Per Se or Rule of Reason Criteria for EU State Aid Procedure?

Anna Nowak, Ph.D. Researcher
European University Institute, Italy
35th EALE Annual Conference, Milano, September 2018

Abstract
This paper discusses the probability of decisional errors (false positives and false negatives) in EU State aid procedure before the Commission. This issue, ignored by the literature on State aid law, and approached only to a limited extent in the general competition law literature, might be of practical use for the design of State aid law. Indeed, the probability of error, together with the cost of error, determine the expected cost of error (PC) – therefore, the latter may be reduced by lowering any of the variables. This paper discusses only the first of them.

For this purpose, the paper identifies some factors, which may influence the probability of error in State aid assessment: informational asymmetries between the Commission and participants to the procedure, which are difficult to overcome due to argument-based assessment criteria and poor evidence requirements. Based on characteristics of the procedure and on a sample of Commission’s decisions, a conclusion may be drawn as to the probability of error (error-proneness of decisions) at each procedural stage – there is a significant difference in accuracy between the two phases of the procedure. Then, the author looks into the statistics of the Commission’s State aid decisional practice (distribution of the decisions according to their type and procedural stage), which allows to consider that decisions are taken mainly in the most error-prone phase. Hence, it is possible that the risk of error materialises in a non-negligible number of cases, and that current criteria of assessment are sub-optimal, since they should be adjusted to the fact that practically all State aid control is concentrated in the preliminary examination. Following this observation, the author proposes a solution in order to lower the probability of error, which favours a ‘Per Se approach’ to criteria of assessment: simplification of the assessment by clarifying the criteria and recurring less to case-specific considerations.

Naturally, this brings up the discussion about inaccuracy caused by too general Per Se provisions, as opposed to a more effective distinction between pro- and anti-competitive practices derived from the Rule of Reason. In this context, the paper suggests that it is necessary to find the balance between error in application of rules and error caused by unsuitability of Per Se criteria to some cases. In particular, it suggests that adapting the criteria to the capacities of the preliminary examination limits the possibility of using the Rule of Reason and tears optimal criteria towards Per Se side. This state-aid-specific conclusion should inform law-makers in defining individual criteria of assessment, so that it is possible not only to effectively distinguish between desirable and undesirable measures in theory, but also to ensure an effective application of law.
Summary

Introduction

EU State aid law and enforcement are a delicate matter: if one aims to control expenditures of states within the framework of an international organisation, he needs to realise that by definition, this control will have a character significantly different than control of private actors’ behaviour. Such a law will differ as regards its scope, objectives and limits, and it will require a new look at issues known from other fields, as well as more cautious propositions for improvement. In this context, the present paper will endeavour to uncover, and still only partially, the question of errors in State aid enforcement by the Commission, more specifically the probability of error in the basic State aid procedure.

The analysis of accuracy in decision-making is nothing new: lowering costs of errors has been for quite some time an object of discussion in the literature. It also seems that the objective of accuracy informs law-makers, and inspires changes in the spirit of a more economic approach, which did not spare EU State aid law.

As regards, generally, the issue or error in decision-making, the literature provides for considerations related mainly to the relationship between error and the probability of detection of infractions, the related impact on deterrence and optimal sanctions, and the costs of increasing accuracy. ¹ A more detailed discussion has been undertaken in some fields of law, such as antitrust, involving considerations on the preference between Per Se and Rule of Reason (effect-based) legal standards, optimal sanctions, information problems and preference between false acquittals and false

The conclusion is more or less uniform throughout the literature: more Rule of Reason leads to less errors in assessment.

However, accuracy is analysed mainly from the perspective of an effective distinction between pro- and anticompetitive practices. Indeed, the problem of error in application of law is not explicitly and separately analysed, and informational and rent-seeking problems are considered as one of disadvantages of the Rule of Reason. Hence, error in application happens not even to be called an ‘error’.

Whatever the reason for this, this conceptual framework stands in clear opposition to the conclusions this paper aims to draw. Indeed, this is the very aim to achieve correct outcomes that may argue against the Rule of Reason, due to a high risk of error in application of law. Such an uncommon approach is adopted in this paper because the author finds it particularly interesting and powerful in the field of State aid control, where a better distinction between good and bad practices may lead to a reduction of the overall cost of error only to a limited extent. All in all, an error in application of law is a costly failure to achieve the desired outcome; incorrect outcome – an error – is caused by any of the two issues, and accuracy in decision-making depends on both.

Moreover, the analysis in antitrust may not automatically be transposed to the field of State aid due to particularities of the latter, just to mention involvement of Member States (acting repeatedly) or Commission’s limited investigatory powers. At the same time, the State aid literature is silent on the point of accuracy in decision-making, even though there obviously is some critique of substantive and procedural law, the latter mainly from the perspective of third parties. Moreover, the literature employs rather a general, abstract approach to State aid control, without referring to statistical data on

---


3 Christiansen, Arndt and Kerber, Wolfgang. 2006. Competition policy with optimally differentiated rules..., op. cit., p. 224 and 229


the decisional practice of the Commission, while the main discussion in this paper is constructed precisely on the basis of, and is justified by, this practical aspect.

It is essential to recall that this paper focuses only on the probability of error, leaving aside its costs. Indeed, once the costs are taken into account, the best solution would not have to be to lower the probability of error. First, it might be preferable to make the Commission err differently, based on costs of different types of errors and the resulting preference between them. Second, it might be more interesting to strengthen ex post error correction mechanisms. It is, though, not the objective of this paper to discuss and compare these different options, the sole focus being placed on the probability of error. In the same vein, the conclusions of this paper constitute a suggestion, but by no means prescribe lowering the probability: the idea is to discuss one of possibilities to decrease the expected cost of error in State aid assessment.

In order to further narrow down the scope of analysis, this paper only deals with the basic, “core” State aid proceeding – assessment of notified state measures. Secondary issues, such as recovery of aid, interim measures, conditions joint to positive decisions, simplified procedure, implementation of Commission’s decisions, infringement of standstill obligation, review of existing aid, and damages claims will not be covered. The analysis will pertain solely to notified new aid, which constitutes around 90% of aid, and will exclude arrangements made as a reaction to the financial crisis, due to their extraordinary character. These limitations are necessary, since most of the issues that will be discussed have not yet been covered by the literature, and it is thus impossible to make their analysis comprehensive and at the same time understandable in one paper.

This paper will be structured as follows: Section 1 will very briefly describe substantive law of State aid, in order to define error in State aid assessment. Section 2 will prepare the ground for the main discussion, by presenting relevant procedural provisions, distinguishing between two types of assessment criteria, and linking the latter to evidence requirements. The key characteristic of State aid control – reliance on the notifying State – will be analysed in Section 3 from the perspective of informational asymmetries. From that, the probability of error at each stage of the procedure will be derived in Section 4. In order to verify whether the risk of error may in fact materialise, Section 5 will present statistics of State aid control. Finally, Section 6 will attempt to suggest a probability-lowering change in State aid rules, drawing from, and contributing to, the discussion on Per Se rules against Rule of Reason. Section 7 will conclude.

---

6 One of the exceptions is the analysis of the statistics of the General Court’s case-law in competition law, including State aid in: Merola, Massimo. *The role of the Court of Justice... op. cit.*
1. What is error in State aid assessment – basic substantive provisions.

Traditionally, one distinguishes between two types of error: false convictions and false acquittals. This terminology, initially applied to criminal law,\(^7\) is now employed also in other fields, like antitrust.\(^8\) Often, false convictions are called ‘Type 1 errors’ or ‘false positives’, while false acquittals are called ‘Type 2 errors’ or ‘false negatives’. Hence, a Type 1 error is understood as disapproving benign actions, and Type 2 error as approving harmful actions.\(^9\) This terminology may be transposed to State aid law; before that, it is necessary to recall what State aid control consists in.

Article 107 TFEU gives basis for a two-fold appraisal by the Commission. Paragraph 1 sets out criteria that the measure must cumulatively meet in order to be considered as a State aid. It also lays down the general incompatibility rule: if the measure is qualified as aid, it is considered to be incompatible with the internal market. As a result, it may not be granted by the Member State and if it has already been granted, it must be recovered from the beneficiary.

Regardless of the general incompatibility rule, it is possible that a measure that constitutes aid is compatible with the internal market. Exemptions are foreseen in paragraphs 2 and 3 of Article 107. The difference between them lies in the fact that measures falling under Article 107(2) must be approved by the Commission while those falling under 107(3) only may be considered to be compatible with the internal market. The Commission disposes of a whole range of acts of soft law, which contain detailed criteria for assessment of compatibility of measures. If the measure is considered compatible, it is approved, in the opposite case, it may not be granted.

