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## 16 Judicial review of Commission Decisions in State aid

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This chapter focuses on annulment procedures brought against Commission Decisions under Article 263 TFEU.<sup>1</sup> Reflecting the rapid evolution of key aspects of this litigation, it illustrates and contextualises the background and origins of the problems the case law attempts to address (I) and proposes paths to simplification and rationalisation of the developments of the past years with regard to standing (II) as well as the extent of judicial review (III)<sup>2</sup> before drawing general conclusions for the future role of general principles of law (IV) in this area. The chapter shows the increasing importance of information-related general principles of law in this field.

### I. BACKGROUND

Judicial review is an essential aspect of ensuring accountability of the exercise of public power as well as legality of administrative activity, especially, firstly, given that State aid Decisions are often taken in politically highly sensitive areas affecting *inter alia* Member State tax systems, regional policies or incentives for social developments, to name just a few. The importance of effective judicial review arises also, secondly, from the fact that in State aid cases the Commission decides in the context of an investigative and not an adjudicative procedure, requiring comparatively strict oversight over the exercise of far reaching powers conferred on it.

Judicial review in State aid cases, however, takes place in the context of asymmetric information. By nature of the procedural arrangements, the Commission will be made aware by a Member State only of the main issues of an intended aid but an economic and a legal assessment of such planned aid requires near full information about the conditions and the potential effect on the markets. Judicial review of Commission Decisions, in turn is based on Courts obtaining sufficient information about these factors and the Commission Decision in response to it, in order to exercise its review. The more intense the degree of review with regards to the facts

and law of the case, the more a Court will require detailed information about the background and motivation of a Commission Decision.

In State aid law, limitations on available information are intensified through a procedure favouring the relation between the Commission and the Member States. Provision of information through Member States may be partial and biased, since a Member State generally has an interest in a specific outcome of the procedure.<sup>3</sup> Private parties such as beneficiaries, their competitors and trade associations are virtually excluded from the preliminary phase of investigation. They enjoy procedural rights, which allow them to learn about the details of an investigation and submit their views only in the context of an in-depth investigation under Article 108(2) TFEU.<sup>4</sup> Member States are thus initially the most valuable source of information for the Commission, which in the first phase is deprived of the contribution of private parties.

In summary, many of the concrete problems in the area of the State aid litigation arise from problems related to the gathering and use of information. The issue of information re-appears throughout this chapter as a central theme in considerations on understanding and improving procedural provisions and judicial review in the State aid arena.

## II. LITIGATION AGAINST WHAT BY WHOM? ACTS AND STANDING

In State aid litigation against institutions, standing problems are rife. The reason is the very definition of Article 263, fourth paragraph TFEU requiring that any non-privileged actor display that an individual act or regulatory act which does not require further implementing measures is of direct and individual concern to them.<sup>5</sup> To be able to navigate the complexities of judicial review of Commission Decisions in State aid, two major preliminary aspects have to be understood: first, the question what kind of acts or non-acts can be subject to an action for annulment. This is becoming increasingly difficult to discern given the capacity of measures which are not formally Decisions to affect individuals. Second, the question of standing in which the ever-increasing complexity of the case law must be critically reviewed with regard to legal certainty.<sup>6</sup> We shall address these two related aspects separately.

### II.i Acts subject to judicial review

Many of the problems in reviewability of acts and standing stem from the distinction in State aid procedure between preliminary examination and

formal investigation. Whilst the first of these phases aims at allowing the Commission to form a *prima facie* opinion on the case, the second actually recognises the rights of third parties, thereby having the effect also of widening the breadth of information to the Commission.<sup>7</sup> Given the formal absence of procedural rights in the phase of preliminary examination and the almost total lack of information obligations in favour of third parties,<sup>8</sup> the major issues in this area appear to stem from Decisions refusing the opening of a formal investigation. Accordingly, the position of complainants,<sup>9</sup> mainly competitors to the beneficiary of the aid, is particularly weak. This remarkably contrasts with the vital role played by these parties within the procedure.<sup>10</sup>

### **II.i.a. Opening and closing of procedural steps**

The developments of protection of rights of individuals in various steps of the procedure, especially closing a procedure prior to the opening of a formal investigation, have always been problematic. Even before the adoption of Regulation 659/1999,<sup>11</sup> State aid investigation procedures were defined as taking place more or less exclusively between the Commission and Member States. The CJEU was instrumental in defining this position, for example, in *Sytraval* in which it held that ‘decisions adopted by the Commission in the field of State aid,’ were addressed exclusively to the Member States.<sup>12</sup> A consequence of this is that in the field of State aid the Decision addressed to a Member State could not be considered as an implicit rejection of a complaint by an individual. Although the CJEU thereby confirmed *Plaumann*, requiring proof of direct and individual concern, its approach may be problematic in view of the *IBM* case law.<sup>13</sup> Under the latter test, acts adopted by the EU institutions are reviewable, if they are binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position. In order to determine the capacity of an act to be reviewed, the EU judicature looks at the substance of a contested act, in lieu of the form, as well as the intention of its author.<sup>14</sup>

Under Regulation 659/1999, the situation has become more complex. For example, the Commission is required to examine, without delay, the information made available by a complaint,<sup>15</sup> and conclude the preliminary examination by means of a Decision.<sup>16</sup> This has prompted the EU judicature to apply the *IBM* doctrine in order to ascertain the nature of the act adopted by the Commission to conclude the phase of preliminary examination. Consistently, the General Court in *Deutsche Bahn*<sup>17</sup> has reviewed the acts addressed to the complainant examining whether the Commission adopted a *reasoned and definitive position* on the State measure, in conformity with the requirements of *IBM*.<sup>18</sup> The crucial point

in the reasoning of the General Court is that where the Commission had *expressly* held in a letter addressed to the complainant that the State measure did not constitute aid, this would imply that the Commission had actually taken a Decision clearing the measure in the sense of Article 4(2) of Regulation 659/99, and that such Decision is contained in the letter made subject to judicial review. In its case law, the General Court also underlines the exceptional nature of the reviewability of the letters addressed to complainants, explaining that review of these was necessary in case of the absence of a Decision addressed to the Member State.<sup>19</sup> Should the Commission have adopted one, the complainant would be required to challenge the Commission Decision directed at the Member State and not the letter of information.<sup>20</sup> Where therefore an explicit decision towards the Member State exists, a letter to the complainant should be considered as a simple letter communicating that, according to the available information, there are no sufficient grounds for the Commission to take a view on the issue.<sup>21</sup>

While such interpretation of the procedural law in State aids appears to be deeply influenced by the configuration of the State aid procedure as taking place between Commission and Member States, it does not seem to fully comply with the actual rationale designed by the European lawmaker in Regulation 659/1999. The obligation enshrined in Article 10(1) of Regulation 659/99 appears to be focused on a precise and strict duty of diligent investigation,<sup>22</sup> which requires the Commission to thoroughly review and carefully analyse all information provided by the complainant, as well as by all other sources.<sup>23</sup> Similarly, Article 13(1) of Regulation 659/99 urges the institution to conclude its assessment by means of Decision.<sup>24</sup> The two provisions appear to be the poles of a decision-making mechanism based on an adequate stream of information, whereby complainants occupy an important position as sources. In light of this, not appears to exist for a conclusion of the procedure other than by a Decision under Article 4 of Regulation 659/99.

More recently, in this context, the CJEU (in *Athinaiki Techniki*) seems to have considered that preliminary examination must in any case be concluded by a Decision of the Commission. By acknowledging the reviewability of the refusal of the Commission to open a formal investigation, the Court also appears to consider that such a Decision may infringe upon the rationale of the State aid procedure. The rules governing the treatment of complaints, as provided in Articles 10(1) and 13(1) of Regulation 659/1999 actually aim at ensuring that the Commission examines and takes a Decision on the allegedly unlawful State measure, thereby clearing the aid, or, where necessary, opening a formal investigation over it.<sup>25</sup> The logic springing from such provisions reflects the awareness of the risk that the determination not

to investigate in-depth the State measure might actually entail that unlawful new aid is granted, as a consequence of the Commission's failure to properly assess the information in its possession. Therefore, given the possibility that the State measure concerned actually is State aid, in view of the Court, the Commission could not close the examination by simply informing the complainant of the lack of all the necessary information to take a Decision. Conversely, the Commission is called to actively cooperate with the complainant, in order to reduce such informational gap. Thus, where the information provided by a complainant is insufficient for the Commission to take a view on an issue, it would be required to invite the complainant to supply additional comments.<sup>26</sup> According to the Court, such obligation results from Article 20(2) of Regulation 659/99. This approach overturns previous case law interpreting Article 20(2) as allowing the Commission to close the procedure by means of a simple communication.

In conclusion, the finding of such a new obligation can be seen as aiming at reinforcing the stream of information initiated by the submission of the complaint, in order to put the institution in the position to adopt a decision definitively clearing the State measure or, where serious doubts exist as to the compatibility of the Decision, opening formal investigations. Importantly, the Court appears to be fully aware that the weak position of complainants during preliminary examinations could affect their role as sources of precious information for the procedure.<sup>27</sup> Therefore, in *Athinaiki Techniki* the Court consolidated the position of complainants by acknowledging that these, as parties concerned, 'have a right to be *associated with* [the proceedings] in an adequate manner taking into account the circumstances of the case at issue'.<sup>28</sup> Even if such statement does not entail the recognition of any status during preliminary examinations, undoubtedly it represents an important step forward in the consideration of third parties' rights in that phase.

### **II.i.b. Old and new aid**

The construction of the State aid procedure so far described appears to apply in principle only to cases where information has been adopted on allegedly unlawful new aid. As the General Court clearly stated in *NDSHT*,<sup>29</sup> Article 13(1) of Regulation 659/99 actually prescribes that the Commission adopts a Decision only with respect to new aid, thereby excluding existing aid from the application of these procedural requirements.<sup>30</sup> The role of complainants as information suppliers in the course of State aid proceedings is incompatible with the discretion the Commission generally enjoys when handling existing aid.<sup>31</sup> In turn, such a different attitude towards existing aid is justified in the light of the fact that it is presumed that the aid already has been assessed on the basis of all relevant information.

However understandable this distinction on the legal point may be, the reasoning of the General Court does not seem consistent with the judgments rendered in the field of unlawful new aid. Firstly, the fact that, upon a complaint the Commission qualifies the State measure as existing aid appears to be a reasoned and definitive position of the type envisaged in *Deutsche Bahn*.<sup>32</sup> Nothing seems to oppose application of the latter judgment to the facts of *NDSHT*.

Secondly, the approach of the General Court appears particularly restrictive where compared to the attitude shown by the CJEU in *Athinaiki Techniki*. The reasons underlying the judgment in the latter case actually appear to be fully applicable to the facts in *NDSHT*: a broader involvement of the complainant in the procedure could contribute decisively to improve the stream of information. This, in turn, would help in clarifying whether the measure is existing or illegal new aid. The application of the reasoning in *Athinaiki Techniki* does not appear inconsistent with the qualification of the State measure as existing aid. Consistently, the General Court could have urged the Commission to adopt a proactive stance, thereby requiring further information to the complainant. Conversely, however, the General Court endorsed the traditional interpretation of Article 20(2) of Regulation 659/99, which allows the Commission to close preliminary investigations for not enjoying all the information necessary to take a view on the issue. This conclusion is in contrast with the CJEU approach in *Athinaiki Techniki*, which, before the General Court's decision in *NDSHT*, gave quite a different interpretation of the aforementioned provision.<sup>33</sup> If the distinction between new and existing aid can partially justify the different outcome, it does not appear to allow for such a different interpretation of a provision of the EU legislation. This clearly contrasts with the principle of legal certainty, which the General Court itself appears to carefully respect in this area of law.<sup>34</sup>

Thirdly, the approach of the General Court regarding existing aid, as expressed in *NDSHT*, appears also to be not compatible with that of the CJEU on the same issue. In *CIRFS*, for example, the Court held that the decision to classify an aid as existing aid, thereby taking the view that the aid was not subject to the prior notification procedure provided for by Article 108(3) TFEU, is a final refusal to initiate the procedure provided for by Article 108(2) TFEU.<sup>35</sup> On this basis, it rejected the Commission's argument qualifying the act as a preparatory measure, which, as such, could not have been subject to judicial review.<sup>36</sup>

### **II.i.c. Reviewability of informative acts**

Informative acts exist in many forms under the title of: Guidelines, circulars, disciplines and others. Information tools have gained great

significance for national authorities.<sup>37</sup> The General Court has confirmed the Commission's competence to adopt such guidelines, as 'such measures reflect the Commission's desire to publish directions on the approach it intends to follow'.<sup>38</sup> Such acts have a particular importance in the area of State aid, in that they codify the rules evolved in day-to-day practice relating to the exercise by the Commission of the powers conferred on it by Article 108 TFEU.<sup>39</sup> This does not make them generally subject to judicial review in themselves. They may indirectly be reviewed through individual cases.<sup>40</sup> The situation will differ, as the example of *CIRFS* shows, where the discipline was not simply a unilateral tool established by the Commission but was more akin to an agreement concluded between the Commission and certain Member States. The Court concluded from this that the 'discipline,' which was contained in a letter sent by the Commission to the Member States, had binding legal effects.<sup>41</sup> Where 'the rules set out in the discipline and accepted by the Member States themselves have the effect, *inter alia*, of withdrawing from certain aid falling within its scope the authorisation previously granted and hence of classifying it as new aid and subjecting it to the obligation of prior notification'.<sup>42</sup> Information plays the key part in understanding this reasoning. While a binding agreement such as that in *CIRFS* can be subject to judicial review, mere unilateral information about future intentions of the Commission cannot.

