

# Experiences of a State aid expert from private practice

Dr. Andreas Bartosch

European State aid Law Institute

and

Kemmler Rapp Böhlke & Crosby

Brussels

# EU State aid Control

- The Stakeholders

- EU Commission
- Member States
- Aid Beneficiaries
- Complainants

- The Common Goal

- Efficiency of Control



**I. The current state of State aid Procedure**  
**Is it apt to deliver efficiency?**

# Historical Flashback

- The *Sytraval I* scare (GC, Case T – 95/94, [1995] ECR 2651) got soon alleviated by the ECJ ruling in *Sytraval II* (ECJ, Case C – 367/95 P, [1998] ECR I – 1719).
- Following this, the judgment in *British Airways* (GC, Joined Cases T – 371/94 and T – 394/94, [1998] ECR II – 2405, para. 60) has set the relevant standards for the role of third parties in State aid procedure:

*“... that, far from enjoying the same rights to a fair hearing as those which individuals against whom a procedure has been instituted are recognised as having (see to this effect, Joined Cases 142/84 and 156/84, BAT & Reynolds v. Commission, [1987] ECR 447, paragraphs 19 and 20, concerning competition, and Case C – 142/87, Belgium v. Commission, [1990] ECR I – 959, paragraph 43), interested parties have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case”.*
- In *Ufex et al.* (GC, Case T – 613/97, [2000] ECR II – 4055) the “*mere sources of information*” status was born.

# The Role of Beneficiaries

Can the interests of beneficiaries be equated with those of the Member States?

Doubts arise from the factual scenarios in e.g. *Schmitz- Gotha Fahrzeugwerke* (GC, Case T – 17/03, [2006] ECR II – 1139) and, even more pointedly, *Frucona Košice* (GC, Case T – 11/07, nyr).

# My recommendations for improvement

- The Commission shall address all injunctions and decisions it takes during the preliminary and formal procedure directly to the beneficiaries without the circumvention via the Member State authorities.
- The beneficiary should have a claim vis-à-vis the Commission to get access to the complete file including possible complaint statements.

# The Role of Complainants

Despite the earlier set-back in *Sytraval II* complainants have benefitted from the two *Athinaïki* rulings:

- In *Athinaïki I* (ECJ, Case C – 521/06, [2008] ECR I – 5829) it was ruled that an Art. 20 (2) letter informing the complainant that the Commission will (definitely) close the file amounts to a challengeable decision.
- In *Athinaïki II* (ECJ, Case C – 362/09 P, nyr) the Court ruled that a mere revocation of the Art. 20(2) letter in conjunction with a request to submit further pieces of factual information is not capable of correcting the illegality of the original Art. 20 (2) letter. Moreover, a full-fledged factual and legal scrutiny is to be required to make the complaintant's procedural rights meaningful.

# Suggestion for improvement

Trade off between enhanced third parties' rights against binding deadlines!!!





**II. Substantive rules for State aid Control**  
**2 selected issues**

- The offsetting of costs linked to the performance of services of general economic interest (SGEI)
  - The *Altmark* ruling (ECJ, Case C – 280/00, [2003] ECR I – 7747) set new standards for the financing of public services that – at least in the Commission’s point of view – had not been complied with by any scheme in existence at the time this judgment was handed down (July 2003).
  - In *BUPA* the General Court found a scheme for risk equalisation on the Irish market for private insurances dating from the pre-*Altmark* era met all of the earlier judgement’s requirements.

**Question:**

Does *Altmark* provide a stringent set of rules or is it a flexible tool-kit adaptable to the needs of Member States?

# The Oscillation of the Concept of Material Selectivity

- *Adria Wien Pipeline* (ECJ, Case C – 143/99, [2001] ECR I – 8365

*“The only question is whether, under a particular statutory scheme, a State measure is such as to favour ‘certain undertakings or the production of certain goods’ within the meaning of Article 92(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question.”*

- *British Aggregates* (ECJ, Case C – 487/06 P, [2008] I – 10505

Pursuit of a pure effects-based approach

## Key Issues

- Which are the practical consequences arising from the above tension?
- Will Member States have to notify each and every measure (in particular in the fiscal sector) irrespective of which policy goals are to be pursued?