

State Aid Litigation before EU Courts (2004–2012): A Statistical Overview

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I. Introduction

The contemporary relevance of State aid law cannot be denied or questioned. One way to verify what is obvious to any lawyer based in Brussels is to look at the volume of cases reaching European Union (EU) courts every year. As Figure 1 shows, the idea that this discipline is the ‘poor relation’ of competition law is (if at all) a thing of the past. The annual number of State aid cases reaching the General Court (GC) has regularly outnumbered those brought in other areas of competition law considered together (and thus comprising, *inter alia*, cartels, Article 102 TFEU, and merger cases) in the past years (on occasion even by a considerable margin).

This article examines systematically the nature and outcome of actions for annulment in State aid cases. A statistical overview of litigation before EU courts reveals much about the discipline and about the behaviour of its key actors. One of the major objectives of this exercise is to make sense of the strategies followed by Member States, that is, to determine whether they prioritise some sectors and some substantive questions over others. A second objective relates to the behaviour of EU courts. More precisely, the pages below identify the instances in which annulment actions are more likely to succeed and examine, in addition, whether it is more likely that a Commission decision will be annulled where the Member States become involved in the proceedings. Finally, the piece seeks to determine whether there is a pattern in the cases set aside on appeal by the European Court of Justice (ECJ).

Actions for annulment brought before the GC from 2004 onwards and decided before the end of 2012 are considered. The year of 2004 seemed like an appropriate starting date since it was the time at which the GC started to hear actions brought by Member States in State aid cases.¹ Examining actions brought before a

Key Points

- This article considers annulment actions and appeals brought by Member States, recipients, and sub-national entities since 2004.
- Where the Member States took part in the proceedings, Commission decisions were annulled more frequently by the General Court.
- Annulments were more likely where the ‘private investor test’ was raised as a ground.
- On appeal, selectivity-related issues are prominent; first instance judgments were rarely set aside.

single court in the first instance makes it easier to compare the different rulings and to provide a unified statistical account of the evolution of litigation. It is out of a similar concern with coherence and comparability that only actions brought by aid recipients and the awarding bodies (ie the central government or a sub-national entity) are considered. Thus actions brought by other private third parties (in general, competitors of the recipient) are left out of the analysis.² Actions dismissed as inadmissible are also excluded.

The statistical analysis of the fifty-three items shows, first, that Commission decisions were annulled markedly more frequently where Member States took part in the proceedings (either as applicants or in support of the application brought by the recipient). In such cases, close to one in two of the Commission decisions were annulled (44.82 per cent). Where recipients or sub-national

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1 See Council Decision 2004/407/EC amending Arts 51 and 54 of the Protocol on the Statute of the Court of Justice [2004] OJ L132/5.

2 Typically, third parties challenge decisions declaring the compatibility of State aid with the internal market. As a consequence, some of the key questions that are examined in this paper (such as the influence of Member State intervention in the proceedings) are irrelevant in these cases.

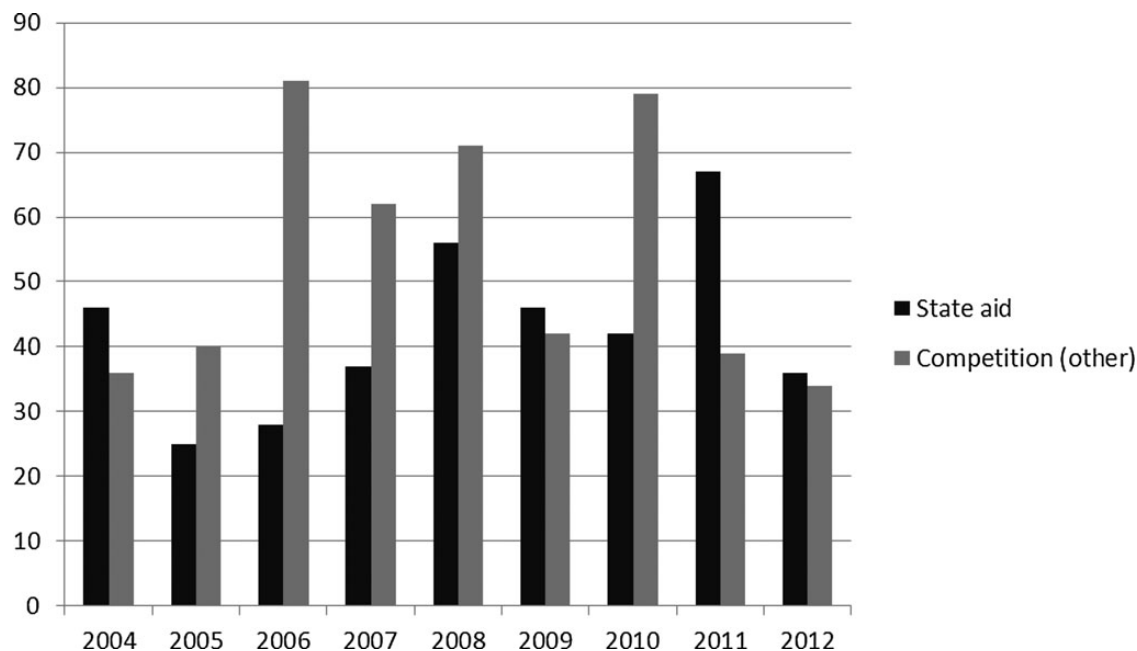


Figure 1: Number of State aid and competitions cases reaching the General Court, 2004–2012

Source: Annual Reports published by the CJEU

entities challenged the decision without the support of the State, the rate dropped to 26.31 per cent. As discussed in the article, several causes could account for this substantial divergence. It is also helpful in this regard to note that the Member States that intervened less frequently in the proceedings were more successful before the GC.

Two additional insights follow from the analysis. Decisions in which the ‘private investor test’ was at stake were those annulled more frequently by the GC, and this by a considerable margin. Close to three in four of the decisions (72 per cent) were annulled—if one considers only those cases in which the Member States took part in the proceedings, the rate of annulment is even higher (83.33 per cent). These figures are all the more notable if one takes account of the fact that the application of the ‘private investor test’ typically involves ‘complex economic assessments’ for which EU courts are assumed to give deference to the Commission.³ The strategic choices made by Member States do not match the observed pattern of annulment. The figures suggest that Member States are not concerned with the outcome of individual cases but with the long-term evolution of the law in some key areas. Readers will not be surprised to learn that national governments intervened significantly more

frequently where the selectivity of the measures was at stake and where the measures concerned the provision of public services in the network industries.

The ECJ set aside GC judgments only relatively rarely (only six judgments). Selectivity issues dominate the sample (three judgments), thereby suggesting that the definition of the boundaries between general and selective measures is as important for the ECJ as it is for the Member States. Interestingly, the ECJ sided with the Commission in disputes with Member States around the boundaries of Article 107(1) TFEU. This is true not only of cases addressing the notion of selectivity but also of the ruling on appeal in the *France Telecom* saga, in which the dispute related to whether the contested measure involved the use of State resources.⁴

II. Main figures: an overview

Cases were identified through the search engine available on the website of the ECJ (<<http://curia.europa.eu>>). Search was narrowed by type of act (‘judgments’); court (‘General Court’); by subject-matter (‘State aids’) and by procedure (‘actions for annulment’). Appeals brought against GC judgments were identified in the same way. The same search engine makes it possible to single out

³ See in particular Joined Cases C-68/94 and C-30/95 *France and others v Commission* [1998] ECR I-1375, paras 223–224; Case T-102/96, *Gencor Ltd v Commission* [1999] ECR II-753, para 164; and Case T-201/04, *Microsoft Corp. v Commission* [2007] ECR II-3601, paras 84–90.

