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Complainants' Rights in State Aid Matters: Lost in Modernisation?

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ABSTRACT

Complainants often play an essential role in revealing the existence of State aid. However, secondary legislation does not go much beyond recognising them a minor role as mere source of information for the Commission. The Union Courts have, in recent years, enhanced the protection of complainants' rights in State aid procedure, most notably as regards their association with proceedings and their access to judicature when their claims are dismissed. In so doing, they have clarified that the Commission has no discretion in setting priorities when handling complaints. The article argues that the Commission should use the State Aid Modernisation process as an opportunity to propose an alignment of secondary law and its best practices with the clear message sent by the Courts. Conversely, if the Commission wishes to enhance its discretion in dismissing complaints by laying down prioritisation criteria, it should accordingly abandon the relative secrecy of State aid proceedings and grant complainants sufficient procedural rights, like in the antitrust field, so as to enable them to verify that such discretion is used within certain limits established in advance.

Complainants' Rights in State Aid Matters: Lost in Modernisation?

Massimo Merola and Leonardo Armati¹

Introduction

Whereas in antitrust procedure the question was resolved in the early nineties by the *Automec II* judgment,² the role of complainants in State aid remains controversial.³ Until the adoption of Regulation No. 659/1999 (the Procedural Regulation),⁴ no secondary legislation dealt with the protection of the interests of third parties in State aid procedures. This is largely due to the fact that State aid control is perceived by the Commission and, generally, Member States, as a procedure essentially between public authorities, where third parties are involved only incidentally.

As a result, the Commission's interpretation of rules governing complaints is rather restrictive, which means that when undertakings knock at the Commission's door to complain about alleged support measures, they are not always treated with the attention and favour they think they deserve.

The Commission's attitude seems largely unjustified. Complainants often play an essential role in revealing the existence of State aid and, even if they are not the lead players in State

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² Case T-24/90, *Automec v Commission* [1992] ECR II-2223.

³ For an analysis of the complainants' status in State aid matters see, *inter alia*, Keppenne, *Guide des aides d'État en droit communautaire*, [1999] Bruylant; Dony, *Le contrôle des aides d'Etat*, Commentaire J.Mégret, [2007] Editions de l'Université de Bruxelles; Grespan, *State Aid Procedures*, in Mederer, Pesaresi and Van Hoof (Ed.) *EU Competition Law - State Aid*, [2008] Claeys and Casteels, p-551; Niejahr and Scharf, *Third Parties in State Aid Control: More than Just a Source of Information?* in *EC State Aid Law - Le droit de l'Union Européenne dans la CE*, Liber Amicorum Francisco Santaolalla Gadea, [2008] Kluwer Law International, p. 354; Quigley, *State aid Law and Policy*, [2009] Hart; Hancher, Ottovanger, Slot, *EU State Aid*, [2012] Sweet and Maxwell.

⁴ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [now Article 108 TFEU], [1999] O.J. L 83/1.

aid control proceedings, it seems only fair that a sufficient right to be heard is granted to them, as they are usually seriously affected by market distortions arising out of State aid.

It is true that the Commission has a legitimate concern to limit its workload, and at the same time try to focus its resources on the most sensitive and potentially harmful cases. It is also true, however, that the Commission is entrusted with the exclusive task of assessing State aid compatibility with the Internal Market, which means that it is the only door to knock on when a State support measure is to be assessed in full. Furthermore, pursuant to Article 10 of the Procedural Regulation, the Commission has an obligation to assess without delay all information regarding alleged unlawful aid from whatever sources (including complaints), which certainly does not help when managing its priorities.

It is against this background that the Union Courts have adopted, in recent years, a consistent body of decisions enhancing the protection of complainants' rights in State aid procedure, most notably as regards their association with proceedings and their access to judicature when their claims are dismissed.⁵

As we write this contribution, the Commission is in the process of reviewing the body of rules governing State aid control in the context of the State Aid Modernisation (SAM) plan promoted by Vice President Almunia. This would certainly be an opportunity for the Commission to propose an alignment of secondary law and its best practices with the clear message sent by the Courts.

In the following paragraphs, we will describe the main differences in the way complaints are treated in State aid and antitrust procedure (Section I); we will then comment on how recent

⁵ See commentaries to this case law: Nehl, *Judicial Protection of Complainants in EC State Aid Law : A silent Revolution? ECJ, judgment of 17 July 2008 in Case C-521/09 P, Athinaiki Techniki v Commission*, [2009] 8(3) EStAL pp. 401-412; Derenne and Chérot, *Chroniques. Aides d'Etat. Actes attaquables - Droits des parties intéressées: la CJCE établit que le classement d'une plainte dénonçant l'octroi illégal d'une aide d'Etat constitue un acte attaquant au sens de l'article 230 CE et annule à ce titre une ordonnance du Tribunal qui avait conclu à l'irrecevabilité d'un recours à l'encontre d'une décision de classement de la plainte*, [2008] 4 Conurrences: revue des droits de la concurrence, pp. 112-116; Gambaro and Mazzocchi, *Case C-521/06 P Athinaiki Techniki v Commission*, *Case C-322/09 P NDSHT v Commission*; *Case C-362/09 P Athinaiki Techniki v Commission*, [2011] CMLR, 48, p. 2083; *Idot*, « Droits des plaignants et accès au prétoire », Europe 2008 Octobre, Comm. n°327, pp. 29-30; Thomas, *Athinaiki Techniki II : comments on case C-362/09 P*, [2011] 10(3) EStAL, p. 491.

case law on access to judicial review for State aid complaints have significantly pushed the two areas of law closer in this respect (Section II); and, finally, we will present our views as to whether, and to what extent, the Commission should change the current framework governing the handling of State aid complaints (Section III).