## II.ii. Standing

While privileged actors like Member States generally do not face any specific difficulties with regard to standing,<sup>43</sup> individual parties (such as beneficiaries and competitors to the beneficiary) or sub-national legal persons (regions, local bodies and authorities), have to prove their direct and individual concern. The very specific relation between the Commission and the Member States, who are officially the parties to a State aid procedure, poses its specific problems to individuals with respect to standing. Individual concern by a private individual is, in the case law of the Courts, generally accepted in two sets of circumstances: either, where a Commission Decision affects them by reason of certain attributes which are particular to the individual, or, where circumstances differentiate and distinguish an individual in the same way as a person would be when being the direct addressee of a Decision.<sup>44</sup> Particular criteria have been developed in the area of State aid review in order to adapt this general approach to the peculiar substantial and procedural features of the policy area. State aid case law on standing often tends to focus on the evaluation of the economic impact of the proposed aid.

### II.ii.a. The position of beneficiaries of aid and of competitors

Sketched in broad strokes, recipients of aid are considered to be substantially affected by the Decision adopted declaring the aid incompatible at the end of an Article 108 (2) TFEU procedure.<sup>45</sup> As already observed, beneficiaries also enjoy standing with respect to decisions to open formal investigations, insofar as the examination concerns unlawful new aid, in which case the extension of the standstill obligation<sup>46</sup> entails substantial effects on the economic sphere of the aid recipients.<sup>47</sup> On the contrary, a Decision opening a formal investigation concerning existing aid does not entail any substantial change in their situation, because here the standstill obligation actually does not apply. Consequently, beneficiaries must show a specific interest to challenge it. Finally, beneficiaries of aid generally do not enjoy standing vis-à-vis Decisions not to open a formal investigation, as such Decision entails the grant of the aid. However, in the event that the State measure was qualified as aid, though compatible, beneficiaries might be interested in furthering the proceedings, in order to obtain a decision that the Commission completely clears the measure from the qualification of aid. In this case, beneficiaries are required to prove that they have a vested and present interest in the proceedings.<sup>48</sup>

The position of competitors appears weaker than that of beneficiaries. For the purpose of standing, it may be more difficult for competitors both to prove their competitive position and to show that they are individually concerned by a Commission's Decision clearing the State measure. The burden of the *Plaumann* case law would be particularly difficult to bear during the phase of preliminary examination due to the absence of procedural rights of complainants and the extremely limited information available. The lack of information of the complainant appears to be particularly severe. Information accessible to the complaining competitor is necessarily limited to the elements which have been communicated by and exchanged with the Commission in the dialogue which followed the submission of the complaint. In principle, the State aid procedure does not provide for any form of publication of either notified aid or the carrying out of preliminary examinations, subsequent to the submission of a complaint. Decisions not to open formal investigations are published only as a summary notice,<sup>49</sup> while the complainant enjoys a right to be informed of such a Decision.<sup>50</sup> Upon acknowledgment of such weakness, the Court, in the case law *Cook* and *Matra*, has elaborated a more lenient test for the standing of competitors vis-à-vis Decisions not to open formal investigations.<sup>51</sup> Accordingly, competitors (as well as other third parties) may enjoy standing against decisions not to open a procedure under Article 108(2) TFEU, insofar as these can prove to be concerned parties according to the meaning of Article 108(2) TFEU.<sup>52</sup> Competitors may thus avoid the



burdensome test of *Plaumann* and challenge the decision not to give suite to the proceedings, where they claim the existence of serious difficulties as to the qualification of the measure. The more lenient *Cook* and *Matra* test appears therefore as a remedy found against the peculiar information constraints that a complainant has to bear in the preliminary examination phase.

Crucially, the reasoning laying down the construction of such a lenient standing test is deeply rooted in the acknowledgement that the complainant is not in the position to be fully aware of the particular features of the case. Thus, the complainant could not be able to substantiate why its position is individually concerned is the Decision.<sup>53</sup> The test elaborated in *Cook* and *Matra* is thus based on such acknowledgement of the difficulties of obtaining information, which the complainant itself has to bear. Furthermore, this appears to respond to the same logics of the (already described) case law on reviewability of the Commission's decisions. The lenient test for standing actually allows for the judicial review of the Commission Decision not to look in-depth into the State measure. By means of the application against such Decision, the Courts are able to assess the existence of serious difficulties as to the compatibility of the measure with the common market.<sup>54</sup>

#### **II.ii.b. The complex role of the parties' pleas for the definition of standing**

Notwithstanding the undeniable goodwill of the Court, the application of the *Cook* and *Matra* test for standing has shown itself to be complex. This is true especially vis-à-vis the relationship between the specific requests of the parties, as expressed in the pleas, and the determination of the subject-matter of the application. The subject-matter is actually defined by the specific pleas that the parties submit in their applications for annulment. In general, the parties are obliged to forward pleas supporting their case and to select the arguments to support the pleas. However, the subject-matter of an application for the annulment of a Decision ending the phase of preliminary examination is strictly influenced by the particular nature of the Decision challenged.<sup>55</sup>

Even if the Commission is substantially called to carry out the same evaluations required in the phase of formal investigations, the examination is only preliminary, that is, aimed at letting the institution form a *prima facie* opinion.<sup>56</sup> The Commission is actually urged to open the phase of formal investigation where there are doubts as to the compatibility of the measure with the common/internal market, unless no such doubts are raised as to the fact that the measure is not an aid, or its compatibility with the common/internal market.<sup>57</sup> Thus, the subject-matter of an application for the annulment of a Decision not to open formal investigations

is necessarily limited to the review of the potential existence of serious difficulties to determine the compatibility of the aid measure. As a consequence, the main purpose of the parties in challenging such a decision should be no more than to obtain the opening of a formal investigation, in order to be put in a position to exert the procedural rights conferred upon them by Article 108(2) TFEU.<sup>58</sup>

Therefore, the specific requests presented by the parties in their application against a Decision not to open a formal investigation must aim at proving that serious difficulties exist as to the compatibility of the aid, thereby compelling the Commission to look more thoroughly into the State measure.

A look to the case law shows that the requests of the parties are generally broader than such a definition of the subject-matter, as they include pleas ranging from the claim of infringement of the procedural rights, to issues of substance, such as the application of Article 108(1) and (3) TFEU.<sup>59</sup> Such a wide range of pleas is comprehensible, given that the Commission clears the aid with a Decision similar in content to the Decision adopted at the end of formal investigations. However, as the subject-matter of the dispute is limited, the scope of the judicial review also will be restricted to verifying the existence of serious difficulties and ought not to be extended to a full review of the issues of substance. This should actually take place only once a decision has been adopted following the opening of formal investigations. Otherwise, the Courts would go beyond the determination of the existence of serious difficulties and review the Commission's assessment in light of Article 108(1) and (3) TFEU. Thereby they would effectively replace the potential future Commission decision with their own. This was clearly stated in the Opinion of Advocate General Mengozzi of 17 July 2008 in *British Aggregates Association*:

[there is] a need to ensure that, where an action is brought by a person who is simply relying on his status as a concerned party within the meaning of [Article 108(2) TFEU], the [Union] judicature's review of the contested decision does not go beyond what is needed to ensure that the procedural rights conferred by that provision are complied with. That would be the case where, rather than merely determining whether the conditions justifying non-initiation of the formal investigation procedure were satisfied – namely the absence of serious difficulties in classifying the measure as aid and/or in assessing its compatibility with the common market – the [Union] judicature were to establish the existence of State aid (or of individual elements of State aid which the Commission had found to be lacking), or to find that the conditions relied upon by the Commission, in declaring the aid compatible with the Treaty, were not satisfied. In such circumstances, the applicant would in fact, secure not only initiation of the formal investigation procedure, where appropriate, but the additional result that the Commission would be bound by those

findings on the part of the [Union] judicature and the substance of the decision to be adopted on conclusion of that procedure would, in part at least, be predetermined; that is to say, the applicant would have brought about the predetermination of a decision which it would not have been entitled to challenge solely by virtue of its status as a 'concerned party' within the meaning of [Article 108 (2) TFEU].<sup>60</sup>

In order for the lenient test to apply, the CJEU actually therefore requires that the parties *expressly* aim at securing the procedural rights provided for in Article 108 (2) TFEU, thereby obtaining the opening of formal investigations. This implies that the *locus standi* in State aid cases under Article 263 TFEU is therefore dependent on the pleadings of the applicant. Accordingly, these could gain standing only where, in the application, they expressly plead for the protection of their procedural rights.<sup>61</sup>

One consequence of this stance is that, where no pleas on this point are formulated in the application, the Courts could not *construe* the other ones advanced by the parties as they were conceived to obtain the opening of formal investigations.<sup>62</sup> The CJEU therefore aims at determining the subject-matter by channelling the formulation of the pleas with express references to the protection of procedural rights. This appears to have clarified the somewhat inconsistent case law of the General Court, which has sometimes rejected applications lacking any such plea as inadmissible,<sup>63</sup> while on another occasion granting it on the basis of a teleological reading of the other pleas.<sup>64</sup>

A second consequence results from the specific relationship existing between the different pleas advanced by the parties. In particular, if applicants advance grounds both on infringement of procedural rights and on substance, two different tests appear to apply in order to determine their admissibility. Standing in respect of substantial grounds follows the *Plaumann* test, whereas the more lenient *Cook* and *Matra* test applies to pleas relating to procedural rights.<sup>65</sup> Consideration of the already mentioned lack of information of third parties necessary to meet the test of *Plaumann* is evident from the fact that, should demonstration of the individual concern fail, standing could be granted under the *Cook* and *Matra* test.<sup>66</sup>

Maintaining the parallel tests for standing of *Cook* and *Matra*, and *Plaumann* responds to the EU judicature's intention to limit the subject-matter in preliminary examinations. As the already well-stressed lack of sufficient information renders it difficult to meet the *Plaumann* test for standing, the parties are much more likely to challenge the Commission's Decision arguing infringement of procedural rights. This will entail the admissibility of the application and, at the same time, the limitation of

proceedings to the assessment of the existence of serious difficulties in the determination of the compatibility of the State measure.