⁴ See Joined Cases T-425/04, T-444/04, T-450/04, and T-456/04 *France, France Télécom SA and others v Commission* [2010] ECR II-2099; and Joined Cases C-399/10 P and C-401/10 P *France, France Télécom SA and others v Commission* [2013] (GC, 19 March 2013).

‘appeals’ (by definition before the ECJ) in the field of ‘State aids’. Actions brought by aid recipients and/or granting Member States were then identified from the hits returned by the search engine.

It is not unusual that parallel actions for annulment are brought by the aid recipient and by the Member State and/or the sub-national entity awarding it. Even though they formally constitute separate cases, parallel applications challenging the same Commission decision are treated in the study as a single *item* for the purposes of the quantitative analysis, even when they are not joined by the GC. Because it is based on the rate of annulment of Commission decisions, it makes sense to focus on them.⁵ Details about the *items* (53) singled out in accordance with this methodology are to be found in the appendix. GC judgments are coded according to different criteria, and more precisely:

- First, those instances in which Member States took part in the proceedings—29/53 or 54.71 per cent—are identified. In 22 of these 29 items, Member States did so as applicants and in 7 they intervened in support of the aid recipient’s application. 24 decisions (45.28 per cent) were challenged by non-privileged applicants without Member State participation. Of the latter, 19 (35.84 per cent) were challenged by aid recipients alone, 3 by sub-national entities (regions and municipalities) alone, and 2 by sub-national entities and recipients together.
- The 53 items are coded based on whether the Commission decision that was challenged was annulled—whether on total or on partial grounds—or upheld; 19 decisions (or 35.84 per cent) were annulled by the GC in the period considered.
- The grounds for annulment are also taken into account in the quantitative analysis. As far as annulled decisions are concerned, only the grounds that were deemed well-founded by the GC are identified. Where decisions were upheld in the first instance, on the other hand, the substantive grounds invoked by the applicants are mentioned. This means that recurrent generic procedural grounds (such as the duty to state reasons) are left outside of the analysis. Only the substantive claim to which such grounds relate is considered.
- Finally, items are coded by sector. Five main sectors/activities are identified: network industries (which

encompass, in turn, broadcasting, electricity, postal services, telecommunications, and transport), agriculture, shipbuilding, and manufacturing (other than shipbuilding).⁶ Horizontal measures that are potentially selective but that apply across sectors are identified as such.⁷

III. Success rate on appeal: Member States versus non-privileged applicants

As shown in Table 1, of the 19 decisions that were challenged by aid recipients alone, 5 (or 26.31 per cent) were annulled by the GC, whether partially or in full. The rate of annulment is very similar to that observed for non-privileged applicants as a whole (6/24, or 25 per cent). This means, in turn, that the said rate is not significantly altered depending on whether sub-national entities intervened in the proceedings. If anything, these entities were less successful than aid recipients. It appears that all three decisions challenged by sub-national entities alone were upheld by the GC (one of the two decisions brought by an aid recipient and a sub-national entity acting together was annulled in first instance).

The rate of annulment of Commission decisions is markedly higher where it is observed that Member States became involved in the proceedings (44.82 per cent). Interestingly, the highest rate of annulment is observed, as sketched in Table 2, where the Member State intervened in support of the application brought by the recipient. A total of 71.42 per cent (5/7) of the decisions were annulled when challenged in these cases; 36.36 per cent (8/22) of the decisions challenged by Member States as applicants were annulled by the GC.

The rate of success of applications varies from one Member State to another. Table 3 shows that the Member States that were more prone to litigate (those that challenged a larger number of decisions) met with less success before the GC. Italy took part in challenges against ten decisions during the period considered, and the rate of success of its legal services is roughly similar to that of recipients intervening without the support of the Member States (irrespective of whether one considers an application brought jointly with France and Ireland). The rate of success of France, which is the second most active Member State, is already significantly above that figure. Finally, it should be mentioned

5 Based on this same rationale, a judgment rendered by the GC after a judgment had been set aside by the ECJ on appeal has also been considered together with the original judgment in the first instance. See Joined Cases T-50/06 RENV, T-56/06 RENV, T-60/06 RENV, T-62/06 RENV, and T-69/06 RENV *Ireland, France and others v Commission* [2012] (GC, 21 March 2012).

6 The following sectors are represented: automotive tubes, bicycles, metallurgy, railway rolling stock, steel, textile, timber products.

7 By ‘horizontal’ it is meant that certain activities, as opposed to certain sectors, are advantaged by means of State aid. Examples include aid to the training of workers, to small and medium-sized firms, environmental aid, or rescue and restructuring aid.

Table 1. Success rate on appeal — recipients and sub-national entities without member State participation

	Applications	Annulment	Rate of annulment
Recipient (alone)	19	5	0.26
Sub-national entity (alone)	3	0	0
Recipient and sub-national entity	2	1	0.50
Total non-privileged	24	6	0.25
Total sub-national entity	5	1	0.20

Table 2. Success rate on appeal with Member State participation

	Applications	Annulment	Rate of annulment
State applicant	22	8	0.36
State supports	7	5	0.71
Total State	29	13	0.44

that the overwhelming majority of Member States (except for Austria) taking part in the challenge against a single Commission decision were successful in first instance.

The relatively limited number of studies examining the rate of annulment of Commission decisions makes it difficult to compare systematically the above figures with other areas of competition and EU law at large. The most ambitious study in this regard was undertaken by Tridimas and Gari and considers annulment actions in all areas of EU law during the period between 2001 and 2005.⁸ The authors observe a general rate of annulment of 31.76 per cent before the GC, and of 33.94 per cent when challenges against decisions alone are considered.⁹ The latter figure would be very similar to the total rate of annulment observed (35.84 per cent) in the present study. Interestingly, the rate of success of

Table 3. Success rate on appeal, by country

	Applications	Annulment	Rate of success
Italy	10(+1)	2(+1)	0.20 (0.27)
France	6(+1)	2(+1)	0.33 (0.42)
Netherlands	4	2	0.50
Germany	2	1	0.50
Austria	1	0	0
Denmark	1	1	1
Finland	1	1	1
Greece	1	1	1
Poland	1	1	1
United Kingdom	1	1	1
(Italy, France and Ireland)	1	1	1
Total	29	13	0.44

Member States is below the average rate in the sample considered by Tridimas and Gari (26.40 per cent). This figure contrasts greatly with that of 44.82 per cent shown in Table 2.¹⁰

In a piece recently published in this Journal, Camesasca, Ysewyn, Weck, and Bowman derived figures that suggest that the rate of success of applicants in cartel cases is significantly below that observed in this work.¹¹ These authors examine the success rate of the different pleas raised by the parties and observe a success rate which, depending on the plea, is between 15 per cent and 25 per cent. In a study examining the rate of success of applications for annulment in the field of Article 102 TFEU, this author found that defendants in administrative proceedings succeeded in 33.33 per cent of cases, a figure that is, again, very similar to that found in this piece and in Gari and Tridimas's work.¹²

A. What explains Member States' higher success rate before the GC?

The substantial disparity in the rate of success of applications can be interpreted in various ways. Perhaps the most obvious explanation relates to the nature of State aid proceedings before the Commission. To the extent that the administrative procedure is one that takes place

8 Takis Tridimas and Gabriel Gari, 'Winners and losers in Luxembourg: A statistical analysis of judicial review before the European Court of Justice and the Court of First Instance (2001–2005)' (2010) 35 *European Law Review* 131.

