited role in state aid enforcement.[163] It is perhaps likely that such involvement would increase if NCAs were delegated powers.

The cry for more delegation have for long been present in the doctrine. The main idea is that the Commission only should intervene in state aid cases, where such measures create negative spillovers. In other cases, Member States should be free to implement them. Such an approach includes serious risks that Member States would neglect their duties of control, as they are the party who is granting the aid. The Member States would thus control themselves.[164] It is therefore, essential that the NCAs are independent from the governments but even so, it is doubtful if the market studies that they produce are not biased in favour of their own Member States.

This could also be an advantage. *Nicolaides* claims that Member States would gain on having internal control by NCAs, as they could help designing state aid so that it would be compatible with the common market. Furthermore, the model with NCAs has been a success in the Member States that joined the Union in the latest enlargement. They instituted those agencies in order to fulfil the requirements concerning state aid for being accepted in the Union.[165] The same experiences should be drawn from ECN in other fields of competition. Furthermore, *Nicolaides* draw the conclusion that just because complete decentralisation is unwise, it does not mean that a full centralisation is the only alternative.[166]

In sum, it seems that too much decentralisation, in terms of enforcement responsibilities, is an invitation to inconsistent or misguided resolution of state aid problems.[167] If such decentralisation would be fully realised, confusion could also rise to whom a measure should be notified. This would

[163] Bartosch, Andrea, *State Aid and the National Judiciary: Where Do we Stand?* (2006) p. 213.
[164] Crocioni, 2006, p. 96.
[165] Nicolaides, 2003, p. 264.
[166] *Ibid*., p. 272.
[167] Ross, 2004, p. 101.

be a mistake since notification still is central to state aid procedures. The decentralisation would require a close contact between NCAs and the Commission, which would be entitled to intervene in case it can detect a cross-border element. This contact will be analysed in later chapters.

Finally, it is doubtful whether the suggestions in the SAAP will be put into practice. There have been few concrete proposals for an institutionalised decentralisation even though it is the final year of the action plan period. It should also be added that the suggestion of more involvement of Member States in state aid control reached the highest disapproval rates in the consultation round of the SAAP.[168]

[168] Prete, Luca, *State Aid Reform: Some Reflections on the Need to Revise the Notice on Guarantees* (2006) p. 422.

5 The Financial Crisis

Before going into analysing the trends within the state aid reform from a governance perspective, a few remarks need to be done about the current changes of state aid control, due to the financial crisis. The crisis accentuated the need for speedier procedures and Commission activism, which put a halt to the realisation of the SAAP. Instead, the Council called for the need for fast and flexible action by the Commission in applying the state aid rules.[169]

With Art. 87(3)(b) as legal basis, the Commission issued several new instruments to handle the new aid schemes for the financial sector. However, there was already prior to those new instruments, measures present to deal with rescue and restructuring operations (R&R Guidelines),[170] and those were applied on the first signs of the financial crisis. Those guidelines is recognised by the Commission as being effective against the most distortive types of aid but was regarded as not sufficient to meet the genuinely exceptional circumstances of the new crisis, where the entire functioning of financial markets is jeopardised. Some scholars believe that the reason for the Commission to chose Art. 87(3)(b) is that it offered a legal basis that would permit the maximum flexibility for approval of aid measures and increase the ability to allow larger aid schemes and avoid singular cases.[171] Furthermore, was the old R&R Guidelines used as a last resort solution, in the way that they could only be applied to a case once.[172] This will hardly be the case for the new set of Communications.[173]

[169] Editorial *Common Market Law Review* 2009, p. 7
[170] Community Guidelines on State aid for rescuing and restructuring firms in difficulty, O.J. C 244/2, 1/10/2004.
[171] D'Sa, Rose, *"Instant" State Aid Law in a Financial Crisis- A U-Turn?* (2009) pp. 141-142.
[172] Community Guidelines on State aid for rescuing and restructuring firms in difficulty, O.J. C 244/2, 1/10/2004, para 10.
[173] Lutja, Raymond, *State Aid and the Financial Crisis: Overview of the Crisis Framework* (2009) p. 153.

