The Optimal Assessment Rule for EU State Aid Procedure

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This article fills the gap in the State aid literature by discussing the optimal rule for State aid assessment, which shall increase the reliability and accuracy of State aid enforcement by the European Commission. Moreover, it contributes to decision theory more broadly, by putting emphasis on the error in application of law, which hampers an effective distinction between desirable and undesirable measures.

The argument developed in this article is that the informational asymmetries, which the Commission faces when assessing measures, may be overcome to a different extent at each procedural stage. Hence, and due to the interrelation between complexity of rules and the probability of error in their application, State aid assessment requires two assessment rules, one for the preliminary examination and one for the formal investigation. However, it seems that such optimal assessment rules have not been identified, and no concern about accuracy in application of complex rules is reflected in the literature or in the legal framework. Consequently, the Commission shall structure and make known the rules which guide its assessment, especially in the preliminary examination. This would benefit the quality and transparency of the decision-making and might be particularly valuable in the context of the on-going revision of State aid guidelines.

Keywords: EU State aid law, Article 107 TFEU, Decisional Errors, Decision Theory, State Aid Procedure, Compatibility Assessment, Notion of Aid, State Aid Modernisation, Revision of State Aid Guidelines, Optimal Assessment Rule

1 INTRODUCTION

State aid control in the European Union (EU), based on Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU), is designed to prevent the Member States from granting to selected businesses advantages that might distort competition and intra-European trade. For that purpose, the European Commission (the Commission) carries out control, by which it approves or prohibits State measures, depending on the balance between their beneficial and harmful effects. Indeed, the aim of State aid control is to distinguish desirable from undesirable aid and decide on the future of State measures accordingly.

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EU State aid law and enforcement are a delicate matter: if one aims to control expenditures of states within the framework of an international organization, by definition this control must have significantly different character from the control of private actors' behaviour. In this context, this article will engage in the quest for the optimal assessment rule in the field of State aid, by attempting to identify the characteristics of the rule that would minimize the probability of decisional errors at different stages of State aid procedure.

The search for the optimal decision rule is well-known from the literature on European antitrust, where it translates into form-based versus effect-based approach, and has a rich history in the US antitrust. As regards the issue of error in decision-making in general, the literature provides for considerations related to the relationship between error and the probability of detection of infractions, the related impact on deterrence and optimal sanctions, and the cost of increasing accuracy.[1] A more detailed discussion in antitrust involved considerations on the preference between per se and rule of reason legal standards, informational problems and preference between false acquittals and false convictions.[2] The conclusion is rather uniform throughout the literature: more complex rules secure lower probability of decisional errors, because they allow to more effectively distinguish between desirable and undesirable practices. Indeed, the case-by-case analysis ensured by complex rules allows to take account of individual circumstances of the case and apply the law accordingly, as opposed to simple rules, which apply the same standard to an entire category of situations, without considering that their consequences may vary depending on the context. In this way, complex rules allow to avoid mistaken approvals and refusals and therefore, the probability of error is reduced.

Similar analysis would be of utmost value in State aid law, because as an *ex ante* assessment, this area is naturally prone to errors.[3] Moreover, errors are costly and reduce efficiency of State aid control[4] and welfare,[5] so that identifying the optimal

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1 Alan Mitchell Polinsky & Steven Shavell, *Handbook of Law and Economics* 427–429 (Elsevier 2007); Louis Kaplow, *The Value of Accuracy in Adjudication – An Economic Analysis*, 23 J. Legal Stud. 307 (1994); Dominique Demougin & Claude Fluet, *Deterrence Versus Judicial Error: A Comparative View of Standards of Proof*, 161 J. Institutional & Theoretical Econ. 193 (2005); Steven Shavell, *Foundations of Economic Analysis of Law* 450–457 (Belknap Press of Harvard University Press 2004).

2 Yannis Katsoulacos & David Ulph, *Legal Uncertainty, Competition Law Enforcement Procedures and Optimal Penalties*, 41 Eur. J. L. & Econ. 255 (2016); C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 Antitrust L.J. 41 (1991); Frank H. Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984); Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of 'Per Se rules vs Rule of Reason'*, 2 J. Competition L. & Econ. 215 (2006).

3 Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 Willian & Mary L. Rev. 75, 105 (2010).

4 Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 401 (1963).

5 Yannis Katsoulacos & David Ulph, *Regulatory Decision Errors, Legal Uncertainty and Welfare: A General Treatment*, 53(1) Int'l J. Indus. Org. 326 (2017).

rule that would increase accuracy lies in the interest of a more efficient State aid enforcement. Nevertheless, conclusions of analyses developed in other areas of law may not be automatically transposed to the field of State aid due to a range of particularities of the latter, just to mention the involvement of repeatedly acting Member States or the Commission's limited investigatory powers. At the same time, and although there exists some critique of substantive[6] and procedural law,[7] the State aid literature is silent on the point of accuracy in decision-making. Although it was briefly considered that the use of a full-blown rule of reason is unadvisable due to the limits of the economic analysis in State aid assessment,[8] the relationship between the procedural law and the optimal decision rule was not uncovered. Moreover, the literature typically analyses the two-stage State aid procedure in its entirety, while this article perceives as fundamental the distinction between the two procedures. Consequently, no fully fledged analysis of the appropriate legal standard has been carried out in State aid literature, and there currently exists no decision theory which would point at the error-minimizing assessment rule.

Therefore, this article contributes to the existing literature in two ways. Firstly, it fills the gap in State aid literature as regards analysis of optimal rules for State aid assessment, by examining proneness to error in light of procedural provisions. This analysis might push to reflection especially within the framework of the current revision of State aid guidelines, inasmuch as it points at the lack of distinction between assessment rules at different procedural stages. Secondly, it contributes to the decision theory more broadly, by pointing at the underestimated aspect of error: error in application. By analysing this type of error much more explicitly than it has been done in the existing literature, it draws attention to this crucial aspect that determines effectiveness of complex rules.

