

The Role of Competitors in the Enforcement of State Aid Law

Fernando Pastor-Merchante



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The Position of Complainants in State Aid Procedures

Introduction

The previous chapter has brought to light the limitations that the private enforcement of State aid law presents from the viewpoint of competitors. As a result of the pivotal position occupied by the Commission in this field, competitors may decide to bypass national courts and to resort directly to the Commission when it comes to challenging State measures of financial assistance to other firms. This chapter is therefore concerned with complaints as a vehicle for competitors to fight State aids.

The definition of the status of complainants within State aid procedures faces two basic difficulties. The first one is the need to take account of the general dilemma posed by the embedment of complaints within any regulatory scheme: complainants act as watchdogs and, as such, increase the likelihood of detecting infringements; but they also challenge the autonomy of the regulator to set priorities and follow its own enforcement agenda. The first part of this chapter spells out this problem and describes the way in which EU administrative law has generally responded to it, releasing the Commission from the obligation to investigate and respond to every complaint that it receives.

The second problem stems from the peculiar design of the system of State aid supervision, which rests on the obligation of Member States to notify any plan to grant State aid before putting it into place. Chapter 2 noted that the bilateral character of the State aid procedure is particularly strong at the initiation stage, given its design as an authorisation procedure in which the role of the Commission is to respond to the requests for clearance made by Member States. The question that arises, then, is how to embed complaints within a system to which they are in principle alien. The second part of the chapter deals with this issue (ie, the issue of access), describing the different jurisprudential and legislative moves that opened the State aid procedure to the input of complainants.

Finally, the last part of the chapter addresses the issue of leverage. It shows that the status of complainants in State aid cases is not governed by the general regime outlined in the first part of the chapter, which means that they have more bite. This is because, besides securing access, the European Courts (first) and the legislator (later) have provided complainants in State aid matters with a right that they

seldom enjoy in other contexts, namely the right to a response on the merits of their allegations. The chapter concludes with an assessment of the significance that this right has for the inquiry carried out in this book.

I. The Position of Complainants in EU Administrative Law

1. Administrative Authorities, Complaints and Enforcement Discretion

As noted in Chapter 2, the system of State aid control places great emphasis on the need to detect every measure that falls within the definition of aid of Article 107(1) TFEU, irrespective of their eligibility to the exemptions listed in Article 107(2) and (3) TFEU. This is the result of the constitutional choice in favour of a system of ex ante control that places the ultimate decision on the implementation of national State aid plans in the hands of the Commission. The challenge is to detect those measures that meet the definition of State aid but are implemented without going through the Commission—‘unlawful’ or ‘illegal’ State aid in the jargon of the discipline.

The reader is referred to the second chapter for a more elaborate discussion of the added value that competitors bring to the system of State aid control in terms of detection, be it when they rely on the direct effect of the standstill provision before national courts or when they lodge complaints with the Commission. This chapter is concerned with the latter scenario, which raises some problems of its own. These problems are not specific to the realm of State aid control, nor, in fact, to the EU administration itself. They affect the relationship between complainants and supervisory authorities at large, which is why it may be useful to take one step back and to look at them from a more general perspective.

The ultimate cause of these problems lies in the necessarily limited character of any administrative authority’s resources. It is this limitation that makes complaints a potentially useful device, insofar as they add strength to the authority’s detection capacity. Yet it is also this limitation that turns complaints into a double-edged sword. This is because they challenge the authority’s capacity to carry out a ‘proactive’ rather than ‘reactive’ policy of enforcement.¹

In the ‘reactive mode’,² supervisory authorities are complaints driven and hence in the position that is typical of courts.³ The main drawback of this approach is

¹ Robert A. Kagan, ‘On Regulatory Inspectorates and Police’ in Keith Hawkins and John M Thomas (eds), *Enforcing Regulation* (Boston, MA: Kluwer/Nijhoff Publishing, 1984) 40.

² *ibid.*

³ For a general discussion of the problems raised by ‘case based policy making’, see Frederick Schauer and Richard Zeckhauser, ‘The Trouble with Cases’ in Daniel P Kessler (ed), *Regulation versus Litigation. Perspectives from Economics and Law* (Chicago, IL: University of Chicago Press, 2011) 61.

that ‘Responding to complaints ... often diverts enforcement personnel to comparatively low-priority problems’,⁴ hence the need for some degree of proactive enforcement. The challenge then is to figure out how to allocate the available resources so that they provide the most ‘value added’,⁵ ie, to determine the criteria that are to inform ‘an ordered policy of selective enforcement’.⁶ This is certainly no easy task.⁷ Particular attention may be devoted to the most important or common infringements, or to those that raise particular difficulties as a result of their novelty or complexity.⁸ In any event, the kernel of this strategy is that the regulator retains control over its own enforcement agenda.

The challenge is thus to find ‘the optimum balance of reactive and proactive strategies’.⁹ It is in order to achieve this balance that supervisory authorities are normally endowed with some degree of ‘enforcement discretion’—ie, with ‘the authority to turn a blind eye to legal violations’.¹⁰ What this means is that complaints are welcome as a useful source of information, but that the enforcer is given leeway in the selection of complaints that it decides to investigate. It may therefore refrain from investigating certain complaints, despite their being in appearance well founded, and focus its resources instead on those allegations that match its own enforcement priorities. The other side of the coin is that complainants are entitled neither to an investigation of their allegations nor to a response on the merits of their claims. The following two sections illustrate how these principles work in EU administrative law.

2. The Enforcement Discretion of the Commission Under EU Administrative Law

Article 17(1) TEU entrusts the Commission with the mission of ensuring the application of the Treaties. In order to fulfil this task, the Commission has at its disposal several mechanisms. It has, on the one hand, the *general* procedure for the enforcement of EU law, laid down by Articles 258 and 259 TFEU, which empower

⁴ Kagan (n 1) 40.

⁵ *ibid.*, 41.

⁶ Richard Rawlings, ‘Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement’ (2000) 6 *European Law Journal* 4, 28.

⁷ Rodolphe Muñoz, ‘The Monitoring of the Application of Community Law: The Need to Improve the Current Tools and an Obligation to Innovate’ (2006) 4 *Jean Monnet Working Paper Series*, 9.

⁸ For an example of the way in which the Commission sets its own priorities in the framework of its general supervisory task see, eg, ‘Commission Communication—Better monitoring of the application of Community law’ COM (2002) 725 final, and ‘Commission Communication—A Europe of results. Applying Community law’ COM (2007) 502 final. In the field of antitrust, see ‘Communication from the Commission—Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’ (OJ C45, 24.2.2009, p 7).

⁹ Kagan (n 1) 41.

¹⁰ I borrow the phrase from Zachary S Price, ‘Enforcement Discretion and Executive Duty’ (2014) 67 *Vanderbilt Law Review* 671, 673, who uses it in a different context.

the Commission to sue before the Court of Justice any Member State that fails to abide by one of its reasoned opinions. It has, on the other hand, several *special* procedures for the enforcement of particular provisions of the Treaty. These special procedures empower the Commission to declare that an infringement has occurred and to record this finding in a binding decision, without going through the Court. It is on the basis of this power that the Commission may enforce the rules on competition against private undertakings¹¹ and Member States.¹²

From the very early days, the Commission has sought the assistance of citizens and undertakings in its task of monitoring the application of EU law.¹³ The Commission has been very successful in its endeavour to promote complaints.¹⁴ However, it has had to face a growing number of judicial challenges by ‘disappointed complainants’¹⁵ as well as increasing demands ‘for greater “voice” or more participatory elements in the procedure’.¹⁶

As a result of this pressure, the position of complainants in the procedures for the enforcement of EU law has undergone some changes. Their position within the general infringement procedure has attracted the attention of the Commission in several soft-law instruments, which have articulated certain procedural guarantees such as the systematic registration of complaints and the establishment of certain time limits.¹⁷ The status of complainants within competition procedures has been developed by secondary law.¹⁸ Finally, the establishment of a European Ombudsman has created a new instrument to bring to light the most flagrant examples of maladministration committed by the Commission in the handling of complaints.¹⁹

It is beyond the scope of this chapter to describe in detail these developments. The point to note is that none of them has called into question the power of the Commission to allocate its enforcement resources as it deems best—that is to say, the idea that the Commission enjoys some degree of enforcement discretion on

¹¹ Article 105 TFEU and 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 (OJ L1, 4.1.2003, p 1).

¹² Article 106(3) TFEU.

¹³ Ignace Maselis and Hans M Gilliams, ‘Rights of Complainants in Community Law’ (1997) 22 *European Law Review* 103, 103.

¹⁴ See the historical account of Ludwig Krämer, ‘The Environmental Complaint in EU Law’ (2009) 6 *Journal for European Environmental & Planning Law* 13.

¹⁵ Maselis and Gilliams (n 13) 103.

¹⁶ Carol Harlow and Richard Rawlings, ‘Accountability and Law Enforcement: The Centralised EU Infringement Procedure’ (2006) 31 *European Law Review* 447, 466.

¹⁷ ‘Commission Communication on the relations with the complainant in respect of infringements of Community law’ COM (2002) 141 final; ‘Communication from the Commission to the Council and the European Parliament. Updating the handling of relations with the complainant in respect of the application of Union law’ COM (2012) 154 final.

