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From Soft Law to Hard Law?:
Discretion and Rule-making
in the Commission's State Aid Regime

MICHELLE CINI

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**ROBERT SCHUMAN CENTRE
FOR ADVANCED STUDIES**

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European Forum

The European Forum was set up by the High Council of the EUI in 1992 with the mission of bringing together at the Institute for a given academic year a group of experts, under the supervision of annual scientific director(s), for researching a specific topic primarily of a comparative and interdisciplinary nature.

This Working Paper has been written in the context of the 1999-2000 European Forum programme on "Between Europe and the Nation State: the Reshaping of Interests, Identities and Political Representation" directed by Professors Stefano Bartolini (EUI, SPS Department), Thomas Risse (EUI, RSC/SPS Joint Chair) and Bo Stråth (EUI, RSC/HEC Joint Chair).

The Forum reflects on the domestic impact of European integration, studying the extent to which *Europeanisation* shapes the adaptation patterns, power redistribution, and shifting loyalties at the national level. The categories of 'interest' and 'identity' are at the core of the programme and a particular emphasis is given to the formation of new social identities, the redefinition of corporate interests, and the domestic changes in the forms of political representation.

Abstract*

This paper explores the Commission's use of soft law within the EU state aid regime and how its application of informal policy instruments has evolved since the early 1990s. It argues that developments over the past decade have led to a "hardening" of the regulatory approach applied within the state aid regime, an evolution which seems to run against a more general EU trend towards soft law and "softer" forms of governance. Yet this policy development should not be read simply a trend from hard law to soft law. Rather, the reconfiguration of policy instruments used in the state aid regime reflects the challenges facing and the distinctive characteristics defining this policy area. The paper thus begins by introducing and defining soft law. It then provides an overview of the EU's state aid regime; of the role of discretion in the decision-making process; and of Commission rule-making on state aid matters. The paper concludes by pointing to two legal "events" that show how the Commission's soft law approach has recently changed and by analysing and drawing out some of the implications of this development.

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INTRODUCTION

In a recent contribution to the literature on EU governance, Eising and Kohler-Koch (1999: 285) unpack the “complex mixture of governance models” that characterise the EU’s policy process. They argue that “most EC policy areas are marked by a preponderance of network governance” which rests on a “belief that networks and consensus formation are an appropriate way of governing the European Union” (Eising and Kohler-Koch, 1999: 275). This, it is claimed, is as true for many of the EU’s regulatory policies as it is, say, for redistributive policies. Thus, while a top-down “command-and-control” approach may have once seemed the most appropriate model of governance for regulation at the European-level, this is no longer necessarily the case. The Commission, in particular, has been keen to introduce softer consensus-based models of governance, even in policy areas traditionally characterised by interventionist and legalistic styles of decision-making (see, for example, Lenschow, 1999 on environment policy). Part of this process of “transformation” has involved an increasing use of informal rule-making by both EU institutions and member states (see, for example, Klabbers, 1998; Snyder, 1993), and frequent reference is made to how such an approach in the hands of member governments is certain to reduce the decision-making role of the supranational institutions. One commentator has even gone as far as to suggest that the European Union is entering an “era of soft law” (Flynn, 1997: 2), characterised by the proliferation of “regulation by publication” (Snyder, 1993: 3) and linked to the emergence of the subsidiarity principle.

If such a trend towards a “softer” model of European governance does exist, the EU’s state aid policy might at first sight appear an exception to it. After all, this is a policy area which has long been shaped by a soft law approach, and where “harder” legally-binding forms of regulation have been a feature only of the 1990s. Crucial for the building and consolidation of the internal market, state aid policy also raises extremely sensitive political issues for the EU’s member states. As a regulatory policy, but one dependent upon the use of informal instruments, it is something of an oddity, even in EU terms. But it is precisely for these reasons (namely, the sensitivity and the centrality of the policy, and its early reliance on soft law) that the state aid regime makes for an intriguing case study.

This paper charts the context within which a soft law approach has been applied within the European Union’s state aid regime: and more specifically, asks whether recent developments in state aid enforcement confirm that the policy is indeed evolving away from, rather than towards a softer form of governance. Thus the paper begins by introducing and defining soft law, and by

summarising the arguments made both against it and in its favour. Turning to the state aid case, there follows an overview of the distinctive characteristics of this unusual EU regime; of the role of discretion in the decision-making process; and of Commission rule-making on state aid matters. The paper then presents some evidence that a "hardening" of the Commission's soft law approach has been taking place since the early 1990s. Yet, as is spelt out in the Conclusion, this alone does not necessarily imply the existence of a trend from soft law to hard law, or an end to the Commission's soft law approach. Rather, it reflects the Commission's desire to find an appropriate mix of policy instruments in a regime in which the legal and economic requirement of rigorous supranational enforcement must be weighed against the political need for intergovernmental consensus.

THE SOFT LAW APPROACH

The origins of the Commission's soft law approach lie in the international sphere where governments find it easier to conclude international agreements of a (legally) soft and flexible nature than those imposing hard legal obligations and ratification requirements. It was only from the early 1970s that the soft law concept began to appear widely in the public law literature (Wellens and Borchardt, 1989: 267) and this was soon picked up by those working in the field of European legal studies (Baldwin and Houghton, 1986: 239). Even so, many lawyers continue to deny the value of the concept. Law, they argue, is either hard or it is not law at all. Yet despite such hostility, Wellens and Borchardt (1989: 268) have shown how political, and possibly even legal effects can arise from these acts which on the surface are non-binding.

So what then is "soft law"? Snyder's definition is perhaps the clearest. He says that soft laws are "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects" (Snyder, 1993: 2). While this definition is broad enough to encompass both an *international* and an *EU* understanding of soft law, the latter includes not only international agreements but also texts issued by the European institutions. In the case of Commission soft law, the focus of this paper, the concept is best understood by listing the forms that it takes: codes of conduct, frameworks, resolutions, communications, declarations, guidance notes, and circulars for example. While it is generally accepted that soft law lies somewhere between general policy statements (and Commission discretion) on the one hand, and legislation on the other, identifying precisely where this rather illusive concept begins and ends can be extremely difficult. For lawyers in particular, soft law remains a highly contested concept.

Not surprisingly, much of the (legal) literature on soft law deals with how it affects legal doctrine, though the wider (non-legal) pros and cons of the proliferation of these sorts of instruments is also raised in some studies (see for example, Beveridge and Nott, 1998). It has been argued, for example, that soft law can act as a helpful guide to officials, encouraging consistency in bureaucratic decision-making; it can inform the public of official attitudes; it is flexible and can be more speedily issued than legislation; it can deal with issues of regulatory philosophy and broad policy which may not so easily be communicated using more formal legal instruments; and it can allow for regulation where no regulation would otherwise be possible.

Such rules inexpensively and swiftly routinise the exercise of discretion; they provide easy justification for the use of statutory powers; the “get the job done” whilst offering something to critics ... they give a flexibility that primary legislation does not offer; and they are largely immune from judicial review (Baldwin and Houghton, 1971: 239-40).

This benign interpretation does little to conceal the dangers inherent in informal rule-making. Perhaps the most damning criticism of soft law is that it results in soft compliance: that is, as soft law is not legally binding, implementation must rest solely on the goodwill of those agreeing to and affected by it, which some might argue is a rather unstable foundation for policy consistency. Moreover, when soft law is used, parliaments tend to be by-passed; its content is often vague and non-judiciable; it may be inconsistent with existing legislation; it tends to be inaccessible (opaque), with little scope for public input; and it can allow judges and/or administrators a dominant role in the making of policy. Indeed, “once political and moral concerns are allowed to creep back into the law, the law loses its relative autonomy from politics or morality”, thus opening the way for abuses of power (Klabbers, 1998: 391).

