Practitioner's (Biased) Diary on What Beneficiaries Complain About (Mainly in Conference Rooms)

*Michał Bernat**

I. Introduction

Following examination by the distinguished speakers, in the previous sessions, of the various rights and obligations of third parties at the stage of award, notification, the Commission's procedure and potential recovery, this intervention aspires to procure by way of conclusion, somewhat provocatively and perhaps over-ambitiously, a non-exhaustive wish list of the obligations which the Member States have, or should have, towards the beneficiaries - at least in the eyes of the latter.

Make no mistake, to my knowledge these rights have never been laid down and enacted in any Member State in such an academically systemic manner as proposed below. However, the Commission and the EU courts often claim that it is at the national level that the beneficiaries should seek satisfaction for their claims related to State aid. It would thus be of the utmost interest to a practitioner to see what is actually offered to these beneficiaries when they eventually follow the Commission's wholehearted advice and direct themselves to national authorities and courts.

II. Obligation to Inform, but No Right to Be Informed

*Access of Member States to information held by beneficiaries.*Many Member States obviously feel that a beneficiary is a perfect source of information of great use in management of a case: not only are they well acquainted with their respective sectors and business models, but for obvious reasons they are also more than willing to support the government's case. They are also equipped and prepared, or are actually compelled, to seek and fund external advice and data collecting, which the national authorities would have no means or time to handle themselves. Hence, the national authorities frequently have recourse to beneficiaries, either individually or through various trade associations or ad hoc working groups.

Such recourse may be more or less automated, with much depending on the status and experience of the national authority involved in the case. I was a witness both to intense communications with the beneficiaries being requested to suggest comments on each and every enquiry raised by the Commission and to targeted and selective fact finding, where the national authority was interested only in particular pieces of information. Likewise, the impact of the information provided by beneficiaries on the conduct of the national authorities differs to a great extent: some of them felt bound to pass on that information to the Commission with minor adjustments (possibly also due to limited human resources that could be dedicated to the case), while others were far more distanced and dismissed or retained the information at their absolute discretion. Moreover, while the submission of information by beneficiaries is typically rather spontaneous or at least voluntary, Member States do have plenty of administrative instruments at hand to retrieve information from beneficiaries where the latter are reluctant to cooperate or delay their reaction.

Access of beneficiaries to information held by Member States. Access to information is crucial in State aid cases just as in any legal dispute; in the normal course of events it also forms a key guarantee of fair trial to a party. However, State aid cases have an outstanding feature which distinguishes them from many others: the Commission and the Member State debate, on a strictly bilateral and exclusive basis, a verdict in a case which is essentially that of a beneficiary, but without formally inviting him or her to take part. Without knowing in greater or lesser de-

* Dr Michał Bernat, Legal adviser, Tax adviser at Dentons Warsaw, michal.bernat@dentons.com. Speaker at Lexxion's Paris State Aid Conference, 19 February 2016. A previous version of the text was included in the conference material.

tail what issues are discussed, what data is being submitted (or challenged) and what arguments are actually advanced by the disputants the beneficiary may find it excessively difficult to make a valid, timely and pertinent point with its own submissions. This may also necessitate subsequent rectification of the Commission's findings leading to procedural sagas running from one generation to the next for which State aid law is famous, such as recently in the *Frucona* case.

Surprisingly, courtesy in the area of information exchange is not always reciprocal. It happens from time to time that when it is the beneficiaries who need information from the Member States, their requests seem to fall on deaf ears. The issue is then whether the beneficiaries have any specific legal measures to actually obtain State aid-related information from the Member States, especially if they met with an initial refusal from the national authorities.

One of the routes to follow would typically be the national regime on access to public documents, which vary greatly from one Member State to another. While that often works in respect of simple information (as to, for instance, whether and when a measure was notified), it can also run counter to what a Member State considers as a matter of its internal (and well-guarded) industrial policy or litigation strategy. Not all beneficiaries (including particularly private operators) are also equally dear to the national authorities, especially when they compete with national champions or claim the enforcement of a contract with the authorities that are involved in State aid issues; that can also impede their access to information.

Furthermore, in case of individual State aid measures the bond of the beneficiary and the national authorities is naturally intimate enough to imply an exchange of information as well. That may, however, be an entirely different matter if the Commission deals with a State aid programme and the Member States would find it rather exhausting to exchange information with each single beneficiary of the programme (instead, that issue is managed in practice by bringing beneficiaries together in structured or *ad hoc* representative bodies or groups).