¹⁸ 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 (OJ L1, 4.01.2003, p. 1) and Articles 5 to 9 of 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 (OJ L123, 27.4.2004, p 18).

¹⁹ For a critical account of the role played by the EU in some salient cases related to complaints, see Harlow and Rawlings (n 16) 465–72.

the basis of which it can refrain from investigating certain complaints and that, as a corollary, complaints enjoy no right to a response on the merits of their allegations.

Within the framework of the general infringement procedure, the issue has arisen in two types of cases. It has arisen within the framework of actions of annulment brought by complainants against the act—typically a letter—whereby the Commission informed them of its intention to drop the investigation of their complaint. The question then was whether the act in question was actionable, ie, whether the decision to discontinue the investigation was subject to judicial review. The issue has also arisen within the framework of actions for failure to act brought by complainants pursuant to the refusal of the Commission to issue a reasoned opinion and/or to bring the subject matter of their complaint before the Court of Justice. The question then was whether the Commission was under an obligation to act in response to their complaint. A clear and common principle has arisen in both types of cases: the Commission enjoys under current Article 258 TFEU ‘a discretion which excludes the right of individuals to require that institution to adopt a specific position’ on their complaint.²⁰

The European Courts have embraced the same principle (albeit with some qualifications)²¹ in the context of the special procedures for the enforcement of the competition rules of the Treaty.²² As far as the rules on antitrust are concerned, the CFI held in its landmark *Automec II* judgment that neither the Treaty nor secondary legislation confer upon complainants the right to obtain a decision as regards the existence or inexistence of any alleged infringement,²³ a principle that has been confirmed by the ECJ in later cases.²⁴ The same conclusion was reached in the *max.mobil* case, which concerned the enforcement of the rules on competition against a Member State through Article 106 TFEU. The ECJ held that under that provision ‘individuals cannot require the Commission to take a position in a specific case’.²⁵

The preceding analysis suggests that the default rule in EU administrative law is that, in the fulfilment of its general supervisory authority, the Commission is under no obligation to investigate every complaint that it receives. Needless to say, this principle is not without limits. These limits are considered next.

²⁰ Case 247/87 *Star Fruit Company SA v Commission* [1989] ECR 291, para 11 (action for failure to act) and Case C-87/89 *Sonito and others v Commission* [1990] ECR I-1981, para 6 (action of annulment).

²¹ See next section.

²² For a broader discussion of the issue see, eg, Wouter PJ Wils, ‘Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement’ (2011) 34 *World Competition* 353.

²³ Case T-24/90 *Automec Srl v Commission* [1992] ECR II-2223, para 75.

²⁴ See, eg, Case C-119/97 P *Ufex v Commission* [1999] ECR I-1341, para 88: the Commission ‘is entitled to give differing degrees of priorities to complaints before it’.

²⁵ Case C-141/02 *Commission v T-Mobile Austria* [2005] ECR I-1283, para 69.

3. Limits: The Principle of Good Administration

Article 41(1) of the Charter of Fundamental Rights of the European Union recognises, under the head of the right to good administration, the right of every person to have one's affairs 'handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'. The explanation to the Charter provided by the Convention's *Praesidium* provides that 'Article 41 is based on the existence of a Community subject to the rule of law whose characteristics were developed in the case law which enshrined inter alia the principle of good administration'.²⁶ More specifically, Article 41(1) of the Charter builds on the case law of the European Courts on the duty of careful and impartial examination, whose implications for the enforcement discretion of the Commission are explored in the following.²⁷

The duty of careful and impartial examination (also referred to as 'the principle of care' or 'principle of due diligence')²⁸ emerged as a standard to review the administrative action of the Commission in cases like *Nolle I*²⁹ and *Technische Universität München*,³⁰ where it was used to counterbalance the Commission's wide power of appraisal in antidumping procedures involving 'complex technical evaluations'.³¹ It was then also applied to review the legality of decisions involving 'complex economic matters', be it in antitrust cases, like *Asia Motor France*,³² or in State aid cases, like *Sytraval*.³³ In both types of case, the European Courts used the duty of careful and impartial examination to censure the way in which the Commission carried out its investigations. Thus, in *Asia Motor France*, the CFI held that

once it decides to proceed with the investigation, [the Commission] must ... conduct it 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 by the complainants.³⁴

A different function was assigned to the duty of careful and impartial examination in the seminal *Automec II* case, where it was used to censure the decision of

²⁶ 'Draft Charter of Fundamental Rights of the European Union. Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50' (CHARTE 4473 CONVENT 49) 36.

²⁷ On the different genesis and functions of good administration as a general principle and as a specific procedural right, see Loïc Azoulay, 'Le principe de bonne administration' in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds), *Droit administratif européen* (Brussels: Bruylant, 2007); Hans P Nehl, 'Good Administration as Procedural Right and/or General Principle?' in Herwig CH Hofmann and Alexander H Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Cheltenham: Edward Elgar, 2009).

²⁸ Hans P Nehl, *Principles of Administrative Procedure in EC Law* (Oxford: Hart Publishing, 1999) 103.

²⁹ Case C-16/90 *Detlef Nölle, trading as 'Eugen Nölle' v Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163.

³⁰ Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1990] ECR I-5469.

³¹ Case T-24/90 *Automec Srl v Commission* [1992] ECR II-2223, para 14.

³² Case T-7/92 *Asia Motor France SA and others v Commission* [1993] ECR II-669.

³³ Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719.

³⁴ Case T-7/92 *Asia Motor France SA and others v Commission* [1993] ECR II-669, para 36.

the Commission to refrain from investigating certain cases.³⁵ It is this aspect of the principle that is relevant for the purposes of this chapter. As noted earlier, one of the main contributions of the *Automec II* judgment was that it cemented the enforcement discretion of the Commission in the handling of complaints. The same judgment made it clear, however, that the broad margin of manoeuvre recognised to the Commission was not boundless. The Commission would have to decide whether to investigate or to refrain from investigating complaints on the basis of a careful and impartial examination of the ‘factual and legal particulars brought to its notice by the complainant’,³⁶ and this decision would be subject to judicial review on the basis of two standards: the duty of careful and impartial examination itself and the duty to provide reasons, which required the Commission to justify its decision ‘in light of the Community interest’.³⁷

When applying these principles to the facts of the case, the *Automec II* Court concluded that the Commission had lived up to these standards, which is why it ruled in its favour. However, it would soon reach the opposite conclusion and quash a similar decision in another case concerning the car industry,³⁸ thereby dispelling any doubts with regard to its willingness to scrutinise very closely the handling of complaints by the Commission.³⁹

This line of cases brings to the fore the relationship between the principle of care and the enforcement discretion of the Commission. It suggests that the principle now enshrined in Article 41(1) of the Charter does not exclude a priori the enforcement discretion of the Commission, but that it does impose certain formal constraints on its exercise. It should be noted, however, that the *Automec II* Court derived these constraints from the ‘procedural safeguards’ provided for by secondary law, namely the right to submit complaints in antitrust matters recognised—at that time—by Regulation No 17.⁴⁰ It follows, or so it seems, that in the absence of an explicit recognition by the legislator of the right to submit complaints, the duty of careful and impartial examination does not limit in any way the enforcement discretion of the Commission.⁴¹

This is confirmed by the case law of the European Courts on the position of complainants under Article 106 TFEU, which empowers the Commission to ensure compliance with the competition rules of the Treaty by the Member States themselves. Article 106(3) TFEU authorises the Commission to record its findings in decisions addressed against Member States, but the details of the procedure that it must follow have not been developed by secondary law. In the *Ladbroke* and *German accountants* cases, the CFI and the ECJ took the position that the Commission

³⁵ Nehl (n 28) 140.

³⁶ Case T-24/90 *Automec Srl v Commission* [1992] ECR II-2223, para 79.

³⁷ *ibid*, para 81.

³⁸ Case T-37/92 *BEUC v Commission* [1994] ECR II-285.

³⁹ Tim Frazer and Peter Holmes, ‘Self-restraint: Cars, Complaints and the Commission’ (1995) 1 *European Public Law* 85, 88.

⁴⁰ Case T-24/90 *Automec Srl v Commission* [1992] ECR II-2223, para 79.

⁴¹ Maselis and Gilliams (n 13) 106.

was under no obligation to take action in response to complaints brought under Article 106 TFEU.⁴² Yet in the latter case the ECJ added, *obiter*, that

exceptional circumstances might exist where an individual or, possibly, an association constituted for the defence of the collective interests of a class of individuals has standing to bring proceedings against a refusal by the Commission to adopt a decision pursuant to its supervisory functions under Article [106 TFEU].⁴³

In *max.mobil*, the CFI clung to this possibility and made a far-reaching interpretation of the duty of careful and impartial examination, using it to restrict the enforcement discretion of the Commission under Article 106 TFEU in a similar way as in *Automec II*. The CFI was well aware of the link that the case law had so far established between the duty of careful and impartial examination and ‘the existence of procedural rights expressly recognised by the Treaty or by provisions of secondary law in order to account for the Commission’s obligation to undertake an examination’.⁴⁴ However, it decided to test a broader conception of the scope of this duty, according to which ‘the existence of [the] obligation to undertake a diligent and impartial examination is also justified by the general duty of supervision to which the Commission is subject’.⁴⁵

The CFI relied on this idea to hold that the action for failure to act was admissible, but then dismissed it on the merits. The Commission was nevertheless unsatisfied and appealed the judgment out of fear of the far-reaching implications that the interpretation put forward by the Court could have in later cases.⁴⁶ It was successful in convincing the ECJ that the CFI should have dismissed the action as inadmissible in the first place, because ‘the Commission is not obliged to bring proceedings within the terms of [Article 106 TFEU], as individuals cannot require the Commission to take a position in specific case’.⁴⁷ This is how the ECJ came to clarify, more generally, that this is not contrary to the principle of good administration for ‘no general principle of Community law requires that an undertaking be recognised as having standing before the Community judicature to challenge a refusal by the Commission to bring proceedings against a Member State on the basis of Article [106(3) TFEU]’.⁴⁸

The judgment of the ECJ in *max.mobil* has been described as a ‘severe’ one,⁴⁹ because it confirms that the duty of careful and impartial examination does not

⁴² Case T-32/93 *Ladbroke Racing v Commission* [1994] ECR II-1015, para 38; Case C-107/95 P *Bundesverband der Bilanzbuchhalter v Commission* [1997] ECR I-947, paras 26–27.

