

Rights of third parties in State aid proceedings

Chillin' State Aid Workshop: Charting the Territory

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Introduction

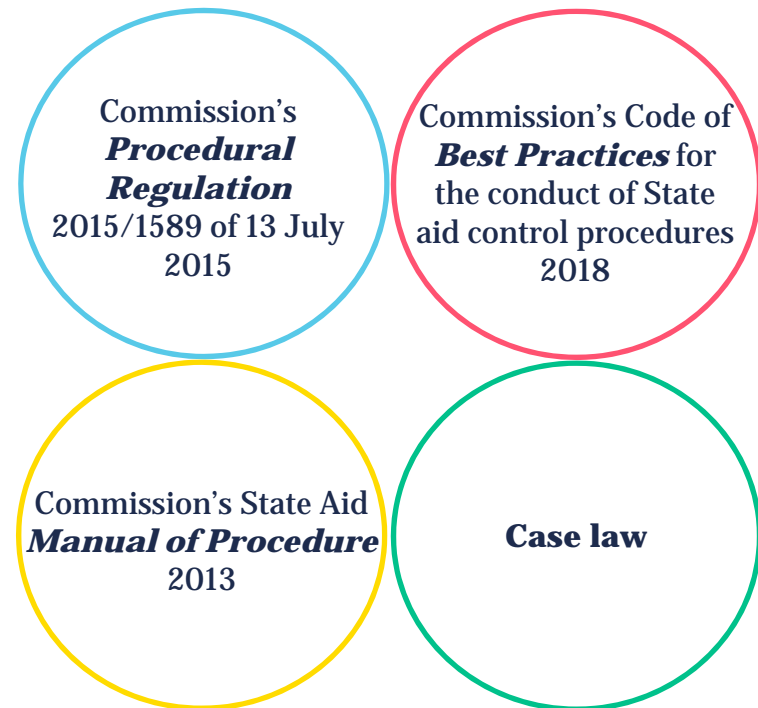
What is a third party?



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

Procedural Regulation, Art. 1(h)

Which are the key sources?



Rights of third parties

Third parties currently have limited rights / options available

**If not, expect
fines/penalty!**
Proc. Reg., Art. 8

**Submit comments on
an opening decision**

Proc. Reg., Art. 6(1)



**Receive copy of formal
decision**

Proc. Reg., Art. 24(1),(3)



**Participate in pre-
notification &
investigation stages,
but ONLY if Member
State so decides**

Best Practices, §18, 36



**Provide information if
asked by Commission
(for beneficiaries, prior
Member State approval
required)**

Proc. Reg., Art. 7(1)



**Submit complaint to
Commission**

Proc. Reg., Art. 24(2)



**Submit complaint to
European Ombudsman**

Art. 228 TFEU



**File appeal before the
General Court**

Art. 263 TFEU



Rights of third parties

Despite the possibility of significant consequences (e.g. full recovery for beneficiaries)
third parties are still lacking many rights

**Right to be informed
that Commission is
investigating aid in
preliminary phase**

e.g. Case T-354/05 *TF1 v
Commission* [2009]



**Right to submit
comments in
preliminary phase**

e.g. Case T-354/05 *TF1 v
Commission* [2009]



**Right to be informed of
the essential facts
before an opening
decision is adopted**

e.g. Case T-354/05 *TF1 v
Commission* [2009]



**Right of access to
Commission's file**

e.g. Case C-139/07 P
*Commission v. Technische
Glaswerke Imenau GmbH*



**Right to appeal to hearing
officer on procedural issues**



**Right to be heard
(apart from comments on
opening decision)**



**Right to participate in
Commission / Member State
meetings**



Recent developments

State aid control rules

✓ The 1999 Procedural Regulation introduced certain rights to reflect case law (*Sytraval*). The 2005-2009 State aid action plan resulted in the adoption of the Code of Best Practices

✗ State aid modernisation in 2012-2014 seen by many as a missed opportunity to improve third party rights

? **No sign of substantive reform / change since then**

Case law

✓ *Tempus Energy* (T-793/14, 2018, appealed): the Court annulled the Commission's decision as it did not open a formal investigation despite the existence of serious doubts; doubts proven by i) the length and circumstances of pre-notification phase and ii) the incomplete and insufficient reasoning in the decision due to lack of appropriate Commission investigation at pre-notification phase.

✓ *Freistaat Bayern* (T-683/15, 2018, appealed): the Court annulled the Commission's decision as it did not contain the basic elements to enable all (including third) parties to comment

✗ *Hércules Club de Fútbol* (T-134/17, 2019, appealed): Court confirmed the longstanding principle of no access to the file for interested third parties

? **Courts continue to defend the right to comment of third parties but remain reluctant to extend their rights**

Challenges in practice

Beneficiaries

- Right to be heard limited to commenting on opening decision - which may be unclear / defective or simply too late to explain as Commission has nearly finalised analysis in (long) pre-notification / preliminary phase
- Commission can disregard any unsolicited submissions made by the beneficiary (Member State is the formal interlocutor)
- Lack of transparency – it is at the discretion of the Member State to keep the beneficiary informed of the process

Other third parties

- Direct and individual concern can be hard to prove
- Lack of access to the arrangements between the Member State and beneficiary can make it difficult to build a strong case
- Lack of transparency and length of Commission process

A positive impact on State aid enforcement

Increased involvement of third parties in State aid proceedings benefits enforcement

Stakes are much higher for beneficiaries and other third parties in “big on big” era

Strong incentives on beneficiaries to **actively cooperate** and provide **useful information**

Strong incentives to bring **State aid violations** to the surface

Higher quality and quantity of information at Commission’s disposal

Better State aid control enforcement

Fewer type II errors

Practical tips / Suggestions for improvement

What can third parties do?

- ✓ Be proactive in providing information to the Member State and the Commission
- ✓ Keep in close contact with the Member State and the Commission
- ✓ Know your rights and check for alternative options, e.g.
 - Involve public affairs consultants
 - Complain to European Ombudsman

What can the Commission do (better)?

- ✓ Encourage Member State to involve beneficiaries, esp. in technically complex cases
- ✓ Seek from interested parties relevant information for the assessment, where necessary (Tempus, para.113)
- ✓ Engage with any beneficiaries' submissions if critical to the analysis
- ✓ Give regular updates on process to Member State and to complainants

Thank you

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