STATE AID LITIGATION BEFORE THE EU COURTS. THE CASE OF AID SCHEMES

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Abstract: Both the European Commission’s decision-making and the EU case-law on state aid schemes are symptomatic of the uncertainty, and sometimes even contradiction, that is implicit in treatments of State aid, a discipline which form part of the Treaty’s rules on competition, in which, nonetheless the rights that undertakings enjoy are quite limited. This article examines the current position in the case-law on whether it is possible for undertakings (whether aid beneficiaries, or their competitors) to challenge the Commission’s decision on aid schemes, meaning state measures, often implemented in the form of legislation, that address a number of beneficiaries and that may fall under the prohibition set forth in Articles 107 et seq. TFEU. This is an area in which the Commission and the Community judicature are constantly doing battle. The Commission tends to view its decisions as purely general measures, and as such not open to challenge, the judicature has shown greater flexibility towards the undertakings that bring actions before it, frequently finding that these decisions affect applicants’ positions, and are thus subject to review.

1. INTRODUCTION

Long considered the Cinderella of competition law, State aid rules have acquired increased importance in recent years, and had material impacts on the way companies and Member States behave. While the basic rules governing State aid that came in with the Treaty of Rome have remained unaltered over the years, the system as a whole has seen significant change. Initially the system was conceived as a means of achieving prior control over Member States

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pursuing measures that favoured their domestic undertakings, as a complement to the rules on freedom of circulation (goods, services, persons and capital). In recent years it has also become an instrument of public policy, driving a number of legislative developments in key sectors of the EU’s economy, and indeed, in some cases, entering previously unfamiliar areas. Consider, for example, the Commission’s rules on State aid to banks, known as the crisis framework, which filled what had previously been, in substance, a regulatory vacuum, and foreshadowed some areas of the banking union regulation that would follow; and recent initiatives by the Commission against the aggressive fiscal strategies of some multinational companies, which go well beyond the initiatives that have been taken on tax elusion at an EU and international level.

This rationale is illustrated by the early jurisprudence of the Court of Justice: See Case C-18/84, Commission v. France [1985] ECR 1339 (para. 13).

Since June 2013, the Commission has been investigating the tax ruling practices of Member States. Towards the end of August 2016 the Commission concluded that Ireland had granted Apple illegal State aid in the form of an undue tax advantage worth up to €13 billion. Similarly, in October 2015, the Commission concluded that Luxembourg and the Netherlands had granted selective tax advantages to Fiat and Starbucks, respectively. In January 2016, the Commission concluded that selective tax advantages granted by Belgium to at least 35 multinational organisations under its "excess profit" tax scheme had been illegal under EU state aid rules. The Commission also has two ongoing, detailed, investigations into tax rulings that may give rise to state aid issues vis-à-vis Luxembourg, as regards Amazon and McDonald’s. For a clear and concise summary of the thinking behind these moves, see the speech the Director General of DG Competition gave in St. Gallen on 20 May 2016 “State aid tax cases: sine timore aut favore”, available at: http://ec.europa.eu/competition/speeches/text/sp2016_06_en.pdf.

The fundamental objective of avoiding public resources being used to confer upon particular undertakings or categories of undertakings advantages distorting competition in the internal market has remained constant, but the State aid rules have shown great flexibility in their ability to respond to the major changes that have impacted on the European Union.

This undeniable flexibility has not affected the apparent contradiction at the heart of the field. On the one hand, undertakings enjoy rather limited rights in the administrative stage, before the European Commission, a stage that is often decisive in terms of the way in which measures are assessed, given the considerable discretion that the Commission enjoys, and the complex assessments - also in economics terms - that the rules so often entail. On the other, it is only undertakings that suffer the negative consequences that may flow from States granting aid. In the first place, the beneficiaries of such aid are obliged to return it where it has been granted in breach of the Treaty, where the Commission adopts a decision that there has been unlawful aid. This compulsory repayment (which includes compound interest on the

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5 For a thorough overview of this subject, see A. Santa Maria (ed.) Competition and State Aid – Analysis of the EU Practice, Kluwer Law International, June 2015.

6 Within the meaning of Article 107 TFEU, State aid is considered to have been granted unlawfully when: (i) it has not been notified by the relevant Member State to the Commission prior to its implementation (the “notification requirement”); and/or (ii) it has been granted prior to the issuance by the Commission of a clearance decision (the “standstill requirement”).
whole of the amounts received) generally arises years after the national measure has been granted and often results in a severe and unexpected financial burden for the beneficiary.\(^7\)

The recipients’ competitors also may be injured by the grant of such State aid, by a different route. Like other private parties, they have limited opportunities for dialogue with the Commission (both when submitting complaints, and subsequently, while the EU competition authorities are investigating).\(^8\)

This substantive exclusion of the private parties from the administrative phase is implicit in the way in which the law has been interpreted, fundamentally. That interpretation – originally offered by the Commission, and substantially endorsed by the European Court of Justice (“ECJ”) – is that it operates as an exclusive dialogue between the State that grants the aid and the European Commission,\(^9\) which is the only authority entitled to assess the measures’ compatibility with the internal market.

Interested parties - such as aid recipients, competitors of beneficiaries and trade associations\(^10\) - enjoy very limited rights in the two-stage procedure that the review of a State measure comprises. In terms of procedure, the Commission’s review may entail two successive steps: (i) a *preliminary examination* (pursuant to Article 108(3) TFEU) and (ii) a *formal investigation* procedure (pursuant to Article 108(2) TFEU). Whilst the preliminary examination is intended to allow the Commission to form a *prima facie* opinion on the case, the second phase takes place where the Commission experiences serious difficulties with the assessment and doubts remain as to the nature of the measure and/or its compatibility with the internal market.