Without even getting into the procedural framework of State aid control, it is straightforward to observe what kind of decisions the Commission takes. First, these are decisions by which a measure is approved: that a measure does not constitute aid (assessment based on Article 107(1)), or that the measure constitutes aid but it is compatible with the internal market (on the basis of Article 107(2) or (3)). These are positive decisions. Second, there are decisions by which a measure is disapproved: that the measure constitutes aid and is incompatible with the internal market (on the basis of Article 107(1), because the exemptions from (2) or (3) do not apply). These are negative decisions.

Hence, a Type 1 error (false conviction) in State aid consists in an erroneous negative decision: it disapproves a measure, which in fact does not raise concerns from the EU State aid law point of view. It means that the Commission erroneously considers an aid to be incompatible with the internal

---


market. The Commission may also erroneously consider that a measure constitutes aid: however, such a decision is not final, since it must necessarily be followed by a compatibility assessment. A Type 2 error (false acquittal) consists in an erroneous positive decision, which mistakenly approves a measure. 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.

Different sources of error are presented in the following diagram.

2. **State aid procedure, assessment criteria and evidence requirements.**

Knowing *what* kind of errors may be made by the Commission, it should be assessed *why* these errors may be made. The elements that will constitute the basis for examination of the risk of error in State aid assessment are, first, State aid procedural rules, second, criteria for assessment, and third, evidence requirements imposed on actors submitting information.

### 2.1. The preliminary examination

Detailed rules of State aid administrative procedure before the Commission are contained in the Procedural Regulation,\(^{10}\) which introduces a distinction between two stages: the preliminary examination and the formal investigation procedure.\(^{11}\) In line with Article 108(3), a Member State that wishes to grant aid notifies its project to the Commission. Once the notification received, the Commission opens the first phase of the procedure: the preliminary examination. Its purpose is to enable the Commission to “form an initial view as to the

---


\(^{11}\) Terms ‘Phase 1’ and ‘Phase 2’ are not used in the Procedural Regulation, but will be used in this paper for simplicity.
partial or total compatibility of the aid in question with the [internal] market.”

Following this logic, this phase was envisaged to last no longer than 2 months; in practice, the procedure often takes longer.

At this stage of the procedure, the Commission exchanges information only with the notifying State. It may not require information from actors such as the beneficiary of aid, its competitors or other States. Moreover, interested parties may not even voluntarily participate in the preliminary examination by submitting their comments. Therefore, this part of the procedure takes place exclusively between the Commission and the notifying State.

At the end of the preliminary examination, the Commission decides either to end the procedure (by a decision that the measure does not constitute aid or by a decision not to raise objections) or to open the formal investigation procedure.

2.2. The formal investigation procedure

The Commission is obliged to open the formal investigation whenever “it has serious difficulties or doubts in determining the compatibility of the aid... and/or difficulties of a procedural nature in obtaining the necessary information.” The formal investigation, whose duration shall not exceed 18 months, allows the Commission to be “fully informed of all the facts of the case”. It ensures “a comprehensive examination of the case by exploring doubtful matters further with the Member State concerned and by hearing the views of interested parties.”

At this stage of the procedure, interested parties may submit comments; the Commission may also address requests for information to any Member State, undertaking or association of undertakings. Since 2015, the Commission may impose sanctions for providing incorrect or misleading information or failing to submit it, but this threat does not pertain to Member States.

At the end of the formal investigation procedure, the Commission adopts a positive, conditional, negative decision or a decision that the measure does not constitute aid. If the information obtained is insufficient to prove compatibility of aid, the Commission shall take a negative decision.

---

12 C-646/11 P, 3F v Commission (2013) ECLI:EU:C:2013:36, para 24
13 Procedural Regulation, Art. 4(5)
14 The period starts running only when all information is obtained: if the State submits an incomplete notification, the Commission addresses to it a request for information and waits for the response. E.g. in case C-99/98, Austria v Commission (2001) ECLI:EU:C:2001:94 five requests for information were sent to the State and 18 moths separated the notification from the opening of the formal investigation.
15 The lack of procedural rights has been confirmed by the Court, eg in T-79/14, Secop v Commission (2016) ECLI:EU:T:2016:118, para 64
16 Manual of Procedures, at 6.4
18 Manual of Procedures, at 6.2
19 Ibidem, Art. 7(6), (7) and 8(1) (2)
20 Ibidem, Art. 9(7)
2.3. Limited powers as compared to antitrust and merger control

The investigative powers of the Commission in State aid control are more limited than in other fields of competition law. Similarly, the process of reaching the final decision seems less complicated, in the sense that the Commission is required to do less than in antitrust/merger proceedings. In other words, the Commission has both less rights and less obligations. This observation pertains to the formal investigation and, a fortiori, to the preliminary examination.

Some of the limitations are: lack of the power of inspection, lack of a body to consult projects of final decisions (an Advisory Committee), no general obligation to define the relevant market, limitation of the use of some investigatory powers only to Phase 2 of the procedure (as opposed to merger control), or no right of access to the file for interested parties.

2.4. Criteria of assessment of State measures

Criteria used by the Commission in the compatibility assessment of measures may be systematised into two groups, each of them requiring a different type of information. Thus, a difference may be made between ‘technical’, ‘black or white’, ‘one-piece information’ criteria on the one hand, and ‘argument-based’, ‘open-ended’, referring to unclear notions criteria on the other.

The first-type information covers numerical data and clearly defined, unambiguous information, needed to answer straightforward ‘yes or no’ questions; it could be called ‘objective’. Often, it is composed of only one piece, which makes the assessment, evidence requirements and the decision about the completeness of information relatively uncomplicated. As a general rule, an evidence provided for such a circumstance makes the assessment undisputable and excludes the possibility of arguing the other way: there is no room for interpretation and argumentation.

This is opposed to the subjective character of the second-type information. The latter consists in interpretation of factual and legal circumstances of the case and is thus composed of many pieces. Its trait is that the very submission of information already involves some interpretation of the situation, reflected either in the choice of information provided or its presentation. To an argument or evidence going in one direction often corresponds a counter-argument or counter-evidence.

Deducing from the acts of soft law and from Commission’s decisions, one may get a feeling about which criteria belong to which category. Argument-based assessment criteria slightly prevail in State aid design. May be considered as such: contribution to an objective of common interest, necessity and appropriateness of aid, and negative effects of aid under Research & Development & Innovation Framework\(^\text{21}\) and Guidelines on State aid for environmental protection and energy.\(^\text{22}\)

\(^{21}\) Communication from the Commission — Framework for State aid for research and development and innovation, OJ 2014/C 198/01

\(^{22}\) Guidelines on State aid for environmental protection and energy 2014-2020, OJ 2014/C 200/01
distortive effects of aid involve a number of elements, which require a deeper look into the market and market operators.

On the other side, ‘black or white’ criteria are those defined by thresholds, simple checklists, or calculation-based. Apart from obvious examples, such as calculation of aid intensity, may be defined as such proportionality and incentive effect of aid, as well as negative effects of aid and balancing test under Regional Aid Guidelines. Even though these criteria could seem intrinsically open to argumentation, they have been evolved into a set of technical, objective pieces of information.

Because the Commission does not carry out its own fully-fledged investigation (eg it does not delineate the relevant market), it is relevant what evidence it requires from actors submitting information in order to prove a given circumstance.

2.5. Low evidence requirements

Adding to the situation, the Commission’s practice as regards evidence requirements is surprisingly disappointing. Broadly speaking, the quality of evidence and of information provided by the notifying State depends on the State itself. Indeed, with regard to a given element of assessment, there are cases in which Member States provide very detailed information, accompanied by studies and estimations, and there are others, in which they submit modest evidence, focusing on their own speculation and presentation of the context. In any of these situations, the Commission is rather uncritical and willing to issue a positive decision. Therefore, in some cases Member States prove their statements, while in others they only convince the Commission to their statements.

The inconsistency between Member States’ commitment to precision is readily noticeable throughout Commission’s Phase 1 decisions. On the contrary, in the formal investigation the Commission requires the notifying State to substantiate its statements, if not by strong evidence, at least by a very detailed explanation.