I. State aid *versus* antitrust procedure: the complainants' perspective

Until the adoption of the Procedural Regulation, the only provision recognising a role to interested parties (a category that includes complainants) was Article 108(2) TFEU, pursuant to which the Commission, during the formal investigation procedure, must give “*notice to the parties concerned to submit their comments*”.

The entry into force of the Procedural Regulation has not significantly enhanced the legal position of concerned parties. No rights are provided to allow interested parties to be associated with the proceedings, let alone access to file and rights of defense. The only provision in the Procedural Regulation specifically regarding complainants, Article 20(2), entitles the complainant to inform the Commission of any alleged unlawful aid or misuse of aid, and in turn to be informed if the Commission considers that there are insufficient grounds for taking a view on its complaint, and to receive a copy of the decision that is adopted concerning the subject matter of the complaint.⁶

The relatively vague wording of Article 20(2) has led to considerable uncertainty as to the formal and substantive requirements incumbent on the Commission, the degree of its discretion in treating or rejecting a complaint, and the complainants' access to judicature against such a rejection.

If interpreted conservatively, this provision does not go much beyond recognising the minor

⁶ Pursuant to Article 20(2) of the Procedural Regulation “*Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party*”.

role of the complainant as “official source” of information for the Commission.⁷ Indeed, nowhere in the Regulation is it provided that complainants’ have a right to receive a decision rejecting the complaint, while, on the contrary, Article 25 regards Member States as the only addressees of the decisions adopted under the Regulation. The complainant’s access to judicature is therefore limited to its ability to challenge a decision on the subject matter of the complaint that is addressed to a Member State, which therefore justifies its right to receive such a decision via an administrative letter.

The restrictive approach in the Procedural Regulation rested on the case law preceding its adoption. The first time the Court of Justice addressed the question of the reviewable nature of complaints rejection letters was in *Irish Cement*,⁸ where it adopted a rather conflicting reasoning: on the one hand, it considered that such a letter constituted a decision with definitive legal effects while, on the other, it seemed to imply that the complainants could only challenge it if it was of direct and individual concern to them (implying that they were not the addressees). The action was eventually dismissed because the Court of Justice considered that the letter was a confirmatory act of the decision adopted *vis-à-vis* the Member State.⁹ In *Cook*¹⁰ and *Matra*,¹¹ the Court of Justice for the first time explicitly recognised that a decision finding that a measure does not constitute State aid or declaring it compatible with the Internal Market is a reviewable act for complainants, in that it amounts to a refusal to open the procedure provided in Article 108(2) TFEU, and therefore is a denial of their only procedural guarantee provided by law. In *Sytraval*, the General Court first recognised the reviewable nature of a decision rejecting a complaint,¹² but the ruling was overturned by the Court of Justice on appeal and the complainant’s right to challenge

⁷ See, *inter alia*, Grespan, *State aid Procedures*, in Mederer, Pesaresi and Van Hoof (Ed.) EU Competition Law - State Aid, [2008] Claeys and Casteels, p. 590 based on Case 234/84 Belgium v Commission [1986] ECR 2263, para. 29.

⁸ Joined Cases C-166 and C-220 /86 *Irish Cement v Commission* [1988] ECR p. 6473.

⁹ *Irish Cement*, paras. 11 and 16. See in this respect Keppenne, *Guide des aides d’État en droit communautaire*, 1999 Bruylant, p. 166.

¹⁰ Case C-198/91 *Cook v Commission* [1993] ECR I-2487, para. 22.

¹¹ Case C-225/91 *Matra v Commission* [1993] ECR I-3203, para. 16.

¹² Case T-95/94 *Sytraval and Brink’s France v Commission*, [1995] ECR II-2651, para. 51, where the General Court recognised that the decision of the Commission rejecting the applicants’ allegations on the ground that the measures complained of do not constitute State aid was a reviewable act.

decisions in State aid matters was carefully circumscribed,¹³ according to the judgment, in the field of State aid decisions must be held to be addressed to the Member State concerned only. The letter informing the complainant that there are insufficient grounds for taking a view on the case is to be regarded as an informal communication, not open to challenge.¹⁴ Therefore, where a decision has been adopted following a complaint, only this decision and not the letter addressed to the complainant can be challenged.

The *Sytraval* judgment has long been regarded by the Commission¹⁵ as a limitation to complainants' access to judicial review, to the extent that letters rejecting complaints, irrespective of their contents, were necessarily considered as informal communications, not open to challenge. The consequence being that, when there was no decision addressed to the Member States, complainants were left with no other action than Article 265 TFEU, which, in addition to being inappropriate when a position had indeed been taken, was indisputably less practical given the need to preliminarily call on the Commission to act.

In addition to this limitation to their access to judicial review, case law has on several occasions excluded that complainants enjoy any significant rights of defense during the administrative State aid proceedings before the Commission. More specifically, the Court ruled out any obligation for the Commission to conduct an exchange with the complainants or to give them an opportunity to state their views, let alone to access the file, during the preliminary examination stage.¹⁶ Moreover, the Commission has no duty, in its decisions, to state its position on every aspect of the complaint, with the consequence that it can ignore matters that are manifestly irrelevant, insignificant or of secondary importance.¹⁷ Having regard to the formal investigation procedure, the General Court clarified that concerned parties are involved only to the extent appropriate in light of the circumstances of the case and that they do not have right to a hearing.¹⁸ Moreover, when opening a formal

¹³ Case C-367/95 *Commission v Sytraval and Brink's France* [1998] ECR I-1719.