⁴³ Case C-107/95 P *Bundesverband der Bilanzbuchhalter v Commission* [1997] ECR I-947, para 25.

⁴⁴ Case T-54/99 *max.mobil v Commission* [2002] ECR II-313, para 50.

⁴⁵ *ibid*, para 52.

⁴⁶ Melanie K Smith, *Centralised Enforcement, Legitimacy and Good Governance in the EU* (London: Routledge, 2010) 42.

⁴⁷ Case C-141/02 P *Commission v max.mobil Telekommunikation Service GmbH* [2005] I-1283, para 69.

⁴⁸ *ibid*, para 72.

⁴⁹ Jill Wakefield, *The Right to Good Administration* (Alphen aan den Rijn: Kluwer Law International, 2007) 157.

by itself curtail the enforcement discretion of the Commission in the handling of complaints. This is an important insight for the inquiry carried out in this chapter. It confirms that the general rule in EU administrative law is that the Commission enjoys a wide margin of discretion in the definition of its enforcement priorities and, as a corollary, in the selection of the complaints that it investigates. It also confirms that the Commission is subject to certain constraints in the exercise of this discretion, but only where primary or secondary law impose upon it (in one way or another) the obligation to examine complaints in the first place. And, even then, these constraints come down to the obligation to record its refusal to investigate in a duly reasoned decision. It is against this background that the rest of the chapter analyses the status of complainants in State aid cases.

II. The Road to the Adoption of the Procedural Regulation

1. The Opening of the State Aid Procedure to Complainants

The Treaty foresees a single mechanism to set the State aid procedure in motion, which is the notification made by Member States in compliance with Article 108(3) TFEU. The first question that arises is whether it is possible at all to embed complaints within a system imprinted with such a strong bilateral character. Although obvious for the modern State aid lawyer, there was a time when the answer to this question was open to doubt.⁵⁰ This is because the possibility of bringing complaints was never explicitly recognised in the Treaties but also, more importantly, because the role of the Commission itself in fighting unlawful State aid was not always as clear as it is today. There were indeed two possible interpretations of the courses of action that were open to the Commission in this endeavour.

The first interpretation was that the State aid procedure was not an appropriate device to enforce the rules on State aid against non-notified measures. This interpretation was favoured by several Advocates General, who saw ‘no reason for regarding it as implicit in Article [108 TFEU] that the procedure is available also in a case where the question is whether a Member State has introduced or altered an aid in contravention of the prohibition in paragraph (3)’.⁵¹ The main implication of this reading was that the Commission would have to treat the implementation of State aid in breach of the standstill and notification obligation as any other

⁵⁰ See, eg, David R Gilmour, ‘The Enforcement of Community Law by the Commission in the Context of State Aids: The Relationship between Article 93 and 169 and the Choice of Remedies’ (1981) 18 *Common Market Law Review* 63.

⁵¹ Opinion of Advocate General Warner in Case 173/73 *Italy v Commission* [1974] ECR 709, p 724. See also Opinion of Advocate General Lagrange in Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

infringement of the Treaty and, hence, to try to redress it through the general infringement procedure.⁵² This interpretation did not completely rule out the possibility of bringing complaints in State aid matters, but it did imply that these complaints would have the same status as any other complaint lodged under the rules of the general infringement procedure, which is to say (as noted earlier) hardly any status at all.

The second interpretation was that the State aid procedure was an appropriate tool to fight unlawful State aid, which meant that the Commission could enforce State aid law against Member States in breach of their procedural obligations, without necessarily going through the general infringement procedure. According to this reading, the Commission was empowered to initiate of its own motion the State aid procedure whenever adverted of the existence of allegedly unlawful State aid and, as a corollary, to adopt a final decision without having to go through the Court. By segregating the fight of unlawful State aid from the general infringement procedure, this interpretation made some room—in principle at least—for the involvement of complainants in the State aid procedure itself.

The question was settled in *Italy v Commission*, where the ECJ endorsed the latter interpretation.⁵³ The Italian government challenged the decision of the Commission to declare the incompatibility with the common market of several measures of support to the textile industry that were never notified. In fact, none of the pleas put forward by Italy called into question the power of the Commission to launch the State aid procedure against unlawful measures. However, the ECJ grasped the opportunity to clarify that, in order to fight this type of State aid, ‘the means of recourse open to the Commission are not restricted to the more complicated procedure under Article [258 TFEU]’.⁵⁴ This statement wiped out any possible doubts with regard to the power of the Commission to enforce on its own the rules on State aid in the absence of prior notification, a power that it would start using very actively in the early 1980s.⁵⁵

No complaint was involved in the administrative procedure at the origin of this dispute, because the Commission took cognisance of the controversial measures through its own means. Yet, by recognising the power of the Commission to enforce the rules on State aid against non-notified measures, the judgment of the ECJ in *Italy v Commission* paved the way for the association of complainants with State aid procedures.

It is difficult to pinpoint the precise moment when this happened, because the possibility of bringing complaints emerged ‘as a general administrative practice’, without any explicit recognition in primary or secondary law.⁵⁶ The truth is, however,

⁵² Alberto J. Gil Ibáñez, ‘Exceptions to Article 226: Alternative Administrative Procedures and the Pursuit of Member States’ (2000) 6 *European Law Journal* 148, 151.

⁵³ Case 173/73 *Italy v Commission* [1974] ECR 709.

⁵⁴ *ibid*, para 9.

⁵⁵ Johannes A Winter, ‘The Rights of Complainants in State Aid Cases: Judicial Review of Commission Decisions Adopted under Article 88 (Ex 93)’ (1999) 36 *Common Market Law Review* 521, 522.

⁵⁶ Pieter J Slot, ‘Administrative Procedure’ in Leigh Hancher, Tom Ottervanger and Pieter J Slot (eds), *EU State Aids* (London: Sweet & Maxwell, 2012) 947.

that it was a smooth process, as shown by the fact that the cases reviewed in the following section did not discuss in any way the possibility of lodging complaints in State aid matters, but only the implications that these complaints had from the viewpoint of the procedural status of the applicants and of the enforcement discretion of the Commission. In other words, the problem was not *whether* complaints had any role to play in State aid procedures (*access*), but rather *what* role they would play (*leverage*).

2. State Aid Complainants Before the European Courts

The European Courts were confronted with this problem in several cases brought by complainants who had failed to secure, in the course of the administrative procedure, the outcome that they were looking for. In one way or another, these cases called, in essence, for a clarification of the two main problems raised by the definition of the status of complainants within EU administrative procedures: the degree of enforcement discretion of the Commission in the handling of these complaints and, if any, the limits imposed upon its exercise.

In general, the Courts stuck to the bilateral definition of the procedure and to the idea that private parties do not acquire a special position as a result of their acting as complainants.⁵⁷ Their stance on this issue rested on the theory that the rationale for the involvement of private actors in State aid proceedings is instrumental to the information needs of the Commission, which means that it is for the Commission to decide, on a case-by-case basis, what use to make of the allegations put forward by complainants.⁵⁸ Whilst clinging to this conventional theory, however, the European Courts made some moves that could indicate a certain departure from the purely bilateral paradigm.

(a) *The Right to Challenge the Premature Closure of the State Aid Procedure* (Cook)

The first move was the empowerment of complainants to challenge the decision of the Commission to discontinue the investigation of their allegations at the preliminary stage of the procedure.

The standard that determines the legality of positive decisions adopted at the end of the preliminary phase ('decision to raise no objections') was spelled out by the ECJ in *Germany v Commission*.⁵⁹ Following a challenge brought by Germany against the decision of the Commission to raise no objections to a State aid plan notified by Belgium, the ECJ held that the decision to clear a State aid at the preliminary stage of the procedure is subject to judicial scrutiny, the standard of

⁵⁷ See, eg, Case T-613/97 *Ufex and others v Commission* [2000] ECR II-4055, para 86.

⁵⁸ *ibid*, para 89.

