

## Impact case study (REF3)

<b>Institution:</b> King's College London		
<b>Unit of Assessment:</b> 18 Law		
<b>Title of case study:</b> Narrowing the European Commission's power to veto beneficial national public spending		
<b>Period when the underpinning research was undertaken:</b> 2009 – 2018		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b>	<b>Role(s) (e.g. job title):</b>	<b>Period(s) employed by submitting HEI:</b>
Oana Ștefan	Reader in Law	From 01/09/2013
Andrea Biondi	Professor of European Union Law	From 01/09/1997
<b>Period when the claimed impact occurred:</b> July 2016 - Dec 2020		
<b>Is this case study continued from a case study submitted in 2014?</b> N		

### 1. Summary of the impact

Researchers from King's College London argued successfully for amendments to be made to the European Commission's Draft Notice on the Notion of Aid 2016. They contended that this guidance would unjustifiably increase the powers of the Commission in controlling how Member States spend public money to support their national industries. They made a targeted, early intervention based on their research findings to improve the overall quality and legality of the draft. Following their contribution, the guidance was amended, considerably reducing its remit. The Notice is now regularly relied on by the European Union (EU), national public authorities and courts in both policy and decision making. It facilitates public funding of activities across the EU such as job creation, research, environmentally friendly business practices, and community activities of cultural and social significance that would otherwise have had to undergo a lengthy and uncertain approval process. Countless legal challenges, with the attendant costs to governments and businesses, have been prevented.

### 2. Underpinning research

The European Commission has sweeping powers in relation to internal market rules that limit the sovereignty of Member States in how they organise economic affairs. This is to avoid distorting EU competition and trade in the Single Market. Exceptions are granted exclusively by the Commission in limited circumstances where state interventions are deemed necessary for an efficient and equitable economy, such as providing modern and sustainable infrastructure. The Commission relies on a series of non-binding guidance instruments on these matters, including notices (soft law). These instruments constrain the ways in which governments can support their industry through subsidies or State aid. Dr Oana Ștefan and Professor Andrea Biondi have written extensively about the impact and dangers of EU soft law [1,6], suggesting ways to promote virtuous economic policies through EU-compliant State aid [1,3,4,5].

#### Identifying challenges with European Commission notices

Ștefan's empirical work examining the influence of notices in EU law [1,5] was the first in the field to combine extensive statistical, doctrinal and theoretical analysis of the case law regarding soft law. She highlighted that as guidance documents, issued by the Commission, notices are categorised as 'soft law' since they do not have the same status as legislation but are *de facto* binding on Member States and all national authorities [5]. Notices also fall into a legal 'no man's land' – once published, even if faults are discovered, the Commission cannot depart from the guidance. To do so would risk breaching general principles of law, such as the protection of legitimate expectations (in this case, that the guidance would be followed). Ștefan argued that, whilst there are benefits to such documents, in clarifying expectations and obligations, they lack democratic input and accountability. They are issued by the Commission, with no involvement from the European Parliament. Because of the soft law

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status of guidance documents, it is very difficult for anyone to challenge a notice successfully as neither EU nor national courts have, in practice, a sufficient oversight of their use [1,5].

After comprehensive quantitative and textual analysis of judgments of the Court of Justice of the EU (CJEU) in the area of economic law, Ştefan showed that there is a risk that the Commission could misuse such guidance documents to add new rules and constraints on public spending while giving itself powers beyond those set out in the relevant treaties [1]. She argued that it is instead only through a proper process of public consultations that individuals, businesses, practitioners and academics can be heard, and increase the legitimacy of soft law instruments [1,5].

#### Exploring notions of State aid

The definition of State aid is crucial, since any national measure deemed to fall within the definition requires the Commission's approval before it can be implemented. Indeed, the EU internal market rules limit strictly the support that Member States can give to their national industries or companies. This is to avoid distorting EU competition and trade in the Single Market.

