

# Modernisation of EU State aid procedures: are the rights of third parties more protected?

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## **Abstract**

*Despite the important role in increasing efficiency of the State aid control and in revealing the existence of State aid, third parties in EU State aid procedures are considered merely as a “source of information”. This article provides a critical analysis of the reforms of State aid procedures from a third party perspective. The reforms are disappointing maintaining the bilateral character of State aid procedures between two main parties the Commission and the Member States concerned and leaving third parties with very limited procedural rights. In addition the hard-law reform of the State aid procedures of 2013 increases the procedural duties of third parties without procedural guarantees and extends the investigatory powers of the Commission.*

**Keywords:** *State aid procedures, third party, Procedural Regulation, State aid reforms.*

**JEL Classification:** K22, K23, K33

## **1. Introduction**

In the beginning the administrative procedure in State aid matters was based on primary legislation and on the Commission’s practice as well as the case law of the European Courts. A “Regulation laying down detailed rules for the application of Article 93 [now Article 108] of the EC Treaty” was adopted by the Council on 22 March 1999 (the “Procedural Regulation”).<sup>2</sup> The first objective of the Procedural Regulation was to codify the procedural rules, developed by the Court of Justice<sup>3</sup> through its case law and the practice of the Commission into one legally binding document. Whereas the second objective was to strengthen control of State aid by removing those aspects of the existing system that endangered the

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<sup>2</sup> Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999.

<sup>3</sup> For the conditions developed by the Court of Justice to be satisfied for a measure to qualify as State aid see Cătălin-Silviu Săraru, *State Aids that are Incompatible with the Internal Market in European Court of Justice Case Law*, in Cătălin-Silviu Săraru (ed.), *Studies of Business Law – Recent Developments and Perspectives*, Peter Lang International Academic Publishers, Frankfurt, 2013, pp. 39-48.

proper functioning and effectiveness of the rules on State aid and the efficiency of the procedural system. By relying in the existing case law the Regulation has codified the rights of third parties deriving from Article 93 [now Article 108].<sup>4</sup> According to the Commission referring to Article 108 TFEU, State aid procedures are a bilateral dialogue between the Commission and the Member State concerned, where third parties are involved only incidentally. This role of third parties in State aid procedures has often been criticised by different legal practitioners and scholars.<sup>5</sup>

The most important reforms of the State aid law are the one launched by the Commission through its State Aid Action Plan (the “SAAP”)<sup>6</sup> and next launched through its Communication on State Aid Modernisation (SAM).<sup>7</sup> The Commission in its State Aid Action Plan proposed an ambitious reform of State aid procedures including more effective procedures, better enforcement and enhanced transparency. The Commission through a soft law reform introduced the Notice on the enforcement of State aid law by national courts (the “Enforcement Notice”)<sup>8</sup>, the Notice on a simplified procedure for treatment of certain types of State aid (the “Notice on Simplified Procedures”)<sup>9</sup> and a Code of Best Practices for the control of State aid procedures (the “Code of Best Practices”)<sup>10</sup>. Another ambitious reform of the State aid law was introduced through the SAM aiming at more efficient procedures and at the implementation of the substantive rules. In the framework of this reform regarding the regulation of EU State aid procedures some amendments of the Procedural Regulation were introduced.<sup>11</sup>

This article critically analyses of the reforms of the State aid procedures from a third party perspective. Regarding the due process both reforms are disappointing leaving third parties with very limited procedural right. The State

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<sup>4</sup> Adinda Sinnaeve and Piet Jan Slot, “The New Regulation on State Aid Procedures” (1999) 36 CMLRev 1153.

<sup>5</sup> See Andreas Bartosch, “The End of Procedural Reform: the Commission, the Member States and Third Parties = the Teams that Lose” Editorial, (2008) 1 EStAL 1–2; Andreas Bartosch, “The Procedural Regulation in State Aid Matters – A Case for Profound Reform” (2007) 3 EStAL 474; Sinnaeve and Slot, note 3, at 1153–1194. See Opinion of AG *Tesouro*, Case C-198/91 – *Cook v Commission* [1993] ECR I-2486 (2502), para. 7 et seq.; Opinion of AG *Van Gerven*, Case C-225/91 – *Matra v Commission* [1993] ECR I-3203 (3222).

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

<sup>7</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM (2012) 209, 8.5.2012 (Communication on State Aid Modernisation).

<sup>8</sup> Commission notice on the enforcement of State aid law by national courts OJ C85/01, 9.4.2009.