Two policy studies which conceive of soft law from rather different perspectives suggest how the Commission might use a soft law approach to serve different ends. In the first case, that of European environmental policy (Flynn, 1997), soft law is deemed to be part of a new regulatory trend within the European Union, one which places more emphasis than in the past on informal rule-making and norm-setting, whilst at the same time responding to concerns long advanced within the EU member states that the EU’s regulatory regime imposes exceedingly heavy burdens on European non-state actors. In this case, soft law is deemed to provide an *alternative* to harder forms of EU regulation.¹ This is very much connected to the application of the subsidiarity principle which Flynn says has become tied to “a debate about styles of regulation, sensitivity to Member States interests, and above all a leaner, meaner and more

discreet but simultaneously effective pattern of EU regulation”(Flynn, 1997: 2). It is in this context that the start of an era of soft law has been heralded.

Yet by contrast, in a paper by Dehousse and Weiler (1990) on European foreign policy, a trend of a different sort is suggested, as the title “EPC and the Single Act: From Soft Law to Hard Law?” suggests. In this case, the authors understand soft law as a “half-way house” between discretion and legislation. They claim that “in legitimizing certain types of behaviour, this kind of instrument may represent an important stage in the process that leads to the elaboration of customary international law” (1990: 5-6) and that “from a historical viewpoint ... the ‘soft law’ concept may be useful in understanding how pragmatic arrangements have slowly crystallized into binding rules of law” (1990: 7). More specifically, in the case of European Political Co-operation, the forerunner of today’s Common Foreign and Security Policy, they suggest that

[...] the “soft law” construct can be regarded as a useful instrument for understanding the radiating effect which basic EPC documents undoubtedly had in the pre-Single Act years. Their ‘soft’ legal value can, at least in part, account for the influence political cooperation exerted on the Member States and for the sense of comity which developed between European partners (Dehousse and Weiler, 1990: 6).

In this case, soft law may be viewed in a number of inter-connected ways: as symbolic policy, marking out a certain common direction without formal commitment; as a practical solution allowing difficulties associated with introducing more formal policy instruments to be circumvented; and as a consequence of the sort of incrementalism which implies “small steps ahead, bringing each time the various partners closer, and reinforcing their cohesion” (Dehousse and Weiler, 1990: 26).

In the first case identified above, soft law is a characteristic of a distinctive form of regulation, one which implies a softer form of governance, resting for example on negotiated settlements and voluntarily agreed codes of practice. To generalise from this perspective, we might expect to find, at least in some policy areas, that a softer form of governance –based on soft law – would come to replace or serve as an alternative to more conventional, “hard” forms of legislation. By contrast, in the second example, soft law is conceived of as a stepping-stone to hard law rather than as an alternative to it. Generalising from this second perspective then, we might expect to find that softer forms of governance eventually harden into binding legislative regimes, and that soft law is in this sense somewhat ephemeral. While these two hypotheses are by no means intended to cover all possible regulatory options, they do help to frame our enquiry into the EU’s state aid policy. How then should we understand the soft law approach in this particular policy area? What do recent developments

in state aid enforcement tell us about the way in which this regime is governed? Before addressing these questions directly, the following sections provide an overview of the policy, so as to shed light on both the discretionary and rule-making context which has helped to shape the Commission's current approach to enforcement in this particular area.

THE DISTINCTIVENESS OF THE STATE AID REGIME

The European Union's state aid policy regulates the grant of subsidies by national and sub-national authorities on the grounds that aid of this sort can, at least potentially, distort competition between the EU's member states. The policy has been characterised by three distinctive features: its centrality to the single European market objective; its absence of formal legislation; and its political sensitivity. Resting on a strict notification requirement which has become something of a burden for the Commission, the policy regulates both regional and sectoral aids, as well as those that are horizontal in application (addressing, for example, R&D or environmental concerns), and it rules on both individual grants of aid and on aid schemes which establish national frameworks of subsidisation. The Commission was endowed with discretion and a monopoly of enforcement in this field by the EC Treaty. But even though the formal instruments of state aid control were laid out in the 1957 Treaty of Rome, it was only in the mid-1980s that enforcement became a Commission priority. Piecemeal efforts to apply the treaty provisions had been made earlier, but it was with the appointment of Peter Sutherland as Competition Commissioner (1985-89) and his successor, Sir Leon Brittan (1989-93), that a coherent policy began to take shape. This policy clearly formed part of the single market logic of the time (Petersen, 1993). Indeed, state aid control is deemed by the Commission to be a crucial element in the creation and maintenance of free and fair competition within the European market, and is an important part of the EU's competition regime. But though state aid policy is clearly a regulatory policy, it is all the same a regulatory policy with a difference.

EU state aid policy is governed by Articles 87-89 [ex. 92-94] of the Treaty on European Union. Article 87(1) bans nationally-granted state aid and is something of a catch-all provision. Articles 87(2) and 87(3) allow for exemptions (or derogations) to the prohibitive rule: mandatory in the case of the former, covering aid of a social nature granted to individuals, financial support in the event of natural disasters, and aid to parts of Germany affected by the division of that country; but discretionary in the case of the latter, for aid promoting economic development in certain areas; aid for projects of a common European interest or to remedy a serious disturbance in a national economy;

certain sectoral and regional aid; aid to promote cultural and heritage conservation; and any other aid specified by a qualified majority of the Council on the basis of a proposal from the Commission.² The main objective of the policy is to reduce levels of national subsidy and avoid the damaging effects of subsidy races within the internal market. Yet the possibility of exemption suggests that state aid policy may be used to achieve objectives other than the reduction of subsidy for its own sake and the creation of a level playing-field for European industry. This is clearly the case. Regional and, though to a lesser extent, social, environmental and industrial objectives have all been pursued through the state aid rules, even during the ostensibly neo-liberal years of the late 1980s, to the extent that by the early 1990s, "state aid [was] increasingly seen as a vehicle for making the completion of the internal market politically acceptable" (Evans and Martin, 1991: 110).³

The Commission has a substantial freedom of manoeuvre in the taking of state aid decisions. Until 1997 there was practically no Council legislation at all in this policy area.⁴ Commission policy derived from the Treaty, from Court Judgements and from the Commission's own rules and experience, and while Article 89 [ex. 94] did allow the Council of Ministers to issue state aid regulations which might add flesh to the bare bones of the Treaty, this was dependent upon a Commission proposal (Sinnaeve, 1998). Until the late 1990s no such regulation was agreed by the Council and after 1972 no proposals were made by the Commission. As a result, the Council has been seated very much on the sidelines of what was and still remains a *Commission* policy. We might even argue that a Commission--Court relationship has replaced the more conventional inter-institutional policy-making triangle of Commission, Parliament and Council in this policy area (Goyder, 1988). Moreover, the absence of state aid legislation led, as we shall see below, to the construction of a body of informal Commission rules which served as a substitute for "hard" legislation.

The policy's distinctiveness also stretches to the state aid decision-making process. This is in certain respects similar to that found in the Commission's antitrust rules, though without the same sweeping powers of investigation. The decision-making procedure rests on the opening of what is known as the "contentious" (or the Article 88(2) [ex. 93(2)]) procedure. This follows an initial and less formal preliminary investigation. Whereas at this first stage, officials decide if the national authorities have a case to answer, a full investigation of the aid measures granted has to wait until a contentious procedure is initiated. While in theory this procedure should conclude with a legally binding decision, in fact very few of these are taken. Informal settlements are very much the norm, not least because national authorities are

aware that once a procedure is opened, the Commission is more likely to take a negative than a positive decision. Where a decision is taken it generally spells out why the subsidy in question is deemed a "state aid" under the Treaty and why the treaty derogations do or do not apply in this case. It also includes information on the nature of the measure, the extent to which it distorts competition and its effect on inter-state trade within the Union.

