



Concurrences

Revue des droits de la concurrence

“Delivering the State aid reform”

Interview | *Concurrences* N° 4-2006 – pp. 7-9

Lowri EVANS

lowri.evans@ec.europa.eu

■ Deputy Director General for State aid,
DG COMP, European Commission



Institut de droit
de la concurrence



Interview

Lowri EVANS

lowri.evans@ec.europa.eu

Deputy Director General for State aid,
DG COMP, European Commission

Before 1983

Chartered Accountant,
Deloitte's

1983

Joined the EC Commission

2002-2006

Director of Services in DG
Competition,

Responsible for antitrust and
mergers (financial services,
liberal professions and
transport...)

December 2005 - May 2006

Acting Deputy Director
General for Mergers

June 2006

Deputy Director General
for State aid

Delivering the State aid reform

Could you let us know about your personal background?

In May 2006, I became the Deputy Director-General for State aid and from December 2005 to June 2006 I was Acting Deputy Director General for Mergers. From 2002 to 2006, I was Director of Services in DG Competition, responsible for antitrust and mergers, in particular in the areas of financial services, liberal professions and transport. I joined the Commission in 1983 and apart from DG Competition, I have worked in DG Employment, Financial Control and the Cabinet of Commissioner Flynn. Before the Commission, I worked with Deloitte's as a Chartered Accountant.

State aid is an exciting new challenge for me with the added bonus of being able to work with excellent colleagues who have a depth of knowledge in this very important area!

“When it comes to assessing the impact of State aid on competition and trade, we can build on experience gained in the field of antitrust and merger control...”

Taking into account your antitrust background, would you consider that the same analysis should be conducted in the State aid field? What about the relevant market, should the effect of aid on the relevant market be assessed as in antitrust? Is it reasonable to import the definition of relevant market in State aid?

Putting a greater emphasis on economic analysis will help better focus and target State aid control towards the objectives of the Lisbon strategy for Growth and

Jobs. When it comes to assessing the impact of State aid on competition and trade, we can build on experience gained

in the field of antitrust and merger control, where antitrust economics have developed sophisticated analytical tools over time. So, yes, I foresee an increased use of these techniques in the State aid field.

“It must be borne in mind, however, that there are certain important differences... which may not allow the Commission to directly transpose the economic techniques developed in antitrust or merger control into State aids analysis.”

It must be borne in mind, however, that there are certain important differences between antitrust and merger control on the one hand, and the State aids discipline on the other, which may not allow the Commission to directly transpose the economic techniques developed in antitrust or merger control into State aids analysis.

First, State aid control is not only, and not even primarily about competition between undertakings and concerns of market power, but about the proper functioning of the internal market and “competition between Member States”, which may be significantly impaired by Member States embarking in harmful subsidy races. Second, State aid control is not only about economic efficiency, but also takes into account wider public interest objectives such as cohesion, environmental protection and social objectives; there is thus necessarily a more political dimension to State aid control.

“There is... necessarily a more political dimension to State aid control”

Third, the vast majority of State aid cases concern schemes, for which it is hardly feasible to conduct a precise market analysis at the time they are notified to us, since the beneficiaries are not known in advance. In addition, while the effect on competition of giving aid to one small company may appear insignificant the overall effect of a scheme providing aid to many companies may be significant. A further issue is how to take into account the cost of aid. State aid does not come for free, but is financed via taxation and thus ultimately by consumers and producers.

About economic analysis of State aid: Some authors have suggested that State aid policy should focus more on consumer welfare in order to be a truly competition policy (S. Martin, Ch. Strasse, Concurrences N° 3-2005). What is your point of view? More generally, would you consider that economic analysis implemented in antitrust should apply in the State aid field?

In the fields of mergers and antitrust the negative and positive effects are assessed essentially on the basis of a consumer welfare standard. It is however not possible to transpose such a consumer welfare standard one-to-one to State aid. The test for exempting State aid under Article 87(3) is whether the aid is in the “common interest”. Contrary to mergers and antitrust, State aid, even if it distorts competition and trade to some (limited) extent, can be allowed on the basis of social or regional cohesion objectives. In other words, the common interest comprises both an economic efficiency dimension (efficient functioning of markets) and an equity dimension. Speaking in welfare terms, maximizing social welfare, a concept which comprises both efficiency and equity dimensions, is probably a good interpretation of the term “common interest”.