The first of the new Commission Communications[174], handles different types of aid namely, guarantees to financial institutions' liabilities, recapitalisation of financial institutions, controlled winding-up of financial institutions and short-term liquidity assistance. However, in order for a measure to benefit from the rules contained in the Communication, especially the faster procedures, it must fulfil several criteria. It must be objective and not discriminatory, limited in time, well-targeted, proportionate and designed in such a way as to avoid negative spill-over effects on competitors or other sectors. It is also fundamental that the Communication is only targeting the sound financial institutions, which difficulties originate in the financial crisis.[175] An assessment of such characteristics is likely to encompass a large portion of arbitration with the Commission, as it must be difficult to decide whether financial distress started prior to July 2008.[176]

Shortly after instituting the new instrument, the Commission approved a large number of rescue aid operations for banks at a much more rapid procedure than usual. Most emergent aid was given green light within two days and there were examples of decisions taken overnight.[177] The Commission reasoned that state support for banks should not provide the recipients an artificially advantageous competitive position.[178]

Eventually, the Commission also relaxed the criteria for other firms than financial institutions, by initiating new instruments under Art. 87(3)(b).[179] The Commission thereby admitted that emergency support is needed for other sectors and that state aid measures could support for a limited period. It is also likely that this instrument is departing from the notion of systemic disturbances and aid could thus, be given for companies that are not of such

[174] Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, O.J. C 270/8, 25/10/2008.
[175] *Ibid*., para. 14.
[176] Lutja, 2009, pp. 147, 154.
[177] Jaeger, Thomas, *How much Flexibility do we need?* (2009) p. 4.
[178] Editorial *Common Market Law Review* 2009, p. 8
[179] Predominately the: Communication from the Commission – Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis, O.J. C 16/1, 22/1/2009.

a character. However, it should be a substantial group of companies in certain sensitive sectors.[180] At the same time, the Commission decided to increase the threshold for compatibility of aid up to 500 000 EUR. This is nevertheless not a new de minimis ceiling and Courts are thereby, not bound by the Communication. However, as the Commission still has a wide margin of appreciation in determining on compatibility, the effect will most probably be the same as a de minimis regulation. The system with the new Temporary Framework Communication is that it allows Member States to create aid schemes without individual approval by the Commission, once the scheme itself is cleared.[181]

All these new instruments have affected the state aid system of procedure. The main characteristics of the new procedure is speed, streamlined consultation process within the Commission, a more liberal approach towards language versions and the responsible Commissioner (Kroes) is delegated powers of deciding on cases without approval of the College.[182] Thus, the new crisis instruments have applied flexibility in the procedural requirements in order to maintain relative consistency in the substantive rules.[183]Even though notification and decision by the Commission are needed, it has become much of a formality since, according to the new legislative framework; the Commission is almost bound to allow the measures in question.

There has been a remarkable development of the speed of the current processes. The Commission has admitted itself to a policy in which it will give decisions within 24 hours even on weekends.[184] Also in relation to non- financial institutions there is a quick procedure, however not ad hoc measures. The fast track procedure relies heavily on cooperation between the Commission and the Member States and the formal administrative

[180] Lutja, 2009, p. 154.
[181] D'Sa, 2009, p. 143.
[182] Werner, Philipp – Maier, Martina, *Procedure in Crisis? – Overview and Assessment of the Commission's State Aid Procedure during the Current Crisis* (2009) p. 177.
[183] *Ibid*., p. 178.
[184] Communication from the Commission – The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, O.J. C 270/8, 25/10/2008, para. 53.

burden has decreased significantly. With the very urgent written procedures, a complemented pre-notification standard has arisen.[185]