<sup>9</sup> Notice from the Commission on a simplified procedure for treatment of certain types of State Aid, OJ C 136/03 16.6.2009.

<sup>10</sup> Code of Best Practice for the conduct of State aid control procedures OJ C136/04, 16.6.2009.

<sup>11</sup> Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999. See however the modifications of a rather technical nature of Commission Regulation 2004/794/EC of 21 April 2004 implementing Council Regulation 1999/659/EC laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 2004 L 140/1.

aid procedures are still developed between the Commission and Member States considering the third parties as a mere “source of information”. While, the Code of Best Practices hasn’t been able to address the shortcomings and inefficiencies in the procedures resulting from the insignificant role given to aid beneficiaries and third parties, the Council Regulation No 734/2013 of 22 July 2013 amending Regulation No 659/1999 laying down detailed rules for the application of Article [108 TFEU] (the “new Procedural Regulation”) creates an imbalance between the efficiency of the State aid procedures and limited procedural rights granted to third parties during these procedures. Furthermore, the new Procedural Regulation by enhancing the investigatory powers of the Commission increases the procedural duties of the third parties while their procedural guarantees are still missing. The article will first give an overview of the rights of third parties as provided by the case law of the European Courts and the Procedural Regulation. In continuance, the reforms of the State aid Procedures will be scrutinised from a private party perspective.

## 2. Third parties’ rights

### 2.1 Case law of the European Courts - the traditional approach

Until 1999 there was no Procedural Regulation providing for the exercise of the powers of the Commission, consequently the procedures of the Commission regarding State aid matters were based on the primary legislation and case law. The only provision providing a role to interested parties<sup>12</sup> (including State aid beneficiary, its competitors and complainants) is Article 108(2) TFEU according to which the Commission during the formal investigation procedure, has the obligation to give “notice to the parties concerned to submit their comments”.<sup>13</sup>

The European Courts have explained the notion of third parties and the rights granted to them during the preliminary procedure and after this phase. In *Cook*<sup>14</sup> and *Matra*<sup>15</sup> cases the Court of Justice for the first time accepted that a decision declaring that a measure doesn’t constitute State aid or that it is compatible with the Internal Market can be challenged by interested parties. According to the Court such a decision is an implicit rejection to open the formal investigation procedure according to Article 108(2) of the TFEU thus it deprives third parties to make full use of the procedural guarantees provided to them during the formal investigation procedure.

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<sup>12</sup> For the purpose of this article, the use of the concept of “*interested parties*” and “*third parties*” are equivalent.

<sup>13</sup> Article 108(2) TFEU provides: “*If, after giving notice to the parties to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission*”.

<sup>14</sup> Case C-198/91 *Cook v Commission* [1993] ECR I-2487, para. 22.

<sup>15</sup> Case C-225/91 *Matra v Commission* [1993] ECR I-3203, para. 16.

Unfortunately the Courts have held a restrictive approach towards third parties' rights. According to the General Court in *Sytraval* a decision rejecting a complaint was challengeable.<sup>16</sup> But on appeal the ruling was overturned by the Court of Justice, according to the Court decisions in State aid field must be held to be addressed to the Member State concerned. The letter informing the complainant of the decision of the Commission that the measure doesn't constitute State aid or that it doesn't affect the Internal Market cannot be challenged therefore it is to be considered as an informal communication.<sup>17</sup> Consequently, only the decision taken following a complaint can be challenged and not the letter addressed to the complainant.

Except for the limited access to judicial review the case law has excluded third parties from any important rights of defence during the administrative proceedings held before the Commission. According to the abovementioned *Sytraval* case the Commission is not obliged to give complainants an opportunity to state their views during the preliminary examination stage.<sup>18</sup> In *British Airway* case which followed *Sytraval* case the General Court clarified that interested parties have only the right to be involved in the administrative procedure during the formal investigation phase to the extent appropriate in the light of the circumstances of the case and they do not enjoy the right to a hearing<sup>19</sup>.

## 2.2 Article 20 of the Procedural Regulation of 1999

A "Regulation laying down detailed rules for the application of Article 93 of the EC Treaty" was adopted by the Council on 22 March 1999 (the "Procedural Regulation").<sup>20</sup> It was later followed by the Implementing Regulation, issued by the Commission.<sup>21</sup> The Procedural Regulation was mainly perceived as a codification of the procedural rules developed by the Court of Justice and the practice of the Commission with the main objective of enhancing legal certainty. Consequently the Procedural Regulation doesn't introduce any major changes in State aid procedures existing before its approval, especially no enhancement of the third parties' rights was provided leaving State aid procedures still concentrated on the Commission and the Member State concerned. This restrictive approach reflects the case law analysed above which preceded the adoption of the procedural regulation.<sup>22</sup>

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<sup>16</sup> Case T-95/94 *Sytraval and Brink's France v Commission*, [1995] ECR II-2651, para. 51.

