

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

The Position of Third Parties in EU State Aid Procedures

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The cornerstone of state aid control: Article 107 TFEU

Main principle: the grant of state aid by national authorities is prohibited

- Exception: compatible state aid

Public order precedence rule

State aid control is based on a bilateral procedure between the Commission and the Member State concerned

Definition of third parties

State Aid Procedural Regulation, Article 1(h):

“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”

Reference to third parties in the Procedural Regulation

Chapter VII - Interested parties - Article 25

- Right to submit comments on a decision to open the formal investigation procedure - Article 6(1)
- Right to receive a copy of a decision - Article 9
- Source for market information within formal investigation procedures - Article 7(1)
- Source of information regarding alleged unlawful aid - provided it fills in the compulsory complaint form correctly - Article 12(1)

Complaints and the Sytraval case law

Case T-95/94, Sytraval

The obligation for the Commission to motivate its decisions could require an exchange of views and arguments with complainants.

Case C-367/95 P, Sytraval

The Commission is under no obligation to examine of its own motion objections which the complainant would certainly have raised had it been given the opportunity of taking cognisance of the information obtained by the Commission in the course of its investigation.

That criterion, which requires the Commission to place itself in the complainant's shoes, is not an appropriate criterion for defining the scope of the Commission's obligation of investigation

Third parties and pre-notifications

- **Informal and confidential** discussions about legal and economic aspects of a proposed measure
- No specific rights of third parties but...
- And beneficiaries may be involved in pre-notification contacts
 - If the Member State so decides (Code of Best Practices, para 18)

Third parties and notifications

- No specific rights:
 - Submission of comments not foreseen by procedural rules
 - No right of the Commission to request information from third parties
- Involvement of beneficiary if the Member State so decides (Code of Best Practices, para 36)
- BUT parties may spontaneously contribute to the decision making process of the Commission and provide information (*Tempus*)

Third parties and formal investigations

- Purpose of a formal investigation
- Right to submit comments:
 - Copy of the opening decision to interested parties asking for specific comments;
- Requests for information
 - To undertakings or associations - Article 7(1)
 - To aid beneficiaries if the Member State agrees to the request - Article 7(2)

Third parties and recovery

- Recovery of the aid with interests without delay and in accordance with the national procedures
- Exception: recovery would contrary to a general principle of Union law
- No role of aid beneficiaries in the recovery procedure
- Insolvent or bankruptcy proceedings have no effect - Case C-42/93, Spain v Commission
 - But suspension of recovery order - T-901/16 R Elche

Third parties and the Court

Two ways to contest the Commission's decision:

- protection of procedural rights in the case of a decision not to open the formal investigation procedure
- actions on the merits of the Commission's decision

Different admissibility requirements and different outcomes

Third parties and the national courts

- Third parties may challenge the validity of the Commission's decision within the framework of national procedures, thus trying to trigger a reference for a preliminary ruling
- The beneficiary who could without any doubt have challenged a decision under Article 263 TFEU before a European Court can no longer challenge the validity of the decision in proceedings before the national court on the ground that the decision was unlawful - Case C-188/92, *TWD Textilwerke Deggendorf*;
- Interested parties may start proceedings before national courts which can order that illegal aid be suspended or recovered

Third parties and access to documents

No right of access to documents in the Commission's administrative file:

- For beneficiaries
- For other third parties

Rationale:

- Regulation 1049/2001
- System of review of State aid

Recent case:

- T-134/17 Hércules Club de Fútbol

Third parties rights and obligations

Best Practices Code

internal guidelines to ensure that the Commission practice is consistent and equal

VGG/Tempus/Scandlines

- Are the Union courts willing (on the initiative of complainants) to ensure that the Commission effectively abides by them?

However

- how to reconcile the bilateral nature of state aid control procedures, the burden of proof of third parties to challenge the lack of opening and the objective character of the concept of doubt

Thank you very much for your attention

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