Even though it is desirable to have swift process times, especially in times of crisis, the new system of procedures involves considerable risks. The agreement that all applications should have a fast track dismantles the Commission's ability to exercise an effective control. This has led to a system in which, the Commission regularly approves schemes first and limits the measure in time, giving it the possibility to assess later. Therefore, Member States must submit a list of all schemes put in place, as a guarantee for, at least, limited monitoring from the Commission's side.[186] Even so, there is a deficit of the legal certainty. The rapid procedure will increasingly lead to bad judgements at the same time as the formal investigation procedure has a value in itself. Except the consequences that such judgements will have on taxpayers and possibly on beneficiaries, competitors and other third parties have ended up in a very disadvantaged position. Many measures are approved long before a third party would be able to express any concern. As the control is increasingly a matter of cooperation between the Member State and the Commission, realised through a pre-notification phase, there is very little incentive for concerned competitors to participate in the non-transparent procedure.[187] Another apparent risk with the current approach is that it might become difficult to return to the previous structure of formal investigation procedures, after the crisis, when the Member States have grown accustomed to the flexible way.

Despite the latest events and challenges to the state aid regime, the Commission is playing its controlling role. New simplified procedures were necessary in order to maintain a state aid control at all, since the Member States otherwise would likely ignore the Commission imposing the strict rules.[188] Thus, the new instruments are a result of political pressure rather than economic assessments and legal principles.[189] Even though the

[185] Werner *et al*., 2009, p. 181.
[186] *Ibid*., p. 182.
[187] *Ibid*., pp. 184-185.
[188] Lutja, 2009, p. 146.
[189] Werner *et al*., 2009, p. 183.

Commission has maintained its role, there is an obvious risk that the new speedy procedure will mean that the Commission cannot exercise any substantive control. There is also a serious risk that decisions will be taken without any real data as ground. The new instruments effectively afford individual Member States a very wide range of possibilities for the granting of aid to various sectors of the economy. The empirical data also supports the assumption that the number of aid measures have increased and so is the level of state aid of the national GDPs.[190] Comparing this with the goals of the SAAP of less and better targeted state aid can hardly come to satisfactory conclusions. The new sort of procedure goes also quite against the ambition of the SAAP that, the Commission should use a more comprehensive economic approach. As the decisions are now, there is hardly any assessment of competitive effects, market definition or analysis of market failures. Neither are the new instruments, in relation to the crisis, pointing towards a more economic approach, even though there are some references in the Temporary Framework to market failure.[191]

Others find the current approach as to rigid and not flexible enough. Instead of being based on Art. 87(3)(b), the Commission could have used a rule of reason test and seen the measure in a broader context. That would include a balancing test between the number of potential bankruptcies and oligopolised markets.[192] Such a test could suggest a flexible treatment of state aids but maintaining the procedural requirements.

It remains to be seen what effect the temporary crisis instruments will have on the state aid control and on the Commission's ability to effectively monitor the level of state aids. With the latest changes, it is most likely that the realisation of the SAAP is paused until the recession is over. Hence, the analysis of the governance issues in the state aid field must include both the trends of the SAAP and the developments of crisis management.

[190] D'Sa, 2009, p. 144.
[191] Jaeger, 2009, p. 4.
[192] Koenig, Christian, *Instant State Aid Law in a Financial Crisis, State of Emergency or Turmoil* (2008) pp. 628f.

6 The Institutional Balance

This chapter analyses the current developments and reforms, both actual and potential, from a governance perspective. The aim is to analyse whether the latest trends in the state aid regime is an expression for the new forms of governance and thereby entails a power shift to the Member States. Keeping in mind that generalisations are difficult to make at the present stage and remembering the particular character of the state aid field of law, it will nevertheless be the goal to provide a systematisation of the current trends. The chapter will start by providing some general insights of the particularity of the state aid regime and continue by trying to sort out what major developments that can be categorised under decentralisation and governmentality, respectively. Finally, the analysis will end up in an overall impression, where remarks on the future of state aid control is speculated.

