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State Aid Control, Government Spending and the Virtue of Loyalty.

Andrea Biondi

Introduction.

A recurring theme going through the various contributions in this volume is how to manage differentiation; exploring whether there are any constitutional or legal tools that can be employed in order to manage the different centrifugal forces that are at work in the constant evolution of the relationship between the United Kingdom and the European Union. The proverbial intolerance of this Member State against any excessive dirigisme from outside is also well documented in most of the chapters. My take is slightly different. I would like to argue that at least in some crucial sectors of EU policies, only a supranational model is able to deliver efficiency, transparency and equality of position between the different parties, in particular between the Member states and the EU institutions and between the Member states themselves. It could, surprisingly, also be conducive to the preservation of vital national interests and foster virtuous and fair economic policies. Further, it will be argued that a model of direct supranational administration does not need to equate to a model of full centralization. Differentiation and delegation can, and actually should, exist and function within clearly pre-established parameters.

There are several areas which demonstrate and verify that it is sometimes worth leaving it to the EU. The chosen test case analysed here is the EU regulatory process on state aid control, an area extremely important for British economic policy. This chapter will be structured around two main themes. The first will try to sketch how the unique system of state aid control in Europe is providing an important tool to ensure a competitive level playing field between Member states and between undertakings; the second, is how such a system, properly employed, allows the development of coherent business and industrial policies. In particular, public spending channelled ‘through EU levees’ can be utilised to develop more responsible and eventually more socially useful economic practices. Needless to say, nothing is perfect. Thus a preliminary disclaimer might be necessary, as it is wise to acknowledge at the outset that there are deficiencies in the system and
improvements and changes are of course always possible. Still the main contention remains unchanged: the machinery of control on anti-competitive public spending, as sketched by the EU Treaty, is one of the clearest reasons why European partnership is valuable for the United Kingdom to preserve.


Despite some political rhetoric on the many virtues of the approach ‘that government is best which governs least’, the public purse remains the main instrument for pursuing numerous policies. Even for those member states, such as the UK, that are perceived as the champions of the free market and a reduced role for the state, the case remains compelling. The United Kingdom government’s spending in the early 2000s was calculated at around 40% of national income. The vast amount was, and still is –despite a sensible reduction in recent years - devoted to the performance of solidarity tasks such a social security, health, education, defence and public order.1 Public spending in the UK cannot of course be dissociated with the vicissitudes of the financial crises. In 2009-2010, faced with the collapse of several banks, government spending shot up to 47 % and in the financial year 2013–14, the UK government spent £714.2 billion, or 43.8% of the UK’s national income.2 The UK is also extremely active in its policies towards sustaining the private sector, either by direct intervention or through financial support. For instance, in recent years the sale of public assets such as the 3G and 4G spectrums and the transfer of Royal Mail’s pension assets to the public sector, are examples of considerable commercial transactions. The government raised £23.5 billion from the sale of the 3G spectrums in 2000– 01, and £2.3 billion was raised from the sale of the 4G spectrum in 2012–13. Royal Mail’s pension assets were also transferred to the public sector in 2012–13, to pave the way for postal service privatization. This cost around £28 billion. These operations were classified in the National Accounts as sales of a public asset, in other words, negative public sector investments.3

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1 http://www.ukpublicspending.co.uk/.
European Commission reports also contain some interesting data on more classic forms of financial support. The lion’s share of UK public spending, unsurprisingly, is related to aid to financial institutions. A selection of examples are as follows. In relation to financial sector measures, between October 2008 and October 2014, the United Kingdom spending peaks at EUR 191.5bn (10.1%). In 2013, EUR 35.8bn (1.9%) with another EUR 167.3bn (8.8%) is spent on recapitalization and other liquidity measures. Even if one removes the aid to financial institutions and all the guarantees and other forms of support to ailing banks, which one could optimistically describe as a one in an hundred years episode, others sectors are also heavily subsidized. Very well known cases are Rolls- Royce, around £34 million in 2010, or the £28 million by the Welsh Assembly to Airbus in 2009, also Nissan, £25 million between 2005-10, or tech companies such Hewlett Packard, £7.3 million in 2010, or Dell Corporation, awarded £7.3 million in 2005. Further recent research shows slightly more obscure but equally robust amounts of direct capital grants, corporate tax benefits, tax reductions or deductions estimated at around £93 bn. These transfers of course appear in different forms, such as: straight subsidies and grants, £14.5bn ranging from cash to the train operators to run services, subsidies to defence firms and pro investment grants to businesses. Corporate tax benefits are estimated at around a staggering £44bn. Insurance, advice and advocacy services to promote the state’s insurance scheme for trading abroad – the export credit guarantee - £406m. The UK is of course not alone in the EU in using the public purse to support economic activities. However, the data shows that there are still huge differences in the level of public spending between Member states. The state aid scoreboard prepared by the European Commission is revealing:

5In a nicely performed budget make up as most of the ‘financial rescue’ spending was considered only a temporary injection into the private sector (meaning that some money will be recouped) the Office for Budget Responsibility whose task is to monitor public spending, excluded these one-off changes.
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*Non-crisis state aid, excluding railways - million EUR, % of GDP

For instance in terms of percentage of GDP, the UK has spent less on aid over the last six years than all other countries except Luxembourg, and spends significantly less than comparable states such as Italy, France or Germany. It is also interesting to note that when the Commission published data in 2011, on how state aid spending by Member States was considered as a contribution to European common objectives collected under the umbrella of Europe 2020, the UK came top in several categories. For example, the UK was the largest spender on SMEs in Europe, its spending accounted for 14% of the EU total, with 70% of the total risk capital investments in SMEs in the EU. On broadband, UK spending amounted to 43% of

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9These are encapsulated in the five, now famous, targets: 1) Employment, 75% of the 20-64 year-olds to be employed; 2) R&D 3% of the EU’s GDP to be invested in R&. 3) Climate change and energy sustainability greenhouse gas emissions 20% (or even 30%, if the conditions are right) lower than 1990 20% of energy from renewables 20% increase in energy efficiency. 4) Education reducing the rates of early school leaving below 10% at least 40% of 30-34-year-olds completing third level education. 5) Fighting poverty and social exclusion. See http://ec.europa.eu/europe2020/index_en.htm.

the total EU spend. Therefore, the UK could be considered one of the most loyal Member states in term of EU objectives.

2. Constitutional Reflections: the Relationships between the EU and its Member States and between the Member States themselves

Loyalty, as one of the cornerstones of the European Union constitutional edifice, is the principle that each of the EU Member States has a duty of sincere cooperation with the EU institutions. This is imposed by the EU Treaty itself, which, in Article 4 (3) TEU (formerly Art 10 TEU and Article 5 EC) so provides:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

Despite some terminological differences, Article 4 (3) TFEU can be considered as an approximate codification of forty years of consistent case law of the European Court of Justice. According to this acquis, the obligation imposed on Member States of cooperation is a ‘principle inherent in the Community legal order’ and it requires ‘a duty of genuine cooperation and assistance which Member States owe the Community and which finds expression in the obligation laid down in Article 5 of the EEC Treaty (now article 4(3) TFEU)’. As is well known, the principle of loyal collaboration is far from being an abstract moral commandment, but translates into very specific and demanding constraints on Member states, as they need to ensure that any provision of their legal system, any legislative, administrative measure or judicial practice which might impair the effectiveness of EU law, should not prevent

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European rules from having full force and effect. The principle of loyal collaboration cannot however be merely equated to an obligation imposed by the Sovereign on its participating Member states. As discussed in the literature, loyalty, in reality, performs several different functions, from guaranteeing the respective autonomy of the Member States and of the EU institutions, to managing the co-operation itself. Thus, loyalty, on the one hand, serves to maintain unity with respect for independence, and on the other hand, ensures the effective application of EU policies. However, the idea of mutual collaboration has a further important objective; the mediation of conflicts, meaning primarily conflicts between a State and the EU, for which several different political and judicial procedures are available. A secondary but equally relevant purpose is that by imposing on all participating states the same level of commitment, loyalty creates a locus for an unbiased and impartial resolution of the conflicting interests of the different member states. Finally, it ensures that core EU law effectiveness should not be undermined by unilateral actions. Defection should therefore be effectively sanctioned and should not be considered as a viable option.

2.2 Loyalty and direct execution.

The dynamics of Supranational - national loyalty are well documented. They are mainly *institutional* through Member states involvement in law making and in the implementation of EU rules and *substantive* and *procedural* through the necessity to comply with direct effect, supremacy, liability in damages and the armoury of EU law core principles. They are also *administrative* in nature, as national authorities need to comply with the European regulatory process. As for the latter, a full discussion of the entire EU administrative structure is beyond the scope of this chapter. For the sake of brevity and at the risk of oversimplification, I suggest to adopt Chiti’s  

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classification: this is mainly based on the following models: indirect execution, EU policies are carried out by relying on national machinery; bottom up mechanisms of administration, EU objectives are carried out by all member states in different shapes and forms; bottom down mechanisms, where the EU institutions instigate processes of administrative integration. In relation to the latter, the most well know is the creation of a European system of EU and national independent authorities. Under this model the administrative tasks are organized and distributed from an EU source to all national designated authorities. Finally, direct execution, which is correctly described by Chiti, not as the mere conferral to the executive branch - the European Commission - of certain administrative tasks, but 'that the functional prominence of the European Commission is required by the Treaty itself: the supranational component has not only a particularly strong role in the process of execution of the European Union regulation but it is also subject to ‘constitutional’ protection'.