<sup>17</sup> Case C-367/95 *Commission v Sytraval and Brink's France* [1998] ECR I-1719, para. 45.

<sup>18</sup> Case C-367/95 *Commission v Sytraval and Brink's France* [1998] ECR I-1719, para. 59.

<sup>19</sup> Joined cases C-371/94 and C-394/94 *British Airways and o. v Commission* [1998] ECR II-2405, para. 60.

<sup>20</sup> Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999.

<sup>21</sup> Commission Regulation 2004/794/EC of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 140/1, 30 October 2004

<sup>22</sup> Sinnave & Slot, note 3, at 1183.

The regulation provides for the rights of interested parties in chapter VI. The role of “interested parties” as defined by Article 1 (h) of the Procedural Regulation differentiates between the beneficiary of aid on one hand and complainants/competitors on the other.<sup>23</sup> Article 20 of the Procedural Regulation codifies the rights of third parties. First, Article 20(1)<sup>24</sup> provides for the right of the interested parties to submit comments, which is based on Article 108(2) TFEU. However, this right is provided only during the formal investigation phase following a decision to initiate the formal investigation phase pursuant Article 4(4) of the Procedural Regulation. The preliminary investigation procedure is not transparent and potential beneficiaries have little or no possibility to find out what are the exact contents of the notification also their views and the views of competitors or complainants do not have to be taken into account by the Commission during this phase.<sup>25</sup>

Another important issue related to the rights of third parties is the right to submit complaints. Article 20(2)<sup>26</sup> of the Procedural Regulation doesn't expressly use the word “complaint”, as there was an intention to prevent an evolution of the case law regarding the status of complainants in EU State aid proceedings.<sup>27</sup> The second paragraph of Article 20 of the Procedural Regulation imposes an obligation on the Commission to inform the interested party on how it intends to go on with the case. The first possibility for the Commission is to take a decision on the case. Article 10(1) of the Procedural Regulation read in conjunction with Article 13 (1) impose on the Commission the obligation to take a decision every time it seems from the first examination of the information provided by the complainant that it involves possible unlawful aid or misuse of aid. The aid involved will be examined in a procedure between the Commission and the Member State concerned and at the end there will be a decision by the Commission addressed to Member State, a copy of which should be sent also to the complainant. The second possibility is that Commission based on the information in its possession answers that there are insufficient grounds for taking a view on the case. As the Commission has the obligation to scrutinise “information from whatever source regarding alleged unlawful aid” it can answer to complainant that there are no grounds for taking a

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<sup>23</sup> Andreas Bartosch, “The Procedural Regulation in State Aid Matters – A Case for Profound Reform” (2007) 3 EStAL 474, at 477.

<sup>24</sup> Article 20(1) of the Procedural Regulation provides: “Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7”.

<sup>25</sup> Michael Schutte, ‘Procedural aspects of EU State aid law and practice’ in Erika Szyszczak (ed), *Research Handbook on European State Aid Law* (Edward Elgar 2011) at 179-180.

<sup>26</sup> Article 20(2) of the Procedural Regulation provides “Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party”.

<sup>27</sup> Sinnavee and Slot, note 3, at. 1183.

view on the case only when a measure manifestly doesn't constitute aid within the meaning of Article 107(1) TFEU or when the complaint is about authorized aid. A refusal from the Commission to pursue a case could be interpreted as a breach of Article 13(1) so the Commission will take a decision addressed to the Member State. Such decision can then be challenged according to the conditions provided by Article 263 TFEU.

