

AUTONOMY BY THE RULES:
THE EUROPEAN COMMISSION AND THE
DEVELOPMENT OF STATE AID POLICY*

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The debate between theorists of European construction concerning the degree of autonomy of supranational institutions has begun to yield concrete rewards. Advances in our understanding of the emerging European polity have shown that these institutions are relatively independent actors in the European integration process; the critical question remains precisely how, where and why supranational autonomy is circumscribed by national interests, and how this relationship changes over time.

For many years the academic debate about European construction did not move beyond a standoff between intergovernmentalists and neofunctionalists of various strands. Three achievements have moved the debate forward. The first is the success of numerous scholars in demonstrating that nonstate actors at both subnational and supranational levels have been critical in determining the course of European integration, especially through agenda-setting (Sandholtz and Zysman, 1989; Cowles, 1995). These findings

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establish the multi-level composition of the European polity and demonstrate that the continuing importance of Member States as the most powerful actors in the European integration process is not incompatible with the critical independent role played by nonstate actors (Marks, 1992; Sandholtz, 1993; Nugent, 1995; Grande, 1996; Marks, Hooghe and Blank, 1996). Second is the empirical work that has been done on the autonomous influence over outcomes of supranational institutions. This work analyzes the role of the European Court and Parliament as well as the Commission, whether in individual policy areas (Alter and Meunier- Aitsahalia, 1994; Schneider, Dang-Nguyen and Werle, 1994; Smyrl, 1995; Golub, 1996) or in shaping integration processes more generally (Burley and Mattli, 1993; Weiler, 1993; Ross, 1995; Alter, 1996; Sandholtz, 1996). And finally, there is the contribution of historical institutionalism, best represented by the recent work of Pierson (1996), which calls on scholars wishing to explain the nature of European construction to look beyond the 'snapshot' that emerges from comparing outcomes and the interests of the actors involved at a particular point in time. Instead, historical institutionalism urges us to consider how the preferences and choices of Member State governments have interacted over time with the autonomous actions of European institutions to produce results not entirely intended or controlled by Member States (Pierson, 1996; Sandholtz, 1996). In other words, the examination of processes of policy development over time is essential to helping us comprehend the unfolding relationship between

Member State power and supranational autonomy. This essay pursues this task by focusing on the development of the European Commission's state aid policy.

State aid is a promising policy area for advancing the debate for several reasons. First, controlling Member State aid to industry represents an intersection between implementation of the Single Market and traditionally national Member State concerns with industrial policy and employment. Second, the exclusive legal competence of the Commission to regulate state aid is established in the EEC Treaty, yet the precise scope of that authority and the enforcement mechanisms available to the Commission are left ambiguous, and therefore are a product of the historical and political development of EU institutions. Indeed, competition policy is an area in which the Commission is vested with strong legal powers enshrined in the EEC Treaty. However, while the Treaty powers of the Commission are in theory similar in the area of state aid to those for merger controls, merger controls typically involve private sector companies, while in regulation of state aid, the Competition Directorate, DGIV, confronts Member State governments.² Consequently, control of state aid is

² Even in the area of merger control, though, the competition directorate has had to struggle to expand the scope of its 'exclusive competence.' Beginning in 1973 the Commission fought for quantitative thresholds establishing its authority, but Member States resisted until 1989. At that point the Commission became responsible for vetting cases in which the companies' combined worldwide turnover exceeds ECU 5

politically sensitive, and can bring the Commission into direct confrontation with the wishes of Member State executives (Ross, 1995; Smith, 1996). As John Pinder writes, 'The control of state aids is a powerful policy instrument, if the Commission's position can be strong enough in relation to the governments. In the main, this is a political question as to how far the Commission gains the capacity to act as a government for the Community or to what extent governments of the member states succeed in preventing it' (1995: 117).

Finally, state aid cases have yielded a range of outcomes, including cases in which the Commission appears to directly challenge important interests of Member States, such as in the June 1996 Volkswagen decision, as well as those, like the continuing case of France's *Crédit Lyonnais*, in which the Commission appears to have been overly indulgent toward Member States. However, there are two problems with looking at outcomes in isolation. First, upon closer examination these decisions are substantially different from what they appear.

billion and the EU turnover of any two involved companies ECU 250 million. This gave DGIV competence over an additional 40-50 mergers and takeovers cases each year. In 1993 DGIV sought a lowering of these thresholds to 2 billion Ecus and 100 million Ecus, respectively, but Germany, France and Britain, the sources of the bulk of large mergers and takeovers, opposed the change in the merger regulation. The Commission reintroduced this proposal in 1996, and after consultation with Member States decided to press for a more modest reduction to ECU 3 billion and ECU 150 million.

The federal government in Bonn may not have shared the preferences of the regional government in Saxony, and there have been fairly restrictive conditions imposed on the approval of aid to Crédit Lyonnais. Second, there is the danger of a step back to the stale intergovernmentalist -supranationalist standoff in which we draw conclusions by judging the compatibility of interests and outcomes at a particular point in time. Indeed, the evidence from state aid policy suggests that sometimes the Competition Directorate has a substantial impact on outcomes by virtue of its relationship with important allies in Member States, precisely as intergovernmentalists claim.³ But Member States also have had to adapt their industrial policies in numerous ways to take account of the DGIV's state aid policies, and they've had to do so increasingly over time. Thus what is more significant is the temporal shift in the pattern of outcomes and the nature of interaction between Member States and the Commission. This variation over time makes state aid a productive policy area for probing the limits, conditions, and causes of the Commission's autonomy.

While state aid is unrepresentative of other policy areas because of the exclusive competence exercised by the

³ This is often the case when ministers in Member State governments seek to use the Commission's role as state aid watchdog as leverage against powerful domestic constituencies for particular aids. For elaboration on this theme and examples, including the January 1996 decision in the Iberia case, see Smith (1997).

Commission, two aspects of the experience of state aid policy are generalizable. First, the means by which the parameters of the Commission's authority have been defined and by which DGIV itself has sought to expand that authority are similar to that for other policy areas. And second, as the work of the Commission shifts away from primary legislation and more toward a focus on implementation and enforcement, the tasks of other parts of the Commission become more like those of DGIV. Thus DG-IV's application of state aid policy can provide insight into problems faced by DGs in other policy areas and strategies of policy influence and effective enforcement.

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The Articulation of State Aid Rules

The EEC Treaty rules governing Member State aid to industry are a product of the initial compromise between German liberalism and French wariness about opening markets integral to the EEC's founding bargain.⁵ This compromise made

⁴ Recent literature has criticized the tendency to treat the Commission as a monolith and emphasized the importance of studying the strategic behavior of individual Directorates in order to understand differences in the Commission's influence across policy areas. See especially Cram (1994).