In this two-stage procedure, interested parties (i) do not receive the decision opening the formal investigation (the equivalent of a statement of objections in antitrust cases); (ii) cannot access the Commission’s file, including

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\(^7\) On this, see F. Mazzocchi, *The Procedures before the Commission*, in A. Santa Maria (Ed.) *Competition and State Aid – Analysis of the EU Practice*, cited above.

\(^8\) This despite the fact that they have a weapon in their armoury unavailable to the recipient – the ability to complain to the domestic courts of the State’s failure to comply with the prohibition imposed by Article 108(3) TFEU (the standstill clause that obliges Member States not to put a proposed measure into effect until the Commission has reached a final decision). Indeed, while the Commission is responsible for assessing the compatibility of aid measures, the national courts have a separate and complementary role, that is to preserve, until the final decision by the Commission, the rights of private parties against any violation, by the State in question, of the prohibition that Article 108(3) TFEU imposes. This, however, has proved a rather ineffectual remedy, and it has not met with great success within Member States’ domestic systems.

\(^9\) EU Courts have repeatedly held that “the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in light of its Community obligations, for granting the aid”. See, *inter alia*, Joined Cases C-74/00 P and C-75/00 P, *Falck and Acciaierie di Bolzano v. Commission* [2002] ECR-I7869, para. 81.

\(^10\) “Interested party” is defined in Article 1(h) of the Procedural Regulation to mean “[any Member State] and any person, undertaking or association of undertakings whose interest might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations”.

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the letters and other information that has passed between the State and the Commission; and (iii) have no right to be heard before the Commission. Overall, interested parties are only entitled to submit comments on the Commission’s decision to open a formal investigation, within one month from its publication in the Official Journal.\(^{11}\)

The State aid procedure has recently been the subject of reform, but under the new Procedural Regulation (No. 2015/1589) the private parties continue to be treated as mere sources of information for the Commission, without any entitlement to play a full role in the administrative phase - indeed, in some regards, the changes brought to the Procedural Regulation have weakened their position.\(^{12}\)

The situation regarding private parties’ ability to challenge the Commission’s decision through the European courts is both more complex and more subtle.\(^{13}\) Decisions are also published on the Commission’s website once any confidentiality issues have been resolved.\(^{11}\)

The legislative treatment of *locus standi* became more sophisticated when the Lisbon Treaty came into force. That added a final limb to Article 263(4) TFEU, specifying that an applicant may also challenge before the EU Courts a “regulatory act which is of direct concern to them and does not entail implementing measures”.\(^{14}\)

Questions of when and how the Commission’s decisions on State aid may be challenged has been thoroughly discussed,\(^{15}\) resulting in a

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\(^{12}\) See Council Regulation (EU) No. 1589/2015 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. The Commission now has new tools and investigative powers (such as the ability to launch sector inquiries and ask information from private individuals and companies), and it can also impose fines upon businesses that fail to respond, or incorrectly respond, to demands for information. The rules on the submission of complaints to the Commission have also been tightened considerably. See Gambaro, Mazzocchi, *Private Parties and State Aid Procedures: A Critical Analysis of the Changes Brought by Regulation No. 734/2013* in *Common Market Law Review* (2016) 53, Issue 2, pp. 385–417.

\(^{13}\) This principle was established by the European Court of Justice in Case C-367/95 P, *Commission v Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (Sytraval) and Brink’s France* [1998] ECR I-1719, para. 45.

\(^{14}\) Also, for obvious reasons the applicant must prove an interest in bringing the action. On this, see, among others, Case C-320/09P A2A SpA, formerly AEM SpA v. European Commission, ECLI:EU:C:2011:858 para. 66. The interest in bringing an action is a condition to the action’s admissibility, and must endure until the court reaches its substantive decision. The case-law is consistent in considering such an interest to be present for so long as the action, and its outcome, may result in a benefit to the party that brought it.

series of distinctions based on the scope of the decision (ad hoc measures as opposed to aid schemes), the type of decision to which the annulment action relates (an opening decision, as opposed to a decision concluding an investigation), the level of implementation in the relevant Member State of the national measures investigated by the Commission, the status of the applicant (whether an actual or a potential beneficiary) and whether or not the applicant has submitted observations pursuant to Article 108(2) TFEU in the course of the administrative procedure. The matter is particularly controversial when it comes to state aid schemes. Aid schemes are general acts that confer advantages upon specific categories of undertakings. They are typically legislative in nature. The “general” nature of such a measure, its ability to benefit a group of entities, at first glance conflicts with the requirement that private parties must be individually concerned by the Commission decision in order to being proceedings before the EU Courts.

This article seeks to analyse the current status of the EU case-law regarding the ability of beneficiaries and competitors to challenge decisions on aid schemes. As we will see, this is an issue over which the Commission and the European Courts take opposing views, and continue to clash. The Commission for its part invariably adopts a fairly restrictive approach, attempting to avoid challenges to its decisions through the courts, from too many quarters. The Court of Justice has meanwhile sought to open the field, offering hearings to both beneficiaries and their competitors, provided certain conditions are satisfied.