Therefore the Commission is not entitled to refuse the pursuit of complaints for lack of Community or Union interests.<sup>28</sup> The arguments might be that only the Commission is competent to examine the compatibility of State aid with the Internal Market and must necessarily judge that compatibility.<sup>29</sup> In addition, as Article 107 (1) TFEU has no direct effect the legal protection offered by the national courts is only partially compensated by the remedies pursuant to Article 88 (3) TFEU which has direct effect.<sup>30</sup> Finally, the Procedural Regulation obliges the Commission to examine all possible unlawful aid. The Commission can reply to a complainant that there are no grounds to take a view on the case only when there is no possible unlawful aid.<sup>31</sup>

Article 20(3)<sup>32</sup> deals with the issue of communication of decisions. It provides that interested parties have the right to obtain copies of decisions concluding preliminary and formal investigation as well as information, suspension and recovery injunction. However, in practice all the decisions on the Commission mentioned above except for the injunctions and the decisions according to Article 4(2) and (3) are published in the Official Journal as required by Article 26 of the Procedural Regulation. Decisions taken according to Article 4(2) and (3) are published in a form of summary notice, as provided by Article 26(1).

### **3. Procedural rights of the third parties in the context of the soft-law reform of state Aid procedures**

In 2005, the Commission adopted the State Aid Action (the "SAAP")<sup>33</sup> aimed at reforming State aid policies and procedures. The principles guiding the SAAP were: less and better targeted aid; a refined economic approach; more effective procedures, higher predictability and enhanced transparency and a shared

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<sup>28</sup> Sinnaeve and Slot, note 3, at 1185.

<sup>29</sup> Case C301/87, *France v. Commission*, [1990] I307. In this case the Court of the First Instance held that the Commission was obliged to examine the compatibility of State aid, even in cases where it was illegally granted

<sup>30</sup> Sinnaeve and Slot, note 3 at 1185.

<sup>31</sup> Jonathan Faull, "Decentralised enforcement of State aid law" in Claus Ehlermann & Michelle Everson (ed.), *European competition law annual 1999: selected issues in the field of State aids* (Hart Publishing 2001) at. 531.

<sup>32</sup> Article 20(3) of the Procedural Regulation provides: "*At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11*".

<sup>33</sup> State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM (2005) 107 final.

responsibility between the Commission and Member States. Regarding the reform of State aid procedures according to the SAAP the Commission planned to introduce a consultation document to be discussed with Member States, which might have resulted in amending the Procedural Regulation<sup>34</sup>, but in the end a soft law reform was chosen. Consequently, the Commission adopted the Enforcement Notice<sup>35</sup>, the Notice on Simplified<sup>36</sup> the Code of Best Practices<sup>37</sup>.

In the context of third party rights, the Enforcement Notice released by the Commission contains a section on damages claims towards State aid granting authorities and State aid beneficiaries. This increases the rights of third parties affected by unlawful State aid before national courts.<sup>38</sup> The Enforcement Notice also introduces a referral system which consists of a possibility for the national courts to ask the Commission for an opinion concerning the application of the State aid rules. The Commission is under the obligation to process such request as soon as possible. This enhances the effectiveness of national procedures related to State aid issues.

The Notice of Simplified Procedures contributes to making State aid control more predictable and efficient. In the meantime it leaves the possibility to third parties to revert to the standard procedure when the simplified procedure raises concerns related to competition<sup>39</sup>. Consequently the increased efficiency is not compensated by the degradation of the procedural rights of the third parties.<sup>40</sup>

### *3.1 Best Practices Code*

With the Code of Best Practices (the “Code”) the Commission reaffirms the objectives of the SAAP by making State aid procedures as productive and efficient as possible for all parties concerned. The Code aims at providing guidance on the day-to-day conduct of State aid proceedings, by developing cooperation and understanding between Member States, the Commission services and business community. It will contribute to a greater transparency, predictability and efficiency of State aid procedures complementing the existing Procedural Regulation<sup>41</sup>. The Code regulates a pre-notification phase, introduces the possibility for a mutually agreed planning and finally it attempts to make more

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<sup>34</sup> State Aid Action Plan: Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM (2005) 107 final. para. 57.

<sup>35</sup> Commission notice on the enforcement of State aid law by national courts OJ C85/01, 9.4.2009.

<sup>36</sup> Notice from the Commission on a simplified procedure for treatment of certain types of State Aid, OJ C136/03 16.6.2009.

<sup>37</sup> Code of Best Practice for the conduct of State aid control procedures OJ C136/04, 16.6.2009.

<sup>38</sup> Notice on the enforcement of State aid law by national courts, OJ C 85/01, 9.4.2009 para. 43- 62

<sup>39</sup> Notice on a Simplified Procedure OJ C136/03, 16.6.2009, para 12 and 21.

<sup>40</sup> Fabio Filpo, “The Commission 2009 Procedural Reform from a Private Party Perspective: Two Steps Forward, One Step Back?” 2010 2 EStAL 323, at 328.