Much more than its decision-making procedure however, the distinctiveness of state aid policy is tied to the function it performs. It is one of the most politicised of the EU's regulatory policies, as Commission decisions can, in a very blatant manner, prevent national governments from pursuing their own (national) industrial policies. This is after all a policy area which pits the Commission directly against the member states, with governmental authorities rather than firms, the targets of Commission regulation. While EU governments in principle agree that a state aid regime is necessary for the fair and effective functioning of the single market, this does not stop them contesting both Commission policy and Commission decisions in individual cases of aid particularly when national or governmental interests are perceived to be at stake. This point is crucial as it demonstrates the fine line that the state aid officials tread when vigorously enforcing a policy which is both central to the single market objective, and highly sensitive politically. To assist it in this difficult task the Commission has drawn up its own state aid rules. Before turning to these rules, the following section provides a more detailed account the state aid decision-making process and the instances of discretion to be found within it. It is these instances of discretion which form the decision-making context within which, in this policy area, the Commission's soft law approach has evolved.

DISCRETIONARY DECISION-MAKING IN THE STATE AID REGIME

Just as the concept of discretion makes little sense without some understanding of the importance of rules, it is only through the discretionary character of the state aid decision-making process, that the rule-making function of the Commission in this policy area can be explained. The section that follows thus reviews the state aid decision-making process from this perspective. More specifically, it serves to highlight the function performed by discretion within the decision-making process. For example, discretion might be used as a means of dealing with complex cases for which rules are difficult to draft; it could be endowed in an authority when another rule-making body (or legislature) is unable to agree on appropriate rules; or it might be granted to a body to enable it to develop rules on the basis of its own experience. It is only by looking

empirically at decision processes that the function of discretionary decision-making in this particular policy case may be identified.

The Preliminary Investigation

Article 88 [ex. 93] of the EC Treaty obliges the EU's member states to inform the Commission of any new state aid about to be granted, or of any changes to be made to existing aid. It is this system of prior notification which has formed the basis of the Commission's state aid regime and which triggers the preliminary stage of the decision-making process.⁵ In many cases a more informal process of notification precedes the preliminary investigation however. Member states sound out state aid officials on their likely reaction to a planned measure which they believe to be relevant to or exemptible under the aid rules. Aid which comes to the DG's attention in this way will have to be formally notified if it is to be introduced.

Once a formal notification has been received and acknowledged by the Commission the first question the *rapporteur* in charge of the case must ask is whether the measure is in fact a state aid. Usually it is, as the definition of an aid is broad enough to encompass almost all forms of government assistance. There are however a number of conditions that must be fulfilled when determining the compatibility of a measure under the state aid rules (Quigley, 1993), namely: that the measure in question has been granted through state resources; that it distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods; and that it affects trade between the member states. While in the majority of cases the *rapporteur* reaches a decision with ease at this stage, there can occasionally be difficult issues to contend with. Those involving the relationship between governments and state-owned firms, for example, can be particularly problematic (Hancher, 1994). Yet it is often in grey areas such as these that the Commission's discretion is most visible.

A principle which helps to guide Commission decision-making in such cases is known as the "market investor principle" (sometimes called the "private commercial investor principle") (Bernitsas, 1993). The principle spells out that it is only when the state acts as would a private investor can a measure (such as an injection of capital) *not* classed as a state aid. In a 1996 case, for example, when considering aid of eighty-seven billion pesetas to the Spanish state-holding company, Teneo, for investment in the Spanish airline, Iberia, the Commission raised no objection as it claimed that the market investor principle had been satisfied (Commission, 1996, point 196). In some cases, the operationalisation of the principle has been contentious given that decisions

must ultimately be taken on the basis of hypothetical assumptions. In what, for example, would a private investor invest? The answer to this question is rarely self-evident as political, social or philanthropic factors may be taken into consideration even by decision-takers in the private sector?

Assuming that a state aid is said to exist, the second question asked at this stage is whether the aid is likely to fall under any of the Article 87 [ex. 92] exemption clauses. This question is addressed in a fairly informal manner, though where there are any doubts the aid must not be approved. The European Court of Justice made this perfectly clear in the *Cook* case (C-198/91) in 1991. Yet state aid officials are so adept at dealing with notifications that an initial reading of the relevant paperwork is often enough to allow conclusions to be drawn about a measure's compatibility with the aid rules. There is thus no need for a step-by-step analysis in any formal sense. It should not be forgotten that the majority of work done by the state aid directorate is in effect the rubber-stamping of notifications that do not in any way infringe the treaty provisions. We should not be surprised that routine decisions do not get a great deal of attention however, as these cases are never as exciting as the infrequent yet more high-profile state aid controversies.

There are occasionally borderline cases where the legality of an aid is a matter for debate of course. But even here the decision to approve an aid, or that which opens a full investigative procedure under Article 88 [ex. 93](2) has more to do with the gut-feelings of the *rapporteur* than with any detailed economic or legal analysis (Evans and Martin, 1991). This is not to imply that the decision is an arbitrary one (Kobia, 1996). The state aid staff have a great deal of experience of dealing with individual cases and there is always the threat of a Court appeal hanging over the Competition DG should an unlawful decision be taken. If there is any concern about the effects of a measure there must be a *full* investigation. The *preliminary* investigation is just that – preliminary and impressionistic. There are so many cases to deal with at this stage that it would be impossible for it to be otherwise. There is, even so, an inherent ambivalence about the state aid procedures at this early stage. With state aid so broadly defined, and with the number of notifications required by the Commission so large, officials seek to dispose of the routine-type notifications as quickly as possible so as to concentrate on the most important cases, that is, those deemed priorities. Thus the preliminary investigation has performed a function bureaucratically that a more selective legal framework would have achieved more formally, and discretion plays an important part in this process. As we shall see, however, this method of dealing with an ever-growing state aid caseload has proven inadequate, and since the end of the 1990s an alternative means of prioritising decision-making has been found.

Time limits are often a serious source of contention at this stage and indeed remain so throughout the entire procedure. Also increasingly contentious is the position of competitor firms (and other third parties) who have little input at the preliminary stage. So although the preliminary investigation into a state aid may be considered as routine and uncontroversial discretionary decisions are taken at this stage: to define an aid; to frame the content of the proposal (this may colour the reading of the case higher up the hierarchy); and to propose the initiation of the second stage in the state aid procedure. However, these decisions are not well documented, interests are unlikely to be involved and general information is hard to come by.

The “Contentious” or Article 88(2) [ex. 93(2)] Procedure

Once a preliminary investigation has been completed, the state aid directorate must decide if there is a case to answer and whether doubts about the aid's compatibility with the treaty provisions still exist. If there are doubts, the formal proceedings under Article 88(2) [ex. 93(2)] are initiated. This decision to investigate a case further is clearly an instance of discretion in the state aid procedure.

The opening of the Article 88 [ex. 93](2) procedure means that decision-making enters a more public domain, and this in turn implies that a statement is being made about the importance of a case – whether in political, legal or economic terms. With limited resources the state aid directorates do not have the capacity to pursue all aid cases through to final decision. Increasingly the Commission has come to recognize the importance of prioritizing its formal investigations (Commission, 1995, point. 395) in order to use its decision-making capacity strategically. For example, it was stated in its *Twenty-Fifth Report* (1996, point 209) that the contentious procedure had been opened in a number of internationalization schemes “[t]o establish a clear policy in this field”.