Importantly, the CJEU has clarified that failure to meet the *Plaumann* test does not rule out the application of *Cook* and *Matra*.<sup>67</sup> In accordance with this, should the applicant fail the test in *Plaumann*, it will always be possible to obtain standing under the more lenient test in *Cook* and *Matra*. This, however, still leaves open the question of the relationship between the different pleas presented by the parties. In particular, it is not clear whether failure to meet *Plaumann*, should bring the courts to automatically drop the pleas on substance. Recent case law of the General Court, for example in *Kronoply*, seems to indicate that although failure to meet *Plaumann* implies the inadmissibility of pleas on merits, the latter could nonetheless be used by the EU judicature in order to determine the subsistence of serious difficulties in determining the compatibility of the aid with the common market thus warranting the opening of the second phase.<sup>68</sup>

This case law raises the question of a lack of consistency, and even of equity in the treatment of complainants, as based on the different requests they advance in their pleas. If preserving the consistency of the subject-matter of the application, while, at the same time, granting applicants a lenient standing test, constitutes a reasonable ground to frame the *Cook* and *Matra* case law, such choice also implies a heavier burden on applicants. In particular, applicants' lawyers must actually be very careful in shaping the application as, under the current case law, failure to claim infringement of procedural rights practically implies the obligation to satisfy the stricter *Plaumann* test. Furthermore, as Advocate General Sharpston has rightly pointed out, it is difficult to see how an applicant could avoid being drawn into arguments about the merits of a Decision '[. . .] when seeking to show that there were still serious difficulties remaining in the Commission's initial assessment of the aid in issue (. . .). It is all too easy for them to slip and find that they are either trapped by the stricter *Plaumann* test, or that they have not done enough to satisfy the Court that there were indeed procedural errors in the decision they wish to contest'.<sup>69</sup>

### II.ii. c. Legal position of an applicant

As to what more precisely concerns the test enshrined in *Plaumann*, and applied by the CJEU to verify the standing of applicants advancing pleas on substance, the applicant must,<sup>70</sup> in general, demonstrate that its legal position is affected. The beneficiaries of aid schemes have *locus standi* where they are the actual beneficiaries of the aid in question.

It may appear at first sight that in State aid cases brought by competitors,

the Court has been comparatively lenient with respect to the standing requirements of the applicant's legal position being affected. Instead the focus seems to have developed towards giving more weight to procedural and economic considerations than to the more dogmatic definition of direct and individual concern applied in other policy areas.<sup>71</sup> In particular, competitors affected only by their competitive relationship to a recipient of aid must not only demonstrate that their market position as competitor is affected in some distant way, but corroborate that the market position was 'substantially' affected by demonstrating the 'magnitude and prejudice' of the aid 'to its market position.'<sup>72</sup> This does not yet answer the question to whether any type of actual or potential competitive relationship between the recipient of an aid and a third party might be sufficient to grant standing against a Decision.

The case law of the CJEU confirms that the competitive relationship is the criterion also to be applied to parties who had been involved in the procedures during a second phase in-depth review of a proposed aid, mentioning explicitly 'the persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations'.<sup>73</sup> A competitor will then have standing if he played an active role in the procedure, provided that his market position is significantly affected by the aid which is the subject of the contested Decision.<sup>74</sup>

The case law since *Cofaz* has clarified that the competitive relationship needs to be qualified to fulfil the criteria of individual concern under Article 263(4) TFEU. The mere fact that a contested Decision may have an effect on the competitive relationship is in itself not sufficient even if the party had been participating in a formal investigation.<sup>75</sup> The claimant additionally has to show itself to be individually concerned in a way similar to an addressee of a Decision.<sup>76</sup> Individual concern will be denied if the position of the applicant in the relevant market is not substantially affected by the aid in question.<sup>77</sup> Several factors can be identified in the case law as being relevant in that respect. First, the Court will have to analyse the market situation in question. Only an analysis of the overall market situation will, in its view, allow demonstration of a substantial adverse effect on a competitor's position. It cannot, the CJEU states, be 'simply a matter of the existence of certain factors' indicating a decline in the commercial or financial performance of one competitor due to the aid granted to another.<sup>78</sup>

The overall analysis of the market will consist *inter alia* of factors such as the number of producers which are in competition to another, the smaller the number, the more likely the effect. In *Lenzing*, for example, the Court granted standing finding that the relevant viscose market was

characterised by ‘a very small number of producers and by serious production overcapacity’ increasing the significance of the distortive effect of an aid granted to one of the few producers in the market.<sup>79</sup> In *ARE* on the other hand, an association of small businesses and former land owners, despite having actively participated in a formal investigation, could not show to be individually concerned due to the competitive situation they were in. The Court found that a very large number of competitors, in fact, ‘all farmers in the EU’ could be regarded as competitors of the beneficiaries of the land acquisition scheme’ applied under German law.<sup>80</sup> Similarly, in *Italy and Sardegna* the Court held, that a company could not contest ‘a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme’.<sup>81</sup>

The same reasoning applies to standing by associations, which are ‘as a rule, entitled to bring an action for annulment against a final Decision of the Commission in matters of State aid only if the undertakings which it represents or some of those undertakings themselves have *locus standi* or if it can prove an interest of its own’. In *Territorio Histórico de Álava* the Court stated that:

the adoption of a broad interpretation of the right of associations to intervene is intended to facilitate assessment of the context of such cases whilst avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure.<sup>82</sup>

Since standing is to the benefit of the individual claiming it, the burden of proof falls onto third parties to show the individual effect in view of the market situation in the concrete case. All relevant information has therefore to be placed before the Court for evaluation.

#### **II.ii.d. Overall remarks on standing and reviewability of acts**

The construction of the State aid procedure as a procedure between the Commission and Member States appears to internalise some peculiarities of State aid control which date back to the period preceding the adoption of Regulation 659/1999. First, the identification of reviewable acts in principle covers decisions addressed to Member States concerning State measures.<sup>83</sup> Second, according to Article 108 TFEU, third parties could enjoy procedural rights only once, and if a formal investigation is opened. This in principle imposed the heavy burden of the *Plaumann* test for standing to actions for annulment of decisions clearing the State measure at the end of the preliminary examination.<sup>84</sup> In State aid procedure, third parties are actually considered as mere sources of information<sup>85</sup> and do not enjoy the status of parties in the procedure. Even the

exercise of procedural rights, which follows the opening of formal investigations, is conceived as a means principally to ensure the full stream of information.<sup>86</sup>

Such shortcomings in the construction of the procedure appeared to directly impact upon the function of third parties as information providers, reducing the participation of the latter in the procedure and thereby substantively ostracising their potential contributions. As already observed, the outcome of this has been the uncertainty as to the identification of Commission Decisions, which prompted the Courts' searching for remedies against a Decision-making too lacking in crucial information. In light of this, the rebalancing of third parties' rights entailed by the solutions envisaged by the EU judicature is not exclusively to be considered as a purpose itself, but as a means to ensure the effective application of the relevant State aid rules. Importantly, this purpose appears to be common in all the case law on reviewability of acts and standing.<sup>87</sup>

It must be noted that, notwithstanding the praetorian nature of these advancements, the Courts have carefully stuck to the relevant rules and the precedents in case law, so as to ensure consistency with the existing procedural rules and continuity in the jurisprudence.<sup>88</sup> This comprehensible need for consistency is partly the basis of the great complexity which characterises the solutions elaborated by the Courts on these issues.<sup>89</sup> The admissibility criteria actually may differ depending on whether the Decision has been adopted before or after the opening of a formal investigation on the aid. The standing rights further depend on whether the plaintiff only challenges the non-opening of such an in-depth procedure or also the material grounds of a contested decision. This is a situation which is difficult to reconcile with the principle of legal certainty, a key element of the rule of law. Advocate General Jacobs stressed this point by stating that access to the Court, is 'an area in which, more than in any other, the law must be clear and consistent'.<sup>90</sup> One of the many practical suggestions was made by Advocate General Bot in *Kronofrance* in which he suggested that the Court:

make the case law more straightforward and consistent, by defining the conditions of the admissibility of actions brought against State aid decisions only in relation to the purpose of the action, not in relation to the pleas in law invoked in support of it.<sup>91</sup>

This in turn stresses how, notwithstanding its important achievements, judicial review in this particular area of State aid is not capable of fully replacing legislation in the field. It is time the legislation addressed these serious shortcomings of the procedural rules.<sup>92</sup>

### III. EXTENT OF JUDICIAL REVIEW

Judicial review of Commission's Decisions in State aid matters is a central tool of holding the Commission accountable. Judicial review, generally being a key notion to a system of checks and balances and maintaining the rule of law, is especially relevant in State aid matters, given the far reaching investigatory and adjudicatory decision-making powers bundled in the hands of the Commission.<sup>93</sup>

To what extent judicial review takes place vis-à-vis State aid Decisions by the Commission remains unclear when looking at Article 263 TFEU which merely contains a list of grounds of review: lack of competence, infringement of essential procedural requirements, infringement of the Treaty or of any rule of law in relation to its application or misuse of powers.<sup>94</sup> This list stems from the origins of Article 263 TFEU which was initially modelled on the *recours pour excès de pouvoir* before the French Conseil d'Etat. Since its founding days, the EU legal order has strongly evolved. What is left is the original wording which is now little but a shell since the notion of infringement of the Treaty or of any rule deriving thereof virtually covers any case one might be able to think of.<sup>95</sup> In today's reality, the key term indicating whether European Courts will engage in only marginal review,<sup>96</sup> or more fully review a Commission Decision, is the notion of discretion.<sup>97</sup> This is not a static concept and in the recent dynamic case law of the Courts has developed quite complex distinctions and particularities, which will be subject of this part of the chapter.

#### III.i. Delegation of Decision-making Powers and the Latest Definition of Discretion

Delegation of decision-making powers comes in many forms. Delegation of the most far reaching powers to the administration is often referred to as 'wide discretion'.<sup>98</sup> Discretion can be defined as the conferral of power to take decisions within legally defined limits regarding content and procedure. Key to this notion is that the administration is granted powers to decide about the substance of a certain policy<sup>99</sup> also with a view to future situations.<sup>100</sup> It exists where the broad nature of the provision applied or the analytical process required to subsume the facts of the case under such powers leaves room for either cognitive assessment to appreciate the relevance of factors or volitive assessment such as policy considerations.<sup>101</sup> These responsibilities are in the case law often addressed as matters of specific 'complexity'.<sup>102</sup> The notion of complexity is used as short-hand for the requirement to undertake a balancing decision taking into account a combination of various facts, evaluations of future developments of facts, as



well as interests and rights.<sup>103</sup> Despite this, one might legitimately wonder why the fact that a matter contains economically or technically complex considerations should put it beyond the intellectual reach of a Court.<sup>104</sup> After all, one would expect judges to be generally capable of reviewing a Commission file and reconstructing complex situations and their legal assessment.<sup>105</sup> What lies behind the misleading term of ‘complexity’ is actually a separation of powers consideration that policy decisions or decisions based on specific non-legal expertise should be taken by the institutions which have a competence and the mandate to do so.<sup>106</sup>

Generally, the main consequence of the European Courts’ finding that an institution enjoys broad discretion is that the so called ‘manifest error of assessment’ test is applicable.<sup>107</sup> This test indicates that instead of a full review, the Court will undertake a restricted degree of review under which it will confine itself ‘to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers’.<sup>108</sup> However, on the other hand, where no discretionary powers have been delegated, that is, no conferral of expedient judgment or evaluation of policies has taken place, administrative decisions are submitted to full review.<sup>109</sup> This means that the Courts should fully review interpretations of the delegating act, the determination of the facts and the ultimate holding that the statutory prerequisites have been met, or not.

Although there is a tendency in the case law to declare either a marginal or a full review,<sup>110</sup> the case law of the European Courts in reality puts less emphasis on a clear definition of theoretical notions. Instead, it aims at adapting the degree of judicial review to the situation.<sup>111</sup> Thus the distinctions between wide discretion, discretion and non-discretion are fluid, and also depend on factors such as the question of whether the situation is one of legislative or administrative context. The true nature of the extent of judicial review is thus found not by the labelling as a power to be discretionary (or not) but as to the effective exercise of judicial review underlying a specific case.