9 However, one should note in this regard that the sample considered in this study does not include actions by third parties and applications dismissed as inadmissible.

10 In the sample examined by Tridimas and Gari the most successful applicants were the EU institutions, with a rate of success of 75 per cent.

11 Peter Camesasca, Johan Ysewyn, Thomas Weck, and Brian Bowman, 'Cartel Appeals to the Court of Justice: The Song of the Sirens?' (2013) 4 *Journal of European Competition Law and Practice* 215.

12 Pablo Ibanez Colomo, 'The Law on Abuses of Dominance and the System of Judicial Remedies' (2013) *Yearbook of European Law*, forthcoming.

between the Commission and the Member State,¹³ the latter can be expected to have at least two advantages that can be successfully exploited when challenging decisions before the GC. First, close involvement in the procedure makes it possible to identify those points of the decision at which the analysis of the Commission is more vulnerable to criticism. Second, Member States may be in a better position to know the chances of success of an action for annulment. From this perspective, Member State intervention (or the lack of ability on the part of the recipient or sub-national entity to persuade the Member State to take part in the proceedings) would be an indicator of the credibility of the action. It is submitted that this interpretation of the data would also help to explain why the most successful Member States before the GC are those that take part less often in annulment actions.

In addition to their insights about the details of individual cases, Member States enjoy a significant advantage emerging from their status as ‘repeat players’ (to use the term popularised by Galanter in his classic piece¹⁴) in State aid law and, more generally, in proceedings before EU courts. One can presume that the wealth of knowledge acquired over the years, their familiarity with the procedures and with the officials and judges applying and interpreting the law will be reflected in the choice of cases and in the preparation of annulment actions. Member States are also likely to have more resources (staff, research services) than ‘one-shotters’ such as recipient firms and sub-national entities.

An alternative explanation relates to the possible bias of the GC in the first instance. One can think of at least two sources of bias (one not necessarily incompatible with the other) behind the disparity in the rate of annulment of Commission decisions. First, it may be the case that EU courts are biased in favour of Member States. Accordingly, the mere fact that a Member State signals its interest in the outcome of a particular action may increase the likelihood that the decision in question will be annulled by the GC.¹⁵ This may be true, in particular, in areas such as State aid, where the Commission enjoys significant discretion in the definition of EU policies and which have an impact on the exercise of Member States’ competences in key areas that include taxation, public services, or energy regulation. Alternatively, it may be

the case that EU courts are biased in favour of the Commission in disputes with private parties. To the extent that the Commission represents the public interest, EU courts may be naturally inclined to err on its side (or, if one prefers, EU courts may have developed greater tolerance towards erring on the side of the Commission). This bias in favour of the Commission may be reduced, or neutralised, once Member States become involved in the proceedings (this will be all the more so if, as conjectured above, EU courts are biased in favour of the latter).

In support of what one may term the ‘bias hypotheses’ may be the fact that Member States, precisely because they are ‘repeat players’, can be assumed to be interested not so much in the outcome of individual cases (as ‘one-shotters’ can be expected to be) but in the long-run evolution of the law. Put differently, Member States may be expected to devote their resources to influencing the definition of some key aspects of Article 107(1) TFEU that they perceive as strategic. For those same reasons, short-term considerations, such as the likelihood that a particular decision will be annulled, would be of less relevance for the choice of cases.

IV. Analysis of the items

A. A look at the items from three perspectives

It is difficult to draw univocal conclusions about the observed divergence in the rate of success of annulment actions. A discussion of the possible causes behind this phenomenon, however, raises questions on which an analysis of the data can provide insights. The question of whether Member States choose their cases based on short-term or long-term considerations invites us to consider whether the data available hint at a discernible strategy on their part. A clear pattern in the choice of cases (that priority is given to some aspects of Article 107(1) TFEU over others) would suggest that Member States are more interested in shaping the substance of State aid law provisions to their advantage over the long run than in having individual decisions annulled.

This question will be assessed by looking at the data from three different perspectives, as shown in Figures 2, 3, and 4. Figure 2 presents applications by grounds for annulment.¹⁶ It makes it possible to identify the frequency with which Member States take part in the

13 See in this sense Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Art. 108 of the Treaty on the Functioning of the European Union [1999] OJ L83/1.

14 Marc Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law & Society Review* 95.

15 One should remember in this regard that the highest rate of annulment is observed where the Member State intervenes in support of the application brought by the non-privileged applicant.

16 The grounds for annulment included in Figure 2 are the following: ‘private investor test’ (whether the measure adopted by a Member State is comparable to that adopted by a profit-seeking private investor); ‘State resources’ (whether the measure entails the use of State resources within the meaning of Art. 107(1) TFEU); ‘selectivity’ (whether the measure favours ‘certain undertakings or the production of certain goods’); ‘trade/distortion’ (whether the measure distorts competition and/or affects trade between Member States within the meaning of Art. 107(1) TFEU);