¹⁴ Case C-367/95 *Sytraval*, cit. para. 45.

¹⁵ This is demonstrated by the wording of Article 20(2) of the Procedural Regulation, which was largely inspired by the judgment (see to that effect Keppenne, *Guide des aides d'État en droit communautaire*, cit.), and by the arguments put forth by the Commission in numerous cases before the Union Courts..

¹⁶ *Sytraval*, cit. para. 59.

¹⁷ *Sytraval*, cit. para. 64.

¹⁸ Joined cases C-371/94 and C-394/94 *British Airways and o. v Commission* [1998] ECR II-2405, para. 60.

investigation procedure, the Commission may confine its communication in the Official Journal to those aspects on which it still harbours doubts,¹⁹ and it is not required to discuss all the issues of fact and law raised by interested parties.²⁰

The lack of procedural rights in State aid law is at odds with other areas of competition law where the complainants' role is explicitly accepted and reflected in a comprehensive package of procedural rights. Most notably, as regards antitrust procedure, Council Regulation (EC) No. 1/2003 provides that "complainants shall be associated closely with the proceedings".²¹ The Commission implementing regulation (EC) No. 773/2004²² lays down in detail the implications of such a close association. Accordingly, complainants' are entitled to: (i) receive a copy of the non-confidential version of the statement of objections and to submit comments on the same (Article 6(1)); (ii) participate in the oral hearing (Article 6(2)); (iii) be heard if the Commission intends not to pursue the complaint (Article 7); (iv) have partial access to the file (Article 8); and (v) receive a formal decision rejecting the complaint, which can be challenged before the Union Courts (Article 7(2)).

The reason for this divergence between State aid and antitrust procedure is not entirely clear. It is true that, unlike in antitrust, State aid proceedings contain elements of both public international law, with interactions between a supra-national authority and Member States, and administrative law, where interactions are between the public administration and individuals. On this basis, it could be *prima facie* argued that, despite being under the same chapter in the Treaty on competition rules, State aid and antitrust are not comparable as far as procedure is concerned.²³ The hybrid nature of State aid procedure, however, seems to have

¹⁹ *British Airways*, para. 62.

²⁰ *British Airways*, para. 94.

²¹ Article 27 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] O.J. L 1/1. Moreover, pursuant to Article 7(2), natural or legal persons that can show a legitimate interest are entitled to lodge a complaint.

²² Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] O.J. L 123/18.

²³ This argument is endorsed by various authors, who underline the peculiar nature of State aid control, which aims not only to restore a level playing field among undertakings but also to avoid competition between Member States. As a result, the argument is that State aid amounts to an internal market policy as much as a competition policy. See to that effect Thomas, "*Athinaiki Techniki II*" : comments on case C-362/09 P, cit. p. 491, Buendia Sierra and Smulders *The limited role of the 'Refined Economic*

implications only as regards the parties against which proceedings are carried out (Member States rather than undertakings), whilst it does not seem decisive for the purpose of distinguishing the status of third parties in the two procedures. In both cases, generally, these are undertakings that are affected by an allegedly anticompetitive behavior, whose main function is to contribute to the disclosure of infringements and, as a result, to the removal of market distortions. The protected interest is therefore the same, as is the rationale for the participation in the proceedings, which is crucial, in both cases, for the Commission to carry out an effective enforcement activity. Moreover, in light of the transparency duty incumbent on many public administrations in the EU, and the Commission's duty to avoid disclosure of confidential information which would also apply to information coming from national authorities, it is difficult to argue that State aid proceedings should be more "secretive" than antitrust proceedings.

If this is true, the reason for the absence of specific rights for complainants in State aid can hardly be justified by the mere assumption that the procedure is essentially between the Commission and Member States. Possible explanations should rest elsewhere and, again, useful elements of assessment may be found in the antitrust experience. By observing the evolution of complainants' rights in this area of law, a reasonable conclusion reached by some authors²⁴ is that their extent is the counterpart of the discretion that the Commission enjoys in dismissing complaints where it considers that there is no Community interest in pursuing them.²⁵ This discretion has been further enhanced with the decentralisation of

Approach, in EC State Aid Law, *Le droit des aides d'Etat dans la CE*, Liber amicorum Francisco Santaolalla Gadea, Kluwer Law International, p.8-9, Di Bucci "Some reflections on the role of third parties in State aid procedures", in Bartosch (ed.), *ESTAL Proceedings of the 5th Experts Forum*, Brussels 21 and 22 May 2007.

²⁴ Niejahr and Scharf, *Third Parties in State Aid Control: More than Just a Source of Information?* in EC State Aid Law, cit..