From a methodological perspective, this article departs from the nomenclature of per se rules and the rule of reason, which is used in antitrust but is not embedded in State aid vocabulary and it is uncertain whether it would constitute

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6 Sanoussi Bilal & Phedon Nicolaides, *An Appraisal of the State Aid Rules of the European Community: Do They Promote Efficiency?*, 33 J. World Trade 97, 9–13 (1999); Leigh Hancher et al., *EU State Aids* 2–017 (Sweet & Maxwell 2016); Massimo Merola & Marie Debieuvre, *The New Approach to State Aid: Contributions and Limits form Case Law of the European Courts*, in *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America* 400–405 (Edward Elgar 2010).

7 Juan Jorge Piernas López, *The Concept of State Aid Under EU Law : From Internal Market to Competition and Beyond* (Oxford University Press 2015); Francois-Charles Laprévote, *A Missed Opportunity? State Aid Modernization and Effective Third Parties Rights in State Aid Proceedings*, Eur. State Aid L. Q. 426 (2014); Hanns Peter Nehl, *2013 Reform of EU State Aid Procedures: How to Exacerbate the Imbalance Between Efficiency and Individual Protection*, 13 Eur. State Aid L. Q. 235 (2014); Merola & Debieuvre, *supra* n. 6, at 415–420.

8 David Spector, *State Aids: Economic Analysis and Practice in the European Union*, in *Competition Policy in the EU : Fifty Years on from the Treaty of Rome* 193–194 (Oxford University Press 2009).

an appropriate approach. Instead, it adopts a straightforward and intuitive scale, departing from simple, precise and easy to apply assessment criteria to open-ended complex rules whose application requires significant resources. The article will analyse the procedural law of State aid in order to reflect on the characteristics of an assessment rule, which would allow us to effectively distinguish between good and bad aid without bringing high risk of error in application.

In order to narrow down the scope of the analysis, this article deals only with the 'core' State aid proceeding – assessment of notifiable State measures by the Commission. Secondary issues, such as recovery of aid, conditional decisions and review of existing aid will not be covered. Moreover, the analysis does not extend to the General Block Exemption Regulation.[9] The General Block Exemption Regulation, although aspiring to cover an important part of State aid, only highlights the importance of accuracy in the assessment by the Commission, since the latter deals with the most distortive measures with the highest impact on the market. Although the issues left aside in this article are interesting and worth a similar analysis, the limitations are necessary, as it is impossible to carry out a comprehensive analysis in one article.

This article will be structured as follows: section 2 will describe the substantive law of State aid, in order to define an error in State aid assessment. Section 3 will outline characteristics of the State aid procedure, putting emphasis on the participation of the State and distinguishing between two procedural stages. The intuition that the difference between the procedures shall be reflected in different assessment rules will be developed by reference to the probability of decisional error under simple and complex rules in Section 4. The lack of the optimal assessment rule for the preliminary examination, leading to suboptimal enforcement, will be demonstrated and accompanied by suggestions in section 5. Section 6 will conclude.

2 SUBSTANTIVE STATE AID PROVISIONS

Article 107 TFEU gives a basis for a twofold appraisal by the Commission. Paragraph 1 sets out five criteria that a measure must cumulatively meet in order to be considered as State aid: transfer of State resources, existence of an advantage, its selectivity, distortion of competition and effect on trade. These criteria have been subject to interpretation by the Commission and the Court of Justice. Some of them, such as selectivity or advantage, have evolved throughout the years and

[9] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Arts 107 and 108 of the Treaty, OJ L 187, 26 June 2014, at 1–78.

numerous criteria have been adopted to decide on the character of a measure.[10] As a result, application of Article 107(1) must be in line with the decisional practice of the Commission and especially with the case-law of the Court. In a 2016 document, the Commission clarified the notion of State aid, as understood and interpreted by the Commission and the EU Courts.[11]

In addition, Article 107(1) lays down the general incompatibility rule: if a measure is qualified as aid, it is incompatible with the internal market. Hence, it may not be granted by the Member State and if it has already been granted, it must be recovered from the aid beneficiary. Regardless of this general rule, aid may be approved in line with the exemptions foreseen in paragraphs 2 and 3 of Article 107, according to which some measures, respectively, must or may be considered to be compatible. These measures cover aid having a social character, aid granted in response to a natural disaster or exceptional occurrences, aid granted to remedy the effects of the division of Germany, aid to promote the economic development of disadvantaged areas, aid to promote the execution of an important project of common European interest, aid to facilitate the development of certain economic activities or of certain economic areas, and aid for culture and heritage conservation.

In the compatibility assessment, the Commission exercises its discretion by balancing 'the necessity and the proportionality of the aid measure in achieving a Community objective versus the distortion of competition brought about by it'.[12] It disposes of a range of acts of soft law, which contain detailed criteria for assessment of different categories of measures. These documents refer to specific types of aid: e.g. Guidelines on State aid for rescuing and restructuring,[13] Guidelines on regional State aid,[14] Framework for State aid for research and development and innovation[15] and over twenty other acts. Therefore, the Commission applies to a notified measure the appropriate act of soft law and on this basis makes a judgment on application of Article 107(2) or (3).

Consequently, a distinction may be made between positive and negative decisions. By positive decisions, measures are approved, either because they

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[10] The evolution of the concept of aid has been described and analysed in: Piernas López, *supra* n. 7.

[11] European Commission, Notice on the notion of State aid as referred to in Art. 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01), OJ C 262, 19 July 2016, at 1–50.