As we have seen, the field of state aid control has traditionally been one of the most communitarised areas of EC law, as integration is mostly driven by supranational institutions. Hence, the Commission has been transferred a high degree of sovereignty, both in deciding on what measures constitute aid and what aid that is acceptable in the common market. This has lead to a relatively invasive policy where the Commission has interfered in areas that would be considered as national policies in order to protect the integrity of the Treaty.[193] Thus, the push for reform has been consistent during the latest years and many have regarded the law on state aid control as "the poor relative" of European competition policy.[194] The latest developments, both in case law, SAAP and the financial crisis must therefore be analysed through this perspective.

The control of the state aid regime is a balance of power between the Commission and the Member States and includes parameters as effectiveness and legitimacy. Some analysts even go as far as depicting the

[193] Schmidt, Susanne K. – Blauberger, Michael, *Interpreting the Treaty- The role of the ECJ and the Commission in the areas of mutual recognition of goods and services and state aid control* (2005) p. 3.
[194] Hansen, Marc – Van Ysendyck, Anne – Zühlke, Susanne, *The Coming of Age of EC State Aid Law: A Review of the Principal Developments in 2002 and 2003* (2004) p. 202.

relationship as a constant struggle of the Commission in order to tighten its control of Member States' aid policies while guarding the maximum degree of its own policy autonomy.[195] However, with the increased policy activism, crucial case law and adaptation to the financial turmoil, this description might only be partly true.

6.1 A Case of Decentralisation?

The SAAP has suggested a network of national authorities that would be partly responsible for the control of national state aid. This has clearly not been realised but even so, there are signs of an actual decentralisation. As we have seen above, the conditions of what constitutes state aid under Art. 87(1) have always been applied strictly. The Article has had a wide application in order to encompass as much as possible of different national subsidies and loans. Regarding the requirements in that Article it seems clear that the burden on the Commission has primarily been to prove that there is an advantage conferred through some kind of state resources. The competition and trade requirements have been largely presumed as a natural consequence of the former conditions. However, later case law seem to slowly shift the burden onto the Commission. We have seen that the selectivity condition can be justified due to the nature of the system of the national aid. Concerning the competition and trade conditions, the CFI has increasingly put higher standards on the Commission's level of analysis of the market. This is also an approach that is confirmed in the SAAP and a careful competition analysis, similar to the ones in other fields of competition, is also widely applauded in the doctrine. This indicates a shift in the view of state aid, namely that some measures could be beneficial to the common market and a stricter cost/benefit analysis would investigate this. Hence, the national authorities are slowly increasing their abilities to shape their measures in a way that would make it more difficult for the Commission to fail them. This could be a sign of decentralisation in substantive terms. However, one must recall that the Commission is still the

[195] Schmidt *et al.*, 2005, p. 12.

centrally placed institution that would be able to tell the effects on the intra community trade and competition.

It is perhaps in the sensitive areas of SGEIs that the decentralisation is most striking. Even though the *Altmark* case tried to make the rules more stringent and hence, increasingly difficult to apply for Member States, later case law suggests a favourable outcome for the Member States. Firstly, it seems confirmed that Member States have a complete freedom in defining their service obligations and are thus free to decide how much of their public policy that should be undertaken through state measures. This wide discretion also encompasses the right to define the nature of the system and how to calculate compensation. With the *BUPA* case, the compensation should be seen as a part of the context of the service obligation. Thus, Member States' wide discretion is creeping towards also including the actual calculation. This recent line of case law also points in the direction of a substantial decentralisation.

These substantial decentralisations are certainly questionable. However, the most evident decentralisation is rather from the procedural side. Concerning SGEIs, instruments following the *Altmark* judgement have exempted measures of the obligation to notify if they fulfil the relevant criteria. Also with the increasing use of block exemptions and de minimis thresholds, several new types of aid are exempted from the notification requirement. All these exemptions are in line with the SAAP's aim of less but better targeted state aid. It has facilitated for the Commission only to investigate large and contentious aid measures, while measures that anyway would have been compatible, are exempted from control. This however, does not come without risks. Member States are freer to organise their measures in a way that will allow them to fall under the scope of the relevant exemption, which mean decentralised state aid enforcement.

