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Private Participation in the Control of Public Spending - The Multi-Level Subsidy Regimes

A. Introduction, Background, The Questions

This paper is on the role of private parties in the laws regulating subsidies. The law of subsidies is a multi-level phenomenon. Governments on the supranational, national, regional and local levels *grant* subsidies. Rules to *control* the use of subsidies additionally exist on the level of WTO.

Subsidies are regulated within multi-level systems because they can have an effect on competition between participants in markets[2] and on competition between jurisdictions.[3] Many attempts have been made to exactly define subsidies.[4] However, subsidies have as common denominator that they are steering tools to regulate or influence market behaviour. Often they take the form of incentives. These incentives are set by public actors in order to entice private actors to act in a manner, which without the subsidy they might not have done. With subsidies governments seek to deliver public services and to achieve policy goals. By subsidizing, they can reach these goals without providing services themselves and without using 'traditional'

[2] These markets can be either within or outside of the jurisdiction of the subsidizing government. Due to the potential external effects of the practice of subsidization, which exists in all developed and most developing countries, subsidies is an area which creates trade friction between jurisdictions (the OECD reports that about 20% of all WTO disputes are related to subsidies) and has led to strict rules in the EU (Art. 87-89 EC and subsequent secondary legislation).

[3] Especially where subsidies are geared to attract private investment, one government granting subsidies can create an incentive for other governments to offer competing subsidies. Subsidies granted on different levels of government can influence each other if they either intend to reach the same goals (doubling effect) or intend to reach the opposite goals. If for example one level of government would try to solve the problems of low income of participants in a transport market by paying subsidies for reduction of capacity and another by subsidizing bigger and more efficient transport vehicles. Participants could use one set of subsidies to get rid of their old vehicles and use the next set of subsidies to purchase new, bigger transport capacities. The market problems would still exist, despite the spending of public resources.

[4] See for example Art 1, 2 SCM.

means of public law such as hierarchical command and control structures.[5] Subsidies can be granted in many forms e.g. on the basis of a statute, by means of contractual or other arrangements between public and private actors. They are often the result of negotiated relations between the public and private parties. Subsidies thereby are granted within a system of close public-private interaction.

Due to the potential negative effects of the subsidies on public welfare, attempts have been made in all multi-level legal systems to control and coordinate the use of subsidies. Also with respect to control of subsidies private parties play a crucial role in providing information and holding administrations accountable by participating in administrative procedures and controlling the legality of subsidies in Court. Although the mechanisms for control and coordination differ on each regulatory level, all levels use private involvement to encounter the steering problems known in principle-agent relations.[6]

Due to these characteristics, subsidies have therefore long been regarded as *atypical* structures in public law. The reason for this is that subsidies usually are granted outside traditional

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[5] An excellent overview over the economic and political motivation for subsidization is contained in the OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy Report "Competition Policy in Subsidies and State Aid" of 12 November 2001, DAFFE/CLP(2001)24, 7.

[6] See for an overview: Gerard C. Rowe, Servants of the People - Constitutions and States from a Principle-Agent Perspective, in: Stefan Voigt and Hans-Jürgen Wagener (eds.), Constitutions, Markets and Law, Cheltanham, Northamption, 2002, 287-316. Problems exist e.g. with respect to information. Information asymmetries exist in detecting a subsidy, assessing a subsidy and when evaluating whether a different jurisdiction is complying with. The controlling administration will need to employ considerable resources if it wishes to detect all forms of subsidies in all controlled jurisdictions. Also the evaluation of the controlled subsidy programs might be a difficult task and require knowledge about local conditions; i.e. is the subsidy achieving a public policy goal with the least possible impact on other interests. It might be even more problematic to evaluate whether a jurisdiction has ceased to subsidize after a control procedure. The OECD in its 2001 report on subsidies noted at the information problems to be essential in the process of control within multi-level system DAFFE/CLP(2001)24, pages 9, 24: "A full analysis of the costs and benefits of different policies by a higher level of government requires detailed information about the effects of policies and the preferences of the citizens of lower levels of government." "A sizable component of subsidies and aid are granted by sub-national governments. The OECD study on support to industry noted that the lack of information on sub-national programmes remained one of the principal problems of the study." Also, problems of the collusion of interest between the controlling and the controlled level may lead to the disadvantage of other third party interests (e.g. where the controlling and the controlled level have the same policy objectives but a subsidy will damage interests in yet a third jurisdiction or private interests which are not represented in the control process). Further problems of accountability exist. These arise with respect to the relation between different levels of government granting subsidies and controlling the subsidizing practice.

forms of public administrative law and escape the hierarchic relation between the public and the private sphere.

However, exactly these characteristics may make the law on subsidies appear *typical* for some of the more recent developments in public law - especially with respect to the changing relation between public and private actors.[7] Such developments are:

- The development described as the 'transformation from *government to governance'*.[8] Associated with this are problems of controlling and structuring private influence in defining and implementing public policy.
- The closely related topic of the *transformation of regulatory approaches* away from 'unilateral' action (e.g. by administrative acts) to public-private cooperation and forms of 'negotiated regulation'.[9] These forms of cooperation have in-

[7] An interesting analysis on the usefulness of the selection reference-areas for the study of problems in public law: Christoph Möllers, Reform des Verwaltungsrechts - Möglichkeiten und Grenzen eines wissenschaftlichen Diskurses in Deutschland, EUI Working Papers Law No. 2001/10, 51.

[8] In today's legislation and literature on public administration and political science the term governance has largely replaced the word government (see e.g. Article 41 of the European Charter of Fundamental Rights. Although not yet formally a part of primary law, the Charter is nonetheless one of the sources of fundamental rights for the European Courts, see: Case T-177/01 *Jégo-Quéré v Commission* of 3. Mai 2002, para. 47. See for the political science literature e.g.: Beate Kohler-Koch and Rainer Eising (eds.), The Transformation of Governance in the European Union, 1999. Also the 2001 Harvard Jean Monnet Working Papers [www.jeanmonnetprogram.org] discussing the European Commission's White Paper on Governance - European Commission, *European Governance: A White Paper,* COM [2001] 428). The definition of the term governance however remains vague. The word is most widely used to describe current phenomena of decision making in the field of public law. There, no longer is a strict distinction between the administrative decision making bodies and the private actors on the receiving end of such decisions. The inclusion of various actors from the 'civil society' such as experts, NGOs, private parties into public decision making and implementation is one of the main features of the transformation from government to governance (Martin Shapiro, Administrative Law Unbounded: Reflections on Government and Governance, 8 [2001] Indiana Journal of Global Legal Studies, 369-377). This inclusion goes beyond the traditional notion of the *'right to be heard'* to a more inclusive concept of cooperative decision making. With respect to the transformation of public law from governance to government, questions arise as to the mechanisms of inclusion of the civil society in achieving public goals. Questions however also arise as to the accountability of the network of actors and the legitimacy of decision-making in such networks.

[9] Privatisation has not necessarily lead to a reduction of public intervention into society. In many fields, direct involvement and intervention through action by agencies has been replaced by regulation and/or the creation of financial incentives often in the form of subsidization. This requires that there are forms by which the public sphere can gather the information and knowledge for effective regulation through cooperation and incentives. The downside of the increased flexibility, these de-

creased with the reduction of direct provision of essential services ('Daseinsvorsorge') by public authorities and the trend towards more private provision of these services. Public activity is then often reduced to regulatory supervision, with public authorities setting incentives, controlling the conditions of the provision of services and gathering the information for the supervision.[10]

- Regulation within *multi-level* legal systems.[11] Most regulatory tasks are nowadays governed in some sense or another by multi-level questions making it impossible to work in closed systems.

In the following, this paper will therefore present a brief outline of conditions and possibilities for private actors to control public activities with a financial impact through the provisions on the control of subsidies. The goal is to analyse a) the conditions for private involvement in the definition of the use of subsidies and b) the conditions of the involvement of private parties into their control.

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velopments entail, is that the system of public law and its interaction with the private sphere becomes less transparent. Reduced transparency is problematic with respect to holding administrations *accountable* and therefore is a problem with respect to legitimacy of administrative action. Administrations as main public actors traditionally were regarded sufficiently capable of gathering the information necessary to undertake their tasks for the public good. But knowledge on conditions within the society and on the market place needed for effective regulation is no longer exclusively gathered by the administrations itself with the help of channelled participation of society actors. In many jurisdictions it is possible to observe a more far reaching transformation of regulatory approaches. As *Ladeur* puts it: "New forms of co-operative rule making or decision making emerge; unilateral decision making by 'administrative acts' is more and more replaced by informal agreements or explicit forms of contract which make it difficult to distinguish clearly between private and public interest" (See: Karl-Heinz Ladeur, The Changing Role of the Private in Public Governance, EUI Working Paper Law No. 2002/9, 24; Elke Gurlit, Verwaltungsvertrag und Gesetz, Tübingen 2000, 17 *et seq.*; Jody Freeman, The Private Role in Public Governance, 75 [2000] NYU Law Review, 547).

[10] Karl-Heinz Ladeur, The Changing Role of the Private in Public Governance, EUI Working Paper Law No. 2002/9, 24-25.

[11] Until the creation and effective enforcement of the subsidy regimes of the EEC (now the EC, EU) and the GATT (and now the WTO) the law of subsidies was limited to the coordination of national and subnational levels of governance. Since the 1950ies there has been a continuous momentum to fine-tune the provision of subsidies and their supervision in accordance with other regulatory levels. With respect to these problems of multi-level governance, federal states are an interesting model to look at. They themselves are organised in a multi-level system with levels of law on the federal, the regional and several local levels. Private parties can therefore act on various levels within this multi-level system. Developments on the conditions of governance on one level will have impact on governance on other levels.