Conversely, the reluctance of Member States to share State aid-related information may turn out to be quite opportune for the beneficiaries. Practical examples of major restructuring instruments and programmes could be discussed, where competitors, eager to learn more details regarding restructuring aid, were dismissed, mostly on grounds of business secrets of the beneficiaries, which allegedly the national law protected so avidly.

EU law obstacles to access to national State aid files. Interestingly, EU law can also be invoked to refuse at the national level access of private claimants to State aid-related information. Such has been the case of, for instance, the very regulation (EC) no. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.[1] Some of the Member States infer from this regulation that as soon as a State aid procedure is launched before the Commission, be it a notification process or an illegal aid investigation, any document received or filed by a Member State involved automatically becomes a part of the Commission's file and, therefore, cannot be released to a private claimant otherwise than upon the Commission's consent (which, as the national authorities obviously know from the practice in the application of regulation no. 1049/2001, is rather unlikely). That is, one must admit, a rather perverse effect of an EU regulation on public access to documents - rather than extending the right to such access, previously recognised in national laws, to EU documents, it turns against these national regimes allegedly limiting access to national documents which the claimants would have otherwise enjoyed.

Conclusion. The conclusion on access to information would thus probably be that it is a patchwork area comprising of a variety of legal regimes which sit uncomfortably with each other and definitely leave a beneficiary in the dark as to whether access to information essential to his defence in a State aid case will, or not, be awarded in a particular case.

A practitioner would, therefore, never cease to underline the importance of (and recommend to the beneficiary) entertaining and upholding as good and vast relationships as possible with the relevant national authority hands on the procedure (which is also a reason why beneficiaries tend not to intervene directly before the Commission in a pending procedure as long as it is not necessary, thus preferring not to frustrate the national authorities' command of that

1 European Parliament and Council Regulation (EC) No 1049/200 regarding public access to European Parliament, Council and Commission documents, OJ EC L 145 of 31 May 2001, 43.

procedure). With sufficient dexterity one could steer through the case so as to be always close to this source of information, and react accordingly without delay. Still, that is rather a matter of skill and chance and far from what could be properly referred to as the predictable, unconditional and objective legal protection of a beneficiary in the area of access to files and information.

III. National Law Obligation to Notify

Member States' discretion as to whether and how to notify. It is not uncommon for practitioners to advise companies that the incentives they plan to benefit from qualify as notifiable State aid (including aid that falls outside the scope of the relevant block exemption), which, however, the Member State concerned is not willing to notify. From time to time beneficiaries nevertheless go on to apply and use the measure without further ado following their internal compatibility assessment of the aid at issue. Still, it occurs to some of them to enquire about legal measures they could actually invoke to compel the Member State to file a notification.

Experience indicates that a large potential beneficiary eligible for individual aid would eventually persuade the relevant national authorities to submit a notification. That is usually achieved through repeated communication, reports on the risks related to unnotified aid and similar soft instruments. However, beneficiaries in State aid programmes could be less successful in attracting attention of their respective national administration.

Legal means to induce notification. In such circumstances a claimant could consider an action for a failure to act, that claimants may find in the national law of the Member States. To my knowledge, this has not been a popular option though, although it does have certain intellectual appeal and, in practical terms, could facilitate subsequent claims for damages if, in the absence of notification, statutory aid (aid applicable by the sole operation of law) is ultimately refused or recovered. This is due to the fact that an action for a failure to act could help demonstrate the claimant's diligence and initiative to rectify the lack of notification.

IV. Towards the Obligation to Defend Aid (and Thus Beneficiaries As Well)

Uneasy status of private parties in EU State aid proceedings. The difficulties of beneficiaries in obtaining *locus standi* required under Article 263 TFEU to bring an action for annulment of a Commission's State aid decision has given rise to abundant case law and jurisprudence and are well known. Still, as we all know, not much improvement has occurred since the landmark judgments such as *Sytraval*[2] and *British Airways,*[3] and that despite various legislative developments within the SAM framework.

The deficient legal standing of beneficiaries contrasts with the status of the Member State granting the aid, which naturally enjoy legal standing to initiate a court case without any additional qualifications, even though the outcome of the court proceedings would have material adverse impact primarily on the beneficiary, and not the Member State (the latter will actually typically benefit while recovering aid amounts from the beneficiary).

