I need to begin this Lecture by saying that, despite the title of the Lecture and the fact that I shall be severely critical of EU State aid law in its present state, I am not contemplating joining the United Kingdom Independence Party. I remain a European federalist, using that expression in its technically correct sense. Federation was classically defined by Professor Sir Kenneth Wheare, a great man whom it was my good fortune to know. A federal organisation is one which, without necessarily the unanimity of its constituents, can make rules, within the area assigned to it, which have the force of law within the constituent parts of the federation. It is true that historically federation has been a way in which States have been organised; the European Communities, now the European Union, may indeed be the first organisation that is a federation, albeit with some confederal features, that were not and still is not a State. A number of other Member States of the EU may wish to become and may become a State. However, I hope that the United Kingdom can remain a member of the federation without losing its identity as itself a State. Such a development was foreseen some 40 years ago by a distinguished German lawyer, Professor Mestmaeck, who envisaged Member States continuing to move individually to closer unions, if they wished to do so, without dragging other Member States unwillingly into those unions. And, as a good European federalist, I believe that Europe in the 21st Century needs to have a federal organisation if it is to operate properly, in every sense of that word, and that both the United Kingdom and the other Member States would be significantly worse off if the United Kingdom were to secede from the Union. So this Lecture is not intended as a wrecking exercise and will conclude with some suggestions for improving EU law and its administration in this area. In particular, I accept that as a corollary of the freedom of movement of goods, persons and capital within the EU, it almost certainly needs to retain a measure of Union control over the grant of State aid by Member States to undertakings, even though the United States of America seems to manage adequately without Federal control of aid granted to undertakings by the constituent States.

However, I shall show that the economic background against which State aid is to be seen in perspective - and the at present unsatisfactory features of EU State aid law both in scope, substance and procedurally - make it highly desirable to curtail its scope, to reform its procedures and to introduce at least one new remedy. I have to say that the State Aid Modernisation paper recently published by the Commission seems to me to be a most inadequate response to the undoubted need for modernisation.

Let us look first at the economic background against which State aid is to be viewed. In the first place, other action at the multi-State and State level affects competition between undertakings far more than State aid does or could potentially do. The Economic and Monetary Union has advantaged German manufacturing industry far more than any conceivable amount of State aid granted in Germany could have done. The Euro is incontestably undervalued in Germany and overvalued in many, if not most, of the other members of EMU. Hence, a significant number of Greeks, Portuguese, Spaniards and Italians in particular have been enabled to buy beautifully engineered German cars that they would not otherwise have bought. EMU, whatever the political gains that it may otherwise engender, if it survives, has operated to date in an anticompetitive fashion. So
too, obviously, do differences in the fiscal regimes of the Member States of the European Union as a whole and here the current Parliamentary inquiries about Starbucks and Amazon's tax arrangements spring to mind. Nor is it just the legislative texts of the fiscal regimes, which Member States understandably continue jealously to guard as part of their democratic inheritance, that can have such effects: think of the "settlements" between Her Majesty's Revenue and Customs and giant multinational corporations that have recently attracted publicity in this country. The Press has pointed out that multinationals no doubt draw to the attention of HMRC the loss that the British Exchequer would suffer from the indirect results of a move offshore by the multinational. One cannot suppose that Member States would welcome attention by Commission officials into the details of the affairs of individual tax-payers and their particular treatment by their national fisc. A third example is provided by the recently reported agreement of the European Investment Bank to fund the construction of a Ford factory in Turkey that will build Transit vans that for many years have been manufactured in Britain and this notwithstanding that the Commission has understandably set its face against State aid in the motor vehicle industry which is currently plagued by excess capacity. By contrast, State aid solutions to a problem may be more economic than a non-State aid solution: it might be more efficient for the State to subsidise investment in facilities in, say the Isle of Wight to compensate for the island's geographical isolation than it would be to do so by building a bridge; but the subsidy would be State aid whereas the benefit resulting from construction of a bridge would not be State aid. Thus, at least in economic terms, there is a certain arbitrariness in what publicly funded benefits are classified as State aid and what are not so classified.