Biondi's work delved extensively into the criteria used to define a State aid measure. He argued that State aid control should strike a fair balance between the protection of market efficiency and the preservation of national 'virtuous' policies that would raise living standards and protect the environment. He contended that making decisions about State aid based solely on economic principles was inconsistent with the role of government in the sustainable, social market economy that the EU embraces [3]. He drew upon CJEU case law to make the case for limiting the application of EU State aid law and the powers of the Commission to avoid encroaching upon core values of national sovereignty [2,3,4,6]. Biondi demonstrated why, in certain cases, such as environmental protection or social policy, public spending measures should not be classified as State aid and not be subjected to the Commission's review [3,4].

#### Analysing contemporary actions

The Commission's 2016 Draft Notice on the Notion of State Aid prompted the researchers to combine their expertise on soft law and State aid to critically analyse the Draft Notice. Informed by their previous publications, their analysis discussed the legal status of the Draft Notice within the hybrid framework of EU State aid regulation and examined its text and specific provisions.

Ştefan and Biondi's analysis of the Draft Notice [6] acknowledged the need for the Commission to codify and clarify over 50 years of CJEU case law to improve transparency and legal certainty, but they criticised how this was done. They argued that the Commission's Draft Notice went beyond the interpretation given by the CJEU in its established case law. The misinterpretation of CJEU rulings would have allowed the Commission unjustifiably to extend its powers to control national economic policies. This would have impaired national sovereignty and upset the balance of competences enshrined in the EU Treaties. As such, King's researchers offered suggestions to improve the text of the Draft Notice, providing an easier, more transparent and consistent application of EU regulations on public spending [6]. Unlike their other research, which has examined the lawfulness of Member State's proposals, this research sought to prevent the Commission itself from acting unlawfully.

### 3. References to the research

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All publications have gone through strict peer-review processes, are widely cited in the literature and are included as further reading in the leading books on EU law. [1] is cited by leading scholars in monographs on new governance or the financial crisis. [5] is a chapter published in a seminal monograph for the field, which was singled out as 'shining light in the context of enforcement on the growing importance of soft law in EU governance.'

- [1] Ştefan, O. (2014). Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance, *Maastricht Journal of European and Comparative Law* 2, pp. 359-379. DOI: 10.1177/1023263X1402100209

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- [2] Biondi, A. & Tarrant, A. (2017). Brexit and Labour's Political Economy: Labour's Programme and EU Law, *Renewal: A journal of social democracy*, vol. 25, no. 3-4, pp. 66-89.
- [3] Biondi, A. (2010). The Rationale of State Aid Control: A Return to Orthodoxy', in C. Barnard & O. Odudu (eds), *Cambridge Yearbook of European Legal Studies*. 2009-2010 edn., vol. 12, Hart Publishing, pp. 35-52. DOI: 10.5040/9781472565327.ch-002
- [4] Biondi, A. (2013). State Aid is falling down, falling down: An analysis of the notion of aid, *Common Market Law Review*, vol. 50, no. 6, pp. 1719-1743.
- [5] Ştefan, O. (2017). Soft Law and the Enforcement of EU Law, in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, A. Jakab & D. Kochenov (eds), Oxford University Press, pp. 200-217. DOI: 10.1093/acprof:oso/9780198746560.003.0012
- [6] Biondi, A. & Ştefan, O. (2018). The Notice on the Notion of State Aid: Every light has its shadow, in B. Nascimbene & A. Di Pascale (eds), *The Modernisation of EU State Aid Control – Evolution and Perspectives of the EU Rules on State Aids and Services of General Economic Interest*, Springer. DOI: 10.1007/978-3-319-99226-6\_3

### 4. Details of the impact

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In 2016, as part of the State aid modernisation programme, the European Commission published a public consultation on the Draft Notice on the Notion of Aid. The Notice transcended the technical issues of State aid, altering the distribution of powers between the national and EU levels of governance. Drafted in response to frequent requests from stakeholders, the Notice aimed to streamline and improve existing rules to provide faster and better-informed decision making. It also sought to define the legal criteria for State aid, which were contradictory and constitutionally dubious, and to codify the case law of the CJEU.