⁵⁹ Case 84/82 *Germany v Commission* [1984] ECR 1451.

review being the so-called ‘serious difficulties test’.⁶⁰ The operation of this test is analysed in more depth in Chapter 6. Suffice it to say here that it is premised on the idea that the Commission is bound to open the second phase of the procedure ‘when [it] has serious difficulties in determining whether a plan to grant aid is compatible with the common market’;⁶¹ and that the existence or inexistence of ‘serious difficulties’ is done on the basis of a cursory but objective assessment of the information available to the Commission at the time of its decision. Insofar as it forecloses the possibility to drop a case at the first stage of the procedure on the basis of opportunistic considerations, this test represents a sort of ‘procedural trap’ for the Commission, which is thus bound to go through both phases of the procedure unless a case is really straightforward.

The administrative procedure at the origin of *Germany v Commission* was initiated in response to a notification, rather than a complaint; all the actors involved in the dispute were actually Member States. The judgment matters, however, because the ECJ grounded its holding on the observation that the second phase of the procedure ‘guarantees the other Member States and the sectors concerned an opportunity to make their views known’, the idea being that this guarantee can only be effective if the opening of the consultation phase is deemed to be compulsory ‘when the Commission has serious difficulties in determining whether a plan to grant an aid is compatible with the common market’.⁶² In *Germany v Commission* it was a third-party Member State that relied on this guarantee, but the reference to the ‘sectors concerned’ suggested that the same course of action was open to competitors and other interested parties.

This was confirmed by the rulings of the ECJ in *CIRFS*⁶³ and in *Cook*, where the serious difficulties test was applied to strike down a decision not to raise objections adopted pursuant to a complaint.⁶⁴ The judgment of the ECJ in *Cook* will surface very often in this book, for its significance lies in the fact that it both sanctions the right of competitors to participate in the second phase of State aid procedures⁶⁵ and that it articulates a special rule of standing to enforce this right through the European judicature.⁶⁶ The point to note here is that the Court did not hide behind the fact that the procedure had its origin in a complaint to avoid rendering the Commission accountable for its decision to clear a State aid without exhausting the two phases of the procedure.

Insofar as it allows competitors to follow up their complaints and to challenge the premature closure of their file, the possibility of invoking the serious difficulties test can be seen as a first departure from the purely bilateral paradigm. Granted,

⁶⁰ *ibid*, para 13.

⁶¹ *ibid*.

⁶² *ibid*.

⁶³ Case 313/90 *Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) and others v Commission* [1993] ECR I-1125, paras 26–27.

⁶⁴ Case C-198/91 *William Cook plc v Commission* [1993] ECR I-2487, para 29.

⁶⁵ See Chapter 5.

⁶⁶ See Chapter 6.

the serious difficulties test sets a relatively low standard for the Commission, since it leaves some room for the clearance of State aids without a fully fledged analysis of their likely effects. Still, it subjects any such decision to an objective standard of legality that prevents the Commission from relying on its own enforcement priorities to dispose of complaints at the preliminary stage of the procedure.

Yet the significance of this move should not be overestimated. This is because the possibility of invoking the serious difficulties test enables complainants to challenge the legality of State aid decisions adopted at the end of the preliminary phase, but leaves them powerless in the face of the Commission's inaction. The test is indeed relevant to determine whether the Commission was entitled to close the procedure without following it through to the end. However, it does not seem to provide any criterion to determine whether the Commission was under an obligation to initiate the procedure in the first place. If this analysis is correct, the move made by the Court in *Cook* left the Commission's enforcement discretion intact.

(b) *Procedural Rights of Complainants (Sytraval)*

Whereas the first move implied the empowerment of complainants to enforce the procedural rights that they enjoy in the second phase of the procedure, the second and third moves consisted instead in the recognition of certain procedural guarantees within the preliminary procedure itself. Let us start with the second one, which was famously made by the CFI in its controversial *Sytraval* judgment.⁶⁷

The dispute at the origin of this case concerned the relationship between the French postal service operator (La Poste) and the commercial subsidiary that was set up to contract out the transportation of its moneys and valuables. Various companies operating in this sector (and an association reuniting them) lodged a complaint with the Commission alleging that the creation and operation of the subsidiary concealed several measures of unlawful aid. Despite having initially recognised that the complaint raised 'a number of important points of principle calling, in this instance, for an in-depth investigation',⁶⁸ the Commission eventually decided to close the file at the preliminary stage with a decision holding that there was no aid. The CFI upheld the action of annulment that the complainants brought against that decision, finding that the statement of reasons put forward by the Commission was not sufficient to support the conclusion that the contested measures did not constitute State aid.⁶⁹

What is remarkable, however, is that the CFI inferred from the general duty to provide reasons the existence of three procedural obligations that the Commission had, in its view, completely disregarded. The CFI held, first, that the Commission is 'obliged to give a reasoned answer to each of the objections raised in the complaint, if only by referring where appropriate to the *de minimis* rule where the

⁶⁷ Case T-95/94 *Sytraval and Brink's France SARL v Commission* [1995] ECR-II 2651.

⁶⁸ *ibid*, para 11.

⁶⁹ *ibid*, para 86.

point in question is so insignificant as not to warrant the Commission spending any time on it⁷⁰ (*reasoned response requirement*). The CFI held, secondly, that the Commission is obliged 'to examine the objection which the complainant would certainly have raised if it had been given the opportunity of taking cognizance of [the information at the disposal of the Commission]'; whenever it dismisses a complaint without allowing the complainant to comment⁷¹ (*synoptic requirement*).⁷² It further held, finally, that 'the Commission's obligation to state reasons for its decisions may in certain circumstances require an exchange of views and arguments with the complainant [in order to] ascertain what view the complainant takes of the information gathered by the Commission in the course of its inquiry'⁷³ (*dialogue requirement*). The latter obligation was 'a necessary extension of the Commission's obligation to deal diligently and impartially with its inquiry into the matter'.⁷⁴

The judgment of the CFI in *Sytraval* altered dramatically the position of complainants in State aid procedures. It represented an outright departure from the bilateral model and was therefore seen as a silent but genuine revolution.⁷⁵ It was, however, a short-lived one, since the ECJ would eventually tone down the interpretation of the rights of complainants made by the CFI. On appeal, the ECJ also found that the reasoning of the Commission's decision was defective,⁷⁶ but it clearly distanced itself from the views of the CFI with regard to the position of complainants in State aid procedures. Indeed, it rejected the existence of an obligation to conduct 'an exchange of views and arguments with the complainant' or to give complainants an opportunity to 'state their views'.⁷⁷ It also rejected the synoptic requirement and simply conceded that the obligation of the Commission to conduct a diligent and impartial examination 'may make it necessary for it to examine matters not expressly raised by the complainant'.⁷⁸ Finally, it loosened the reasons-giving requirement, releasing the Commission from the obligation to give an answer to each of the objections raised by complainants and relying instead on the oft-cited proposition that 'The requirements to be satisfied by the statement of reasons depend on the circumstances of each case'.⁷⁹ The move made by the CFI in *Sytraval* was thus redressed by the ECJ.

⁷⁰ *ibid*, para 62.

⁷¹ *ibid*, para 66.

⁷² I borrow the label from Martin Shapiro, 'Two Transformations in Administrative Law: American and European?' in Karl-Heinz Ladeur (ed), *The Europeanisation of Administrative Law: Transforming National Decision-Making Procedures* (Aldershot: Ashgate, 2002) 16.

⁷³ Case T-95/94 *Sytraval and Brink's France SARL v Commission* [1995] ECR-II 2651, para 78.

⁷⁴ *ibid*.

⁷⁵ Hans P Nehl, 'Judicial Protection of Complainants in EC State Aid Law: A Silent Revolution?' (2009) 8 *European State Aid Law Quarterly* 401, 408.

⁷⁶ Case C-367/95 *P Commission v Sytraval and Brink's France* [1998] ECR I-1719, paras 73–78.

⁷⁷ *ibid*, paras 58–59.

⁷⁸ *ibid*, para 62.

⁷⁹ *ibid*, para 63.

(c) *Time Limits (Television Cases)*

The third move concerns the time limits faced by the Commission to conclude the preliminary phase of the State aid procedure. The general rule in that regard was adopted in the *Lorenz* case, where the ECJ held that the Commission was under a duty to define its position on the compatibility of notified aids ‘within a reasonable period’.⁸⁰ Given the silence of the Treaty on this issue, the Court applied by analogy the time limits that govern the conduct of the general infringement procedure, holding that the Commission was under a duty to define its position within two months from the notification.⁸¹ This time limit would be later codified in the Procedural Regulation (PR).⁸²

The foundation of such a duty was the need to ‘take account of the interest of Member States of being informed of the position quickly’,⁸³ which is why it was not possible to transpose this rule automatically to complaint-triggered procedures, as the CFI explicitly acknowledged in *Gestevisión*.⁸⁴ *Gestevisión* concerned an action for failure to act brought by a competitor of the alleged beneficiary more than two years after the submission of a complaint. Yet the unavailability of the *Lorenz* rule did not prevent the Court from holding that the Commission was obliged to act within a reasonable time and that it could not ‘prolong indefinitely its preliminary investigation into measures that have been the object of complaints’.⁸⁵ The CFI found, on the facts of the case, that the duration of the investigation had not been reasonable and, accordingly, ruled in favour of the complainant. The same principle was applied, with the same result, in *TF1*.⁸⁶

These two television cases represent a second inroad into the purely bilateral character of the procedure, insofar as they impose on the Commission the obligation to take a position on complaints within a reasonable time. Again, however, this claim cannot be taken too far, since in both cases the CFI expressly pointed out that the requirement to adopt a position within a reasonable time operates where the Commission ‘has, as in this case, agreed to initiate such an investigation’.⁸⁷ This qualification suggests that the Commission can avoid the obligation to adopt a position within a reasonable time if it simply refrains from taking any action on the basis of the complaint, a reading that preserves the enforcement discretion of

⁸⁰ Case 120/73 *Gebrüder Lorenz GmbH v Germany* [1973] ECR 1471, para 4.