Also in the final enforcement, the recovery obligation, due to breaches of the standstill clause, has been relaxed. With the *CELF* judgement, it is questionable if recovery is necessary where measures later are deemed compatible with the common market. Even though this seems quite natural,

it might affect the States incentive to respect the notification and standstill obligations.

Then there is the question of a network of competition authorities being more involved in state aid control. If the new, shared responsibility would mean that some measures automatically are transferred to national rather than Union level, it could imply an actual decentralisation. As described above it is perhaps not likely that the model of other fields of competition will be used, which put a procedural decentralisation into question.

6.2 A Case of Governmentality?

There are also signs that the decentralisation is not realised without the Commission instituting new mechanisms of surveillance. The overall ambition of the Commission in the SAAP is after all to reduce the levels of state aid in Europe, which indicates a continuing Commission control. One should keep in mind that the state aid control has traditionally been much centralised and it is most likely that the Commission will keep having the greatest influence. Still, the rules of the Treaty allow the Commission to capture the majority of state aid measures even though there are signs of a relaxation. With the increasing workload on the Commission, some kind of reform was needed and the use of block exemptions has facilitated for the Commission to engage more effectively in the most serious forms of aid.

The procedural regulation in itself is a powerful tool for the Commission to control the Member States. It makes more effective, the obligation to notify and is securing a steady flow of notifications. The SAAP has also announced the Commission's ambition to more actively pursue non-compliance procedures under Articles 88(2), 226 and 228, which will increase the respect for the fundamental procedural rules. In this way, the hard law of the regime will become a necessary supplement to the increasing volume of soft law and help the Commission to ensure compliance with the rules.[196] In this way, the Commission will accomplish

[196] Cini, Michelle, *The soft law approach: Commission rule-making in the EU's state aid regime* (2001) p. 203.

both more effective procedures and higher predictability while keeping the main control.

Another tool of governmentality mechanisms are found in many of the exemptions themselves. For instance in the GBER, Member States are under a duty to inform the Commission of ongoing projects even though there is no actual notification. The Member States are increasingly obligated to submit lists of their aid measures, which the Commission will monitor. The Commission also retains the right to investigate aid measures further that could be liable of having negative effects on the common market. A similar approach is taken in relation to aid exempted under the new financial crisis instruments, where the measures are allowed for certain time periods and allows the Commission to further intervene when conditions are not fully respected.

With the potential installation of a network of NCAs in the state aid field, it would further allow the Commission to control the decentralised powers. This would facilitate the Commission's ability to give guidance and put pressure on the network to engage in benchmarking. However, it could also mean that more state aid would be put into effect if too much authority were handed over. This is mainly because there are few national provisions on state aid, which would allow aid that is not adversely affecting the intra community trade to be realised. Hence, the Commission would need to have a continuing monitoring ability.

Finally, there is another way in which the Commission is securing its influence. Another aim of the SAAP is to increasingly encourage stakeholders to engage in state aid proceedings and ensure that rules are respected. As state aid increasingly is decentralised, it falls on competitors and other interested parties to pursue procedures in front of the national courts. The Commission has therefore tried to develop a dialogue between the national courts and the Commission that would ensure Commission influence. It is thus likely that this link will increase if more state aid is decentralised to the Member States.

6.3 Final Results

From the analysis above no clear conclusion is reached. In fact, it seems as there is a mixed picture of Commission activism, decentralisation and governmentality. There are however, obvious signs that the state aid rules are moving towards a similar character as other fields of competition. Both the latest case law and the SAAP suggests a decentralisation and weakening of the procedural rules even though some mechanisms are still left with the Commission. However, the financial crisis could have absurdly reinforced the Commission's position as the main institution of state aid control as all national measures must be notified and meanwhile the Commission promises a speedy procedure.

At the same time, considering the substance, the financial crisis might have meant a decentralisation as Member States' measures are approved at a speedy basis and the Commission cannot guarantee the compatibility of the measures. Even so, the Commission always retain some control as the preliminary examination is followed up by mechanisms of monitoring, registrations and announcements.