For reasons of clarity, the brief analysis of the rules on subsidies will take place on the basis of an analysis of the different levels of law: the WTO, the EU, and the different levels of governance in Germany. Germany is an interesting field of study for two reasons: Firstly, its legal system is marked by a multi-level system of governance in itself. Problems of coordination and of control of various providers of subsidies arise also on that level. Secondly, its post war legal order addressing the questions of subsidies within the federal system stem from roughly the same historic period as the GATT/WTO rules and the EC provisions. Nevertheless it has developed a different approach to the issue.

B. *International Level: WTO*

Since the WTO lacks the competence to engage in legislation or distributive policies itself, it is geared towards the control of the subsidising practice of its members. This brief overview over WTO law on subsidies therefore firstly outlines the provisions of substantive WTO subisidies law. It then takes a look at forms of private involvement in the enforcement of those provisions.

I. Overview over WTO Subsidies Law

Within WTO provisions on subsidies are contained in Art. III (8) (b), VI (3-7) and Art. XVI des GATT 1994 and in the „Agreement on Subsidies and Countervailing Measures“, SCM.[12] The SCM in turn refers to the WTO provisions on dispute settlement in the WTO Dispute Settlement Mechanism, DSM.

WTO provisions on subsidies come in two categories, called ‘Track I’ and ‘Track II’: Firstly, international obligations in the form of substantial provisions which oblige WTO member states to act in a certain way or to omit a certain activity (so called Track I provisions). These include provisions on reactions in cases of alleged breach of these obligations including dispute settlement procedures. Secondly, unilateral protective measures against the use of subsidies on imported goods and services (e.g. the imposition of countervailing duties, so called Track II provisions).

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[12] The WTO law provisions, on subsidies are parallel to the rules against dumping. Anti-dumping provisions intend to provide safeguards against predatory pricing funded by private actors. The provisions against subsidies intend to safeguard against distortions of competition in world trade due to subsidies from other states.

The WTO provisions on subsidies are enforced - like all other WTO law - through the member states. There is no central agency comparable to the European Commission acting as authority to enforce WTO law. The "Committee on Subsidies and Countervailing Measures" under Art 24 SCM has the functions to "afford Members the opportunity of consulting on any matter relating to the operation of the Agreement". It elects a group of experts to provide for advisory opinions to panels and the Committee.

The subsidy related GATT provisions basically deal with Export subsidies. In the original GATT 1947 only very few provisions dealt with subsidies. One of the core provisions is Art. III (8) GATT which provides for an exception to the principle of equal treatment of all imported and domestic products by allowing the payment of subsidies to domestic production only (Art. III (8) (b) GATT).

Art. VI (3) GATT allows Member States to levy "special duties" on the import of products in order to offset the effect of subsidies which these products have benefited from in their country of origin (Art. 10 *et seq* SCM contain further elaboration on Art. VI GATT).[13]

Art. XVI GATT contains general provisions on subsidies. According to Section A of Art. XVI GATT the Member States of GATT provided for a system of mutual notification for certain types of export subsidies. This obligation has now been redefined in Art. 25 SCM. The WTO members are under the obligation to enter into negotiations with those states whose could be seriously affected by subsidies as defined in Art. 1, 2 SCM.[14] Section B of Art. XVI GATT was later added. Under the heading of "Additional Provisions on Export Subsidies" which in subpara (3) calls on all WTO members to avoid the use of subsidies on the export of primary products.

Other measures on the subsidies are provided for in the SCM. This is the WTO's multilateral follow-up agreement to the plurilateral Tokyo Round on Subsidies of 1979. It defines the term subsidy in a broad sense in Art. 1, 2 and in Part II distinguishes between prohibited and ac-

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[13] These obligations are elaborated also in Art VI (5) GATT which contains a kind of *ne bis in idem* clause, which prevents from one and the same product being subject to countervailing duties for subsidies and for dumping. Art. VI (4) GATT forbids sanctioning products because of non-export related tax advantages which these products enjoy in their country of origin. Art. VI (7) GATT finally limits the possibility of sanctions due to systems of protection of domestic producers of primary commodities under certain conditions.

[14] According to R.R. Rivers, J.D. Greenwald, The Negotiation of a Code on Subsidies and Countervailing Measures, 11 Law & Policy in International Business, 1979, S. 1447 *et seq.*, at 1460, however between 1947 and 1979 there was no case of notification under this provision.

tionable subsidies. Prohibited are subsidies which by law or fact have the effect of preferring domestic over imported goods or are granted inter alia on the basis of the export performance of a product (Art. 3 SCM). Actionable are subsidies which can lead to adverse effects to the interest of other WTO members (Art. 5 SCM). In case of violations of the obligations under these provisions, member states may call for consultations. In the case of the consultations not leading to a mutually agreed solution, the member state may call upon the DSB for the establishment of a Panel. Additionally, WTO members who have suffered damaged, may take countervailing measures under Art. 10-23 SCM (Track II). The implementation of the agreement is supervised by a committee of experts.

According to Art. 30 SCM disputes over subsidy cases will be brought under a procedure as defined in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) except as otherwise provided for in the SCM.[15] The WTO system of dispute settlement has been developed from its GATT origins. Despite the DSU introducing several important innovations to dispute resolution within the WTO[16] which constitute a great step towards a more 'legal' in contrast to the former 'political' or 'diplomatic' mode of dispute resolution, the main players are the WTO members. Within this framework the current role of the individual in WTO subsidies law is defined.

II. Private Involvement in Enforcement of WTO Subsidies Law

The modes of direct participation of private interest in strictly member driven international organisation such as the WTO are naturally very limited. Although Art V (2) of the Marrakech Agreement under the heading of "Relations with other organisations" states that "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO", this does not mean that NGOs may directly influence WTO policies.[17] Private influence on en-

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[15] Annex 2 to the Marakesh Agreement establishing the WTO.

[16] Including the creation of an appellate review of Panel decision by a standing Appellate Body and provisions for compensation or retaliation in case a defendant party does not comply with the finding that its practice has been objectionable. See: Andreas F. Lowenfeld, International Economic Law, Oxford 2002, 152 et seq.

[17] See: WTO General Council, Guidelines for Arrangements on Relations with Non-Governmental Organisations, WT/L/162, of 18 July 1996. This accepts only a very limited role for NGOs with respect to the WTO. They are not involved in decision making, but may be consulted. NGOs however may informally a much greater role than becomes clear from the official text:

forcement of WTO law can however either take place through influencing policy within WTO members in order to make them force other WTO members to honour their obligations under WTO law (1) or taking part within existing disputes (2).

1. Private Influence within a WTO Member to Enforce WTO Subsidies Law

There are two possible ways of reaction to an alleged breach of WTO subsidies law: WTO members can enforce international obligations of WTO members by entering into the formal procedure of consultation. If they do not reach an agreement they can enter into dispute settlement. Also, members can impose unilateral measures such as countervailing duties.

Under this system, private parties can neither impose countervailing duties nor can they initiate the consultation procedure and subsequent dispute settlements in their own rights. However, according to some jurisdictions, private parties have the right to request from their government in certain circumstances to act upon a private complaint.[18] The DSB has decided a case on the extent within which WTO members may empower private parties to initiate disputes under WTO law. The case related to US law which gives private parties far reaching rights vis a vis the US government on the issue of the imposition of unilateral sanctions in case of violations of trade agreements.

Under US law the so called 'Section 301' of the US Trade Act 1974 provision gives interested private parties standing to request initiation of formal investigations into trade practices

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I. Under Article V:2 of the Marrakesh Agreement establishing the WTO "the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO". II. In deciding on these guidelines for arrangements on relations with non-governmental organizations, Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs. III. To contribute to achieve greater transparency Members will ensure more information about WTO activities in particular by making available documents which would be derestricted more promptly than in the past. To enhance this process the Secretariat will make available on on-line computer network the material which is accessible to the public, including derestricted documents. IV. The Secretariat should play a more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the accuracy and richness of the public debate. This interaction with NGOs should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO. V. If chairpersons of WTO councils and committees participate in discussions or meetings with NGOs it shall be in their personal capacity unless that particular council or committee decides otherwise.

[18] See below for the US and the EU as examples for approaches to these rights.

or policies of a foreign country which conduct an 'unjustified practice'.[19] If the problem is not satisfactorily resolved the private party may request from the US government the imposition of a remedy against the foreign country including sanctions. Under the US law, the Trade Representative is obliged to decide within 45 days after receipt of the petition by the private party whether to initiate an investigation into the alleged foreign misconduct. If the investigation is opened the US Trade Representative has to enter into negotiations with the foreign country. If necessary, the Trade Representative is obliged to enter into a dispute settlement procedure under WTO law. The Trade Representative's discretion is limited in case he/she finds a violation of an international trade agreement to which the US is party. In that case the Trade Representative is obliged to take unilateral responsive action unless the possibility of dispute settlement exists. The Trade Representative is not required to take unilateral responsive action on behalf of the US if he/she finds that the foreign country is taking satisfactory measures to comply with the recommendations and rules handed down by the DSB.[20] Altogether '§ 301' provisions give individuals strong rights with respect to the determination of US trade policy. For the US the use and encouragement of individual complaints with such a tool allows for a more effective enforcement of trade agreements since the private actors within the market place avail of the detailed information of a breach which government agencies will often lack.

The EC argued that that provision violated Art. 23 DSU.[21] The reason was that under § 304 of the US Trade Act, the US Trade Representative is obliged to determine whether any rights to which the US is entitled are being denied and if so whether unilateral retaliation was necessary within a deadline of 30 days after the date in which the dispute settlement procedure is concluded, or 18 months after the initial initiation of the US investigation. Under certain circumstances these deadlines can be shorter than the possible WTO dispute settlement proce-

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[19] See for details: John H. Jackson, William J. Davey, Alan O. Skyes, Legal Problems of International Economic Relations, 3rd ed., St. Paul, 1995, 815-843; William Kitchell, Leslie Alan Glick (eds.), Manual for the Practice of U.S. International Trade Law, Kluwer 2001, 1279-1344; Andreas F. Lowenfeld, International Economic Law, Oxford 2002, 179-188.