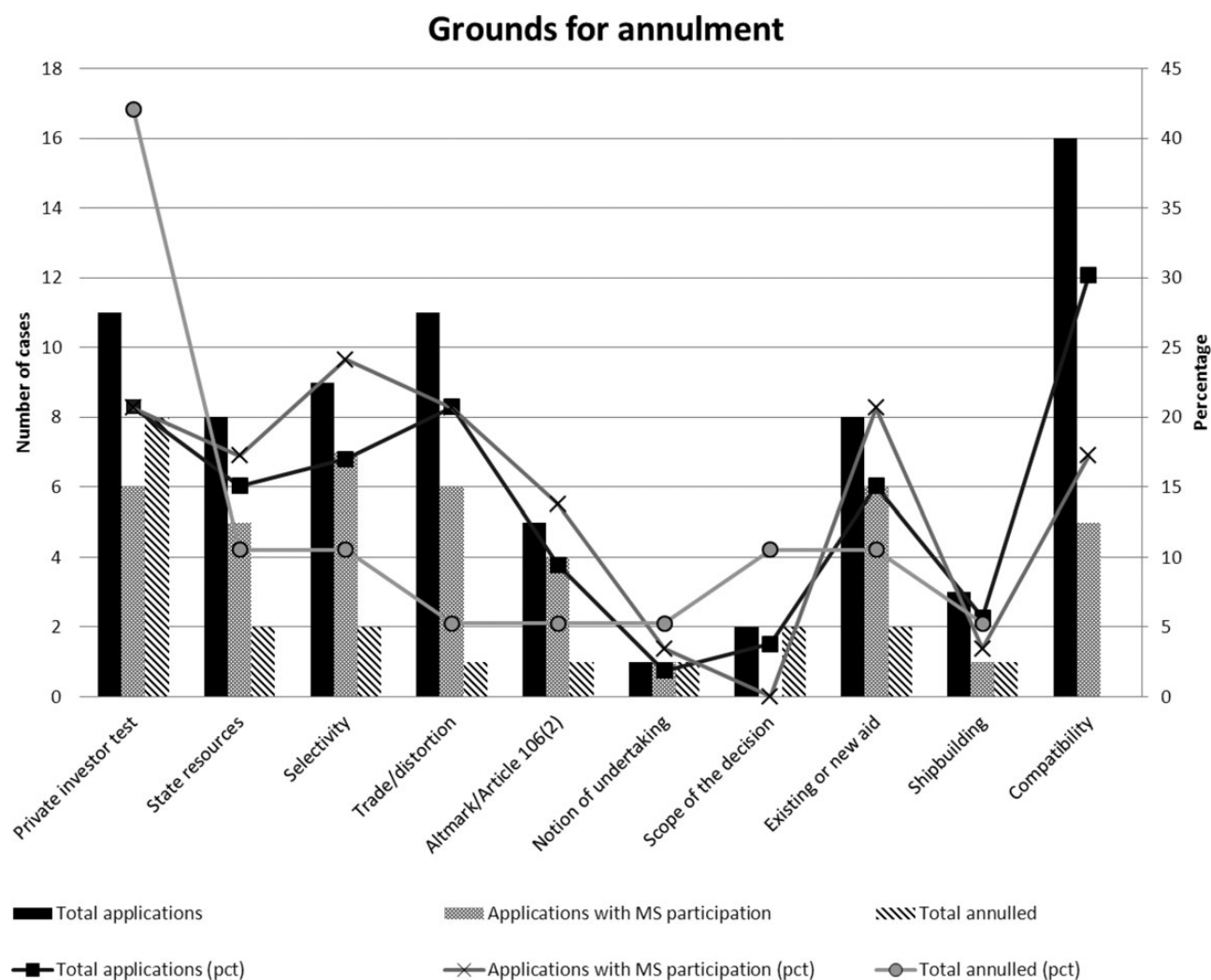


Figure 2: Applications by grounds for annulment

proceedings when a particular ground for annulment is raised. In addition, Figure 2 presents the rate of success of each ground for annulment. Thus it is possible to determine whether Member States' strategies match the pattern of annulments followed by the GC, and thus to establish whether Member States focus their litigation efforts on those areas that are inherently more contentious (at least when measured by reference to their rate of success). Figure 3 arranges the items by reference to the form of the contested measures (that is, whether the alleged aid is awarded, *inter alia*, by means of a direct

subsidy, a tax measure, or a loan). Finally, Figure 4 sheds light on the sectors concerned by the measures.

B. Understanding Member States' strategic choices

The data suggest that Member States prioritise some areas over others. It is quickly apparent from Figure 2 that Member States took part in six of the eight items in which selectivity-related issues were raised in the application. These include key disputes such as Joined Cases T-211/04 and T-215/04 (*Gibraltar*),¹⁷ concerning the tax

'Altmark/Article 106(2)' (whether the measure falls outside the scope of Art. 107(1) TFEU or can be justified under Art. 106(2) TFEU insofar as it entails a compensation for the public service obligations imposed on the recipient); 'notion of undertaking' (whether the recipient is an entity engaged in an economic activity); 'scope of the decision' (the extent to which all measures challenged qualify as State aid); 'existing or new aid' (whether the aid qualifies as existing or new within the meaning of Art. 108

TFEU); 'shipbuilding' (whether sector-specific shipbuilding legislation has been correctly interpreted and applied by the Commission); and 'compatibility' (whether the compatibility assessment provided for in Art. 107(3) TFEU has been correctly carried out by the Commission).

¹⁷ Joined Cases T-211/04 and T-215/04 *Gibraltar and UK v Commission* [2008] ECR II-3745.

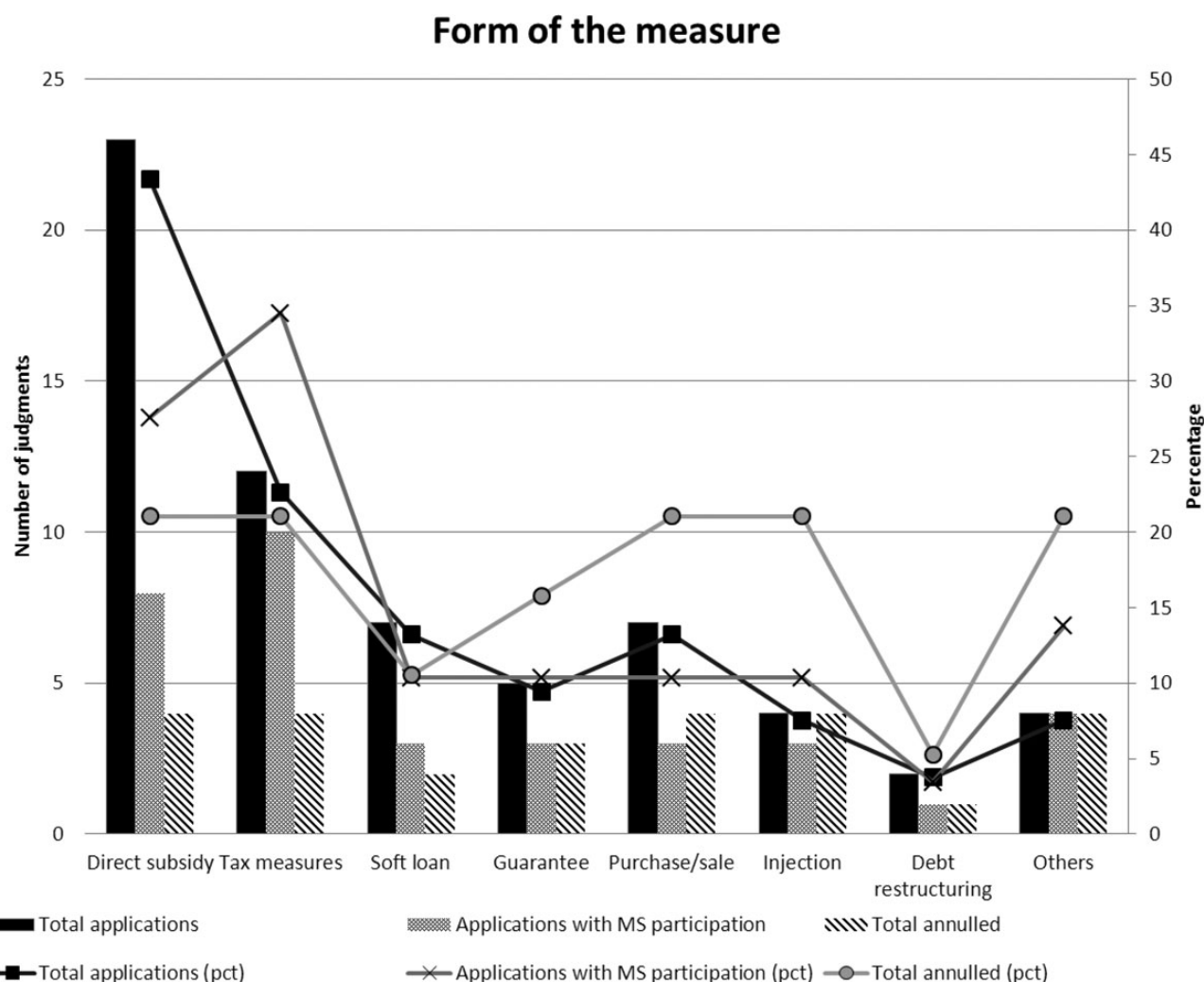


Figure 3: Applications by the form of the measure

system applied in that British Territory; and Case T-233/04 (*NOx*),¹⁸ which related to a trading emissions scheme put in place by the Dutch government. It comes as no surprise to note that Member States proved more prone to challenge Commission decisions (or to intervene in support of a challenge by the recipient) when the dispute revolved around the boundaries of the notion of selectivity. As the two abovementioned examples show, these are cases which often touch upon the heart of sensitive areas for national governments.