[12] European Commission, *State Aid Manual of Procedures* (2013). Internal DG Competition working documents on procedures for the application of Arts 107 and 108 TFEU (Manual of Procedures), at 1.10.

[13] Communication from the Commission, Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01), OJ C 244, 1 Oct. 2004, at 2–17.

[14] Guidelines on regional State aid for 2014–2020 (2013/C 209/01), OJ C 209, 23 July 2013, at 1–45.

[15] Communication from the Commission, Framework for State aid for research and development and innovation (2014/C 198/01), OJ C 198, 27 June 2014, at 1–29.

do not constitute aid or because they constitute aid but are compatible with the internal market. According to a negative decision, a measure constitutes aid that is incompatible with the internal market, and therefore must be banned.

Accordingly, a Type 1 error (false conviction) in State aid consists in an erroneous negative decision: the Commission prohibits a measure, which in fact does not raise concerns from the perspective of EU State aid law. It means that the Commission erroneously considers an aid to be incompatible with the internal market and prevents its granting although it is desirable. A Type 2 error (false acquittal) consists in an erroneous positive decision, by which an undesirable measure is mistakenly approved. The Commission may commit such an error in two ways: it erroneously considers either that a measure does not constitute aid, or that an aid is compatible with the internal market.

3 CHARACTERISTICS OF THE STATE AID PROCEDURE

The probability that the Commission adopts an erroneous decision is, as it will be demonstrated further in this article, related to characteristics of the procedure it follows. State aid procedure is composed of two stages – the preliminary examination and the formal investigation procedure, which pursue different objectives and therefore, are organized differently. In addition, the essential characteristic of EU State aid law, namely the omnipresence of the Member State throughout the procedure, is related to the existence of informational asymmetries the Commission needs to overcome in its assessment. Different potential to overcome these asymmetries at each procedural stage will be crucial for identifying the optimal assessment rule.

3.1 Two stages of the State aid procedure

In line with Article 108(3) TFEU, a Member State that wishes to grant aid shall notify its project to the Commission. Once the notification received, the Commission opens the first phase of the procedure: the preliminary examination. If, after the preliminary examination, the Commission encounters doubts as to the conformity of the measure with State aid law, it opens a formal investigation – it may not adopt a negative decision in the first phase.

The benchmark separating the preliminary examination from the formal investigation, i.e. the existence of doubts, remains relatively unclear in application. Indeed, although the Procedural Regulation mentions 'doubts', the Court and the Manual of Procedures use the notion of 'serious' doubts or difficulties,

which must be demonstrated in order to establish that the Commission should have opened a formal investigation.[16] Consequently, 'doubts' became 'serious doubts'. In addition, while the Manual of Procedures considers serious doubts to be demonstrated by more than one request for information sent to the State or the prescribed duration of the procedure manifestly exceeded,[17] these elements are not considered by the Court to be sufficient.[18] As a result, there emerges some confusion as to the circumstances capable of proving the existence of serious doubts, which also implies uncertainty as to the result of the Court's assessment: for instance, in the period from 2010 to March 2018 the Court acknowledged doubts only in three actions for annulment, while only in 2019 it annulled five decisions on that basis. In any case, the Commission has a 'certain margin of discretion' when determining the existence of serious difficulties, which reportedly does not impact its obligation to open a formal investigation once such difficulties arise.[19]

Provided that the Commission does not identify any doubts, it approves the measure by adopting a decision either that it does not constitute aid or that the aid is compatible with the internal market, which both put an end to the State aid procedure. On the contrary, if doubts persist, a formal investigation procedure must be opened. The remaining part of this section will highlight different objectives and design of both procedural stages.

Each procedural stage has a pre-defined function, clearly spelled out in the hard law or case-law of the Court of Justice. More specifically, the purpose of the preliminary examination is to enable the Commission to 'form an initial view as to the partial or total compatibility of the aid in question with the market'.[20] This objective openly diverges from the more ambitious aim of the formal investigation, which shall lead the Commission to become 'fully informed of all the facts of the case'.[21]

The assumption underlying the preliminary examination is that the Commission is able to realize whenever information provided by the State raises doubts about the measure, and to open a formal investigation whenever necessary. Thus, the procedure allows the Commission to decide only on straightforward cases and to secure correct outcomes for problematic measures by using the second

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[16] For example, T-289/03, *BUPA and Others v. Commission* (2008) ECLI:EU:T:2008:29, para. 328; T-210/02, *British Aggregates v. Commission* (2006) ECLI:EU:T:2006:253, para. 165; T-79/14, *Secop v. Commission* (2016) ECLI:EU:T:2016:118, paras 25–27; Manual of Procedures, at 5.60 and 6.4.

[17] Manual of Procedures, at 5.60.

[18] T-57/15, *Trajektna luka Split d.d. v. Commission* (2016) ECLI:EU:T:2016:470, paras 64–75; T-58/13, *Club Hotel Loutraki AE and Others* (2015) ECLI:EU:T:2015:1, paras 45–63.

[19] T-375/04, *Scheucher-Fleisch* (2009) ECLI:EU:T:2009:445, para. 73; T-304/08, *Smurfit Kappa Group* (2012) ECLI:EU:T:2012:351, para. 75.

[20] C-646/11 P, *3F v. Commission* (2013) ECLI:EU:C:2013:36, para. 24.

[21] T-103/14, *Frucona Košice* (2016) ECLI:EU:T:2016:152, para. 110; 290/83, *Commission v. France* (1985) ECLI:EU:C:1985:37, para. 16.

stage of the procedure. In fact, this is how the lack of contradictory procedure at this stage is justified.[22]

Consequently, the preliminary examination takes place exclusively between the Commission and the notifying State. The latter submits a notification and the former asks for additional information if the notification is incomplete. The practice shows that the Commission is rather uncritical about Member States' statements, as the evidence requirements are relatively low.[23] Third parties have no rights at this stage and are not allowed to submit comments[24] while the Commission does not dispose of any investigatory tools aside from requests for information addressed to the State.