Another relevant feature of the background against which State aid is to be viewed is that almost certainly much State aid that has been granted unlawfully goes unremedied, either because it is undetected or because, although it has been exposed, the Commission takes no action in respect of it, no complaint to it having been made such as it was bound to investigate. Thus, in the 1970s and 1980s French local authorities granted a great deal of State aid in the interest of generating industrial investment in their area. The aid was granted unlawfully and that was exposed in a Report by the French Cour des Comptes, effectively the French National Audit Office. Only one of the reported cases was taken up by the Commission, where the grantee of the aid was a subsidiary of a US group and a French competitor, probably itself the beneficiary of never to be investigated State aid, had made a complaint. Today the Commission itself acknowledges that some new Member States are maladministering the Block Exemption Regulation to grant State aid; and, given the well known level of corruption in some Member States, it is impossible to be confident that any local administration of the State aid rules would be reliable - which makes all the more surprising that the State Aid Modernisation paper appears to contemplate some devolution of administration of the rules.

Let us now look at some of the unattractive aspects of the substance of the EU regime.

contrary, the borrower is liable to the lender for the amount of the loan. Nevertheless, the Commission's decision will require the State to "recover" the whole amount that was guaranteed. Talk about unjust enrichment of wrongdoers! Now let us consider the position of the recipient of unlawfully granted aid - and bear in mind that it is well established that recipients cannot rely on what they are told by the State authorities with regard to regularity of the grant. The State will be ordered by the Commission to recover from the recipient the face value of the aid rather than the
economic value of the benefit conferred by the aid - and the amount of the aid may greatly exceed the benefit to the recipient having regard to the conditions that the recipient must fulfil to qualify for the grant of the aid.

There is little doubt in my mind that a reason for the draconian treatment by the EU institutions of the recipients of unlawfully granted State aid is to try to make potential grantees of State aid policemen upon whom responsibility for lawful action by their State authorities is to be imposed, there being no EU prescribed penalty on a Member State that unlawfully grants State aid.

Of course, the regime that I have been describing probably suits Member States very well: on the one hand, if State aid is unlawfully granted and it is found by the Commission to be incompatible with the internal market, the Member State is often in a win-win position; the conduct that it wished to induce has been brought about and now it gets its money back with compound interest at a commercial rate. Member States may also benefit because the existence of the EU's State aid rules helps them to resist requests - perhaps more aptly described as demands - for State aid from powerful undertakings and trade unions, who may incidentally be political donors. But that consideration will be largely, if not wholly, irrelevant where the grantee of the aid is a small enterprise.

So far, I have been considering unlawfully granted aid that is found by the Commission to be incompatible with the internal market and some of you may be thinking that those who accept State aid without satisfying themselves by inquiring from the Commission whether the Commission has approved the aid deserve little sympathy. But even that lack of sympathy is largely ill-placed.

In the first instance, if the enterprise is located in a State that hopes in due course to accede to the Union and the State seeks to enter into a long term contract with the enterprise, the Commission has no competence to approve the contract so it will be useless for the enterprise to ask it whether it has done so. And even if the contract when made is fully justified by normal economic considerations, the Commission will, on the present case law, be entitled to attack it as an unlawful grant of incompatible State aid if, when the State accedes to the EU, the State would not, in the conditions then prevailing, then make a contract on those terms. So the claim that enterprises can always protect themselves by going to the Commission before they accept the aid (always a rather artificial claim) is disregarded by the Commission and the EU Courts when the enterprise could not have so protected itself (and indeed if the contract had fallen to be judged in the conditions ruling when it was made it would not have been judged to be State aid at all).