That situation inspired recurrent criticism, including that based on arguments as grave as a breach of the right to fair trial or blunt denial of justice. In reaction the Commission and EU courts have observed, from time to time, that one of the reasons why the beneficiaries do not necessarily need to enjoy procedural rights (including in litigation before EU courts) equal to those of a party to EU proceedings is that they are, needless to say, skilfully represented and defended by the respective Member States themselves.

Beneficiaries' interest in the Member State's action for annulment. In practice, as the Commission proceeds with its State aid examination the Member States and the beneficiaries come to embark more and more often on the thorny issue of what would be the proper reaction if the Commission's procedure eventually cumulates in a negative decision. The Member States tend to assure beneficiaries of their intention to remain with them to whatever end, including an action for annulment. However, as the Commission's procedure approaches its conclusion the national authorities may become more evasive on that issue.

2 C-367/95 *Commission v Sytraval and Brink's France* [1998] ECLI-154.

3 Joined cases C-371/94 and C-394/94, judgment of 25 June 1998 *British Airways and o. v Commission* ECLI-140.

Various procedural conundrums can arise out of that peculiar situation. For instance, if the beneficiary is informed of the Commission's negative decision, the two months' period for the action for annulment may already start running from that date. Bearing in mind the potential issues with their legal standing (the Commission is inclined to start any case by contesting the admissibility of the private applicant's action), the beneficiaries (especially those with unclear legal standing) often look up to the Member State for that State's own action for annulment. However, it may occur that it is only close to the end of the two months' deadline for the court action that the beneficiary learns of the home Member State's decision (often due to unclear political considerations) not to bring a case to the General Court, which happened to leave the beneficiary perplexed and desperately seeking to draft its own application to the court in whatever little time remains.

Conclusion. In the context of such situations one might argue that since the Commission's procedure follows from the Member State's own failure to report the aid granted (or to grant aid within the scope of the relevant block exemption), the Member State should also feel bound to compensate for its shortcomings at least by triggering judicial control of the Commission's decision based on its privileged legal standing.

V. The Obligation to Enable *Private Enforcement*

Current status. Improvement in private enforcement of State aid law is visible and administrative authorities and administrative courts (rather than civil courts) tend to give the issue more and more attention as well as gain experience. Recent cases that I had occasion to assist involved, for instance, a declaration by an administrative court, that local laws introducing a real estate tax exemption in breach of the notification duty are invalid. Another example involved a protest to the national public procurement body on account of the fact that the best bid submitted by a service provider using the public infrastructure, was made possible only by a selective pricing advantage granted to that user (to the detriment of other bidders using that infrastructure) by the infrastructure operator, the latter himself a beneficiary of (EU-funded) State aid specifically awarded for the construction of that infrastructure. Instances of private enforcement included also a request, in that instance to a civil court, for an interim injunction against enforcement of an arbitration settlement made by the public authorities with another private party and allegedly qualified as State aid provided to that party in light of the unusually generous concessions the public authority accepted in that settlement.

Private claimants play an important role in that respect, seeking redress before national authorities and courts based on State aid law in areas as varied as procurement, unfair competition, public infrastructure and investment regulations, public finance, tax, EU funding or, interestingly, even criminal law.

Member States policy towards defaulting beneficiaries. In parallel, at least some of the Member States follow the trend towards heavier sanctions imposed on State aid beneficiaries in instances of State aid abuse.[4] Accordingly, when a fraudulent application for aid or misuse of aid already granted is detected, not only is the aid cut off or recovered with interest, depending on the case, but more and more often criminal sanctions follow, including spectacular raids (occasionally disproportionate to the offence) by the police.

Moreover, even the very failure to reimburse aid may give rise to (separate) sanctions, such as individual convictions or disqualification of the beneficiary company from further State aid measures for a number of years. In that respect, it was rather surprising to observe a case in one of the Member States where charges were pressed against members of the board of the beneficiary company even though the very claim for recovery of aid was still being litigated. All that intensified activism of the Member States is, however, due rather to their internal policies concerning protection of public finances (or, in case of EU-funded measures, of the finances of the Union) rather than renewed interest of the Member States for the direct effect of Article 108 section 3 third sentence TFEU.