This second stage in the decision-making process involves a much more in-depth appraisal of the aid in line with criteria set out in the Treaty, in case-law and in policy guidelines. It also involves some consultation with the member states. The “compensatory justification” principle underpins the Commission's decision-taking at this point. This principle which involves the weighing up of the pros and cons of an aid has been applied with vigour ever since it was confirmed by the European Court in the *Philip Morris (Holland)* judgement of 1980 (Case 730/79), although in practice it has shaped Commission decision-making since the 1960s (Mortelmans, 1984). The approach was initially spelt out in the Commission's *First Report on*

Competition Policy in 1972, though perhaps its clearest statement came in the *Tenth Report on Competition Policy*, where it was stated that:

if the Commission has to use its discretionary power not to raise objections to an aid proposal, it must contain a compensatory justification which takes the form of a contribution by the beneficiary of aid over and above the effects of the normal play of market forces to the achievement of Community objectives as contained in the derogations of Article 88 [ex. 92] (3)EEC (Commission, 1981, point 213).

It is clear therefore that the regulation of state aid allows for the balancing of the effects of legal certainty against a more flexible approach. The compensatory justification principle opens the door to a qualitative cost-benefit analysis undertaken by the state aid staff, within which the losses to European competition and the single market are balanced against gains associated with other policy objectives, most notably those that contribute to the cohesion of the Union.

At this second stage in the proceedings third parties do have certain rights. But while member governments are kept informed of cases through their Permanent Representations in Brussels, competitor firms often find it difficult to get hold of useful information. A rather sketchy and unhelpful summary is published in the EU's *Official Journal*, as the Commission is extremely cautious about publishing information which could be commercially sensitive. This leaves most competitors having to seek redress through the courts as a last resort as did British Airways and six other airlines in the *Air France* case decided in 1998 (Graham and Iskander, 1998). Thus the final decision taken by the Commission always has to be sound enough for it to stand up in court on appeal, though many would argue that this does not necessarily mean that it is either well-reasoned or particularly detailed (Bishop, 1997). A shoddy, speedily drafted and poorly investigated decision will certainly involve some risk that the case will be overturned. But on the other hand, the Courts may also penalize the Commission, possibly by refusing to allow aid already distributed to be recovered if there is too great a delay in issuing a decision.

Before a final proposal is issued by the Competition DG, drafts are transmitted up the DG hierarchy and are often returned to the *rapporteur* for reworking. In all but the most routine cases, the staff in Directorate A which oversees all aspects of competition policy will vet the proposal before it is passed on to the staff of the Competition Commissioner (the *cabinet*). Other Commission services also get the opportunity to view the proposal when it enters interservice consultation. The draft is circulated to interested DGs (and will as a matter of course go to the Legal Service) and if there are any serious problems an interservice meeting may be held to try to iron them out.

At the end of the second stage the DG will recommend the issuing of either a positive, a negative or a conditional decision. Conditional decisions, such as in the decision on aid to French computer firm *Bull* in 1994 might include restrictions on the type, amounts, intensity, beneficiaries, purposes and/or duration of the aid (Commission, 1994, point 396). While most procedures do not end in formal decisions (Pijnacker Hordijk, 1985), since the mid-1980s an increasing number have been taken each year. In 1995, for example, twenty-two positive final decisions, nine negative final decisions and five conditional final decisions were taken. Back in 1982, by contrast, no final decisions were taken under Article 88 [ex. 93](2) and in 1983 there were only five in all. Indeed, most aid cases still end in informal settlements which either involve modifications to the aid proposal, or its complete withdrawal if Commission approval is unlikely. All the same it can still be said with some confidence that "[v]ery few grants of aid are approved by the Commission once it has decided to initiate the procedure in Article 92" (Cownie, 1986: 262). Member governments are well aware of this.

The decision to take a formal and enforceable decision is arcane but important. Indeed, it is perhaps the most crucial discretionary step in the decision-taking process as without formal decisions there would be less scope for appeals and very little case-law. While the informal procedure may well resolve the problem of having to deal with an individual grant of aid, it makes little contribution to the broader legal and policy framework. This policy-making objective necessitates the formality of decision-making and links, as we shall see, the Commission's role in individual cases to its rule-making function.

Decision-taking in the College of Commissioners

Although draft decisions are drawn up by the staff of the state aid directorate, final state aid decisions, in all but routine cases, are taken by the College of Commissioners. This leaves open the possibility that at the final stage in the Commission procedure bargains will be struck over the content of the decision. The importance of bureaucratic politics in state aid decision-taking should not be understated. Indeed, within the College itself there is scope for the exercise of a form of discretion in the taking of state aid decisions, with the proviso that the decision must be able to stand up in any appeal to the Courts. Even so, it is clear that the College has been able to profit from the ECJ's support for Commission discretion in the past to unpack proposals put before it. As has been noted, the Court's "kid-glove" standard of review (Bernitsas, 1993, 117) has failed to act as a constraint upon the College.

It would be misleading however to conceive of the involvement of the College as an entirely separate stage in the state aid decision-making process. Likewise it would be wrong to assume that it is at this stage alone that political imperatives become important. Rather, the involvement of the Commissioners' offices can begin early on in the decision-making process and can impact upon all the discretionary instances identified above. However, this is only likely when a decision is identified as controversial in one or more member states, and where differences of opinion emerge amongst Commissioners. Inter-service consultations which are a necessary part of the "contentious" procedure flag up any proposal which is likely to be controversial. As such, *cabinet* members will be alerted early on to any case which is likely to be problematic. They will then try to prepare the ground in advance, taking steps to minimize the likelihood of a clash wherever possible. Informal soundings-out of fellow *cabinet* members will suggest which Commissioners are likely to oppose the Competition line, and which will support it. It may be clear early on that opponents will have a majority in the College, or that their opposition will be ineffective.

Formally, the draft decision will be discussed in a number of forums. The *special chefs* meetings are the meetings of *cabinet* officials responsible for specific policy areas, one of which is state aid. These meetings serve to iron out difficulties whilst confirming the official line of the *cabinets*/Commissioner for the record. At the *chefs de cabinet* meeting, the heads of the *cabinets* may also have an opportunity to review the proposed decision, once again confirming areas of disagreement and possibly deciding that the issue is controversial enough to be discussed in the weekly Commissioners' meeting.

The desired image of unity that the College often attempts to project convinces few when it comes to high-profile state aid cases, and the financial press are adept at uncovering disagreements of this sort within the College. These conflicts often emerge around three poles: around preferences for state interventionism as against market solutions to policy problems (ideological differences); around multi-faceted national cleavages (territorial differences); and around sectorally informed preferences, often manifesting themselves as departmental disagreements (functional differences). However, these distinctions are in practice blurred and often indistinguishable one from the other. Governments regularly put pressure on "their" Commissioner(s) to follow the "national" line. In any case, some Commissioners choose to do so with little encouragement necessary. It was argued in 1991, for example, that President Delors' opposition to Commissioner Brittan's demand that aid to Renault be repaid was more to do with national sentiment than respect for the aid rules (Cini and McGowan, 1998). Indeed, the process of decision-taking in controversial cases in many ways mirrors decision-taking in the Council of

Ministers (Peterson, 1995), with bargaining, log-rolling and consensus-building part-and-parcel of the Commission's decision-taking process. This is not peculiar to the state aid domain, although it is perhaps less surprising that the Commission should seek to recreate itself as a pseudo-Council in this particular policy area given the marginal involvement of the Council in state aid matters.

The mid-1990s were dominated by a number of high profile aid cases affecting the airline industry (Jones, 1996). These cases were judged by competitors and the media to demonstrate the extent to which the Commission was "under the thumb" of national governments keen to see a soft line taken with their "national" carriers. The Commission, meanwhile, claimed that aid granted to these companies fell under the aid rules, given the restructuring plans they had submitted to the Commission. However, the opacity of the rules and the decision-making process more broadly made it difficult to demonstrate unequivocally, first, that the decisions taken were in fact covered by the aid rules, and second, the extent to which the final decisions were determined (politically) at the level of the College (rather than by officials within the DG on the basis of technical criteria). Not surprisingly, this lack of transparency opens the door to accusations that political factors outside the scope of the rules played a large part in aid approval and the June 1998 ECJ judgement which condemned the form rather than the substance of the Commission decision (on aid to Air France) did little to alter this perception (Graham and Iskander, 1998). Nevertheless, it is clear that it is largely at the level of the College that both internal and external political pressures are placed on the Commission. This is the case whether the Competition DG's line ultimately wins the day or not.