In State aid cases, the identification of cases where discretion exists is especially relevant in the context of the definition of an aid under Article 107 TFEU. The Courts held that the concept of aid is objective, the test being whether a State measure confers an advantage on one or more particular undertakings.<sup>112</sup> Here, the Commission assesses situations in interpretation of the law without enjoying discretion, ‘save for particular circumstances owing to the complex nature of the State intervention in question’.<sup>113</sup> These particular circumstances have been found by the case law for example in areas in which the Commission, in order to determine

whether investment by the public authorities in the capital of an undertaking, constitutes State aid within the meaning of Article 107 TFEU, considers the so-called ‘private investor test’.<sup>114</sup> Further, since in view of the Courts, in the evaluation of State aids under Article 107(3) TFEU and in some cases of Article 107(2) TFEU the Commission must rely on ‘complex economic, social, regional and sectoral assessments,’ and therefore its Decisions are to be covered by the notion of broad discretion.<sup>115</sup> In recent years, however, a tendency in the case law of the Courts can be observed to increase the level of its judicial review. Two contributing factors may be identified leading to this trend.

The first factor is the approach of reviewing administrative activity including discretionary activity through information-related general principles of law such as the duty of care.<sup>116</sup> Under this principle, an administrative decision-maker, even when granted wide discretion, must make the decision after considering all the relevant factors, including special circumstances affecting the matter.<sup>117</sup> The Courts review whether all of the ‘relevant factors and circumstances of the situation the act was intended to regulate’ have been taken into consideration, and whether the institution ‘was able, without exceeding the bounds of the broad discretion it enjoys in the matter, to reach the conclusion’ it had drawn.<sup>118</sup>

The duty of care is thus a principle allowing the Courts to review the *quantity* and to a certain degree the *quality* of the information taken into account by the Commission in a State aid Decision, as can be seen for example in *Sytraval*. The applicant in the case challenged the Commission’s Decision rejecting a complaint about the grant of a loan and raise of capital to a competitor wholly controlled by the French State. The General Court had established an expansive reading of the obligations the Commission was under, by stating that under the duty of care, the Commission deciding whether to enter into a second phase of a State aid case, in which the complainant would have had a procedural role to present its arguments, had the ‘automatic obligation to examine the objections which the complainant would certainly have raised if it had been given the opportunity of taking cognizance of that information.’<sup>119</sup> Upon appeal of this far reaching view, the CJEU confirmed this by finding that the Commission could be required ‘to conduct a diligent and impartial examination of the complaint, which may make it necessary for it to examine matters not expressly raised by the complainant.’<sup>120</sup> Also, where the Commission has entered into a formal investigation, the duty of care obliges the administration maturing a case towards a final decision to conduct its investigation with ‘the requisite care, seriousness and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal.’<sup>121</sup>

A second, related, tendency to expansion of judicial review arises by expanding the notion of reviewable ‘facts’ including applied economic theory, and thus reducing the margin of appreciation which has been submitted to only marginal or limited review.<sup>122</sup> This case law has been developed on the back of the duty to give reasons. In practice this means that where the Court finds in the analysis of the Commission, contradictions, insufficient analysis and substantiation of the relevant facts underlying the Decision,<sup>123</sup> even in an area giving rise to complex economic assessments, the Court will not ‘refrain from reviewing the Commission’s interpretation of information of an economic nature.’<sup>124</sup> As a consequence, the Courts distinguish the measure of judicial review from the verification of the quantity and quality of the evidence offered to meet the required standard of proof.

Combining these two approaches, the case law of the CJEU has identified several factors to be taken into account. These include first, to analyse whether the evidence relied on by the institution, was ‘factually accurate, reliable and consistent.’<sup>125</sup> Secondly, the Court will have to review, whether the evidence presented by the institution in support of its Decision ‘contains all the information which must be taken into account in order to assess a complex situation.’ Finally, the institution must show that it is ‘capable of substantiating the conclusions’ drawn from this information.<sup>126</sup>

This standard of review allows the Courts to enter deeply into the reasoning of the Commission in a given administrative Decision, in this case, a State aid Decision. The standard of review is based on a complex obligation of gathering information and the use thereof. These information-related obligations are thus drawn from general principles of law which are upheld also in the presence of a wide margin of discretion of an institution. The CJEU refers to these as ‘procedural guarantees of fundamental importance.’<sup>127</sup>

The application of the duty of care combined with far reaching obligations of reasoning have reduced the power of the notion of ‘marginal review’ to inflict limitations on the degree of judicial review of Commission Decisions in State aid matters. This is an appropriate approach of the Courts in view of the administrative nature of the Commission’s exercise of discretionary powers.

Not surprisingly, the test applied by the Courts in review of the factual basis for the exercise of discretion under the duty of care, closely resembles the Courts’ three-step test of proportionality. The obligation under the duty of care is linked to the principle of proportionality in so far as it imposes ‘an obligation on Community institutions at least to satisfy themselves that the proposed measures are *prima facie* adequate to attain the legitimate aims pursued.’<sup>128</sup> The CJEU can thus use the information

collected by the Commission for the judicial review of all three steps of the proportionality test: *first*, the capability of a measure to contribute to reaching a legitimate policy goal; *secondly*, the review whether the least onerous measure vis-à-vis the Member States' prerogatives and individual rights has been chosen; *thirdly*, the overall balancing for exclusion of extreme cases of imbalance between means and objectives. Given the constitutional basis of the proportionality principle under Article 5(4) TEU, it is a principle very well suited to limit the unwritten concept of the extent of discretionary powers of the Commission in administrative procedures.<sup>129</sup>

### III.ii. Self-limitation of discretion

An important and typical issue arising from the existence of discretionary power is the degree to which the administration can bind itself, in effect restricting its own discretionary range. The most important general principles of law leading to a self-limitation of administrative discretionary powers are the principles of equality, legal certainty and legitimate expectations. In the last few decades, the case law of the CJEU has developed these general principles of law as a question of self-limitation of discretion.<sup>130</sup> 'Self-binding' of the Commission can be discussed in at least five categories: *first*, by the establishment of a decisional practice of an administration, *second*, by creating (internal) administrative guidelines, *third*, by publishing the information that the Commission intends to follow a certain approach and, *fourth*, by entering into administrative agreements and, *fifth*, by publication of information.

With regard to the first three categories, internal administrative guidelines may be used by an institution to lay down 'policy rules' for the exercise of its discretion as a reflection of 'the Commission's desire to publish directions on the approach it intends to follow.'<sup>131</sup> They are 'an instance of the exercise of its discretion and requires only a self-imposed limitation of that power',<sup>132</sup> helping to ensure that an institution 'acts in a manner which is transparent, foreseeable and consistent with legal certainty'.<sup>133</sup> Judicial review of the Commission's exercise of discretion will thus include considering whether it has observed guidelines which the Commission itself has laid down and published either vis-à-vis the Member States or the wider public.<sup>134</sup>

With respect to the fourth possibility of self-limitation of discretionary powers by agreement, the CJEU has developed these notions for example in its case law on Article 108(1) TFEU which provides for agreements 'from which neither the Commission nor a Member State can release itself'.<sup>135</sup> But also self-limitation of discretion by publicised information has been accepted by the case law as a possible method of self-limitation

of discretionary powers. For instance, self-binding can also take place through information tools. The difference between pure information and binding administrative guidelines can however be fluid.<sup>136</sup> The approach of the Courts is well established by *CIRFS*,<sup>137</sup> in which the Court assessed a case where the Commission had made a Decision, contrary to its own administrative rule, that a particular undertaking need not submit a notification in respect of State aids received. The CJEU held that the rules relating to a particular economic sector which the Commission had established in a communication on this policy area (a so-called discipline) and which were also accepted by the Member States, have a binding effect. They have to be seen as constituting ‘a measure of general application and may not be impliedly amended by an individual decision.’<sup>138</sup> The Commission is bound by the Guidelines and Notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States and the parties may thus rely on these.<sup>139</sup> The reasons for this are the principles of equal treatment and protection of legitimate expectations. This determination shows very importantly also that the principle of equality also applies to EU institutions.

### **III.iii. Review of Discretion in Supervisory Cases: BUPA**

The Commission’s power to review the legality of aid to be granted by Member States in the context of State aid control under Article 108 TFEU, becomes an interesting constellation for example in the area of Services of General Economic Interest (SGEI) where in turn the Member States have the power to establish and define such services in the context of national law (for further discussion see chapter 13). These constellations are characterised by a multiple step procedure. In the first step, generally the Member State institutions enjoy discretion to determine a special legal regime for an SGEI.<sup>140</sup> The second step consists of the Commission’s supervision of the decisions taken on SGEIs in the context of Article 108(2) and (3) TFEU.

In these contexts, two questions arise with respect to discretionary decision-making. The first question is the extent of the supervision powers. To what degree of control may the Commission subject the original decision by a Member State institution? The second question is to what degree the supervisory decision of the Commission itself is subject to review and how much discretion the supervisory body enjoys in the context of its supervision. At stake is, on one hand, the extent of the Commission’s power to take supervisory decisions, and, on the other hand, the freedom of action available to Member States.

In State aids the General Court has held that the review of the

Commission's supervisory assessment of Member State compliance with EU law, in itself must be confined to ascertaining whether the Commission properly found or rejected the existence of a manifest error by the Member State.<sup>141</sup> Supervisory powers by the Commission are 'limited to ascertaining whether there is a manifest error or assessment'.<sup>142</sup> The Commission will review whether the factual premises on which a Member State decision is based is 'manifestly erroneous and whether, second, the system is manifestly inappropriate for achieving the objectives pursued'.<sup>143</sup>

In this framework, the Commission itself enjoys discretion for taking its supervisory decisions if and so far as the supervision activity contains complex economic and ecologic assessments. As a consequence, judicial review of supervisory decisions by the Commission is limited:

In such a context, review by the Court consists in ascertaining that the Commission complied with the rules of procedure and the rules relating to the duty to give reasons and also that the facts relied on were accurate and that there has been no error of law manifest error of assessment or misuse of powers.<sup>144</sup>

In other words, a Court review of the supervisory decision by the Commission will assess whether the Commission's assessment of the Member State decision is 'sufficiently plausible'.<sup>145</sup>

Inextricably linked to this limitation of Commission review of a Member State decision, where the Member State enjoys discretion, is the burden of proof. Even where a Member State enjoys discretion as to the choice of a policy, it is obliged to justify its choice with respect to its compliance with requirements under Union law. The General Court held in *BUPA* that:

in absence of such reasons, even a marginal review by the Community institutions (. . .) with respect to a manifest error by the Member State in the context of this discretion would not be possible.<sup>146</sup>

On the other hand, the Commission is obliged to prove the manifest error of the Member State on the basis of erroneous facts and assessments or implausibility of the result established on this factual basis.<sup>147</sup>

When seeing this case law in context, it will not escape the readers' attention that the case law of the European Courts with respect to these multi-level situations is probably not completely established. After all, the same reasons for controlling the Commission's exercise of discretion through an analysis of the information taken into account under the duty of care, when applied by the Commission would also require future justification by the Member States of their exercise of powers to define SGEIs. This would consequently empower the Commission to analyse whether all

relevant facts were taken into consideration, whether the Member State could have drawn the conclusions therefrom and whether the possible conclusions sportinged the final result.

#### IV. CONCLUDING REMARKS

Most of the problematic issues regarding the structure of judicial review of Commission decisions in EU State aid control refer to issues of information. EU State aid control is an eminently political policy field, in which the Commission has been granted a very powerful role to establish itself as reviewer of a host of highly sensitive policy areas, key to the exercise of public powers in the Member States. The system which has been established in the EU enhances accountability of Member States' exercise of their powers by requiring them to justify their activity and offer information about objectives, effects and analysis of their activities. It equally requires the Commission in the exercise of its control powers to be open to accountability by justification of its decision-making and reasoning. The notion of information and the rights associated with it through general principles of law increasingly enforced by the European Courts is thus the key to understanding modern judicial review in State aid procedures as well as, we may add, actually more generally EU administrative law. This is the theme under which simplification and rationalisation of the case law of the Courts needs to be understood. It is an area in which the Courts are visibly struggling with adapting the general system of judicial review, especially the annulment procedures, to the specific constellation of participants and individual rights arising in State aid procedures.<sup>148</sup> Problems with regard to the issue of standing arise in no small part due to the specificity that the procedure *de jure* takes place between the EU Commission and one or several Member States, but *de facto* the potential beneficiaries and their competitors have not only a legal but also an economic interest in the outcome of the proceedings between the Commission and the Member States. Complexity of the case law on judicial review in State aid matters further arises from the variation of possible tools the Commission can employ at various stages of the procedure, ranging from pure publication of information, to binding decisions on Member States and finally concluding agreements with one or several Member States. Such factors contribute to a growing complexity in the case law. Such complexity results in dangers to plaintiffs, requiring ever more specialised legal advice to navigate the various dangers of formulating and forwarding one plea rather than another.