²⁵ The Court of Justice has recognized since *Automec II* that, in order to perform its enforcement task effectively, the Commission is entitled to give differing degrees of priority to the complaints brought before it. The Commission therefore enjoys a certain discretion to dismiss complaints, most notably in light of different criteria such as the possibility of asserting rights before national courts, the seriousness and persistence of the infringement, the balance between the scope of the investigation and the real impact of the infringement, the termination of the practices in question. See Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty ([2004] O.J. C 101/65). See also, in particular, Case T-24/90 *Automec v Commission*, cit., Case C-119/97 P *Union française de l'express (Ufex) and Others v Commission* [1999] ECR I-1341, paras 92/93, Case C-449/98 P *International Express Carriers Conference (IECC) v Commission* [2001] ECR I-3875, para 37, and Case T-77/95, *Syndicat français de l'Express International and Others (SFEI) v Commission* [1997] ECR

antitrust enforcement enacted by Regulation 1/2003, which empowers Member States' courts and competition authorities to apply Articles 101 and 102 in their entirety.²⁶

Conversely, in the State aid field, the Commission has far less, if any, discretion in setting its priorities in the analysis of complaints,²⁷ as confirmed by the stream of judgments commented below. Based on the above, a possible reason for the difference in the procedural rights granted in antitrust and State aid procedure is the difference in the degree of discretion currently enjoyed by the Commission in handling complaints, as the two seem inversely proportionate.

II. The recent evolution of the case law on complainants' access to judicature

As set out in the previous section, a twofold message as regards complainants emerges from the case law preceding the adoption of the Procedural Regulation: on the one hand, it accepted their rights to obtain judicial review of Commission "first phase" decisions provided they were addressed to Member States. On the other hand, complainants' procedural rights in both the preliminary and the formal investigation procedure were limited to the minimum, in light of the perceived role of complainants as mere information sources.

While the latter aspect has not clearly evolved since the adoption of the Procedural Regulation, starting from 2006, the Union Courts have taken a firm stance in favour of complainants' access to judicature, substantially clarifying the Commission's duties when handling complaints.

Deutsche Bahn

II-1, para 57.

²⁶ This evolution has allowed the Commission to refocus its enforcement priorities and resources on cases for which it is better placed than national authorities, or concerning most serious infringements, or on matters that are important for the definition of its policy.

²⁷ Grespan, *The Procedure before the Commission*, in "EU Competition law - State aid", cit. who however argues that this conclusion is quite unrealistic and fails to take account of the limited resources at the Commission's disposal (p. 609).

The first landmark judgment in this regard was the *Deutsche Bahn*²⁸ case in which a complaint had been rejected via an administrative letter and the Commission had not adopted a formal decision addressed to the State.

Though a systematic interpretation of the Procedural Regulation, the judgment refers the Commission to a clear set of rules to be taken into account when handling complaints. First of all, drawing from Article 10, which provides that the Commission must examine information on alleged unlawful aid from whatever source and Article 13, under which that examination must lead to a decision pursuant to Article 4(2) (non-aid), (3) (compatible aid) or (4) (opening of formal investigation procedure), the General Court held that the examination of a complaint must result in either a decision within the meaning of Article 4 or in a letter, pursuant to Article 20(2), informing the complainant that there are insufficient grounds to take a view on the case. In *Deutsche Bahn*, the General Court found that, despite closing the file via an administrative letter, the Commission had in reality not chosen the option offered by Article 20(2).²⁹ On the contrary, looking at the substance of the act, the Commission had expressed the position that the information provided in the complaint did not enable it to identify any State aid and such position in the merits was considered tantamount to a decision pursuant to Article 4(2) of the Procedural Regulation. In this respect, responding to the argument - based on *Sytraval* - that the Commission had not addressed any decision to the Member State, the General Court clarified, in line with the substantive approach explained above, that the Commission could not rely on its failure to comply with Article 25 of the Procedural Regulation (providing that decisions must be addressed to Member States), to deny the complainants' procedural guarantees.³⁰

It is interesting to note that in parallel with the action for annulment of the letter rejecting its complaint, *Deutsche Bahn* had initiated proceedings under Article 265 TFEU for failure to act. The need for double action shows how unclear the case law was until the judgment in this case. Consistent with the reasoning explained above, the General Court dismissed the

²⁸ Case T-351/02, *Deutsche Bahn v Commission* [2006] ECR II-1047.

²⁹ Case T-351/02, *Deutsche Bahn v Commission*, para. 52.

³⁰ Case T-351/02, *Deutsche Bahn v Commission*, paras. 53-54.

second action as manifestly inadmissible,³¹ due to the fact that the Commission had indeed taken a clear and explicit position on the applicant's complaint in the contested letter, which was therefore challengeable under Article 263 TFEU.

The lesson from *Deutsche Bahn* is that there is no mid-way point between investigating and, consequently, deciding on a case on the one hand, and taking no action because there are insufficient grounds to justify an investigation, on the other. In the first case, the Commission adopts a challengeable act, even if this is done through a simple administrative letter with no reasoning, as the substance and legal effects remain the same as a formally adopted decision. In the second scenario, the Commission refrains from investigating the measure and fails to take a position because it believes that there are insufficient grounds. The complainant can in this case supply further information or, if it considers that the information is already sufficient, have recourse to an action for failure to act under Article 265 TFEU. In both cases the Commission is subject to judicial review, which is the inevitable consequence of its role as the exclusive enforcer of State aid rules.

Athinaiki Techniki

This significant evolution in favour of complainants' access to judicature was pushed even further in *Athinaiki Techniki*.³² This was an appeal against the order whereby the General Court had dismissed, on grounds of inadmissibility, the action brought by a complainant against an administrative letter giving notice of the Commission Services' decision to close the case.

The Court of Justice overturned the General Court's order and concluded, after a clear reasoning inspired by general principles of law, human rights, and antitrust procedure, that the Commission's rejection of the complaint was indeed an actionable decision.

The first innovative statement in the judgment concerns the status of complainants in the

³¹ Case T-361/02 (Order) *Deutsche Bahn v Commission*, [2004] O.J. C 217/40.