When the disagreement relates to the dividing line between general and selective measures, it is more likely that Member States perceive the application of Article 107(1) TFEU as an interference with general policy making, and will as a result be more inclined to take part in an annulment action. A look at Figures 3 and 4 seems

to confirm this intuition. Unsurprisingly, Figure 3 reveals that Member States were substantially more likely to take part in annulment proceedings where the alleged measure was granted (at least partially) by means of a tax measure (10 of 12 proceedings involving tax measures). As shown in Figure 4, the same is true where the alleged aid was ‘horizontal’ in nature.

Figure 2 shows that Member States intervened in four of the five items in which the application of Article 106(2) TFEU and/or the *Altmark* ruling¹⁹ was contentious. Again, this should not come as a surprise. It seems natural that Member States react when the application of Article 107(1) TFEU interferes with the provision of public services, and with particular conceptions and traditions prevailing at the national level. The importance attached to this question is reflected

18 Case T-233/04 *Netherlands v Commission* [2008] ECR II-591.

19 Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

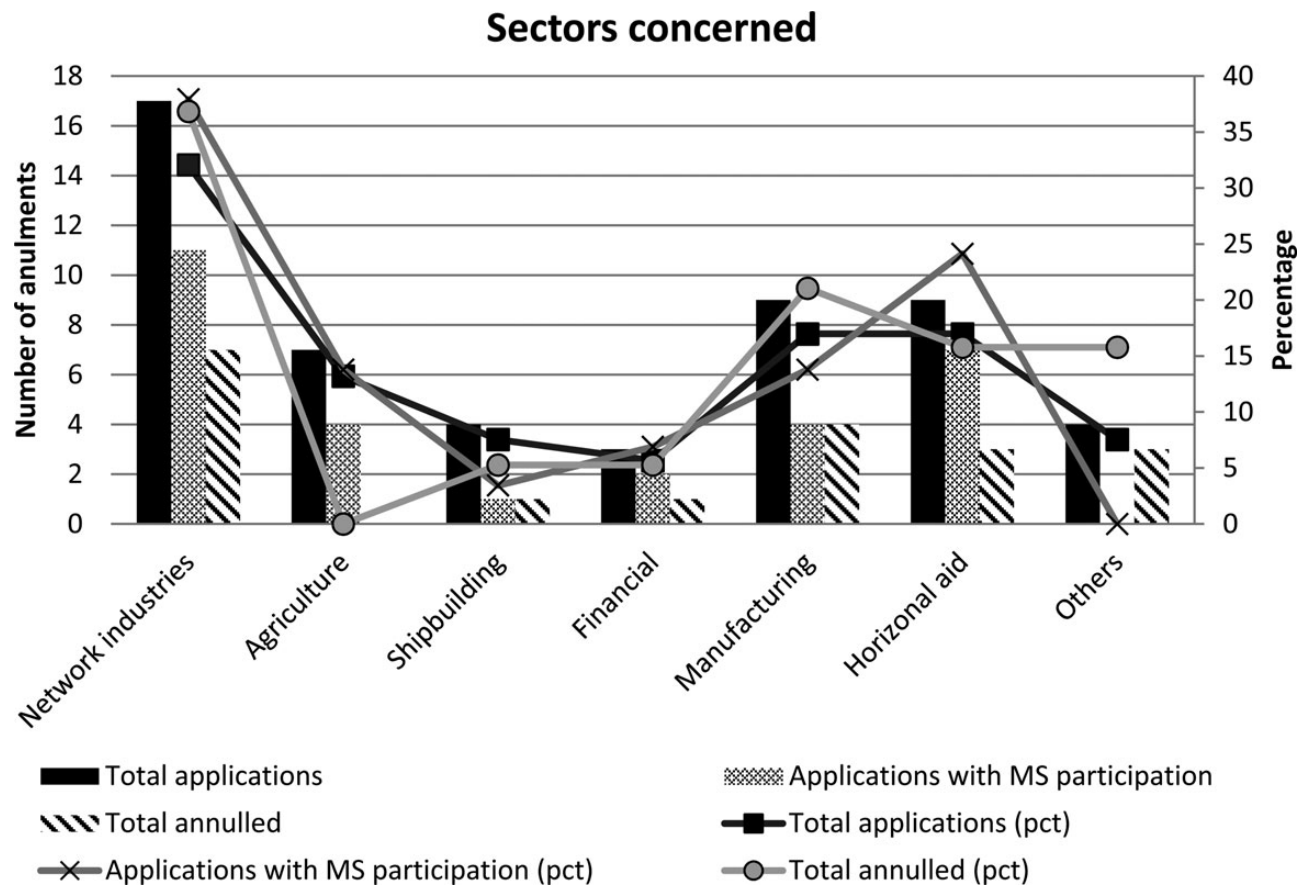


Figure 4: Applications by sector

in the Protocols on public service broadcasting²⁰ and on services of general interest²¹ annexed to the successive versions of the Treaties. It is equally unsurprising to note, in this same vein, that three of four of the items in which the application of Article 106(2) TFEU and/or the *Altmark* ruling was contested concerned the provision of broadcasting services.²² While all network industries (telecommunications, energy, transport) are still tightly regulated, broadcasting is the sector in which the wave of liberalisation has been less intense and has altered to a more limited extent the market structures and the style of intervention prevailing in the monopoly era. On account of the cultural and democratic relevance of this economic activity, strong State-owned broadcasters are still central players in national media landscapes in Europe.

Measures classified as ‘others’ in Figure 3 (that is, those the form of which differs from the most common categories) were challenged in all cases with Member State participation. Precisely because of their unusual nature, the application of Article 107(1) TFEU to these four scenarios was far from straightforward and raised genuinely novel substantive issues. One would expect Member States to seek to influence the shaping of the law in such instances. The novelty of the issues was crucial for the outcome of the dispute in three cases. As mentioned above, Case T-233/04 (*NOx*) concerned an emissions trading scheme for large industrial facilities.²³ The extent to which the implementation of such a system conferred an advantage on firms and was selective was not obviously inferred from the relevant precedents. Case T-1/08, in turn, revolved around the

20 Protocol on the System of Public Broadcasting in the Member States [2004] C310/372.

21 Protocol on Services of General Interest [2007] C306/158.

22 See Joined Cases T-309/04, T-317/04, T-329/04, and T-336/04 *TV 2/Danmark A/S and Others v Commission* [2008] ECR II-2935; Case T-8/06 *FAB Fernsehen aus Berlin GmbH v Commission* [2009] ECR II-196; and

Joined Cases T-231/06 and T-237/06 *Netherlands and Nederlandse Omroep Stichting (NOS) v Commission* [2010] ECR II-5993. The fourth case is T-222/04 *Italy v Commission* [2009] ECR II-1877, concerning a system of tax exemptions for public utilities and thus also related to the non-competition aspects of the regulation of network industries.