However, there is a more general objection to the way in which the rules work with regard to aid that was notified to the Commission before it was granted and was found, by a Commission decision, to be compatible with the internal market. In some cases, following notification of the aid by the Member State to the Commission, the Commission will open a formal procedure under Article 108(2) TFEU. The resulting final decision will then need to be published in full in the Official Journal in all the EU official languages. It may be many months before such a decision is so published. Until then, time does not start to run for any one with a sufficient interest to commence proceedings in the General Court to annul the Commission's decision. It is well established that until that time has expired without having been challenged in the General Court, anyone who receives the aid in question does so accepting the risk that the Commission's decision may be annulled by the General Court. And if the Commission's decision is challenged, that risk continues for what may be the three or four years that the General Court takes to decide the case; and if the General Court does then annul the Commission's decision, even if only for inadequate or defective reasoning, which can be cured by a subsequent decision by the Commission, the first decision is as though it had never been taken, so the grant of the aid will have been
unlawful and will be treated as such by EU law; and the national courts, if faced with a demand that the aid be repaid, will be bound to order recovery of the aid with compound interest - a misfortune for the recipient that may be, but will not necessarily be, remedied by fresh action by the Commission and the Member State concerned, though even then the position will be remedied only in part since interest on the aid will continue to be recoverable for the period when the aid was not yet covered by a valid Commission decision. And this is not a theoretical horror story, dreamt up by an ill-disposed critic of the system. No less than three decisions approving State aid to certain retailers of French language books were approved by the Commission, then annulled by the EU courts and irrespective of whether or not the aid was capable of lawful approval, its unlawful status, with practical consequences in the meanwhile, appears to be clear. Therefore, even at present the State aid rules, as they are administered, can give rise to great legal uncertainty, which any legal system should seek to avoid. And the suggestion, contained in the Commission's State Aid Modernisation paper, for the separate treatment of "fast track" and "slow track" cases would aggravate such legal uncertainty for the "slow track" cases by putting them in limbo in the first place.

At the outset of this Lecture I said that I would also say something about the procedures in State aid cases. Some of you may be thinking that, given the EU's much trumpeted dedication to the rule of law and fair procedures, this should be the point in the Lecture where I speak of redeeming features of the State aid regime. Not a bit of it! The EU should be ashamed of the procedures.

I have already referred to the correct juridical analysis of a Commission State aid decision that contains a recovery order, namely that it imposes -

- on the Member State a duty to recover the aid from the recipient and
- on the recipient a monetary liability, which is of direct effect in the national courts.

The breach of the Treaty is committed by the Member State that granted the aid (unlike the competition rules contained in Articles 101 and 102 TFEU, which are addressed to undertakings, the State aid rules are addressed exclusively to Member States) and the Member State that has unlawfully granted the aid is the wrongdoer. That being so, EU law has treated the resulting administrative procedure as being between exclusively the Commission and the Member State, with the putative recipient merely an interested onlooker. Similarly, a prospective recipient of State aid cannot notify it to the Commission in advance so as to ensure that the Commission will have approved it before it is put into effect. Hence, although there is now a limitation period for the recovery of unlawfully granted State aid, so that an order for its recovery cannot be made more than ten years after its grant, the limitation period is interrupted by any action taken by the Commission and known to the Member State with regard to the aid - even though the recipient has no knowledge of the action because the Commission's "right of action", as it were, is against the Member State.

The mantra that the procedure is exclusively between the Commission and the Member State has been used by the Commission and the EU Courts to justify allowing the putative recipient of aid a very limited role in the Commission's administrative procedure with regard to the aid, with adverse consequential effects for the recipient if the recipient subsequently applies to the EU General Court to annul the Commission's decision refusing to approve pre-notified aid or ordering the recovery of unlawfully granted aid. The recipient of the aid is treated as merely an interested person. It is allowed normally one month from the publication of the Commission's decision to open the Commission's administrative procedure within which to lodge with the Commission the recipient's observations - I say "normally" since in at least one case the recipient had only nine working days within which to do so. The recipient may have had no prior notice of the impending administrative procedure which may relate to a transaction that was effected a number of years earlier,
when the matter was handled by executives who are no longer in place. Although the Commission is free to extend the one month "window of opportunity", it is under no obligation to do so. Once the widow of opportunity has closed, the Commission is free to reject any further communication from the recipient about the aid, however relevant the information then supplied by the recipient may be and even though the Commission could take the information into account without delaying the reaching by the Commission of its decision. What makes the system even more objectionable is that when it suits the Commission to have ongoing discussions with the recipient during the course of the administrative procedure, it does so; therefore there can be no force in any argument that such involvement of recipients in the administrative procedure after the window of opportunity has closed is not allowed by the procedural rules. Equally, so far as I can ascertain, the Commission has no compunction about keeping a complainant fully informed about the progress of the procedure and continuing to use the complainant as a source of information.