Despite such admirable goals, the Draft Notice contained important flaws. In response to the Commission's public consultations on the Draft Notice, Ştefan and Biondi drew on their academic analysis [6] to write a policy paper [A] addressing these flaws and suggesting solutions. The specific amendments proposed were incorporated by the Commission in the revised final version of the Notice on the Notion of Aid [B]. This both improved the quality of the final document and helped to preserve national sovereignty. Without the implementation of the technical amendments Ştefan and Biondi suggested, the Notice would have been an *ultra vires* document, failing to achieve its full potential. Even more worryingly, such shortcomings could have gone unchallenged as judicial review is difficult in practice for such instruments. As noted by the Commission Head of Unit in charge of the drafting, "[T]he Commission services took [Ştefan and Biondi's] comments into account and found them very useful in finalising the Notice on the Notion of State Aid. Particular suggestions made in [their] comments were taken into account in the final text in, e.g., paragraphs 61, 70, 100, 135, and 229" [C]. The Notice has had widespread application and impact across the EU.

#### Challenging the legal status of the Draft Notice

Ştefan and Biondi's analysis [6] emphasised the importance of specifying the legal status of the Notice and its impact on both general principles of law and previous legal instruments. These recommendations were taken into consideration in the final text [B, para. 229]. The Commission implemented these suggestions, adding a commitment to constitutional principles such as transparency and legal certainty that gave the Notice more caution in order to avoid unintended repeals of previous guidance [B, para. 229]. These changes not only ensured the legality of the document and its consistency with CJEU case law, but also reinstated and promoted the Commission's commitment to legal certainty, openness and accountability, all essential for the EU's supranational democracy. This improved the legal status of the Notice, which ultimately enhanced rule of law protection in the EU.

#### Improving specific provisions of the final text of the Notice

Relying on substantive research on State aid [2,3,4,6], Ştefan and Biondi offered concrete recommendations to improve several technical elements of the Notice. As confirmed by the Commission Head of Unit [C], their suggestions contributed to the following technical points:

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- i. They helped better define the conditions under which public spending on services of general economic interest could be allowed [B, para. 70]. This enabled a wide array of activities beneficial to the community to be carried out, such as, in a recent case before the CJEU, the enhancement of local Italian railways [D].
- ii. The criteria to determine whether transactions between businesses and the State take place under normal market conditions were better outlined [B, section 4.2.3]. The Commission acknowledged Ştefan and Biondi's contribution to establishing the appropriate benchmark to distinguish between activities undertaken by the State in its capacity as market participant or as public authority [B, para. 100]. This distinction is vital, as it is not always easy to determine whether the authorities grant financial aid to the economy or whether they behave like any other rational investor in the market. Following Ştefan and Biondi's suggestions, these provisions were altered and have had an impact on judicial practice. For example, they assisted a Dutch court to determine whether the offering of public spaces for advertising was based on sound transparent market criteria [E, para. 4.1.2.6].
- iii. Following Ştefan and Biondi's suggestions, the Commission streamlined the criteria employed when determining whether a State measure was discriminating unjustly between different firms [B, para. 135]. The incorporation of this suggestion proved useful to settle a dispute, at the EU level, where the Court's Advocate General found that a national tax measure did not breach EU State aid rules in Germany in 2018 [F, para. 149].
- iv. Ştefan and Biondi's contributions changed the way in which the Notice defined the notion of State control over public resources, a crucial criterion that needs to be met for the activation of the Treaty prohibition on State aid [B, para. 61]. As such, Member States now have a bigger margin of manoeuvre to help their economies, which is crucial, especially in light of the COVID-19 crisis.

In broad terms, Ştefan and Biondi's recommendations improved the quality of the final document and helped to preserve the national sovereignty of Member States. Without these technical changes, the Notice would have been *ultra vires* and could have been subject to challenge in the Courts.

#### **Impact of the Notice on administrative and judicial practice in the UK and EU**

The Notice has rapidly become the main instrument relied on in relation to State aid, both at the EU and at the national level. It shapes the decision making of national authorities on public spending, with a direct impact on local communities and industry. It distributes powers between the national and EU levels of governance, enabling better and more accountable public spending. For example, ministries of Finance use the Notice extensively. In France, it is relied on at length in the national rules on State aid [F], and in countries such as Slovenia, the Notice is referred to in around half of the cases dealing with the notion of aid [G].