24 This part constitutes a fragment of: Anna Nowak ‘Evidence Requirements in the State Aid Compatibility Assessment’ (2018) 17(2) European State Aid Law Quarterly 212, in which this issue has been discussed extensively
27 E.g. Commission decision of 24 June 2015 on State aid SA.34992; Commission decision of 11 March 2014 on State aid SA.38129
Overall, it may be said that the notion of evidentiary standards in State aid procedure is very blurred and that it is up to the notifying State to select more or less hard proof for its statements. More importantly, while evidence requirements could mitigate problems created by argument-based criteria, they only exacerbate these problems. Indeed, when a State uses information by which it argues in favour of the measure, it is particularly important to verify the source of this information: the evidence allows to distinguish original information from its presentation and interpretation by the State. Current evidence requirements do not constitute such a filter.

To sum up, what characterises State aid procedure are Commission’s limited investigative powers, especially in the preliminary examination, as well as a strong reliance on the State. Moreover, an important part of criteria of assessment are argument-based, while evidence requirements imposed on Member States are relatively weak. These flaws matter because they preclude the Commission from obtaining the necessary information.

3. **Informational asymmetries in State aid procedure – disadvantages of relying on the State**

During any State aid procedure, the Commission needs to gain knowledge necessary to decide on the case. It may obtain information from different actors; however, its main partner throughout the procedure is the notifying State. This choice determines the whole architecture of State aid control, at the detriment of interaction with other actors. However, reliance on the notifying State may be detrimental for accuracy in decisions. It is due to informational asymmetries between actors in State aid procedure, difficult to overcome especially in the case of argument-based assessment criteria, supported by low evidence requirements.

In this context, two main informational asymmetries may be observed: between (1) the Commission and the State, and (2) the State and other market operators. These asymmetries and possible ways of overcoming them will be discussed below.

3.1. **Informational asymmetry between the Commission and the notifying State**

Generally, the Commission knows less 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, a 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.

Indeed, the notifying State actually wants to grant the aid: it is not an impartial actor providing information. Rather, it acts in its own case and therefore, it naturally advocates for approving the measure. It may well be that Member States accepted State aid control and generally act in good faith;
but it is difficult to argue that the willingness to act at the expense of the internal market, especially at
the rise of euro-sceptic governments, has completely disappeared.
Moreover, it is still true that governments may be willing to go for short-term benefits of aid rather
than focus on its long-run harmful effects. Moreover, it may be observed that Member States are
determine to grant aid, especially in the cases in which they argue strongly, and even against the
Commission, on admissibility of measure, and in numerous cases in which they bring actions for
annulment against negative decisions. Finally, it has been suggested in the literature the reason for
keeping procedural rights of third parties below standards adopted in other fields of EU law, is that
these rights go against Member States’ interests in granting aid.
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 this
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, allowing to obtain the green light. It may
submit incomplete notifications and provide information only at the request of the Commission,
hoping that the latter does not ask for everything it knows.
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 realise
that it has imperfect information since all elements necessary for the analysis are delivered, however
incomplete.

Obviously, it is a rather pessimistic version and there is no claim here that Member States act in bad
faith on a daily basis. However, this certainly is one of the risks brought by the 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.

29 Quite undisguised in some cases, e.g. in Commission decision 2016/632 of 9 July 2014 and decision of 27 January 2010 on the State aid C27/08. In both cases Germany argues strongly in favour of aid measures, contradicting Commission’s reasoning
30 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.
3.2. Informational asymmetry between the notifying State and market operators

In any case, Commission’s informational problems may be completely independent of a good or bad faith of the notifying 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.\textsuperscript{32} For instance, the State may be under-informed on the state of economy, necessary to determine “the appropriate amount and method of aid”\textsuperscript{33}, or on the costs borne by the recipient of aid, relevant in the context of the incentive effect.\textsuperscript{34} 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,\textsuperscript{35} or may be unable to identify projects which deserve support, in particular in the area of Research and Development.\textsuperscript{36} Therefore, the notifying State knows less on certain relevant aid elements than other economic actors, the latter having an informational advantage over the State and, \textit{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 it has been pointed out, “the private sector seeking to benefit from State aid possesses information not directly available to the government, which thus runs the risk of being misled when designing and implementing its aid policy.”\textsuperscript{37} This situation is similar to the first informational asymmetry: the potential beneficiary wants to obtain the aid and thus transfers to the State information that will allow it to succeed. If the aid risks to 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 notifying 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, relying on national standards, which necessarily vary from one State and from one measure to another, is at least precarious.

The two asymmetries may be graphically presented as follows:

\textsuperscript{32} In the context of designing an efficient industrial policy: Perrot, Anne. \textit{Do national champions have anything to do with economics?}, in: Mateus, Abel Moreira and Moreira, Teresa Coelho. 2010. \textit{Competition law and economics : advances in competition policy enforcement in the EU and North America}. Cheltenham: Edward Elgar, p. 297-298


\textsuperscript{34} Hancher, Leigh. 2012. \textit{EU State aids}. London: Sweet & Maxwell / Thomson Reuters, at 2-041

\textsuperscript{35} As required by SAAP, p. 7


In both cases of informational asymmetry the Commission is led to a Type 2 error, because both the notifying State and the potential recipient of aid are interested in the approval of the measure, and may submit information according to this interest. Hence, excessive reliance on the State increases the risk of erroneous positive decisions.

3.3. Informational asymmetries in the context of two types of assessment criteria.

The intuitive difference between ‘black or white’ and argument-based criteria is that more trust may be put into information provided within the framework of the first category. Indeed, when a State has limited knowledge on a given issue, clear-cut criteria allow to disclose the lack of information quickly – the State possesses the defined piece of information or not and is able to prove it or not. Moreover, such criteria curb Member States’ possibilities when they want to present incomplete or incorrect information, since the information is usually verifiable. ‘Cheating’ is unlikely also because it might require to falsify the evidence, which demands much more bad faith and may have serious legal consequences. The same pertains to the aid beneficiary, whose lack of knowledge or bad faith may be discovered by the national authorities more easily.

On the contrary, where a criterion is based on multiple elements (or unclear notions), it is almost natural that informational problems occur because more information needs to be gathered and verified. A given participant in the procedure will present only one part of the picture, either on purpose or because it is unconscious of other relevant elements. Supposing that the notifying State acts in good faith but has limited knowledge, it will transfer to the Commission incomplete or inaccurate information. Naturally, if it acts in bad faith, it may intentionally submit only information favourable to it – the State decides what information to submit and thus how to present and interpret the circumstances of the case. Since there are no other actors who might ‘check’ its reliability, the Commission may found itself flooded with incomplete, distorted information, and do not realise that.
Hence, inasmuch as excessive reliance on the notifying State does not seem very dangerous in the case of ‘black or white’ criteria, it may be an important factor for errors when argument-based criteria are used.

4. The probability of error at different procedural stages

One could have already deduced from the above considerations that certain elements of State aid assessment do not serve the purpose of accuracy. In this section, these loose observations will be applied to each procedural stage, with the aim of concluding on the probability of error. It will be demonstrated that the risk of error is significant, especially in the preliminary examination.

4.1. Risk of decisional errors in the preliminary examination

This section will focus only on the shortcomings proper to the preliminary examination. They will allow to demonstrate that the accuracy in decisions issued at this stage is, at least, jeopardised.

4.1.1. Relying on the State and the risk of errors

The preliminary examination is an exclusive dialogue between the Commission and the State. The latter submits the notification and the former asks additional information if it does not find it complete. Other actors have no rights, nor obligations, at this stage. As it was pointed out above, full reliance on information from the State may be pernicious due to two informational asymmetries. Therefore, the Commission is led to Type 2 errors.

Nevertheless, the logic behind this stage of the procedure is that the Commission is able to realise that information provided by the State raises doubts about the measure, and to open the formal investigation whenever necessary. In such a case, the procedure indeed “merely... allow[s] the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question”38 – the Commission decides only on absolutely straightforward cases and secures correct outcomes by using the second stage of the procedure. In fact, this is how the lack of contradictory procedure at this stage is justified.39

However, a number of doubts arise as to the ability of the preliminary examination to effectively screen States’ measures.

4.1.2. The Commission’s ability to assess measures in two months

The amount of information the notifying State needs to provide and the Commission process and evaluate is impressive – all information needed for an assessment under Article 107(1) and (2)/(3) TFEU. This task is complex especially with regards to numerous argument-based criteria, where more information is needed in order to make an assessment while the State may provide incomplete or biased information. Apart from this, the Commission must conduct its own reasoning with regards to some elements of assessment and make discretionary decisions, which may be erroneous as well. Therefore, if the function of the preliminary examination is to form ‘an initial view’ on the measure and decide whether doubts exist as to its compatibility, the question may be asked: are two months sufficient to verify and assess information provided by the State to a degree necessary to form a reliable initial view, capturing doubts? In other words, does the Commission have time to do more than check whether the notification ‘makes sense’ or ‘sounds okay’? Even though it is impossible to give a firm answer to this question, there are several reasons for which it could be doubted.