Simplification would be key to increasing the transparency of the policy area. Guiding principles for a reform may arise not least from the principle

of good administration, as Advocate General Mengozzi most recently reconfirmed.<sup>149</sup> Good administration is thus the theme which should govern decisions about the degree of judicial review reflecting an increasing awareness for general principles of EU law and the role that these play in shaping the legal system.

## NOTES

1. Annulment procedures are brought under Article 263 TFEU against Commission Decisions and, exceptionally, also against decisions of the Council in Article 108(2) 3 paragraph TFEU. Jurisdiction is split between the CJEU General Court, with the General Court having jurisdiction for all actions for annulment by individual claimants under Article 263 4th paragraph TFEU and the CJEU having jurisdiction for claims by privileged actors, especially Member States, under Article 263 2nd paragraph TFEU and for preliminary reference procedures referred to it by national courts under Article 267 TFEU. Further the CJEU has jurisdiction for actions brought by the Commission against Member State acts or omissions under Article 108(2) 2nd paragraph TFEU.
2. Thereby the contribution does not explicitly address actions for failure to act (Article 265 TFEU), preliminary reference procedures by Member State courts (Article 267 TFEU), actions for damages (Article 340 2nd paragraph TFEU) or actions brought by the Commission against Member States under Article 108 (2) 2nd paragraph TFEU.
3. Bartosch 2007: 481. The author particularly stresses how the introduction of a 'complaints' culture conflicts with the Member States' interest in having fast and smooth procedures, responding to their economic interests (especially attracting investments).
4. Regulation 659/1999 confirms the construction of the State aid procedure, as enshrined in Article 108 TFEU. It contains a few indications allowing for a major involvement of third parties in the procedures, already pending the preliminary examination. As will be explained in the following pages, this can be appreciated with reference to the treatment of complaints. Article 10 of Regulation 659/1999 actually requires the Commission to examine information it has in its possession without delay. Read in light of Article 20(2) of Regulation 659/99, which expressly allows third parties to submit a complaint, the provision acknowledges that complaints submitted by competitors could prove to be important sources of information in order for the Commission to be informed about potentially unlawful aid.
5. It is worth noting that the Treaty of Lisbon 2009 has introduced a significant amendment to the action of annulment, aimed at widening the admissibility of such type of judicial remedy. Thus, under Article 263 TFEU, natural and legal persons also are allowed to bring applications against 'a regulatory act which is of direct concern to them and does not entail implementing measures'. See Balthasar 2010.
6. The issue of standing appears particularly delicate in light of the *TWD* case law, limiting individual access to judicial protection before national courts. Acknowledgment of standing of third parties would actually have the effect of compelling third parties to abide by the two-month period for applying against an act affecting them individually, as provided in Article 263 TFEU. Therefore, recognition of third parties' standing in judicial proceedings against decisions on State aid might turn out to be a double-edged sword. See: Case C-188/92, *TWD Textilwerke Deggendorf v. Germany* [1994] E.C.R. I-833. See Flynn 2004: 293.
7. See Case C-198/91, *Cook v. Commission* [1993] E.C.R. I-2487, para. 22; Case



- C-225/91, *Matra v. Commission* [1993] E.C.R. I-3203, para. 16; Case C-367/95 P, *Commission v. Sytraval and Brink's France* [1998] E.C.R. I-1719, para. 38; Case C-78/03 P, *Aktionsgemeinschaft Recht und Eigentum v. Commission* [2005] E.C.R. I-10737, para. 34.
8. Lack of information appears particularly severe in preliminary examination, whereby neither the case law nor Regulation 659/1999 recognise any obligation to publish notification of an aid measure by the Member States; a short summary only of the Decision clearing the State measure is published in the *Official Journal*; and complainants must be informed that there are insufficient grounds for taking a view over the case (Article 20(2), although such interpretation is questionable in light of the judgment on appeal in Case C-521/06 P, *Athinaiki Techniki v. Commission* [2008] E.C.R. I-5829).
  9. A Decision not to open formal investigation in principle ensures that beneficiaries are able to receive the benefits granted by the State measure. Occasionally this might not be the case where the State measure had been cleared as an aid compatible with the common/internal market. In such a situation, beneficiaries may be interested in a Decision completely clearing the State measure, which actually would avoid this being challenged before national courts. See Case T-141/03, *Sniace v. Commission* [2005] E.C.R. II-1197.
  10. *Bartosch* 2007: 480.
  11. Council Regulation 659/1999/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, O.J. 1999 L 83/1.
  12. Case C-367/95 P, *Commission v. Sytraval and Brink's France* [1998] E.C.R. I-1719, paras. 44–45. By this judgment, the CJEU annulled the General Court's decision which had recognised that a Commission Decision issued upon submission of a complaint by an individual could be considered as a Decision rejecting the complaint, even if formally addressed to a Member State. Case T-95/94, *Sytraval and Brink's France v. Commission* [1995] E.C.R. II-2651, para. 51.
  13. Case 60/81 *IBM v. Commission* [1981] E.C.R. 2639. The Courts have generally applied strictly the *IBM* ruling to acts other than those from Commission's Decisions. Judicial review appears to be quite delicate, as the acts adopted by the institutions, even where unable to produce effects to the meaning of *IBM*, touch upon situations whereby the conflicting interests of beneficiaries and competitors are mixed. Therefore, acts have been challenged which, in principle, appear unable to produce legal effects. For example, in *Tramarin* the Commission, by letter, requested Italy to withdraw a regional aid scheme. Such request could not produce any effects, as it took place in the phase of preliminary examination, where Member States are free to comply with such indications, or to leave the original plan unchanged. Nonetheless, the letter was challenged, which ultimately led to the application being dismissed by the General Court. See Order of the General Court in T-426/04, *Tramarin v. Commission* [2005] E.C.R. II-4765, paras. 34–35.
  14. See Case 60/81, *IBM v. Commission* [1981] E.C.R. 2639 paras. 9–10; Case C-147/96, *Netherlands v. Commission* [2000] E.C.R. I-4723, para. 27; Case C-521/06 P, *Athinaiki Techniki v. Commission* [2009] E.C.R. I-5829, para. 42; Case C-362/08 P, *Internationaler Hilfsfonds v. Commission* [2010] E.C.R. I-nyr (Grand Chamber), para. 52. In the light of this, challenge to an act would be admissible where such act represents the final determination of the Commission upon the conclusion of an administrative procedure, and is intended to have legal effects capable of affecting the interests of the complainant.
  15. Article 10(1) of Regulation 659/1999/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, O.J. 1999 L 83/1.
  16. Article 13(1) of Regulation 659/1999/EC of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, O.J. 1999 L 83/1, referring to Article 4 of the same Regulation to identify the contents of Decisions terminating a preliminary examination. Accordingly, the Commission might clear the State measure, either concluding that it does not constitute State aid (Article 4(2)) or declaring it

- aid compatible with the common market (Article 4(3)), or, conversely, finding that there are serious difficulties to determine its compatibility with the common/internal market (Article 4(4)), thereby opening the phase of formal investigation.
17. Case T-351/02, *Deutsche Bahn v. Commission* [2006] E.C.R. II-1047. In *Deutsche Bahn*, the German national railway urged the Commission to look into a tax exemption accorded to some competitors, which allegedly would distort the market. The Commission considered that the State measure at issue complied with Council Directive 92/81 on the harmonisation of the structures of excise duties of mineral oils, it could not be qualified as aid. On this basis, the Commission exposed in a letter to the complainant its intention not to proceed further.
  18. Case T-351/02, *Deutsche Bahn v. Commission* [2006] E.C.R. II-1047, paras. 44–45 and 52; also see Order of the General Court in Case T-94/05, *Athinaiki Techniki v. Commission* [2006] E.C.R. II-73, paras. 29; Case T-152/06, *NDSHT v. Commission* [2009] E.C.R. II-1517, paras. 56.
  19. Case T-351/02, *Deutsche Bahn v. Commission* [2006] E.C.R. II-1047, paras. 53–54.
  20. *Ibid.*, para. 55.
  21. *Deutsche Bahn*, *ibid.*, para. 43; Order of the General Court in Case T-94/05, *Athinaiki Techniki v. Commission* [2006] E.C.R. II-73, para. 29; Case T-152/06, *NDSHT v. Commission* [2009] E.C.R. II-1517, para. 41.
  22. Opinion of AG Bot of 3 April 2008 in Case C-521/06 P, *Athinaiki Techniki v. Commission* [2008] E.C.R. I-5829, para. 122.
  23. Case T-351/02, *Deutsche Bahn v. Commission* [2006] E.C.R. II-1047, paras. 41, 49 and 52; Opinion of AG Bot of 3 April 2008 in Case C-521/06 P, *Athinaiki Techniki v. Commission* [2008] E.C.R. I-5829, para. 106; Case C-521/06 P, *Athinaiki Techniki v. Commission* [2009] E.C.R. I-5829, para. 37; Case T-152/06, *NDSHT v. Commission* [2009] E.C.R. II-1517, para. 40.
  24. Case T-351/02, *Deutsche Bahn v. Commission* [2006] E.C.R. II-1047, para. 42; Opinion of AG Bot of 3 April 2008 in Case C-521/06 P, *Athinaiki Techniki v. Commission* [2008] E.C.R. I-5829, paras. 40, 60 and 107; Case T-152/06, *NDSHT v. Commission* [2009] E.C.R. II-1517, para. 44, whereby the General Court states the difference in the procedure entailed by new and existing aid.
  25. See the explanation in *Athinaiki Techniki* *ibid.*, paras. 33–37.
  26. *Ibid.*, paras. 38–41. See Jürimäe 2010: 318. Such stance, aiming at obliging the Commission to adopt a positive and proactive attitude towards the applicant has been affirmed in other areas of EU law, for example access to documents. See for instance, in the area of application of access to documents, Case T-42/05, *Williams v. Commission* [2008] E.C.R. II-156.
  27. This was already recognised, with specific reference to beneficiaries of aid, in the Opinion of AG Jacobs of 14 April 2005 in Case C-276/03 P, *Scott v. Commission* [2005] E.C.R. I-8437, at para. 74: '[. . .] The very fact that the rights of interested parties – amongst which beneficiaries are not accorded any special treatment – are dealt with in such limited terms in the context of [Article 20 of Regulation 659/1999] is significant when contrasted with the references, omnipresent throughout the rest of the regulation, to the powers and duties of the Commission and the Member States, and to the relations and exchanges between the two’.
  28. Case C-521/06 P, *Athinaiki Techniki v. Commission* [2009] E.C.R. I-5829, para. 38.
  29. Case T-152/06, *NDSHT v. Commission* [2009] E.C.R. II-1517. See extensively Polverino 2010.
  30. Case T-152/06, *NDSHT v. Commission* [2009] E.C.R. II-1517, para. 44: ‘The obligation of the Commission to adopt a decision in response to a complaint arises only in the situation envisaged in Article 13 of Regulation 659/1999. Under the second sentence of Article 20(2) of that Regulation, the Commission needs only inform the complainant by letter that there are insufficient grounds for taking a view on the case. The latter situation arises, in particular, where Article 13 does not apply because, in reality, the aid referred to in the complaint is not unlawful aid, but existing aid’.