23 Case T-233/04 *Netherlands v Commission* [2008] ECR II-591.

question of whether the failure by a Member State to seek a declaration of insolvency could be caught by Article 107(1) TFEU insofar as it would be inconsistent with the behaviour a private operator would have adopted in a similar context.²⁴ In Joined Cases T-425/04, T-444/04, T-450/04, and T-456/04 (*France Telecom*), which have been more widely discussed in the literature, the Commission applied Article 107(1) TFEU to a loan proposal and some public declarations by a member of the French government in support of France Telecom.²⁵ While these measures clearly benefitted the telecommunications operator, the sense that they had a positive and stabilising impact on its credit ratings, the question of whether they entailed the use of State resources, as the case law demands,²⁶ was far from straightforward.

C. Which decisions are more likely to be annulled?

The profile of annulled decisions differs from that of decisions favoured by Member States. It would therefore seem that governments do not focus their litigation efforts on areas that are inherently more contentious (or more likely to be annulled). Figure 2 reveals that 42.10 per cent of annulments related to the application of the private investor test by the Commission. As seen in Table 4, this ground for annulment met with an unusually high rate of success (72.72 per cent). This figure is almost three times as high as that of the second most successful ground for annulment (25 per cent). Figure 3 provides an alternative perspective of the same phenomenon. Decisions in which the alleged aid was granted in the form of a guarantee, a purchase/sale, or a capital injection are distinctly more frequent among those annulled. Where such measures are at stake, the dispute between the Commission and the Member States tends to revolve around the question of whether they respond to normal market conditions.²⁷

The distribution of annulments summarised in Table 4 would have been difficult to anticipate. The application of the ‘private investor test’ typically entails ‘complex economic assessments’. To the extent that such assessments are only subject to review for ‘manifest

errors’, one could have expected the GC to give greater deference to the Commission. The fact that the analysis found in these decisions was subject to close and systematic scrutiny would suggest that the leeway recognised by EU courts is not necessarily at odds with the standard of judicial review that would stem from the European Court of Human Rights (ECtHR) judgment in *Menarini*.²⁸ It should be reminded in this regard that in some classic cases, such as *Tetra Laval*, the Commission decision was annulled even though the GC scrutinised the decision, at least from a formal standpoint, under a ‘limited review’ standard.²⁹

A possible interpretation of the distinctly high rate of annulment of decisions in which the application of the ‘private investor test’ is contentious is that the sort of assessment that these cases require is perceived by the GC as capturing the essence of its role as a review court. Where the dispute relates to the application of this notion, it is not necessary to define a legal standard, as the underlying substantive principle has long been clear in the case law and is not seriously disputed. As a result, the judicial review of administrative action generally revolves around the legal characterisation of facts (whether the right benchmark has been identified, whether the findings can adequately justify the legal claims that are derived from them), which typically involves a meticulous examination of the decision but which does not amount to the second-guessing of the choices made by the Commission.

In any event, the sample analysed makes it clear that the GC does not confine itself to such an exercise and does not hesitate to examine and, if necessary, to redefine, the interpretation of Article 107(1) TFEU given by the Commission. It would in fact seem that, at least in the field of State aid, judicial review is effective. Measures classified as ‘others’ in Figure 3—three of which concerned, as already described above, unresolved substantive issues—were all annulled in the first instance. Other major disputes in this sense include Case T-156/04 (*EDF*), where the Member State claimed that a tax relief granted to a firm could be subject to, and compatible with, the ‘private investor test’;³⁰ and Joined Cases

24 Case T-1/08 *Buczek Automotive sp. z o.o. v Commission* [2011] (GC, 17 May 2011).

25 Joined Cases T-425/04, T-444/04, T-450/04, and T-456/04 *France, France Télécom SA and others v Commission* (n 4). See eg Leo Flynn, ‘Grand Chamber Ruling in the France Télécom Case: The concept of “offer” of a State aid’ (2013) *Journal of European Competition Law & Practice*, forthcoming; and Cédric Kaczmarek, ‘Judgment of 13 September 2010 in France, “France Télécom a.o. v Commission”’ (2012) 11 *European State Aid Law Quarterly* 697.

26 Case C-379/98 *PreussenElektra AG v Schleswig AG* [2001] ECR I-2099.

27 See in particular Case T-196/04 *Ryanair Ltd v Commission* [2008] ECR II-3643; Case T-244/08 *Konsum Nord ekonomisk förening v Commission* [2011] ECR II-444*; Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012] (GC, 28 February 2012); and Cases T-29/10 and T-33/10, *Netherlands and ING Groep NV v Commission* [2012] (GC, 2 March 2012).

28 *A Menarini Diagnostics v Italy* App no 43509/08 (ECtHR, 27 September 2011).

29 Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381.

30 Case T-156/04 *Électricité de France (EDF) v Commission* [2009] ECR II-4503.

Table 4. Rate of success of applications before the GC, by grounds for annulment

	Total applications	Total annulled	Success rate	MS applications	MS annulled	Success rate	N-P applications	N-P annulled	Success rate
Private investor	11	8	0.72	6	5	0.83	5	3	0.60
State resources	8	2	0.25	5	2	0.40	3	0	0
Selectivity	9	2	0.22	7	2	0.28	2	0	0
Effect on trade/distortion	11	1	0.09	6	1	0.16	5	0	0
Altmark/Article 106(2)	5	1	0.20	4	1	0.25	1	0	0
Notion of undertaking	1	1	1	1	1	1	0	0	0
Scope of the decision	2	2	1	0	0	0	2	2	1
Existing/new aid	8	2	0.25	6	2	0.33	2	0	0
Shipbuilding legislation	3	1	0.33	1	0	0	2	1	0.50

Table 5. Rate of success of appeals before the ECJ

	Appeals	Set aside	Set aside: rate
Decided	26	6	0.23
Pending	5	0	-
Total appeals	31	6	-

T-443/08 and T-455/08 (*Leipzig Airport*), which concerned the question of whether, and in which circumstances, investments in infrastructure by the State can be classified as aid within the meaning of Article 107(1) TFEU.³¹

The observed activism of the GC in the field of State aid raises interesting additional questions. Table 4 shows that the majority of grounds for annulment only proved successful with Member State participation. As far as the application of the 'private investor test' is concerned, non-privileged applicants acting alone met with a notable rate of success (3 in 5 decisions, ie 60 per cent, were annulled by the GC). This figure is still significantly below the rate of annulments with Member State inter-

vention (5 in 6 decisions, or 83.33 per cent). One could interpret the disparities observed for each of the grounds for annulment as evidence of bias when Member States take part in the proceedings. Further research would be necessary to determine whether the 'bias hypothesis' is correct or whether such disparities are simply a different manifestation of the advantage enjoyed by Member States over non-privileged applicants as 'insiders' and 'repeat players'. In this same vein, future research could examine systematically whether the behaviour of the GC in the field of State aid is observed in other areas of competition law where Member State participation is substantially less frequent.

D. Appeals before the ECJ

Table 5 reveals that it is relatively rare for the ECJ to set aside a judgment of the GC on appeal. This outcome has only been observed in six (or 23.07 per cent) of the 26 appeals decided by the end of May 2013. Member States were involved as applicants in three of these six items.³² More relevant for the purposes of this work is to note, first, that the selectivity of tax measures stands out prominently as the central substantive question in three of the items.³³ The private investor test, on the other

31 Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and Land Sachsen-Anhalt and Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* [2011] ECR II-1311.