First, the two-month period for a given case overlaps with two-month periods for other cases: an agent is assigned to more than one case, so he may not devote complete two months to a particular case. Moreover, this period includes not only a pure examination of the case but also clerical steps, like attribution of the case, communication with other units, drafting the text of the decision, signing it, et cetera. Therefore, the real time to handle a case is difficult to estimate, but is necessarily shorter than the official two months.

Second, since the amount of information provided by the notifying State is usually quite significant, getting to know a case and absorbing all information is a time-consuming task. It is questionable to what extent it is possible to understand and analyse the case, verify the submitted information and make even a preliminary, but sound assessment of all criteria. In particular when information at hand is argument-based and submitted evidence is not high-quality.

Third, and still as regards argument-based criteria, a superficial assessment may not be enough since Member States act repeatedly, so they learn how to provide applications prone to acceptation. It is unlikely that a State submits obviously lacking or unobjective information: throughout the years it observes the Commission work and skills in turning things in a delicate manner. The two-month period may not be enough to discover inconsistencies and subtleties, while it is just enough to succumb to the State’s argumentation.

---

40 If not by the criteria laid down in guidelines, it may be considered by looking at the complexity of supplementary information sheets.
4.1.3. The practice of Phase 1 decisions.

Concerns about the quality of assessment in the preliminary examination get confirmed when confronted with Commission’s decisions issued at this stage. Indeed, in a typical Phase 1 decision, the Commission seems to rush through criteria of assessment, which are often discussed briefly and, the impression one may get, overly superficially. The conciseness in these decisions is puzzling especially when compared with much detailed Phase 2 decisions, which indicate that elements of assessment are in fact complex and equivocal, and that the preliminary examination is often not even a ‘quick’ look at these sophisticated issues.

Moreover, Phase 1 decisions mainly repeat information submitted by the State – there is not much room for Commission’s own analysis. Additionally, it often does not stem from the decisions that information provided by the notifying State was actually verified, nor what kind of proof the State presented. This might confirm that Phase 1 often consists in considering that the State presented the aid as fine, rather than in being critical about particular statements. As a result, the “initial view”, which the Commission ought to form at the end of this stage of the procedure, seems more of the State’s view, accepted by the Commission.

Furthermore, it is not always obvious why some cases are stopped after Phase 1 while other are subject to a decision to open the formal investigation. One may get the impression that such decisions are based on Commission’s overall feeling or clumsiness in the State’s argumentation rather than on an analysis of particular characteristics of aid. This impression is exacerbated by the fact that the Commission usually does not express doubts about a particular information or a concrete criterion, but it expresses general incertitude about the measure, covering the majority of or all criteria: most of decisions to open the formal investigation are similar.

4.1.4. Interpretation of doubts – tacit consent to errors

For the reasons described above, the Commission may not realise that the basis for opening of the formal investigation exists. It may consider itself sufficiently enlighten on all relevant points while information at hand is in fact incomplete and leads to an erroneous outcome. The situation may, even though less likely, be reversed: the Commission may have doubts and open the formal investigation for a measure that does not raise any concerns. However, in the latter case, doubts will be removed or proven unjustified in the course of the procedure and the final decision will not be erroneous. On the contrary, ignoring doubts in the preliminary examination may directly result in an erroneous decision.

41 The observations in this section are based on the same sample as that used for the assessment of evidence requirements, i.e. a sample of 157 decisions taken pursuant to four guidelines, covering all negative and positive decisions adopted at the end of the formal investigation, and randomly chosen decisions not to raise objections.
42 On the other hand, this has the disadvantage of costs of formal investigation opened unnecessarily.
However, the interpretation of procedural rules by the Court of Justice seems to implicitly accept Phase 1 decisional errors, loosening the obligation to open the formal investigation. Indeed, even if doubts actually arise, there is some confusion as to how they should be dealt with; this ambiguity leads to a higher risk of errors in State aid decisions.

The Procedural Regulation prescribes opening of the formal investigation procedure when the Commission “finds that doubts are raised as to the compatibility”.\(^{43}\) However, within the framework of actions for annulment against Commission’s decisions, the Court uses the notion of ‘serious difficulties’, necessary to consider that the formal investigation should have been opened.\(^{44}\) Therefore, the circle of ‘eligible doubts’ has been tightened.

Besides that, the interpretation of ‘serious doubts’ is highly unclear, which may be observed in the reticence of the General Court to annul decisions on this basis.\(^{45}\) Indeed, even though the Manual of Procedures explicitly considers serious doubts to be proven by more than one request for information or the two-month period manifestly exceeded,\(^{46}\) these circumstances are not considered sufficient by the Court.\(^{47}\)

Moreover, the Commission has been recognised to have a “certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties”, which reportedly does not impact its obligation to open the formal investigation once such difficulties arise.\(^{48}\) However, this reasoning seems somewhat contradictory, inasmuch as discretion in deciding on serious doubts in fact allows the Commission to decide when to open the procedure. Joined with an almost inaccessible standard for annulment, it means that the Commission has a big discretion in taking decisions at the preliminary stage, even when it realises the decision may be erroneous. This stands in clear opposition to the provision of the Procedural Regulation, which states that in a case of doubts, a negative decision should be adopted\(^{49}\) (which requires the opening of the formal investigation.)

As a result, the threshold marking the difference between the two phases of procedure – doubts – is not fully operative any more. This favours decision-making in Phase 1, and may be interpreted as a kind of a tacit consent to inaccurate decision-making resulting from this latitude.

---

\(^{43}\) Procedural Regulation, Art. 4(4)


\(^{45}\) Out of 16 actions brought on this basis in the period 30\(^{th}\) August 2008 – 28\(^{th}\) March 2016, in 12 of them applicants failed to demonstrate serious difficulties.

\(^{46}\) Manual of Procedures, at 5.60


\(^{49}\) Procedural Regulation, Art. 9(7)
To conclude, the way the preliminary examination is designed and interpreted brings quite an important risk of Type 2 errors, caused by an excessive reliance on the State, not balanced by other investigative powers, short duration of the procedure, and a tacit support of the Court for adoption of positive decisions regardless of doubts. This risk is exacerbated by argument-based criteria and low evidence requirements. All these issues may be observed in Commission’s Phase 1 decisions.

The problem of the preliminary examination does not lay in the fact that it does not allow for an in-depth assessment of measures, because it is not the role reserved for it in the Procedural Regulation. The problem lies in the fact that this procedure favours admitting measures hastily, and does not allow to capture those which should be sent to the formal investigation.

4.2. Risk of decisional errors in the formal investigation procedure

Compared to the preliminary examination, the formal investigation procedure offers more promising tools to lead the Commission to better information and thus, to a correct decision.

4.2.1. Comments and requests for information

Comments submitted by interested parties may be for the Commission a precious source of information, especially when they are numerous or extensive. However, it may be that parties are not willing to submit them: in fact, it happens that none of them react to the opening of the formal investigation. Nevertheless, the practice shows that it is not overly rare to receive comments – for instance, out of 12 cases involving environmental guidelines, the Commission received comments from parties other than the beneficiaries in 8 of them. In the majority of cases, comments were mixed, involving both positive and negative opinions on the proposed measure. It is difficult to consider to what extent these comments influenced Commission’s final decisions, but they certainly allowed to confront the notifying States’ arguments, sometimes by providing very detailed information, e.g. on the product concerned.

Apart from voluntarily submitted comments, the Commission may rely on requests for information addressed to undertakings, associations of undertakings or other Member States, even though the

---


51 “It is not uncommon that no interested party reacts to the opening of the procedure”: Manual of Procedures, at 6.47


53 E.g. Commission decision 2017/1436 of 1 December 2015, paras 33-52
notifying State has to agree on the request to be addressed to the beneficiary of aid.\textsuperscript{54} The power of requests for information is significantly reinforced by fines that may be imposed on undertakings.\textsuperscript{55} Fines deter from providing incomplete or false information, especially when the actors know that others may provide information they wish to hide or denature.

Nevertheless, these considerations remain mainly theoretical since this investigatory power is for now a dead letter of the Procedural Regulation. Indeed, the Commission is not in the habit of recurring to requests for information addressed to actors other than the notifying State.\textsuperscript{56} On the Commission’s side, the procedure seems to still be mainly the dialogue with the State and therefore, the potential of the formal investigation is not exploited. At the same time, and unsurprisingly, fines have not been foreseen for Member States, which certainly reduces their incentives to obey.