17 As previously mentioned, provided that the constitutional Treaty based guarantee and the prerogatives of the body entrusted to fulfil it are respected, the direct execution model can then display its effects in various shapes, and does afford a certain degree of delegation. In my view state aid policy exactly fits the direct execution model.

3. State Aid Control as a Direct Execution Model.

The constitutional guarantee offered by the Treaty in the area of State aid law could not be stronger. The drafting of the relevant provision is itself revealing: it starts with a bang as Article 107(1) introduces a straight prohibition on any state intervention in the economy that could have the effect of favouring certain undertakings and thus produce a distortive effect and an obstacle to the free flow of trade. Such a blow is softened by centralising control over those measures and by simultaneously conferring on the European Commission a discretionary power to ‘forgive’ the States and make the aid in question compatible with EU objectives and policies. Article 107 provides for two kinds of compatibility: Article 107(2) aids which, as a matter of law, are compatible with the internal market, provided they meet certain conditions, and


which the Commission must therefore approve; Article 107(3) aids which can be declared compatible with the internal market, thus giving, unlike in (a) above, the Commission a wide measure of discretion in approving them, and in so doing weighing different interests. The effectiveness of the Commission’s direct execution is guaranteed by an ad hoc procedure provided by Article 108 TFEU that requires a compulsory prior notification of all new aid measures. This mechanism is reinforced by the so-called standstill clause under which Member States are prevented from granting the proposed aid before the Commission has made its assessment. The constitutional elevation made by the founding Treaty of rules aimed at ensuring control over public spending is easily explained: a straight prohibition on financial assistance made sense in the context of a progressive abolition of regulatory measures which could have the effect of preventing free movement for economic actors. From a European integration perspective, the abolition of internal borders would have been pretty ineffective if a state was still allowed to create a de facto barrier by pouring money into a domestic undertaking. Historically, there were also concerns to avoid distortions of competition between companies and subsidies races between Member States trying to attract companies to their territories. Finally, national governments gained credibility in showing commitment to the new European enterprise.

As with many other EU policies, state aid has been through different phases and came alive only after the initiation of the single market project with stronger Commission action backed by robust ECJ judgments. Whatever the historical developments, it is clear that state aid is now one of the ‘core EU policies’. As recently empathically reaffirmed by the European Court of Justice Grand Chamber in Commission v Spain, State aid control rules are ‘the expression of one of the essential tasks with which the European Union is entrusted under Article 2 EC, namely the establishment of a common market, and under Article 3(1) (g) EC which provides that the activities of the Community are to include a system ensuring that

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18 Intergovernmental Committee on European Integration. The Brussels Report on the General Common Market (the Spaak Report), June 1956, Title II, Chapter 2.
21W. Mederer ‘Evolution of State aid control’ cit. above.
The functioning of the rather sophisticated mechanism laid down in the Treaty is however complicated and risky. Complicated as state aid control is a tool for the fulfilment of the internal market but at the same time touches on traditional national interests such as industrial policy and employment. Risky because for national governments strictly applied state aid rules can signify a loss of their political power and autonomy. Therefore the success of the EU model has to be earned. This can be done in at least three ways: firstly the sanctity of the role of the supranational arbiter, the Commission, always needs to be protected; secondly the willingness of ALL the Member States to cooperate must be ensured and consequently adequate remedies for dealing with the recalcitrant ones should be provided; and thirdly a degree of discretion for the supranational actor to allow it to incorporate and develop legitimate national policy goals so as to avoid defection should be allowed and actually encouraged.

3.1 The (legal) Sanctity of the European Commission’s Role.

The European Court of Justice consistently emphasises that Article 4(3) TFEU imposes a duty of genuine cooperation on the Member States and the EU institutions when applying EU State aid law. The privileged position of super partes arbiter between Member states is preserved in reality through a full transfer of competence. Together with very few other areas, the Commission competence in the area of state aid control cannot be regarded as anything but pre-emptive of any residual Member State powers as any kind of national unilateral action would

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22Case C184/11 Commission v Spain [2014] ECLI:316, para 70. See also Case C-128/97 Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-305 5.that the objective of pursuing undistorted competition is essential for the accomplishment of the tasks entrusted to the EU, and that the functioning of the internal market is to be considered as an orde public rule that has to be applied fully by all national institutions.