⁵ Although an intergovernmentalist interpretation would emphasise that the French viewed the founding of the EEC as a means of fostering the modernisation of French industry. See Moravcsik (1993), p. 518, as well as A.S. Milward, *The European Rescue of the Nation-State* (Berkeley: University of California Press, 1992).

a tough state aid regime theoretically possible, but also made the fulfillment of this potential largely dependent on incremental acquiescence by Member States. Thus the significance of Treaty Articles 92 and 93 and their precise implications have unfolded only over time.

The potential for distortions to trade within the common market caused by the granting of industrial aid is recognized in the EEC Treaty. Treaty Article 92(1) states that any aid granted by a Member State which threatens to distort competition by affecting trade between Member States is incompatible with the common market. Article 93(3) requires member states to inform the Commission of plans to grant aid and stipulates that proposed aid measures may not be put into effect until the Commission has made a decision concerning the compatibility of the aid with the common market. While 93(1) charges the Commission with reviewing aid schemes and authorizes the Commission to propose appropriate measures 'required by the progressive development...of the common market,' Article 93 (2) gives the Commission authority to require that states 'abolish or alter' aid that it deems incompatible with the common market. The procedure embodied in Article 93 (2) allows the Commission to impose conditions on approved aid, including 'restrictions on the type, amounts, intensities, beneficiaries, purposes and duration of aid.' Finally, Article 94 gives the Council authority, at the proposal of the Commission, to make regulations governing the application of Articles 92 and 93.

The EEC Treaty leaves many details to be filled in, and

therefore does not define the political risks of delegation for Member States with any certainty. For example, the Treaty language itself does not make clear if the Commission has the authority to demand that an illegally granted aid be recovered. As a consequence, state aid policy has evolved in an environment characterized by Commission legal authority tempered by Member State political power. For the Competition Directorate the result is a 'dilemma of discretion,' according to which flexibility in evaluating state aid cases makes the policy regime workable in the face of sometimes weighty political pressures from Member States, while using rules to narrow discretion can help DGIV establish a rigorous policy regime more insulated from political pressures.

DGIV's approach to resolving substantive details has changed little in the past quarter century, consisting of articulating frameworks for assessing various types of industrial aid after consultation with Member State governments. Initially these frameworks emerged directly from Member State interests. The first framework, set out in 1971 following the initiation of the Common Market, focused on regional aid. The rules followed a decision by the Council to coordinate the application of regional aid because of the risk of competitive regional subsidization (OJ C 111, 4 November 1971, p. 1). DGIV had tried to address the problem by instituting advance notification of regional aid schemes to allow the Commission to assess the impact of these aids on competition and their compatibility with the common market. However, while the northern European Member States favored

this solution, France and Italy opposed it (Commission communication, OJ C 111, 4.11.1971, p. 7). The result was a compromise agreement in the Council focusing on limits on regional aid intensities, regional targeting, rules on transparency and an effort to assess the sectoral effects of regional aid (Council Resolution of 20 October 1971).

The Commission's role was largely restricted to progressively sharpening the definition of regions that should be targetted for aid, assessing degrees of regional imbalance in order to determine permissible aid intensities, and managing the process of extending the applicability of regional aid guidelines in the wake of Community enlargement. The 1971 Community framework for aid to the textile industry followed this same pattern. Increased production of some textile products from developing countries magnified already intense intra-Community competition, raising the prospect of competitive subsidization. In response, the Commission sought to control subsidies and direct them in ways that would minimize distortions within the Common Market, calling in particular for aid to focus on reducing overcapacity.

Although the objective of reducing overcapacity has endured, sectoral arrangements in the post-SEA period reveal two differences. First, the more recent frameworks, such as the 1989 rules for the automobile sector, contain stronger language concerning the inadmissibility of operating aid and the burden of responsibility for the costs of industrial restructuring. Whereas the standard for restructuring in the early '70s is 'substantial contributions from the

beneficiaries,' the presumption by the late '80s is that these investments should be undertaken entirely by private firms, who are themselves responsible for funding their investments via private channels in a competitive market environment (OJ C 123, 18 May 1989).

Second is the explicit connection of criteria for evaluating aid with broader Community objectives, reflected especially in the shift in emphasis from internal competition to outward *competitiveness*.⁶ This shift represents entrepreneurship on the part of the Commission. The competitiveness objective, as articulated in the 1993 White Paper on growth, competitiveness and employment, was essentially a vehicle crafted by Jacques Delors to build on the momentum of the Single Market legislation. The SEA and TEU facilitated the Commission's efforts to rhetorically tie together integration objectives as a means of promoting its state aid regime. In the 1993 White Paper the Commission argued that a lag in structural adjustment, attributable in part to distortionary state aid, was a prime factor in the fragile global competitiveness of European industry (Commission, 1994, pp. 63 and 79). Similarly, 1994 guidelines

⁶ The Community Framework on State aid to the motor vehicle industry is justified partly by the claim that 'overreliance on State aid to solve problems of industrial adjustment *vis-à-vis* third country producers undermines the competitiveness of Community car manufacturing by hindering the economically healthy influence of market forces.' OJ C 123, 18 May 1989, p. 3.

on aid to firms in financial difficulty warn that subsidies can deny the Community the full benefits of the Single Market, place severe strain on national budgets, and thereby hamper economic convergence (OJ C 368, 23 December 1994).

**The Commission and State Aid:
Reducing the Benefits of Defection**

The following two sections review the development of DGIV's enforcement capacities over time and analyze the changing consequences of Member State delegation of authority over state aid to the Commission. The delegation of exclusive competence over competition policy itself may be explained by problems of incomplete contracting and credibility. The signatories of the original EEC Treaty could lower the transaction costs of adjusting to new contingencies by having a neutral arbiter interpreting and applying the rules. In addition, such an arbiter strengthened the credibility of each government's commitment to the central bargain. This could benefit the Member State governments both collectively, maximising the gains from the common market, and individually vis-a-vis domestic constituencies (Moravcsik, 1993). Ultimately Member State governments calculated that the gains to be derived from the common market would exceed the costs.

Of course, any such delegation of enforcement authority entails political risks. However, according to state-centric theory, such risks are minimized by the superior political power of the principals, the Member States, because (a) each individual decision of the enforcing authority is of limited importance, so that single decisions contrary to the interests of individual Member State governments do not threaten the

overall benefits they derive from the enforcement regime; (b) 'the scope of delegation is explicitly limited by national governments'; and (c) ultimately governments can individually choose not to comply with decisions made by the supranational agent, the Commission (Moravcsik, 1993, p. 513), or can collectively reverse the delegation of authority to the agent. Yet the historical development of state aid policy casts doubt on all three of these arguments. First, a 'single decision' in this policy area can involve a regional aid scheme with substantial consequences for national industry (as for the 1 March 1995 decision on the Italian government's reduction of social security contributions for firms in the Mezzogiorno) or on a case involving very large sums of money having a sizable impact on jobs and the very trajectory of industrial policy (such as the recent cases of Iberia and Credit Lyonnais). Second, the scope of delegation implied by Articles 92 and 93 of the EEC Treaty is not at all explicit. Third, successive decisions by the European Court and policy measures by DGIV both in response to Court decisions and as a consequence of independent initiatives have increased the difficulty of non-compliance for Member State governments. And finally, stripping the Commission of its power to regulate state aid would substantially undermine the single market programme.