On the contrary, in the formal investigation procedure interested parties may submit comments and the Commission may request information from any Member State, undertaking or group of undertakings, as well as impose penalties on non-cooperating private actors. This stage of the procedure, although still involving mainly the Member State concerned, confers upon the Commission additional investigation tools and provides other actors with an opportunity to express their opinion on the measure.

The purpose of each procedure is further reflected in their duration. Indeed, the preliminary examination is designed to last no longer than two months,[25] although the time starts running only when a full notification is received. Moreover, pre-notification contacts, which become increasingly common, give the Commission a chance to have a glance at the measure before the official notification is submitted. As a result, the preliminary examination often takes longer than the two months prescribed by the Regulation.

However, the time reserved for the preliminary assessment is still much shorter than the time devoted to the formal investigation. In particular, the latter may last up to eighteen months, which gives the Commission the time to investigate all contentious aspects of the measure, and which adds to the time previously spent on assessment in the preliminary examination.

In sum, State aid procedure is divided into two stages, which have distinct characteristics and pursue distinct objectives. The preliminary examination serves

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22 Piet Jan Slot, *EC Policy on State Aid Are the Procedures 'User-Friendly'? The Rights of Third Parties*, in *Understanding State Aid Policy in the European Community: Perspectives on Rules and Practice* 91 (European Institute of Public Administration 1999).

23 Anna Nowak, *Evidence Requirements in the State Aid Compatibility Assessment*, 17 Eur. State Aid L. Q. 212 (2018).

24 The lack of procedural rights was confirmed by the Court, in T-79/14, *Secop v. Commission* (2016) ECLI:EU:T:2016:118, para. 64.

25 Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24 Sept. 2015, at 9–29 (Procedural Regulation), Art. 4(5).

the purpose of identifying clearly unproblematic measures, and therefore is limited to an initial view on the measure. In contrast, the formal investigation procedure, which constitutes an in-depth assessment of the case, is reserved for measures that present doubts, and for this purpose foresees a much broader range of investigatory tools as well as longer duration of assessment. It is logical to assume that the different objectives, reflected in the procedural design, justify different scopes of the assessments. The optimal assessment rule may not be common for both procedural stages, which becomes even more obvious when identifying the informational asymmetries hampering an accurate assessment.

3.2 Reliance on the Member State and informational asymmetries in State aid procedure

The Commission's main and often the only partner throughout the procedure is the Member State concerned, which constitutes the Commission's principal source of information. This arrangement determines the entire architecture of State aid control, to the detriment of interaction with other actors, and it becomes the key to understanding the specificity of EU State aid law as well as to the discussion on the optimal assessment rule.

In order to carry out accurate assessment of a measure, the Commission must overcome informational asymmetries, which may become difficult to achieve in the case of excessive reliance on information provided by the State. Two asymmetries may be observed: between the Commission and the State, and between the State and other market operators.

3.2[a] *Informational Asymmetry Between the Commission and the State*

In general terms, the Commission knows less about the measure and the national market than the notifying State does. The latter has broader knowledge on virtually all points related to the measure: it has an informational advantage over the Commission. Therefore, dialogue with the State is legitimate; however, it is not necessarily by the sole interaction with the State that this informational asymmetry may be overcome.

More specifically, the State wants to grant the aid: it is not an impartial actor providing information. Rather, it acts in its own interest and therefore, it naturally advocates in favour of the measure. It may well be that Member States accepted State aid control and generally act in good faith; it is, however, difficult to argue that the willingness to act at the expense of the internal market, especially given the rise of euro-sceptic governments, has completely disappeared. Indeed, it is true that

governments may be willing to opt for short-term benefits of aid rather than focus on its long-term harmful effects.[26] Moreover, it may be observed that Member States are determined to grant aid, especially in cases in which they strongly oppose the Commission's reasoning in order to justify measures,[27] and in numerous cases in which they bring actions for annulment against negative decisions.[28] Finally, the literature suggests that the reason for keeping procedural rights of third parties below standards adopted in other fields of EU competition law is precisely because these rights go against Member States' interests in granting aid.[29]

It is thus imaginable that a Member State contravenes its obligation of sincere cooperation and acts in bad faith. It does not necessarily have to provide false information – it is sufficient that the information is incomplete. The State may deliver only as much information as necessary to obtain a positive decision or deliver information of a particular kind, which allows to obtain an approval. It may submit an incomplete notification and provide information only at the request of the Commission, releasing information at its convenience.

Furthermore, Member States act repeatedly, so they learn how the Commission operates the control and hence, they learn not only how to cooperate but also how to act in order to secure 'a win'. Misleading the Commission has as another consequence that the Commission will probably not realize that it has imperfect information since all elements necessary for the analysis are delivered, however incomplete or biased.

Naturally, it is a rather pessimistic vision and this article does not claim that Member States mostly act in bad faith. However, this is certainly one of the risks brought by a procedure where the only witness is the defendant. Its result may be that the informational asymmetry between the Commission and the State is not eliminated, and thus the Commission is led to an error.

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[26] Spector, *supra* n. 8, at 180.

[27] Quite undisguised in some cases. For example, in decision 2016/632 of 9 July 2014 and decision of 27 Jan. 2010 on the State aid C27/08, Germany strongly argued in favour of aid measures, contradicting the Commission's reasoning. In decision of 10 July 2018 on the measures SA.37977 (2016/C) (in particular s. 5.1.1), Spain was trying to undermine the Commission's methodology. Finally, in the tax ruling saga the Member States openly contested the Commission's competence and methodology, e.g. decision of 30 Aug. 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple (s. 4), or decision of 4 Oct. 2017on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon (s. 4.2), and the actions for annulment against these decisions.