24No one is so naive to suggest that the Commission is totally waterproof from political influence or in some cases politically biased. As in any form of government, independence and transparency although obvious, are not always easy to achieve. However in all fairness DC Competition who is in charge of state aid policy is a well-respected segment of the European Competition, with officials of outstanding expertise. See further M P Smith ‘How adaptable is the European Commission? The case of state aid regulation’ in Journal of Public Policy 21/3, 219.
endanger the uniformity and effectiveness of the EU constitutional regime.\textsuperscript{25} Such ‘field-pre-emption’ in the area of state aid therefore implies that Member States do not have any appreciable discretion when acting within the remit of the supranational arbiter - the Commission - as the Treaty operated a full transfer of competence. In its case law, the European Court of Justice repeated over and over its mantra that ‘the assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union’.\textsuperscript{26} This approach is exemplified by the case law of the Court where it did not hesitate in alienating some of its more trusted allies, the national courts, so as to preserve the Commission’s role. National courts have been denied their more powerful weapon - direct effect- to get instead a sort of ancillary role as a ‘temporary’ guarantor of state aid control before the Commission’s final and decisive intervention.\textsuperscript{27} For instance in the recent \textit{Deutsche Lufthansa} ruling, the Court reaffirmed that if the Commission has already started the formal examination procedure of a possible aid measure then courts must refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional.\textsuperscript{28} The most striking example however, is the \textit{Lucchini} judgment.\textsuperscript{29} In that case the CJEU found that Italian provisions ensuring the principle of \textit{res judicata} must not be applied in so far as their application prevented the exercise of an EU right, the recovery of State aid granted in breach of EU law. The Court held that ‘the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts. That rule applies within the national legal order as a result of the principle of the primacy of Community law’.\textsuperscript{30} As State aid is an area of centralised competence, it was logical that the Court, despite being confronted with a question dealing with an extremely relevant principle of national law – the finality of judgments - expressed in the strongest of terms the supremacy of the EU legal order over the

\textsuperscript{25}R.Schutze, Supremacy without preemption? The very slowly emergence doctrine of Community pre-emption’ in 43 Common Market Law Review (2006), 1036, at 1040.
\textsuperscript{27}Case C—199/06 CELF and Ministre de la Culture v SIDE [2008] ECR I—469, para 38.
\textsuperscript{28}Case C-284/12 Deutsche Lufthansa ECLI:EU:C:2013:755, paras 34-35.
\textsuperscript{30}Ibid. para 61-62.
domestic one.\textsuperscript{31}

The pre-emptive effect of state aid constitutional supremacy is expressed by Advocate General Cruz Villaon, when referring to \textit{Lucchini}, that in a context ‘procedurally national but functionally and substantively Community proceedings, it was, therefore, possible for a judgment to be given which, from the point of view of national law, was without doubt final but which, in the context of the, substantively speaking, Community proceedings, was deprived of all legal effect’.\textsuperscript{32} In Köbler - the first case where liability for breaching EU law on account of judicial acts of courts of final resort was first raised, the United Kingdom submitted an extremely powerful argument maintaining that the liability of a Member State cannot be incurred in the case of a breach of EU law attributable to a court.\textsuperscript{33} It relied on arguments based on \textit{res judicata}, the principle of legal certainty, the independence of the judiciary, the judiciary's place in the Community legal order and so on. No such challenge was mounted in \textit{Lucchini} as this latter judgment was conducive to the preservation of the impartiality / market efficiency role of the Commission. The Court itself made it clear that the supremacy / pre-emption rationale used in \textit{Lucchini} cannot be automatically transplanted from state aid control to other areas of EU law or to any other situation. It consistently held that ‘\textit{European Union law does not in all circumstances require a national court to disapply domestic rules of procedure conferring the force of \textit{res judicata} on a judgment, even if to do so would make it possible to remedy an infringement of \textit{European Union law} by the judgment in question}'.\textsuperscript{34} However the robust stance exemplified in \textit{Lucchini} will bite anytime the constitutional protection afforded to state aid control via specific administrative tasks entrusted to the Commission, could be endangered.