32 Cases C-106/09 P and C-107/09 P *Gibraltar and UK v Commission* [2011] (GC, 15 November 2011); Case C-279/08 P, *Netherlands v Commission* [2011] (GC, 8 September 2011); C-89/08 P *Ireland, France and others v Commission* [2009] ECR II-11245.

hand, is underrepresented (a single judgment), at least if one compares it to the volume of Commission decisions that are annulled by the GC on such grounds.³⁴

The ECJ set aside the GC judgment in the only two instances in which the annulment of the decision related to the interpretation of the notion of selectivity (*NOx* and *Gibraltar*, both mentioned above). On appeal, the ECJ favoured a relatively broad understanding of the scope of Article 107(1) TFEU. While the GC advanced an interpretation of the notion of selectivity that is capable of being modulated in light of the nature and objectives of the contested measure, the ECJ reiterated the principle whereby the applicability of Article 107(1) TFEU depends on the effects of the contested measure and not on its form or objectives. The powers of the Commission under the effects-based approach endorsed by the ECJ are significantly wider than under the alternative.

A similar attitude can be observed in relation to the notion of State resources. The Commission only appealed one of the two judgments annulling decisions on grounds relating to the application of the notion (*France Telecom*, mentioned above). Again, the ECJ followed the wider interpretation of Article 107(1) TFEU, according to which a loan proposal may qualify as State aid even though it is not possible to quantify with precision the burden that such a measure places on the budget of the Member State.³⁵ This understanding of the notion of State resources broadens the reach of Article 107(1) TFEU. The link required between a given measure and its impact on State resources would be looser than that required by the GC in first instance.

As much as the pattern of annulments in the first instance, the behaviour of the ECJ on appeal can be interpreted in different ways. In line with the discussion above, one could argue that the tendency to side with the Commission when major substantive questions around the key notions of Article 107(1) TFEU are raised is suggestive of a bias in favour of the administrative authority. When one takes a broader perspective, however, it appears that the ECJ has a tendency to confirm old lines of case law that can be observed in other areas of competition law. *Glaxo*

Spain, where the ECJ confirmed that agreements aimed at restricting parallel imports are restrictive by their very nature and that market integration is an autonomous objective of EU competition law, is one example in this regard.³⁶ The reluctance to depart, when invited to do so, from what has come to be known as the form-based approach to Article 102 TFEU is another one.³⁷

VI. Conclusions and outlook

The statistical analysis of eight years of State aid litigation before the GC provides interesting insights about the discipline, and about the EU system of judicial remedies, which could be explored in future works. The marked difference in the rate of success of applications for annulment depending on whether a Member State takes part in the proceedings is one of the most remarkable conclusions of the analysis, and one that could have an impact on strategic choices made by stakeholders. Further research would be necessary, however, to establish whether this divergence is an indication of bias or simply a consequence of the fact that Member States are involved in the administrative procedure and enjoy substantial experience as ‘repeat players’ in the field.

A look at annulled decisions leads to counterintuitive conclusions about the behaviour of the GC. This is true, in particular, of the unusually high rate of success of applications contesting the application of the ‘private investor test’ by the Commission. More generally, both the relatively high rate of success of applications and the analysis of individual cases give the impression that Commission decisions are subject to effective judicial review. This conclusion also contradicts received ideas about the intensity of judicial review in EU competition law. More research work would be necessary to establish whether the same conclusions extend to other areas of competition law, including cartels and Article 102 TFEU.

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33 *Gibraltar and UK v Commission* (n 32); *Netherlands v Commission* (n 32) and C-452/10 P, *BNP Paribas and Banca Nazionale del Lavoro SpA (BNL) v Commission* [2012] (ECJ), 21 June 2012).

34 Case C-73/11 P, *Frucona Košice a.s. v Commission* [2013] not yet reported.

35 Joined Cases C-399/10 P and C-401/10 P *France, France Télécom SA and others v Commission* (n 4), in particular paras 98–111.

36 Joined cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P *GlaxoSmithKline Services Unlimited v Commission* [2009] ECR I-9291.

37 See in particular Case C-549/10 P *Tomra Systems ASA and Others v European Commission* [2012] (ECJ), 19 April 2012).

Appendix: Table of cases

Case no	Parties	Annulment	State involved?	Form of the aid	Grounds for annulment	Sector
1	T-25/04 Gonzalez y Diez SA v Commission	Partial	No Recipient	Direct subsidy	Scope of the decision	Coal <i>Other</i>
2	T-156/04 EDF v Commission	Partial	Supports	Tax measure	Private investor test	Electricity <i>Network industry</i>
3	T-196/04 Ryanair v Commission	Total	No Recipient	Purchase/sale	Private investor test	Airline <i>Network industry</i>
4	T-200/04 Sardegna v Commission	Dismiss	No Region	Direct subsidy	Compatibility assessment	Agriculture
5	T-211/04 Gibraltar and UK v Commission	Total	Applicant	Tax measure	Selectivity	Off-shore <i>Horizontal</i>
6	T-222/04 Italy v Commission	Dismiss	Applicant	Tax measure	Effect on trade/distortion Existing or new aid <i>Altmark</i> /Article 106(2) TFEU	Local utilities <i>Network industry</i>
7	T-233/04 Netherlands v Commission	Total	Applicant	Emissions trading <i>Other</i>	Selectivity	Large industries <i>Horizontal</i>
8	T-239/04 Italy and Brandt Italia v T-323/04 Commission	Dismiss	Applicant	Direct subsidy Tax measure	Selectivity Existing or new aid Compatibility assessment	Firms in difficulty <i>Horizontal</i>
9	T-265/04 Tirrenia di Navigazione ea T-292/04 v Commission T-504/04	Total	Supports	Direct subsidy	Existing or new aid	Transport <i>Network industry</i>
10	T-304/04 Italy and Wam v Commission T-316/04	Total	Applicant	Soft loan	Effect on trade/distortion	Export <i>Horizontal</i>
11	T-309/04 TV2/Danmark and Denmark ea v T-317/04 Commission ea	Total	Applicant	Direct subsidy Tax measure	State resources <i>Altmark</i> /Article 106(2)	Broadcasting <i>Network industry</i>
12	T-425/04 France and France Telecom v T-444/04 Commission	Partial	Applicant	Public statements Loan proposal <i>Other</i>	State resources	Telecoms <i>Network industry</i>
13	T-427/04 France and France Telecom v T-17/05 Commission	Dismiss	Applicant	Tax measure	Selectivity Legitimate expectations	Telecoms <i>Network industry</i>
14	T-68/05 Aker Warnow Werft and Kvaerner v Commission	Total	No Recipient	Direct subsidy	Shipbuilding legislation	Shipbuilding