It should be noted however that although attention has focused here on the decision-taking role of the College, increasingly decisions ostensibly taken by the College are in fact issued by means of an accelerated procedure.

"In all areas where the Commission's discretionary power is circumscribed by precise assessment criteria which are laid down in notices, guidelines and communications to Member States, decisions on schemes or cases are usually taken by way of delegation of powers, by the Member of the Commission responsible for state aid. Today, this amounts to 45% of all decisions in the field of state aid (Mederer, 1997)".

Such delegation within the Commission sees the College of Commissioners as well as the Council marginalised within the decision-taking process. In such cases, which have an important bearing on the discussion below, it is the responsible DG staff and the Commissioner for Competition, rather than the Commission as a whole, become the *de facto* state aid decision-makers.

This section of the paper has provided an overview of the state aid decision-making process and the instances of discretion within it. Without this it would be difficult to understand the rule-making dimension of the policy as it is spelt out below. Three functions of discretion, each of which has implications for our understanding of Commission rule-making in this policy area. First, discretion allows for the translation of broad policy principles into practice. As we shall see below, these policy principles are set out in Commission texts, the Competition Reports, Commissioners' speeches and, more pertinently, in policy guidelines. Second, discretion allows policy objectives to be attained through a process of prioritisation and a mix of informal and formal decision-making. This mix is only made possible because of the discretionary capacity of Commission staff. The policy objectives, however, are found in Commission documentation, rules which bind the Commission more than it does those affected by the policy. Third, discretion allows politics to play a role in decision-making. This is controversial for those who believe that this permits the subversion of both stated policy objectives and the principles underpinning them. Rules which limit discretion thus limit this potential for subversion, with the aim of removing politics from the decision-making process. So, although the focus in this section has been on the discretion and decision-making, it serves to set the scene for the rest of the paper in which the focus of attention lies more specifically with the Commission rule-making and its 'soft law approach'.

RULE-MAKING IN THE STATE AID REGIME

Since the early 1970s there has been a gradual increase in the use of soft law instruments in the EU's state aid regime. Taking the form of guidelines, frameworks, communications, codes and even at times letters, soft law has been used to clarify the Commission's approach to nationally granted aid and to structure discretion in this policy area (della Cananea, 1993). Although there is no doubt that EU state aid policy is now "rule-based" (Kobia, 1996), there should be no presumption that the policy will always be consistent. Indeed, "no one could, for a moment, assume that in an area as highly charged by political and social considerations as state aids policy that one could expect the Commission to apply a rigid, formalistic or mechanistic approach to controlling national state aids" (Hancher *et al.*, 1993: 10). Without guidelines however the potential for political decision-making would be all the greater. The Commission would have only the Treaty and the relatively limited body of state aid case law to work with and enforcement would rely solely on a case-by-case analysis of individual aid (della Cananea, 1993: 63). Even by the early 1970s such an *ad hoc* approach to state aid control was deemed unworkable. In a policy area which forces the Commission to face national governments head-on,

direct comparisons of individual decisions would have inevitably led to political wrangling, making the Commission's job almost impossible (Bishop, 1997). Frank Rawlinson, when serving as a Principal Administrator in the Commission's state aid directorate, made a similar point:

"Experience has shown that aid levels tend to rise if there are no hard-and-fast rules but only a vaguely formulated policy. There is nothing easier for the State aid controller than to allow a few percent more this time, a few percent more next time, and so on. The Commission needs rules to discipline itself. Rules are the best safeguard against political decisions which, if they were to proliferate, would destroy all state aid control" (Rawlinson, 1993: 58).

While the point is well taken, guidelines themselves may also be contentious. Not only have there been bitter disagreements between the Commission and member governments, as in the case of the Motor Vehicles Framework (below), but there have also been disputes within the Commission itself. For example, when the state aid officials sought to draft an aid framework for the audio-visual sector early in the 1990s, their efforts ran up against opposition from other Commission services who objected to the Competition DG's "technocratic" approach in this culturally important policy area (Rawlinson, 1993: 55).

The absence of a formal framework beyond that provided by the Treaty opened up a regulatory space which soft law was able to fill. The Commission had originally sought to persuade the Council to regulate in this area on two occasions: once in 1966 when a Commission proposal on state aid procedure was drafted; and subsequently in 1972 when a Council Regulation covering a number of regional aid issues was discussed. The strategy failed in both cases and the Commission gave up on this approach. Instead, it began to rely more and more heavily on its own informal rule-making capacity, with the drafting of state aid guidelines coming to serve as an alternative to a more conventional form of EU regulation. By the early 1990s, the Commission was not only resigned to the absence of a Council Regulation, but was also arguing vehemently against making further proposals in the face of increasing calls by academics and practitioners for a more formal set of state aid rules.

Rawlinson (1993) explains why such a soft law approach came to be so attractive for the Commission. He highlights the time-saving potential of guidelines, that is, their value in speeding up decision-taking and reducing backlogs. He also notes their contribution to the goals of transparency, legal certainty and the credibility of state aid enforcement, as well as to their scope for tightening the control of aid levels. Yet while these goals could have been achieved by means of legislation, it was the balance sought between policy

flexibility on the one hand, and policy stability and credibility on the other, that ultimately made soft law the instrument of choice within the state aid directorate. Choosing a soft law approach, then, became less about making the best of a bad situation, and more about finding a compromise between the rigidities of hard law and the uncertainties associated with a more discretionary approach.

1971 saw the start of the soft law era in the state aid regime, with the drafting of rules on aid to the textiles and clothing industry. There followed a series of guidelines devised for problem sectors such as coal and steel,⁶ and over time rules on regional aid, on horizontal categories of aid (such as aid for investment, capital injections and environmental protection) and, though to a lesser extent, on procedural issues (such as aids deemed to be of minor importance – known as *de minimis* aid) have also been drawn up. These guidelines take many different forms. Some, for example, lay out special notification rules and reporting requirements, while others provide guidance for calculating grant equivalencies or on the criteria the Commission will use in determining the eligibility of an aid. Most list the activities for which subsidies are permitted, and include data on maximum permissible aid levels (Rawlinson, 1993: 55). In the case of the Commission's policy on Research and Development Aid, for example, the current Framework which came into force in 1996⁷ is a revision of a Framework drafted a decade earlier, and is again up for review and renewal in 2001.⁸ The Framework spells out the application of the state aid rules to R&D aid; the compatibility of R&D aid with the common market; the notification procedures necessary; and the "allowable intensity" and "required incentive effect", these being the main criteria used by the Commission for assessing the compatibility of an aid (Núñez Müller, 1999: 104). The 1996 guidelines are actually quite similar to those drafted in 1985, but were adjusted to take on board policy recommendations made in the Commission's 1993 *White Paper on Growth* and the *Agreement on Subsidies and Countervailing Measures* (the *SCM Agreement*) which is part of the 1994 World Trade Organisation (WTO) Agreement (Núñez Müller, 1999: 102-3).