Litigation in the field of State aid varies, but since the Notice was issued, judges frequently refer to it at the national level [G]. In the UK, the High Court and the Court of Appeal relied on the Notice to determine the conditions under which a City Council could lease a sports ground, thus impacting local communities [H]. In the Netherlands, the Notice was instrumental in a case allowing funding for initiatives promoting local culture [I].

The Notice has also been referred to in 15 cases dealing with the notion of State aid before the CJEU. These are landmark judgments, which constitute reference points for subsequent case law. In one such judgment, the CJEU relied on the Notice to enable Spain to introduce supplementary taxation on the large retail sector [J, para. 39]. This policy, aimed at environmental protection, forced business to act responsibly and allowed sustainable outcomes to benefit society at large. In another case, the CJEU relied on a specific paragraph of the Notice [B, para. 135] to confirm the sovereign right of Germany to grant tax relief to firms, allowing German businesses to benefit from tax exemptions to restructure their operations and save jobs. There is thus a concrete impact on the distribution of powers

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between the national and EU levels of governance, enabling better and more accountable public spending [K].

In the UK, the Notice was used within the Department for Business, Energy & Industrial Strategy (BEIS) as an important source of information and guidance when drafting the 2015 BEIS *State Aid Manual*, which acts as the UK's own guide to State aid rules and how they should be interpreted and applied. A document of high national relevance, it is meant to “*help public sector officials understand the state aid rules and how they apply in practice*” [L]. As Deputy Director, Construction at the BEIS stated: “*The work of Oana Stefan and Andrea Biondi on soft law, which was submitted as part of a formal public consultation by the European Commission, has made a valuable contribution to the development of the Notice. The research undertaken ... identified a number of areas where the text of the Notice could be clarified or supplemented to aid comprehension and ensure that the Notice can be more easily understood and applied, and a number of the proposals made have been incorporated into the revised Notice. This is a good example of how academic research can be applied to positively influence the development of public policy and achieve beneficial outcomes within society*” [M].

### 5. Sources to corroborate the impact

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- [A] Biondi, Andrea and Buendia Sierra, José Luis and Galletti, Gian Marco and Stefan, Oana Andreea (24 April 2014). 'Comments on the Draft Commission Notice on the Notion of State Aid Pursuant to Article 107 (1) TFEU'. Social Science Research Network DOI:10.2139/ssrn.2428771r.
- [B] European Union (19 July 2016) Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, (2016/C 262/01)
- [C] Testimonial from: Koen Van De Castele, Head of European Commission's State aid Case Support and Infringement Coordination unit, 8 December 2016.
- [D] *Arriva Italia Srl and Others v Ministero delle Infrastrutture e dei Trasporti*, Case 358/18, ECLI:EU:C:2019:647, 2019.
- [E] *Rechtbank Overijssel*, 14/3/2018, Case no. C/08/197942.
- [F] Department of Legal Affairs (2020). *Vade-mecum des aides d'état*, France.
- [G] European Network of Soft Law Research (2020). *EU Competition and State Aid Soft Law in the Selected Member States: Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK*. DOI: 10.2139/ssrn.3667387.
- [H] *R (Sky Blue Sports & Leisure Ltd) v Coventry City Council* [2014] EWHC 2089 (Admin), confirmed in *R (Sky Blue Sports and Leisure Ltd) v Coventry City Council* [2016] EWCA Civ 453.
- [I] *Rechtbank Den Haag*, 3/4/2017, Case no. C/0526817.
- [J] *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón*, Case C-236/16, ECLI:EU:C:2018:291, 2018.
- [K] Opinion of the Advocate General in Case C-374/17, *Finanzamt B v A-Brauerei*, ECLI:EU:C:2018:741, 2018.
- [L] Department for Business, Energy & Industrial Strategy (2015). *State Aid Manual*, UK.
- [M] Testimonial from: Fergus Harradence, Deputy Director, Construction Department for Business, Energy & Industrial Strategy, 31 March 2020.