[20] § 301 (a) (2), 19 U.S.C. § 2413 (a) (2).

[21] Art. 23 DSU stipulates that prior to unilateral action the DSU procedures need to be followed and Members need to be afforded reasonable time to implement the recommendations and rules by the DSB; *United States - Sections 301-310 of the Trade Act of 1974,* WT/DS152/R of 22 Decmeber 1999.

dure time lines.[22] Therefore US law could require the US Trade Representative to take unilateral action on behalf of the US irrespective of whether the DSU procedures had been completed or not.

The Panel found § 304 in prima facie violation of DSU rules. If a dispute under the DSU were to continue for more than 18 months, the legal security afforded under Art 23 DSU were violated by the US provision which grants the US Trade Representative discretion whether to enact unilateral sanctions or not.[23] However the Panel accepted that the US Administration had produced a Statement of Administrative Action and had in the proceedings before the Panel reaffirmed that it would not apply § 304 of the Trade Act 1974 in violation of Art. 23 DSU. The Panel therefore concluded that this representation "clarifies and gives an undertaking, at an international level, concerning aspects of domestic US law, in particular, the way the US has implemented its obligations under Art. 23 (2) (a) of the DSU."[24]

The EC has similar tools. Regulation 3286/94, the so called Trade Barrier Regulation ('TBR'),[25] enables the Community to react upon complaint any natural or legal person, associations representing the Community industry or a complaint of a EU Member State about a limitation of trade rights encountered by EC actors in foreign trading partners. With respect to Subsidies, the EC has a specific regulation, providing for an instrument to protect EC producers of goods and services against allegedly unfairly subsidized imports.[26] Parties which are entitled to complain are, as within the scope of the TBR, private parties, associations representing the Community industry and EU member states.[27] The latter in turn can obtain their

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[22] Andreas F. Lowenfeld, International Economic Law, Oxford 2002, 184 gives a in depth analysis of the different possible time frames and in which cases the deadlines in the US law could violate WTO DSU provisions.

[23] *United States - Sections 301-310 of the Trade Act of 1974,* WT/DS152/R of 22 Decmeber 1999, paras 7.56-7.63.

[24] *United States - Sections 301-310 of the Trade Act of 1974,* WT/DS152/R of 22 Decmeber 1999, paras 125, 126.

[25] Council Regulation (EC) 3286/94 of 22 December 1994, OJ 1995 L-41/ 54 "laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, *in particular* those established under the auspices of the World Trade Organisation."

[26] Council Regulation (EC) 2026/97 of 6 October 1997, OJ 1997 L 288/1. A similar regulation exists with respect to the defence of community interests against dumping practices. See: Anti Dumping (Reg 384/96 of 22 Dec. 1995, OJ 1996 L 56/1.

[27] Art. 9, 10 of Council Regulation (EC) 2026/97 of 6 October 1997, OJ 1997 L 288/1.

information from private parties within the member state. According to Art. 10 (8) of the EC subsidies regulation, which implements Art. 11 (4) SCM, an investigation will only be initiated if the complaint can be regarded to represent the interest of the Community industry. That is the case if it is either not opposed by producers which account for more than 50% of the Community producers of a product. At least 25% worth of the Community producers of a product need to expressly support the complaint. The Commission after examination of the complaint has discretion to initiate an investigation into whether there is an alleged subsidy. The discretion is guided by the criteria set out in Art. 10 (4) and (11) of the EC subsidies regulation such as *de-minimis* criteria as to the turnover and minimum evidence requirements.

If in the initial investigation including the consultation of the state accused of unlawfully subsidizing products, it becomes 'apparent' (i.e. it produces sufficient evidence for the existence of) that there is a subsidy in violation of WTO law, the Commission 'shall' initiate the formal proceedings of a 'countervailing duty investigation' outlined in Art 10 *et seq.* SCM. Within the period of investigation, private involvement takes mainly place in the provision of information helping the European Commission to gather the necessary evidence (Art. 11 of the EC subsidies regulation).

These rules give the Commission a certain degree of discretion about how to act upon a private complaint. The degree of Commission's discretion has been subject to dispute in the ECJ - mainly however with respect to the rights of private actors lodging a complaint with the Commission in order to secure the adoption of protective measures against foreign dumping practices. These cases are informative because EC provisions on the protective measures against dumping and subsidising practices provide an almost identical procedures on initiation of an investigation and the investigation of alleged violations of WTO dumping and subsidies provisions to the detriment of EU industries.

In *Fediol III* the Court submitted the Commission's discretionary decision to review of the basis of the decision including the Commission's interpretation of GATT law. "Since the economic agents concerned are entitled to rely on the GATT provisions as a basis for the complaint, they may request the Court to review the legality of the Commission's decision applying those provisions." This review however is limited to the decision on the initiation of proceedings. Since the GATT and now WTO law provides for consultations to be undertaken

between the WTO parties, the Commission has a large margin of discretion at to the conduct these negotiations and their outcome.[28]

The private parties' rights under EU law are however seem less far reaching than the US parties rights under Section 301 legislation. The European procedures follow a two step procedure according to which the Commission decides on the initiation of proceedings and after a positive decision investigates a case. The final decision on the imposition of countervailing duties (and for that reason also of anti-dumping duties) rests with the Council which decides by simple majority.[29] The extent of the Council's discretion whether or not to adopt a Commission proposal to impose a duty has been long been subject to disputes in court, few of which have so far received close academic attention.[30]

In *Eurocoton* for example, private parties had issued a complaint to the Commission under the EC anti-dumping regulation. The Commission after formal examination of the complaint found enough evidence to suggest to the Council to adopt a decision imposing anti-dumping duties. The central element of dispute was the nature of a Council decision in an anti-dumping procedure: Was the Council vote on the imposition of special duties a legislative decision with the consequence of only limited review of discretion by the Court? Or did the Council decision mark the last step in an administrative procedure, at the end of which the Council would be obliged to issue an anti-dumping measure if the facts so required and would have to give reasons if it intended to adopt a measure which differed from the reasoned Commission proposal. The CFI held that it was "legally impossible" for the Council "to adopt that proposal if only a minority of Member States consider that it should be adopted."[31] It held, that the Council could not be obliged to reach a simple majority and therefore to adopt a proposal submitted by the Commission. The Council was not obliged to reason its positive or negative decision. Advocate General Jacobs, in his opinion on the case disagreed. To him, the Council decision has to be subject to judicial review. The fact that the Council could fail to reach the necessary simple majority for example would not allow the Council to discharge itself from

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[28] ECJ Case 70/87, *Fediol v Commission,* ECR 1989, 1781, headnote 2, para 3 et seq.

[29] Art. 15 of Council Regulation (EC) 2026/97 of 6 October 1997, OJ 1997 L 288/1.

[30] See e.g. Cases T-213/97, *Eurocoton v Council,* ECR 2000 II-3727; C-76/01, *Eurocoton v Council,* of 30 September 2003; T-58/99, *Mukand v Council,* ECR 2001 II-2521.

[31] CFI Case T-213/97, *Eurocoton v Council,* ECR 2000 II-3727, para 86-88.

the requirement to issue a reasoned decision.[32] However, the reasoning that the Council had to give in order to comply with its obligations under Art. 253 EC is very brief, the statement that the necessary majority has not been reached was sufficient.[33] The ECJ finally found that the Council, under the anti-dumping regulation acted in an administrative capacity. It acted "within a regulatory framework which it has imposed on itself, specifying the conditions in which an anti-dumping regulation may be adopted as well as the Council's room for manoeuvre as to whether or not to adopt such measures."[34] If the Council decided not to adopt a proposal for a regulation imposing definitive anti-dumping duties, "it should provide an adequate statement of reasons which shows clearly and unambiguously why, in the light of the provisions of the basic regulation, there is no need to adopt the proposal."[35] Additional criteria for judicial review of Council decisions in this area are to "ascertaining whether the procedural rules have been complied with, whether the facts on which the contested decision is based have been accurately stated and whether there has been any manifest error of assessment of the facts or any misuse of powers."[36]

Under the EC regulation for the trade policy mechanisms in subsidies, the relation between the Commission investigating a case and the Council making a final decision are parallel to the approach under the EC anti-dumping regulation. Therefore the case law under the dumping regulation can be applied also with respect to protection against foreign subsidies within the EC.

WTO law also limits the WTO members' margin of discretion as to the involvement of private parties. In *US - Continued Dumping and Subsidies Offset Act of 2000* (CDSOA) the Appellate Body found that the US, by enacting a statute which provides for the use of countervailing duties collected from subsidised imports to the US, failed to comply with the Art. 32 (1), (5) SCM.[37] The US statute provided that the duties would be offset amongst the private

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[32] Opinion of Advocate General Jacobs, C-76/01 P, *Eurocoton v Council,* of 16 January 2003, paras 79 et seq.

[33] Opinion of Advocate General Jacobs, C-76/01 P, *Eurocoton v Council,* of 16 January 2003, para 122.

[34] C-76/01, *Eurocoton v Council,* of 30 September 2003, para 71.

[35] C-76/01, *Eurocoton v Council,* of 30 September 2003, para 89.

[36] CFI Case T-58/99, *Mukand v Council,* ECR 2001 II-2521, para 38.

[37] Appellate Body Reports WT/DS217/AB/R and WT/DS234/AB/R, *US - Continued Dumping and Subsidies Offset Act of 2000,* of 16 January 2003.

complainants. Only those parties were eligible to offset payments, which had filed or supported the original applications for review of foreign subsidies. According to the Appellate Body, the SCM was not violated because the US measure had the effect of creating an incentive for US producers to support the initiation of a subsidies investigation by the US authorities. Instead, the AB was of the opinion that the fact that importers of subsidized goods would be subject to double disadvantages: First, of countervailing duty payments. Secondly, they would also suffer from the fact that US competitors could use the offset of countervailing duties to enhance their position in competition. According to the AB this created a response to subsidies not authorised by the SCM and thus illegal under Art. 32 (1) SCM.