Moreover, the Commission's decision that opens an administrative procedure often does not cover important aspects of the Commission's final decision. In the case of aid for which approval by the Commission is sought, the opening decision will generally not even outline any conditions that may ultimately be attached to approval of the aid. In the case of aid that has allegedly been unlawfully granted, the opening decision may well not cover how the Commission may quantify the aid when that is not obvious - even when the quantification may be novel and contentious. And even in such cases the Commission generally does not keep the recipient informed about the progress of the procedure and provide the recipient with an opportunity to make comments. Similarly, the Commission generally provides to the Member State concerned the material supplied to the Commission by third parties including the recipient but does not pass to those parties the Member State's comments on that material. And here I want to stress three things. First, the Member State itself - i.e. the part of central government that interfaces with the Commission - may be ill-informed about the relevant facts, especially where the aid is to be, or has been, granted by a State body other than the central government - a body such as a regional or local authority or some other more or less remote "State body". Secondly, Governments are not reliable as sources of information - indeed they are liable to be "economical with the truth" even when they know it. Thirdly, as the General Court has explicitly recognised, the Member State's interests and those of the recipient of the aid may well differ so that the Commission should not proceed on the basis that the Member State can be relied on to make the recipient's case as the recipient would wish.

The Commission's State Aid Modernisation paper recognises that a weakness of the present procedural rules is that they do not provide the Commission with a power to require the recipient and other interested parties to provide the Commission with information and documents - a power such as the Commission has and uses very effectively, in competition cases under Articles 101 and 102 TFEU. It remains to be seen how Member States react to the Commission's proposal which, if implemented, might give the Commission access to communications between the State and undertakings which the Member State might prefer to keep confidential. But, if the Commission gets such a power, as, in the interest of arriving at the truth and the right answer, I hope that it will, the case for involving the recipient properly in the administrative procedure will be further strengthened. But that case rests, in any event, on the now recognised principle of EU law - the principle of good administration. The present administrative procedure simply does not accord with that principle. And the principle is flexible enough to be respected without imposing on the Commission unreasonable constraints such as would hinder the Commission in the proper and timely administration of the State aid rules. The fact that the rules are not at present being satisfactorily implemented by the EU institutions was illustrated by the fact that the European Surveillance Authority recently held, as I believe
correctly, that in State aid cases one could not properly treat spot prices for electricity as the yardstick by which to measure the economic adequacy or otherwise of prices under a long term contract whereas the General Court, without any prior decisional practice or independent expert evidence to guide it, simply accepted the Commission's ipse dixit that it was entitled to proceed in that way. Moreover, implementation of the principle in State aid procedures could have a real advantage for the Commission, not only in helping it to reach a fair and correct conclusion. At present a well advised recipient will dump on the Commission during the window of opportunity every document that it thinks might conceivably turn out to be relevant and in its interest. It will do so not only because that is its only certain opportunity to communicate directly with the Commission but also because, if it needs subsequently to apply to the General Court to annul the Commission's eventual decision, it will not be allowed to refer to anything that was not placed before the Commission in the administrative procedure. And that is not the only problem faced by an applicant to the General Court in a State aid case. The making of an application to annul the decision does not itself result in suspension of the Commission's decision pending the decision of the General Court - one has to apply to the President of the General Court for a specific order for suspension of the decision. The applicant is then in a "catch 22" situation. If the applicant submits that its case for annulment of the decision is a very strong case, suspension is liable to be denied on the ground that the applicant should be able in due course to get compensation from the Commission under its non-contractual liability for taking a wrong decision. So the only way to get suspension seems to be to submit that the case for annulling the decision is problematic, not to say weak, and that the applicant would therefore have little or no chance of recovering compensation from the Commission if and when the decision was annulled. Most clients do not want their advocate to go on record as saying that their case is a weak one! Nor is this the only potential problem for the applicant. When a decision orders recovery of unlawfully granted State aid from several enterprises and they each apply to the General Court to annul the decision, the cases may be allocated to different Chambers and may proceed at different speeds and one of the cases may come on for hearing - years rather than months after the applications were made - before the other or others. The Chamber may then decide that case against the applicant in a way that clearly prejudices the other applicant or applicants without it or them having been heard. In consequence in future the only safe course may be for such applicants all to file interventions in all the other cases, thus multiplying the work and the burden of paper for the Court.