15	T-136/05	EARL Salvat pere et fils v Commission	Dismiss	Supports	Direct subsidy	State resources	Agriculture
16	T-211/05	Italy v Commission	Dismiss	Applicant	Tax measure	Selectivity Effect on trade/distortion	Newly listed companies <i>Horizontal</i>
17	T-303/05	AceaElectrabel v Commission	Dismiss	No Recipient	Direct subsidy	Recovery	Electricity <i>Network industry</i>
18	T-415/05 T-416/05 T-423/05	Greece and Olympic v Commission	Partial	Applicant	Purchase/sale	Private investor test	Airline <i>Network industry</i>
19	T-424/05	Italy v Commission	Dismiss	Applicant	Tax measure	Selectivity Effect on trade/distortion	SMEs capitalisation <i>Horizontal</i>
	T-445/05	Ass. Risparmio Gestito v Commission	Dismiss	Applicant		Compatibility assessment	
20	T-455/05	Componenta Oyj v Commission	Total	Supports	Capital injection Soft loan	Private investor test	Metallurgy <i>Manufacturing</i>
21	T-8/06	FAB Fernhesen	Dismiss	Applicant	Direct subsidy	State resources <i>Altmark</i> /Article 106(2) Compatibility assessment	Broadcasting <i>Network industry</i>
22	T-21/06 T-50/06 T-56/06 T-60/06	Germany v Commission Ireland, France, Italy ea v Commission (<i>referred back to the GC</i>)	Dismiss Total	Applicant Applicant	Tax measure	Existing or new aid	Alumina <i>Manufacturing</i>
23	T-80/06 T-182/09	Budapesti Eromu Zrt v Commission	Dismiss	No Recipient	Direct subsidy	Economic advantage <i>Altmark</i> /Article 106(2) Effect on trade/distortion Compatibility assessment	Electricity <i>Network industry</i>
24	T-162/06	Kronopoly v Commission	Dismiss	No Recipient	Direct subsidy	Compatibility assessment Necessity and incentive effect	Timber products <i>Manufacturing</i>
25	T-231/06 T-237/06	Netherlands and NOS v Commission	Dismiss	Applicant	Direct subsidy	Existing or new aid <i>Altmark</i> /Article 106(2)	Broadcasting <i>Network industry</i>
26	T-273/06 T-297/06 T-288/06	ISD Polska v Commission Regionalny Fundusz V Commission	Dismiss Dismiss	No Recipient No	Direct subsidy	Legitimate expectations Recovery Recovery	Steel <i>Manufacturing</i>
27	T-332/06	Alcoa Trasformazioni v Commission	Dismiss	No Recipient	Purchase/sale	Existing or new aid Economic advantage	Aluminium <i>Manufacturing</i>

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Appendix: Continued

Case no	Parties	Annulment	State involved?	Form of the aid	Grounds for annulment	Sector
28	T-369/06 Holland Malt BV v Commission	Dismiss	Supports	Direct subsidy	Effect on trade/distortion Compatibility assessment	Agriculture
29	T-11/07 Frucona Kosice v Commission	Dismiss	No Recipient	Tax measure	Private investor test	Agriculture
30	T-25/07 Iride SpA v Commission	Dismiss	No Recipient	Direct subsidy	State resources Effect on trade/distortion Economic advantage	Electricity <i>Network industry</i>
31	T-70/07 Cantieri Navali Termoli v Commission	Dismiss	No Recipient	Direct subsidy	Shipbuilding Regulation (Council)	Shipbuilding
32	T-81/07 T-82/07 T-83/07 Rudolf Maas and Jean Marcel v Commission	Partial	No Recipient	Capital injection	Scope of the decision	Employment <i>Other</i>
33	T-102/07 Freistaat Sachsen and MB Immobilien Verwaltungs and MB System v Commission	Total	No Region Recipient	Guarantee	Calculation of the normal market conditions	Bicycles <i>Manufacturing</i>
34	T-177/07 Mediaset v Commission	Dismiss	No Recipient	Direct subsidy	Selectivity Economic advantage Effect on trade/distortion Compatibility assessment	Broadcasting <i>Network industry</i>
35	T-422/07 Djebel SGPS v Commission	Dismiss	No Recipient	Soft loan	Effect on trade/distortion Compatibility assessment	SME <i>Horizontal</i>
36	T-1/08 Buczek Automotive v Commission	Partial	Supports	Debt restructuring Failure to seek insolvency <i>Other</i>	Private investor test	Tubes automobiles <i>Manufacturing</i>
37	T-53/08 Italy v Commission	Dismiss	Applicant	Purchase/sale	Economic advantage Legitimate expectations	Regional <i>Horizontal</i>
	T-62/08 ThyssenKrupp v Commission	Dismiss	Applicant		Economic advantage Legitimate expectations	

	T-63/08	Cementir v Commission	Dismiss	Applicant		Economic advantage Legitimate expectations	
38	T-244/08	Konsum Nord v Commission	Total	No Recipient	Purchase/sale	Private investor test	Retail <i>Other</i>
39	T-267/08 T-279/08	Region Nord Pas de Calais v Commission	Dismiss	No Region	Soft loan	Calculation of the aid State resources Compatibility assessment Private investor test	Railway rolling stock <i>Manufacturing</i>
40	T-268/08 T-281/08 T-282/08	Land Burgenland and Austria v Commission Grazer Wechselseitige v Commission	Dismiss Dismiss	Applicant Applicant	Purchase/sale	Private investor test	Financial services
41	T-335/08	BNP and BNL v Commission	Dismiss	No Recipient	Tax measure	Selectivity	Financial services
42	T-384/08	Elliniki Nafpi' v Commission	Dismiss	No Recipient	Direct subsidy Guarantee Soft loan	State resources	Shipbuilding
43	T-391/08 T-394/08 T-408/08 T-453/08	Ellinika Nafpigeia v Commission Sardegna and many hotels v Commission	Dismiss Dismiss	No No Region Recipient	Direct subsidy Soft loan	Abuse of the aid Recovery Compatibility assessment Unlawful or abusive aid Existing or new aid De minimis Compatibility assessment	Hospitality <i>Other</i>
44	T-396/08	Freistaat Sachsen and Land Sachsen-Anhalt v Commission	Dismiss	No Region	Direct subsidy	Necessity and incentive effect Market failure	Postal services <i>Network industry</i>
45	T-443/08 T-455/08	Freistaat Sachsen and Mitteldeutsche flughafen and Flughafen Leipzig v Commission	Partial	Region Supports	Capital injection Guarantee Comfort letter <i>Other</i>	Economic activity Undertaking	Airport Postal services <i>Network industry</i>
46	T-452/08 T-579/08	DHL v Commission Eridania Sadam v Commission	Dismiss Dismiss	Supports No Recipient	Direct subsidy	Recovery of aid Effect on trade/distortion Compatibility assessment	Agriculture
47	T-584/08	Cantiere Navale de Poli v Commission	Dismiss	Applicant	Direct subsidy	Shipbuilding legislation	Shipbuilding

Continued

Appendix: Continued

	Case no	Parties	Annulment	State involved?	Form of the aid	Grounds for annulment	Sector
	T-3/09	Italy v Commission	Dismiss	Applicant		Existing or new aid Shipbuilding legislation	
48	T-139/09 T-243/09	France v Commission Fedecom v Commission	Dismiss Dismiss	Applicant Applicant	Direct subsidy	State resources State resources Compatibility assessment Legitimate expectations Recovery Legitimate expectations	Agriculture
	T-328/09	Producteurs legumes v Commission	Dismiss	Applicant		Private investor test Effect on trade/distortion	Textile Manufacturing
49	T-238/09	Sniace v Commission	Dismiss	No Recipient	Debt restructuring	Selectivity Effect on trade/distortion	Agriculture
50	T-379/09	Italy v Commission	Dismiss	Applicant	Tax measure	Private investor test Economic advantage	Financial services
51	T-29/10 T-33/10	Netherlands and ING v Commission	Partial	Applicant	Capital injection Guarantee Purchase/sale	Economic advantage	Postal services Network industry
52	T-154/10	France v Commission	Dismiss	Applicant	Guarantee	Recovery of aid Due process	Export Horizontal
53	T-257/10	Italy v Commission	Dismiss	Applicant	Soft loan	Recovery of aid Due process	
	T-303/10	Wam Industriale v Commission	Dismiss	Applicant			