The cost-benefit assessments made by national governments when they entered into the EEC Treaty explicitly or implicitly included estimates of the costs of defection. Autonomy in this context implies that no outside party -- including the enforcement agent -- can alter the net benefits of defection

without the consent of the Member State governments. Yet in the area of state aid policy this is precisely what DGIV has systematically done. Where state aid is granted in violation of the EC rules, the result is a distortion of trade in favor of a firm or sector in the defecting state. We may describe the expected benefits of defection as follows:

Net Expected Benefits =

(Expected Gain x (1 - likelihood of detection and punishment))
- (Defection Costs x likelihood of detection and punishment)
- estimated costs to collective institution,

where the expected gain represents benefits from distorting trade in favor of national industry, but where the Member State will also incur costs in the event that their defection is detected. These costs consist of such items as attracting greater scrutiny of aid from the Commission, as well as pressures to cooperate from other Member States that may jeopardize related interests of the defecting Member State. Even where the costs of defection are substantial relative to the expected gain, net expected benefits will be positive where the likelihood of detection is low.

In fact, DGIV has lowered the expected net benefits of defecting from the state aid regime by increasing the likelihood of detection and punishment. There are three mechanisms through which this has taken place increasingly in the 1990s. The first mechanism closely shadows the neo-functional argument applied by Burley and Mattli (1993) to explain the role of the European Court in 'constitutionalizing' the Treaty and may be thought of as the

Commission's response to the dilemma of discretion. This consists of using the principle of neutrality of rules (law in the case of the Court) as a defense against the threatening impact of politics. Indeed, there is a substantial parallel between the role of the Court generally and the role of the Commission in the area of state aid policy, where policy-making must be sensitive to the political environment comprised by Member State sentiment but in which the Council does not have a direct decision-making role. As for the Court's authority, only Treaty revision could alter the powers of the Commission to develop and enforce Articles 92 and 93 of the Treaty.⁷ Under these circumstances, DGIV has built on the base of Articles 92 and 93 a superstructure of frameworks and guidelines that it invokes in order to partly neutralize the strong political pressures it sometimes faces on state aid cases. In the course of policy making DGIV seeks to fill in gaps in this superstructure by developing new frameworks to address aid categories not covered by existing rules and to establish precedents of rigorous enforcement. This has been particularly important as governments have sought to counteract the Commission's enhanced enforcement capacities by

⁷ Of course, there is the crucial difference that Member State governments, as well as private actors, can challenge the Commission's decisions in the Court. In addition, the Council can, according to Articles 92(2)(e) and 94, regulate the application of Articles 92 and 93 if it can induce the Commission to offer a desired proposal.

granting state aid in different forms.⁸ By appealing to the rules, precedents of enforcement, and the principle of equal treatment of Member States, the competition commissioner has greater leverage to resist the lobbying efforts of government ministers. As Burley and Mattli assert, 'actors are best able to circumvent and overcome political obstacles by acting as nonpolitically as possible' (1993, p. 57).

Second, rulings by the European Court of Justice on state aid cases and interpretations of Article 93 of the EEC Treaty have given the Competition Directorate an increasingly potent armoury with which to combat state aid that distort competition in the Single Market. Court decisions since the mid-1980s have augmented the Commission's powers to investigate aid in a broad range of forms, suspend aid, order recovery of illegal aid, and compel Member State governments to provide information.

DGIV also has tried to influence Member States' assessments of the potential gains accruing from defection by presenting arguments about the interdependence of Community policies. This technique has been most effective since the Single European Act, as the Commission has invoked the aims of industrial competitiveness and economic convergence and cohesion of Member States to highlight the imperative of

⁸ For example, while the 1980 public sector transparency directive focused on government provision of equity capital to public undertakings, in 1996 the Commission turned its attention toward aids in the less visible form of state loan guarantees.

reining in state aid and justify tightening of the state aid regime. This same approach to strengthening the regime was evident as early as the 1970s, when DGIV proclaimed the importance of state aid control for fighting inflation, then the principal problem plaguing Member States. The difference since the Single European Act is that DGIV's arguments find a more receptive audience because it has harnessed ends that have been explicitly endorsed by Member States as objectives of European construction.

Finally, as the rigor of the state aid regime has developed and become more visible, nonstate actors at both national and trans-European levels have come to interact increasingly with the Commission, typically as supporters of DGIV's scrutiny of particular cases. The impact of these actors has been twofold: first, they have occasionally drawn DGIV's attention to specific instances of illegal aid, and second, they reinforce the Commission's claim to being a neutral enforcer of the rules. Officials responsible for competition policy can point to arguments presented by third parties, typically national industrial associations in competing Member States or firms competing with the aided firm within the Member State granting an aid, as one response to the lobbying efforts of government ministers. The growing involvement of these actors has supported efforts to tighten enforcement of the state aid regime and thereby contributed to higher defection costs for Member State governments. At the same time, this involvement has also threatened to impose constraints on DGIV itself, which may in the future have to

devote more resources to investigating cases brought to its attention by non-state actors, and thereby lose some of its autonomy in setting its policy course.⁹

Although developing a rigorous regime of state aid regulation appears especially critical with the advent of the single market, and state aid cases have garnered a particularly high profile in the post-1992 period, many of the rules governing state aid were developed in the 1970s and early '80s, following completion of the customs union in 1968. Ironically, it was during the era of 'Europessimism,' often characterized as a period of dormancy in the development of European integration, that regulations designed to reduce distortions of competition within the common market were put in place. However, an examination of the historical development of state aid policy reveals that the Competition Directorate was not able to exercise a strong regime of enforcement until the late 1980s and early 1990s.

A functional explanation of why enforcement and compliance lagged behind the articulation of regulations is inadequate. While the elimination of nontariff barriers intended by the Single Market threatened to amplify distortions created by state aids, the earlier completion of the customs union certainly called for rigorous control over potential distortions of trade. Yet that control remained fragile until

⁹ See note 11, page 23. In order to prevent this, the Commission plans to seek Council approval of a regulation establishing the procedure to be followed in cases of third party complaints.

the runup to the Single Market beginning at the close of the 1980s and beginning of the '90s.