From the point of view of private participation in international subsidies control, the AB's findings are unfortunate. With good reasons the AB could have concluded that the US were simply using the public income generated through countervailing duties to create a legitimate incentive for private parties to initiate proceedings. Such, the AB explicitly found was a legitimate possibility by the US legislator under Art. 11 (4) SCM. As long as offsetting countervailing duties does not create a further subsidy to US producers not be compatible with WTO law, the AB should have left it to the national legislator to create forms of private involvement. After this ruling, any measure giving real incentives to private party involvement needs to be reviewed carefully against the strict threshold the AB has created in its very wide interpretation of Art. 32 (1) SCM.

2. Private Influence in Already Existing Cases

If consultations between the WTO members on the alleged breach of WTO subsidies rules fail within the time period after receipt of the request for consultations, the complainant WTO member may request the establishment of a Panel (Art. 4 (7) DSU). The Dispute Settlement Body, DSB[38] sets up the Panel. In the proceedings before the Panel, the parties to the dispute are represented by their governments. It is for the national delegations to decide who is member of each single delegation.[39]

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[38] The DSB is a specific meeting of the representatives of the WTO membership. THe meeting takes place under a separate chairman and with differentiated rules of procedure.

[39] Of course there are several more possibilities of disputes under the WTO DSU such as dispputes about compliance (Art. 21 DSU), disputes on compensation and retaliation (Art. 22 DSU). These forms of disputes do not give private parties any more extensive rights than the other forms of dis-

Proceedings at the dispute settlement are generally confidential. This is a left over from the days of the old GATT where dispute settlement took place still in more of a diplomatic atmosphere. Even now, the confidentiality of Panel proceedings (Art. 14 DSU) is maintained in order to make compromises more easy. Therefore, even when private parties are directly concerned, they will not be permitted to attend or to make submissions, other than as part of a WTO member's delegation.[40]

All in all, the WTO dispute settlement system is a WTO member based system. Private interests will only be represented by a WTO member. The procedural rules of the consultations under the SCM and the dispute settlement under the DSU are therefore geared towards public actors. As reminiscent to the phase of a more diplomatic approach to dispute resolution in the times prior to the WTO, certain procedural rules such as the confidentiality of consultations and Panel procedures have remained. Therefore it is very difficult for private actors to tell, whether governmental actors representing the WTO members in the dispute represent the private interest or whether solutions and compromises reached within the confidential deliberations and negotiations will actually affect them. In the creation of the WTO confidentiality was chosen in order to protect the dispute settlement system against lobbying and politization.[41] One in route to private participation in dispute settlement is the use of WTO governments to obtain private counsel for the representation of their interest. Since the WTO dispute settlement system originally was created as a diplomatic forum, it was not at all clear that governments could retain private counsel for their representation. In their 1997 Bananas Case report, the Appelate Body allowed the government of Saint Lucia to be represented in an oral hearing at the Appelate Body level by private counsel.[42] This right has been extended to the Panel level.[43]

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pute do. ‚Third party' involvement in WTO dispute settlement system is possible (Art. 10 DSU). 'Third parties' are parties to the WTO agreements only.

[40] Andreas F. Lowenfeld, International Economic Law, Oxford 2002, 153.

[41] Andreas F. Lowenfeld, International Economic Law, Oxford 2002, 164.

[42] Report of the Appelate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, paras 4-12, of 9 September 1997. The USA had disputed the right of Saint Lucia to retain private council for representation in the WTO forum.

[43] Report of the Panel in *Indonesia – Ceratin Measures Affecting the Automobile Industry,* WT/DS54,55,59 64/R, para of 2 July 1998; John H. Jackson, Dispute Settlement and the WTO: Emerging Problems, in: GATT/WTO (ed.), 50 Years of World Trade 1948-1998, Geneva 1998, 73.

The possibility of WTO members to retain private council for representation in WTO forums however is only a side line to private participation in subsidies disputes on WTO level. Although it is possible that financially potent private entities finance private counsel for small WTO member states and thereby influence the issues addressed, such a possibility would rather seem far removed from what one might qualify as private participation in the enforcement of WTO subsidies law on a regular basis.

The main in-route for direct private interest representation within the dispute settlement procedure has arisen with respect to ‚*amicus curiae*' briefs to the Panel. After long dispute in the WTO, it is now standing practice that the Appelate Body and Panels have the discretion to accept non-solicited *amicus curiae* briefs.[44] Art. 11 DSU, which obliges the Panel to "make an objective assessment of the matter before it", can be regarded to limit the Panel's discretion on whether to take the Brief into account. Insofar as the brief is important for the Panel to make an objective assessment of the matter, it will have to do so. Since the obligation to make an objective assessment will also expand to the Appelate Body, even though it is not explicitly so stated in the DSU, also the Appelate Bodies will have to exercise their discretion in the same manner as the Panel vis a vis taking non-solicited *amicus curiae* briefs into account.[45]

As a conclusion of this very brief review of private party involvement in WTO law, it is possible to state that the regulatory intention of subsidies law on the WTO level is the creation of a 'level playing field' for international trade. WTO law on subsidies in that respect is essentially international competition law. Private parties play an important role in the enforcement of this policy as they can provide the detailed information, which is necessary for WTO members' public authorities to initiate proceedings on the WTO level. The procedural rules for the inclusion of private parties in the different jurisdictions differ considerably – as the brief overview over some aspects of the US and the EU system showed.

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[44] See e.g. Report of the Appelate Body *United States - Import Prohibition of certain Shrimp and Shrimp Priducts,* WT/DS58/AB/R, of 12 October 1998, paras 79-91; for a more recent decision in that respect: Report of the Appelate Body *United States – Countervailing Measurs Concerning Certain Products from the European Communities,* WT/DS212/AB/R of 9 December 2002, 33.

[45] Robert Howse, Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence, in: J.H.H. Weiler (ed.), The EU, WTO and NAFTA, Oxford 2000, 47.

C. Supranational Level: EU

The subject of the last chapter was the possible involvement of private parties in subsidies control on the WTO level. That included private involvement in EU investigations into subsidies cases under WTO law.

This chapter contains an overview over the possibilities of private participation in subsidies control and steering on the EU level both by

- the EC's own subsidizing practice (I) and
- control of EU member state subsidies on the basis of Art. 87-89 EC (II).

I. EC Subsidies

Unlike state aids from Member State sources, Community aids are directly financed or co-financed from the EC budget. Community action through the Structural Funds, the Cohesion Fund, the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, the European Investment Bank (EIB) and the other existing financial instruments is intended to support the general objectives set out in Art. 158, 160 EC.[46]

Community actions complement or contribute to corresponding national operations - the so-called principle of "additionality"[47]. They are drawn up in partnership between the Commission and the Member States and the local and regional authorities in cooperation with the "the economic and social partners" (Art. 8 Reg. 1260/1999). This partnership covers the preparation, financing, monitoring and evaluation of assistance. The plans for the distribution of aid from the funds is submitted to the Commission by the Member State after consultation with the local economic and social partners, who have the opportunity to express their views to the national authorities. These have discretion how to take the views of the economic and social partners into account.

In application of the principle of subsidiarity, the implementation of assistance is the responsibility of the Member States and the local and regional authorities. All programs are gener-

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[46] See: Art. 1 Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds [1999] OJ L 161/1; European Commission, Ninth Survey on State Aid in the EU, COM (2001) 403 final, page 150, Table A.

[47] Art. 11 Reg 1260/1999.

ally co-financed from the national and sub-national as well as the EC level. Each year, the Commission undertakes to consult the European-level organisations representing the social partners about the structural policy of the Community. Individual decisions on the distribution of aid from the EC funds are generally taken on the MS level in single case decisions. Payments by the EC are generally made out to the MS. These then administer the programs vis-à-vis the individual recipients of the money. The MS are responsible to set up Monitoring Committees to supervise the use of the funds. These committees shall be set up with participation of the economic and social partners (Art. 35 Reg. 1260/1999). The evaluation of the effectiveness of the use of the funds however takes place without formal involvement of the economic and social partners. According to Art. 40-43 Reg 1260/1999, the MS and the Commission are in charge of evaluating the success of the programs *ex ante*, mid-term and *ex post*.

These procedures make the Community and the Member States become jointly responsible for the definition of tasks to be achieved with the programs. MS aid programs, according to the national administrative provisions, may provide for private involvement in the definition of tasks. Private interests on the European level are represented through the Economic and Social Committee.

Aids directly administered by the EC's administration are exceptional. Examples for this category are certain aids for research (e.g. the EC framework research programs). Where the EC directly administers aids, the payment of a subsidy from a Community fund, according to the jurisprudence of the ECJ, is an administrative act. Private parties have the right of participation in the procedure leading to the grant of the aid when and where they are applicants to the administrative procedure. Often however in the area of Community aids, the Member States or regional bodies are applicants for Community aids. Where private individuals are directly involved in the administrative procedures for granting the aid, their rights and duties are defined in the secondary legislation and the individual administrative act leading to the subsidization. After payment of the subsidy, the Commission (or EC agency) may only revoke its subsidy decision "provided that the withdrawal occurs within a reasonable time and provided that the institution from which it originates has sufficient regard to how far persons to whom the measure was addressed might have been led to rely on the lawfulness thereof."[48]

[48] ECJ Joined Cases 205-215, *Milchkontor,* ECR 1983 2633, para 31; Case 14/81, *Alpha Steel,* ECR 1982, 749, headnote 2.

There is very little external control of the Community's own aid policies schemes. The overall budgeting of the funds and the steering of single projects takes place in a coordinated approach between the Commission and the MS. MS involvement is guaranteed by means of their involvement in setting up the individual spending projects. Also they are represented at the Commission level through advisory and management comitology committees as well as an atypical committee – the Art. 147 Committee (Art. 47-51 Reg. 1260/1999). There is very little external control of the policy of distribution of aid through EC funds. Individual funding decisions are taken on the national level and therefore subject to national Court review. National Courts can of course initiate a preliminary ruling under Art. 234 EC.