3.2. All Member States Must Cooperate: the Stick

\textsuperscript{31}A. Biondi 'The \textit{Lucchini} Judgment', in 45 Common Market Law Review 2008, 1459
\textsuperscript{32}Opinion of AG Cruz Villalon in Case C- 507/08 Commission v Slovakia [2010] ECR I-13489, para 49.
\textsuperscript{33}Case C-224/01 Köbler [2003] ECR I-10239.
A model of direct administration works only and in so far as all the interested parties collaborate equally and fairly. Thus it is remarkable to note that state aid control is even procedurally and remedially an area where EU law pre-empts against Member state discretion. Let’s take the sanction par excellence in the instance of a Member states failure to cooperate: the action for recovery. In the case of unlawful State aid, that is to say when the aid measure has not been notified, the Commission can decide that the Member State must take all necessary measures to recover the aid from the beneficiary in accordance with its national procedures. As the Court has repeatedly held, recovery of unlawful aid is the logical consequence of the finding that it is unlawful. Consequently, the Member State obligation lies in the actual recovery of the sums owed in order to eliminate the distortion of competition caused by the competitive advantage procured by the unlawful aid. Therefore the action for recovery has as its only aim the achievement of a very specific outcome. In several instances, Member States have actually attempted to argue that the key consideration is not whether recovery is actually achieved, but whether the measures taken have the capacity in abstracto to ensure compliance. The case law does not support such a contention. Recovery presupposes an obligation de résultat précis, not one de moyens. The Court always draws a clear distinction between means, the choice of which is with the Member State (which is the addressee of a recovery decision) to make in accordance with its own internal rules, and the result, that is ensuring the effectiveness of EU law. Thus the ‘measures taken by the

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37With regard to the specific rules on the action for recovery, these are now contained in Article 14(1) of the Procedural Regulation Procedural Regulation of 2013 [OJ L 204 of 31.07.2013, p. 15 amending Council Regulation (EC) No 659/1999.1]. Article 14(3) of the Procedural Regulation in particular provides that: ‘Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article 201 TFEU of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law’.
38Case C-527/12 Commission v Germany [2014]. ECLI: EU: C: 2014:2193
Member State must lead to the actual recovery of the sums owed’.\textsuperscript{41} The case law provides that recovery should be executed according to rules available in national law. However, such a renvoi to the domestic legal system should not be understood as softening the need to ensure a full and complete recovery. The objective character of the recovery action is also demonstrated by the fact that the discretionary choice that is in theory vested in Member States - that is to say the choice to decide which procedure the Member State should apply to execute a recovery decision - is in reality very limited. The Court requires only that in so far as the procedure laid down by national law is applicable to the recovery of an illegal aid, the relevant provisions of national law must be applied in such a way that the recovery required by EU law is not rendered practically impossible and the interests of the EU are taken fully into consideration.\textsuperscript{42} However this is not just an apparent minimum guarantee of justiciability, a possibility of ensuring that EU rights can ‘be meaningful in practice’.\textsuperscript{43} The case law in reality sketches an almost fully EU centralised procedure of recovery. For instance, in the celebrated Alcan case\textsuperscript{44} the Court held that where the national authorities seek the recovery of State aid found by the Commission to be incompatible with the common market, the recipient cannot rely on the expiry of national time limits to resist an action for repayment. The effect of that judgment was to introduce a procedural norm that time limits are not applicable to an action of recovery, save for the limit established at supranational level. As suggested by Dougan, the CJEU acquis on recovery aid is an example of a line of cases that signals an attempt by the Court to support a highly centralised system of enforcement.\textsuperscript{45} Such a long detour to simply state that a uniform ‘centralised’ recovery remedy is a guarantee for all parties involved.

\textsuperscript{41}Case C-207/05 Commission v Italy [2006] ECR I-70, paras 36-37; and Case C-331/09 Commission v Poland [2011] ECR I-2933, para 5.
\textsuperscript{43}Joined Cases C222-225/05 Van der Weerd and Others v Minister van Landbouw, Natuur en Voedselkwaliteit [2007] ECR I-4233, Opinion of AG Maduro, para 29.
\textsuperscript{44}Case C-24/95 Land Rheinland-Pfalz v Alcan Deutschland GmbH [1997] ECR I-1591, paras 34-37.
\textsuperscript{45}M Dougan, National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation (Hart Publishing 2004), pp. 349 ss.
There is also abundant evidence that action to remedy breaches is being actively taken. For example, since 2000, the Commission has ordered the recovery of illegal State aid in 202 cases across all Member States.\textsuperscript{46}

Of those, only four were UK measures. This compares with a total of nine in Belgium, twenty in France, fifty in Germany, forty one in Italy, nine in the Netherlands, and twenty seven in Spain. To strengthen the recovery procedure even further, an almost de facto nearly automatic fine attached to the failure to recover unlawful aid, also increases the effective application of state aid rules. In the case of a failure to recover the sum, the Commission can routinely bring an action against the defaulting Member state under articles 258 and 259 TFEU. In the instance of a total failure to comply with a Court ruling finding that the state had to recover the aid, Article 260(2) TFEU provides that the Commission can bring a second action asking for the imposition of a lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.\textsuperscript{47} There have been

\textsuperscript{46}http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html.