³² Case C-521 P *Athinaiki Techniki v Commission* [2008] ECR I-5829.

preliminary examination stage: although they cannot rely on rights of defense, they have the right to be associated with it in an adequate manner.³³ This is an important clarification that brings the State aid closer to the field of antitrust (as already mentioned, Article 27(1) of Regulation 1/2003 provides that “complainants shall be associated closely with the proceedings”). Again, the Court seems to take inspiration from antitrust rules when, as a consequence of this association, it requires the Commission, where it sends an Article 20(2) letter, to allow the complainant to submit additional comments within a reasonable period.³⁴

Although the scope of the right to be associated with the proceedings is not clarified in the judgment, this statement may by itself be seen as going beyond the explicit content of Article 108(2) of the Treaty and the Regulation 659/99, which, as stated above, requires the Commission to take account of comments “from all concerned parties” only during the formal investigation procedure. Unlike some authors,³⁵ however, we believe that there is no conflict with the above rules. On the contrary, given the increasing involvement of third parties even in the preliminary proceedings, the recognition of their procedural rights seems very much in line with the general principle of good administration regulating the Commission’s activity in all fields.

Beyond the incidental statement on complainants’ right to be associated with the proceedings, the importance of the judgment lies in the clear principle that, once the comments on the Article 20(2) letter have been lodged by the complainant, or a “reasonable period” has expired, the Commission is bound by Article 13(1) of Regulation N° 659/99 to close the preliminary examination stage by adopting a decision pursuant to Article 4(2), (3) or (4).³⁶

The Court of Justice therefore considers that a complaint on allegedly unlawful aid triggers the initiation of the preliminary stage investigation under Article 108(3) of the Treaty, and accordingly frames the Commission’s review of a complaint from the very start in a

³³ Case C-521 P *Athinaiki Techniki*, cit. para. 38.

³⁴ Case C-521 P *Athinaiki Techniki*, cit. para. 39

³⁵ Gambaro and Mazzocchi, cit..

³⁶ Case C-521 P *Athinaiki Techniki*, cit. para. 40.

procedural context, considering it tantamount to a notification from a Member State. The consequence is that the Commission has an obligation to close that preliminary examination stage by adopting a formal decision.

In *Athinaiki Techniki*, the Court of Justice, looking at the substance of the act³⁷ (as the General Court did in *Deutsche Bahn*) found that the Commission had, in reality, decided to bring to an end the preliminary examination procedure. As a consequence, the act underlying the administrative letter rejecting the complaint was interpreted as a decision within the meaning of Article 4(2) of the Procedural Regulation (a decision that the measure does not constitute aid). The natural consequence was that the decision was open to challenge irrespective of whether it had been addressed to the State concerned as required by Article 25 of the Procedural Regulation.

Compared to *Deutsche Bahn*, the *Athinaiki Techniki* judgment seems to have put an extra burden on the Commission. While *Deutsche Bahn* left some scope for the Commission to avoid the adoption of a decision without opening the preliminary examination stage, by sending an Article 20(2) letter before carrying out any investigation, *Athinaiki Techniki* suggests that the transmission of one such letter is merely a preliminary step in proceedings that must anyway lead to a decision.

In fact, the end result is not significantly different: despite *Athinaiki Techniki*, it would be unreasonable to argue that the Commission is under a duty to adopt an Article 4(2) in all cases where it receives a complaint. It certainly does not have such a duty where the complainant fails to further substantiate, within reasonable terms, a poorly grounded or detailed complaint. This seems to be confirmed by the recent judgments in cases brought by *Ryanair*,³⁸ where the General Court dismissed the applicant's actions for failure to act based on a number of ungrounded claims, resulting from what Ryanair's C.E.O. provocatively

³⁷ Case C-521 P *Athinaiki Techniki*, paras. 41-44.

³⁸ Case T-423/07 and Case T-442/07 *Ryanair v Commission*, not yet reported. See in this respect, Barbier de La Serre, *Attention aux plaintes low cost*, *Revue Lamy de la Concurrence : droit, économie, régulation* 2011 n° 28 p.66-67; Struckmann, Forwood, *If you have just one shot - aim well: how to make an effective complaint : comments on Case T-423/07, Ryanair Ltd v Commission, Judgment of 19 May 2011*, *European state aid law quarterly* 2012, v. 11, n. 1, p. 283.

defined as the company's "low cost" approach to complaints.³⁹ The General Court's reasoning was that those claims could not be considered as information within the meaning of Article 10(1) of the Procedural Regulation.⁴⁰

To sum up, the main contribution brought by *Athinaiki Techniki* is the statement that the Commission has a duty to associate the complainant with the proceedings - although the scope of this duty remains unclear - and the general rule that, in principle, any complaint should lead to a decision. Given that the case law developed in the context of antitrust procedure was explicitly relied upon in the judgment,⁴¹ it is easy to conclude that the Court's intention was to bring the two areas of EU law closer together.

Human rights, in particular the need to ensure effective judicial protection, have also been an important source of inspiration for the Court of Justice, as is clear from the wording of paragraph 45 of the judgment: "*as the European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the EC Treaty, the procedural rules governing actions brought before the Community courts must be interpreted in such a way as to ensure, wherever possible, that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law*".

Athinaiki Techniki II

The judgment in *Athinaiki Techniki* had an interesting follow-up. During the proceedings before the General Court following the referral back from the Court of Justice, the Commission withdrew its letter dismissing the complaint and asked for the case's removal from the register. Following the Commission's request, the General Court issued a no need

³⁹ This statement was made during the 10th Experts' Forum on New Developments in European State Aid Law Conference, 7/8 June 2012, Brussels.