The evidence suggests that DGIV has been able to promote its state aid regime not only when it has had allies in Member State governments, but also when the Court of Justice has handed down judgments implicitly lending the Commission added authority, and by taking advantage of opportunities to knit a web of state aid rules that help insulate it from political pressures from Member State executives.¹⁰ Non-state actors, including individual businesses, national industry associations, and their legal representatives have come to rely upon this web to protect their interests in fair competition. Recognising this development, Claus-Dieter Ehlermann has written that state aid is 'no longer controlled exclusively or principally in the interest of other Member States, but also, and perhaps even more so, in the interest of the competitors of the intended beneficiaries of the aid' (Ehlermann, 1995: 1219).

The Development of Enforcement and Compliance

Despite the progressive liberalization of markets and spread of privatization of public holdings across EU Member States in recent years, the flow to Brussels of representatives of Member State governments armed with arguments for Commission approval of particular industrial

¹⁰ This explains why the rigor of the state aid regime has increased despite the persistent and growing problem of mass unemployment in Europe.

aids has not diminished. These actors apply pressure at all levels of the Commission, from the office of the competition commissioner, to their nation's commissioner(s), to the administrative services. Therefore DGIV must rely for its independent capacities on a set of rules which, based on the principle of equality of treatment of Member States, prevent the Commission from continually having to succumb to political pressures.

The Commission derives little autonomous power directly from the Treaty. For example, the development of state aid policy reflects a long and continuing struggle by DGIV to gain full compliance with the aid notification requirements in Article 93(3). In 1980, the Competition Directorate informed Member States of its increasing concern with widespread instances of non-notification or late notification of aid, in violation of the obligations codified in Article 93(3) of the EEC Treaty. The state of compliance was so tenuous that 'the extent of the tendency towards non-notification or late notification would appear in some cases to indicate the possible existence of a general decision not to respect the provisions in question' (OJ C 252, 30.9.1980, p. 2). DGIV reiterated its frustration with Member State non-compliance with information requirements several times in communications during the 1980s.¹¹

¹¹ Commission difficulties in generating state aid inventories testify to these ongoing problems. DGIV sought to establish an inventory of aids granted to the textile and clothing industries in Member States between 1980 and 1982,

In order to strengthen the deterrent effect of the state aid regime, DGIV in 1983 first communicated to Member States its intention to order recovery of aids deemed illegal (Commission, 1984, point 220; OJ C 318, 24.11.1983, p. 4). The following year the Competition Directorate fulfilled this pledge, insisting on full recovery of a state aid to a Belgian synthetic fibre producer ruled incompatible with the common market (Commission, 1985, p. 152). In response it became more common for Member States to consider the Commission's requirements for approval of aid prior to notifying DGIV of an aid scheme and to alter aid under scrutiny in order to gain final Commission approval.¹²

By the mid-1990s, DGIV had developed three means of altering the expected benefits of defection from competition rules governing state aid: information, deterrence, and institutionalization. The Commission had amassed a substantial base of information on the dimensions and types of aid paid by Member States; Member State governments regularly factored state aid rules into the process of designing aid;

and reported in 1985 that it remained unable to publish the report because 'despite several reminders, some Member States have still not provided the necessary information' (Commission, 1995, p. 151).

¹² Thus in its 1986 competition policy report, the Commission refers to 'the increasing trend for Member States to modify their initial proposals or to abandon them altogether after the Article 93(2) procedure is opened' (Commission, 1986, p. 138).

and DGIV had sufficient experience with the application of state aid rules to diminish the incidence of confrontation with a Member State government each time it attached conditions to the approval of an aid or ruled one incompatible with the common market.

Mechanisms of Institution-Building

What forces drove the development of the Commission's capacities in the area of state aid policy? The articulation of rules and communications to Member States in the 1970s and early '80s indicate that DGIV was interested in implementing a more rigorous enforcement regime after completion of the customs union. Yet enforcement capabilities lagged behind the Competition Directorate's preferences. Indeed, the buildup of the Commission's capacities coincided with the general retreat from extensive government subsidies as an instrument of economic policy and the movement toward fiscal austerity across western Europe. State-centric theory would point to the interests of Member States in a supranational reinforcement mechanism for their budget-trimming plans and a locus of blame for austerity policies.

However, while Member State governments are interested in increasing their own fiscal autonomy from domestic interests, they also wish to see their competitors reduce state aids in order to make it less costly for them to confer competitive advantages on their own industry, and they wish to retain substantial autonomy over industrial policy. Thus, while sharing a general interest in state aid control, powerful

Member States would prefer that there be substantial discretion in state aid enforcement, allowing them to capture the benefits of their superior bargaining strength vis-a-vis the Commission. Moreover, the state-centric hypothesis that a tougher regime is the product of state interests is reductionist, because ultimately the SEM is in the interests of Member States and state aid control is an integral part of the SEM.¹³ The state-centric claim also remains unfalsifiable unless we examine the mechanisms by which the capacities of the Commission grew from the early 1980s to the mid-1990s. In fact, Member State decisions played only an indirect role in the expansion of the Commission's institutional capacities and autonomy. There were three principal means by which this expansion took place: rulings of the Court of Justice, entrepreneurship by DGIV both in applying principles established in case law and in spinning a comprehensive web of state aid rules, and the increased involvement of sub-national actors in supporting the Commission's positions on aid cases.

Court Rulings

Rulings of the ECJ created opportunities for the

¹³ Taking a historical institutionalist approach, Sandholtz (1996) points out that the EU system is a complex of intertwined policies that prohibits the singling out and reversal of individual policies that have become inconvenient or costly for some member states. Provided the system as a whole generates benefits that exceed the costs of the undesirable policy, the member state will not abandon the entire project. See Sandholtz, 1996, p. 411.

Commission to augment the scope and rigor of its state aid enforcement regime and thereby lower the expected net benefits of defection in several ways. First, Court decisions prompted DGIV to make more extensive use of Article 93(2) proceedings, increasing the frequency with which Member State governments needed to alter aid schemes in order to gain the Commission's approval. The Court's rulings also increased the breadth of aid that could be judged incompatible with the common market. And perhaps most significantly for the Commission's authority, the Court enhanced the power of the Commission to compel Member States to provide information and to recover illegal aid. The body of case law developed over the past decade also demands that relations between Member State governments and public enterprises be sufficiently transparent to enable the Commission to carry out its obligations under Article 93, and that national measures not interfere with the enforcement of Article 93. These developments make noncompliance more difficult, increase the likelihood of detection of cheating, and rendering it problematic for Member State governments to ignore Commission decisions.

Two aspects of the impact of ECJ rulings on Commission capacities are particularly important. First, the impact of Court decisions depends upon the use the Commission makes of them (Alter and Meunier-Aitsahalia, 1994). Second, the Commission's exploitation of opportunities provided by Court cases is not limited to Commission victories. Successful suits of the Commission by Member State governments or private companies can also open doors for the Commission.