European subsidization therefore is characterised by a highly developed system of administrative cooperation in the definition and administration of subsidies from the EC. The few means of private involvement are not geared towards control but towards hearing organised economic and social interest prior to taking major distribution decisions. These organised interests are however no longer represented when it comes to evaluating the efficiency and the quality of projects.

II. Private Parties' Role in the EC Control of State Aid by Member States

Policing state aid granted by the Member States has the objective of creating equal conditions for all participants on the single market and avoid 'distortions of competition (Art. 3(g) EC). State Aid policy is from this perspective central to the single market objective. However, it is a regulatory area, which touches the very essence of the political procedures: public spending and the definition of the limitation between private and public spheres.

The control of state aids in the EC rests on a strict *ex ante* notification requirement. Any aid that does not fall within one of the 'block exemptions' needs to be notified with the Commission.[49] This notification requirement is burdensome to the Commission. Although to a certain degree similar to the notification requirement in Art. 25 of the SCM, the notification requirement of state aids in Art. 88 (3) EC has more legal consequences attached to it. Non-notification of an aid carries severe consequences for an EC Member State and the individual recipient of an aid. Any notifiable aid, which has been granted in absence of Commission ap-

[49] The Council Regulation (EC) No 994/98 of 7 May 1998 enables the Commission to adopt block exemptions. So far the Commission has enacted three such block exemptions which came into force in February 2001 for aids to SMEs and for training aid as well as on *de minimis* aid.

proval, is classified as unlawful aid. Authorisation can only take place after notification to the Commission.

The Member States originally were not very diligent to follow up on their obligation to notify. State Aid control was therefore difficult for the Commission. It was dependent on other sources of information about existing and future aid schemes than notification if it wanted to enforce EC State Aid policy. The Commission can - with its very limited staff – not assess the vast amount of Member States activities, especially given the amount of public activity caught by the wide interpretation of State Aid under European law. In order to counter that information problem, the Commission sought to make use of the interest and information of private parties. This was possible since the ECJ in 1973 had ruled, that the last sentence of Art. 88 (3) EC established procedural criteria, "which the national Court could establish".[50] Therefore they were capable of being directly applied in national courts. Thus in the *Saumon* case, the ECJ drew the conclusion that in case of non-notification of an aid the national courts were obliged to offer private claimants protection under national law such as interim measures, requests for recovery of aid granted in disregard of the notification requirement and remedies to possible damages.[51] The Commission attempted to further enable private participation in the implementation of the State Aid regime by increasing the transparency of the enforcement criteria in State aid cases. This was attempted by means of the publication of guidelines, vademecums and notices explaining the Commission's approach to state aid policies.[52]

State aid policy is a regulatory area, regulating a vast array of national policy decisions including regional aids, structural aids, state guarantees, R&D aid, environmental grants etc. It regulates not only individual payment or exemptions of dues to the state but also MS aid schemes, which establish the national frameworks of subsidisation. State aid control therefore reaches deeply into the review of the MS' social and tax systems. The Commission has the power to require that illegally granted aid be repaid by recipients to the public authorities which granted it.

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[50] Case 77/72, *Capolongo,* [1973] ECR 611, para 6.

[51] Case C-354/90, *Féderation Nationale du Commerce Extérieur des Produits Alimentarires and Syndicat National des Négotiants du Saumon v France,* [1991] ECR I-5505, para 12.

[52] Jan A Winter, The Rights of Complainants in State Aid Cases: Judicial Review of Commission Decisions Adopted under Art 88 EC, in: 36 [1999] CMLRev, 521-568.

In 1999 the Council issued the Regulation 659/1999[53] laying down detailed rules for the application of Art. 88 (ex 93) EC. The examination of duly notified aid follows a two-phase procedure. Within maximum two months after notification (Art. 4 (5) Reg. 659/1999), the Commission either decides 'not to raise objections' or adopts a decision to initiate Art. 88 (2) EC proceedings. If in this preliminary investigation the Commission does not raise objections the aid can be implemented by the member state subject to the conditions in Art. 4 (6) Reg. 659/1999. If the Commission has doubts as to the compatibility of the proposed aid with the single market, it will 'initiate a formal investigation procedure' under Art. 88 (2) EC. That decision will be published in the OJ. Interested parties[54] are invited to comment to the Commission. The formal investigation comes to an end with a final decision by the Commission, which will either allow the member state to implement the aid, forbid it to do so, or allow the implementation under certain conditions (Art. 7 Reg 659/1999). All decisions are subject to review in Court. The addressee of a Commission decisions in the field of State aid however remains the Member State (Art. 25 Reg. 659/1999). By acting unanimously, the Council may, on application by a Member State, decide that the state aid under investigation by the Commission is compatible with the common market (Art. 88 II third sentence).

Prior to the adoption of the procedural Regulation 659/1999, the Commission was very much in a legal 'dialogue' with the Courts as to the shaping and enforcement of state aid policies. The position of the individual was thereby to a great degree developed in case law. With the procedural regulation 659/99 in force, the Council and EP have entered into the definition of the individual's role in this area.[55]

Art. 1 (h) Reg. 659/1999 defines as interested parties any Member State or any [natural or legal] person. It lists three types of private parties whose interests might be particularly affected by granting of aid: The beneficiary of the aid, competing undertakings and trade associations.[56] Each of these parties plays a different role in State Aid control on the European

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[53] OJ 1999 L 83/1.

[54] These are in the definition of Art. 1 (h) Reg. 659/1999 „any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations."

[55] Michelle Cini, From Soft Law to Hard Law? Discretion and Rule-making in the Commission's State Aid Regime, EUI Working Papers RSC 2000/35, 9.

[56] Trade associations had been accepted by the ECJ to be an interested party, see: ECJ Case 323/82, *Intermills,* [1984] ECR 3809.

level. Additionally, parties may gain a legal position in the control procedure by issuing a complaint.

1. The role of the Complainant and other Interested Private Parties

On the European level private parties play an essential role in policing Member States' aids, especially as information resource not otherwise available to the Commission. Therefore, they enjoy procedural rights within the State Aid review process which they can enforce vis-à-vis the Commission in the European Courts. Additionally, private parties can also enforce their rights in national Courts due to the direct effect of Art. 88 (3) EC.

a) Rights to Initiate a Preliminary Investigation

Art. 20 Reg 659/1999. Art. 20 (2) states that "any interested party may inform the Commission of any alleged unlawful aid or any misuse of aid". Art. 20 (2) grants such an informant the right to a reasoned decision as to the Commission's action in respect to the complaint.[57] If the information supplied by an interested party lead to an investigation, that party shall receive a copy of the final decision. Under Art. 20 (2) Reg. 659/1999 the Commission enjoys wide discretion as to its decision to enter into a preliminary investigation.

Individual complainants though have a strong position vis à vis the Commission, since they have an enforceable right to a decision on whether the Commission intends to enter into the preliminary investigation.[58] In the *Gestevision* and the *Max.Mobil* cases, the CFI also estab-

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[57] An individual may bring an action for failure to act under Art. 232 (3) EC if the Commission does not provide for the answer to the information provided for in Art. 20 (2) Reg. 659/1999. See e.g.: Joined cases 166 and 220/86, *Irish Cement v Commission,* [1988] ECR 6473. With that in the area of State Aid law, the Commission is under a more stringent obligation than the Court provided for under the Automec case law for other areas of Competition law, see: Case T-24/90, *Automec Srl v Commission,* [1992] ECR II-2223.

[58] Case T-95/96, *Gestevisión Telecinco SA v Commission*, [1998] ECR II-3407, headnote 1: „Where interested third parties for the purposes of Article 93(2) of the Treaty submit complaints to the Commission relating to State measures which have not been notified under Article 93(3), the Commission is bound, in the context of the preliminary stage referred to above, to conduct a diligent and impartial examination of the complaints in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, which may make it necessary for it to examine matters not expressly raised by the complainants. On completion of that examination, the Commission should, in regard to the Member State, adopt a decision declaring that the State measure does not constitute aid within the meaning of Article 92(1) of the Treaty, or that the measure does constitute

lished that in the "interest of sound administration" the Commission has the obligation to investigate a case beyond the points raised by the complainant and undertake an independent research in cases of doubt.[59] The CFI explicitly points out that the right to sound administration is one of the general principles protected by Art. 41 (1) of the Charter of Fundamental Rights of the European Union which it applies as expression of the rule of law and as common tradition to the constitutions of the Member States.[60]

Individuals can enforce these rights by bringing an action under Art. 232 (3) EC for failure of an EC institution to act. The CFI in *Gestevision* stated that Art. 232 (3) EC must be interpreted as entitling individuals to bring an action for failure to act against an institution under the same conditions, as they would have been entitled to request the review of an act under Art. 230 (4) EC. They would need to show that they would have been concerned by a measure of an institution not addressed to them and that the measure is of direct and individual concern to them. That means that "where an undertaking has brought a complaint alleging the existence of State aid incompatible with the common market, it must be considered to be directly affected by the Commission's failure to rule on that complaint where there is no doubt that the national authorities intend to implement their plan to grant aid or where the aid in question has already been granted." This, according to the CFI means, that "persons, undertakings or associations whose interests might be affected by the grant of aid, particularly competing undertakings and professional organisations" may bring cases for failure to act against the Commission if a Commission decision in the matter would have effected their interests in the matter.

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aid but is compatible with the common market under Article 92(2) or (3), or that the procedure under Article 93(2) should be initiated."

[59] See on the topic in general: Piet Jan Slot, EC Policy on State Aid: Are the Procedures „User-Friendly"? The Rights of Third Parties, in: Sanoussi Bilal and Thedon Nicolaides (eds.) Understanding State Aid Policy in the EC, Kluwer 1999, 81-97; Jan A Winter, The Rights of Complainants in State Aid Cases: Judicial Review of Commission Decisions Adopted under Article 88 EC, [1999] CMLRev 36, 521-568.