“...Maximizing social welfare, a concept which comprises both efficiency and equity dimensions, is probably a good interpretation of the term “common interest”

The differences between the areas that I mentioned earlier make the economic analysis of the impact of State aid on markets considerably more complex than in antitrust or mergers. Still, it is important that State aid control is geared towards economic realities. Analysing the effects of State aid requires understanding of how economic behaviour, and consequently the market equilibrium, may be affected by the aid. This analysis must be incorporated in the rules, whereas a detailed individual economic assessment of cases will be warranted for large, complex and/or precedent setting cases. For instance, in the new guidelines for State aid to risk capital investments, investments under € 1,5 million over a period of 12 months will be subject to an ordinary assessment, whereas, investments above this threshold will be subject to a detailed assessment.

It is often said that State aid law is the worst area of competition law with regard to legal certainty as more and more national provisions/acts are found to constitute State aid measures. What could be done to offer more legal certainty to the States and undertakings? Would it be possible for the Commission to take decisions for the future only, as done by the ECJ?

I don't think it is true that there is a poor legal certainty in the field of State aid. First of all, the Commission makes guidelines, frameworks, notices etc. to explain how it interprets the notion and the compatibility of “State aid” under the EC Treaty. Second, Member States are well aware that they cannot grant any State aid unless the aid has been authorised by the Commission. It may be authorised under a scheme or as an individual notification. The aid can also fall under a block exemption regulation allowing Member State to grant the aid without notifying it to the Commission.

In my view there is legal certainty if Member States respect the principles to only grant aid in accordance with an authorised scheme, individual notification or a scheme which is clearly covered by an exemption regulation.

The report on State aid implementation by national courts underlined that Member States are increasingly applying State aids provisions. However, the report highlighted legal problems with some national procedural rules (legal basis, interim measures...). What is your position on the recommendations suggested on these points in the executive summary? The report also underlined that recovery is far from being fully effective. What would you suggest to be done in order to render recovery more efficient? Finally, it remains difficult for practitioners to know about national State aids decisions. What could be done at the EC and national levels in order to organize a better flow of information?

Case law does show that legal uncertainty about the legal basis under national law for State aid recovery, and the lack of interim relief for its enforcement under national law often impede immediate and effective recovery of illegal State aid. It is quite clear that national judges are best placed to obtain efficient and immediate recovery and it would already be a big step ahead if the national courts in all Member States would accept that the Commission's recovery decision constitutes a sufficient legal basis for State aid recovery under national law. Furthermore, when dealing with recovery cases, national courts should also ensure that the “effet utile” of the Commission's recovery decision is duly taken into account. If necessary, they should set aside provisions of national procedural law that prevent the immediate implementation of the Commission's decision. I agree that Member States do not always implement the Commission's recovery decisions in a sufficiently expedient manner, but I would also like to say that the situation is improving. The information that we have at our disposal shows that more than three quarters of the illegal and incompatible aid which the Commission ordered Member States to recover in recent years has been effectively paid back. This is something we monitor closely.

“3/4 of the illegal and incompatible aid which the Commission ordered Member States to recover in recent years has been effectively paid back”

I also agree that it is useful for practitioners to have easy access to information on State aid related judgments by national courts in other Member States. This is also why we have commissioned a study on the enforcement of State aid rules at national level which includes summaries of published State aid related judgments by national courts. This will contribute to a diffusion of best practice across the Union. As the Commission announced in its State aid action plan, it will also address the question of how to enhance the role of national courts in the enforcement of the Community's State aid rules in a communication which it intends to adopt in the course of 2007.

Finally, let me add that if Member States respected their obligation to notify State aid in the first place, then recovery of illegal State aid would not be an issue.

Would you consider that one Directorate General should be in charge of all State aid investigations in order to increase consistency? What about the idea of an independent authority for State aid?