The 1984 judgment in *Germany v. Commission* (ECJ, 1984) provides an example. The case was brought by the Federal German government in 1981 after the Commission approved the Claes Plan, an aid scheme for the Belgian textile industry, without scrutinizing the aid according to the Article 93(2) procedure. The German government argued that this had denied interested parties the opportunity to present their views on how the aid scheme might affect their company or trade between member states. The Commission was 'defeated' in this case, and the Court annulled the Commission's decision, requiring it to reopen negotiations with the Belgian government on the textile aid plan (Commission, 1985, p. 127). Nonetheless, the decision empowered the Commission to be bolder in its use of the Article 93(2) procedure.¹⁴

¹⁴ Recent decisions by the Court of First Instance have enhanced the rights of third parties that lodge complaints against alleged recipients of aid, increasing the prospect that the Commission will in the future have to make still greater use of Article 93(2) to investigate the claims of third parties. The landmark case is the 1995 *Sytravel* judgment. In this case, several French companies filed a case against the Commission for failing to rule that the French government had infringed Articles 92 and 93 of the EEC Treaty by setting up state-owned commercial companies to provide security and other services for the French post office. This suggests that Court judgments not only empower, but can also constrain the Commission. The need to initiate more Article 93(2) investigations in response to third party claims would

Similarly, a decision that goes against the Commission can also enhance the Commission's ability to undermine the net benefits of defection by endorsing essential policy principles. This is the case for the 1984 Intermills judgment. In this instance the Court struck down the Commission's rejection of part of an aid to a Belgian paper manufacturer because the Commission had treated differently two elements of the aid, a capital injection from the Wallonian regional government and subsidized loans granted by the Belgian government (OJ 326, 7.12.84, p. 4). The Commission had interpreted the first as operating aid and the second as restructuring aid, while the Court ruled that the Commission had not provided sufficient justification for viewing the two parts of the assistance package differently. However, in its ruling, the Court established that a government's provision of new capital to a company as operating aid -- i.e., to rescue the firm -- can constitute aid and could therefore be declared incompatible with the common market (Commission, 1985, p. 128). As it had in the famous Cassis de Dijon decision, the Commission used this specific decision as a springboard to articulating broader policy principles (Alter and Meunier-Aitsahalia, 1993). DGIV distilled from the ruling the general concept of non-discrimination between types of aid; all forms of aid could be subject to state aid rules, including not only direct

in particular contravene the current efforts of DGIV to increase the resources it can devote to the largest, most politically contentious cases, as discussed below. Also see Ehlermann (1995).

subsidies, but also loans at below market interest rates, loan guarantees, tax and social security contribution relief, and direct provision of capital by any level of government on terms different from those that would be applied by a market investor (Commission, 1985, p. 129). This principle eventually was codified in the Commission's 1993 public sector transparency directive.

Court interpretations of Treaty provisions also have undergirded the Commission's capacities more directly by legitimating Commission actions challenged by Member State governments. The Court's July 1986 ruling in the Meura case, again involving Belgium v the Commission, established the power of the Commission to reach a negative decision on a state aid on the basis of incomplete information if the Member State does not provide full information requested by the Commission (ECJ 1986, pp. 2286-2288). The Court ruled that whether or not the Member State government could demonstrate that the assistance given was an integral part of a restructuring plan that would insure the viability of the firm and not distort competition, the case had to be judged on the basis 'of the information available to the Commission when the decision was adopted' (ECJ 1986, para. 16).¹⁵

In 1990 the Court's Boussac judgment gave the Commission authority to suspend the application of an aid granted without

¹⁵ This decision was confirmed in at least two additional cases also involving the Belgian government v the Commission, Boch (Case 40/85, ECR 2321), and Tubemeuse (ECJ 1990c: 1010, para. 18).

prior notification in accordance with Article 93(3).¹⁶ The Boussac procedure made it possible for the Commission to demand full information on the case within one month and, in the absence of full compliance, to declare the aid incompatible with the common market on the basis of the information at its disposal (Commission, 1991; ECJ, 1990a).¹⁷ The Commission could then order that the aid in question be recovered by the member state government. Thus in October 1995 DGIV demanded that Germany provide information on committed and planned investment by Volkswagen in its Mosel II and Chemnitz II projects, on production plans for both plants, and on the federal government's investment aid for the two projects, warning that it could make a final decision based on partial information if the German government did not comply within six weeks.

Boussac also confirms the authority of the Commission to issue injunctions requiring Member State governments either to supply information required to evaluate a state aid or to suspend payment of an aid until the scrutiny process has been

¹⁶ The Court ruled that requiring the Commission to first demonstrate any distortions caused by the non-notified aid would advantage those breaching their notification duties over those complying with notification requirements (ECJ 1990a, I 359, para. 33).

¹⁷ However, Boussac also established that the Commission could *not* rule an aid finally incompatible with the single market because of the procedural violation of non-notification. See Winter (1993), p. 312.

completed. Boussac was most recently confirmed by the April 1994 ruling in Germany and Pleuger Worthington v Commission (ECJ 1994). The Commission had declared an industrial aid offered by the City of Hamburg to prevent firms from fleeing in favor of regions with lower production costs incompatible with the single market according to Article 92(1) of the EEC Treaty. However, the ruling rejected the Commission's decision, reached on the basis of the incomplete information provided by Hamburg, because the Commission did not use its full powers to compel the authorities in the Member State to provide the information required. Nonetheless, the ruling confirmed the power of the Commission to order the interim suspension of an aid pending the provision of complete information and to reject an aid on the basis of the available information where the Member State government does not comply (ECJ 1994, I1205, para. 26).

The Commission also has garnered substantial power from ECJ rulings in its efforts to tighten the state aid enforcement regime by securing recovery of aid paid illegally by Member State governments. The authority to demand recovery is a critical deterrent to non-notification and the payment of illegal aid. Before gaining this authority, the Commission was limited to identifying illegal aid a posteriori and simply requiring that it be discontinued, allowing Member State governments to reap substantial net benefits from periodic defection from the state aid regime. The first Court decision explicitly stating that suppressing a state aid to fulfill its Treaty obligations could mean that the Commission demands

repayment of an illegal aid came in 1973 in *Commission v Germany (North Rhine-Westphalia)* (ECJ 1973). However, the decade-long lag in the Commission's application of this authority indicates that Court judgments alone do not create capacities for the Commission; they are necessary but not sufficient conditions for institution-building. At the time of this ruling, Commission authority over state aid was entirely consistent with the cost-benefit calculations Member State governments had made in the mid-1950s. Many of the cases that would have involved repayment concerned enterprises in financial difficulty at a time of deep recession. In addition, although the Commission was engaged in articulating rules governing state aid,¹⁸ the political climate of the 1970s and early '80s did not support policy entrepreneurship on the part of the Commission.

