

Recent changes in State aid procedures: a new dawn for third parties?

Elisabetta Righini

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Defence of procedural rights

- Recent case-law of the General Court reinforces rights of third parties to a fair State aid control procedure
 - 15 Oct 2018 – case T-79/16, *VGG*
 - 15 Nov 2018 – case T-793/14, *Tempus Energy*
 - 13 Dec 2018 – case T-630/15, *Scandlines Danmark*
- If “doubts” exist, Commission must open an investigation:
 - The concept is exclusive
 - The Commission is under an obligation
 - The concept is objective
- To challenge lack of opening, third parties bear a burden of proof limited to
 - Circumstances and length of the preliminary phase
 - Content of the contested decision, i.e. sufficient to show that “*the Commission has not researched and examined, thoroughly and impartially, all of the relevant information ... or it has failed duly to take them into account ...*”

But is it enough?

- *Cook and Matra* date from 1993
- In the three cases, phase 1 decisions after notification
- Would an opening after X years, or the GC annulment of a phase 1 decision after X years + 1yrs ½ be enough if the third party is a complainant?
- What if the third party is a beneficiary? Is there an interest to appeal a phase 1 decision?
- What if the third party is not a direct competitors but it still adversely affected by the grant of the aid?

SAM ...

“The proposals [to reform the Procedural and Enabling Regulation] will streamline our decision making process and refocus the enforcement on the aid that really matters”

Joaquín Almunia, December 2012

“...the new Procedural Regulation adopted in December 2013 ... is also a missed opportunity to enhance third parties’ rights and legal certainty ...”

F.C. Laprevote, Autumn 2014

“the new rules should streamline and sensibly speed up the process. They should also increase the very marginal role of national courts”

A. Biondi & E. Righini, Summer 2015

... more than 5 years later

- 95% of aid granted is block exempted and/but
 - ❑ *ex officio* cases basically inexistent
 - ❑ little legal certainty for aid beneficiaries
- Mandatory complaint forms have been introduced and/but
 - ❑ no deadlines to review complaints
 - ❑ no transparency on complaints' handling
 - ❑ limited opening of investigation
- MIT are rarely used and
 - ❑ no right to be heard for beneficiaries

What is the way forward?

- Control of State aid should be focused on true enforcement in all markets
 - No decentralisation
 - Enough GBER
- Companies active in a market should be best allies
 - stop giving in to Member States' real politik
- Best practices should be established to give more voice to beneficiaries, complainants and third parties
 - Review of Procedural Regulation not necessary, a lot can be obtained *à droit constant*