[60] Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000, OJ 2000 C 364/1; Case T-54/99, *max.mobil Telekommunikation Service GmbH v Commission,* [2002] ECR II-313, at paras 48, 49.

b) Rights in Cases in which a Preliminary Investigation has been opened

If the Commission finds that an aid is compatible with the Common Market in the preliminary investigation and therefore does not open the second phase, procedural guarantees afforded to individuals can be only properly safeguarded if such parties were able to challenge a Commission decision in Court.[61] Interested parties may challenge the Commission's decision not to enter into a second phase in Court if they demonstrate that their competitive position in the market is affected.[62]

c) Rights in Cases in which the Second Phase has been entered into by the Commission

Interested parties may comment on second phase investigation after their publication in the OJ under Art. 6 EC Regulation 659/1999. Those parties will also have the right to present their opinion in the oral hearing. Their rights will be safeguarded by the Hearing Officer (HO) under his general mandate to provide for procedural rights of the parties involved to be safeguarded.[63] The HO's is to safeguard the parties' rights to a due process.[64] The main role of the HO is to conduct the hearings during which he is obliged to ensure that the hearing is properly conducted. He or she is required to ensure the 'objectivity' of the hearing itself and later that in the draft Decision of the Commission, due account is taken of all relevant facts, favourable or unfavourable to the parties.

Interested parties, who were involved in the second phase investigation under Art. 88 (2) EC, have the right to receive a copy of the decision taken by the Commission at the end of the second phase (Art. 7 Reg. 659/1999).

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[61] Case T-188/95, *Waterleiding Maatschappij v Commission*, [1998] ECR II-3713, para 52 *et seq*; Case C-313/90, *CIRFS v Commission*, [1993] ECR I-1125; Case C-198/91, *Cook v Commission*, [1993] ECR I-2487, para 23; Case C-225/91, *Matra v Commission*, [1993] ECR I-3203, para 17.

[62] Case T-69/96, *HHLA v Commission,* [2001] ECR II-1037, para 41; Case C-367/95, *Commission v Sytraval,* [1998] ECR I-2486.

[63] Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings 2001/462, O.J. 2001 L 162/21.

[64] See for details: Themistoklis Giannakopoulos, The Right to be Orally heard by the Commission in Antitrust, Merger, Anti-Dumping/Anti-subsidies and State Aid Community Procedures, 24 World Competition (2001), pp. 541-569. Practically, a hearing is conducted over a one or two days at which Commission staff develop their view of the case, the parties to the case defend their position merger, third parties present their observations and Member State representatives ask questions to the Commission and the parties. The hearing is presided over by the Hearing Officer.

In Court, competitors and other interested private parties have *locus standi* for review of the Commission's decision if they satisfy the conditions of Art. 230 EC. The Courts have in the area of state aids allowed for a wide definition of acts 'producing legal effect' in the sense of Art. 230 EC. The decision of the Commission not to open the second phase investigation for example has been regarded to produce definitive legal effects and therefore can be the subject of an action for annulment for the purposes of Art 230 EC.[65]

Individuals claiming *locus standi* have to convince the Court of them being individually effected by this act. The Courts have granted standing to interveners within the second phase investigation who have submitted comments to the Commission and who could suffer harm from the aid being granted by the Member State.[66] Parties who have not submitted comments during the investigation might still have the right to review of Commission decisions in Court if they prove that they are individually concerned by the decision. It is not sufficient to show to be a competitor of the potential beneficiary of the aid.[67]

Trade associations must be able to show a high degree of involvement and a particular interest in acting. The ECJ has accepted such particular interest in cases in which the association was set up to represent a specific collective interest and that association has actively entered into negotiations on behalf of its members in a case.[68] Also, the ECJ has granted trade associations *locus standi* in cases in which single members of the association would have themselves had standing.[69]

The ECJ is hesitant to grant associations of employees standing to bring cases in Court.[70] However, trade unions and other organisations representing employees can still profit from the direct effect of Art. 88 (3) EC and bring in cases in national courts. This was for example the case in *Sloman Neptun* in which an industrial tribunal then requested a preliminary ruling

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[65] Case C-313/90, *CIRFS v Commission*, [1993] ECR I-1125.

[66] Case T-380/94, *AIUFFASS v Commission,* [1996] ECR II-2169; Case C-198/91, *William Cook, v Commission,* [1993] ECRI-2486; Case 169/84, *COFAZ v Commission,* [1986] ECR 391.

[67] Case T-16/96, *Citiflyer Express v Commission,* [1998] ECR II-757; Case T-11/95, *BP v Commission,* [1998] ECR II-3235.

[68] Case T-380/94, *AIUFASS and AKT v Commission,* [1996] ECR II-2169; Case C-313/90, *CIRFS v Commission*, [1993] ECR I-1125.

[69] Cases T-447-449 /93, *AITEC v Commission,* [1995] ECR II-1971 („AITEC I"), para 62.

[70] Case T-189/97, *Comité d'intreprise de la Société francaise de production,* [1998] ECR II-335.

from the ECJ to clarify the question of state aid in a case brought by the representatives of the employees of a shipping company.[71]

d) Private Rights to Control the Implementation of Commission Decisions

Private parties can use their rights granted to them as competitors of beneficiaries of aid to also control the Commission's implementation of Commission state aid decisions. In the *Ryanair* case the Commission had originally approved of a plan by the Irish state to grant Aer Lingus several tranches of aid under the condition of the completion of a restructuring plan. Aer Lingus had not fulfilled all conditions of that restructuring plan but the Commission nevertheless decided to "derogate" from its original decision "and to authorize the Irish Government to pay the second tranche of the aid to Aer Lingus".[72] The CFI did not hesitate to grant Ryanair, as private competitor of Aer Lingus, standing to bring the case against the Commission's decision to allow the Commission's derogation from the original aid plan. However, the Court found that "in the light of a change in external circumstances which occurs after the initial decision" the Commission might, under certain circumstances vary the conditions governing the implementation of the restructuring plan or of its monitoring without re-opening the initial procedure under Article 88 (2) EC.[73] Therefore the CFI granted the Commission wide discretion as to whether it regarded it necessary on the basis of the facts of the case to re-open the investigation under Art. 88 (2) EC or whether an alteration of the original decision was possible.

e) Rights in National Courts

Irrespective of a Commission investigation into an allegedly illegal state aid, parties who are affected in their rights have the right to bring a case in national courts on the basis of the direct effect of the notification requirement under Art. 88 (3) EC. There the interested party can claim the illegality of a non-notified aid and recover damages suffered through the payment of the aid. The Commission has issued a notice on the cooperation between national courts and

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[71] Joined cases C-72/91 and C-73/91, *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*, [1993] ECR I-887.

[72] Case T-140/95*, Ryanair Limited v Commission,* [1998] ECR II-3327.

[73] Case T-140/95*, Ryanair Limited v Commission,* [1998] ECR II-3327, para 89.

itself in which it outlines the conditions under which it will assist national Courts in their state aid cases.[74] The ECJ declared in *SFEI* that the Commission investigation into an alleged case of illegal aid can "not release national courts form their duty to safeguard the rights of individuals in the event of a breach of the requirement to give prior notification".[75]

However, private enforcement of State Aid cases in national courts does to a certain degree depend on the Commission and its view on the legal situation. It will be difficult for private plaintiffs to convince a national court of the existence of an illegal aid, if the Commission does not agree with that interpretation after having been requested to comment on a private law suit.

2. The Intended Beneficiary of the Aid

Beneficiaries of an intended aid are to a certain degree protected by the Member State granting the aid. Both – the Member State and the beneficiary – usually agree to apply an aid to reach the policy goal intended by the Member State giving the aid. Since the Member State avails of a prominent position in the State Aid control procedure, the protection of the beneficiary is indirectly protected.

Nevertheless, the beneficiary's legal position is mentioned in the Reg. 659/1999 with respect to the obligation of the Member State to recover illegal aid following a Commission decision (Art. 14). Beneficiaries of aid are also regarded interested parties in the sense of Art. 1 (h) Reg. 659/1999. They have the rights allocated to interested parties with respect to *locus standi* in Court as being directly affected by Commission decision with respect to State Aid in their cases.

III. Reasons for the Different Approaches between policing MS State Aids and controlling European aids

The policies outlined above show that there is a striking discrepancy between the approach taken on the European level on the involvement of individual interest in designing programs for the distribution of EC aid on one hand and the control of MS aid on the other.

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[74] [1995] OJ C 312/7.

[75] Case C-39/94, *SFEI v La Poste,* [1996] ECR I-3547, headnote 2.

In the former individual interests are only marginally represented. Where they are represented they are limited to the advising national authorities in the design and targeting of aid-worthy projects. The individual influence is again ‚softened' by allowing individual influence only by means of organized interest through employers' organizations, trade unions and other ‚economic and social partners'.

The difference to the use of individual information and incentives for their control of MS aid is striking. In the latter area, individuals are an essential factor in an effective administration of the EC's State Aid policy.

There are of course several possible explanations for this striking difference. One is certainly that State Aid policy under Art. 87-89 EC is part of competition policy. The administration of funds is part of single policy areas where the EC has very little real regulatory power other than influencing developments by distributing funds. Given the requirement of cooperation with the MS and the principle of ‚additionality' of aid, close administrative cooperation instead of the more confrontational approach in competition policy seems to be approach chosen for governing within the multi-level policy areas of social, regional and cohesion policies as well as in agriculture and other targets of aid.

D. *National and Sub-national Levels: Germany's Federal, Länder and Local Levels*

State Aids are mainly granted on the national and sub-national levels. Obviously, MS differ in their internal organization. Within federal states such as Germany, they can be granted on basically three levels: the Federal level, the Länder level or one of the municipal levels. Aid can also be granted by additional sources such as private bodies controlled or influenced by the public sector.