<sup>41</sup> Code of Best Practice for the conduct of State aid control procedures OJ C136/04, 16.6.2009, para 2. 3 and 7.

efficient the preliminary and the formal investigation and the complaints procedure.

A pre-notification phase is introduced by the Code for the first time emphasising the added value of the pre-notification contacts with Member States to pave the way for a more quick treatment of the notifications.<sup>42</sup> Pre-notification contacts create the possibility to discuss and guide the Member State concerned about the notification process related to the scope of the information to be submitted or on whether the case is *prima facie* eligible for the simplified procedure. However, during this phase also substantive issues can be discussed<sup>43</sup>. The Code provides for a timeline of two months, but pre-notification may last also several months depending on the complexity of the case.<sup>44</sup> At the end of this phase the Commission provides the Member State concerned with an informal preliminary assessment of the project, which is not an official position of the Commission, but simple informal guidance on the completeness of the draft notification and the *prima facie* compatibility of the planned project with the Internal Market<sup>45</sup>. The Commission provides also for the involvement of the aid beneficiaries during the pre-notification discussions but it doesn't give further details.<sup>46</sup> The pre-notification phase has been criticised as the focus on the pre-notification contacts might reduce the rights of third parties.<sup>47</sup> If the pre-notification phase to gather information is used broadly than it might duplicate the preliminary examination phase foreseen by the Procedural Regulation. Furthermore, Article 4(6) of the Procedural Regulation provides for aid which has been approved by default by the Commission. Consequently Member States have the right to put into effect new aid if the Commission has not been able to take a decision within a period of two months following the notification of new aid. Whereas, during the pre-notification phase the Commission is not bound by this Article, therefore it has more time and less responsibility. In addition the discussion of the merits of the case during the pre-notification communications denies third parties from the possibility to exercise even their limited rights acknowledged by the Procedural Regulation and at the same time deprives the Commission from a source of information.<sup>48</sup>

Section 4 of the Code establishes a mechanism of mutually agreed planning which is a form of structured cooperation between the Commission services and the Member State by which they can agree on the priority of the treatment of the case concerned, in return the Member State should suspend the examination of other cases notified from it. This mechanism can be used in cases which represent a novelty or which are technically complex or sensitive, for which a clear preliminary assessment proves impossible at the end of the pre-notification

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<sup>42</sup> *Ibid.*, at para 10.

<sup>43</sup> *Ibid.*, at para. 13.

<sup>44</sup> *Ibid.*, at para 14.

<sup>45</sup> *Ibid.*, at para. 16.

<sup>46</sup> *Ibid.*, at para. 15.

<sup>47</sup> Filpo, note 39, at 329.

<sup>48</sup> Filpo, note 39, at 330.



phase. However the Code doesn't regulate the time frames.<sup>49</sup> From a perspective of the rights of the third parties this mechanism may raise concerns as it establishes the suspension of non-priority cases without the involvement of the beneficiary of aid.<sup>50</sup>

Section 7 of the Code of Best Practices, is about the handling of complaints. The Commission undertakes to adopt a decision under Article 4 of the Procedural Regulation, within twelve months from the receipt of the complaint, in priority cases and an initial administrative letter setting out its preliminary views on non-priority cases<sup>51</sup>. Such a time limit is inconsistent with the time limit provided by Article 4(5) of the Procedural Regulation, according to which the Commission should take a decision within 2 months from the notification and also with the time limit provided by Article 10(1) of the above-mentioned regulation which imposes on the Commission the duty to examine information about unlawful aid as soon as possible.

The Code of Best Practices doesn't provide for strict binding time limits. The time frames provided are subject of the discretion of the Commission and the Member States. In certain cases they also risk to cause damage to potential aid recipients and third parties.<sup>52</sup> The Code provides for the following deadlines:

- Pre-notification contacts should typically not exceed two months, however, depending on the complexity of the case pre-notification contacts may last several months;<sup>53</sup>
- A comprehensive information request for preliminary assessment will be sent within 4-6 weeks after the date of the notification. (Member State has one month to respond);<sup>54</sup>
- The preliminary investigation phase must be started within two months following a complete notification,<sup>55</sup> however the Commission may send different requests for information to the Member State during the preliminary examination and this period may be extend with the consent of the Member State concerned and the Commission;<sup>56</sup>
- After initiation of the formal investigation procedure the Commission must endeavour to adopt a decision within a period of 18 months,

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<sup>49</sup> Code of Best Practice for the conduct of State aid control procedures OJ C136/04, 16.6.2009 para. 19-24.