Most recently the Commission has sought to combine the powers of interim suspension and repayment in order to strengthen enforcement. Recognizing that even the suspension and prospect of eventual recovery of an aid might not be a sufficient deterrent to aid paid without the Commission's awareness or approval, DGIV in 1995 informed Member States that it would, in certain cases, call for recovery as an interim step prior to reaching a final decision on the compatibility of the aid with the Single Market. This measure would have the advantage of immediately reversing any distortions of trade resulting from an illegal aid rather than

¹⁸ For a brief discussion of Commission activity during the period of 'Europessimism,' see Ross (1995: 25).

allowing an aid recipient to garner competitive advantages while the aid is under examination. Citing the Boussac and Tubemeuse judgments, the Commission pointed out that this step stemmed from its authority 'to counteract any infringement of Article 93(3)' (OJ C 156/5, 22.6.95).

The principle that national measures can not interfere with the Commission's enforcement of Treaty articles 92 and 93 reinforces the power to require that aid be recovered. In the 1990 Alutechnik case involving the Commission v Germany, the Court rejected the German government's claim that enterprises receiving aid could legitimately expect that the aid was granted lawfully, placing the burden of diligence on recipients of aid (ECJ 1990b, I-3457, para. 14). Thus Member State governments could not rely on the 'legitimate expectations' argument as a means of avoiding compliance with a Commission decision instructing it to recover an aid. To do so would, in the judgment of the Court, enable the illegal conduct of Member State governments to nullify Articles 92 and 93 of the EEC Treaty (ECJ 1990b, p. I-3437, para. 17).

All of the Commission powers legally established by this body of case law -- expanded use of Article 92(3), the ability to compel Member States to provide additional information, the ability to make decisions based on partial information, the power to require recovery of an illegal aid, and the increased certainty of national transposition of decisions -- were made theoretically possible by the wording of Articles 92 and 93 of the EEC Treaty. However, the Commission could not legitimately exercise any of these powers without the Court's

support, and none of this institutional authority could have been factored into the cost-benefit calculations of Member State governments at the signing of the Treaty of Rome.

Entrepreneurship by the Competition Directorate

The costs to Member States of reversing the development of the state aid regime have been raised by other policy developments, such as the movement toward EMU and the selloff of public sector holdings. The Competition Directorate has sought to strengthen the perception that costs of backtracking would be high by 'upgrading the common interest,' explicitly tying state aid austerity together with other elements of integration, such as competitiveness and cohesion.¹⁹ The objective is to establish that a weakening of state aid rules would imply an unraveling of the substantial efforts made to realize the benefits of the single market and to improve the competitiveness of European industry in global markets. DGIV has tried in this manner to further depress national governments' expected net benefits of defecting from the state aid regime by raising their estimates of the negative impact of cheating on the collective endeavor. It is not clear that

¹⁹ In their study of the role of the Court, Burley and Mattli (1993, pp. 68-9) describe this as a 'teleological method' of using elementary Community goals as a basis for rationalising the Court's interpretations and to 'enhance Community authority'. The Commission frequently invokes fundamental objectives and shared preferences in a parallel fashion.

the Commission has had a significant impact here; certainly the effect of increasing the probability and costs of detection is larger and more direct.

Additionally, by broadening the applicability of state aid regulations, DGIV has provided for itself some protection from the political pressures that attend the process of policing aid. As one Commission official noted, frameworks are critical for depoliticizing state aid cases because 'with only Article 93(2), the margin of discretion is large and can be abused.'²⁰

The Commission has garnered substantial leverage in evaluating state aid in the manufacturing sector since generalizing the market economy investor principle agreed in 1981 by the Council for the steel and shipbuilding sectors.²¹ Setting out its position on capital injections by public authorities in 1984, the Commission asserted that 'there is State aid where fresh capital is contributed in circumstances that would not be acceptable to a private investor operating under normal market economy conditions' (Commission, 1995, p. 105). This includes conditions in which the company could not be expected to generate a normal return on the funds invested by the government, would be unable to raise funds on the capital market, or where the investment from the public sector is disproportionate to its stake in the enterprise relative to

²⁰ Interview with author, October 1996.

²¹ Decision 81/2320/ECSC of 7.8.81 (OJ L 228, 13.8.81, p. 14), and Council Directive 81/363/EEC of 28.4.81 (OJ L 137, 23.5.81, p. 39).

private shareholders.

In the wake of the Single Market, the Commission joined broader application of the market economy investor principle with renewed emphasis on transparency in the public sector. Public sector transparency became a Commission priority when a series of large cases in the mid-1980s in sectors like motor vehicles with increasingly serious overcapacity, made clear both the vastness of the gaps in the Commission's information and the impossibly opaque relations between governments and public sector enterprises in some Member States.²²

Broadening the applicability of principles agreed by the Council and sanctioned by Court rulings is closely linked with a second means of institution-building. This consists of efforts by the Commission to seal holes in its web of state aid rules. An important recent example concerns the announcement in 1996 of new rules governing aid granted in support of job creation. The Commission's primary task is to distinguish between aid designed to stimulate employment, especially among certain categories of workers such as the long-term unemployed, and that to preserve jobs in particular firms or sectors and which may therefore be viewed as an

²² When Peter Sutherland took over as competition Commissioner in 1985, he discovered that the state aids directorate had little aggregate data on aid levels, and set up a task force to begin compiling such data. This task force became institutionalized as the state aids directorate's analysis unit and in the form of biannual surveys of state aids.

impediment to structural adjustment or as bestowing a competitive advantage relative to firms in other EU Member States.²³ In order to accomplish this, the Commission's criteria focus on the location and types of firms aided, categories of workers targeted, and the terms of the jobs created. Consistent with the competitiveness objectives set out in the 1993 White Paper on growth and employment, the criteria favor job creation assistance aimed at small and medium enterprises and areas eligible for regional aid, workers experiencing particularly severe employment difficulties, creation of stable jobs, and provisions for training. While the Competition Directorate must tread carefully in the face of claims that particular aids are designed to boost employment, it recognises the potential for 'job-creation' to become a catch-all category justifying a host of distortionary aid and conflicting with several other objectives of integration. Adding this framework to its

²³ In its guidelines the Commission warns that 'without rigorous controls and strict limits, employment aid can have harmful macroeconomic effects which cancel out its immediate effects on job creation. If the aid is used to protect firms exposed to intra-Community competition, it could have the effect of delaying adjustments needed to ensure the competitiveness of European industry.' Furthermore, 'the fact that such aid will probably be concentrated in the most prosperous regions runs counter to the objective of economic and social cohesion.' OJ C 334, 12 December 1995, p. 6, paragraph 12.

superstructure of rules, DGIV in effect enlarges the 'neutral zone' of decision-making justified by non-political objectives (Burley and Mattli, 1993, p. 72).