This pattern is common. Over time there is a gradual formalisation of both substantive policy and procedures: the translation of both Commission practice in individual decisions and of court judgements into criteria; the translation of those criteria into policy statements and guidelines; and the constant updating, clarification and/or tightening of criteria within those guidelines often on the basis of a changing policy context. Yet until very recently this process of formalisation stopped short of hard law. We might question whether this really matters given that from the state aid official's perspective, there may be little difference in practice between guidelines that



take the form of legislation and those of a softer kind: in other words it is not *legal form*, but *substantive provisions* that are relevant in the application of state aid policy (Rawlinson, 1993: 59). This is not an argument most state aid lawyers would ascribe to of course. The uncertain legal effects of soft law have long posed puzzles for lawyers working in this area and while the European Courts have gone some way towards clarifying some of these issues, there are still many legal questions that remain unanswered.

One such question concerns the legal base upon which the guidelines rest. While some guidelines have no legal base at all, others rely expressly on Article 88(1) [ex 93(1)]. This is the provision which requires that the Commission monitor "existing aid" and which allows it to propose "appropriate measures" to the member states. Yet it has been pointed out that the *appropriateness* of these measures (that is, of the guidelines, frameworks etc.) is doubtful given that it is not only *existing* aid that is subject to Commission soft law.⁹ Moreover, it has also been claimed that it is the voluntary nature of the Commission's guidelines, the fact that the member states agree to abide by them, that has allowed for such a quasi-legal approach (Hancher, 1994: 42). The Commission does indeed consult with member state representatives in multilateral meetings, and circulates written drafts of guidelines before issuing them, but consultation does not give member governments a veto. Indeed, since the early 1990s and the after-effects of the first Motor Vehicles Framework, the Commission has made it clear that it is willing to impose its guidelines on unwilling member states if necessary. Indeed, the Motor Vehicles case is the first of two legal events which demonstrate how the Commission's use of soft law instruments has evolved over the course of the 1990s.

THE EVOLVING SOFT LAW APPROACH

The Commission has long recognised the strategic importance of the motor vehicles sector to the European economy. Increasingly concerned about the massive subsidies being granted to the industry and by the effect that this was having both on competition within the internal market and on competitiveness beyond it, the Commission decided in December 1988 to adopt a set of guidelines, the *Community Framework on State Aid to the Motor Vehicle Industry*.¹⁰ Initially expected to enter into force on 1 January 1989, the Framework required Community vehicle and engine manufacturers to notify to the Commission all awards of aid over ECU 12 million which were to be granted under schemes already approved, and to provide the Commission with an Annual Report of all aid, no matter how small, granted to the motor vehicle industry (D'Sa, 1998: 184).

Ten of the then twelve EC member states accepted the Commission's Framework (if not until mid-1989): however, two states, Spain and Germany, did not. Although both Spanish and German opposition to the Framework revolved around its industrial policy implications, the arguments advanced by these two member states were very different. Thus while the German authorities disapproved of what they saw as the Framework's sectoral industrial policy objectives which, they claimed, would threaten the effectiveness of German regional policy, the Spanish asserted that they would approve the Framework only if the Commission went further than it already had in developing a fully-fledged industrial policy for the sector. The Commission rejected both positions. To the Spanish they made it clear that there could be no preconditions for the application of the Framework, while in response to the German claim that the Framework offered a backdoor route to a Community industrial policy, the Commission dismissed this argument as incomprehensible (Commission, 1990: 129-30).

As both states continued to refuse to abide by the Framework, the Commission opened a "contentious" procedure under Article 88 (2) [ex. 93(2)] of the Treaty. It wasn't long however, early in 1990 in fact, before the Spanish authorities gave in to Commission pressure, faced with the threat that all their approved aid would be subject to a thorough re-evaluation.¹¹ The German authorities continued to hold out and the Commission's procedure concluded in February 1990 with a formal and legally-binding negative decision.¹² The decision set out the background to the dispute, listed the (thirteen) reasons why the German authorities opposed the framework and dealt with the German objections one-by-one. Noting the direct effect of Article 87(2) [then 93(2)], but also the fact that this provision cannot be applied retroactively, the Commission required the German government to notify all aid under the Framework from 1 May 1990, with the warning that if they did not, aid granted after this date would be deemed illegal and would thereby be subject to eventual repayment.

The Article 88(2) procedure had ostensibly been initiated in respect of all approved aid schemes available to the motor industry in Germany. However in practice the decision dealt only with the application of the Framework. This was something new. The Article 87(2) [ex. 93(2)] procedure had never before been used to compel a member state to abide by obligations contained within a Commission soft law instrument. State aid decisions normally spell out the compatibility or incompatibility of an aid or aid scheme in terms of the existing state aid rules. But here the Commission decision seemed to impose a Commission soft law instrument on a reluctant member state. It did this by restating, in the form of a legally-binding decision, the obligations required by the Framework: that is to say, it formalised what would have otherwise been an

informal rule, one resting on the voluntary acquiescence of the EU's member governments.

The decision thus marked the beginning of a new Commission policy, a shift in the Commission's soft law approach. Indeed, since the adoption of the German decision, the Commission has pursued a similar line of reasoning in other cases.¹³ It is now clear that the Commission is prepared to use the more formal legal instruments at its disposal to impose its informally-made guidelines on reluctant member states, even if it has been argued that should a *majority* of member states oppose the introduction of a soft law instrument the Commission would be unlikely to pursue such an approach (D'Sa, 1988: 33). In a sense, the Commission needs the political weight of the consenting member states behind it to justify this more heavy-handed enforcement of its own rules. As for the German authorities, their eventual acquiescence and acceptance of the Framework led, in a later version of Framework, to a statement that the decision taken in 1990 was no longer to be considered valid. Once compliance was assured, then, there was no further need for the hard law instrument. It is still too early to say whether member state opposition to other soft law instruments will be quelled as a result of such moves, even if this is the motivation behind the Commission's new approach.

While the Commission's approach in the Motor Vehicles case was very much in line with the general policy thrust of toughening up state aid enforcement characteristic of the 1990s (Brittan, 1989), the second legal event which offers evidence of an evolving soft law approach in the state aid field can be read as a *consequence* of the revitalised Commission regime. As we have seen, the Commission had earlier resisted pressure to draft Council Regulations under Article 89 [ex. 94]. Yet in what appears as a rather dramatic U-turn by the Commission in the late 1990s, two Council Regulations were proposed and subsequently approved. The first, agreed in May 1998, is a so-called "enabling" regulation which gives the Commission the authority to exempt entire categories of aid from the notification requirement (known as a "group" or "block" exemption): that is, it allows the Commission to issue its own regulations within limits established by the Council.¹⁴ The second Council Regulation, approved in March 1999, codifies the decision-making procedures that apply to state aid policy (Sinnaeve, 1999).¹⁵

These two regulations were proposed largely for pragmatic reasons and were very much the personal projects of the then Competition Commissioner, Karel Van Miert. In the case of the first Regulation, the impulse behind the shift in policy was clearly the state aid regime's changing institutional context. It became clear from the end of the 1980s that the Commission could no longer

rely on the taken-for-granted support of the European Courts in state aid appeals. Driven initially by the Court of First Instance, both Courts came to make increasing demands on the Commission in terms of the detailed information that they required in state aid decisions, a development that was bound to have an impact on the Commission's already stretched resources. Moreover, the Commission was in some measure a victim of its own success. It had publicised and enforced its policy with the aim of encouraging a culture of complaint amongst the European business community. But over the course of the 1990s, complaints seemed to be made as much against the Commission (for failure to act, or in opposition to its authorisation of certain aids) as against competitor firms (Rawlinson, 1993: 56). Finding it hard to cope with the increased workload on both of these counts and suffering an effective cap on resources, the Commission sought to off-load its more routine cases. This was intended to allow it not only to cope with the notification backlog, but also to focus more of its attention on new and priority policy areas, on the banking and insurance sectors for example.