⁸¹ *ibid.*

⁸² Article 4(5) PR.

⁸³ Case 120/73 *Gebrüder Lorenz GmbH v Germany* [1973] ECR 1471, para 4.

⁸⁴ Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, paras 76–79.

⁸⁵ *ibid.*, paras 73–74.

⁸⁶ Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, paras 72–81.

⁸⁷ Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, para 74: ‘the Commission cannot prolong indefinitely its preliminary investigation into State measures in relation to which there has been a complaint under Article 92(1) of the Treaty where it has, as in this case, agreed to initiate such an investigation’ (emphasis added) reproduced in Case T-17/96 *TF1 v Commission* [1999] ECR II-1757, para 74.

the Commission and its power to decide whether to initiate the State aid procedure in the first place.⁸⁸

(d) *The Departure From the Bilateral Paradigm in State Aid Procedures*

The preceding analysis has identified three moves in which the EU judicature departed from the bilateral paradigm according to which complainants are completely alien to the State aid procedure. The ruling of the CFI in *Sytraval* made a far-reaching interpretation of the rights of complainants in the State aid procedure, which included a right to a reasoned response that left little room for the Commission to carry out a selective policy of enforcement—on appeal, however, this interpretation was rejected by the ECJ. *Cook* and the television cases, on the other hand, allowed complainants to benefit from a set of procedural guarantees initially recognised in favour of Member States—the right to challenge the preliminary closure of the State aid procedure and the right to a decision within a reasonable time.

However, none of these cases went so far as to impose upon the Commission the duty to investigate and adopt a position on every complaint, since they were based on the assumption that the Commission had adopted a position in response to a complaint—the *Cook* line of cases—or that it had decided to launch an investigation but failed to adopt a position within a reasonable time—the television cases. Insofar as they got around this problem, these developments seemed to suggest that the default rule in EU administrative law was also applicable in the context of State aid procedures and that the Commission was therefore invested, in this field as in all others, with a broad margin of enforcement discretion in the handling of complaints.

3. The Position of Complainants Under the Original Procedural Regulation

The judgments of the ECJ in *Sytraval* and of the CFI in *Gestevisión* were issued in 1998, just a few months before the adoption and entry into force of the PR.⁸⁹ This regulation was adopted on the basis of ex-Article 89 EC (current Article 109 TFEU), which empowers ‘The Council, on a proposal from the Commission and after consulting the European Parliament, [to] make any appropriate regulations for the application of Articles 107 and 108’. It was the first attempt to lay out in a piece of secondary legislation the rules that govern the conduct of State aid procedures.

⁸⁸ Adinda Sinnavee, ‘State Aid Procedures: Developments since the Entry into Force of the Procedural Regulation’ (2007) 44 *Common Market Law Review* 965, 1026.

⁸⁹ Note that the ruling of the CFI in *TF1* was issued after the adoption of the PR, but reviewed a procedure pre-dating the PR, which was therefore not applicable.

The jurisprudential developments described in the previous section were not unconnected to the adoption of the PR. During the first four decades of State aid policy, the Commission had sat on Article 89 EC and its precedents, without producing any proposal to legislate in this field—save for two proposals elaborated in the 1960s and 1970s that failed to be approved by the Council.⁹⁰ According to some commentators, one of the reasons why the Commission decided to change gear and to push for the adoption of the PR was the perceived threat represented by some of the jurisprudential moves described above, and most notably by the CFI's judgment in *Sytraval*.⁹¹ As Bartosch puts it:

Looking at the timetable of these *Sytraval* judgments (at both the CFI and the ECJ level) and the stages of the adoption of Regulation No. 659/1999, i.e. judgement of the CFI in *Sytraval* on 28 September 1995, proposal of a Procedural Regulation on 18 February 1998, judgement of the ECJ in *Sytraval* on 2 April 1998, final adoption of the Procedural Regulation on 22 March 1999, it seems that the Commission—possibly intimidated by the first ruling in *Sytraval*—felt finally compelled to take up the various appeals made—at least implicitly—by the Community Courts to lay down the rules for its administrative procedure in State aid matters rather than have them elaborated on a case-by-case basis by its Luxembourg watchdogs.⁹²

Although the ECJ would eventually step in and impose a much more restrictive reading of the position of complainants in State aid cases, the judgment of the CFI in *Sytraval* may thus have sufficed to convince the Commission of the need to have clear procedural rules capable of countering the pro-competitor stance of the European Courts in some of their rulings.

As originally adopted, the PR basically codified the rules that had been developed through the combination of the administrative practice of the Commission and the case law of the European Courts. In relation to the involvement of complainants, it confirmed the possibility for the Commission to rely on complaints to initiate the State aid procedure. This was done implicitly as the original draft of the PR did not contain a single reference to complaints or complainants. It did, however, devote a whole chapter to the procedure for the review of unlawful aids, thus confirming the adequacy of the State aid procedure to assess non-notified measures.⁹³ And it did recognise the right of interested parties to 'inform the Commission of any alleged unlawful aid'.⁹⁴

By omission, the PR also endorsed the restrictive vision of the ECJ in *Sytraval* with regard to the role of complainants in the development of the State aid procedure. The absence of any reference to any participatory opportunity available

⁹⁰ Adinda Sinnaeve and Pieter J Slot, 'The New Regulation on State Aid Procedures' (1999) 36 *Common Market Law Review* 1153, 1153.

⁹¹ *ibid*, 1154.

⁹² Andreas Bartosch, 'The Procedural Regulation in State Aid Matters. A Case for Profound Reform' (2007) 6 *European State Aid Law Quarterly* 474, 477.

⁹³ Chapter III, Articles 10 to 15 PR.

⁹⁴ Article 20(2) PR.

to complainants—that is, besides the initial submission of the complaint and the subsequent submission of comments in the context of the consultation phase foreseen by Article 108(2) TFEU—ruled out the existence of any dialogue requirement of the type read by the CFI into the preliminary procedure. In general, there was therefore little doubt that the original PR took ‘its cue from the judgment in the *Sytraval* appeal, and not the judgment of the CFI (now General Court) in the same case, which ... gave the complainant considerable rights.⁹⁵ The only exception was the right of complainants to be sent a copy of any decision taken on the basis of the information supplied,⁹⁶ which is of utmost importance given the possibility of challenging that decision opened up by *Cook*⁹⁷—and which had been praised as a matter of good administrative practice but declared groundless by the ECJ.⁹⁸

As a result of the codifying approach taken in its elaboration, the PR was silent on some of the issues that had been left open by the previous case law. One of these issues was, precisely, the degree of enforcement discretion that the Commission enjoyed in relation to complaints. Indeed, whilst entrenching the right of competitors and other interested parties to denounce unlawful aids, the PR did not explicitly address the central question raised by the involvement of complainants in State aid procedures, namely the extent to which they place the Commission under an obligation to investigate and adopt a position on the merits of their claims. If ‘interpreted conservatively’, it was thus difficult to escape the conclusion that the silence of the PR left intact the enforcement discretion of the Commission.⁹⁹

An alternative reading was, however, possible. Some commentators argued that the PR did in fact provide an implicit answer to the question of the enforcement discretion of the Commission, ruling out the existence of any such discretion in the handling of State aid complaints.¹⁰⁰ This claim was based, in essence, on the combined interpretation of three of its provisions—namely, Articles 10(1), 13(1) and 20(2) of the original PR.

Article 10(1) PR stated that ‘Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it *shall* examine that information without delay’ (emphasis added).¹⁰¹ The mandatory language used

⁹⁵ Slot (n 56) 967.

⁹⁶ Article 20(2) PR, *in fine*.

⁹⁷ Slot (n 56) 953.

⁹⁸ Case C-367/95 P *Commission v Sytraval and Brink’s France* [1998] ECR I-1719, paras 45–46. But see: Slot, (n 56) 953, who considers that the right only exists where the decision is taken pursuant to the formal investigation phase.

⁹⁹ Massimo Merola and Leonardo Armati, ‘Complainants’ Rights in State Aid Matters. Lost in Modernisation?’ in Inge Govaere and Dominik Hanf (eds), *Scrutinizing Internal and External Dimensions of European Law. Liber Amicorum Paul Demaret* (Brussels: Peter Lang, 2013) 569, 580.

¹⁰⁰ Adinda Sinnaeve, ‘Rights of Interested Parties’ in Martin Heidenhain (ed), *European State Aid Law* (Munich: Verlag CH Beck, 2010) 685, who bases his assertion on Article 10(1) read in conjunction with Article 20 PR. See also: Bartosch (n 92) 480, who bases his claim on Article 13(1) PR.