\textsuperscript{47}Despite Article 260(2) TFEU providing the Commission with the right to specify the amount of the lump sum or penalty payment, the Court has consistently stated that the Commission indication is merely a guide, which will not bind the Court. Therefore, both the quantification and the modalities of the payment can be decided entirely by the Court and secondly, the Court reserves for itself the authority to decide whether to condemn the Member State to payment of a financial penalty and/or a lump sum. The two financial sanctions are considered by the CJEU as performing a different function: the penalty payment is an instrument to coerce the State to comply as soon as possible; whilst the imposition of a lump sum is due to the consideration of the effect that a prolonged breach might have on private and public interests. The imposition of both, according to the Court, is necessary when the breach of the obligation to comply has continued for a long time and tends to persist. Case C-304/02 Commission v France [2005] ECR I-6263.
several cases dealing with failure to recover unlawful aid and in all of them the Court decided in favour of the imposition of sanctions on the defaulting member states.\footnote{See Case C-369/07, Commission v Greece, [ECR] 2009 I-5703 and Case C-496/09 Commission v Italy, [ECR] 2011 I-11483; and Case C529/09 Commission v Spain ECLI: EU: C: 2013:31; and Case C184/11 Commission v Spain [2014] ECLI: EU: C: 2014:316.}

Once again the system is far from perfect as it is laborious, sometimes heavily dependent on the vagaries of national procedural law and other forms of redress, such as actions in damages by competitors.\footnote{J.Temple Lang, ‘EU State Aid rules – The need for substantive reform’, in European State Aid Law Quarterly (2014) 440.} Nonetheless, the action for recovery is one of the very few examples of an EU uniform procedural system acting as a deterrent for defecting states and a rather reassuring guarantee for the loyal ones.

3. Direct Administration and Flexibility: the Carrot

It would be wrong to characterize state aid rules only in terms of ‘sticks’ when there is a ‘carrot’ dimension as well, which is gradually becoming more important. As argued elsewhere, state aid rules have been constantly evolving in response to the geographical, social and economic transformation of Europe.\footnote{A.Biondi & E.Righini ‘An evolutionary theory of state aid control’ in A. Arnull & D. Chalmers, The Oxford Handbook of European Law, OUP, Ch. 12, 2015.} In recent years the Commission has fully embraced a more flexible approach so as to ensure that if certain ‘worthy’ objectives are pursued by the state measure, state aid rules are not be used to block such virtuous intentions. The last decade has therefore seen a robust process of the replacement of individual ad hoc state aid decisions with a general criteria codified in a varied list of soft law instruments such as guidelines, notices etc. This has created a general framework that attempts to foster good business practice and competitiveness whilst allowing Member states the flexibility to pursue such policies.\footnote{See further O Ştefan, ‘Hybridity before the Court: a Hard Look at Soft Law in the EU Competition and State Aid Case Law’ 37 European Law Review, (2012), 49 and M Blauberger, ‘Of ‘Good’ and ‘Bad’ Subsidies: European State Aid Control through Soft and Hard Law’, West European Politics 32(4), (2009), 719.} The recent European Commission modernization plan of State aid control\footnote{Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2012) 209 Final, 8 May 2012.} and its implementation is particularly revealing. It speaks of targeting its policies at making Europe ‘a smart, sustainable and inclusive economy
with the objective of enabling the EU and its Member States to deliver high levels of employment, productivity and social cohesion’. It advocates that public spending should become more efficient, effective and targeted at growth-promoting policies that fulfil common European objectives. By putting an emphasis on the quality and the efficiency of public support, State aid should therefore be conceived as an instrument able to help strengthen budgetary discipline and to improve the quality of public finances, thereby reconciling the role of targeted public spending in generating growth with the need to bring budgets under control. To the Commission’s credit, it has translated its rhetoric into practice in a relatively short period of time, revising many of the areas of state intervention; from research, development and innovation, to risk capital, broadband, regional aid, aviation, energy and environment.  

The Commission has also proposed the revision of the Enabling Regulation, approved by the Council in 2013, on the basis of which the Commission has adopted an enlarged GBER whose scope now extends to block exemptions of certain categories of aid that are "good" a priori as they are considered conducive to achieve the aims listed above. For instance these categories include aid for innovation, culture, natural disasters, sport, certain broadband infrastructure, social aid for transport to remote regions and aid for certain agriculture, forestry and fisheries issues.