This idea is coming up from time to time and clearly, it is not up to me to decide on it. There are however several mechanisms in place within the Commission that ensure consistency. First of all of course, we talk to each other. On top of this, there is an established system of inter-service consultation, the Commission's Legal Service assesses all cases, and it should not be forgotten that the decisions are taken by the Commission as a college. As to an independent authority, well the Commission is an independent authority in this area. And there are very strong advantages in

having the Commissioner responsible for competition embedded within the college, exercising her influence on other EU policies, and helping to ensure consistency in a wider sense.

New EC memberships gave special attention to the State aids issue. The notion of existing aid received special treatment following pre-access and membership agreements. In addition, some national competition authorities were given special power in order to monitor existing aids. Is there anything in this process that could be useful for an evolution of EC State aid policy? Would you be in favour to modify the existing aid definition Treaty rules or to allow NCA to be granted new powers in State aid provisions implementation?

The implementation of a strict State aid discipline already even before accession has indeed been a central issue in the context of the recent enlargement. Our historical challenge was that 8 of the 10 new Member States – as well as Bulgaria and Romania – were in transition from a planned economy to a market economy. State aid has been one of the legitimate tools in this enormous restructuring process. The Union was however keen to ensure that this process would be guided by clear rules regarding government intervention into the economy. Hence, we insisted that the State aid “acquis”, i.e., the full set of State aid rules, be implemented as soon as possible.

This was achieved through bilateral agreements, known as “Europe agreements”. In the absence of supra- or international institutions like the European Commission for the EU Member States or the EFTA Surveillance Authority for the EFTA countries participating in the European Economic Area – which helped to prepare the accession of Austria, Finland and Sweden prior to 1995 – the Europe agreements requested the setting up of independent State aid authorities in the accession countries. Usually, the accession countries entrusted their national competition authorities with this task.

What can we learn from this? First, the State aid authorities in the acceding countries did a good job – with all the limitations that go along with self-surveillance within a country. It is however fair to say that this process would not have worked as well as it did without close and constant cooperation with the Commission, and our possibility to intervene when necessary. I see this as a workable tool to prepare for future enlargements, but I do not think that the concept of self-surveillance would assure a level playing field within the Union in the long run.

“We can achieve this without changing the Treaty rules on State aid.”

There is however a second strand of experience on which the Commission could build a future evolution of its State aid policy: enhanced cooperation. The bilateral agreements have contributed to raise awareness of the need for a strict State aid discipline. After accession, most new Member States have transformed their State aid authorities into well-functioning coordination and monitoring bodies.

This goes in the right direction: the Commission needs strong and committed partners in the Member States who contribute to awareness raising, ensure a good information flow between the Commission and national authorities and share experiences and best practices. We can achieve this without changing the Treaty rules on State aid.

Finally, could you let us know about the main lines of your 2007-2009 program for the State aids unit?

Let me start with 2005, where the Commission adopted new regional aid Guidelines. These Guidelines will apply from 2007 to 2013, the same period as for the next programming period for EU structural funds. In 2006 the Commission has adopted new State aid Guidelines in the field of risk capital, which entered into force in August this year. Before the end of the year the Commission will also adopt a

new Framework for research, development and innovation and an amendment to the *de-minimis* Regulation, which will increase the threshold under which measures will not have to be notified. Finally, it is foreseen that the Commission will adopt an exemption Regulation for regional investment aid and a proposal to the Council to amend the so-called enabling Regulation.

“In 2007-2009, the main topics will be a general block exemption regulation merging the existing regulations into one and including new areas...”

In 2007-2009, the main topics will be a general block exemption regulation merging the existing regulations into one and including new areas like environment and research and development. Furthermore, the Commission will revise the guidelines on State aid to environmental protection and the notice on State aid in the form of guarantees. In addition, the Commission intends to launch a consultation document on a reform of the procedural rules.