<sup>50</sup> *Ibid.*, at para. 21.

<sup>51</sup> *Ibid.*, at para. 47 and 48.

<sup>52</sup> Kristina Nordlander and David Went, "Checks and balances in EU State aid procedures: should more be done to protect the rights of aid recipients and third parties?" (2011) *Era Forum* 361.

<sup>53</sup> Code of Best Practice for the conduct of State aid control procedures OJ C136/04, 16.6.2009 para. 14.

<sup>54</sup> Code of Best Practice for the conduct of State aid control procedures OJ C136/04, 16.6.2009 para. 25.

<sup>55</sup> Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999, Art. 4(5).

<sup>56</sup> Code of Best Practice for the conduct of State aid control procedures OJ C136/04, 16.6.2009, para. 25-28.

however this time limit may be extended by common agreement between the Commission and the Member State concerned.<sup>57</sup>

Regarding the role and the rights of the third parties the Procedural Reform of 2009 has been seen as a lost opportunity in increasing their insufficient procedural rights<sup>58</sup>. In the end from this procedural reform the losing teams are three: the Commission, the Member States, and the third parties.<sup>59</sup> Clarifying the role of third parties and increasing their rights would be not only to the benefit of state aid beneficiaries, their competitors and complainants but also to the benefit of the efficiency of the State aid control consequently to the benefit of the Commission itself. On the other hand continuing to consider the flow of communication between the Commission and the Member States and lack of any binding deadlines will also contradict the interests of the Member States themselves.

#### 4. State aid modernisation of 2013 – another reform

On 8 May 2012 the Commission adopted a Communication setting out an ambitious reform of the State aid.<sup>60</sup> The objective of the State aid reform was: (i) to foster sustainable, smart and inclusive growth in a competitive Internal Market, (ii) to focus Commission *ex ante* scrutiny on cases with the biggest impact on the Internal Market whilst strengthening the Member States cooperation in State aid enforcement and (iii) to streamline the rules and provide for faster decisions.<sup>61</sup> This reform has resulted in the revision of several State aid documents.<sup>62</sup>

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<sup>57</sup> Code of Best Practice for the conduct of State aid control procedures OJ C136/04, 16.6.2009, para. 43.

<sup>58</sup> Filpo, note 39, at 330.

<sup>59</sup> Bartosch, note 22, at 2.

<sup>60</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM (2012) 209, 8.5.2012 (Communication on State Aid Modernisation).

<sup>61</sup> *Ibid.*, para. 8

<sup>62</sup> Such as the “Enabling Regulation” through Council Regulation No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, OJ 2013 L204/11, Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ 2014 L187/1, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ 2013 L 352/1 Guidelines on regional State aid for 2014-2020, OJ 2013 C209/1, Guidelines for the application of State rules in relation to the rapid deployment of broadband network, OJ 2013 C 25/01, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ 2014 C249/01, Framework for State aid for research and development and innovation, OJ 2014 C198/01, Guidelines on State aid for environmental protection and energy, 2014-2020 OJ 2014 C200/01, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ 2014 C188/02, Guidelines on State aid to promote risk finance investments, OJ 2014 C19/04, Guidelines on State aid to airports and airlines, OJ 2014 C99/03.

#### ***4.1 The new Procedural Regulation – amendments of the complaint procedure***

The new Procedural Regulation<sup>63</sup> uses the term “complaint” for the first time in the secondary legislation. Pursuant to the amended Article 10(1) and (2) “the Commission shall examine without undue delay any complaint submitted by any interested party in accordance with Article 20(2) and shall ensure that the Member State concerned is kept fully and regularly informed of the progress and outcome of the examination”. However, the new Procedural Regulation still leaves unclear the legal nature of the Commission letter based on Article 20(2) declaring its intention to close the case and in particular whether that letter can be reviewed by the European Courts. The complainant right to obtain a copy of the decision about the case concerning the subject matter of the complaint is still recognised by Article 20(2) (3). Analysing the minor amendments of Article 20(2) of the Procedural Regulation it is clear that the Commission doesn’t refer to the *Athiniki Techniki* judgment which is important as the Court states that the Commission has the duty to associate the complainant with the proceedings and that any complaint should lead to a decision. It seems that the Commission wants to keep the possibility to reject a complaint without adopting a decision.<sup>64</sup>