The Role of Nonstate Actors

In the emerging European polity Member States are not fully in control of the diffuse agenda of European construction; even in areas where they are central in defining the agenda, they do not control policy outcomes. In the case of state aid policy, the growing involvement of trans-European and subnational actors has been fostered by DGIV's activism. This is an example of the way in which 'policy creates politics,' one of the policy feedback effects discerned by historical institutionalist analysis (Pierson, 1992). This role of nonstate actors has gained increasing significance for the terms of the state aid regime.

The Treaty articles governing state aid provide for the opportunity for all interested parties to submit to the Commission relevant information when Article 93(2) proceedings are initiated. Both anecdotal and more systematic information suggest that third party interventions have become significant both in numbers and impact on Commission decisions, sometimes providing DGIV with evidence that weighs against the objectives of Member State governments.

Data compiled from state aid decisions published in the Official Journal support the claim that the Commission's visibility in state aid enforcement has encouraged the involvement of a wide range of nonstate actors. One effect is

that these actors in essence become allies of DGIV as it enforces its state aid rules when decisions are contested by individual Member State governments. Historically, large aid cases typically have been met with responses from other Member State governments with substantial interests in the market in question. While this practice continues, in relation to Member State responses, the frequency of responses from private competitors, including individual firms, attorneys representing firms, and European or national producers associations, has grown enormously.

These trends are revealed by a comparison of decisions published during the 1985-86 period with those published during 1995-96. First, the frequency of responses from national governments has declined. Member State governments responded in 13 of 14 cases during 1985-86; there were a total of more than 35 responses, an average in excess of 2.5 per case.²⁴ During 1995-96, there were a total of 23 Member State responses in 40 cases, an average of slightly more than 0.5 per case. Conversely, responses from nonstate actors increased slightly. While the average number of responses per case is approximately 1.8 for 1985-86, it increases to 1.9 for

²⁴ In some cases the Official Journal simply reports that 'several' Member States responded. In such cases a figure of 3+ was assigned to the case. The same applies to business associations, though there are references to 'several' in only two cases.

a much larger number of cases a decade later.²⁵ Thus there were approximately 0.7 nonstate responses for every Member State response during 1985-6; this ratio increased to 3.8 a decade later.

Of 17 decisions outside the agricultural sector reported in the Official Journal 'L' series during the first 9 months of 1996, there were responses to the Commission's invitation to submit relevant information in 12. In only 1 of these cases was the response restricted to other Member States. In the remaining 11 cases, there were a total of 13 responses from Member State governments; 26 competing firms; 8 national or European producers associations; 1 law firm representing a competing company; and one union representing employees in a competing company. In addition, there was one response from a supplier of the state company that was a recipient of the aid under examination and one from legal representatives of banks that had granted a loan secured by a Member State government. In at least two of these cases the scrutiny was set in motion by complaints from the aid recipient's competitors; in several instances in which the Commission ruled the aid in question incompatible with the common market, the arguments and evidence presented by nonstate actors coincided with the rationale provided by DGIV for judging the aid illegal. The overwhelming majority of responses seeks to sustain the claim that the aid under scrutiny distorts competition.

²⁵ There were approximately 25 responses in 14 cases for 1985-86, and 74 responses in 40 cases in 1995-96 (including only the first 9 months of 1996).

Thus a growing number and range of nonstate actors have come to view the Commission as an important interlocutor in the development and enforcement of competition policy. By articulating a growing web of state aid rules DGIV has fostered increased activism at the European level by firms and industrial associations interested in a regime of rigorous scrutiny. These actors generally bolster the Competition Directorate's efforts to uphold the state aid rules in the face of political pressures from Member State governments, though they also can constrain the Commission itself by requiring it to devote resources to cases it is not yet prepared to address, particularly those involving commercial activities of public services (see note 11).

The Scope of Commission Autonomy

A more rigorous state aid regime has been possible for reasons beyond the shift by Member States toward fiscal austerity. To begin with, convergence on the preference for fiscal austerity does not imply convergence of mechanisms of industrial policy across EU Member States (Garrett, 1992, p. 535). While the Competition Directorate seeks to minimize conflict with Member States, there have been acute tensions between state aid enforcement and preferred industrial policy objectives of Member States. In these instances, Member State governments have not been able to escape compliance with Commission decisions by invoking the priority of industrial policy objectives.

For example, as a consequence of an Article 93(2)

proceeding, the Commission became instrumental in setting in motion the privatization of the surviving concerns of Italian state holding company, EFIM. Article 2362 of the Italian Civil Code establishes that a 100% shareholder of a firm guarantees its total debts in an unlimited amount. Arguing that such a guarantee offered by the government represents a state aid that distorts intra-Community trade, the Commission in 1993 ruled that the government would either have to amend the Civil Code or reduce its holdings in the subsidiaries reformed after the liquidation of EFIM. The agreement reached between Competition Commissioner Van Miert and the Italian Foreign Ministry included a commitment by the Italian government to reduce its shares. In addition to this immediate consequence, the more far-reaching result was to shift the balance of political debate within a stalemated governing coalition in favor of privatization.

Acting in the Council Presidency, the Italian Industry Minister in 1990 requested that the Commission, in accordance with Article 94, propose a regulation allowing the Council to specify the criteria for evaluating state aid cases. The Italian government was concerned about the Commission's tougher stance on state aid, arguing that the constraints on industrial policy resulting from the Commission's state aid regime would disadvantage EU Member States vis-a-vis competitors outside the EU (Agence Europe, 1990). Competition Commissioner Leon Brittan declined to submit a draft regulation, and rejected Italian Industry Minister Battaglia's interpretation of Article 94, arguing that the

Treaty provided for a separation of powers between the Commission and the Council, with the intention that the Commission be exclusively responsible for applying the conditions specified in Treaty Articles 92 and 93 (Agence Europe, 1990). Only in November 1996 did the Commission bring a preliminary proposal for a regulation on the basis of Article 94 to the Council. However, the Commission did so out of concern with its expanding workload rather than Member State demands for broader discretion in industrial policy.²⁶

Liberal intergovernmentalism posits that the incentive for governments to delegate authority will be high where delegated decisions are unlikely to be biased against any national government 'or major domestic interest group' (Moravcsik, p. 511) Moreover, Garrett (1992) asserts that although the Court has substantial power to shape the European polity by its decisions, those decisions are unlikely to run afoul of the interests of the most powerful states. Such an argument does not hold for the Commission's application of state aid policy. The 'neutral' state aid regime is biased against those governments with the greatest ability to pay subsidies (except when they need the help of the Commission to fend off domestic constituents), and especially against states with strong traditions of industrial aid. In this sense, the state aid

²⁶ Such a regulation would also give a firmer legal basis to Commission frameworks and guidelines by incorporating them into EU Directives.

regime may be most biased against France and Italy.²⁷ Garrett argues that 'France and Germany...are both concerned that the internal market not result in the dismantling of stringent financial regulation, active industrial policies, and other aspects of their domestic political economic regimes that they deem central to their economic performance' (Garrett, 1992, p. 559). However, state aid policies now demand, if not an end to active industrial policies, at least very substantial reconsideration of the mechanisms to be employed. Indeed, it is France that continues to be the source of major state aid cases and controversies. Germany, meanwhile, expresses concern that the Commission, under pressure from competing firms and Member States, is beginning to depart from its hitherto indulgent attitude toward aid in the eastern Länder.