Member States have defined the overall policy goal as “less and better targeted State aid”. Commissioner Kroes has said from the beginning of her mandate that her top priority is to bring about a comprehensive reform of the State aid rules that will help bring this about. We’re well into the delivery phase now, although there’s still a lot of work to do. As our Commissioner has said recently our objective is to help Member States spend only as much taxpayers’ money on subsidies as is absolutely necessary, and to target that expenditure as effectively as possible. We’re putting in place the tools to do that job. ■

Concurrences est une revue trimestrielle couvrant l'ensemble des questions de droits communautaire et interne de la concurrence. Les analyses de fonds sont effectuées sous forme d'articles doctrinaux, de notes de synthèse ou de tableaux jurisprudentiels. L'actualité jurisprudentielle et législative est couverte par neuf chroniques thématiques.

Concurrences

Editorial

Jean-Bernard Blaise, Nicolas Charbit,
Claus-Dieter Ehlermann, Laurence Idot,
Hubert Legal, Claude Lucas de Leyssac,
Denis Waelbroeck...

Interview

Sir Christopher Bellamy, Dr. Ulf Böge,
Frédéric Jenny, Nelly Kroes, Mario Monti,
Mustafa Parlak, Dominique Voillemot...

Tendances

Christophe Barthelemy, Guillaume Cerutti,
John Davies, Céline Gauer, Damien Gérardin,
Pierre Kirch, Christophe Lemaire, Irène Luc,
Emil Paulis, Richard Whish...

Doctrines

Guy Canivet, Emmanuel Combe, Serge Durande,
Luc Gyselen, Daniel Fasquelle, Barry Hawk,
Laurence Idot, Bruno Lasserre, Stanislas Martin,
Caroline Montalcino, Catherine Prieto,
François Souty...

Pratiques

Tableaux jurisprudentiels : Bilan de la pratique des
engagements, Données publiques et concurrence,
Droit pénal et concurrence...

Horizons

Allemagne, Belgique, Canada, Japon,
Luxembourg, Suisse, USA...

Droit et économie

François LÉVÊQUE

Chroniques

Ententes

Emmanuelle CLAUDEL
Michel DEBROUX
Marc VAN DER WOUDE

Pratiques unilatérales

Catherine PRIETO
David SPECTOR
Anne WACHSMANN

Pratiques restrictives et concurrence déloyale

Daniel FASQUELLE
Jean-Patrice de la LAURENCIE
Marie-Claude MITCHELL

Concentrations

Jean-Mathieu COT
Jérôme PHILIPPE
Stanislas MARTIN

Aides d'État

Alain ALEXIS
Jean-Yves CHÉROT
Jacques DERENNE

Procédures

Valérie MICHEL-AMSELLEM
Chantal MOMÈGE
Fabien ZIVY

Régulations

Jean-Paul TRAN THIET
Thierry TUOT

Secteur public

Bertrand du MARAIS
Stéphane RODRIGUES
Antoine GOSSET-GRAINVILLE

Politique internationale

Frédérique DAUDRET-JOHN
François SOUTY
Stéphanie YON

Revue des revues

Christelle ADJEMIAN
Umberto BERKANI
Alain RONZANO

Bibliographies

Centre de Recherches et d'Études Européennes
(Université Paris 1 – Panthéon-Sorbonne)



Comité scientifique

Laurence IDOT

Professeur à l'Université Paris I – Panthéon-Sorbonne

Jean-Bernard BLAISE

Professeur émérite de l'Université Paris II

Guy CANIVET

Premier Président de la Cour de cassation

Damaso Ruiz Jarabo COLOMER

Avocat général à la Cour de justice des Communautés européennes

Marco DARMON

Ancien Avocat général à la Cour de justice des Communautés européennes

Damien GÉRADIN

Directeur du Global Competition Law Center Collège d'Europe, Bruges

David GERBER

Professeur au Kent College of Law, Chicago

Marie-Dominique HAGELSTEEN

Conseiller d'État, ancienne Présidente du Conseil de la concurrence

Bruno LASSERRE

Président du Conseil de la concurrence

Hubert LEGAL

Juge au Tribunal de première instance des Communautés européennes

Koen LENAERTS

Juge à la Cour de justice des Communautés européennes

Aristide LÉVI

Directeur du Centre de Recherches sur le Droit des Affaires - CCIP

Claude LUCAS DE LEYSSAC

Professeur à l'Université Paris I

Emil PAULIS

Directeur de l'unité Politique de concurrence et coordination, DG Concurrence Commission européenne