The new Procedural Regulation formalises some steps regarding the handling of complaints. First, an admissibility test of the complaint is introduced by the Procedural Regulation. Consequently the complainant should demonstrate that he is an interested party within the meaning of Article 108(2) TFEU and Article 1(h) of the Procedural Regulation.<sup>65</sup> Second, according to the amendments of Article 20(1) and (2) of the Procedural Regulation any interested party (including complainant) should complete a form of complaint containing some mandatory information that is defined in the implementing regulation issued by the Commission.<sup>66</sup> The aim of the Commission is to improve the quality of the complaints submitted and to increase transparency and legal certainty.<sup>67</sup> Submissions not meeting the conditions are going to be treated as market information and should not necessarily lead to *ex officio* investigations.<sup>68</sup> Third, Article 20 (2) of the new Procedural Regulation formalises the possibility for the Commission to consider complaints withdrawn if the complainant doesn’t

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<sup>63</sup> Council Regulation 2013/734/EC of 22 July 2013 OJ L204/15, 31 July 2013, amending Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999.

<sup>64</sup> Maria J. Segura Catalán · Marianne Clayton, “State aid modernisation: another reform?” 2013 14 ERA Forum 14/2013 21, at 31.

<sup>65</sup> Council Regulation 2013/734/EC of 22 July 2013 OJ L204/15, 31 July 2013, amending Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999, Recital 15.

<sup>66</sup> *Ibid.*

<sup>67</sup> Council Regulation 2013/734/EC of 22 July 2013 OJ L204/15, 31 July 2013, amending Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999, Recital 15, Recital 14.

<sup>68</sup> *Ibid.*

return to it with meaningful information or fails to collaborate during the procedure.

It is uncertain if the new steps added by the new Procedural Regulation will contribute to reduce the Commission from its workload related to the handling of complaint. It is further unclear how the Commission under the new Procedural Regulation will use its discretion to take up complaints and to set priorities as the concept of prioritisation doesn't seem to influence the wording of the new Procedural Regulation.<sup>69</sup> In its Code of Best Practices the Commission introduced the possibility to reject State aid complaints for lack of Community or Union interest and also established the criteria to that effect. The Code reflects the judgment of the General Court in *Bouygues* where it accepted the power of the Commission to give different degrees of priority to the complaints brought before it and to set priorities in the light of its work load and difficulty of the case to postpone dealing with a measure, which according to the opinion of the Commission did not raise serious difficulties.<sup>70</sup> This reasoning of the General Court wasn't criticised later by ECJ.<sup>71</sup> However, maybe cases such as *Deutsche Bahn*,<sup>72</sup> *Athinaiki Techniki*,<sup>73</sup> *NDSHT*,<sup>74</sup> promoting legal effective protection of the complainants might be a factor explaining this stepping back of the Commission in relation to the concept of prioritisation.

### **5. Commissions increased investigatory powers - no procedural guarantees for third parties?**

According to the new Procedural Regulation the Commission is allowed to request information, once the formal investigation has started, not only from the notifying Member States but also from other Member States, undertakings, association of undertakings, on the condition that the information submitted by the notifying Member State during the preliminary investigation was not sufficient. According to recital 3 of the new Procedural Regulation information requests can be used in technically complex cases subject to substantive assessment. The information covers all market information necessary to enable the Commission to complete its assessment. The new Procedural Regulation makes a distinction between simple requests to undertakings to provide information and circumstances where the Commission may require an undertaking to provide information by means of a decision.

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<sup>69</sup> Hanns Peter Nehl, "2013 Reform of EU State Aid Procedures: How to Exacerbate the Imbalance between Efficiency and Individual Protection" (2014) 2 EStAL 235, at 245.

<sup>70</sup> Case T-475/04, *Bouygues SA v Commission* [2007] ECR II-2097, para. 158 and 159.

<sup>71</sup> Case C- 431/07 P – *Bouygues v Commission* [2009] ECR I-2665.

<sup>72</sup> Case T-351/02, *Deutsche Bahn v Commission* [2006] ECR II-1047.

<sup>73</sup> Case C-521 P *Athinaiki Techniki v Commission* [2008] ECR I-5829.

<sup>74</sup> Case T-152/06 *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v. Commission*, [2009] ECR II-1517.