[28] Around 40% of Commission's negative decisions is subject to actions for annulment: they are usually brought either by the State or by the beneficiary of aid with the State supporting the action.

[29] Andreas Bartosch, *The Procedural Regulation in State Aid Matters. A Case for Profound Reform*, 6 State Aid L. Q. 474, 480, 481 (2007).

3.2[b] *Informational Asymmetry Between the State and Market Operators*

In any case, informational problems may arise independently of good or bad faith of the State. Indeed, the latter simply does not always possess all information related to the measure. In general, the State has less information about the market than private actors operating on it.[30] For instance, the State may be under-informed regarding the state of the economy to determine the appropriate amount and form of aid,[31] or on the costs borne by the recipient of aid, relevant in the context of the incentive effect.[32] Furthermore, the State may lack or have incomplete information on whether there exists a market failure and consequently, whether the aid will effectively solve it,[33] or may be unable to identify projects which deserve support, in particular in the area of Research and Development.[34] Therefore, the State knows less about certain relevant aid elements than other economic actors, the latter having an informational advantage over the State and, *a fortiori*, over the Commission.

The informational advantage that market operators have over the State may be used when the former discloses information to the latter. As was observed, governments may be misled in the process of designing and implementing aid, because they lack information possessed by potential aid beneficiaries.[35] This situation is similar to the first informational asymmetry: the potential beneficiary wishes to receive aid and thus transfers to the national authority incomplete or distorted information, which will allow it to succeed. If there is a risk that aid will be prohibited at a later stage by the Commission, it is in the interest of the potential beneficiary to keep the granting authority under-informed. As a result, even acting in good faith, the State may forward such imperfect information to the Commission.

Naturally, it might be argued that before State aid control takes place, the State carries out a national procedure in order to decide whether to grant the measure, and thus gathers information necessary also for the Commission's assessment. However, reliance on national standards, which necessarily vary from one State and from one measure to another, is at least precarious, and national authorities may simply lack expertise to identify and address uncertainties.

The two asymmetries may be graphically presented as follows:

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30 In the context of designing an efficient industrial policy: Anne Perrot, *Do National Champions Have Anything to Do with Economics?*, in *Competition Law and Economics: Advances in Competition Policy Enforcement in the EU and North America* 297, 298 (Edward Elgar 2010).

31 Bilal & Nicolaides, *supra* n. 6, at 30.

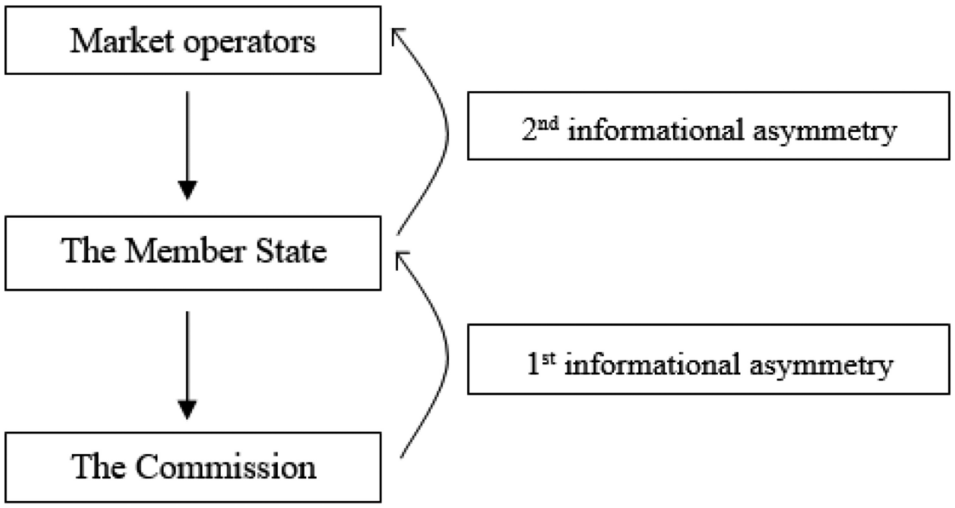
32 Hancher et al., *supra* n. 6, at 2–041.

33 As required by: European Commission, *State Aid Action Plan – Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005–2009* (2005), COM/2005/0107 final (SAAP), at 7.

34 Spector, *supra* n. 8, at 191.

35 Bilal & Nicolaides, *supra* n. 6, at 30.

Figure 1 Informational Asymmetries in State Aid Assessment



In both cases of informational asymmetry, the Commission is led to Type 2 errors, because both the Member State and the potential recipient of aid are interested in approval of the measure and both may submit information according to this interest. Hence, excessive reliance on the State may increase the risk of erroneous positive decisions, depending on the procedural safeguards and the assessment rule applied.

3.2[c] *Informational Asymmetries in the Case of a Complaint*

A remark should be made with regard to State aid assessments triggered by complaints, i.e. in cases in which a competitor believes that an aid was granted in violation of the notification obligation (illegal aid). Whether a complaint fulfils the formal requirements or is considered only as market information, the direct involvement of a market operator, which represents interests different from those of the Member State, allows the Commission to gather information potentially unobtainable only from the State. Consequently, the Commission starts the investigation with better information submitted through the complaint and may more effectively spot inconsistencies and gaps in its further exchange with the State. This function of competitors as bringing added-value to the assessment is in line with the instrumental paradigm, which underlies their involvement in State aid

procedure.[36] Therefore, the complaint may be an interesting tool for overcoming informational asymmetries.