One recent such expansion occurred in the General Court judgments in the cases, Ferracci v Commission, and Scuola Elementare Maria Montessori v Commission, which regarded the exemption from the Italian municipal ICI and IMU taxes granted to certain non-commercial entities. The General Court provided a novel and, in some respects, revolutionary interpretation of the final limb of Article 263(4), upholding the applicants’ submissions that as far as the beneficiaries’ competitors were concerned, the Commission’s decision on that aid scheme represented a regulatory act which is of direct concern [to them] and does not entail implementing measures.

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16 For more detail on these issues, see Gambaro and Mazzocchi, The changing nature of Commission opening decisions: yet another obstacle to the access of EU courts? - Annotation of the Order of the General Court in Case T-251/13 Gemeente Nijmegen v. European Commission in European State Aid Law Quarterly, 2/2016.

17 For a critique of aid schemes effected by legislation, and the different approach taken in the United States, see A. Santa Maria (ed.) Competition and State Aid – An Analysis of the EU Practice, cited above, pp. 6 ss. In the US federal system, for example, the adoption of governmental measures in support of specific categories of enterprises is in principle subject to constitutional precepts and falls outside the jurisdiction of the Federal Trade Commission and the Department of Justice.

In the first part of this article, we will briefly analyse the justifications for, and particular features of, aid schemes. The second part examines the matter of standing of beneficiaries and competitors with respect to aid schemes and the third part addresses the question of whether decisions on aid schemes should qualify as regulatory acts under Article 263(4) TFEU, and ponders the impact of the most recent decisions on this. The final section seeks to draw some conclusions.

2. THE CONCEPT OF AID SCHEME

The Treaty provides no complete definition of State aid. It merely states in Article 107(1) TFEU that aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

The case-law has made clear that for a measure to be caught by the prohibition laid down in Article 107(1) TFEU, a number of requirements must all be met, namely that there must be: (i) an intervention imputable to the State and granted through State resources,¹⁹ (ii) conferring an advantage which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention (iii) favouring certain undertakings or the production of certain goods (and be therefore “selective”); (iv) distorting or threaten to distort competition within the internal market and (v) affecting trade between Member States.

The notion of “selectivity” covers not just aid granted to individual undertakings (known as individual aid) but also that addressed to a group of undertakings, or particular sectors (which may also comprise a relatively large number of undertakings). The fundamental decision, in terms of selectivity, consists of determining whether the measure in question constitutes a derogation from the system of reference under which the measure must be assessed. This is not an easy task, both because the system of reference that is used as a benchmark is not always easy to identify, and because genuinely general measures that seek not to support a particular business or group of undertakings but the expansion of the economy as a whole are beyond the scope of Article 107(1) TFEU, precisely because they fail the selectivity test.²⁰

¹⁹ Notwithstanding the wording of Article 107(1) TFEU referring to aid granted “by a Member State or through State resources” (our emphasis), the EU Courts have made clear that for advantages to qualify as aid for the purposes of that provision, two requirements must both be met, that they are: (i) granted directly or indirectly through State resources; and (ii) imputable to the State. See, in this regard, Case 482/99 France v. Commission (“Stardust Marine”) [2002] ECR I-4397, para. 24.

²⁰ Article 1(d) of Regulation No. 2015/1589 provides the following definition of “aid scheme”: “any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be
The ECJ case-law has allowed the Commission quite broad flexibility when assessing the evaluations the latter institution has made of aid schemes. The European Courts have consistently held that it suffices that the Commission examine the general characteristics of the scheme in question, without it being required to examine each particular case to which it applies.\footnote{21}

Where it identifies a scheme as incompatible with the internal market, the Commission may thus simply instruct that the aid must be recovered, leaving the various acts necessary to give effect to that instruction to the relevant Member State.

Further, while the decision must contain in itself all the matters essential for its implementation by the national authorities, the Commission is not under any obligation in its decision either to identify the beneficiaries of the measures, or to indicate the exact amount that is to be recovered. Only at the stage of the aid’s recovery the national authorities of the relevant Member State will examine the individual situation of each undertaking affected by the aid scheme.

Issues regarding not only the amounts to be recovered from each beneficiary, but frequently also who exactly benefited from the scheme, are typically for national authorities to resolve in the decision’s implementation stage. On this, the case-law has made clear that the national authorities must bring any difficulties that arose in implementing the decision to the Commission, so that they may be overcome in accordance with the principle of “loyal cooperation” set forth in Article 4(3) TEU.\footnote{22}

3. THE STANDING OF BENEFICIARIES IN RESPECT OF DECISIONS ON AID SCHEMES

As mentioned above, natural or legal persons will have the possibility to challenge decisions addressed to the State if they meet the requirements of Article 263(4) TFEU, that is to say, the decision is of direct and individual concern to them.\footnote{23} These two requirements, as to direct and individual concern, have been examined separately by the courts.

The condition of direct concern is traditionally not controversial and is not a requirement on


\footnote{22} See the ECJ judgment of 22 December 2010, Commission v. Italy, C-304/09, EU:C:2010:812, para. 37; and the General Court judgment in Ferracci, para. 81 and Montessori, para. 78.