Sylvaine POILLOT-PERUZZETTO

Professeur à l'Université de Toulouse I

Louis VOGEL

Professeur à l'Université Paris II

Richard WHISH

Professeur à King's College London University

Comité international

Frédéric JENNY

Président du Comité de concurrence de l'OCDE
Conseiller à la Cour de cassation en service extraordinaire

Christopher BELLAMY

Président du Competition Appeal Tribunal, Londres

Christian BOVET

Professeur à l'Université de Genève

Josef DREXL

Professeur à l'Institut Max Planck, Munich

Claus-Dieter EHLERMANN

Ancien Directeur général DG Concurrence

Philippe GUGLER

Professeur à l'Université de Fribourg

Barry HAWK

Professeur à Fordham University, New-York

Bill KOVACIC

Professeur à George Mason University Washington

Santiago MARTINEZ LAGE

Avocat, Madrid

Abel MATEUS

Président de l'Autorité portugaise de concurrence

Karel VAN MIERT

Président de l'Université de Nyenrode
Ancien Commissaire en charge de la politique de concurrence

Thomas SHARPE

Avocat - QC, Londres

Comité de rédaction

Nicolas CHARBIT

Directeur de la rédaction

Pierre KIRCH

Avocat à la Cour et au barreau de Bruxelles

Alain RONZANO

Rédacteur de la lettre d'information "Creda-Concurrence" - CCIP

François SOUTY

Chargé des affaires internationales et multilatérales, Conseil de la concurrence
Professeur associé à l'Université de La Rochelle

e-Competitions est un bulletin d'actualité électronique couvrant en anglais l'actualité des droits nationaux de la concurrence dans les Etats européens. Tous les quinze jours, le bulletin analyse les décisions nationales d'application du droit communautaire de la concurrence et/ou les textes et décisions des droits nationaux de la concurrence.

e-Competitions

> Décisions nationales d'application du droit communautaire de la concurrence

Avec l'entrée en vigueur du Règlement n° 1/2003, les décisions nationales d'application du droit communautaire de la concurrence sont devenues une nouvelle source d'information. Ces décisions sont encore peu nombreuses et difficiles à recenser, les juridictions nationales n'alimentant pas encore régulièrement le site de la Commission. Grâce à son réseau de correspondants, *e-Competitions* offre à ses abonnés un accès en avant-première à ces décisions.



> Droits nationaux de la concurrence des États européens



Le bulletin *e-Competitions* couvre également les nouvelles dispositions nationales de concurrence, ainsi que les décisions d'application des droits internes de la concurrence dès lors qu'elles présentent un lien direct avec les articles 81 ou 82 CE.

e-Competitions présente et commente les principaux textes nationaux destinés à la mise en œuvre par les autorités de concurrence et les juridictions nationales des pouvoirs prévus par le Règlement n° 1/2003.

Accès aux textes originaux

Chaque commentaire est accompagné de la décision ou du texte en langue originale.

Des liens hypertextes renvoient aux textes et décisions communautaires cités (Commission européenne, arrêts de la Cour de justice, règlements, directives, livres verts, working papers...). Le bulletin est rédigé en anglais. *e-Competitions* est à ce jour la seule base de données systématique sur l'application du droit communautaire de la concurrence dans chacun des Etats membres. Plus de 300 décisions ou textes commentés au 1^{er} avril 2006 par 100 auteurs de 25 États membres.



Les partenaires de e-Competitions

Cabinets

- | Allen & Overy
- | Debevoise & Plimpton
- | Freshfields
- | Gide Loyrette Nouel
- | Hogan & Hartson
- | LECC
- | Lovells
- | White & Case...

Universités

- | Global Competition Law Center (Collège d'Europe)
- | King's College London
- | K.U. Leuven (ICL/ICT)
- | Université Paris I – Panthéon-Sorbonne (CRUE)
- | Université Paris X – Nanterre (CDCACE)
- | Université du Maine (CRDA)
- | Université de Liège (IEJE)
- | University College London...