\subsection*{4.2.2. Missing investigatory powers}

In spite of tools increasing the amount of information in State aid proceeding, there are also several powers that the Commission does not have, even if they function well in other fields of competition law: those have already been listed. Limits to the Commission’s investigative powers are relevant especially in the context of introducing an economic assessment to State aid control, whose success depends on the necessary data.\textsuperscript{57}

However, a problem with increasing Commission’s powers is that it is in the interest of Member States to maintain the current system, which favours them “procedurally and substantively”.\textsuperscript{58} Moreover, some solutions known from antitrust would not necessarily have to work in State aid: e.g. an Advisory Committee composed of Member States’ representatives might be biased towards acceptance of state measures, while such a bias in State aid control already is strong.

\subsection*{4.2.3. The practice of Phase 2 decisions – more time, more accuracy}

Even though limited, more robust investigative powers in Phase 2 would suggest that the probability of error is lower. This seems confirmed by the reading of Commission’s decisions issued in this phase,\textsuperscript{59} whereby the quality of investigation is definitely better that in Phase 1. However, it seems to

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{54} Procedural Regulation, Art. 7 (2)b
\item\textsuperscript{56} In none of the examined Commission’s decisions was such a request made.
\item\textsuperscript{57} Bacon, Kelyn. 2009. \textit{European Community law of State aid}. Oxford: Oxford University Press, at 1.40
\item\textsuperscript{59} The observations in this section are based on the same sample as that used for the assessment of evidence requirements, i.e a sample of 157 decisions taken pursuant to four guidelines, covering all negative and positive decisions adopted at the end of the formal investigation, and randomly chosen decisions not to raise objections.
\end{itemize}
\end{footnotesize}
be due mainly to a longer investigation time, which allows for a clearer and fairer analysis of measures.

As indicated above, an important problem of the preliminary examination is its limited time, especially taking into account the amount of information to be processed and its often ambiguous character. This is not the case for the 18-month-long formal investigation procedure. Such time allows the Commission to carefully examine received information, confront it with its own considerations and comments of interested parties, and eventually to form its own, mature opinion on the case. Without attempting to judge the outcome of individual decisions, the overall impression is that the investigation is indeed in-depth and that the Commission truly looks into different aspects of analysed criteria. Generally, these decisions are significantly longer and more ‘full of content’; the Commission is more critical about information it obtains and seems to care more about Member States’ statements and evidence they provide.

This is not to say that Commission’s decisions do not bear any vices nor that all of them are accurate. As mentioned above, the Commission still bases its assessment mainly on the information provided by the notifying State – it is possible that in some cases it makes the same mistakes it would have made in Phase 1. However, thanks to a much longer duration and comments submitted by third parties, the difference in quality between Phase 1 and Phase 2 decisions is remarkable, which allows to reasonably suspect that Phase 2 decisions bear less errors than Phase 1 ones.

4.3. Conclusion

In general, decisions in State aid are prone to errors, probably more than in other fields of competition law. However, a difference may be observed between the two stages of the procedure. Some characteristics of the preliminary examination allow to question accuracy of its outcomes: decisions seem prone to errors. A bulk of these shortcomings is made up for in the formal investigation procedure, which reduces the probability of error with respect to the same risk run in Phase 1.

Since negative decisions may be adopted only after the formal investigation procedure, while positive decisions may be (and mainly are) adopted in the preliminary examination, the probability that an erroneous negative decision will be adopted is lower than the probability that an erroneous positive decision will be.
5. Decisional practice of the Commission – super-dominance of Phase 1

If the preliminary examination raises serious concerns about accuracy, it is logical for the Commission to be very cautious in taking decisions in this phase: the formal investigation, in theory and practice, secures correct outcomes better. The aim to reduce the probability of error should result in more suspicion towards measures and consequently, some non-negligible amount of formal investigations opened. In other words, one might hope that most decisions are issued in the formal investigation.

Statistics show clearly that this is not the case. Decisions adopted in the preliminary examination constitute around 93% of all decisions, or 4147 Phase 1 against 392 Phase 2 decisions. Corresponding to this trend, 98% of decisions are positive, or 4376 positive against 163 negative ones.

Naturally, these statistics are disappointing because the procedure is concentrated at the stage, at which the probability of error is much higher. Moreover, they seem to confirm that the design of the preliminary examination, in particular rules on opening of the formal investigation, may actually favour decision-making in Phase 1. However, it shall not be presumed that decisions adopted in the preliminary examination are so numerous only because they are erroneous, even though some of them certainly are.

Indeed, it would not undermine previous considerations to suppose that most of measures notified to the Commission are desirable ones. Moreover, EU State aid law is not driven by the sole probability of error, and there are certainly reasons other than errors, for which the statistics are super-dominated by Phase 1. Discovering these reasons lies outside the scope of the present paper, but political reasons and policy considerations intuitively come to mind. Finally, path dependence may contribute to this effect. All in all, it should be accepted that State aid procedure is concentrated in the preliminary examination.

This conclusion changes the perception of State aid procedure. Indeed, the preliminary examination with its shortcomings and the resulting probability of Type 2 errors becomes a real problem: if more decisions are issued in Phase 1, the risk of errors this phase brings materialises more often, and more Type 2 errors occur. Moreover, if proneness to error in Phase 1 is significant, this proneness extends to the State aid control in general. Therefore, it may be said that State aid procedure brings mainly the risk of Type 2 errors.

---

60 These statistics are based on information available in State aid Online Case Search (available at http://ec.europa.eu/competition/elojade/isef/index.cfm), and include final decisions: decisions that the measure does not constitute aid, decisions not to raise objections, positive decisions, conditional decisions and negative decisions with and without recovery. Statistics cover the period from 30th August 2008 to 16th June 2018. The totality of 4457 decisions, out of which the percentage is calculated, does not correspond to the sum of particular decisions, because some decisions are in part positive and in part negative and therefore are classified twice.
As a result, advantages of the formal investigation are of marginal importance, since this stage of the procedure concerns only a very reduced percentage of cases. Naturally, the discussion about Phase 2, its improvements, conditional and negative decisions with recovery is very interesting, but it is not a discussion about the real-life State aid control. Indeed, if one talks generally about Commission’s control over state measures, he should mean Commission’s decisions allowing aid measures after the preliminary examination. Therefore, as long as changes to the formal investigation are laudable and demonstrate the law-maker’s willingness to increase accuracy, these efforts are not necessarily well-placed, or at least are incomplete. Moreover, if elaboration of the criteria of assessment was oriented towards capacities of the formal investigation, it actually does not appear adequate. The formal investigation is not the main State aid procedure and if improvements are to be made, they should (first) be concentrated in Phase 1.

Taking into account all the above, one could wonder how the probability of error could be lowered in order to reduce the overall number of erroneous State aid decisions.

6. Decreasing the probability of error – Per Se vs. Rule of Reason dilemma

Until now, it has been discovered that the overall probability of error in State aid assessment increases as more decisions are adopted in the preliminary examination. It has also been verified that an overwhelming majority of decisions are in fact adopted in Phase 1. This means that the risk of error may be a real problem of State aid procedure and that this risk pertains essentially to Type 2 errors. It thus seems legitimate to ask questions about a possible remedy – to bring the probability of error down is one idea to eventually lower the expected cost of error. The solution this paper offers trespasses into the area of the old Per Se versus Rule of Reason discussion.

6.1. Lowering the probability of error in State aid decisions

The probability of error in the preliminary examination is due to three elements: procedural arrangements, argument-based criteria and low evidence requirements. Remedying one or more of these issues should bring the risk of errors down.

However, it is unlikely that major procedural changes could be introduced. To start with, they would inevitably make the preliminary examination resemble the formal investigation, which makes no sense and contradicts the whole idea of the division between Phase 1 and Phase 2. Apart from that, it is intuitive that keeping Member States close to the procedure is the very condition for EU State aid control: losing the prominent position does not lie in the interest of Member States while these are Member States that would have to introduce such a change.

Moreover, even though evidence requirements may be raised, it is difficult to find the optimal standard due to the ex ante character of State aid control. Indeed, assessment of the future impact of the measure on competition inevitably is highly speculative, and whether a direct evidence is available or
not depends on each individual case, but generally is little. Member States may abuse of these limits, but being too strict brings the risk of rejecting desirable measures due to the lack of evidence, and of replacing Type 2 errors by Type 1 ones. Still, the Commission could be more consistent as regards the type of evidence required, as well as it could increase the requirements with regard to criteria, which are not forward-looking (e.g., existence of a market failure.) Nevertheless, this could only not be a partial solution to the problem. This leaves us with the last component of the risk of error: argument-based criteria.