¹⁰¹ Article 10(1) PR, original drafting.

by that provision made it clear that the Commission was under a duty to devote a minimum of attention to any piece of information pointing to a possibly unlawful aid. That complaints were an appropriate vehicle to bring this information to the attention of the Commission was beyond doubt, given the content of Article 20(2) of the original PR. The question was whether Article 10(1) PR allowed the Commission to discontinue the investigation of some complaints, after a mere cursory examination of their content, in accordance with its own enforcement priorities. This interpretation faced two obstacles.

The first obstacle was that Article 13(1) PR listed the type of decisions to which the examination of unlawful aid could give rise: a decision that there is no aid, a decision to raise no objections or a decision to open the formal investigation phase.¹⁰² This list made no room for the adoption of an *Automec*-type of decision, ie, a formal decision embodying the reasoned refusal of the Commission to investigate a complaint. To be more precise, nothing in the PR itself prevented a ‘decision to raise no objections’ from having this content, but the procedural trap represented by *Cook* did imply that any such decision would be subject to the serious difficulties test and hence to an objective assessment that forecloses the closure of an investigation on the basis of the type of considerations that are relevant under *Automec II*.

If the PR left any margin of enforcement discretion to the Commission, the only way to exercise it would thus be through its own inaction—by refraining from taking any decision on complaints. This possibility fit uneasily, however, with the wording of Article 20(2) PR, whose original drafting provided that ‘Any interested party may inform the Commission of any alleged unlawful aid’ and that ‘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.’ Although this provision left a door open for the Commission to escape the need to take a decision on every complaint, it seemed to subject this course of action to an objective condition, namely, the existence of insufficient grounds for taking a view on the case. Outside this hypothesis, it seemed to imply that the Commission was bound to carry out a proper investigation of every complaint.

There were thus various reasons to conclude that the PR denied the Commission any margin of enforcement discretion in the treatment of complaints. Yet, its hermeneutic appeal notwithstanding, this reasoning led to a somewhat paradoxical result—namely, the reinforcement of the position of complainants in State aid cases. Could this really be the effect intended by a regulation adopted in response to the generosity shown by the European judiciary vis-à-vis complainants? One may of course discuss whether this was the objective of the Commission or plainly call into question the significance of the reasons behind the proposal to adopt a PR. Even so, it would still be paradoxical if the effect of a regulation that was silent

¹⁰² Article 13(1) PR read in conjunction with Article 4 PR.

on the status of complainants, despite its adoption in the wake of a momentous case like *Sytraval*, was to provide them with a power that they do not have under any other branch of EU administrative law.

III. The Status of Complainants in State Aid Procedures

The previous section has traced the evolution of the status of complainants in State aid procedures up to the adoption of the PR. There are two ideas to take out from that analysis. The first idea is that there was a clear rejection on the part of the European Courts and of the legislator alike of providing complainants with any sort of participatory right other than the very submission of their allegations. The second idea is that neither the European Courts nor the legislator squarely addressed the issue of the enforcement discretion of the Commission in this field. Although it was possible to assume that this situation triggered the default rule in EU administrative law (enforcement discretion in the handling of complaints), there were also reasons to understand that the PR enshrined the exact opposite solution (obligation to respond to the merits of complaints).

This section reviews the position taken by the European Courts and the legislator on this issue after the adoption of the PR. The review starts with an analysis of the judgment of the ECJ in *Athinaiki Techniki*, where the ECJ seems to endorse the latter interpretation, and then moves on to consider its aftermath.

1. The *Athinaiki Techniki* Case

The facts of the case go back to October 2001, when the Greek authorities initiated a procedure for the award of a public contract with a view to disposing of 49 per cent of the capital of a casino. *Athinaiki Techniki* AE challenged the procedure before the Commission after the contract was awarded to its competing tenderer. It lodged two different complaints. The first one, lodged with DG Internal Market, challenged the tender in light of the EU public procurement rules. The second one, lodged with DG Competition, challenged the award to its competing undertaking on the ground that it involved unlawful and incompatible State aid. DG Competition decided to await the outcome of the other complaint, arguing that the disposal of a public asset in the context of a tendering procedure does not constitute State aid where the procedure has been carried out transparently and without discrimination. After the closure of the file by DG Internal Market, DG Competition sent a letter to the complainant informing it that there were insufficient grounds to take a view on the case and that it would therefore close the file.

Athinaiki Techniki AE brought an action of annulment against the decision to take no further action on its complaint. The CFI dismissed the action as inadmissible on the ground that the letter did not constitute 'a decision' within the

meaning of the PR and therefore lacked 'legal effect'.¹⁰³ The judgment of the CFI was then overturned, on appeal, by the ECJ, which took the opposite view and considered that the letter was a decision within the meaning of Article 4 PR and was therefore open to challenge.¹⁰⁴ Accordingly, the ECJ set aside the order of the CFI and enjoined the lower Court to give a judgment on the merits of the pleas put forward by the applicant. Although the construction of the letter as an actionable act was outcome determinative, it does not actually represent a significant novelty. It confirms the stance taken by the CFI in *Deutsche Bahn*¹⁰⁵ and also happens to be in line with the un-formalistic approach generally adopted by the European Courts with regard to the conditions that an act needs to fulfil in order to be liable to form the basis of an action of annulment, an issue that is developed in more length in the last chapter of this book.

(a) *The Procedure to Reject Complaints Read into the Procedural Regulation*

Before reaching this conclusion, however, the ECJ took the opportunity to spell out the obligations of the Commission with regard to State aid complaints, and it is this aspect of the judgment that is relevant for the purposes of this chapter. In considering this issue, the ECJ basically drew a distinction between two scenarios, the distinctive criterion being the degree of completeness of the complaint.

The first scenario is that in which the information provided by the complainant is sufficient to assess the merits of the complaint; where this is the case, the ruling of the ECJ deems the procedure automatically initiated. Indeed, it reads former Articles 10(1) and 20(2) PR as

grant[ing] to a person concerned the right to set in motion the preliminary stage ... by sending information regarding any allegedly unlawful aid to the Commission, which is then obliged to examine, without delay, the possible existence of aid and its compatibility with the common market.¹⁰⁶

As explained earlier, the corollary of this interpretation is that the Commission is prevented from putting into effect any type of selective enforcement agenda for, once the procedure is set in motion, *Cook* and the serious difficulties test operate as a trap from which the Commission can only escape through a decision on the merits.

The second scenario covers those instances in which the Commission deems the information provided by complainants to be insufficient to assess the merits of their case. When this is the case, the ECJ considers that the Commission is

¹⁰³ Case T-94/05 *Athinaiki Techniki AE v Commission* [2006] ECR II-73, para 30.

¹⁰⁴ Case C-521/06 P *Athinaiki Techniki AE v Commission* [2008] ECR I-5829, para 60.

¹⁰⁵ Case T-351/02 *Deutsche Bahn v Commission* [2006] ECR II-1047, para 63. See comment in Carsten Nowak, 'Judicial Protection of Complainants in the Scope of EC State Aid Law: New Developments and Question Marks' (2006) 5 *European State Aid Law Quarterly* 621.

¹⁰⁶ Case C-521/06 P *Athinaiki Techniki AE v Commission* [2008] ECR I-5829, para 37.

under an obligation to allow complainants ‘to submit additional comments within a reasonable period’,¹⁰⁷ an obligation that it grounds on their ‘right to be associated with [the procedure] in an adequate manner’.¹⁰⁸ This is remarkable in itself, because it implies that the Commission may not rely on Article 20(2) PR (Article 24 of the codified version) to avoid taking a decision without giving the applicant an opportunity to complete its initial submission. And this means, in turn, that persistent complainants have the tools to overcome the Commission’s initial reluctance to look into their case.

Yet the most remarkable aspect of the ruling is that it precludes the possibility that this process be repeated without end. The ECJ considers, indeed, that ‘Once those comments have been lodged, or the reasonable period expired, Article 13(1) [PR] obliges the Commission to close the preliminary examination with a formal decision’. The upshot is that ‘the Commission is not authorised to persist in its failure to act during the preliminary examination stage’,¹⁰⁹ or, as the Court has recently put it, that the ‘the preliminary examination stage ... *ultimately* obliges the Commission to take a position’ (emphasis added).¹¹⁰ Hence the claim made by some commentators that *Athinaiki Techniki* involved ‘a de facto “abrogation” of the second sentence of Article 20(2) of the Procedural Regulation, in the sense that such a letter can no longer be viewed as a means available to the Commission for closing the file’.¹¹¹

This abrogation is important, for it prevents the Commission from abusing the possibility foreseen in former Article 20(2) PR (Article 24 of the codified version) in order to leave complainants in limbo, with neither an investigation of their claims nor a decision to challenge. It is all the more important given the difficulties that private parties often face in compiling all the information that they need to build a strong complaint in State aid matters. The CFI pointed to this problem in its *Sytraval* ruling in order to reject one of the defences put forward by the Commission, which was based on the ‘flimsiness of the evidence put forward by the complainants’.¹¹² Although the position taken on this issue by the CFI is no longer good law, the underlying institutional analysis still holds:

It is very much more difficult for the complainants than it is for the Commission to gather the information and evidence needed in order to verify the validity of a complaint ... Complainants are generally faced with the administrative obstacles inherent in steps of this kind, since they have to obtain confirmation of their objections from the very authorities whom they suspect of having infringed the Community rules on State aid,

¹⁰⁷ *ibid*, para 39.

¹⁰⁸ *ibid*, para 38.

¹⁰⁹ *ibid*, para 40.