In the case of the second Regulation which formalises state aid procedures, the impulse behind the legislation came in part from the legal community who had long been pushing for greater transparency and legal certainty in matters procedural. The Procedural Regulation is a trade-off in two senses. First, it allows the Commission more investigative powers as well as assurances that its negative state aid decisions ordering the recovery of aid will not be blocked in member state courts. At the same time, the member states get the time limits for decision-taking that they were keen to have. Second, and for this paper most importantly, it gave the Commission the capacity to constrain the activism of the Court of First Instance. The CFI's line on state aid procedural matters has been consistently tougher than that of the ECJ (see in particular the *Sytraval* case). The Procedural Regulation may well limit the freedom of manoeuvre of the Commission, but to a lesser extent than would future CFI judgements (or so the Commission surmises). But what are the implications of this policy development?

Both the recent agreement of the two Council Regulations and (though to a lesser extent) the developments surrounding the Motor Vehicles case, would seem to support the view that what we are witnessing within the state aid regime is a trend from soft law to hard law. The hardening of state aid soft law, whether in the form of Council and Commission regulations or individual Commission decisions suggests then that soft law serves as a sort of stepping-stone between discretion on the one hand, and "hard" regulation on the other.

Yet a closer look at the Motor Vehicles case in particular suggests a rather different conclusion. In this case, hard law does not *replace* soft law, but serves as a *supplement* to it. Hard law helps to ensure compliance where a more consensus-based approach has proven inadequate. Moreover, it serves as a kind of shadow of hierarchy which compels member state authorities to seek consensus, in the knowledge that an alternative to consensus-formation exists should an agreement not be reached. Qualified majority voting in the Council can serve very much the same purpose. It would seem, then, that soft law now serves at least two functions in the state aid regime: it acts as both a means to a hard regulatory end, and, when supplemented by hard law, as an end in itself.

One way in which this dual function of soft law can be clarified is by focusing on the distinction between substantive and procedural law. Most state aid soft law is substantive (that is, it has to do with the substance or content of the law/policy). There are by contrast relatively few informal procedural rules dealing with how the law/policy is made. Yet procedural guidelines do exist all the same, in the form of the aforementioned rules on aid of minor importance and in statements of procedural policy found in the Commission's Annual Competition Reports for example. It is only in substantive matters, as the Motor Vehicles case attests, that soft law serves as a supplement to hard law. From the Commission's perspective, the combination of soft and hard law is designed to ensure compliance with state aid policy whilst allowing it to retain a certain sensitivity in dealings with national authorities within its normal consensual practice of rule-making. In procedural matters, the situation is rather different. Here, the Commission line on the hardening of informal practices and soft law was driven less by its relationship with member governments, and more by an attempt to preempt likely future constraints on the Commission's freedom of manoeuvre by the courts, and by the Court of First Instance in particular. In procedural matters, hard law (taking the form of the Procedural and Block Exemption Regulations) effectively replaces the discretionary and soft law approach which preceded it.

CONCLUSION

This paper has explored the context within which a soft law approach has been applied and has evolved within the European Union's state aid regime. More specifically, it asked whether recent developments in state aid enforcement confirm that the policy is indeed evolving away from, rather than towards a softer form of governance, one which amongst other things relies more heavily on the use of flexible and consensually-agreed informal policy instruments. Thus the paper began by introducing and defining soft law. Two conceptualisations were identified, the first of which identified soft law as characteristic of a distinctive form of regulation. By contrast, the second conceptualisation of soft law emphasised its temporary nature, and used the metaphor of a 'stepping-stone' (to hard law) to stress this point. Turning to the state aid case, the paper then provided evidence of the distinctive characteristics of this unusual EU regime, thereby introducing the themes of discretion and rule-making. In the sections that followed, an overview of the state aid decision-making procedure highlighted the discretionary characteristics of this policy area, while an account of Commission rule-making clarified what is meant in this case by a 'soft law approach'. In the final section, the paper then offered evidence of a "hardening" of the Commission's soft law approach since the early 1990s.

This hardening of the Commission's approach does not, on its own, demonstrate a trend away from soft law or indeed an end to the Commission's soft law approach, at least not as far as the substantive policy and the enforcement of that policy is concerned towards hard law. In this sense soft law serves a supplement to hard law when a tough line on member state compliance is deemed necessary. Yet this is only the case when substantive soft law is at issue. In procedural matters, it is the Commission's relationship with the Courts, both European and national, which has driven the "hardening" of its rule-making. Here, loose procedural rules (and even more informal practices) have been replaced by a more formal legalistic approach, as the Commission seeks to circumvent the even more restrictive approach which it predicted the Courts and the CFI in particular, would continue to take in cases of procedural relevance. What we are witnessing in this policy area is a new *mix* of soft and hard law. This comes as a response to a policy and organisational context which since the late 1980s has placed a premium upon the effectiveness of the policy, and which has suffered from an inexorable and largely unresourced growth in workload as a consequence. Where the balance between soft and hard law and the particular mix of instruments used lies, depends on a perceived need to balance its discretion and formal freedom of manoeuvre against other requirements, most notably those of policy credibility and legal certainty. This

balance depends largely on the specific characteristics of the policy at hand; in the state aid case, its centrality to the internal market objective, its absence of formal regulation (and the particularities of the relationships with member state and courts that follow from this) and, not least, its political sensitivity.

Moreover, even within the policy itself a distinction can be made between the balance required by procedural and substantive aspects of the policy. This reflects the close relationship between the Commission and the Courts, on the one hand, and the Commission and the member states on the other – in spite of the relative autonomy of the Commission in this policy area. Procedural wrangling has pitched the Commission against the Courts to the extent that the introduction of hard law (that is, the replacement of soft law by hard), though constraining the Commission, serves to preempt more even severe constraints that are likely to result from future Court judgements. Substantive policy issues have raised important issues of policy effectiveness and political realism for the Commission. In this case the move to an approach in which hard law supplements rather than replaces soft law allows an appropriate balance to be found between the requirements of rigorous enforcement and the desirability of inter-governmental and inter-institutional consensus within a regime which is both politically sensitive and of crucial importance to the functioning of the internal market.

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ENDNOTES

¹ To say this is not to assume identical effects. This is particularly important with regard to legal effects, as it is only when hard law is issued that individual rights which can be claimed before a court of law are conferred.

² These discretionary derogations are paraphrased in the text. They do not include exemptions outside Article 87 [ex. 92]. These include certain aids to the agricultural sector, to the transport sector, to public sector firms, to the military industry and to the coal and steel sectors. On the shipbuilding sector see Note 9.

³ Article 88 [ex. 93] spells out the procedure to be used in state aid cases. This provision requires that the Commission keep under review so-called 'existing aid', that is, aid which has already been authorised; it offers certain rights to third parties, allowing for judicial review in aid cases; it grants the Council of Ministers, on the basis of a unanimous vote, the right to derogate from Article 87 [92]; and institutes a system of prior notification. Finally, Article 89 [94] allows a qualified majority in the Council to agree regulations on the basis of a Commission proposal after consultation with the European Parliament.

⁴ There are a few exceptions to the general statement that there is no secondary legislation in the state aid field. See D'Sa (1998: xli) for a list of the legislation in force.

⁵ In practice, however, the requirement is extremely problematic as it relies upon the national authorities to submit voluntarily to the scrutiny of the Commission's state aid directorate. Not surprisingly, non-notification is wide-spread. The Commission is able to expose unnotified aid in a number of ways: complaints made by competitor firms and states, and information gleaned from the financial or trade press are especially important in this respect. In the case of aid to Crédit Lyonnais, for example, officials only learnt of the bank's restructuring plans in the French press. But as non-notified aid must still be assessed substantively for its compatibility with the common market it is often in a government's interest not to notify the Commission, especially when approval is unlikely to be granted (see Flynn, 1993).