Control of State Aids granted by these levels within Member States takes place through EU law and through the law of the Member State itself. EU law overarches MS law insofar as it controls all forms of MS aid no matter which level of government grants the aid.

Where MS mechanisms of state aid control exist, they are generally additional to EC law. MS's State aid then has to comply with both standards of control. MS law is the exclusive criteria of control only in exceptional cases: When EC law is not applicable due to 'block exemptions' or if the aid is *de minimis* under EC law and therefore not subject to control on that level.

Germany is an interesting case study to review in conjunction with WTO and EU law not only because its law governing subsidies and state aids stems from roughly the same historical period (post-world-war-II-period), also it itself has a multi-level systems of granting and controlling aid.

The following section outlines the control mechanisms for State Aid in the different levels within the German federal multi-level system in broad strokes.

I. State aid control in the German Federal System

Most national systems within the EC do not avail of a system of control of State Aids in the same manner as EC law provides. In Germany's multi-level system there are mechanisms of control of State Aids but that control does not take place through a hierarchic authorization by a central agency. Instead aid grants are coordinated by means of administrative cooperation.

The Federal level and the Länder for example in some matters are responsible for subsidization programs in a joint responsibility, for example in the cases of Art. 91a and 91b of the German constitution ('Grundgesetz', GG), which define certain areas of common responsibilities ('Gemeinschaftsaufgaben'). Also the federal level may co-finance investment designated by the Länder. Generally however, the Federal and the Länder level have clearly distinct areas of genuine competencies within which they not only have the right to legislate but also to achieve policy goals by means of subsidization. Where the Länder have the competence for subsidization on their own, they report to the Federal level the extent of their subsidies programs. The federal government compiles these reports in its own bi-annual reports on subsidies which it is obliged to assemble under § 12 II of the law for the promotion of stability and growth ('Gesetz zur Förderung der Stabilität und des Wachstums', WStG of 1967).[76]

Looking at the relation between the two levels in an overview, with respect to subsidies, the federal and the Länder level interact less on the basis of mutual or hierarchic control than on the basis of a cooperative system.[77] This system is less oriented towards reducing the overall amount of subsidies but to coordinate the subsidies in order to guarantee that they are spent

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[76] Gesetz vom 8.6.1967 (BGBl I 582). The last report under this obligation is the:ß Achtzehnter Subventionsbericht, Bericht der Bundesregierung über die Entwicklung der Finanzhilfen des Bundes und der Steuervergünstigungen 1999-2002, August 2001, www.bundesfinanzministerium.de.

[77] See especially the provisions of the German constitution such as Art. 91a, 91b, 104a IV Grundgesetz, see: Michael Rodi, Die Subventionsrechtsordnung, Tübingen 2000, 372 *et seq.*

without creating a culture of competition of subsidization, in which the effect of different subsidies from different regions would be reduced.

In relation to the local level, the Länder often have the right to control the legality vis-à-vis the different levels of local bodies' activities ('Rechtsaufsicht'). In many Länder, local budgets require the prior authorization of the competent Länder authorities. This control which is oriented at the legality and in part in the requirement of an economic use of public means often suffers from information deficit of the higher level authorities and from identities of interest when it comes to subsidization of economic activity within a region.[78]

II. The Role of Private Parties in the Control of Subsidies in Germany

Within such system of administrative cooperation for the control of subsidies there seems little room for private involvement in the control of subsidies. In fact, the private influence in the choice and the definition of subsides is limited mostly to the potential beneficiary who will exercise his influence by lobbying for good conditions for subsidization. Where subsidies are granted on the basis of a contract between the public body and the individual, there will be extensive participation by the beneficiary in the negotiation of the terms of the contract. Although subsidies should be used to reach goals which are in the public interest with the help of a private party, it has been observed that the paradox of subsidies is that politically they are often less of an intervention of the state in private affairs but of private interests making use of state resources.[79]

Given the lack of formalized institutional process of a review of subsidies on the federal or the Länder level in Germany, there is much less possibility of private involvement of the administrative procedure of the review of state aid than there is under Art. 88 EC procedure on the European level.

Nevertheless, individuals - especially competitors - enjoy extensive protection under the fundamental rights guaranteed under the GG. Amongst them are 'defense rights' against direct or indirect public interference in individual private affairs. Those are the right to ownership (Art. 14 GG), the right to exercise a chosen profession (Art. 12 I GG) and the subsidiary right to act free from public intervention as long as that intervention is not based on a law allowing the

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[78] Michael Rodi, Die Subventionsrechtsordnung, Tübingen 2000, 773.

[79] Peter Badura, Wirtschaftsverfassungsrecht, in: Eberhard Schmidt-Aßmann (ed.), Besonderes Verwaltungsrecht, 11th. edition, Berlin, New York, 1999, 279.

state to undertake this intervention (Art. 2 I GG). Private parties additionally have the right to defend themselves against discrimination and to actively seek equal treatment (Art. 3 I GG).[80] The latter right is thus generally used not so much to intervene against the subsidization of a competitor but more to be granted an equal subsidy as a competitor.[81] The combination of this right to equal treatment in combination with a wide interpretation of the principle of the protection of legitimate expectations can lead to a strong position of individuals and serve as a legal basis for the claim to receive subsidies.

Although in the German federal legal system different levels of authorities are involved in granting subsidies, the administrative procedural law is harmonized within Germany. An overview over private rights can therefore be given without detailed review of the individual Länder and local legal structures. One of the essential aspects of the enforceability of private rights is standing of private parties. The rules on standing to request a formal review of an administrative decision to grant a state aid or to instigate a review of such decision in Court are both regulated under the German code on judicial procedures in administrative matters (Verwaltungsgerichtsordnung, VwGO).

Under that system, private parties have the right to a formal review of an administrative decision and may – in case of a negative outcome of their complaint with the administration – have standing in Court only in cases in which they can claim that their own individual rights ('Subjektive öffentliche Rechte') have been violated by a public decision to grant a state aid. The right to a review of the public decision exists only in so far as the rights are affected. Individuals do not have the right to a general review of the legality of public decisions beyond the protection of their individual rights.

Individual rights, which a private party can defend, can stem from

- a contractual relationship with the authority,
- an administrative act (whether this is either directly addressed to the private party or it is addressed to a third party but nevertheless has direct or indirect effects on the rights of the private party),

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[80] Art. 3 I grants the right of equal treatment in comparable cases by the same public authority. Therefore different Länder are entitled to treat individuals differently, whereas the same Land could not differentiate in comparable cases.

[81] See for a recent case in that respect: Bundesverwaltungsgericht (BVerwG) 3 C 54.01, Judgement of 18. July 2002.

- a statute or
- a fundamental right position.

The first two sources will usually give rights mainly to the potential beneficiary of the aid. The individual rights of the competitor are either his/her specific interest addressed in the statutory basis for a subsidy[82] or the fundamental rights of the competitor against public interference in the market conditions.[83]

Under this system, the private parties, which have standing to request the review of a state aid decision, are usually either the beneficiary or a competitor. Other third parties only in very exceptional cases will be able to argue that their rights are affected by a state aid decision.[84] Interest groups such as consumer groups or trade associations rarely have standing to bring cases and thereby exercise control over public action. Associations only have standing, in cases in which there is an explicit statutory provision allowing them to bring a case. In the area of economic law or subsidies control this is – to my knowledge – not the case.[85]

Once the private party has established standing, the public decision to grant an aid can be declared fully or partially void if that decision either

- does not have a sufficient legal basis or
- if it does, does not comply with the legal basis and
- if that violation affects the individual rights of the competitor.[86]

If the competitor's rights can be protected by other means than declaring the public decision void, the Court can also amend the administrative decision or order the administration to

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[82] See e.g.: BVerfGE 80, 124 dealing with a case on the legality of subsidies granted for the distribution of newspapers through the German postal service. The constitutional court in that case had to decide about the guarantee of the right to freedom of expression (of the non-subsidised newspapers) and the freedom of public interference in the marketplace for newspapers; Gesetz über Maßnahmen zur Förderung des deutschen Films (Filmförderungsgesetz) of 1993 with amendments.

[83] Peter Badura, Wirtschaftsverfassungsrecht, in: Eberhard Schmidt-Aßmann (ed.), Besonderes Verwaltungsrecht, 11th. edition, Berlin, New York, 1999, 285.

[84] This is the essential test a Court will undertake when reviewing whether a private party has standing in Court under § 42 II VwGO.

[85] Additionally, associations have standing when the association needs to defend its very own legal interest: BverwG NJW 1981, 362.

[86] § 113 (1) VwGO.

amend the decision. Generally the Court would order to include certain conditions which would protect the private interests of the third parties.

Private parties can - under certain conditions - request the public authority, which granted a subsidy, to reclaim the payment if the subsidy proves to have been illegal. However, the private party's rights in such a case are limited to the right to the authority's decision on whether or not to reclaim the subsidy. The reason for this is that the authority in its decision whether or not to reclaim the subsidy has to balance the rights of the party to which the subsidy was awarded (especially with their legitimate expectations) with the rights of other parties. That balancing of interests entails a discretionary decision.

To summarize, Germany grants and controls state aid on the national level, the Länder level and the local levels. Although the interpretation of the fundamental rights afforded under the GG also includes economic rights, they are enforceable only by parties directly affected by a subsidy. That excludes the enforcement of such rights by business or consumer associations. There is no formalized administrative control-procedure on the national or sub-national level, which would allow for individual participation in the controlling state aid. Instead, the decisions to grant state aids are taken in close administrative cooperation between the different levels of government in Germany. These two factors limit the amount of individual involvement into state aids control on the national and sub-national level in Germany.