6.1.1. Potential of ‘black or white’ criteria in State aid assessment

If the procedure may not be adapted to the complexity of the assessment, an improvement could go in the opposite direction: more specifically, at the level of assessment criteria and required information. As pointed out above, argument-based criteria allow the notifying State to present only convenient information and to interpret it in a favourable way; such information is also more difficult to prove, and its assessment is time-consuming.

In an imaginary world, if argument-based criteria were replaced by those based on technical, objective, easily verifiable information, most problems of State aid procedure could (to a significant extent) be overcome. Ignorance or bad faith of the notifying State or the aid beneficiary could be discovered with more ease, thanks to clear information requirements and corresponding (generally) unequivocal evidence. This way, also evidentiary inconsistency would have a limited impact on the quality of the assessment. Moreover, the procedure would not essentially require the presence of third parties since there is no, or limited, space for argumentation and no differing opinions. Most importantly, the probability of error could be decreased without compromising the main quality of the preliminary examination: its short duration. Indeed, two months could prove sufficient if the exercise was to verify credibility of information provided and to make simple assessments. Finally, even though this issue is not the object of the present paper, simpler criteria would limit the Commission’s discretion, which may be a source of errors, especially when the sole, and rent-seeking, actor in the procedure is the notifying State.

As a result, the probability of error could be decreased while keeping the majority of cases in the unchanged preliminary examination: the Commission could pursue its policy of approving most of state measures. In fact, easier in application criteria do not need to lead to opening more formal investigations or issuing more negative decisions. On the contrary: facing clear informational obligations, Member States would notify only measures for which they gathered all necessary

61 Within the framework of merger analysis: Antitrust error, p. 105-109
information. Since this information is usually non-disputable, most notifications should be successful and even more measures could be accepted in Phase 1. In the long term, it would also discipline Member States to design only acceptable measures. Therefore, this proposition is about increasing the quality of control, not about changing its outcome.

At the same time, when fulfilling the criteria may not be accomplished by the notifying State, but the latter wants the Commission to assess the measure more thoroughly, this would have to lead to an in-depth investigation in Phase 2. Indeed, clearer criteria would make the question of ‘raising doubts’ and opening the formal investigation procedure less obscure, as well as they would facilitate judicial review of decisions.

Naturally, it would be naive to believe that all open-ended and unclear criteria may be brought down to calculations or ‘yes or no’ question: this will be discussed below. However, what this simulation aims to demonstrate is that while the preliminary examination is unable to deal with argument-based criteria, these concerns do not pertain to the other type of information. Considering characteristics of this procedure and its weak points, it seems it could fulfil its function very well, and certainly better, if assessment criteria became less ambitious and ambiguous. Such type of information simply fits this procedure better and reduces the gap between what is expected from the preliminary examination on the one hand, and what the preliminary examination may actually deliver on the other.

6.1.2. Simplifying the rules in the spirit of a “refined economic approach”

If more straightforward assessment criteria could be beneficial for accuracy of State aid assessment, a pertinent question is how this idea fits into the “refined economic approach.” This approach was set out in the State Aid Action Plan, and which triggered numerous changes in State aid law: more economics would rather favour a deeper case-by-case investigation.

Nevertheless, one can find examples of simplification of criteria in the most recent versions of guidelines. In particular, 2014 Regional Aid Guidelines constitute an interesting illustration of framing the notions of incentive effect, negative distortions of competition and even the balancing test. These elements, which intuitively seem to be difficult to seize, have been brought down to calculations (incentive effect), a limited number of relatively straightforward sub-criteria (negative effects), and practically a checklist (balancing test). As another example, contribution of an individual environmental aid to an objective of common interest may be expressed “in quantifiable terms.”

Both guidelines entered into force on 1 July 2014, and were thus adopted within the framework of

---

64 Guidelines on regional State aid for 2014-2020, OJ 2013/C 209/01, respectively 60-74, 112-140 and 118,128, 139, 140
65 Guidelines on State aid for environmental protection and energy 2014-2020, OJ 2014/C 200/01, para 33
2012 State Aid Modernisation, which follows and develops State Aid Action Plan. Therefore, and importantly, these changes are in line with, and even result from, the more economic approach.

It has been suggested that more economics involves “deeper case-specific analysis”: this may obviously be the case. However, more economics may also be a tool for ‘simplification’ of State aid assessment. Indeed, the law-maker may recur more to the economic theory and thus rules become more complex and less understandable to a non-specialist. But at the same time, the improved methods of assessment may bring clarification as regards the relevant information and reliable evidence. Thus, economics may make the assessment both more accurate and concrete, as opposed to unorganised screening of some potentially relevant elements. It is therefore in designing the set of applicable criteria, and most importantly in explaining how these criteria may be fulfilled, where economics may do the most of good. In this light, an increased number of criteria (or sub-criteria) do not have to be undesirable, as long as they are ‘objective’ instead of argument-based. Hence, more economics and less law may in fact be very promising in what regards elimination of ambiguity and of room for argumentation.

Therefore, the transition from argument-based to ‘black or white’ seems to be mandated by the economic approach. However, it would be up to economists to establish which criteria, and to what extent, could integrate this proposition – this paper does not offer concrete solutions to individual criteria of assessment. Still, examples from guidelines show that there is some interesting room for manoeuvre, strongly supported by the ‘economic turn’.

Adopting ‘black or white’ assessment criteria transfers the responsibility for decisional errors to the level of design of substantive rules: the success depends on their quality and suitability of simplified criteria to individual cases. Indeed, uniformity and simplicity of criteria bring a risk that they are not appropriate for assessing each and every case, and thus create another risk of errors. This risk is well-known from an antitrust debate.

67 Ibidem, 235-240
68 As suggested by Christiansen and Kerber, Ibidem, 236-237
69 Ibidem, 236-237
6.2. Between Per Se and Rule of Reason criteria in State aid assessment

The suggestion to introduce ‘black or white’ assessment criteria sends us back to the discussion about the proper way of evaluating measures, reflected in provisions of substantive law. More specifically, it is about deciding between concrete, defined criteria for assessment of all measures and a more flexible, case-by-case assessment, taking into account the circumstances of the case. Advantages of the first option have been discussed above, however the risk exists that one method of assessment may not suit all cases, eventually leading to an incorrect outcome.

6.2.1. Per Se criteria vs. Rule of Reason criteria

In some ways, this dilemma resembles the discussion on Per Se rules versus the Rule of Reason. Long story made short, Per Se rules (declaring an action legal or illegal by the simple fact of being qualified as a particular behaviour), bring the risk of errors caused by unsuitability of rules to some situations (the same behaviour may be either pro- or anticompetitive depending on the circumstances of the case, while generalisation does not allow to account for these different situations). The Rule of Reason, on the other hand, allows to look into the circumstances of the case and assess behaviours on an individual basis, which allows to distinguish between pro- and anticompetitive action more effectively, and thus makes judgments more accurate. However, the disadvantage lies in the fact that application of such rules requires more information, while decision-makers may have serious informational problems. The lack of information, as well as discretion of agents, may lead to erroneous outcomes. The remedy is to increase the expenses on information gathering and to invest in a more precise analysis, which drives up regulation costs.70

As a result, 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 is not a simple Per Se rule; it minimizes the sum of costs “on the average of all cases”.71 The optimal differentiation depends on the regulated behaviour and thus varies from one behaviour to another.72


71 Christiansen, Arndt and Kerber, Wolfgang. 2006. Competition policy with optimally differentiated rules..., op. cit., quotation from page 224

72 Ibidem
Naturally, that discussion is not exactly the same as the one taking place in this paper. Indeed, the idea is not to change basic assessment criteria: it is about how these criteria are conceived and interpreted when they are applied. In particular, it is not questioned that aid needs to e.g. be appropriate or have an incentive effect: it is about what stands behind these notions, how they are defined and applied, and how this impacts the assessment.

In other words, one could consider that State aid law follows the ‘structured Rule of Reason,’ because it limits an open-ended analysis by laying down a list of assessment criteria. However, these criteria ultimately have a life on their own: this second level is the object of the present analysis.