⁴⁰ See for instance Case T- 442/07 *Ryanair*, cit. para. 46.

⁴¹ In particular, Case C-282/95 *P Guérin automobiles v Commission* [1997] ECR I-1503 (para. 36) is used by the Court of Justice at para. 40 of its judgment, as a basis for the reasoning according to which once the preliminary stage of the procedure has been completed, the Commission is bound either to initiate a procedure or to adopt a definitive decision rejecting the complaint.

to adjudicate order.⁴²

The order was challenged again by the claimant, who was worried that the Commission had withdrawn the letter to prevent the Court from deciding on the merits of the case. Advocate General Bot vehemently criticised the Commission's attitude, accusing it of "going round in circles".⁴³ The Court of Justice endorsed A.G.'s opinion and quashed the order.⁴⁴ In particular, it condemned the Commission for taking the procedure, which was already concluded, a step back from where it was. The Court of Justice found that, if the Commission were entitled to withdraw an act such as the letter communicating its decision, it could perpetuate a state of inaction during the preliminary examination stage, contrary to its obligations under Articles 13(1) and 20(2) of Regulation No 659/1999 and, therefore avoid any judicial review.

Although the Commission argued, in that case, that the reason for the withdrawal was to comply with the Court of Justice's ruling and adopt a formal decision to open a formal investigation procedure under Article 4(3) (it later adopted an Article 7(2) decision ruling that the measures were not State aid), AG Bot's and the Court of Justice's criticisms were directed at the heart of what was the Commission's settled policy with regard to complaints: sending letters with a provisional conclusion with a view to discouraging legal action. This implied claiming, during the Court proceedings that arose from time to time, that those letters were merely preparatory acts and therefore that only an action for failure to act under Article 265 TFEU was open to the complainant. As seen above, the legal soundness of this strategy had already been questioned in *Deutsche Bahn*, which showed beyond doubt that the most appropriate action when the Commission dismisses a complaint is Article 263 rather than Article 265 TFEU.

⁴² Case T-94/05 *Athinaiki Techniki v Commission* (Order), [2009] O.J. C 233/14.

⁴³ See Opinion in Case C-362/09 P, [2010] ECR I-13275 para. 101.

⁴⁴ Case C-362/09 P *Athinaiki Techniki v Commission* 2010 Page I-13275.

The same approach as described above was put in place by the Commission in relation to a complaint lodged by a Swedish tour operator against alleged unlawful aid, which was dismissed via an administrative letter from the Commission DG. The General Court rejected the action for annulment brought by the complainant as inadmissible.⁴⁵ However, instead of upholding the Commission's position that the applicant should have recourse to Article 265 TFEU, the General Court founded its decision on the ground that the contested letters concerned *prima facie* existing aid rather than unlawful aid. Relying on its prior ruling in *Salt Union*,⁴⁶ the General Court therefore concluded that the contested letters were not open to judicial review, because the complainant would in no event be entitled to challenge the proposals of appropriate measures that could be issued by the Commission pursuant to Article 108(1) TFEU, given that these are mere preparatory acts without any legal effects.⁴⁷ In this way the General Court brought the case outside the scope of *Deutsche Bahn* and *Athinaiki Techniki*, which were both based on the principle that the duty to adopt a decision was triggered, under Article 13 of the Procedural Regulation, only in cases involving alleged unlawful aid.

The Court of Justice quashed the judgment on appeal.⁴⁸ As in *Athinaiki Techniki* the Court of Justice clarified that, once the preliminary stage examination is concluded, the Commission is bound either to initiate the next stage of the procedure provided for by Article 88(2) EC, or to adopt a definitive decision rejecting the complaint.⁴⁹ Such a formal decision is adopted not

⁴⁵ Case T-152/06 *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v. Commission*, [2009] ECR II-1517.

⁴⁶ Case T-330/94 *Salt Union v Commission*, [1996] ECR II-1475, paras. 33-37.

⁴⁷ Article 17(2) of the Procedural Regulation provides that, where the Commission considers that an existing aid is not, or is no longer, compatible with the internal market, it shall inform the Member State concerned of its preliminary view and give it the opportunity to submit its comments within one month. Where it concludes that an existing aid is not or is no longer compatible, it shall issue a recommendation proposing appropriate measures to the Member State concerned. Only if the Member State does not accept the proposed measures, may it decide to initiate proceedings pursuant to Article 108(2) TFEU.

⁴⁸ Case C-322/09 P *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v. Commission* [2010] ECR I-11911. For a comment of the judgment see Kassow "Judgment of the Court of Justice of the European Union in case C-322/09 P "NDSHT v Commission" : comments on C-322/09 P", *European state aid law quarterly* 2011, v. 10, n. 2, p. 327.