E. *Private Involvement in Subsidy Control – Some Conclusions*

An analysis of private participation in the control of subsidies and state aid seemed interesting *inter alia* for the reason that the very features, which made the law of subsidies seem *atypical* for traditional public law, could make it a *typical* area of reference for challenges of modern public law. Especially important in this context are firstly, the close relation between public and private parties in the area of subsidies, which replaces traditional hierarchic forms of public action. Secondly, the multi-level regulation of the area of subsidies law. Within the levels of regulation (WTO, EU, national) we find administrative cooperation to coordinate and to mutually control the different subsidies' regimes. The analysis of the different levels of law of subsidies helps to unlock the experience gathered in this area of subsidies law which can be valuable for comparison with regulation in other policy areas taking place under similar conditions.

The multi-level nature of the law of subsidies creates a certain complexity of legal relations, both with respect to laws coordinating subsidies and laws on control of subsidization within the multi-level system. The multi-level nature of subsidies law leads to an increase in administrative cooperation and interaction. Administrations try to fine tune their subsidies policies by way of coordination in administrative networks.[87] This cooperation and networking leads to a certain complexity of relations within the multi-level structure. That may pose a challenge for transparency of decision-making powers and therefore for the accountability of actors.

Administrative cooperation and networking can however be constructed in very different ways. The comparison showed that two basic models exist:

One is used for the distribution of the EC's own funds and was the model we found in Germany. Under this model, rules on subsidies are created as rules on administrative cooperation in charge of distributing of a given budget. In this capacity, administrative cooperation - sometimes including some forms of representation of organised society interest - does not control subsidization but decides on how subsidies are spent. These structures do not so much ask *whether* a subsidy should be granted but more *under which conditions and for what.* These structures primarily try to steer the spending of a given amount of money. This type of approach can be observed in the rules governing the distribution of European funds and in the German system of federal administrative cooperation. The approach is to try to reach mutual consensus. Individual interests, which are negatively affected by these majoritarian, consensus-driven decision structures can usually only rely on non-discrimination clauses to also ask for subsidies.

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[87] Administrations may negotiate solutions to disputes on the WTO level prior to a dispute entering into the formal dispute settlement arena. On the EU level, the administrative cooperation takes place mainly in the realm of the creation of subsidies programs financed by the EU through the EC funds (structural, regional, agriculture). The control of national and sub-national subsidies within the EU level contains a certain degree of administrative cooperation, which starts with notification of aid. The Commission, when investigating infringements of Articles 87 *et seq* EC can enter into negotiations with the national level in order to find satisfactory solutions to the problematic issues. The Commission can to a certain degree indirectly harmonize national subsidies decisions. The discretion it has been granted by the EC treaty has led to 'soft law' instruments. The Commission issues 'guidelines', 'notices' and 'communications', which outline the exercise of the Commission's discretion which it will exercise when reviewing national subsidies programs. National subsidies programs will therefore be designed to comply within these programs. Without external control, the administrative cooperation can lead to a very close relationship between the administrations. Such closeness has the immanent danger of collusion and of avoiding hard decisions.

The counter-model is less consensus-driven. Instead it is more adversary by nature. It creates an additional structure to the administrative networks deciding on *how* to spend a subsidy budget. This additional structure is a kind of 'arbitrator' agency analysing *whether* a certain subsidy complies with overall policy guidelines. The most prominent structure of this kind in international subsidies control is the Commission enforcing Art. 87, 88 EC. To a certain degree this function is also fulfilled by the WTO dispute settlement mechanism or by WTO member states' agencies such as the US Trade Representative.

If entrusted with the task of reviewing the policy itself in a kind of inquisitory approach such an independent arbitrator has several obstacles to overcome: These contain the capacity to obtain and compute the information on subsidization. They also contain the problem how to enforce the decisions.

The information problem is considerable in the area of subsidies and state aids. Setting the correct incentives in order to activate self-controlling developments can therefore be a key to finding adequate solutions.

Within the law of subsidies these information requirements of the independent control agency have been met mainly by employing external information sources: The interested private parties. Private parties have the advantage that they often have more information than controlling levels of administrations. They are therefore capable of detecting potential violations of rules on a very detailed level. However, tapping into this resource of private information comes at a cost for the administration. Individuals will only engage in the time and resource consuming exercise if they have an incentive to do so. In the legal systems reviewed in this paper such incentives range from granting individuals procedural rights and involvement to the US approach to offset the financial profits from levying countervailing duties.

The approach to include individuals has an additional effect: Since individuals are offered procedural rights these rights can be enforced in Courts. The European Courts have over the past 30 years adjudicated on the rights of individuals. These often been abstracted in part from general principles of the law (e.g the principle of 'sound administration'). By doing so the Courts have established themselves in their role to supervise and control the administration, which in turn controls MS's subsidies. The inclusion of individual parties into the process of control has thereby lead to an overall strengthening of judicial control with respect to public use of subsidies.

The information and control function which individuals exercise can be seen as to benefit the public. The Information and control activities lead to a more transparent and accountable ad-

ministration. In that respect, the 'price' the administration paid in involving private parties is a valuable investment.

That being so, the use of the individual's interest might be further strengthened by granting open access to public information. Public administrations have traditionally been conceived of as collectors of information. This information created the basis of independent administrative decisions. Means of 'Freedom of Information' procedures could enhance the private parties' capabilities to contribute to a transparent and accountable administration. The EU has in the past made steps in the direction of introducing information transparency in order to accommodate this. Other legal systems like the German not yet have introduced this feature to date on all levels.

The basic critique on an agency based review of state aids has traditionally been that it is undemocratic to allow for 'a few un-elected burocrats' to be allowed to overturn democratically made decisions on how public affairs should be run and public money be spent. This critique has been voiced in different versions with respect to the Commission when exercising state aid control and is voiced as critique of the WTO dispute resolution mechanism.

However, when reviewing the development with the involvement of individuals in state aid and subsidies control, it appears that that involvement goes hand in hand with the development of a more sophisticated structure of checks and balances controlling why and whether subsidies will be paid. The inclusion of individual interests in that process adds a different source of legitimacy to public decision-making – that of the direct involvement of affected parties.

Additionally, the fact that the regulation takes place on several levels can strengthen the position of individuals affected by subsidy and state aid decisions. Especially individuals who would be negatively affected by subsidies to third parties. Individuals affected by subsidies can seek protection not only within their home jurisdiction but can to a certain degree chose on which level of jurisdiction to seek for their protection. On the different levels of jurisdiction individual interest can also be represented by means of arbitration.

It appears that in the area of subsidies review and control, which is an area in which the multi-level nature of a policy area goes hand in hand with complex regulatory problems involving information and compliance issues, a more adversary procedure is more capable of balancing and including the relevant interests than mere administrative cooperation with some input by organised societal interests can.

Why then, might one ask, has Germany with its internal multi-jurisdictional system not taken that approach? Why are the German structures not open towards the inclusion of individual interests at all stages of the procedure? A possible answer could be that during the last 30 years, the EU has continuously taken over the role of an independent review institution to such a degree that there would be no need for doubling that function on the national level. Another possible explanation could be that the Germany has missed to take the initial step to create some form of procedural provision on the federal level for an independent review of subsidies on the national and sub-national level. Therefore, in Germany, no agency has an interest in employing individuals and courts couldn't enforce procedural rights.

The short overview over forms of private involvement in subsidies law in this paper showed that there are some core factors, which make private involvement viable:

- In order to be able to correctly assess a situation a third private party can gain by *access to information* on subsidies. Freedom of information provisions and far reaching right of access to files on all levels of government will improve the transparency for private parties which are interested in using their specific knowledge to help control subsidy policies.
- Individuals need to be granted *procedural rights* in existing administrative control and coordination procedures.[88] Procedural rights provide that private parties may request the review of a subsidy program. They might substantiate the right to be heard in procedures, which will lead to the granting of subsidies. They might also define how the private input must be taken into account in an administrative decision related to subsidies.
- Individuals must also have *substantive rights* of defence against subsidies granted to others. In combination with procedural rights, such substantive rights can allow private parties to request a certain level of review.
- Private parties can only defend these *procedural* and *substantive* rights if they have means to enforce them. *Standing* in Courts to defend substantive and procedural rights are key to the enforceability of private rights in this respect. The provision of effective and fast judicial review to administrative decisions can

[88] On the European level this is dealt with e.g. in Regulation 659/99.

help the private parties to exercise their control rights and other effected parties to reach legal certainty.

- Private parties will only invest the time and recourses needed to enforce their rights, if they have sufficient *incentives* to do so. Incentives, which are granted in the area of subsidies are e.g. the rights to request a public body to reclaim the illegal subsidy. In some cases also the right to ask for the same subsidization is an incentive for private involvement. Entitlements to damages and participation in penalty payments may be an additional potential incentive.[89]
- Finally, in some cases provisions must be made to allow for private parties with 'diffuse interest' to involve themselves. This is a need if the incentives offered to the individual are not strong enough to justify individual action (such as for example *standing* in court for interest representation such as by business associations, consumer groups, trade unions, other NGOs with an interest in the matters).

This study therefore takes the view that the involvement of private interest in subsidies and state aid control is beneficial for the public on all levels of the multi-level system of subsidies. However, the inclusion of private parties is helped by the creation of certain administrative structures, which goes hand in hand with creating systems of checks and balances for the control of public spending within legal systems. For the three levels which have been reviewed in this paper this could mean the following:

The WTO level could profit from the WTO members or the dispute settlement procedure opening itself to private parties and granting them formalised procedural rights. The EU level has been very successful with its approach in including private parties with respect to review of MS state aid. One might however criticise that the Commission combines investigative and adjudicative functions. With respect to the EC's own subsidies, the EC is still far behind the possibilities of including individual interest. The structures for distribution of EC funds are very much like the structures in the German multi-level system. They are geared towards a simple distribution of a given budget. The latter approach stays behind the possibilities of good governance in the area of subsidies.

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[89] See above in Chapter B II with reference to the Appellate Body Reports WT/DS217/AB/R and WT/DS234/AB/R, *US - Continued Dumping and Subsidies Offset Act of 2000,* of 16 January 2003.

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