Nonetheless, from a practical point of view, cases of unnotified aid constitute the minority of State aid enforcement, namely only 15%.[37] Therefore, most investigations may not benefit from the preliminary third party's comment on the measure expressed in a complaint. Moreover, it shall be reiterated that informational asymmetries are discussed in this article within the framework of the optimal assessment rule and the complexity that the Commission may handle in State aid assessment. However, complaints constitute reactions to a non-standard situation, i.e. violation of the notification obligation. Consequently, it is impossible to rely on complaints in order to elaborate a specific standard of assessment, because it may never be foreseen whether aid will be granted without notification, whether this fact will form the object of a complaint, and how qualitative the complaint will be. In other words, it is paradoxical that the intuitively undesirable non-compliance with the standstill obligation may create opportunities for a more accurate assessment, but it is difficult to translate that advantage into a generally applicable assessment rule. Although in theory, the Commission could use a more complex rule when it acts upon a complaint, the optimal complexity would be impossible to capture.

3.4 Conclusion on characteristics of the State aid procedure

Both aspects of State aid procedural law: reliance on the State and differences in design of each procedural stage, are relevant in the context of identifying the appropriate assessment rule. More specifically, if a rule is not well-suited for a given procedure, the Commission may not be able to overcome the informational asymmetries in order to achieve the procedure's objective.

As an illustration, the Commission shall form an initial view in order to establish whether a measure does not raise doubts as to its conformity with State aid law, but at the same time it exchanges information solely with the Member State, which brings the risk of Type 2 errors. In this case, the assessment rule must prevent the risk of adopting an erroneous positive decision. On the other hand, the formal investigation procedure allows to better address informational asymmetries, so that the assessment rule does not have to focus mainly on preventing that risk. It

[36] Fernando Pastor Merchante, *The Role of Competitors in the Enforcement of State Aid Law* (European University Institute 2014); Decision of the European Ombudsman in case 1179/2014/LP on the involvement of 'interested parties' in State aid investigations carried out by the Commission, in which the Ombudsman considers that interested parties have a status of 'information source only', para. 33.

[37] Statistics obtained from the European Commission's Case Search website: 647 cases of unnotified aid out of 4,248 notified and unnotified aid, in the period from 2010 to end of Nov. 2019.

is through the level of complexity of the assessment rule that accuracy at both stages may be secured.

4 ERRORS AND THE OPTIMAL COMPLEXITY OF A RULE

There exists a direct relationship between the probability of decisional errors and the choice of the assessment rule. More specifically, one may place rules on the scale from very precise and straightforward (simple) to open-ended and ambiguous (complex), and by moving an assessment rule on the scale, he will obtain different probabilities of error. Since the optimal assessment rule needs to factor in an effective distinction between good and bad practices and at the same time the potential to correctly apply the rule, the outcome of this weighing exercise will vary especially as the latter value changes.

4.1 Two types of assessment rules

The distinction between two types of decision rules, whether called per se vs. rule of reason,[38] standards vs. rules[39] or different complexity of rules,[40] comes down to uniform conclusions. A complex rule is embedded in the assumption that the same behaviour, under different circumstances, may be either beneficial or harmful. Therefore, the rule consists in open-ended criteria, which are interpreted in light of the circumstances of each individual case. Such case-by-case analysis shall allow to more effectively distinguish between desirable and undesirable actions, because it takes account of the specificities of each situation. However, the disadvantage lies in the fact that application of such rules requires a certain amount of information about the behaviour and its effects to be gathered and assessed in every case; in other words, a complex rule entails relatively high regulation costs.[41]

On the opposite side lie simple rules, which consist in precise, univocal criteria, and which allow to qualify certain types of behaviours as harmful or harmless without individual assessment. As they do not envisage case-specific investigations, they are related to lower regulation costs. Indeed, the cost of

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[38] Christiansen & Kerber, *supra* n. 2, at 215, Beckner III & Salop, *supra* n. 2, at 41, 62–67; Willard K. Tom & Chul Pak, *Toward a Flexible Rule of Reason*, 68 Antitrust L.J. 391, 391–400 (2000).

[39] Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257 (1974).

[40] Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J. L. Econ. & Org. 150–163 (1995).

[41] Christiansen & Kerber, *supra* n. 2; David S. Evans & A. Jorge Padilla, *Excessive Prices: Using Economics to Define Administrable Legal Rules*, 1 J. Competition L. & Econ. 97, 116–119 (2005); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, Colum. Bus. L. Rev. 257, 318–323 (2001); Beckner III & Salop, *supra* n. 2, at 62–67; Jonathan B. Baker, *Taking the Error Out of the 'Error Cost' Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L. J. 1 (2015).

gathering and assessing information about the measure is borne only once, at the moment in which the simple rule is elaborated. The trade-off consists in the risk that a simple rule does not suit all situations: the same behaviour may be either desirable or undesirable depending on the circumstances of the case, while generalization does not allow to take account of individual situations.

As a result, it has been argued that one should seek for an 'optimally differentiated rule', which avoids an open-ended investigation by limiting the scope of analysis, but at the same time minimizes the costs of generalization; it minimizes the sum of costs on the average of all cases.[42] The optimal differentiation depends on the regulated behaviour and thus varies from one behaviour to another.[43]

This analytical framework was developed in antitrust but may be validly applied also to State aid law. Indeed, shaping complexity as a technique to increase accuracy is not founded on specificities of antitrust but on the objective observation that different types of rules allow to distinguish between desirable and undesirable measures to a different extent. The objective of identifying and prohibiting harmful aid while approving beneficial one is the paramount goal of EU State aid law. Hence, if an assessment rule may guarantee effective distinction between good and bad aid, then it is beneficial to draw inspiration from the antitrust framework and apply it to the specific context of State aid procedure. Thus, in the remaining part of this article, it will be argued that the optimal complexity of the rule varies from one State aid procedural stage to another.