It could of course be argued that eventually the Commission’s strategy simply means extending its control over many new areas. Devolving powers to Member States could instead reflect an attempt to ensure a viable partnership between the Commission and Member States. It seems that the UK government has often made good use of such a cooperative relationship. First, it played by the rules by fully complying with the duty to notify to the Commission of any potential state aid measures. Actually, in a perhaps well-calculated strategy, the number of ‘British’ notifications has steadily increased over the years. State aid approval requests from the UK to the Commission rose from twenty nine in 2013 to forty one in 2014. In 2010, only thirteen applications were made. Of course such an increase can be due

53 For a list of the measures adopted see www.ec.europa.eu/competition/state_aid/modernisation/index_en.html.
55According to Thomson Reuters legal business, which requested the data under the Freedom of Information Act as reported in The Global Legal Post, 17 March 2015.
to economic difficulties as the UK government feels that financial support is needed now more than ever. \(^{56}\) In my view, it shows a capability of using EU rules cleverly and in a manner that is also conducive to innovative and socially responsible economic policies. As for the clever use, a rapid survey of recent UK - Commission state aid dealings shows clearly that in the vast majority of cases, the UK managed to have its state aid measures approved or classified as non-aid.

As for the subject matter of the measures notified, UK policies are mostly in line with EU policy on state aid rules, carefully matching the Commission orientations. For instance, in authorizing state aid control, the Commission uses a two part test: firstly, it considers whether the aid is aimed at a well-defined object of common interest, and secondly, it performs a balancing exercise as to whether the proposed aid is a ‘well designed instrument’ which will deliver the objective of common interest. Such a discretionary assessment is obviously guided by consideration of the rationales that have driven the Member state in question to adopt a certain measure. These are usually efficiency rationales (correcting market failures) i.e. in certain circumstances free markets do not result in an efficient (or welfare maximising) outcome leading to a “market failure”. State intervention then needs to be appropriate in order to correct the market failure. \(^{57}\) The second can be branded equity rationale (redistribution/cohesion) – the outcome of the market process is efficient, but may not be socially acceptable. State intervention may then be appropriate for redistributive purposes. \(^{58}\) Let’s now confront these general orientations with two recent UK measures. The first concerned support of up to GBP 400 million to be provided by the United Kingdom for the creation of a social investment company called Big Society Capital (BSC). The object of BSC was to invest in so-called Social Investment Finance Intermediaries (SIFIs) that had difficulties in procuring affordable funding from the markets. The UK authorities never denied in their notification the presence of several aid elements: the capitalization of

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BSC through public monies and other advantages for the investees, mainly SIFIs, and finally at the level of the social end recipients of the investment. However, in an extremely well documented notification, the UK demonstrated how the measures were going to be necessary to fill the gap in a sector where the market did not provide adequate support for social activities. Relying on clear evidence showing how this sector was plagued by capital shortage and misperception of the risk/return couple (meaning basically that banks were not likely to invest and that applications for funding were always rejected) the UK managed to persuade the Commission of the necessity of granting extra financial support.

As far as the necessity to pursue a common interest, an economic sector always singled out by the Commission as worthy of protection is aid for SMEs ‘the backbone of the EU economy’.\(^{59}\) Not only the Block Exemption Regulation exempts aid granted in favour of SMEs from the obligation to notify but also the Commission has adopted a series of positive measures to incentivise this specific category of business. For instance, it adopted new rules on risk finance rules aimed at enhancing the incentives of private sector investors - including institutional ones – to invest and increase their funding activities in the area of SME financing.\(^{60}\) The second example therefore can be drawn from a UK notification dealing with the British Business Bank (BBB), an integrated entity for managing SME access to finance programmes in the UK.\(^{61}\) This structure was split in three parts: the Mandated Arm, Service Arm and Commercial Arm, providing distinct services. It is also planned that certain already existing programmes supporting SMEs will be integrated within the respective arms of the BBB. The BBB was also to manage new SME access to finance programmes. The UK considered that the whole scheme would have ensured a more effective deployment of programmes to support SMEs in their growth and thereby contribute to economic development and job creation. The Commission approved the measure and allowed the Mandated Arm of BBB to receive up to GBP 6 billion funding from the UK on a non-commercial basis for a certain period of years. Specific focus was devoted in the notification to the fact that the Mandated Arm was entitled to use

\(^{60}\)Guidelines on State aid to promote risk finance investments (2014/C 19/04).
\(^{61}\)SA 36061, JOCE C/460/2014.
these funds, within an approved remit, to provide SMEs with access to finance where a market failure was demonstrated, either on commercial terms (through so-called "market conform schemes" in other words conditions that a private market operator could have accepted) or even on subsidised but non-market terms where that was necessary to ensure general social considerations. The dialogue with the Commission was also conducive to establishing certain conditions and safeguards to avoid any possible distortive effects. For instance, the public financing did not crowd out private finance providers. The Mandated Arm was also allowed to operate subsidised schemes involving state aid measures when that was in conformity with EU common objectives, such as the ones provided by the Commission’s General Block Exemption Regulation or those representing participation in EU financial instruments, such Horizon 2020.  