	HT <i>Without tax</i>	TTC <i>Tax included (France only)</i>
Revue Concurrences Review Concurrences		
<input type="checkbox"/> Abonnement annuel - 4 n° (version papier) <i>1 year subscription (4 issues) (print version)</i>	398 €	406,36 €
<input type="checkbox"/> Abonnement annuel - 4 n° (version électronique sur concurrences.com) <i>1 year subscription (4 issues) (electronic version on concurrences.com)</i>	460 €	550,16 €
<input type="checkbox"/> Abonnement annuel - 4 n° (versions papier & électronique sur concurrences.com) <i>1 year subscription (4 issues) (print & electronic versions on concurrences.com)</i>	490 €	586,04 €
<input type="checkbox"/> 1 numéro (version papier) <i>1 issue (print version)</i>	100 €	102,10 €
<input type="checkbox"/> Crédit de 5 articles (version électronique sur concurrences.com) <i>Pack of 5 articles (electronic version on concurrences.com)</i>	110 €	131,56 €
<input type="checkbox"/> 1 article (version électronique sur concurrences.com) <i>1 article (electronic version on concurrences.com)</i>	30 €	35,88 €

Bulletin électronique e-Competitions | e-bulletin e-Competitions

<input type="checkbox"/> Abonnement annuel multi-postes + accès libre aux e-archives <i>1 year subscription with multi PC access + free access to e-archives</i>	448 €	535,81 €
<input type="checkbox"/> Crédit de 5 articles <i>Pack of 5 articles</i>	90 €	107,64 €
<input type="checkbox"/> 1 article <i>1 article</i>	20 €	23,92 €

Revue Concurrences + bulletin e-Competitions | Review Concurrences + e-bulletin e-Competitions

<input type="checkbox"/> Abonnement annuel revue + e-bulletin (versions papier & électronique) <i>1 year subscription to the review + e-bulletin (print & electronic versions)</i>	750 €	897 €
---	-------	-------

Renseignements | Subscriber details

Nom-Prénom | *Name-First name* : e-mail :
 Institution | *Institution* :
 Rue | *Street* : Ville | *City* :
 Code postal | *Zip Code* : Pays | *Country* :
 N° TVA intracommunautaire/VAT number (EU) :

Païement | Payment details

Vous pouvez payer directement sur www.concurrences.com (accès immédiat à votre commande) ou bien utiliser ce formulaire :
For instant access to your order, pay on-line on www.concurrences.com. Alternatively :

- ☐ Veuillez m'adresser une facture d'un montant de €
Please bill me for the sum of €
- ☐ Veuillez débiter ma carte MasterCard/Visa/American Express d'un montant de €
Please debit the sum of € from my MasterCard/Visa/American Express

Numéro de carte/Card n° :
 Date d'expiration/Expiry date :
 Nom-Prénom/Name-First name :

Signature

- ☐ J'ai transféré au compte bancaire dont références ci-dessous la somme de € à la date du
I have transferred the sum of € to the bank account below on (date)

IBAN (International Bank Account Number)	BIC (Bank Identifier Code)
FR76 3000 4007 9900 0255 3523 060	BNPAFRPPOP

Bank : BNP - Agence Opéra | 2, Place de l'Opéra - 75 002 Paris - France

Formulaire à retourner à | Send your order to

Transactive – A Thomson subsidiary
 1 rue Saint-Georges | 75 009 Paris – France | *contact: information@transactive.fr*

Conditions générales (extrait) | Subscription information

Les commandes sont fermes. L'envoi de la revue ou des articles de *Concurrences* et l'accès électronique aux bulletins ou articles de *e-Competitions* ont lieu dès réception du paiement complet. Consultez les conditions d'utilisation du site sur www.concurrences.com ("Notice légale").

Orders are firm and payments are not refundable. Reception of Concurrences and on-line access to e-Competitions and/or Concurrences require full prepayment. For "Terms of use", see www.concurrences.com.

Frais d'expédition Concurrences hors France : 18 € | 18 € extra charge for sending hard copies outside France