Several areas of potentially large state aid, including the public services and banking sector, remain unmined by the Commission. However, recent developments in state aid policy reflect DGIV's efforts to extend the regime into these sensitive areas. In November 1996 the Commission informed the Council of its intention to submit draft legislation for the use of Article 94 to place state aid control on a regulatory basis. DGIV hopes to exclude from Article 93 notification requirements several categories of aid, such as aid to small and medium enterprises (SMEs). This approach to state aid

²⁷ Germany arguably fits in this category, but aid paid by the German government typically is part of large regional aid schemes or aid for research and development, both forms of aid viewed favorably by DGIV.

policy at first appears puzzling given the painstaking process by which the Commission has built up its capacities to control aid. Yet while risky, the attempt to employ Article 94 is entirely consistent with the DGIV's approach to state aid policy development. Provided that Member State governments regulate only those categories of aid proposed by the Commission,²⁸ the impact of regulation will be a sharp reduction in the DGIV's caseload, alleviating it of the burden of hundreds of small cases, many involving SMEs that have difficulty raising private funds and which are at the core of the Competition Directorate's strategy for bolstering competitiveness and creating jobs. In addition, the regulation would establish procedures for third party

²⁸ The Competition Directorate intends to withdraw its draft proposal if the Council seeks to substantially revise the categories of aid excluded from notification requirements. DGIV sought to reduce the risks by attempting to introduce the proposal under the Irish presidency of the Council, since the Irish government supports the increasing rigor of state aid enforcement. However, when the proposal was discussed at the November 1996 Industry Council, some member states feared that the Commission sought to use the proposal to enhance its powers, while the cohesion states (excluding Ireland) led by Spain sought to tie the discussion of state aid enforcement to the renewal of the cohesion funds. DGIV's position is that Article 94 cannot involve any shift in the institutional balance; the regulations will apply to *procedure* but will not effect the Treaty-based competence of the Commission.

complaints that would limit the resources DGIV would have to devote to these cases, allowing it to focus on the most important cases and forward-looking policy development. Intense political lobbying takes place in only a small percentage of aid cases, and these are precisely the cases to which the Competition Directorate would be able to devote more resources. Ironically, DGIV could enhance its independence and enforcement capabilities by directly involving the Council in regulating an area of exclusive Commission competence.

Conclusion

During the past two decades the European Commission's Competition Directorate has developed a rigorous regime of state aid control. Member State governments take account of the Commission's requirements in designing aid, DGIV has substantial powers to acquire the information it needs to evaluate cases, it has publicized its role sufficiently to engage a growing number of non-state actors in the process of state aid enforcement, and it has begun to develop closer relations with national courts to pursue enforcement, including repayment of aid illegally disbursed. While instances of noncompliance with the requirement to notify the Commission of intended aid and challenges to the Commission's authority certainly continue to take place, DGIV has succeeded in insulating itself from some of the political pressure implicitly attached to enforcement of state aid policy by developing a superstructure of rules on the basis of Treaty Articles 92 and 93.

Why haven't Member States been able to control this policy regime more closely? Early on, they did. The state aid regime emerged from Treaty articles forged by Member State executives. In its early development, this regime was extremely circumscribed by the preferences of national governments and their needs, first for coordination of regional aid schemes, then for orderly reduction of excess capacity in declining sectors like coal, steel, and shipbuilding.

However, the desire of Member States to rein in competitive subsidization of enterprises created permissive conditions for the development of a broader regime. An actor-centered approach to studying European integration suggests that some actors within member states have incentives to maximize values other than state sovereignty, such as electoral fortunes, standing with a particular constituency, or simply adherence to strongly-held beliefs (Marks, Hooghe and Blank, 1996: 350). Reflecting this reality are a host of state aid cases, like the recent example of Spanish air carrier Iberia, in which ministers willingly yield to the Commission's authority in order to advance objectives like a shift in the culture of public enterprise away from reliance on heavy government subsidization.

Yet the Competition Directorate, increasingly empowered by the Court and, eventually, preparation for the Single Market, exploited the opportunity to enhance its own autonomy and eventually to create its own opportunities for institution-building. Thus the development of state aid

policy demonstrates that while the opportunities for supranational institutions to expand their role in European construction are broadened or limited by the choices of Member State governments, the processes set in motion by those choices may yield far more authority for supranational institutions than Member State governments would choose to delegate. In enforcing its state aid policy, DGIV has acquired a significant degree of autonomy from the interaction between institutions, its own entrepreneurship, and the responses of non-state actors to its activities. As a consequence of the processes by which the state aid enforcement regime has grown, Member States would encounter high costs in reversing the Commission's authority. This would require treaty revision which, in addition to the obstacles presented by the requirement of unanimity, could threaten the entire single market project.

Intergovernmentalism suggests that delegation of enforcement authority represents a tradeoff between political risk and strengthened credibility of national commitments to the collective institution. The political risks are small because the scope of enforcement is circumscribed by 'existing EC law' and the willingness of Member State governments to comply (Moravcsik, 1993, p. 512). However, in the area of state aid, the landmark case law follows rather than precedes the grand bargain struck in 1957, and ECJ judgments along with the Competition Directorate's deployment of Court decisions have given DGIV considerably greater authority to decide and to enforce its decisions than originally anticipated. The

implications for state aid policy are similar to those for the Court's role in constitutionalizing the Treaty of Rome. As for the supranational delegation to the Court, the decisions of the Commission on state aid 'clearly transcend what was initially foreseen and desired by most national governments' (Moravcsik, 1993, p. 513).

Delegation is likely where cheating can undermine mutual gains from cooperation and monitoring and enforcement are costly. In the case of state aid, signatories to the Treaty of Rome perceived cheating as easy, meaning that the expected benefits of defection were quite high. The fact that this is no longer so and that the Commission is largely responsible may explain why, were Member States given the choice today, they would not likely delegate the same powers to the Commission that they did forty years ago.

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