When some years ago I broke my shoulder a wise surgeon, having first remarked that I was neither a male model nor a manual labourer, advised me against surgery, saying that surgery was an evil, though sometimes a necessary evil. I hope that I have demonstrated that in this respect State aid is similar to surgery and why we should be keen to reduce, so far as we can without noticeable damage to the EU public interest, the application of the EU's State aid regime. How could that be done?

First, the De Minimis Regulation was a step in the right direction and put a stop to ridiculous concerns that public aid for conservation of a Spanish monastery which was visited by tourists or for a municipal swimming pool in Germany that was within driving distance from the Dutch frontier or for the restoration of the West Brighton pier attracted the operation of the then European Community's State aid rules. But the De Minimis Regulation needs to be amended so as, at the very least, to raise the limit on de minimis aid to "small" enterprises. I would myself suggest that such aid not exceeding €1 million over a three year period, should be treated as de minimis, especially now that for the foreseeable future all Member States are having to watch the pennies (or cents) much more closely than in the past.
The Block Exemption Regulation desperately needs to be radically simplified if it is to be even reasonably capable of being administered by authorities throughout the enlarged EU.

Rescue aid probably needs to continue to attract the operation of the rules since it prevents the normal operation of a free market economy in which failed undertakings exit and their assets are redeployed in new hands or removed altogether from the market. A really brave reform would be, subject to that exception, to take out of the EU regime all aid of less than say €50 million over 3 years, though I would be willing to listen to (1) any evidence that aid of lesser amounts is capable of noticeably prejudicing the EU public interest and (2) any reasons why the exemption should be confined to SMEs. In any event, I would like to see recovery orders limited to the economic benefit enjoyed by the recipient as a result of the aid - and with a State aid regime much reduced in scope the extra work for the Commission that that would involve should be manageable. As is obvious from what I have already said, I believe that the Commission's administrative procedures should be radically reformed so as to accord fully with the principle of good administration and I would hope that the General Court would review its procedures when several applications made at about the same time in respect of a particular Commission decision raise identical or similar issues. More contentiously, I would like to see a Regulation that would enable persons who have been injured by the grant to a third party of unlawful State aid that is incompatible with the common market to recover compensation from the body that made the unlawful grant and to do so without proof that the grant had constituted a sufficiently characterised breach of EU law - State bodies would become absolutely liable in such circumstances. That would make much more of a reality the claim that a decision that aid had been granted unlawfully and was to be recovered restores the previously undistorted economic position - a claim that has, at least once, been described by an Advocate General as absurd when the aid was granted many years previously and the grantee had long ceased to operate the State-aided facilities. The new remedy would also lessen the extent to which the Member State is in a in-win situation if it grants State aid without the prior authorisation of the Commission.

I have said the unthinkable - or at least in official circles the unspeakable - and I hope that I have not scandalised too many of those who have listened to, or may hear of, this Lecture. However, I hope that I have at least demonstrated that much more far-reaching reform is needed than that mooted in the Commission's State Aid Modernisation paper. I cannot end this Lecture without acknowledging the great assistance that I have had from Robin Griffith, who, I know, gives generously of his time to King's College's Law School - though, of course, the views expressed in the Lecture and any remaining errors are mine alone.