\footnote{23} The Lisbon Treaty eliminated the phrase “although addressed to another person”, which was considered to be redundant. Please note that Articles 263 TFEU (formerly 230 EC) and 265 TFEU (formerly 232 EC) - regarding action for failure to act - merely prescribe the very same legal remedy. It follows that, just as Article 263(4) TFEU allows individuals to bring an action for annulment against a measure of an institution provided the measure is of direct and individual concern to them, the third paragraph of Article 265 TFEU should be interpreted as similarly entitling them to bring an action for failure to act against an institution which, they claim, has failed to adopt a measure which would have concerned them in the same way. See, in this regard, Case T-395/04 Air One v. Commission [2006] ECR II-1343.
which the Court of Justice has much dwelt. Aid beneficiaries are usually considered to be “directly concerned” by a negative decision of the Commission concerning an aid scheme. The two criteria pertaining to direct concern which emerge from the case-law are: firstly, the measure at issue must directly produce effects on the applicant’s legal situation, and, secondly, the measure must not leave the persons to whom the decision is addressed any discretion as to how it is implemented.  

With regard to the second of these tests, the key thing in relation to aid schemes is that the Commission’s decision must include an order to recover the aid. In such circumstances, the Court of Justice has ruled, that “the national authorities do not have any discretion whatsoever in the execution of the decision”. This statement seems at first sight to be in contradiction with the “room for manoeuvre” that was alluded to above with respect to the implementation of the Commission’s decisions by national authorities. The Court has made clear, however, that the Member State’s discretionary powers regard only the modalities of a decision’s implementation, and that freedom is subject to clear limits stemming from the object of the decision and the obligation upon Member States to give it effective implementation.

The condition of individual concern is more problematic. In those cases that have followed the judgment in Plaumann, persons other than those to whom a decision is addressed may claim to be individually concerned only “if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the persons addressed”. 

In relation to State aid, this rather vague statement has been the subject of quite different interpretations by the Commission and by the Court of Justice. In almost all cases, in fact, the Commission has denied that a decision regarding an aid scheme may be of individual concern to an applicant. In essence, the Commission believes that such decisions should be regarded as measures of general application concerning an indeterminate and indeterminable number of undertakings defined by reference to a general criterion, such as the fact that they belong to a particular category of undertakings.

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26 Ibid., para. 161.
28 In the view of the Commission, the general applicability of a measure is not called into question by the fact that it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time, so long as it applies to them by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose. See, among many, Case T-301/02 AEM v. Commission [2009] ECR II-1757. Moreover, the Commission argues that the protection of the persons affected by a decision finding any such scheme to be incompatible should be provided indirectly by the
By contrast, the EU Courts have adopted a more open and flexible view. On the one hand, they have ruled that an undertaking that is concerned by a decision on a sectoral aid scheme solely by virtue of its belonging to the sector in question and being a potential beneficiary of a particular scheme is not, as a rule, in a position to challenge a decision by the Commission against an aid scheme. On the other hand, however, the case-law has made clear that where the applicant is an actual beneficiary of the individual aid granted under a scheme, recovery of which had been ordered by the Commission, then the decision must be considered of individual concern to him.

There are thus two significant tests that the case-law appears to emphasise, when assessing whether a decision is of individual concern. Firstly, there should be no question over whether the beneficiary is an actual (and not merely a potential) beneficiary of aid; secondly, the Commission’s decision must include an order for the recovery of the aid.

In such cases, the Court has considered the decision as regarding a limited group of persons who were identified or identifiable at the time that the measure was adopted (by reason of criteria specific to the members of the group) such that those persons may be said to be individually concerned by that measure.

In that determination, the presence of a recovery order in the Commission’s decision becomes a matter of central importance. It is that order for recovery that exposes the recipients, from the time of the adoption of the decision, to the risk that the advantages which they have received will be recovered, thus affecting their legal position.

The EU Courts have considered that the possibility that the advantages declared illegal (and within the scope of the general recovery order by the Commission) may subsequently not in fact be recovered from the beneficiaries does not exclude individual concern. In other words, it is immaterial whether the recovery order has practical effects at a national level.

The Commission has frequently argued that this case-law may have the “paradoxical and perverse” effect of requiring the beneficiaries of the State aid to challenge the Commission decision immediately, even before knowing
whether it would lead to a recovery order concerning them, with greater procedural burdens for the EU Courts – but that argument has always been rejected in Luxembourg.

4. THE STANDING OF COMPETITORS IN RESPECT OF DECISIONS ON AID SCHEMES

The question of whether beneficiaries’ competitors may challenge decisions regarding aid schemes usually arises where the decisions are positive, that is to say, they authorise particular schemes (either because they are not considered to constitute aid, or because they are considered compatible with the internal market). 35

While the notion of direct interest has only received cursory attention, there has been much debate around whether or not competitors can lay claim to an individual interest, following the Plaumann case-law.

Here too the Commission is apt to propose a restrictive approach to Article 263(4) TFEU and has consistently pleaded that the EU Courts should require the competitor to demonstrate that its market position would be substantially undermined, regardless of the stage that the procedure has reached when the Commission takes the decision that is the subject of an action for annulment.

The EU courts have not backed such a Draconian approach, and have developed distinct sets of criteria, depending upon whether the challenge regards a decision at the end of a preliminary investigation (pursuant to article 108(3) TFEU) or a decision at the end of the subsequent formal investigation (pursuant to article 108(2) TFEU).

Where the decision is made at the end of a formal investigation, the Court of Justice clarified in its landmark judgment in Cofaz that, in order for its action to be admissible, an undertaking competing with an aid recipient had to show that its position on the market was significantly affected by the aid in discussion. Additionally, the Court of Justice placed some emphasis on the fact that the beneficiaries’ competitors had actively participated in the formal investigation and therefore had been involved in the administrative proceedings. 36 That they submitted comments during the formal investigation is, it would appear, a factor that the Courts should take into consideration, even if the Court of Justice later expressly acknowledged that active participation in the procedure is “not a necessary condition” for a finding of individual concern. 37

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35 Marginal cases that end in negative decisions, with findings that aid is incompatible with the internal market but without ordering recovery, may be the subject of challenges by beneficiaries’ competitors, since the advantage gained by the beneficiaries is left unchanged, as it was not affected by the decision. See, in this regard, the Ferracci and Montessori cases.