Still, it is no secret that private enforcement of State aid remains an exceedingly difficult option for the claimants to exercise and, despite the developments mentioned above, the area does not look very

4 See also Ch Koenig and J Lindner, 'Criminal Liability – An Efficient Tool of EU State Aid Law Enforcement?' (2015) 1 EStAL, 19 - 24.

much different from the picture emerging from the 2006 and 2009 reports on that issue. Impediments remain similar: starting with the issue of lack of legal standing to raise a State aid-based claim (which often is difficult to derive from the national procedural law) or absent substantive grounds for the claim as such to unmanageable standard of proof.

In addition, despite various useful initiatives to build capacity and awareness, such as the 2009 Commission notice,[5] State aid law remains for some national judges a rather obscure area. A practitioner can thus still happen to be obliged to explain to a national judge the very concept of State aid, not to mention notions of notification, illegality, the direct effect of Article 108 section 3 third sentence TFEU, *CELF* interest and the like, in order to reassure the judge that the State aid-related claim is actually triable in the first place.

Consequently, as far as State aid beneficiaries are concerned, they would typically be advised in many Member States that the risk of effective private enforcement claims being raised against them (particularly by competitors) is rather limited, if not negligible. Not surprisingly, quite often the beneficiaries do not consider private enforcement as a serious threat.

Trends parallel to private enforcement of State aid law. Notwithstanding the above, a separate area of practice in State aid litigation has emerged, linked only indirectly to private enforcement within the meaning assumed by the Commission. While claims based specifically on the direct effect of Article 108 section 3 third sentence TFEU remain relatively rare or unsuccessful, it proved more effective to complain to the national authorities against abusive applications for aid, or misuse of aid, by would-be beneficiaries. Such complaints are based on detailed rules of national law establishing specific funding conditions rather than on EU State aid law (although complaints based on a breach of a block exemption do occur), but they nevertheless cut through to the crux of the matter, which is the elimination of illegitimate aid from the market. Substantial grounds for such complaints are manifold, depending on the aid measure at hand, ranging from the lack of the incentive effect or insufficient innovativeness of the project to the imperfect procurement or straightforward criminal abuse.

One of the popular areas is also the duty to maintain the subsidised investment or infrastructure (typical for regional investment aid and also appearing, as the principle of durability, in the law on EU funds). Competitors tend to keep a rather close look on a beneficiary's project (sometimes even with greater scrutiny than the competent national authorities) and blow a whistle when they believe that the project has been subject to early termination or *de facto* discontinued. In that vein, competitors can also reflect on delocalisation issues (which could become more popular under Article 13(d) of GBER [2014]) and challenge aid to projects which trigger closure of a similar activity in another Member State. However, experience indicates that both the durability and delocalisation charges are exceedingly fact-sensitive and can be quite difficult to substantiate without insight into the accounts and files of beneficiary's group.

Still, as the national law may severely sanction (including through criminal law) the filing of an unfounded complaint (especially if found to intentionally aimed at damaging the beneficiary), caution and diligence in providing solid supporting evidence, is recommended when drafting and filing such complaints.

Procedural issues. Yet, also in these matters procedural issues come to the surface yet again. On the one hand, national procedures for awarding aid often resemble those before the Commission as they are also bilateral involving no party other than the granting authority and the beneficiary. In that procedural framework potential complainants will usually find it somewhat difficult to gain insight into details of the contested measure before filing the complaint (particularly in case of individual aid instruments); laws on access to public files will be of little help in that regard if the authorities invoke exceptions (which they customarily do, often with the approval of the national courts) such as business secrets of the beneficiary. Hence the occasionally random or approximated character of such complaints. Moreover, being no party to the procedure on award of aid, the complainant may have no formal right to request the launching of an inspection, control or investigation in respect of the beneficiary, to enjoy adversarial status in the ensuing procedure, to access the file (for reasons mentioned above) or to challenge the decision (or its lack) before the appellate authority or,

5 European Commission, Notice on the enforcement of State aid law by national courts, OJ EU C 85 of 9 April 2009, 1.

subsequently, a court. To overcome that obstacle one may have recourse to the national public finance law which in certain Member States imposes sanctions on public officials failing to take action or recover undue or misused subsidies from a beneficiary.