31. Case T-152/06, *NDSHT v. Commission* [2009] E.C.R. II-1517, para. 57. See the remarks of Polverino 2010: 423.
32. Jürimäe 2010: 321; Polverino 2010: 424.
33. The hearing in *NDSHT* took place before (1 July 2008) the publication of *Athinaiki Techniki* (17 July). Therefore, even if the General Court was not required to reopen the oral procedure following publication of the latter, it anyway had the power to decide to do so. This would probably have helped in achieving a different conclusion, thereby ensuring consistency between the two judgments, and providing useful guidelines on the consequences of the distinction between existing and new aid. See Jürimäe, 2010: 321.
34. See Case T-351/02, *Deutsche Bahn v. Commission* [2006] E.C.R. II-1047, para. 56.
35. Case C-313/90, *CIRFS and Others v Commission* [1993] E.C.R. I-1125, paras. 25–27.
36. On the same issue, see T-190/00, *Regione Siciliana v. Commission* [2003] E.C.R. II-5015, paras. 42–53.
37. See Hofmann 2006.
38. Case T-187/99, *Agrana Zucker und Stärke v. Commission* [2001] E.C.R. II-1587, para. 56. In Case T-214/95, *Het Vlaamse Gewest v. Commission* [1998] E.C.R. II-717, para. 89, the Court has found that: ‘the adoption of such guidelines by the Commission is an instance of the exercise of its discretion and requires only a self-imposed limitation of that power when considering the aids to which the guidelines apply, in accordance with the principle of equal treatment.’ See also: Case T-16/96, *Cityflyer Express Ltd.* [1998] E.C.R. II-757, para. 57; Case T-380/94, *AIUFFASS* [1996] E.C.R. II-2169, para. 57. See in general on the admissibility of applications against informative acts: Case C-325/91, *France v. Commission* [1993] E.C.R. I-3283; Case C-303/90, *France v. Commission* [1991] E.C.R. I-5315; Case 310/85, *Deufl v. Commission* [1987] E.C.R. 901; C-351/98, *Spain v. Commission* [2002] E.C.R. I-8031.
39. In Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rorindustri and others v. Commission* [2005] E.C.R. I-5425, para. 210, the CJEU held that: ‘In adopting such rules of conduct and announcing by publishing them that they will hence forth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot be excluded that, on certain conditions and depending on their conduct, such rules of conduct, which are of general application, may produce legal effects’. Also see Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v. Commission* [2006] E.C.R. I-5479, para. 70. For an exhaustive summary of the limits of Commission’s power to adopt and apply informative acts, see Opinion of AG Bot of 6 March 2008 in Joined Cases C-75/05 P and C-80/05P, *Germany v. Kronofrance* [2008] E.C.R. I-6619, paras. 137–148.
40. For greater detail see: Hofmann 2006b.
41. Case C-313/90, *CIRFS and Others v. Commission* [1993] E.C.R. I-1125, paras. 35, 36. See also Case C-242/00, *Germany v. Commission* [2002] E.C.R. I-5603, para. 35.
42. Case C-313/90, *CIRFS and Others v. Commission* [1993] E.C.R. I-1125, para. 35.
43. See for example, Case 131/86, *United Kingdom v. Council* [1988] E.C.R. 905, para. 6; Case C-208/99, *Portugal v. Commission* [2004] E.C.R. I-9183, para. 22.
44. See, *inter alia*, Case C-198/91 *Cook v. Commission* [1993] E.C.R. I-2487, para. 20; Case C-525/04 P, *Spain v. Lenzing* [2007] E.C.R. I-9947, para. 30; Case C-78/03P, *Commission v ARE* [2005] E.C.R. I-10737, para. 33; all with reference to Case 25/62, *Plaumann v Commission* [1963] E.C.R. 95, 107.
45. See Quigley 2009: 691. See Case 730/79, *Philip Morris* [1980] E.C.R. 2671 para. 5. In light of the recent case law, this seems to be true both for Decisions concerning individual aid and aid schemes. The CJEU has currently relaxed its initial rigid stance against the standing of third parties proceedings concerning general aid schemes. The restrictive attitude of the Court was based on the general scope of such State

measures: because a Decision entailed legal effects for categories of persons determined in a general and abstract manner, it could not have been regarded as being of individual concern to those persons. See Case 282/85, *DEFI v. Commission* [1986] E.C.R. 2469, para. 16; Order of the CJEU in Joined Cases 67, 68 and 70/85, *R. Van der Kooy v. Commission* [1988] E.C.R. 219, para. 15; Case T-398/94, *Kahn Scheppvaart v. Commission* [1996] E.C.R. II-477, paras. 37–38 and 41; Joined Cases C-15/98 and C-105/99, *Italy and Sardinia Lines v. Commission* [2000] E.C.R. I-8855, para. 33. The Court appears to have overcome this rigid stance by applying the *Codorniu* case law more relaxed approach on standing in judicial proceedings for annulment of a decision of an institution (Case C-309/89, *Codorniu v. Council* [1994] E.C.R. I-1853, para. 19). For application of the *Codorniu* case law to the standing of beneficiaries of aid schemes, see Joined Cases C-182/03 and C-217/03, *Belgium and Forum 187 v. Commission* [2006] E.C.R. I-5479, para. 58. The Case C-78/03P, *Commission v. Aktionsgemeinschaft Recht und Eigentum* [2005] E.C.R. I-10737 is particularly significant, in that the Court did not follow the indications presented in the Opinion of AG Jacobs of 24 February 2005 in case C-78/03P, *Commission v. Aktionsgemeinschaft Recht und Eigentum* [2005] E.C.R. I-10737, paras. 111 and 119. The AG expressly requested application of the *Kahn Scheppvaart* case law and therefore suggested that actual beneficiaries could exist only once the grant of the aid took place. The Court did not take an express position on the point, but did not endorse the solution recommended by the Advocate General. This new approach has been confirmed in Case C-487/06P, *British Aggregates Association v. Commission* [2008] E.C.R. I-10505, para. 35.

46. Article 3 of Regulation 659/1999. For a concise and exhaustive review of the standstill obligation in State aid, see Grespan 2008:576.
47. See C-312/90, *Spain v. Commission* [1992] E.C.R. I-4117, para. 22-25; T-246/99, *Tirrenia v. Commission*, Order of 27 December 2007, para. 43.
48. See Case T-141/03, *Sniace v. Commission* [2005] E.C.R. II-1197, para. 25–26.
49. Article 26(1) of Regulation 659/1999.
50. Article 20(2) of Regulation 659/1999.
51. Case C-225/91, *Matra Commission* [1993] E.C.R. I-3203, para. 16; C-198/91, *Cook v. Commission* [1993] E.C.R. I-2487, para. 22; C-367/95P, *Commission v. Sytraval and Brink's France* [1998] E.C.R. I-1719, paras. 38–41; C-78/03P, *Commission v. Aktionsgemeinschaft Recht und Eigentum* [2005] E.C.R. I-10737, paras. 34–35; Joined Cases C-75/05P and C-80/05P, *Germany v. Kronofrance* [2008] E.C.R. I-6619, paras. 37–38; Case C-487/06P, *British Aggregates v. Commission* [2008] E.C.R. I-10505, paras. 26–29.
52. See Dony 2007: 432; Flynn 2004: 93.
53. In the Opinion of AG Tesauero in Case C-198/91, *Cook v. Commission* [1993] E.C.R. I-2487, para. 41, AG Tesauero held: '[. . .] on a more general point of view, one must not forget that undertakings challenging a decision not to raise 'objections', in general, as to what concerns the aid, do not enjoy more than the elements communicated by the Commission or described in the summary publication in the Official Journal. These undertakings should therefore not be required – as the Commission appears to require in the present case – to formulate, in their introductory act a precise statement as to the importance and impact of the aid (for instance, the influence of the aid on the costs of production for the beneficiaries, the evolution of market shares or the impact on market exchanges). As it has been mentioned, for the purpose of standing, the plaintiff is required only to demonstrate that it is in a position of being an effective, and not merely marginal, competitor to the undertaking beneficiary of the aid which has been declared compatible. Evidence of this has been fully produced in this case'.
54. The case law of the Courts shows that the Commission has often to face the lack of information during the preliminary examination. This ultimately can imply the adoption of Decisions flawed to a certain extent. The fact that the Courts have annulled some of these decisions highlights that such risk is far from being theoretical. See, for

- example, Case T-49/93, *SIDE v. Commission* [1995] E.C.R. II-2501; Case T-155/98, *SIDE v. Commission* [2002] E.C.R. II-1179.
55. See for example, Case T-193/06, *TFI v. Commission*, judgment of 13 September 2010, n.y.r., para. 72; Case C-487/06P, *British Aggregates v. Commission* [2008] E.C.R. I-10505, para. 30; C-78/03P, *Commission v. Aktiongemeinschaft Recht und Eigentum* [2005] E.C.R. I-10737, para. 37.
  56. See Case C-198/91, *Cook v. Commission* [1993] E.C.R. I-2487, para. 22; Case C-225/9, *Matra v. Commission* [1993] E.C.R. I-3203, para. 16; Case C-390/06, *Nuova Agricast* [2008] E.C.R. I-2577, para. 57.
  57. See Case C-198/91, *Cook v. Commission* [1993] E.C.R. I-2487, para. 29; Case C-225/91, *Matra v. Commission* [1993] E.C.R. I-3203, para. 33; Case C-367/95P, *Commission v. Sytraval and Brink's France* [1998] E.C.R. I-1719, para. 39.
  58. In Case C-319/07P, *3F v. Commission* [2009] E.C.R. I-5963, para. 35, the CJEU stated this expressly: 'It is true that, as appears from Article 4(3) of Regulation 659/1999, a decision of the Commission not to raise objections is taken where the Commission finds that the notified measure does not raise doubts as to its compatibility with the common market. If an applicant seeks the annulment of such a decision, he is essentially challenging the fact that the decision on the aid was adopted without the Commission initiating the formal review procedure, thereby infringing his procedural rights. For his action to be successful, the applicant may attempt to show that the compatibility of the measure in question should have given rise to doubts. The use of such arguments cannot, however, have the consequence of changing the subject-matter of the application or altering the conditions of its admissibility'.
  59. See, for example, Case T-158/99, *Thermenhotel Stoiser Franz v. Commission* [2004] E.C.R. II-1; Case T-157/01, *Danske Busvognmaend v. Commission* [2004] E.C.R. II-917; case T-27/02, *Kronofrance v. Commission* [2004] E.C.R. II-4177.
  60. C-487/06P, *British Aggregates Association v. Commission* [2008] E.C.R. I-10505, para. 71.
  61. See Case C-78/03P, *Commission v. Aktiongemeinschaft Recht und Eigentum* [2005] E.C.R. I-10737, paras. 65–67; Joined Cases C-75/05 and 80/05, *Germany v. Kronofrance* [2008] E.C.R. I-6619, para. 42-45; Case T-388/02, *Kronoply v. Commission* [2008] E.C.R. II-305, paras. 77–78.
  62. See Case C-78/03P, *Commission v. Aktiongemeinschaft Recht und Eigentum [ARE]* [2005] E.C.R. I-10737, paras. 44–45 and 65–67.
  63. Case T-266/94, *Skibsvaerftsforeningen and Others v. Commission* [1996] E.C.R. II-1399, para. 45; T-212/00, *Nuove industrie molisane v. Commission* [2002] E.C.R. II-347, para. 45; T-30/03, *SID v. Commission* [2007] E.C.R. II-34, para. 40.
  64. In Case T-114/00, *Aktiongemeinschaft Recht und Eigentum v. Commission* [2002] E.C.R. II-5121, para. 49, the General Court held that: 'The pleas for annulment put forward in support for the present action. . . must be construed as seeking to establish that the measures at issue pose serious difficulties as regards their compatibility with the common market, difficulties which place the Commission under an obligation to initiate the formal proceedings'. Also see, in this respect, Case C-198/91, *Cook v. Commission* [1993] E.C.R. I-2487; Case C-225/91, *Matra v. Commission* [1993] E.C.R. I-3203.
  65. See Case T-210/02, *British Aggregates v. Commission* [2008] E.C.R. II-2789, para. 54; C-319/07 P, *3F v. Commission* [2009] E.C.R. I-5963, para. 78.
  66. Case C-319/07P, *3F v. Commission* [2009] E.C.R. I-5963, paras. 78–81. In the Order of the General Court in Case T-30/03, *SID v. Commission* [2007] E.C.R. II-34 (subsequently appealed by the trade organisation 3F in *3F v. Commission*), the General Court declared the application inadmissible by reason of applicant's failure to satisfy the *Plaumann* test, notwithstanding its being a party concerned according to the meaning of *Cook* and *Matra*. In the Opinion of AG Sharpston of 5 March 2009 in Case C-319/07 P, *3F v. Commission* [2009] E.C.R. I-5963, para. 35, AG Sharpston expressed her worries that the rulings in *Aktiongemeinschaft Recht und Eigentum* and

*British Aggregates* might imply the application of the *Plaumann* test for standing already in proceedings brought against Decisions adopted at the end of preliminary examination: ‘The BAA case was notable in that the applicant there had challenged a decision not to initiate a review on the grounds both that its procedural rights had been infringed and that the Commission had erred on the merits of the decision. The Court considered together on appeal all the pleas in law raised by the applicant before the Court of First Instance. It seems from that judgment that if a party includes in its challenge a plea as to the merits of the decision itself, the test for standing to be applied is that set out in *Plaumann* and the subsequent line of case-law. Furthermore, this judgment suggests that it would not be possible for the [General Court] to sever the pleas in law brought before it so that, were the applicant in question not to meet the *Plaumann* criteria for admissibility, in relation to the challenge on the merits, the court might consider admissibility within the category of “parties concerned” with respect of the procedural pleas’.