⁶ The shipbuilding case is exceptional in the sense that in this sector provision was made in the Treaty of Rome for a Directive (that is, for hard law). The first shipbuilding aid directive was issued in 1969. OJ L206/25, 1969. Note that aid in the agricultural and transport domains is also subject in some cases to hard law. For the full set of Commission guidelines, see the Commission's *Competition Law in the European Communities, Volume IIA. Rules Applicable to State Aid at 31 December 1994* (1995) and updates. See also <<http://europa.eu.int/comm/dg04/lawaid/aid3.htm#A>>

⁷ OJ 1998 648/2

⁸ However it is expected that on the basis of the new Council regulation a group exemption regulation will be drawn up for R&D aids, thus transforming soft into hard law.

⁹ This was discussed by Inda Bevis in a presentation made on state aid control to the European Community Studies Association Conference in Seattle in May 1997. The following section on the consequences of the motor vehicles framework is also drawn from part of this presentation.

¹⁰ OJ C123/3, 18.5.89.

¹¹ See OJ C281, 7.11.89.

¹² OJ L188, 20.7.90.

¹³ Commission Decision of 20.12.1995 amending Spanish aid schemes for the motor vehicle industry. OJ L119, 16.5.96. The same principle is also cited in the *CIRFS* case, Case C313/90 [1993] ECR I-1125.

¹⁴ Council Regulation (EC) No. 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal state aid. OJ L142, 14.05.1998. At the time of writing the Commission was proposing regulations under this Council Regulation for three categories of aid: aid for small and medium sized enterprises; training aid; and aid of minor importance (*de minimis* aid). See, for example, Tilmans (1999: 50).

¹⁵ Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. OJ L83/1 27.03.1999.

REFERENCES

- Baldwin, R. and Houghton, J. (1986), "Circular arguments: the status and legitimacy of administrative rules" *Public Law*, 239-84.
- Bernitsas, P. (1993), 'State aids and public undertakings' in I. Harden (ed.) *State aid control: Community law and policy*, Cologne: Bundesanzeiger, pp. 110-23.
- Beveridge, F. and Nott, S. (1998), "A hard look at soft law" in P. Craig and C. Harlow, eds. *Law making in the European Union*, The Hague, Kluwer Law International.
- Bishop, S. (1997), "The European Commission's policy towards state aid: a role for rigorous competitive analysis", *European Competition Law Review* 2, 84-6.
- Brittan, L. (1989), "A Bonfire of Subsidies", *European Access* 2.
- Cananea, G. della (1993), "Administration by Guidelines: the policy guidelines of the Commission in the field of state aids" in I. Harden, (ed.), *State aid: Community law and policy*, Cologne, Bundesanzeiger.
- Cini, M. and McGowan, L. (1998), *Competition Policy in the European Union*, Basingstoke, Macmillan.
- Commission of the European Communities (1972) *First Report on Competition Policy*, Luxembourg: Office of Official Publications.
- Commission of the European Communities (1981) *Tenth Report on Competition Policy*, Luxembourg: Office of Official Publications.
- Commission of the European Communities (1994) *Twenty-third Report on Competition Policy*, Luxembourg: Office of Official Publications.
- Commission of the European Communities (1995) *Twenty-Fourth Report on Competition Policy*, Luxembourg: Office of Official Publications.
- Commission of the European Communities (1996) *Twenty-Fifth Report on Competition Policy*, Luxembourg: Office of Official Publications.
- Commission of the European Communities (1990) *Nineteenth Report on Competition Policy*, Luxembourg, Office of Official Publications.
- Cownie, F. (1986), 'State aid in the Eighties', *European Law Review*, 11: 247-69.
- Dehousse, R. and Weiler, J. H. H. (1990), "EPC and the Single Act: From Soft Law to Hard Law?" European University Institute Working Paper, European Policy Unit, EPU No. 90/1.

D'Sa, R. M. (1998), *European Community Law on State Aid*, London, Sweet and Maxwell.

Eising R. (1999), "Governance in the European Union: a comparative assessment" in B. Kohler-Koch and R. Eising eds. *The Transformation of Governance in the European Union* London, Routledge.

Evans, A., and Martin, S. (1991), "Socially acceptable distortion of competition: Community policy on state aid", *European Law Review*, 16, 79-111.

Flynn, B. (1987), "Subsidiarity and the rise of 'soft law' in EU environmental policy: beyond who does what, to what it is they actually do?" The European Policy Process, The Human Capital and Mobility Network Final Workshops, University College Dublin, Occasional Paper No 40.

Goyder, D. G. (1988), *EEC Competition Law*, Oxford, Clarendon.

Graham, R. and Iskander, S. (1998) 'Airlines win challenge to state aid for Air France' *Financial Times*, 26 June.

Hancher, L., Ottervanger, T. and Slot, P. J. (1993), *EC State Aids*, London, Chancery Law Publishing.

Hancher, L. (1994), "State aids and judicial control in the European Community", *European Competition Law Review*, 3, 134-50.

Hix, S. (1998), "The study of the European Union II: the 'new governance' agenda and its rival" *Journal of European Public Policy*, 5, 1, 38-65.

Hix, S. (1999) *The Political System of the European Union*, Basingstoke, Macmillan.

Jones, T. (1996), 'Commission clips wings of troubled state airlines' *European Voice*, 15 February.

Klabbers, J. (1998) "The undesirability of soft law" *Nordic Journal of International Law*, 67, 381-91.

Kobia, R. A. J. (1996) "Introduction to the law, practice and policy of state aids in the Community" *Competition Policy Newsletter*.

Lenschow, A. (1999). "Transformation of European environmental governance" in B. Kohler-Koch and R. Eising eds. *The Transformation of Governance in the European Union*, London, Routledge.

Mederer, W. (1997), 'The future of state aid control' *Competition Policy Newsletter* 3: 12-14.

Mortelmans, K. (1984), 'The compensatory justification criterion in the practice of the Commission in decisions on state aids', *Common Market Law Review* 21: 405-34.

Núñez Müller, M. (1999), "The Community Framework for state aid for research and development: the recent practice of the court and the Commission" in S. Bilal and P. Nicolaides (eds) *Understanding state aid policy in the European Community: perspectives on rules and practice*, Maastricht, Kluwer Law International.

Petersen, A. (1993), "State aid and European Union: state aid in the light of trade, competition, industrial and cohesion policies" in I. Harden (ed.), *State aid: Community law and policy*, Cologne, Bundesanzeiger.

Peterson, J. (1995) 'Decision-making in the European Union: towards a framework for analysis' *Journal of European Public Policy*, 2: 69-93.

Pijnacker Hordijk, E. H. (1985) 'Judicial protection of private interests under the EEC competition rules relating to state aids', *Legal Issues in European Integration* 12: 67-98.

Quigley, C. (1993) 'The scope of Article 92(1) of the EEC Treaty' in I. Harden (ed.), *State aid: Community law and policy*, Cologne, Bundesanzeiger.

Rawlinson, F. (1993), "The role for policy frameworks, codes and guidelines in the control of state aid" in I. Harden (ed.), *State aid: Community law and policy*, Cologne, Bundesanzeiger.

Sinnaeve, A. (1998) "The Commission's proposal for a regulation on state aid procedures" *Competition policy newsletter*, No. 2, June.

Smith, M. (1998) "Autonomy by the rules: The European Commission and the development of state aid policy" *Journal of Common Market Studies*, 36: 55-78

Snyder, F. (1993) "Soft law and institutional practice in the European Community", European University Institute Working paper, LAW No. 93/5. Tilmans, M. (1999) "Most recent developments", *Competition Policy Newsletter*, 3, 50-61.

Wellens K. C. and Borchardt, G. M. (1989), "Soft law in European Community law", *European Law Review*, 14, 267-321.



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