On the other hand, once the complainant eventually succeeds in triggering a national procedure for examining a contested measure, the beneficiary itself may, despite its status of a party to the aid award procedure, face difficulties in accessing the original complaint and in identifying of the crucial information and arguments raised by the complainant. Confusion increases when EU institutions, such as the European Public Prosecutor's Office, eventually steps in, as the beneficiary could not join or impact their activities.

In practice, complaints against illegitimate aid based on national law often give the impression of a guessing game: the complainants do not know exactly the measure they are challenging and the beneficiaries do not know exactly what allegations are being raised against the measure they benefit from.

Conclusion. It follows from the above that national complaint procedures, albeit based on grounds other than a breach of the standstill obligation or incompatibility of aid with the internal market (which obviously remains for the Commission alone to examine), could provide, in lieu of the Commission's State aid procedure, some useful forum to dispute doubtful State aid measures. However, a transparent, effective and fair framework seems to be lacking in that area. It would thus be reasonable to claim that to develop such a framework remains one of the obligations of the Member States not only towards private complainants, but also towards the beneficiaries.

VI. The Obligation to Indemnify

Award of illegal aid as a source of damage. It may occur, and often occurs in practice, that a Member State commits an error or irregularity, in the process of awarding, disbursing or auditing State aid. For instance, it could wrongly assume that a measure did not qualify as aid, or that it did not require notification.

Examples that immediately spring to mind in my region, which is CEE, include (i) the Polish system of RES and cogeneration certificates introduced in 2005 and 2007, which until 2013[6] Polish authorities had been sincerely convinced, and for good reason, not to qualify as aid at all or (ii) the Polish new RES auction system, which Polish authorities, albeit after some debate within the government, concluded to fall within GBER 2014 and initially decided not to report them, only to be requested by the Commission a few months prior to its entry into force to actually have that measure reported to and tested by the Commission.

Likewise - although that would pose more complicated questions of law and fact - the Member States can be held not to perform sufficiently in the Commission's procedure, in terms of clarity of information, soundness of arguments or of the general line of defence (such as focusing on the absence of aid instead of compatibility with the internal market) and that may lead to doubt whether a more positive outcome could have been achieved if the Member States had approached the procedure in a different manner.

Such circumstances would typically qualify as an act, or omission, of the public authorities, for which they can be held accountable, and most of the EU Member States can be expected to offer in their national laws some indemnification for damage incurred by private parties due to acts or omissions of public authorities. Reports of successful actions of private litigants in that area are, however, rather rare. Various factual issues may have led to that result, such as, for instance, reluctance to sue the State in the case of operators which belong to public and/or target regulated sectors. Moreover, issues include an exceedingly demanding standard of proof or outstanding conditions for the State's liability to be engaged. These circumstances alone might undermine the claim that beneficiaries are ultimately free to request compensation from the Member State. However, again, EU law in its own right can also impede the position of the beneficiary.

EU law issues undermining beneficiaries' actions for damages. Firstly, it has been long established that indemnities offered to a beneficiary for or in relation with the loss or recovery of illegal aid cannot equal the actual amount of aid awarded. Simply put, Member States which were requested to refuse aid to, or recover aid from a beneficiary, who thus suffers damage, cannot circumvent that requirement by granti-

6 In 2013 a complaint was filed by a private party with the Commission, which led to the Commission's preliminary investigation in the case.

ng the beneficiary similar amounts under the guise of compensation for that damage. The simple implication of that rule, which as a principle of EU law overrides any conflicting provisions in the national laws, is that a beneficiary could only claim compensation for some residual damage that might have occurred due to the loss or recovery of aid. For instance, the beneficiary may have been forced to contract a short-term loan under adverse conditions only due to an unexpected turn of events leading to recovery; it could also happen that certain profits would have been expected if not for the loss of aid supporting certain infrastructures etc. It may be assumed that only such incidental damage could be compensated.

Secondly, EU law lurks also in the area of the causal link between the State aid loss or recovery and the damage, however limited. In particular, the Commission and the EU courts have reiterated that a beneficiary, who by definition is a business operator, must live up to the standard of due diligence typically required in the realm of business activity. In State aid terms this implies that a beneficiary is always required, in any event and notwithstanding any respective duties of the home Member State, to verify whether public support he enjoys qualifies as State aid and, if so, whether it has been duly reported. Accordingly, a diligent businessman being expected to obtain professional advice whenever needed could and should have found that he has been in receipt of illegal aid. That is, obviously, just a stone's throw from claiming that the beneficiary cannot, in principle, raise claims for damages from the Member State when, in the absence of a notification, the latter refused or recovered unreported aid from the former.