4.2 Trade-off between two risks of error: Two components of accuracy

When exploring the optimal assessment rule for each procedural stage, two issues must be taken into account. As it was mentioned, complex rules allow to account for circumstances of individual cases, while simple rules create the risk of automatic overenforcement or underenforcement. Hence, at the level of design of law, where one needs to establish a general rule that will guide individual assessments, complex rules may be said to be more effective, as they create a better opportunity to distinguish between desirable and undesirable behaviours.

Nevertheless, such an approach is incomplete as long as one does not investigate the level below the design of law. Indeed, if for some reason the information gathered by the Commission is incomplete or the assessment is superficial, the outcome may be erroneous. Hence, it may be said that the risk of error brought by complex rules pertains to the process of execution of law: the criteria are well designed, but the rule may fail at the level of its application. Complex rules are thus

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42 Christiansen & Kerber, *supra* n. 2, at 224.
43 *Ibid*.

trickier than simple ones, whose application is virtually automatic and related to lower regulation costs. Error caused by misapplication of a rule is a necessary component of accuracy: both risks bring the issue of over- and under-inclusion, because they both result in Type 1 and Type 2 errors – except that their origin is different.

The literature generally does not place the two risks on an equal footing – error in application is usually not analysed as such and is considered as one of the costs of a complex rule. As a result, error costs are considered to be reduced with higher differentiation of rules.[44] One might argue that it is essentially the same to consider the risk of error in application as an inherent limit to effective distinction between good and bad measures as to consider this risk to constitute a separate error. However, once the procedural aspect is singled out, error in application becomes the central concern. Indeed, under certain circumstances, such approach proves more useful than to assume that complex rules always increase accuracy. In particular, the use of complex rules in State aid procedure may in fact increase error costs, due to a high risk of error in application of law; only a separation of the two errors allows to capture how correct outcomes may be best secured.

Therefore, if one wishes to lower down the probability of decisional errors (increase accuracy in decision-making), one must balance advantages and disadvantages of each solution and decide on the characteristics of the optimal rule. The perfect rule will be found somewhere between a totally simple and a totally complex rule. Naturally, if all rules were simple, the 0 risk of error in application[45] would correspond to a high risk of error caused by unsuitability of the rule to some cases. Conversely, under complex rules only, the 0 risk of error arising from ineffective distinction between measures would be compromised by a high risk of error in application. Provided that both errors occur with the same probability, the balance would have to be struck half-way. Obviously, this could virtually never be the case in practice, which justifies the search for an optimal rule.

The trade-off between error in identifying good and bad aid on the one hand and error in application of the rule on the other, shall be read together with the findings of the previous sections. Namely, differences between the preliminary examination and the formal investigation must be related to the risk of error in application of complex rules. Consequently, the optimal complexity of the assessment rule must vary at each procedural stage. Nevertheless, currently there seems to be only one assessment rule for the entire State aid assessment.

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[44] *Ibid.*, at 224, 229.

[45] Obviously, even under such circumstances this value could not be zero, since there always is some margin for inevitable errors, e.g. caused by clerical mistakes. These are, however, not taken into account, in order to simplify the demonstration.

5 QUEST FOR OPTIMAL ASSESSMENT RULES IN STATE AID DECISIONS

It is straigthforward to connect the two risks of error with the differences between the two State aid procedural stages. The complexity of the assessment rule must be adapted to the risk of error in application in order to avoid ineffective enforcement. Intuitively, two assessment rules shall exist, explicitly or implicitly, in State aid assessment. However, the assessment rule for the preliminary examination is missing, and this uncertainty should be addressed.

5.1 One assessment rule in state aid assessment

State aid assessment, both under Articles 107(1) (the notion of aid) and 107(3) (compatibility assessment) is a delicate exercise requiring precision and expertise. Its complexity lies, firstly, in the volume of information which is needed for evaluation of five State aid criteria (transfer of State resources, existence of an advantage, its selectivity, distortion of competition and effect on trade) and six compatibility criteria (contribution to an objective of common interest, necessity, appropriateness, proportionality, incentive effect and avoidance of undue distortions of competition). Secondly, and in addition to the number of criteria, some of them clearly reflect complex rules, for instance the existence of an advantage or assessment of negative effects of aid, which rely on a diversity of open-ended notions requiring careful market analysis.

Assessment of these criteria, as previously signalled, requires some level of knowledge, which must be acquired by overcoming the informational asymmetries. Each procedural stage creates different potential for overcoming these asymmetries, in conformity with the objective pursued by each phase. Hence, in the preliminary examination the Commission needs to establish beyond any doubt that the measure is not harmful. If this may not be confirmed, either because the measure is undesirable or because the informational asymmetries have not been overcome, then a formal investigation procedure shall be opened. It is only then when the Commission proceeds to a fully fledged evaluation.

However, the content of the substantive law suggests that the Commission needs to carry out essentially the same investigation at both stages of the procedure. Judging by the complexity of this set of assessment rules, they seem to allow to carry out a full investigation in the second phase of the procedure. Therefore, the question arises as to their simplified version, which could be applied at the earlier stage and which, however, has not been envisaged. Accordingly, the doubt emerges where the boundary between the initial view and an in-depth investigation is drawn, and how it is secured that formal investigations are not opened in an

aleatory manner. In other words, one may interrogate himself what is the difference between the assessment in the preliminary examination and that in the formal investigation, if both consist in application of exactly the same rules, but in different procedural set-ups. The search for the actual scope of the preliminary assessment is even more pertinent in the light of recent judgments of the General Court, in which decisions of the Commission taken at that stage were annulled because the Commission had not carried out an assessment required to form an initial view that the measures were certainly harmless.[46]