Since the first criterion is crucial, then, one may wonder what the State aid case-law considers the influence in its competitive position that an undertaking must show in order for it to be considered substantially affected by a particular measure. The EU Courts applied a number of different degrees of stringency on this test in the aftermath of *Cofaz*.\(^{38}\) Simply proving that there is a competitive relationship with the beneficiary is not considered sufficient.\(^{39}\) The applicant must provide a series of pieces of factual, compelling evidence, that show the actual prejudice it suffered as a result of the grant of the measure in question to its competitor or competitors. The case-law that has emerged on this point has been quite rigorous, and competitors’ allegations have often been dismissed on a procedural basis.\(^{40}\) The Court has ruled, for example, that pointing to a decline in commercial or financial performance is not sufficient to prove a substantial adverse effect on the competitor’s position in the market.\(^{41}\) Where the decision regards an aid scheme, moreover, and thus a wide population of beneficiaries, who frequently have not even been identified, it is even more difficult for competitors to prove that their competitive position has been significantly affected by the Commission decision.

Different tests apply where bringing a challenge under Article 108(3) TFEU against a decision that concludes a preliminary investigation (and does not result in a formal investigation), on the basis – for example – that the Commission finds that the measure does not constitute aid, or it considers the measure compatible with the internal market.\(^{42}\) In such cases, private parties’ access to the Courts is to some extent “facilitated” by the case-law of the Court of Justice, which has built upon the decisions in *Cook* and *Matra*.\(^{43}\) Since it is only during the formal investigation that concerned parties may make themselves heard by submitting their comments,\(^{44}\) the Courts have emphasised that...
where on the basis of the *prima facie* examination alone the Commission finds, for example, that aid is compatible with the internal market, the persons *intended to benefit from those procedural guarantees* are able to secure compliance therewith only if they are able to challenge that decision by the Commission before the EU Courts.

On that basis, the EU judicature has considered actions for the annulment of decisions at the end of the first phase to be admissible provided both: (i) the person qualifies as a *party concerned* within the meaning of Article 108(2) TFEU;\(^{45}\) and (ii) that person’s *intention* is to benefit from procedural guarantees.\(^ {46} \)

However, the Courts made clear that if the applicant is questioning the *merits* of the decision appraising the aid, the mere fact that they may be a concerned party within the meaning of Article 108(2) cannot suffice to render the action admissible. Accordingly, if a competitor (for example a complainant) challenges a first phase decision on grounds other than the procedural grounds, it must then demonstrate that it enjoys a *particular status* “*within the meaning of the Plaumann caselaw*” - that is to say, the applicant must show that its market position is *substantially affected* by the aid in question.

In short, if the challenge regards the substantive issue, the criterion discussed above, that the Courts have applied to decisions concluding formal investigations, applies equally here – an undertaking competing with an aid recipient will have to show that its position in the market was significantly affected by the aid in question. If on the other hand the challenge is based entirely on procedural grounds, the applicant need only show that it is a “concerned party”.

This distinction between challenges based on procedural pleas and those based on pleas related to the merits is not always easy to make, and raises issues in relation to legal certainty, in part because it has effectively introduced an intentional element into the Courts’ evaluations (namely, “*the intention of the person to benefit from procedural guarantees*”). Moreover, even though the applicant may shelter behind procedure, clearly the ultimate objective is to challenge the position the Commission has taken on the substantive issue.

Although there have been calls over the years for this case-law to be simplified - through, for example, a reduction in the criteria to one, at least with respect to challenges to decisions

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45 The notion of “party concerned” is the same that of “interested party” pursuant Article 1(h) of the Procedural Regulation: “[any Member State] and any person, undertaking or association of undertakings whose interest might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations”.

46 In the *Kronophyl/Kronotex* case (C-83/09 P, *Commission v. Kronophyl GmbH & Co. KG* and *Kronotex GmbH & Co. KG* ECLI:EU:C:2011:341) the Commission invited the ECJ to reconsider its case-law and the compatibility with the Treaty of the *Cook* rule of standing, arguing that such a rule might be tantamount to a derogation from Article 263(4) TFEU.
concluding the first phase - this has been resisted, and competitors have at least some access to the Courts.

5. THE STANDING WITH RESPECT TO REGULATORY ACTS PURSUANT TO ARTICLE 263(4) TFEU

A “regulatory act which is of direct concern [to private parties] and does not entail implementing measures” is a new category of challengeable acts introduced by the Lisbon Treaty, and specifically by Article 263(4) TFEU.

A party is entitled to take action for the annulment without having to prove that the decision is of individual concern to them, provided that the act: (i) regards them directly; (ii) is of a regulatory nature; and (iii) does not entail implementing measures.