67. Case C-319/07 P, *3F v. Commission* [2009] E.C.R. I-5963, para. 78.
68. In Case T-388/02, *Kronoply v. Commission* [2008] E.C.R. II-305, paras. 82–83, the General Court held that: ‘Imposing a limitation to the General Court’s power to interpret the pleas of the parties [as determined in *Commission v. Aktionsgemeinschaft Recht und Eigentum*] does not affect its capacity to examine the arguments on substance presented by the applicant, with a view to determine whether they could support the argument, equally presented by the applicant, bringing on the existence of serious difficulties which would have justified the opening of a formal investigation [. . .] Consequently, in order to decide on the admissibility of the second plea, the Court must examine the other pleas presented by the applicant against the challenged decision. This will enable the Court to determine whether such pleas [both of which bring on substance, and more precisely concern the existence of a manifest error of fact and violation of Articles 107(1) and 107(3) TFEU] can be linked to the plea of the infringement of the procedural guarantees, in that they would provide information on the existence of a serious difficulty, against which the Commission should have opened the formal procedure of investigation’ (unofficial translation from French by the authors). The General Court appears to have confirmed this line of proceeding in Case T-388/03, *Deutsche Post and DHL International v. Commission* [2009] E.C.R. II-199, para. 66 and in Case T-375/04, *Scheuer Fleisch v. Commission* [2009] E.C.R. 4155, para. 62. [On appeal: Case C-47/10P].
69. Opinion of AG Sharpston of 5 March 2009 in Case C-319/07 P, *3F v. Commission* [2009] E.C.R. I-5963, para. 42.
70. Case C-78/03P, *Commission v. ARE* [2005] E.C.R. I-10737, para. 37; Case 169/84, *Cofaz and others v. Commission* [1986] E.C.R. 391, paras. 22–25; Case 25/62, *Plaumann v. Commission* [1963] E.C.R. 95, paras. 9–10.
71. See Case T-380/94, *AIUFFASS and another v. Commission* [1996] E.C.R. II-2169, paras. 44–52; Case T-442/93, *AAC and others v. Commission* [1995] E.C.R. II-1329, paras. 44–53; Case T-149/95, *Ducros v. Commission* [1997] E.C.R. II-2031, paras. 32–42.
72. Case T-193/06, *TFI v Commission*, judgment of 13 September 2010, n.y.r., paras. 77 and 86.
73. Case 323/82, *Intermills v. Commission* [1984] E.C.R. 3809, para. 16. See also Case C-78/03P, *Commission v. Aktionsgemeinschaft Recht und Eigentum* [2005] E.C.R. I-10737, para. 36; Case T-395/04, *Air One v Commission* [2006] E.C.R. II-1343, para. 36; Case T-167/04, *Asklepios Kliniken v. Commission* [2007] E.C.R. II-2379, para. 49; Case T-30/03, *SID v Commission* [2007] E.C.R. II-34, para. 31, in which the General Court held that the applicant was not affected in its competitive position.
74. Case 169/84, *Cofaz and others v. Commission* [1986] E.C.R. 391, para. 25.
75. Case C-260/05, *Sniace v Commission* [2007] ECR I-10005, paras. 56 and 57; Joined Cases 10 and 18/68, *Eridania and Others v Commission* [1969] E.C.R. 459, para. 7.

76. Case C-106/98P, *Comité d'entreprise de la Société française de production and Others v. Commission* [2000] E.C.R. I-3659, para. 41.
77. See Case C-260/05, *Sniace v. Commission* [2007] E.C.R. I-10005, paras. 56 and 57, para. 60.
78. Case C-487/06P, *British Aggregates v. Commission* [2008] E.C.R. I-10505, paras. 47–56; Case C-525/04, *Spain v. Lenzing* [2007] E.C.R. I-9947, paras. 31–38. See also Case C-78/03P *Commission v. Aktionsgemeinschaft Recht und Eigentum* [2005] E.C.R. I-10737, para. 72; Case T-117/04, *Vereniging Werkgroep and Others v. Commission* [2006] E.C.R. II-3861, para. 53.
79. Case C-525/04P, *Spain v. Lenzing* [2007] E.C.R. I-9947, para. 37.
80. C-78/03P, *Commission v. ARE* [2005] E.C.R. I-10737, para. 72.
81. Case C-15/98 and C-105/99, *Italy and Sardegna v. Commission* [2000] E.C.R. I-8855, para. 33 (emphasis added); Joined Cases T-254/00, T-270/00 and T-277/00, *Hotel Cipriani and Italgas v. Commission* [2008] E.C.R. II-3269, at paras. 77 and 78. See, however, Case T-9/98, *Mitteldeutsche Erdoel-Raffinerie GmbH v. Commission* [2001] E.C.R. II-3367, paras. 78–85.
82. Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, *Territorio histórico de Álava and Others v. Commission* [2009] n.y.r, para. 84. [On appeal: Cases C-471/09 C-472/09 C-473/09 C-474/09 C-475/09 C-476/09] with reference, *inter alia*, to the Order of the General Court in Case T-201/04, R *Microsoft v. Commission* [2004] E.C.R. II-2977, para. 38.
83. See Case C-367/95P, *Commission v. Sytraval and Brink's France* [1998] E.C.R. I-1719.
84. See Case C-198/91, *Cook v. Commission* [1993] E.C.R. I-2487; Case C-225/91, *Matra v. Commission* [1993] E.C.R. I-3203.
85. See Bartosch 2007; Case T-613/97, *UFEX v. Commission* [2000] E.C.R. II-4055 para. 89.
86. Case T-266/94, *Skivsvaerftsforeningen and Others v. Commission* [1996] E.C.R. II-1399, para. 256; Joined Cases T-371/94 and T-394/94, *British Airways and Others and British Midland Airways v. Commission* [1998] E.C.R. II-2405, para. 59; Case T-366/00, *Scott v. Commission* [2003] E.C.R. II-1763, para. 59.
87. See Opinion of AG Bot of 3 April 2008 in Case C-521/06 P, *Athinaïki Techniki v. Commission* [2008] E.C.R. I-5829, paras. 127–130. There the AG argued that the case law on defence of procedural rights requires that solutions on reviewability of acts offer the same protection to applicants which the Courts grant with respect to standing.
88. See, with respect to reviewability of decisions refusing to open formal investigations, Case T-351/02, *Deutsche Bahn v. Commission* [2006] E.C.R. II-1047, paras. 54–55; Order of the General Court in Case T-94/05, *Athinaïki Techniki v. Commission* [2006] E.C.R. II-73, para. 28; Case C-521/06P, *Athinaïki Techniki v. Commission* [2008] E.C.R. I-5829, para. 52; with respect to standing of complainants in proceedings against the same kind of act, Case C-78/03 P, *Aktionsgemeinschaft Recht und Eigentum v. Commission* [2005] E.C.R. I-10737, para. 35; Joined Cases C-75/05P and 80/05P, *Germany v. Kronofrance* [2008] E.C.R. I-6619, para. 38.
89. For an in-depth, very exhaustive analysis of the most recent case law on issues of reviewability of acts and standing of third parties, see Jürimäe 2010.
90. Opinion of AG Jacobs of 24 February 2005 in Case C-78/03P, *Commission v. Aktionsgemeinschaft Recht und Eigentum* [2005] E.C.R. I-10737, para. 138.
91. Opinion of AG Bot of 6 March 2008 in Joined Cases C-75/05 P and C-80/05 P, *Germany v. Kronofrance and Others* [2008] E.C.R. I-6619, para. 108.
92. Before the adoption of Regulation 659/1999, some cases had actually nudged the legislator in the direction of adopting rules governing the different procedural aspects of State aid procedure: Case T-277/94, *ATTEC v. Commission* [1996] E.C.R. II-351, para. 70; Case C-375/95P, *Commission v. Sytraval* [1998] E.C.R. I-1719, para. 44.
93. See in particular an insider's description of the procedure before the Commission in State aid procedure: Grespan 2008 : 569–627.

94. See specifically on applications for annulment in State aid Flynn 2004 : 283–285; Dony 2007; Grespan 2008: 689–707 ; Quigley 2009: 528.
95. Meij 2009: 10.
96. On the meaning of marginal review, see specifically Gattinara 2006: 454.
97. On discretion, see in general Craig 2006; Ritleng 1999.
98. The basic case on delegation of decision-making powers in this category is Case 9/56, *Meroni & Co, Industrie Metallurgiche SpA v. High Authority* [1958] E.C.R. 133. Therein the CJEU defined limitations to the possibility of delegation of administrative tasks to bodies not established by the founding Treaties, interpreting a ‘wide margin of discretion’ as a delegation which ‘according to the use which is made of it, make possible the execution of actual economic policy.’ This notion of a ‘wide margin of discretion’ in other cases has been referred to as a ‘broad discretion’, see for example, Case 69/83, *Luxembourg v. Court of Auditors* [1984] E.C.R. 2447; Case T-54/99, *max.mobil v. Commission* [2002] E.C.R. II-313, para. 58.
99. See, for example, Case C-180/96, *UK v Commission* [1998] E.C.R. I-2265, para. 97; Joined Cases T-481 and 484/93, *Exporteurs in Levende Varkens v. Commission* [1995] E.C.R. II-2941, paras. 91 and 120 both from the policy area of agriculture.
100. See, for example, Case 40/72, *Schroeder v. Germany* [1973] E.C.R. 125, para. 28.
101. Meij 2009: 11.
102. See, for example, Case C-352/98P, *Bergaderm and Goupil v. Commission* [2000] E.C.R. I-5291, para. 46; Case 42/84, *Remia BV and Verenigde Bedrijven Nutricia v. Commission* [1985] E.C.R. 2545, para. 34; Joined Cases 142/84 and 156/84, *BAT and Reynolds v. Commission* [1987] E.C.R. 4487, para. 62; and Case C-194/99P, *Thyssen Stahl v. Commission* [2003] E.C.R. I-10821, para. 78 as well as the Order of the General Court in Case T-271/03, *Deutsche Telekom AG v. Commission* [2008] E.C.R. II-477, which formulated in para. 185: ‘it must be borne in mind that, although as a general rule the Community judicature undertakes a comprehensive review of the question whether the conditions for applying the competition provisions of the EC Treaty are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers’.
103. See, for example, Ritleng 1999.
104. See, for example, the case law regarding risk assessment and risk management in which despite the necessity of administrations to undertake ‘complex technical and scientific assessments’, judicial review was undertaken in a detailed fashion. See, for example, Case 14/78, *Denkavit v. Commission* [1978] E.C.R. 2497, para. 20; Case T-13/99, *Pfizer Animal Health SA v. Council* [2002] E.C.R. II-3305, paras. 154–163.
105. Tiili and Vanhamme 1999:890; Azizi 2009: 316.
106. See, for example, Case T-187/06, *Schröder v. CPVO* [2008] E.C.R. II-3151, paras. 59–63. The case is the first explicitly granting discretionary powers to an agency, potentially in conflict with the *Meroni* doctrine.
107. Joined Cases T-371 and 394/94, *British Airways v. Commission* [1998] E.C.R. II-2405, para. 293.
108. Case C-56/93, *Belgium v. Commission* [1996] E.C.R. I-723, paras. 10 and 11; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v. Commission* [2004] E.C.R. I-123, para. 279; Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services v. Commission* [2009] E.C.R. I-9291, para. 85; C-290/07P *Commission v. Scott*, judgment of 2 September 2010, n.y.r., para. 66.
109. See Case C-83/98 P, *France v. Ladbrooke Racing and Commission* [2000] E.C.R. I-3271, para. 25; T-296/97, *Alitalia v. Commission* [2000] E.C.R. II-3871, para. 95; Joined Cases T-195/01 R and T-207/01 R, *Government of Gibraltar v. Commission* [2001]