Hence, there is no clear picture of the new system of governance. The trend follows the same kind of pattern as other fields of competition, with soft law guidance, but the state aid system has its own particularities. The Commission still keep the major control and builds on its Treaty basis to ensure that it is the centre of the control system. The current form of governance could possibly best be described as pragmatic governance, where the system is developed at an ad hoc basis. The risks with the partial decentralisation are inconsistencies and lack of legal certainty in the state aid control as it is performed on different levels. From this, it will be interesting to see what kind of policy the Commission will return to after the financial crisis. There is an obvious risk that the Member States have grown accustomed to the new swift control and are unwilling to return to the old regime. Perhaps the realisation of the SAAP and especially with the institution of the governance network of NCAs will be the final outcome as a solution to the governance dilemma.

7 Conclusion

It is obvious that the state aid regime is under a process of development. Financial support was previously alone a prima facie indication that there was state aid involved. Extensive case- law has however modified this position and filled the concept of state aid with a more precise meaning. Generally, the obligation on the Commission to define what the measure consists of has increased. Member States have become freer to define their own public service obligations, which has been one of the core disputes in state aid law. Also procedural changes, most notably due to the *CELF* case have weakened the incentive to notify which bears the risk that the Commission increasingly will be held in the dark.

The commonly used system of block exemptions and guidelines also relax the system and give the Member States the opportunity to construct schemes, which can be exempted. This is mainly following other fields of law where a partial decentralisation has occurred.

To these changes, described above, the Commission has itself opened the door for reform of the system. In its SAAP, it calls for a shared responsibility with the Member States when it concerns the enforcing of the State aid rules. This could indicate a transformation to a more decentralised structure but it is too early to speculate on how such a network would function.

How could then the changes be categorised? Is it a new form of governance and is it a complete decentralisation or just a symbol of governmentality? As we have seen, no clear answer can be provided to this question. It seems obvious however, that there is a clear conflict of interest between the centralisation of Art. 87(1) and the insertion of enforcing networks. It is likely that such a dispute would be solved through a gradual step down by the Commission and increasing decentralised structures. However, there are two main concerns in relation to this. Firstly, state aid can hardly copy the system of other fields of competition law even though Reg. 1/2003 is widely held as a successful example. This is mainly because

the state is too involved in state aid matters and it would mean a serious risk if the state was to control itself. Supranational control is therefore needed to a rather large extent. Secondly, in the consultation round of the SAAP, the suggestion of the use of NCAs was met with sceptic remarks from the Member States. Paradoxically, the Member States thus seem to be sceptic of receiving more freedom, whereas the Commission seems willing to hand over more enforcing powers to the Member States. The explanation to this can be that the NCAs might be too effective and Member States enjoy the present environment. On the other hand, it could also be that NCAs are mechanisms of control for the Commission and too little an instrument for the Member States. Hence, it is not a decentralising action but rather an expression of governmentality. However, this reasoning is speculative. When NCAs in the state aid field are fully operating, further research is needed.

Perhaps the financial crisis might offer some valuable insights in how the future system could operate. The final control must lie with the Commission, which is realised through a general obligation of notification. Perhaps it is sufficient for the Commission to perform a preliminary examination that would allow more speedy procedures. In order to safeguard the quality of the decisions both national and central authorities could have the responsibility to monitor and execute compulsory follow-up examinations within a prescribed period of time.

Returning to the question whether or not the state aid regime is subject to a new form of governance, it is clear that changes are occurring and are even strived for. The SAAP is a proof of the tendency of a new form of governance, even though it is yet unclear how it would play out. As held above, the particularities of the state aid system, with the direct involvement of the state, makes it difficult to create any existing type of governance. A complete decentralisation is not plausible and it is questionable if a tight governmentality system could work. The likely solution is some decentralisation but with effective control mechanisms. It is vital for the

state aid regime that the Community Courts will continue to uphold the material rules if the procedure will change.

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