The Community legislature introduced that change to the TFEU as a result of the debate that the decisions in Unión de Pequeños Agricultores and Jégo-Quéré had provoked. In those cases, the Court had found challenges to various EU regulations that had not entailed implementing measures inadmissible, on the basis that those measures were not of individual concern to the private applicants, following the Plaumann approach. Since those regulations did not entail implementing measures, the private entities had protection from neither the EU Courts nor their domestic courts, and the only avenue by which they could challenge them would be to breach them and then argue that the Community measure was unlawful in legal proceedings that would be brought against them as a result. The changes to Article 263(4) TFEU should be seen as an attempt to fill this gap, as they enable individuals and entities to bring actions for the annulment of “regulatory acts not entailing implementing measures” upon less restrictive terms than under the traditional case-law.

ECLI:EU:C:2002:462. In that case, a group of olive oil producers challenged a Community regulation abolishing a number of measures that provided aid to the producers. First the Court of First Instance, and then the Court of Justice, declared that the application could not be heard, in that the act had not regarded the association, or its members, "by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee". See also Case C-263/02 P, European Commission v. Jégo-Quéré & Cie SA, ECLI:EU:C:2004:210.

47 Opinion of the Advocate General Jääskinen in Kronoply and Kronotex, ibid.

In the judgments in *Ferracci* and *Montessori* of 15 September 2016, the General Court (the “GC”) decided, for the first time, that a decision by the Commission regarding an aid scheme could be challenged by a competitor on the basis of this new provision in the Treaty.

In those cases, the Commission had ruled that the scheme exempting certain non-commercial entities from payment of the Italian ICI municipal tax constituted unlawful aid (in that it had not been notified) and incompatible with the internal market. However, contrary to its longstanding practice the Commission did not order recovery of the aid, as it considered it would be impossible for the Italian State to identify the individual beneficiaries and recover the unlawful aid. In relation to ICI, then, the Commission had adopted a *negative decision without recovery*. 50

The Commission also had ruled in the same decision that the new system for charging the IMU municipal tax, ICI’s successor, did not constitute state aid under Article 107(1) TFEU.

The challenge that some of the beneficiaries’ competitors had brought before the GC (judgment in *Telefónica v. Commission*, Case C-274/12 P, EU:C:2013:852, para. 27).

50 This is a solution that the Commission only rarely deploys. A recovery order represents in fact “the logical consequence of the finding that aid already granted is incompatible”, and only in exceptional cases does the Commission not order recovery in its decision. As mentioned earlier, typically once the Commission has found measures to be incompatible, it will order recovery, which, under article 16(1) of the Procedural Regulation, is a matter for the Member State, leaving any difficulties that the Member States encounters in that recovery to the decision’s enforcement stage.

regarded that decision, both where it had failed to order the recovery of ICI, and where it had authorised the new IMU scheme.

5.1 The notion of “regulatory act” pursuant to Article 263(4), final limb, with respect to aid schemes

The first question to be addressed is whether one can classify a Commission decision on a State aid scheme addressed to the grantor Member State as a “regulatory act” within the meaning of Article 263(4) TFEU.

The Treaty contains no definition of “regulatory act”. The Court of Justice has defined regulatory acts negatively, as acts of general application that are not within the category of legislative acts. 51 The Commission, on the other hand, takes the view that not all non-legislative acts of general application constitute regulatory acts. It identifies regulatory acts as a narrower category that would not in any event include decisions on aid schemes.

In its judgments in *Ferracci* and *Montessori*, the GC found by contrast that a decision by the Commission on aid schemes constituted a *regulatory act*. 52

51 Judgment in *Inuit Tapiriit C-583/11 P*, EU:C.2013:625, para. 60. The distinction between a legislative and a regulatory act under the TFEU is based upon whether the procedure that led to its adoption was legislative or not (Order of 6 September 2011, *Inuit Tapiriit Kanatami and others v. Parliament and Council*, Case T-18/10, EU:T:2011:419, para. 65).

52 This position was consistent with the opinion of the Advocate General Kokott in *Telefónica I*, paras 17-29. In her view, although a regulatory act is not a legislative act
On this, the Court emphasised that a decision by the Commission on State aid that applies to situations determined objectively, and that has legal effects upon a category of persons viewed generally and in the abstract, is of general application.\textsuperscript{53} It found that while the decision would be addressed only to one person (namely, the Member State), it reflected the application of national legal acts that were subjected to scrutiny by the Commission, which would then either grant the authorisation necessary to implement an aid measure, or decide upon the consequences of its unlawfulness.\textsuperscript{54}

The Court thus draws a direct link between the decision’s general application and the related national measure examined by the Commission (in this case, a statutory fiscal exemption).

On the basis of these considerations, the GC concluded that since the decision that was being challenged was of general application but not a legislative act, it constituted a “regulatory act” for the purposes of article 263(4) TFEU.

If these principles are upheld on appeal by the Court of Justice, one may conclude that almost all the decisions on aid schemes should be considered “regulatory acts” within the meaning of Article 263(4) TFEU, since the characteristics identified by the GC are shared by almost all such decisions by the Commission.

5.2 Applicants’ direct concern with decisions on aid schemes under Article 263(4) TFEU, final limb

As mentioned, traditionally there has been no issue over whether a competitor is directly concerned with the aid, in that all the arguments have regarded whether they were individually concerned. Direct concern presupposes that the act in question: (i) produces effects directly on the competitors’ legal situation; and (ii) does not leave the persons to whom it is addressed with any discretion over its application.