- E.C.R. II-3915, para. 75; Case T-366/00, *Scott v. Commission* [2007] E.C.R. II-797, para. 91; Case T-196/04, *Ryanair v. Commission* [2008] E.C.R. II-3643, para. 40.
110. See in general the approach held by the Courts in other areas of EU law: Case C-84/94, *United Kingdom v. Council* [1996] E.C.R. I-5755, para. 58; Case C-233/94, *Germany v. Parliament and Council* [1997] ECR I-2405, paras. 55–56; C-157/96, *National Farmers' Union and Others* [1998] E.C.R. I-2211, para. 61; Joined Cases C-248/95 and C-249/95, *SAM Schiffahrt and Stapf* [1997] E.C.R. I-4475, para. 23; Case C-266/05P, *Sison v. Council* [2007] E.C.R. I-1233, para. 33.
111. The Court has actually shown to be quite attentive to meet the delicate political points in several cases; one of the most important manifestations of such care is the adaptation of the scope of institutional discretion to the particular facts of the case: confront, for instance, Case C-266/05 P, *Sison v. Council* [2007] E.C.R. I-1233, para. 33, whereby the Court appears to invoke the limits of the scope of judicial review against institutional discretion in order to avoid to review a highly political issue (which nonetheless could actually have been dealt by means of a thorough review of fundamental rights protection, in particular as to application of the proportionality test), and Case T-85/09, *Kadi v. Commission*, judgment of 30 September 2010, n.y.r., paras. 142–143. [on appeal Case C-584/10 C-593/10 C-595/10P]. As appears from the last case, the EU judiciary's approach to institutional discretion (though elaborated in the framework of the administrative activity) represents a reference for the interpretation of it: see C-525/04P, *Spain v. Lenzing* [2007] E.C.R. I-9947, para. 57.
112. Case C-83/98P, *France v. Ladbroke Racing and Commission* [2000] E.C.R. I-3271, para. 25; Case T-296/97, *Alitalia v. Commission* [2000] E.C.R. II-3871, para. 95; Case T-98/00, *Linde v. Commission* [2002] E.C.R. II-3961, para. 40.
113. Case T-67/94, *Ladbroke Racing v. Commission* [1998] E.C.R. II-1, paras. 52–53; Case T-358/94, *Air France v. Commission* [1996] E.C.R. II-2109, para. 71; Case C-56/93, *Belgium v. Commission* [1996] E.C.R. I-723, paras. 10–11.
114. Case C-56/93, *Belgium v. Commission* [1996] E.C.R. I-723, para. 10; Joined Cases T-126/96 and T-127/96, *Breda Fucine Meridionali and Others v. Commission* [1998] E.C.R. II-3437, para. 5; T-296/97, *Alitalia v. Commission* [2000] E.C.R. II-3871, para. 105; T-301/01, *Alitalia v. Commission* [2008] E.C.R. II-1753, para. 185; T-196/04, *Ryanair v. Commission* [2008] E.C.R. II-3643, para. 41.
115. Case 730/79, *Philip Morris v. Commission* [1980] E.C.R. 2671, para. 17 and 24; Case 310/85, *Deufl v. Commission* [1987] E.C.R. 901, para. 18; Case C-301/87, *France v. Commission* [1990] E.C.R. I-307, para. 49; Joined Cases T-371 and 394/04, *British Airways v. Commission* [1998] E.C.R. II-2405, para. 79; Case C-169/95, *Spain v. Commission* [1997] E.C.R. I-135, para. 18; Case C-355/95P, *TWD v. Commission* [1997] E.C.R. I-2549, para. 26; T-20/03, *Kahl/Thüringen Porzellan v. Commission* [2008] E.C.R. II-2305, para. 115.
116. The general principle of the duty of care is probably best known through the judgment in Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte* [1991] E.C.R. I-5469. At para. 14, the CJEU held that 'where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision'.
117. What factors may or may not be taken into account may be either expressly listed, sometimes exhaustively, in the statute or may be inferred from the statutory goals, or both. They may arise from general principles of law or from specific cross-sectoral Treaty provisions regarding the protection of the environment (Article 6 TFEU) or health protection (Article 168(1) TFEU).
118. Case C-310/04, *Spain v. Council* [2006] E.C.R. I-7285, paras. 98, 117, 121, 122, 124, 128, 131–135.

119. Case T-95/94, *Sytraval and Brink's France v. Commission* [1995] E.C.R. II-2651, para. 66.
120. Case C-367/95P, *Commission v. Sytraval and Brinks France* [1998] E.C.R. I-1719, paras. 60–62, linking this duty to the principle of sound (or good) administration.
121. Case T-206/99, *Métropole Télévision v. Commission* [2001] E.C.R. II-2707, para. 59.
122. This tendency began in the judicial review of merger control cases (Case T-342/99, *Airtours v. Commission* [2002] E.C.R. II-2585; Case T-5/02, *Tetra Laval BV v. Commission* [2002] E.C.R. II-4381, upheld on appeal in Case C-12/03P, *Commission v. Tetra Laval* [2005] E.C.R. I-987; T-351/03, *Schneider Electric v. Commission* [2007] E.C.R. II-2237, expanded to Article 101 and 102 TFEU cases (Case T-54/99, *max.mobil Telekommunikation Service GmbH v. Commission* [2002] E.C.R. II-313; C-141/02, *Commission v. max.mobil Telekommunikation Service* [2005] E.C.R. I-1283) and has also been expanded to State aid cases.
123. Case T-36/99, *Lenzing v. Commission* [2004] E.C.R. II-3597, para. 160.
124. Case C-525/04P, *Spain v. Lenzing* [2007] E.C.R. I-9947, para. 56; Case C-12/03, *Commission v. Tetra Laval* [2005] E.C.R. I-987, para. 39.
125. Case C-525/04P, *Spain v. Lenzing* [2007] E.C.R. I-9947, para. 57.
126. Case C-525/04P, *Spain v. Lenzing* [2007] E.C.R. I-9947, para. 57 referring back to the Cases 98/78, *Racke* [1979] E.C.R. 69, para. 5; Case C-16/90, *Nölle* [1991] E.C.R. I-5163, para. 12; Case C-12/03P, *Commission v. Tetra Laval* [2005] E.C.R. I-987, para. 39; Case C-326/05P, *Industrias Químicas del Vallés v. Commission* [2007] E.C.R. I-6557, para. 76.
127. Case C-525/04P, *Spain v. Lenzing* [2007] E.C.R. I-9947, para. 58.
128. Opinion of AG Sharpston of 16 March 2006 in Case C-310/04, *Spain v. Council* [2006] E.C.R. I-7285, paras. 80 and 94. The CJEU followed the Advocate General explicitly referring to the duty of care which requires the Commission to collect and to take into account all relevant information prior to taking a discretionary decision (Case C-310/04, *Spain v. Council* [2006] E.C.R. I-7285, para. 133).
129. See also Opinion of AG Kokott of 7 July 2009 in Case C-558/07, *S. P. C. M. and others* [2009] E.C.R. I-5783, paras. 69–77, and the case law referred to in the footnotes.
130. Case 148/73, *Lowage v. Commission* [1974] E.C.R. 81, para. 15; Case 105/75, *Giuffrida v. Council* [1976] E.C.R. 1395, paras. 17–18. This early case law of the CJEU had already begun to invoke the principle of good (or sound) administration.
131. Case T-187/99, *Agrana Zucker und Stärke AG v. Commission* [2001] E.C.R. II-1587, para. 56.
132. Case T-214/95, *Vlaamse Gewest v. Commission* [1998] E.C.R. II-717, paras. 79 and 89; Case C-382/99, *Netherlands v. Commission* [2002] E.C.R. I-5163, para. 24; Case T-87/05, *EDP – Energias de Portugal SA v. Commission* [2005] E.C.R. II-3745, paras. 161–165.
133. The case law is summarised in Joined Cases C-189, 202, 205, 208 and 213/02P, *Dansk Rorindustri and others v. Commission* [2005] E.C.R. I-5425, para. 211 stating that ‘In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the [Commission] imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be excluded that, on certain conditions and depending on their conduct, such rules of conduct, which are of general application, may produce legal effects’. See also: Case C-310/99, *Italian Republic v. Commission* [2002] E.C.R. I-2289, para. 52.
134. See, for example, Case C-310/99, *Italian Republic v. Commission* [2002] E.C.R. I-2289, para. 52; Case T-35/99, *Keller v. Commission* [2002] E.C.R. II-261, para. 77. The conditions for the validity of such administrative guidelines is that they ‘contain indications as to the direction to be followed’ by the Commission and ‘do not depart from the Treaty rules’ (see also: Case T-187/99, *Agrana Zucker und Stärke AG v. Commission* [2001] E.C.R. II-1587, para. 56) the latter criterion of legality echoing the

- principle of *ultra vires*. In addition, the Commission may not through administrative rulemaking amend the provisions of either primary or secondary law.
135. Case C-311/94, *Ijssel-Vliet v. Minister van Economische Zaken* [1996] E.C.R. I-5023, paras. 36 and 37; Case C-313/90, *CIRFS and others v. Commission* [1993] E.C.R. I-1125, paras. 35, 36. For further detail see Hofmann 2006a: 153–78.
  136. The European Courts have interpreted various forms of Commission documents in the same way as they have applied administrative guidelines formally published in the C series of the *Official Journal*. For example, the General Court has treated Commission's statements in the 17th *Report on Competition Policy* as 'guidelines which the Commission follows when implementing the rules of competition in agriculture, which are thus a reference framework known to the Member States, public bodies and the operators concerned' (Case T-190/00, *Regione Siciliana v. Commission* [2003] E.C.R. II-5015, para. 100). Statements in the report on competition policy can thus be regarded as administrative guidelines. The CJEU has taken this approach a step further and regarded Commission statements in the *Bulletin of the European Communities* in a way similar to guidelines (Case C-457/00, *Belgium v. Commission* [2003] E.C.R. I-6931, paras. 6–10, 43, 79 and 97). In that case, Belgium had successfully argued that the Commission had laid out 'its general position with regard to public authorities' holdings in company capital.' The Court found that the Commission was bound to this statement in the same way as to its formal administrative Guidelines.
  137. Case C-313/90, *CIRFS and other v. Commission* [1993] E.C.R. I-1125, paras. 32 and 45.
  138. Case C-313/90, *CIRFS and other v. Commission* [1993] E.C.R. I-1125, paras. 32 and 45.
  139. Case T-176/01, *Ferriere Nord v. Commission* [2004] E.C.R. II-3931, para. 134.
  140. Case T-289/03, *BUPA v. Commission* [2008] E.C.R. II-81, paras. 165–169. The same situation exists with respect to the establishment of allocation plans for greenhouse gas allowances on the basis of their local economic and ecologic assessments, see Cases T-374/04, *Germany v. Commission* [2007] E.C.R. II-4431, paras. 77–81; T-183/07, *Poland v. Commission* [2009] E.C.R. II-3395, paras. 89–91. [On appeal: Case C-504/09P]; T-263/07, *Estonia v. Commission* [2009] E.C.R. II-3463, paras. 49–69. [On appeal: Case C-505/09P].
  141. Case T-289/03, *BUPA v. Commission* [2008] E.C.R. II-81, para. 220.
  142. *Ibid*, para. 169.
  143. *Ibid*, para. 266.
  144. *Ibid*, para. 221.
  145. *Ibid*, para. 266.
  146. *Ibid*, para. 172.
  147. Case T-374/04, *Germany v. Commission* [2007] E.C.R. II-4431, para. 79.
  148. Opinion of 23 February 2010 in Case C-290/07P, *European Commission v Scott SA* [2010] E.C.R. I-n.y.r., paras. 58–60.

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