However, the power of the Commission to request information is limited.<sup>75</sup> Article 6a (2) of the new Procedural Regulation provides that the Commission is allowed to request information only during the formal investigation procedures that have been identified by the Commission as being ineffective to date, and on the other hand an authorisation from the Member State is required prior the request for information is sent to the aid beneficiary. These limitations were dictated by the Member States which wanted to control and to limit the information flow between the interested parties and the Commission.<sup>76</sup>

The Commission doesn't intend to change the bilateral nature of the State aid procedure.<sup>77</sup> Consequently, in order to preserve the procedural status of the Member States, Article 6a (8) imposes an obligation on the Commission to provide the Member State concerned with a copy of its request or decision for information at the time of its adoption and Article 6a (3) provides that the answers given by undertakings based on a request for information shall be submitted at the same time to the Commission and the Member State. According to Article 6a (5) the Commission may send to Member States simple requests for information based on Article 6a (6) giving them a deadline of no more than one month with the possibility to remind the Member State concerned after the expiry of that deadline. Furthermore, in order to protect the right of defence of Member States according to Article 7 (8) Member States have the possibility to make known their views before the adoption of the final decision within a deadline no more than one month, on the information received by the Commission and provided to that Member State according Article 6a (3). The new Procedural Regulation unfortunately doesn't provide for such right regarding third parties. The Commission will use its power to request information having regard to the principle of proportionality.<sup>78</sup>

Exchange of information between various parties to the State aid administrative procedure raises issues of secret business protection and other information confidential information. To that end Article 7(10) of the new Procedural Regulation provides that the Commission shall pay attention to the legitimate interests of the undertakings in the protection of their business secrets and other confidential information. Nevertheless, the new Procedural Regulation provides Article 7(9) allows the Commission through a specific procedure to exceptionally use confidential information that cannot be aggregated or anonymised even without the consent of the respondent who has submitted that information.

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<sup>75</sup> The initial proposal of the Commission provided for a wide scope of its investigatory powers. See proposal of 5 December 2012 for a Council Regulation amending Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999 (COM(2012) 725 final).

<sup>76</sup> Nehl, note 68 at 246.

<sup>77</sup> Council Regulation 2013/734/EC of 22 July 2013 OJ L204/15, 31 July 2013, amending Council Regulation 1999/659/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83/1, 27 March 1999, Recital 14.

<sup>78</sup> *Ibid.*

The new Procedural Regulation empowers the Commission to impose fines for submitting incorrect or misleading information and in case the request for information is sent by a decision of the Commission it has also the power to impose periodic penalties. These sanctions can be used only towards third parties the new Procedural Regulation provides no measures in case of hesitant or false information issued by the Member States. The Commission based on its experience in the field of mergers and antitrust when deciding fines and periodic penalties is going to take into account the following indicators: fines up to 1% of the total turnovers and periodic penalty payments up to 5% of the average daily turnover in the preceding business year.

The new Procedural Regulation creates an asymmetry between two measures: the limited rights in comparison with legally and economically obligations of individuals in the procedure and secondly the scope of obligations for State parties in comparison with those for private parties.<sup>79</sup>

In addition, all the decisions taken by the Commission in the framework of its new powers provided by the new Regulation such as: a request for information by a formal decision, decisions to impose fines or periodic penalty payments or decisions authorising disclosure of allegedly confidential information can be reviewed by the European Courts. This creates a shift into the basic principle governing EU State aid law according to which all the Commission decisions has to be addressed by to the Member States concerned only and aggravates the overall asymmetry and imbalance established by the new Procedural Regulation.<sup>80</sup>

## 6. Conclusions

State aid law provides for very limited procedural rights to third parties. While in 2009 the Commission chose a soft-law reform of the State aid procedures, in 2013 the Procedural Regulation after 14 year of its implementation was finally amended. The new Procedural Regulation is very disappointing from a rule of law perspective. It doesn't reflect the recent case law of the European Courts which has strengthened the rights of complainants to judicial review and their right to be associated with the proceedings. On the contrary the Commission still maintains its practice of dismissing cases through administrative letters disregarding the right of the complainant to obtain a formal decision. The new Procedural Regulation still maintains the bilateral procedure of State aid procedures between the Commission and the Member State concerned, leaving third parties without procedural guarantees. Furthermore, while increasing its investigatory and sanctions powers the Commission provides for more procedural duties for third parties. On the other hand it is not clear why the Commission in increasing the efficiency of the handling of complaints doesn't use this reform to further refine the concept of prioritisation introduced in its Code of Best Practices.

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<sup>79</sup> Thomas Jaeger, "The Inquisition Retakes Brussels (Via the New Procedural Regulation)" (2013) 3 EStAL 441-443.

<sup>80</sup> Nehl, note 68 at 247.

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