⁴⁹ C-322/09 P *NDSHT*, cit. para. 50.

only when the Commission finds that the investigation has revealed no grounds for concluding that there is State aid within Article 107 TFEU or that the aid is incompatible, but also when the contested measure is classified as existing aid, with the consequence of falling within the procedural framework provided for by Article 108(1) TFEU. The reason is that, in both cases, the Commission refuses by implication to initiate the procedure provided for by Article 108(2) TFEU. This decision is definitive rather than provisional, given that it deprives the complainant of the procedural guarantees afforded by Article 108(2) TFEU.⁵⁰

Although this conclusion is in line with the previous cases and therefore does not come as a surprise,⁵¹ this judgment represents a further considerable step in the wider systematic context of complainants' judicial rights as developed in previous case law. Indeed, *NDSHT* completes *Deutsche Bahn* and *Athinaiki Techniki* to the extent that the kind of decisions to be adopted after a complaint are no longer pigeon-holed in the list set out in Article 4 of the Procedural Regulation, but fall under the rather wider "reply to a complaint" category, thereby moving a further step towards the antitrust model. In light of this ruling, one wonders if further openings can be expected from the Union Courts as regards the ability to challenge Commission's refusal of their complaint, even where their claims concern existing aid that is believed to be or have become incompatible with the Internal Market (in other words, a refusal to adopt a letter pursuant to Article 17(2) of the Procedural Regulation).⁵²

III. The way forward: what can (or should) be expected from the Commission

Athinaiki Techniki has been defined as a "silent revolution" in the jurisprudence relating to the status of complainants in State aid law.⁵³ Indeed the judgment, as well as the case law

⁵⁰ C-322/09 P *NDSHT*, cit. paras. 50-54.

⁵¹ In cases C-313/90 *CIRFS v Commission* [1993] ECR I-1125, and C-321/99 P *ARAP v Commission* [2002] ECR I-4287, the Court of Justice had similarly held that decisions to classify an aid as existing were reviewable acts.

⁵² This would imply a *revirement* from *Salt Union*. A different - but related - question is put by Conte as to whether such a letter could be challenged by a complainant to contest the qualification of the aid as existing (see Conte, *Existing Aid: Substantial and Procedural Aspects*, in Liber Amicorum Francisco Santaolalla Gadea, cit., pag. 306 *et seq.*). To that regard, the author notes that the preliminary nature of the act should not in itself represent an obstacle to it being open to judicial review.

⁵³ H.P. Nehl refers to the judgment as "a rather unexpected, silent revolution" (see Judicial Protection of

analysed above, brings about a long awaited evolution in favour of complainants' access to justice in the field of State aid. We believe, however, that the Court has been "vocal", rather than silent, in revolutionising the framework of reference for the Commission.

Not only did it clearly define the Commission's duties under the Procedural Regulation (or even beyond this regulation, in *NDSHT*), but also, on occasions, it openly criticised the Commission's *modus operandi* which was aimed at restricting the unsuccessful complainant's access to the Union Courts.

This is why the Commission should not ignore the clear message coming from case law and should deeply reflect on the role of complainants in State aid law. The Commission should indeed reconsider its view that State aid proceedings are exclusively (as opposed to officially or mostly) between public authorities and bring its procedure relating to complaints closer to antitrust.

The State Aid Modernisation (SAM) process currently in place provides the ideal forum to propose substantial amendments to the current framework of reference and, in particular, to amend the Code of Best Practice for the conduct of State aid control procedures (the Code),⁵⁴ which the Commission adopted in 2009 seemingly without taking into account the most recent developments in case law and most notably the *Athinaiki Techniki* judgment. The Code states in Section 7.2 (indicative timeframe and outcome of the investigation of a complaint) that the Commission is entitled to give different degrees of priority to the complaint, depending for instance on the scope of the alleged infringement, the size of the beneficiary, the economic sector concerned, or the existence of similar complaints. The Commission can accordingly postpone dealing with a measure that is not a priority, within certain indicative timeframes of twelve months for: (a) adopting of a decision for priority cases pursuant to Article 4 of the Procedural Regulation, with a copy addressed to the complainant; or (b) sending an initial administrative letter to the complainant setting out its preliminary views on non-priority cases. It is interesting to note that the code states that such an administrative letter "*is not an official position of the Commission, but only a preliminary*

⁵⁴ Complainant in EC State aid law: a silent revolution? cit, p. 401 *et seq.*
[2009] O.J. C 136/13.

view of the Commission services, based on the information available and pending any additional comments the complainant might wish to make within one month from the date of the letter". If further comments are not provided within the prescribed period, the complaint is deemed to be withdrawn.⁵⁵ Finally, where the complaint concerns unlawful aid, complainants will be reminded of the possibility to initiate proceedings before national courts, which can order the suspension or recovery of such aid.⁵⁶

The above *modus operandi*, which reflects to a great extent the Commission's practice in the years before the Code's adoption, and in particular the choice of administrative letters rather than decisions, seems to reflect the Commission's willingness to dismiss cases without having to face judicial review. This is in blatant contrast with *Athinaiiki Techniki*, which is very clear in imposing a duty to close all case files on complaints with a decision on substance, with the consequence that this part of the Code would have no chance of standing up in Court. Similarly, the prioritisation method established in the Code does not appear to be effective from a legal standpoint, as it is without prejudice to the Commission duties, under Article 10 of Procedural Regulation and the case law⁵⁷ of examining all alleged State aid measures within a reasonable delay.

In light of this, it would seem that the Commission needs to change the current legal framework relating to the handling of complaints and fine-tune its practice to bring it in line with legal requirements. In so doing, it has two options: one way is to learn the lesson from the stigmatisation of its practices in *Athinaiiki Techniki II* and abide by the clear principles elaborated by the Union Courts, while at the same time finding suitable solutions to improve administrative efficiency. Another option is to simply propose adjustments in the Procedural

⁵⁵ Code of Best Practice, para. 48. Another indicative deadline set by the Code concerns the first reaction to the complaint. Within two months of receipt, the Commission will inform the complainant of the priority status of its submission (para. 49).