In Ferracci and Montessori, the GC found that the decision did produce effects directly on the competitors’ position, since they had sufficiently shown they were operators in the market. It emphasised how the services they offered “could” be in competition with those


\textsuperscript{54} Ferracci, para. 53 and Montessori, para. 50.
offered by some entities which the measures regarded. In the GC’s view, that was enough for it to find that the decision being challenged directly produced effects upon the applicants’ legal situation, and there was no need to look any further into the competitive relationship with the entities in question, or the prejudice caused to the applicants by the grant of the measures. This was thus a rather less stringent test than that required on individual concern, where the competitor had to demonstrate that its position in the market had been “significantly affected” by the aid.

The General Court emphasized that a decision to authorise the aid would directly concern an applicant that was a competitor, where the Member State’s intention to provide the aid was not in any question. This principle applies not only to the part of the decision concerning the IMU (which was expressly authorized by the Commission) but also to the part of the decision that did not order recovery (the ICI exemption), as it too was capable of producing direct effects upon the applicant’s legal situation.

In respect of the second requirement, the GC found that the Commission’s decision had left the State no discretion, and that its effects were automatic.

The above would appear to suggest that with respect to aid schemes, the notion of “direct interest” is the same also when considering the new limb of article 263(4) TFEU and the test will continue to be easy to satisfy by private applicants.

This was not an outcome that was at all assured. The Commission had pushed for a new interpretation of direct concern that was more restrictive than that traditionally applied by the EU Courts. It had sought to rely on the fact that the final limb of article 263(4) TFEU no longer required applicants to prove their individual interest in the acts they challenged.

5.3 Not entailing “implementing measures” - The case of competitors

The last criterion - that there must be an absence of “implementing measures” - is probably the most problematic.

Importantly, the ECJ has found that when considering whether a regulatory act entails implementing measures, one must look to the applicant’s position. It is thus immaterial whether

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55 Paras 43-45 and 41-42, respectively. In Case T-18/10, Inuit, the GC found that particular regulations could not directly affect the position of some of the applicants, emphasising that they traded in different products from those affected by the regulation in question. In appeal, the Court of Justice did not rule on the issue (see C-583/11 P, at paras 73 and 74). In the cases T&L Sugars, C-456/13 P, ECLEU:C:2015:284 and Confederazione Cooperaative Italiana, Joined Cases C-455/13 P, C-457/13 P and C-460/13 P, ECLEU:C:2015:616, the Court similarly found that there was no direct interest, since the applicants were not in the markets that were subject to those provisions, and accordingly could not claim to be competing with the beneficiaries. The GC expressly distinguished the factual situation in Ferracci and Montessori from that of the above two ECJ precedents.

the act in question entails implementing measures in relation to others.\textsuperscript{57}

In Ferracci and Montessori, the GC found that both parts of the Commission’s decision constituted a “regulatory act not entailing implementing measures” with respect to the applicants.\textsuperscript{58}

Firstly, the Court emphasised that the Commission’s decision, which found the ICI exemption incompatible but did not order recovery, meant that the national authorities did not have to adopt any measures in relation to the applicant, in particular to implement the same decision. Similarly, with regard to the IMU exemption, the challenged decision did not impose obligations upon the Member State and did not entail the adoption of any implementing measure (and indeed the national authorities merely applied domestic legislation). The GC therefore concluded that the challenged decision did not entail implementing measures regarding the applicant.\textsuperscript{59}

The GC rejected also the Commission’s argument that an applicant would be always able to apply to the Italian tax authorities to benefit from the same tax advantages as are granted under the disputed measures, and if refused, challenge that decision. According to the GC, if an applicant were to act as the Commission suggested, the refusal decision by the Italian tax authorities cannot properly be described as an implementing measure deriving from the decision that is being challenged, but rather it would be the consequence of an internal measure adopted autonomously by the national authorities following an individual request from the applicant.\textsuperscript{60}

The GC reached an opposite conclusion in the Dansk Automat case, which also regarded a challenge brought by a competitor to a measure’s beneficiaries. The Commission had found that the aid in question was compatible with the internal market, and authorised the measure accordingly. Unlike the Ferracci and Montessori cases, however, the challenged decision expressly provided for the adoption of

\textsuperscript{57} This principle was already stated by the ECJ in Telefónica I, para 30.

\textsuperscript{58} In order to determine whether the measure being challenged entails implementing measures, the Courts have found reference should be made exclusively to the subject-matter of the action and where an applicant seeks only the partial annulment of an act, it is solely any implementing measures which that part of the act entails that must, as the case may be, be taken into consideration. See Ferracci and Montessori, paras 60 ff. and 57 ff., respectively.

\textsuperscript{59} See Ferracci and Montessori, paras 61 ff. and 58 ff., respectively.

\textsuperscript{60} See Ferracci and Montessori, para. 68 and para. 65, respectively. This is consistent with the actual terms of the Italian tax provisions, and appears more favourable to private parties than the approach the same GC adopted when dealing with, for example, in Telefónica I, Iberdrola, and Telefónica II, issuing dismissal orders in 2012 and in 2013. See Iberdrola, Case T-221/10, ECLI:EU:T:2012:112, paras 45-48; Telefónica I, Case T-228/10, ECLI:EU:T:2012:140, paras 42-45; Order in Case T-400/11, Altadis v. Commission, ECLI:EU:T:2013:490, paras 42-50 and Telefónica II, Case T-430/11, ECLI:EU:T:2013:489, paras 48-54 (on appeal: Case C-588/13 P, not yet decided). In those cases, the contested decision itself referred not only to the existence of recovery/implementing measures (for example, tax notices) but also to “other” implementing measures, such as all the “measures for implementing the incompatibility decision” (for example, a rejection of the application for the tax advantage).
specific national acts, which had to be effected after the challenged decision had been adopted in order for the aid scheme in question to produce its effects (apparently, also in respect of the applicant).  