Thirdly, it is not just the Member States that may defend themselves as above to preclude liability for failure to notify, but they would actually be warranted to rely on that failure to avoid uncomfortable commitments towards the beneficiaries. Hence, although EU courts have generally held that EU law does not automatically imply nullity and invalidity of contracts providing unnotified aid (which may, however, stem from the national law[7]), the Member States can, and under EU law actually should, refuse awarding aid based on such contracts despite the fact that it is solely that Member State's own misconduct that caused unenforceability of these contracts. Even a contract held to be valid in the final judgment of a national court cannot escape that fate,[8] if the court adjudicating in the case did not consider the State aid aspects of that contract. What is more, to enhance its claim on its inability to respect a contract, a Member State can and occasionally does alert the Commission as regards illegal aid that is envisaged under that contract, which that Member State itself failed to notify.[9] Needless to say, when a Member State expects that a State aid issue that could undermine a contract may arise, it also tends to make the award and maintenance of aid conditional upon the Commission's decision, so as to preclude any doubts. That practice happens to be particularly frequent with contracts involving the awarding of EU funds (so as not to withhold the allocation and distribution of EU funds when compatibility doubts persist or the project exceeds the thresholds of individual notification requirements).

Fourthly, the Commission is also of the opinion that EU State aid law opposes bilateral investment protection treaties which customarily provide for international arbitration clauses (and that apart from and in addition to the fact mentioned above, compensation for damages corresponding to the principle amount of incompatible aid is prohibited). Still, BIT arbitration procedures have proven exceedingly attractive for the beneficiaries, because foreign shareholders have found it more than convenient to have their case decided outside national courts, that is, by courts naturally inclined to look at cases from the angle of public interest. Also, that forum could have helped overcome deficiencies caused by national laws governing the standard of proof or causal link. With the Commission raising structural issues concerning compatibility of BIT arbitration procedures with EU law, the margin of manoeuvre for private State aid claimants has thus become even tighter.

VII. General Conclusions

The Commission and the EU courts often argue that, the beneficiaries being free to seek redress at the level of and (as the case may be) against the Member States, it is no longer necessary to insist that much on their protection in EU proceedings. Consequent-

7 See, for instance, T-397/12 *Diputación Foral de Bizkaia v European Commission* [2015] ECLI-291, [29].

8 C-505/14 *Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen* [2015] ECLI-742, [46].

9 See *Klausner Holz* (n8), [11].

ly, the deemed prevalence of the Member States as a forum for protection of beneficiaries ends up as an argument justifying the obvious insufficiency of third party procedural rights before the Commission or the EU courts.

Yet, however neat that line of reasoning might look to an uninformed observer, it can only serve its purpose if the Member States do in fact offer to aid beneficiaries, at least on average, a decent degree of legal protection. However, if that proves not to be quite true, the entire line of defence of the Commission fails. In such a case protection, before EU institutions, of the beneficiaries, who are left with little legal comfort before the national courts, pops back on the agenda.

Moreover, it is not just that EU law and jurisprudence offer little protection to beneficiaries condemning them, possibly in good faith but with little merit, to seek legal measures in their national laws. It actually appears that EU law and jurisprudence, on occasions, may actually make it even harder for the beneficiaries to enforce their claims when the latter find themselves fortunate enough to find a national judge willing to hear their case. Scholars and practitioners often complain about the apparent insufficiency of procedural guarantees available in cases involving beneficiaries (not to mention other private parties, whose legal status is probably even less enviable). Various proposals for reforms are debated, despite the Commission's repeated objection that the (quasi-)multilateralism of EU State aid proceedings would clash with the bilateral framework imposed by TFEU. Notwithstanding that long-term discussion one may conclude that lots can and should be done also at the national level, even if, admittedly, no procedural advantage afforded to beneficiaries at the national level can make up for their lack of proper standing before the EU institutions having decisive and supreme authority to rule on the existence and compatibility of aid. One could even be tempted to suggest a coordinated effort throughout the Member States to deliver a similar, minimum level of protection for beneficiaries and other private parties, which the EU institutions could help achieve by instruments similar to those recently introduced in the area of private enforcement of the antitrust law.