Still, the reasoning concerning the two types of rules may be transposed to the level of individual criteria of assessment. Indeed, a parallel may be made between Per Se rules, which automatically declare some behaviours legal or illegal, and technical criteria in State aid guidelines, such as those based on thresholds or simple yes/no questions. A similar character have ‘checklists’, such as the balancing test in the Regional Aid Guidelines. Such criteria do not envisage to look into circumstances of the case, but foresee one (or a limited number of) criteria, not leaving room for interpretation. As in the case of Per Se rules, their application is relatively quick and uncontroversial. On the other hand, such universal criteria (e.g. thresholds) may not suit all cases, leading to approval of some undesirable measures (underinclusion) or prohibition of some desirable ones (overinclusion). Therefore, they seem to constitute the counterpart of Per Se rules: let us thus call them ‘Per Se criteria’.

A similar reasoning may be conducted with regard to, let us call them this way, ‘Rule of Reason criteria’. These argument-based or open-ended criteria allow to take into account case-specific circumstances and numerous factors, since there is no closed catalogue of information, which constitutes the basis for assessment (or informational requirements are interpreted broadly). As a result, assessment of such criteria is not mechanical and the outcome may reflect better the situation at hand. On the other hand, and logically, problems with obtaining necessary information and rent-seeking may compromise this result, and applying such criteria requires higher regulation costs.

State aid law constitutes a mix of Per Se and Rule of Reason criteria and sub-criteria. As it was argued before, Per Se criteria would be preferable taking into account the risk of errors in application, particularly elevated under State aid procedure in its current form. However, the choice between different rules must constitute a balance between the risk of errors in application and the risk that simplified rules do not suit all cases.

6.2.2. Trade-off between two risks – two components of accuracy

Analysing the preference between Per Se and Rule of Reason criteria, two issues have to be taken account of.

First, Per Se criteria increase accuracy in the sense that the risk of their misapplication is lower: they require easily verifiable and not-prone-to-argumentation information, which makes their application relatively uncontroversial. However, there emerges the risk that such criteria, although correctly applied, do not allow to effectively distinguish between desirable and undesirable measures – this is the price of the simplification. The problem is thus situated at the level of design of assessment criteria: the criteria will be well applied, but they may be badly designed.

On the other hand, Rule of Reason criteria allow to account for the circumstances of the case: the reasoning, even though guided in what elements are relevant, is based on case-specific facts and hints, which are interpreted altogether. This flexibility of assessment may make similar measures be judged differently, identifying their pro- or anticompetitive character with higher accuracy. Nevertheless, if the provided elements of assessment are incomplete or biased, accuracy of the assessment may be impaired, leading to an erroneous outcome. In other words, the success of the assessment depends on availability and quality of information. It may be said that the risk of error in the case of Rule of Reason criteria pertains to the process of execution of law: the criteria are well designed, but they may be badly applied.

If one wishes to lower the probability of decisional errors in State aid (increase accuracy in decision-making), he must balance advantages and disadvantages of each solution and decide on the characteristics of the optimal criterion. This perfect ‘State aid criterion’ could be found somewhere between complete Per Se and complete Rule of Reason. Naturally, if all rules were Per Se criteria, the 0 risk of error in application\(^{74}\) would correspond to a high risk of error caused by unsuitability of criteria to some cases. Conversely, under Rule of Reason criteria only, the benefit of 0 risk of error related to ineffective distinction between measures would be compromised by a high risk of error in application. Supposing that both errors occur with the same probability, the balance would have to be struck half-way. Of course, this could only rarely be the case in practice.

It has been stated above that Per Se criteria could largely benefit State aid procedure but the problem lies in balancing the increase in a correct application and the decrease in suitability of criteria to all cases. To put it differently, it should be considered how the possible passage from the Rule of Reason to Per Se would influence the overall risk of error (\(P_E\)), that is errors caused by misapplication of the criteria (\(P_{EM}\)) plus errors caused by unsuitability of the criteria to some cases (\(P_{EU}\)). Therefore, if

\(^{74}\) Obviously, even under such circumstances this value could not be 0, 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.
indeed there is a preference for Per Se rules in State aid assessment, the resulting gain in the overall accuracy (the decrease in $P_{EM}$) has to be higher than its loss (the increase in $P_{EU}$).

As mentioned in the introductory part, the competition law literature does not place both risks on an equal footing – error in application is usually not analysed as such, and is considered as a cost of the Rule of Reason. Thus, error costs are considered to be reduced with a higher differentiation of rules.\textsuperscript{75} One might argue that it is essentially the same to consider the risk of error in application as an inherent limit to the Rule of Reason and to consider this risk within the framework of a separate error. However, once the procedural aspects are singled out, error in application becomes central and it thus proves more useful to adopt a distinction between two errors than to assume that the Rule of Reason always increases accuracy and to look at the problem from the inside of the Rule of Reason. Indeed, this paper insists that in EU State aid assessment, the use of the Rule of Reason actually increases error costs, due to a high risk of error in application of law. Only taking account of the two errors allows to capture how the correct outcomes may be best secured. Therefore, error caused by misapplication of criteria is a necessary component of accuracy: both risks bring the issue of over- and underinclusion, as both result in Type 1 and Type 2 errors – except that their origin is different.

\textbf{6.2.3. Two probabilities of error in State aid procedure – towards Per Se}

Summarising the above considerations, one should find a balance between Per Se and Rule of Reason criteria, so to minimise the probability of error, $P_E = P_{EM} + P_{EU}$. This section is not concerned with the second probability as such, because it does not aspire to identify assessment criteria, which allow for the best distinction between desirable and undesirable measures, but it pertains to accuracy in their application. Based on characteristics of State aid control, described in more detail in previous sections, some inclination towards the use of Per Se criteria could be justified.

In State aid procedure, the probability of error in application should be lower under Per Se than under Rule of Reason criteria. Naturally, it is common knowledge that Per Se rules are easier in application. Nevertheless, the particularity of the situation in State aid is rather based on the opposite reasoning – under Rule of Reason criteria the probability of error would be abnormally high, higher than in other fields of law.

This results mainly from the fact that State aid procedure is concentrated in Phase 1, which offers only limited possibilities of assessment. Indeed, Rule of Reason criteria require procedural arrangements that Phase 1 is not able to provide. Criteria in their actual form may seem to suit the formal investigation, but they are too demanding for the preliminary examination, which is short and involves

\textsuperscript{75} Christiansen, Arndt and Kerber, Wolfgang. 2006. 	extit{Competition policy with optimally differentiated rules...}, op. cit., p. 224 and 229
only the notifying State, which may consciously or unconsciously submit distorted information. As a consequence, the necessary increase in the regulation costs is actually impossible to make, the Commission underperforms, and the probability of error jumps. With a high risk of error in application, one might put into question how often he can really witness the Rule of Reason’s key advantage: a better distinction between desirable and undesirable measures. Indeed, the benefits flowing from more individualised assessment may be to a significant extent compromised by its execution.

In order to make up for this problem, one needs to adopt informational requirements to the capacities of Phase 1. This the most probably leads to a turn towards Per Se criteria – the Rule of Reason must be abandoned to some extent, to the level at which it is possible to carry out the assessment without an excessive risk of error in application. In practice, this means privileging, as much as possible, technical information, reducing ambiguous notions, and defining unclear elements of assessment. The obtained gain from the decrease in $P_{EM}$ might be significant, and it may be higher than the loss caused by the increase in $P_{EU}$.

In other words, one may consider that the maximal regulation cost in State aid procedure is fixed, and may not be increased: this cost is laid down in the procedural rules of Phase 1, which impose limits on the Commission’s investigation capacities. At the same time, it should be reminded that the Rule of Reason requires higher regulation costs than Per Se rules (in particular the cost of gathering information). Hence, the substantive rules of State aid should take account of this fixed regulation costs: they may involve only as much Rule of Reason as may be correctly applied with the given regulation cost. Below this point, the correct outcomes are guaranteed; above this point, the risk of error in application starts to grow. Since the regulation cost in the preliminary examination is relatively low, the critical point after which the risk of error in application grows is quickly reached. Thus, Rule of Reason criteria may be securely employed only to a limited extent.

Taking the above into account, if one aims to strike a balance between Per Se and Rule of Reason criteria, he needs to find the point at which the benefits from Per Se equal the costs of foregoing the Rule of Reason. He could end up concluding that the optimal rule may be ‘saturated’ with the Rule of Reason only to a limited extent, and thus, the sought point of perfectly balanced criteria is generally moved towards Per Se side. It may be suspected that the overall probability of error falls more in the case of Per Se criteria dominating than in the case of dominating Rule of Reason ones.