One might argue that although different assessment rules have not been explicitly laid down in the substantive law, the distinction guides the Commission's assessment in the sense the Commission treats the same criteria in a simplistic way in the preliminary examination and explores their complexity in the formal investigation procedure. Nevertheless, aside from the fact that nothing suggests that the Commission would consciously follow such approach, it would create an even higher risk that Member States or beneficiaries take advantage of such discretional superficial assessment. Indeed, if there is a set of complex criteria, and the Commission applies them by using to the best of its abilities the potential of the preliminary examination, then this situation constitutes a perfect illustration of the risk identified in the previous sections. Namely, it applies a complex rule in the procedure, which is not adapted nor intended to tackle such rule, and hence it runs the risk of error in application of this rule. In other words, the assessment rule that the Commission applies is not optimal for that procedural stage, which results in a risk of Type 2 errors due to informational asymmetries.

5.2 The need for clear assessment rules, especially for the preliminary examination

The fundament for distinguishing between the optimal assessment rules for each procedural stage is to acknowledge that complex rules pose higher requirements, and these requirements may be met by each procedural stage to a different extent. Indeed, in the preliminary examination, the Commission has limited possibilities to overcome the informational asymmetries, because it cooperates mainly with the State and has shorter time and less investigatory powers. Thus, it runs the risk of

[46] T-68/15, *HH Ferries I/S, formerly Scandlines Øresund I/S and Others v. European Commission* (2018) ECLI:EU:T:2018:563; T-630/15, *Scandlines Danmark ApS and Scandlines Deutschland GmbH v. European Commission* (2018) ECLI:EU:T:2018:942; T-631/15, *Stena Line Scandinavia AB v. European Commission* (2018) ECLI:EU:T:2018:944; T-79/16, *Vereniging Gelijkberechtiging Grondbezitters and Others v. European Commission* (2018) ECLI:EU:T:2018:680; T-793/14, *Tempus Energy Ltd and Tempus Energy Technology Ltd v. European Commission* (2018) ECLI:EU:T:2018:790; T-108/16, Naviera Armas, *SA v. European Commission* (2018), ECLI:EU:T:2018:145.

error in application of a complex rule, which undermines the very idea of using such rules and calls for finding a right balance between the effective distinction between desirable and harmful measures on the one hand, and accurate application of such rules on the other.

In the same vein, if the Commission is expected to form an initial view of the measure in order to identify certainly unproblematic measures, one needs to reflect on what an initial view shall consist in. In some sense, measures falling under the notification obligation but clearly harmless are somewhere between the GBER measures and potentially harmful measures deserving a deeper investigation in the formal procedure. The assessment rule shall focus on identification of such measures and let another assessment rule be responsible for the full investigation. Such an optimal rule for the preliminary examination should, probably, be relatively simple, because only clear-cut measures are targeted by such quick approval. However, currently there is no indication that the assessment rule, expressed in the assessment criteria, is optimal either for the preliminary examination (too complex) or the formal investigation (maybe the formal investigation could handle more complex rules, or maybe the current rules already are too complex). State aid reforms suggest that the Commission focused its efforts on the most effective distinction between desirable and undesirable measures,[47] but it did not take into account how this result may be best achieved when applying law at different procedural stages.

Because each procedural phase has its own optimal point of balance between the two types of risks, which is strictly related to their objectives, it is only logical that this difference is accentuated somewhere in the vast body of State aid soft law. It does not have to be necessary to change the law itself. For instance, the Commission could adopt Guidelines, Best Practices or any other type of document, clarifying its priorities in forming the initial view or explaining how it approaches the same assessment criteria at the two procedural stages. In the event that there currently exists no structured approach to the preliminary examination, it would certainly be worth elaborating on the appropriate standard of assessment, based on Commission's rich experience in application of rules and in observing Member States' notifications. Undoubtedly, this would benefit the quality and transparency of State aid decision-making, increase legal certainty and facilitate the subsequent judicial review. In parallel, the Court of Justice could impose on the Commission uniform requirements concerning the standard of assessment, by defining its desired scope when it examines actions for

[47] By aiming at 'refined economic approach', 'less and better targeted aid' in line with the Lisbon strategy, 'promotion of good aid', 'more efficient capturing of bad aid' and other in State Aid Action Plan and State Aid Modernisation.

annulments against non-openings of formal investigations. In other words, the unclear character of the notion of 'serious doubts', which separates the two procedural stages, could be used to clarify the content of the preliminary examination.

6 CONCLUSION

This article approached several characteristics of State aid procedure, in order to address the question of the optimal assessment rule for State aid law. In particular, it was considered that due to informational asymmetries, which the Commission may have difficulties overcoming, the use of complex rules in the preliminary examination may be related to high probability of error in application. In contrast, the formal investigation allows to carry out more profound analysis, therefore welcoming more complex rules. This difference, strictly related to distinct objectives followed by each stage, is not reflected in the assessment criteria laid down in State aid substantive law, which may mean that assessment in the preliminary examination is suboptimal and runs the risk of errors.

In that regard, two assessment rules, which are optimal for the respective stages of the procedure, should be identified and made public by the Commission. Although it is not the object of this article to propose concrete solutions or the optimal content of assessment criteria, it is argued that assessment in the preliminary examination must necessarily be simpler than in the formal investigation. However, currently the set of criteria and the scope of assessment are common for the entire State aid procedure, without operating, implicitly or explicitly, any similar distinction. Hence, guidelines or best practices could explain the real difference between the two types of reasoning, or the General Court could shape the scope of assessment in the preliminary examination when revising actions for annulments against decisions not to open formal investigations. In particular, appropriate considerations could be made at the occasion of revision of State aid guidelines, which will certainly include questions on the practical aspects of their application.