⁵⁶ Code of Best Practice, para.50. This statement, although correct, does not seem to take into account that private enforcement in State aid is a poor substitute for the fully fledged assessment by the Commission. Unlike in antitrust cases, national courts are not empowered to apply State aid rules in their entirety, as only Article 88(3) is of direct application. Moreover, very few cases are known, and arguably the already scant chances of success of a private action appear to be even fewer when the administration or beneficiary concerned can point to the judge that a complaint has been previously dismissed by the Commission.

⁵⁷ Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-03407, para. 72; Case T-73/98 *Prayon Rupel v Commission* [2001] ECR II-867, para. 100.

Regulation in a way that enables it to stick to its current practice of dismissing complaints by administrative letter, but in a more favourable legal context.

Of course the former solution, which would imply a more thorough and structured review of complaints' handling, would certainly be welcomed by the legal community. In particular, the amendments should allow the recognition of the complainants' rights to receive decisions while at the same time allowing the Commission to focus its resources on *prima facie* substantiated cases. This could be done by setting appropriate filters, such as higher standards of information required in complaints (so as to be able to dismiss "low cost" complaints) or higher standards for complainants to qualify as interested party. Moreover, the Commission could propose legal criteria to distinguish priority and non-priority cases, via an amendment to Article 10 of the Procedural Regulation, in respect of which a double standard for the "reasonable delay" would apply. As a result, a fast-track procedure could be established to keep pace with the most sensitive cases.

Many solutions can also be envisaged to better manage the Commission's workload and facilitate the adoption of decisions. For instance, the Commission could establish a system of cooperation with National Competition Authorities' (NCAs), in order to seek their assistance in its assessment. This should be possible even though a proper decentralisation, such as that experienced in antitrust, cannot be replicated in the State aid field given the Commission's role as the sole full enforcer of Article 107 TFEU. Accordingly, after having informed all concerned parties, non-priority cases could be referred to the relevant NCA for a preliminary assessment. If appropriate legal instruments could be established to grant them with the necessary powers, these could carry out the preliminary investigation of the measures complained about and communicate their position to the Commission, for example, in the form of a provisional decision with an appropriate reasoning recommending the complaint's pursuit or dismissal. Although deprived of legal effects, such a provisional decision would enable the complainant to fully understand the reasons underlying the assessment and to judge whether the case should be dropped or further appraised by the Commission. In the latter scenario, the Commission could either adopt a simplified decision confirming the reasoning developed by the NCA or take a fully-fledged decision, but saving a substantial amount of time as it would be able to use the documentation in the NCA's file. The

advantage of a solution contemplating a two-step administrative procedure with the Commission acting as an appellate body, as already experienced in other fields of EU law,⁵⁸ would largely outweigh the administrative effort of setting up the appropriate rules or practices to ensure its smooth operation. The Commission could rely on an effective filter for non-priority cases and devote more resources to priority cases and State aid notifications. Complainants would have their submissions treated with the due care even when they are not classified as priority cases for the Commission. The NCAs would build up a significant expertise in this area of EU law while strengthening their independence *vis-à-vis* national governments, paving the way for a real decentralisation of the application of State aid in the future.

Beyond any concrete example, what is important is that any initiatives taken by the Commission to enhance its efficiency takes into due consideration the explicit recognition of complainants' rights coming from the case law.

This not only encompasses the explicit recognition of the complainants' right to receive a decision, but also their right to be associated with the preliminary and formal proceedings in an adequate manner, a right that to date has not yet been defined in detail by the Union Courts.

The concrete implication of this is the definition of a clear inventory of complainants' rights of defense. As stated above, a reasonable way of interpreting the current lack of procedural rights for complainants in State aid procedure rests on the Commission's lack of discretion in handling complaints, which is the corollary of its obligation to close the examination of all complaints with a decision on substance.

Therefore, if the Commission wishes to enhance its discretion in dismissing complaints by laying down prioritisation criteria, it should accordingly abandon the relative secrecy of State aid proceedings and grant complainants sufficient procedural rights, so as to enable them to verify that such discretion is used within certain limits established in advance. In so doing,

⁵⁸ For instance in relation to acts adopted by certain executive agencies, such as the Education, Audiovisual and Culture Executive Agency-EACEA.

the experience in antitrust law should, again, serve as a benchmark.

Conclusion

By the time this article is published, the Commission will have probably presented the results of its SAM effort and, possibly, already a proposal to amend the current rules governing the handling of complaints in State aid procedure.

The hope is that the Commission will be willing to walk the extra mile in this exercise with a view to striking the right balance between its duty to adopt a decision on complaints and the need to manage a substantial workload with limited resources. Conversely, any shortcut to amend the Procedural Regulation in a way that enables it to stick to its rather “opaque” practice of dismissing cases through administrative letters, without taking the necessary care in making complainants aware of their right to obtain a formal decision, would be hardly conceivable in a Union based on the rule of law.

Be that as it may, the Commission is right in pursuing the objective of increased efficiency in the handling of complaints and this logically implies that it can set priorities in the new Procedural Regulations in a transparent manner. However, it cannot “have the cake and eat it too”; if it wishes to widen its discretion in handling complaints, it must accept that complainants be more involved in the procedure, by granting them appropriate rights of defense as in the antitrust field.

In conclusion, we hope that the clear message sent by the Union Courts will translate into secondary legislation and not be lost in modernisation. It is submitted that not only the Union’s legal system but also the Commission itself have only to gain from a deep and structured review of this important area of law and from the greater legal certainty for complainants resulting from it.