There are of course several controversial cases and decisions. Great media attention has been devoted for instance to the Hinkley Point decision. Under the UK scheme notified to the Commission, the nuclear plant located in Somerset was going to receive stable revenues for a period of 35 years. The operator was also going to benefit from a State guarantee covering any debt, which the operator will seek to obtain from financial markets to fund the construction of the plant. The Commission found that during the investigation, the UK authorities demonstrated that the support would address a genuine market failure. In particular, the promoters of the project showed, according to the Commission, that they would not have been able to obtain the necessary financing due to the unprecedented nature and scale of the project. The decision caused some concern for its impact on the environment and its inherent unqualified support for nuclear energy. Paradoxically, the Hinckley Point controversy proves this chapter’s argument. Energy is certainly one of the most underdeveloped of EU common objectives. In particular the EU rules on state aid have for many years been confusing and contradictory. Only recently has the Commission managed to come up with some new guidelines in this sector and their

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62 The Commission also concluded that neither the activities of the Service Arm (which will only provide advice and services to the UK Government) nor those of the Commercial Arm (which will be funded on a commercial basis and will only carry out market conform interventions) involve any state aid, and are therefore not caught by EU state aid control.

63 SA34947, JOCE C/69/2014.

64 Greenpeace defined the Commission decisions was a “world record sell-out” to the nuclear industry at the expense of taxpayers and the environment. The Guardian, 8th of October 2014.
effectiveness is still to be tested. Most importantly, whist renewable energy sources are now subject to at least some form of regulation, nuclear power generation is not. The lack of ‘direct administration command’ has thus created a gap in supranational control that frees the Member states’ selfish interests and increases the pressure on the Commission. However, the solidity of the constitutional framework is confirmed in a very unusual move; Austria has challenged the Commission decision before the General Court. The power to challenge a positive decision of the Commission has been very rarely exercised and certainly to my knowledge an action brought by a Member state against another Member state measure via a Commission decision is almost unprecedented. The cumulation of the possible defection of a Member state, the alleged lack of scrutiny exercised by the Commission, and possibly the defence of the Austrian green energy market have now been demanded judicial adjudication. That’s loyalty in practice for you.

Conclusions: Stick and Carrot.

The analysis of state aid control dispels the myth that aid, business and economic developments can exist without the state, it shows that public spending can be used in a rational way and that external control is useful and virtuous. This chapter has perhaps glossed over many problematic aspects: the length of proceedings, the excessive bi-focal dimension of the Commission versus the Member States, the limitation of control mechanisms, the politicization of the process, the possible negative impact of such a strict regime in terms of global competiveness etc. It could also be argued, and I agree, that more has to be done. It is clear in the case of the UK, that a wide range of state policies towards corporate business largely goes undetected and the benefits for consumers and the businesses themselves are far from certain. In the field of taxation especially, the discrepancies between policies to


An Association of green producers, municipalities and NGOs, also brought a second challenge.

support business welfare and general social welfare are particularly strident.\(^{68}\) The recent investigations started by the Commission on private tax rulings – sometimes known as “comfort letters” – that Luxembourg and other Member states signed with corporations allegedly granting favourable tax treatment is a step forward at least making these mechanisms more transparent and accountable.\(^{69}\) Alleging that those measures had to be classified a state aids – whatever the outcome of the Commission enquiries, succeeded in starting an EU wide debate on aggressive tax practices and generally on public trust in the fairness of national tax systems.\(^{70}\)

In conclusion, whatever its shortcomings, the supranational system of state aid rules as acknowledged by the unanimity of UK stakeholders themselves, is ultimately a fundamental guarantee to the ability of UK business to take advantage of EU membership.\(^{71}\) Thus to paraphrase Mark Twain it could be concluded from a very UK viewpoint ‘Loyalty to the country always. Loyalty to the (EU) government when it deserves it’.\(^{72}\)

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68 See the comments and the statistics contained in K. Farnsworth, Public Policies for private corporations: the British Corporate welfare state, in Renewal, vol. 21, 51.
70 See for instance the works of TAXE the new Special Committee of the European Parliament on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE). Its tasks is to ‘look into tax ruling practices […], but will also review the way the European Commission treats state aid in member states and the extent to which they are transparent about their tax rulings.” http://www.europarl.europa.eu/committees/en/taxe/home.html.