This observation merits two remarks. First, the indicated tendency applies to the preliminary examination, and thus pertains only to the current circumstance, under which the majority of decisions are made in Phase 1. The paradox of optimal rules for both procedural stages will be analysed below. Second, the above observations pertain to the criteria of assessment in general – looking at the procedure, a preference for Per Se criteria may emerge. Although, the exact balance between the two
types of risk would not be the same for all criteria, and not even the same for similar criteria under different guidelines. Certainly for some criteria, an excessive move towards Per Se could drive the $P_{EU}$ so much up that the decrease in $P_{EM}$ could not compensate for this loss, while others would be more flexible in this regard. Therefore, each criterion would have its own point of optimal balance, guaranteeing the lowest probability of error. Nevertheless, it is not a zero-one system and the gain might be derived from a simple evolution of criteria towards ‘black or white’, and not from making them all technical. Thus, the preference for Per Se criteria may be considered as the starting point, or a guide, for shaping optimal individual criteria.

6.2.4. The paradox of higher accuracy in Phase 1
It has been considered that accuracy in the preliminary examination might be increased by using more of Per Se instead of Rule of Reason criteria. This suggestion is based on the observation that the preliminary examination brings a higher risk of errors than the formal investigation, while the former superdominates State aid enforcement.

However, one needs to take into account another problem. Inaccuracy in the preliminary examination, as it was discussed, results mainly in adopting decisions not to raise objections instead of opening the formal investigation. Therefore, Per Se assessment criteria might have two consequences. First, Member States would try to notify only measures which fulfil the criteria and thus more admissible aid would be notified. Second, controversial measures (those which for some reason do not fulfil the assessment criteria) would more easily be subject to a decision to open formal investigation. Therefore, increasing accuracy in Phase 1 might lead to more decisions being taken in Phase 2. Moreover, even under the current sub-optimal system, some prima facie undesirable measures are effectively captured and sent to the formal investigation in order to carry out an in-depth assessment. Consequently, if one adopts criteria, which correspond better to the preliminary examination and which increase its quality, he eventually has to realise that these criteria must also correspond to the formal investigation.

Although, as it was considered above, the probability that an erroneous negative decision will be adopted is lower than the probability that an erroneous positive decision will be: $P_{E1} < P_{E2}$. This is because $P_E = P_{EM} + P_{EU}$, while $P_{EM}$ leading to a Type 1 error ($P_{EM1}$) is lower than $P_{EM}$ leading to a Type 2 error ($P_{EM2}$): $P_{EM1} < P_{EM2}$. Both conclusions are based on the observation that negative decisions are adopted only in Phase 2, while positive decisions may and mainly are adopted in Phase 1, and that the probability of error is higher in Phase 1 than in Phase 2. The difference in $P_{EM}$ means that the formal investigation may bear higher regulation costs and hence, it may integrate Rule of Reason criteria to a

---

76 Making reference to Kerber and Christiansen’s “optimally differentiated rules”, op. cit.
higher extent. Consequently, each procedural stage has its own optimal balance between Per Se and Rule of Reason.

Nevertheless, $P_{EU}$ remains the same under both probabilities, because the same criteria of assessment are applied at each procedural stage. Thus, if one experiments with $P_{EU}$, he will impact both $P_{EM1}$ and $P_{EM2}$. Consequently, if one applies criteria optimal for the preliminary examination, these criteria will not be optimal for the formal investigation, because the loss from the increase in $P_{EU}$ will be the same, but the gain from the decrease in $P_{EM1}$ will be lower. This means that the potential of the formal investigation, and in particular its character of an ‘in-depth assessment’, could not be exploited, and this phase might not make sense any more, as it would be a repetition of Phase 1.

Because each procedural stage has its own optimal point of balance between the two types of criteria, the increase in accuracy in Phase 1 is linked to the decrease in accuracy in Phase 2 while at the same time, the increase in accuracy in Phase 1 might lead to a more frequently occurring Phase 2. As more formal investigations are opened, and the probability of error in Phase 2 is increased, also the overall probability of error may eventually grow. This result would depend on whether the increase in accuracy in Phase 1 is higher or lower than the decrease of accuracy in Phase 2. If it is higher, the overall decrease in the probability of error in State aid assessment would take place, but it would be mitigated by an increased probability of error in Phase 2.

In order to avoid such a compromise, different sets of criteria would have to be foreseen for each stage of the procedure. For instance, by introducing per-se-oriented, simple in application checklists in the preliminary examination, and keeping open-ended criteria for the formal investigation. Of course, this would require to importantly redesign the State aid framework. However, it only makes sense that the preliminary examination makes simple assessments, and in a case of doubts it is possible to use a more profound analysis in the formal investigation, instead of choosing the quality of either one or another. Importantly, such a solution would mitigate the increase in $P_{EU}$ in Phase 1, in cases in which simplified criteria fail to identify beneficial measures. Indeed, aids that do not fulfil the criteria of the preliminary examination would be sent to a more accurate formal examination. Thus, the erroneous consideration that the measure is undesirable would not be final, and could be verified in Phase 2. A more thorough assessment in Phase 2, with a lower $P_{EU}$, could allow to identify the error and secure a correct final outcome. Thank to this characteristic of Phase 1 – measures not fulfilling criteria are not directly rejected, but are subject to assessment in Phase 2 – the probability of Type 1 errors would be decreased, and only $P_{EU}$ resulting in erroneous approvals would remain problematic.

In the alternative, one would have to design the optimal criteria that are the most effective in Phase 1 and at the same time the most effective in Phase 2, so that the probability of error in State aid procedure in general is maximally lowered. Such a compromise would mean that both Phase 1 and
Phase 2 should employ sub-optimal criteria, but still it seems a better solution than having one stage of the assessment, especially the first one, of a significantly lower quality.

In any case, due account should be taken of the current superdominance of the preliminary examination, and of the need to adapt substantive rules to its capacities.

**Conclusion**

This paper approached several issues of State aid procedure, which impact the risk of errors. It identified problems with informational asymmetries, which are located at two levels: between the Commission and the State and between the State and market operators. The difficulty in overcoming there asymmetries flow from the design of State aid procedure, which appoints the State as the Commission’s main partner in assessment, from the fact that an important part of information used for assessment is argument-based, and from loose evidence requirements.

The time and tools available to the Commission make proneness to error vary depending on whether the decision is taken at Phase 1 or Phase 2. Especially the former leaves much to be desired. Realistically, a two-month period may not suffice to verify and proceed information even in order to form a reliable initial view, especially that the only participant to the procedure is the State. This is aggravated by the fact that the obligation to open the formal investigation procedure whenever doubts arise is very blurred. The formal investigation, on the other hand, is of better quality, mainly thanks to a longer time of assessment. Since negative decisions may be adopted only after the formal investigation procedure, while positive decisions may be (and mainly are) adopted in the preliminary examination, there is a lower risk than an erroneous negative decision will be adopted than that an erroneous positive one will be.

However, 92% of decisions are taken in Phase 1. Therefore, this phase becomes the main State aid procedure and more analysis should be referred to this stage: the probability of error may in fact materialise and it is legitimate to ask questions about how it could be lowered.

The answer to this question may be found in the way of interpretation of particular criteria for assessment. The preference seems to go towards Per Se criteria, which the Commission would have time to assess during two months, and which allow to better address informational asymmetries. However, such a switch must constitute a balance between two costs: the one of error in application, which favours ‘Per Se criteria’ and the one of error caused by unsuitability of generalised criteria to some cases, which favours ‘Rule of Reason criteria’. Overall in State aid law, the probability of error in application under Per Se criteria may be essentially lower than under Rule of Reason criteria and therefore, the optimal criterion could be moved towards Per Se side.

This ‘inclination’ is proper to State aid control and derived from its particularities, which may constitute an interesting factor to account for, when deciding on how criteria for State aid assessment should evolve in the future. Moreover, this finding stemming from the analysis of procedural law
supports the observation, according to which ‘several important effects of state aid, both positive and negative, are difficult to measure’ and thus ‘the theoretical and practical limits of the economic analysis of any given state aid call for a ‘structured rule of reason,’ and is consistent with the more general conclusion that competition rules ‘should only rarely rely on case-by-case analysis.’ However, there is no intention in this paper to convince the reader about the absolute prevalence of Per Se criteria – switching to Per Se criteria may be precautious as it may result in a higher probability of error in Phase 2. Therefore, the probability of error in application should constitute the starting point for the actual definition of criteria, or alternatively, act as a reality check for already existing ones. Most importantly, the underperformance of the preliminary examination should somehow be addressed by the law- or decision-makers, or at least be subject to a more profound analysis.

77 Spector (n 36) 193–194.