¹¹⁰ Case C-615/11 P *Commission v Ryanair*, ECLI:EU:C:2013:310, para 31.

¹¹¹ Edoardo Gambaro and Francesco Mazzocchi, ‘Case C-521/06 P, *Athinaiki Techniki v. Commission*, Judgment of the Court of Justice (Fourth Chamber) of 17 July 2008, [2008] ECR I-5829; Case C-322/09 P, *NDSHT v. Commission*, Judgment of the Court of Justice (Third Chamber) of 18 November 2010, nyr; Case C-362/09 P, *Athinaiki Techniki v. Commission*, Judgment of the Court of Justice (Third Chamber) of 16 December 2010, nyr’ (2011) 48 *Common Market Law Review* 2083.

¹¹² Case T-95/94 *Sytraval and Brink’s France SARL v Commission* [1995] ECR II-2651, para 77.

without having any means of coercion at their disposal. The Commission, on the other hand, has at its disposal more effective and appropriate means of gathering the information necessary for a detailed and impartial investigation of the complaint.¹¹³

(b) *Implications for the Enforcement Discretion of the Commission*

In the course of its analysis of the second scenario, the ECJ draws a parallel with *Guérin*,¹¹⁴ which is a leading case on the status of complainants in the field of antitrust.¹¹⁵ This should come as no surprise, for what the Court essentially does in *Athinaiki Techniki* comes down to importing to the realm of State aid law the procedure that governs the handling of complaints in antitrust. This procedure is now defined by Article 7 of Regulation 773/2004,¹¹⁶ which provides that:

Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing.

This Article further provides that the Commission shall reject the complaint by a decision if the additional written submissions of the complainant are not convincing,¹¹⁷ or deem the complaint withdrawn if no further information is submitted.¹¹⁸

In antitrust, the obligation of the Commission to give an opportunity for the complainant to provide additional information before rejecting its complaint, and the obligation to do so by means of a formal decision, are compatible with the enforcement discretion explicitly recognised to the Commission in the *Automec II* case. They may actually be seen as a procedural device at the service of the Commission's obligation to comply with the second aspect of *Automec II*, ie, with the duty to embody the refusal to investigate in a formal decision that invokes a valid reason of community interest in order to satisfy the requirements of the principle of care.

Yet the transplant of the very same scheme to the State aid procedure yields the opposite result. This is not so much because of the structure of the procedure itself (which does not exclude a priori the possibility of refraining from investigating complaints on grounds of administrative convenience), but rather because of the obligation imposed on the Commission to bring the procedure to an end with the adoption of a formal decision. As noted earlier, any such decision in the field of State aid triggers the serious difficulties test, which prevents the Commission from relying on the type of reasons that it can proffer in the field of antitrust to justify

¹¹³ *ibid.*

¹¹⁴ Case 282/95 P *Guérin automobiles v Commission* [1997] ECR I-1503.

¹¹⁵ Case C-521/06 P *Athinaiki Techniki AE v Commission* [2008] ECR I-5829, para 40.

¹¹⁶ 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 (OJ L123, 27.4.2004, p 18).

¹¹⁷ Article 7(2).

¹¹⁸ Article 7(3).

its refusal to investigate complaints. The effect of *Athinaïki Techniki* is, thus, to uphold the pro-complainants' reading of the PR, according to which the Commission enjoys no enforcement discretion in the field of State aid.

Granted, the judgment of the ECJ in *Athinaïki Techniki* could have been more explicit in that regard—and the same can be said of its later judgment in *NDSHT*, where it reiterated the same interpretation of the obligations borne by the Commission in relation to State aid complaints.¹¹⁹ This is probably the reason why the Commission has tried to argue in later cases—as the CFI noted with disapproval in a recent judgment—that

in reaction to a complaint concerning State aid, it has the option either to open the preliminary examination stage which leads to a decision within the meaning of Article 4 [PR], or, if it considers that there are insufficient grounds to rule on the case, to close the complaint without opening the preliminary stage.¹²⁰

The same judgment of the CFI makes clear, however, that ‘That position has been invalidated by the case-law of the Court of Justice’,¹²¹ because *Athinaïki Techniki* and *NDSHT* imply that ‘the examination of a complaint on State aid necessarily gives rise to the opening of the preliminary examination stage which the Commission is obliged to close by adopting a decision pursuant to Article 4 [PR]’.¹²² This judgment was issued in early 2013, before the approval of the reform of the PR, which was passed in the same year. Yet, as the following section explains, the reform has basically codified the findings of the ECJ in *Athinaïki Techniki*, with some small adjustments that have no impact on the rule that deprives the Commission of enforcement discretion in the field of State aid.

2. The Reform of the Procedural Regulation

It was in the context of the State Aid Modernisation programme (SAM) launched by Commissioner Almunia in 2012¹²³ that the PR was reformed in 2013.¹²⁴ The ultimate goal of the SAM was to turn State aid control into yet another instrument at the service of the Europe 2020 objective of ‘making Europe a smart, sustainable

¹¹⁹ Case C-322/09 *NDSHT v Commission* [2010] ECR I-11911, para 50.

¹²⁰ Case T-182/10 *AISCAT v Commission*, ECLI:EU:T:2013:9.

¹²¹ *ibid*, para 26.

¹²² *ibid*, para 27. See also: Case C-615/11 P *Ryanair v Commission*, ECLI:EU:C:2013:310, paras 26–40.

¹²³ ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on EU State Aid Modernisation (SAM)’ COM (2012) 209 final.

¹²⁴ Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L204, 31.7.2013, p 15. See codified version: Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L248, 24.9.2015, p 9).

and inclusive economy'.¹²⁵ In order to achieve this ambitious goal, the SAM proposed more down-to-earth measures aimed at increasing the 'quality of the Commission's scrutiny' in the field of State aid control.¹²⁶ These measures were informed by the idea that it was necessary to prioritise and to move towards a 'better targeted' system of State aid control.¹²⁷

There were two axes to the prioritisation strategy pioneered by the Commission in the SAM. The first axis involved expanding the decentralisation process analysed in the previous chapter so as 'to focus Commission ex ante scrutiny on cases with the biggest impact on internal market whilst strengthening the Member States cooperation in State aid enforcement'.¹²⁸ The underlying idea was that 'The drive towards more efficient spending should not translate into micro control of all public expenditure but rather into *prioritisation and stronger scrutiny of the aid with a significant impact on the single market*'.¹²⁹ The Commission therefore proposed certain amendments to the enabling, block exemption and *de minimis* regulations.¹³⁰

The second axis involved streamlining the Commission's own procedures,¹³¹ one of the objectives being to 'enabl[e] the Commission to set priorities for complaints handling, in order to prioritise allegations of potential aid with a large impact on competition and trade in the internal market' (emphasis added).¹³² It is this aspect of the SAM that is more relevant for the present inquiry, since it suggests that one of the reasons behind the Commission's proposal to reform the PR was to curb the excessive demands that complaints place on the Commission's enforcement resources. This is confirmed by the explanatory memorandum to the proposal at the origin of the 2013 reform, where the Commission notes (somewhat bitterly) that it 'receives on average more than 300 complaints every year, whether lodged by interested parties or not, among which many are either not motivated by genuine competition concerns or not sufficiently substantiated'.¹³³

It is against this background that the Commission proposed (and the Council approved) a revision of the PR. The reform did not only affect the status of complainants in State aid procedures for it also strengthened the powers of the Commission to request market information from third parties, an issue that need not be considered here.¹³⁴ However, it was particularly significant in that regard, since it explicitly recognised for the first time the right of interested parties to

¹²⁵ SAM (n 123) para 1.

¹²⁶ *ibid*, para 6.

¹²⁷ *ibid*, para 5.

¹²⁸ *ibid*, para 8.

¹²⁹ *ibid*, para 19.

¹³⁰ *ibid*, para 20.

¹³¹ *ibid*, para 8.

¹³² *ibid*, para 23.

¹³³ 'Proposal for a Council Regulation amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty' COM (2012) 725 final, 4.

¹³⁴ *ibid*, 7–11.

‘submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid’ (emphasis added)¹³⁵ and, as a corollary, the obligation of the Commission to ‘examine without undue delay any complaint submitted by any interested party’¹³⁶ and to ‘send a copy of the decision on a case concerning the subject matter of the complaint to the complainant’.¹³⁷ In this way, the reform put an end to the awkward silence that the PR had kept over this issue since its adoption in 1999.

At the same time, the reform articulated a series of filters that clarify the conditions that complaints need to satisfy in order to set the procedure in motion.¹³⁸ The idea behind this aspect of the reform is that any submission that fails to pass these filters will not be registered as a complaint but rather as mere ‘market information’, which can—but will not necessarily—‘be used at a later stage to conduct ex officio investigations’.¹³⁹ This dichotomy rests on the new wording of Article 12(1) of the codified PR (ex-Article 10(1) PR). Whereas its old wording provided in very general terms that the Commission was bound to examine ‘without delay’ any information in its possession pointing to possible unlawful aid, no matter its ‘source’,¹⁴⁰ the amended version specifies that ‘the Commission *may* on its own initiative examine information regarding alleged unlawful aid from whatever source’ and that the Commission is only under an obligation to examine ‘complaint[s] submitted by any interested party in accordance with Article 24(2)’ (emphasis added).