5.4 Not entailing “implementing measures”

– The case of aid recipients

The situation is different when it comes to the beneficiaries. In *Telefónica I*, the European Courts examined a challenge (brought by a number of taxpayers) to a decision that declared a scheme incompatible with the common market. The ECJ emphasised the consequences that the decision produced in respect of individual taxpayers, which would be embodied in subsequent internal administrative documents, such as tax notices. Those internal documents thus constituted “implementing measures” that the Commission’s decision entailed, within the meaning of Article 263(4) TFEU, final limb.

In principle, the implementing measures to which Article 263(4) TFEU refers may either come from institutions of the European Union or of the Member State. However, it seems that a recovery order contained in a Commission decision does not constitute an implementing measure for the purposes of Article 263(4) TFEU, final limb, but rather, any national act issued against the applicants directly stemming from the decision. Indeed, this view is consistent with the stance taken by the GC in *Altadis*, whereby the Court stressed that the recovery order formed part of the legal consequences of the decision, binding upon the Member State concerned (the only addressee of the decision), and did not define the consequences of the incompatibility of the scheme with the internal market with regard to each of the beneficiaries of that scheme. Thus, the consequences of the incompatibility had to individually result from a legal act emanating from the competent national authorities (such as, for instance, a *tax notice*) and that would constitute a measure implementing the Commission decision for the purposes of Article 263(4) TFEU.

From the above, it would appear that, following a negative decision by the Commission, the beneficiaries who are the addressees of an implementing measure at a national level, cannot rely upon Article 263(4) TFEU, final limb.

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61 See Ferraci and Montessori, paras 69 and 66, respectively.

62 Paragraph 29 of the judgment *Telefónica I*, Case C-274/12 P.

63 The matter was not explicitly addressed in *Telefónica*, as the action did not criticise the recovery of the aid, ordered in Article 4(1) of that decision, but was concerned solely with challenging the declaration in Article 1(1) of the contested decision that the scheme at issue was partially incompatible with the common market.

64 Case T-400/11, *Altadis v. Commission*. 
6. CONCLUSIONS

Clearly the case-law in this area, while complex, has afforded private entities with considerable scope for challenging the Commission’s decisions on aid through the EU Courts.

In particular, the ways in which Article 263(4) TFEU has recently been applied has provided opportunities for competitors to bring challenges to aid schemes. Such litigants have long faced great difficulties in proving their individual interest, with the task of showing that they were substantially affected by the grant of the aid often nigh impossible.

It remains to be seen whether the Court of Justice will uphold this new approach, and whether there will be expanded scope for applying Article 263(4) TFEU, final limb, to, for example, decisions on existing aid schemes (for which there has been no recovery by a Member State) and other decisions on aid that, on a case by case basis, do not provide for implementing measures.65

More generally, while the way in which the EU case-law on beneficiaries’ locus standi is developing appears fairly clear and consistent, the positive developments discussed above, providing competitors with greater scope to challenge aid schemes, will have to be accompanied by a relaxation of the conditions on proving individual interest for those cases that do not come within Article 263(4) TFEU, final limb (such as individual aid), not least because the pool of potential applicants is rather smaller for such cases than for aid schemes.

65 Consider, for example, a negative decision challenged by a potential beneficiary of a notified aid scheme or in any case a negative decision appealed by the beneficiary of an illegal aid scheme whose specific nature does not provide for national implementing measures.
7. BIBLIOGRAPHIC REFERENCES


Creve, Locus Standi Requirements for Annulment Actions by Competitors: the Resurfacing 'Unique Position Test' Ought to Be Dissarded, in European State Aid Law Quarterly, 2014, 233

Lever, EU State Aid Law – Not a Pretty Sight, in ESALQ, 1/2013, 6


Hancher, Ottervanger, Slot (Eds), EU State Aid, London, 2012

Jürimäe, Standing in State Aid Cases: What’s the State of Play?, in European State Aid Law Quarterly, 2010, 303

Mederer, Pesaresi, Van Hoof, EU Competition Law – State Aid (Volume IV), Leuven, 2008

Meij, Standing in Direct Actions in the EU Courts After Lisbon, in Marjoelein van Roosmalen et al. (eds), Fundamental Rights and Principles: Liber Amicorum Pieter van Dijk, Intersentia, 2013, 141.


Keppenne, State Aid Litigation before the Community Courts, in Ortiz Blanco, L. EC Competition Procedure, Oxford, 2006

O’Higgins, Overview of the Jurisprudence in State Aid Cases: Substance and Procedure – an Update in European State Aid Law Quarterly, 2011, 601

Peytz, Mygind, Direct actions in State Aid Cases-Tightropes and Legal Protection?, European State Aid Quarterly, 2010, 2, 331

Rossi, Procedura in tema di aiuti, Frignani, Bariatti (Eds), in Disciplina della concorrenza nella UE, Milan, 2012


Santa Maria A., European Economic Law, Alphen aan den Rijn, 2014

Santa Maria (ed.) Competition and State Aid – Analysis of the EU Practice, Kluwer Law International, June 2015


Tizzano, La tutela dei privati nei confronti degli Stati membri dell’Unione europea, in Foro it., 1995, IV, 21

Tizzano (ed.), Trattati dell’Unione europea, Milan, 2014

Vesterdorf, Nielsen, State Aid Law of the European Union, 2008