There are basically three filters. The first filter is discreetly inserted into Article 12(1) itself, which restricts the obligation of the Commission to examine complaints to those submitted by ‘any interested party’ (*subjective filter*). This provision empowers the Commission to ponder the relationship of the applicant with the subject matter of the complaint in order to manage the flow of submissions that it faces. This may prove to be an insurmountable obstacle for some complainants, but is unlikely to have any impact on competitors, because Article 1(h) PR explicitly mentions them among interested parties. From their perspective, then, it is the two other filters that matter.

The second filter stems from Article 24(2) of the codified PR (ex-Article 20(2) PR), which provides that interested parties ‘shall duly complete a form’ to be defined in the implementing regulation (*formal filter*). The rule prior to the reform was that complaints were not subject to specific formal requirements. In its endeavour to promote complaints, the Commission had included in its webpage a

¹³⁵ Article 20(2) PR.

¹³⁶ Article 10(1) PR.

¹³⁷ Article 20(2) PR.

¹³⁸ Proposal (n 133) 5.

¹³⁹ *ibid.*

¹⁴⁰ Article 10(1) PR, as originally drafted, read as follows: ‘Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay’.

user-friendly form.¹⁴¹ However, the European Courts had clarified that ‘use of that form is not required by any rule of European Union law and consequently cannot be set up as a condition of “admissibility” for lodging a complaint concerning State aid’.¹⁴² By introducing such a rule, the reform provides the Commission with the legal basis that it lacked to reject *in limine* any submission that fails to make use of the form.

Article 24(2) PR also lays down a third filter, for it also requires interested parties to ‘provide the mandatory information requested’ in the form (*information filter*). This requirement is not novel since it was already implicit in the possibility foreseen in the old version of the regulation of informing interested parties that there were ‘insufficient grounds for taking a view on the case’. The novelty lies in the fact that the reform codifies the procedure spelled out by the ECJ in *Athinaiki Techniki* for disposing of insufficiently substantiated complaints, making it extend to formally defective submissions. Indeed, the reform adds a second paragraph to Article 24(2) PR, which reads as follows:

Where the Commission considers that the interested party does not comply with the compulsory complaint form, or that the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful aid or misuse of aid, it shall inform the interested party thereof and call upon it to submit comments within a prescribed period which shall not normally exceed one month. If the interested party fails to make known its views within the prescribed period, the complaint shall be deemed to have been withdrawn. The Commission shall inform the Member State concerned when a complaint has been deemed to have been withdrawn.

The codification of this procedure implies that the Commission may only rely on the formal and information filters to avoid taking a formal decision after providing the applicant with an opportunity to revise its initial submission. When the applicant misses this opportunity, the new wording of Article 24(2) PR imports from antitrust the ‘legal fiction’ that the complaint is deemed to be withdrawn.¹⁴³ The reform does not clarify what happens when, on the contrary, the applicant makes use of that opportunity, but there is no reason to believe that the position of the European Courts on this point should change after the reform. Thus, everything seems to suggest that the Commission remains bound by the obligation to close the file with a decision, in accordance with *Athinaiki Techniki*, and that ‘obstinate complainants’ will be able to overcome the information and formal filters ‘quite easily’.¹⁴⁴

¹⁴¹ Michael Niejahr and Tibor Scharf, ‘Third Parties in State Aid Control: More Than Just a Source of Information?’ in *EC State Aid Law/Le droit des aides d’État dans la CE. Liber Amicorum Francisco Santaolalla Gadea* (The Hague: Kluwer Law International, 2008) 350.

¹⁴² Case T-442/07 *Ryanair v Commission* [2011] ECR II-333, para 33.

¹⁴³ Hans P Nehl, ‘2013 Reform of EU State Aid Procedures: How to Exacerbate the Imbalance between Efficiency and Individual Protection’ (2014) 13 *European State Aid Law Quarterly* 235, 241.

¹⁴⁴ *ibid.*, 241.

This observation raises the question of the logic of a reform that was meant to strengthen the capacity of the Commission ‘to set priorities for complaints handling’.¹⁴⁵ The preceding analysis indicates that the reform has not brought back to the field of State aid the general rule in EU administrative law according to which the Commission has the power to refrain from investigating complaints (subject to the requirement, in certain areas, to justify this decision on the basis of the Community interest). Whether this was at all the objective of the reform is open to question.¹⁴⁶ In any event, it seems that the actual reform was more modest, in the sense that it simply creates new tools for the Commission to manage the flow of complaints that it receives, without releasing it from the obligation to respond (at some point) to them.

It confirms, in this sense, that the type of prioritisation that the Commission is entitled to apply in the field of State aid does not concern the selection of complaints that it investigates but only the possibility ‘to give differing degrees of priority to the complaints brought before it’.¹⁴⁷ In other words, it confirms that there is no room for a selective policy of enforcement in the field of State aid and that the Commission can only *postpone* dealing with measures that are not top priority.¹⁴⁸ These are likely to be complaints as opposed to notifications,¹⁴⁹ given the tighter time limits that the Commission faces in relation to the latter,¹⁵⁰ and the rule that deems the aid authorised in case of administrative silence.¹⁵¹ The upshot is that the investigation of complaints is likely to take longer than the investigation of notifications,¹⁵² but that persistent complainants have the tools to ensure that the Commission eventually takes a decision on their claims.¹⁵³

3. The Consolidation of Complainants Within State Aid Procedures

The preceding analysis has shown that the possibility of bringing complaints in State aid matters empowers competitors to push the Commission to investigate and take a formal decision on the merits of their claims.

¹⁴⁵ Proposal (n 133) 5.

¹⁴⁶ According to Nehl (n 143) 242, the draft of the Code of Best Practice proposed reflecting ‘on the opportunity to reject State aid complaints for lack of Community interest’, but this idea did not make it to the final version of the Proposal.

¹⁴⁷ Case T-475/04 *Bouygues SA v Commission* (2007) ECR II-2097, para 158.

¹⁴⁸ ‘Communication from the Commission—Code of Best Practice for the conduct of State aid control procedures’ (OJ C136, 16.6.2009, p 13) para 48.

¹⁴⁹ María J Segura Catalán and Marianne Clayton, ‘State Aid Modernisation: Another Reform?’ (2013) 14 *ERA Forum* 21, 29.

¹⁵⁰ Two months according to Article 4(5) PR.

¹⁵¹ Article 4(6) PR.

¹⁵² According to the Proposal (n 133) 4, ‘As of 31 March 2012, the average duration of pending complaint cases in DG COMP was 17 months’.

¹⁵³ But see Albert Sánchez-Graells, ‘Digging Itself Out of the Hole? A Critical Assessment of the European Commission’s Attempt to Revitalize State Aid Enforcement After the Crisis’ (2016) 2 *Journal*

The analysis has not concealed the limitations of this power. First, complainants need to accommodate to the Commission's demands in terms of form. Second, they need to substantiate their claim with a minimum amount of information, which may prove difficult in some cases. Third, the time limits faced by the Commission in the handling of complaints are not as tight as in the case of notifications, which means that they are unlikely to receive a response within a short time. Finally, and more importantly, the preliminary phase remains an exclusive dialogue between the Commission and the Member State concerned as a result of the refusal of the European Courts and legislator to provide complainants with specific information or participatory rights within that context, which means that their chances of offsetting the influence of the Member State concerned remain slim.¹⁵⁴

It is important to be aware of these limitations so as not to overstate the power of complainants within State aid procedures. Still, the possibility of bringing about a decision on the merits of their allegations (with the help, if need be, of the action for failure to act)¹⁵⁵ represents an important asset in the toolkit of competitors because of the courses of action that it opens up. The decision may be one of two types. It may be a decision to open the formal investigation phase, in which case complainants (and competitors at large) will have the possibility to participate—see next chapter. It may also be a decision to close the file (ie, a final decision that there is no aid or that the aid is compatible), which implies a rejection of the complaint, but in that case *Cook* opens the door for complainants to invoke the serious difficulties test before the European Courts—see Chapter 6.

Conclusion

Access

Despite the difficulties raised by the strongly bilateral design of the system of State aid control, the practice of the Commission and the case law of the European Courts secured from a very early stage the possibility for competitors to have access to State aid procedures through the submission of complaints. This possibility was implicitly recognised in the original version of the PR and is now explicit after the 2013 reform.

of Antitrust Enforcement 157, who argues that the reform 'has effectively restricted (if not fundamentally excluded) the possibility for complainants to force an intervention based on a complaint'.

¹⁵⁴ This is the aspect of the reform that has attracted more criticism. Nehl (n 143) and Bartosch (n 92).

¹⁵⁵ See, eg, Case C-615/11 P *Commission v Ryanair*, ECLI:EU:C:2013:310.

Leverage

The definition of the status of complainants (and hence of their actual chances of influencing the outcome of State aid procedures) has taken longer. It seems, however, that the ECJ (in *Athinaïki Techniki*) and the legislator (in the PR, especially after the 2013 reform) have both made a choice to grant State aid complainants a power that they seldom enjoy in other fields of EU administrative law, namely the power to force the Commission to investigate and take a decision on the merits of their claims. This power is subject to important limitations, which stem for the most part from the privileged position of Member States within the State aid procedure, but it challenges the instrumental conception of competitors that is normally associated with the bilateral design of State aid procedures.