Market and Competition Law Review / VOLUME VIII / No. 1 / APRIL 2024

"Interested parties" versus unlawful State aid. State of play in CJEU's caselaw*

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ABSTRACT: In case of unlawful State aid, Art. 24(2) of Regulation 2015/1589 guarantees the possibility to submit a complaint to "any interested party". The preamble to Regulation 2015/1589 even encourages the submission of such claims. Interested parties are defined by Art. 1(h) of this Regulation as "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". The fact that an entity belongs to one of the categories indicated in this provision (e.g., beneficiary or trade associations) does not determine its status of interested party – a key factor is proving that the interests of a particular entity have been affected by the (potentially) unlawful aid. The concept has been developed in case law. Among many detailed issues in judgements delivered either on the basis of Regulation 2015/1589 or the preceding Regulation 659/1999, the CJEU has discussed conditions under which a status of interested party could be attributed to undertakings in no direct competition with a recipient of State aid. Special attention is drawn to a beneficiary of State aid as a potential "interested party" – this category of entities is mentioned in Art. 1(h) of Regulation 2015/1589, but a form that needs to be used in order to submit a complaint does not list a beneficiary as a subject entitled to submitting a complaint. The article presents a review of CJEU cases in this regard, and aims at defining the current state of interpretation of "interested party" that opens a gate for particular entities to submit a complaint.

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* Date of Reception: 22 December 2023. Date of Acceptance: 12 February 2024.
DOI: https://doi.org/10.34632/mclawreview.2024.16068.
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KEYWORDS: unlawful State aid; interested party; beneficiary of state aid; Regulation 2015/1589

1. Introduction

A complex system of procedural provisions for enforcing EU rules on granting State aid is currently contained in Regulation (EU) 2015/1589 of 13 July 2015, laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union[1]. The key objective of this Regulation is to increase legal certainty and to support the development of State aid policy "in a transparent environment" (Recital 3 Regulation 2015/1589). Certainty and transparency are especially welcome in proceedings regarding alleged unlawful State aid. The procedural framework should ensure that the Commission can obtain "all necessary information enabling it to take a decision and to restore immediately, where appropriate, undistorted competition" (Recital 24 Regulation 2015/1589). Information on unlawful aid can potentially be generated by various sources, among them complaints coming from different entities. Regulation 2015/1589 aims at safeguarding a proper quality of complaints that could set a preliminary examination on unlawful State aid in motion and make it completely efficient. To achieve this goal, Regulation 2015/1589 lays down the conditions that need to be fulfilled by a complainant to give an impetus to the investigation by the Commission. One can easily identify two basic conditions for lodging a successful complaint on the alleged unlawful State aid: the first condition refers to the status of a complainant as an 'interested party' in the meaning of Article 1(h) Regulation 2015/1589, and the second condition concerns the duty to complete a complaint form set out by the Commission in the implementing provision. Theoretically, it is rational to expect that these two conditions match to guarantee the certainty and transparency so generously mentioned by the Council in the preamble of Regulation 2015/1589. However, defining interested party in the light of the wording of Regulation 2015/1589, the content of the form of a complaint and, last but not least, CJEU's case law on this issue, analysed altogether, presents itself as a real challenge. Still, this challenge should be responded to if the monitoring and reviewing system for State aid rules is

[1] OJ L 248, 24.9.2015, pp. 9-29.

to be effective for the sake of sound and undistorted competition in the internal market[2].

This paper reflects on how this definition of interested party, specifically how a prerequisite of affected interests, has been interpreted in the CJEU's judgments in recent years. The problem of identification of "interested parties" is crucial also from a point of view of using State aid as a tool to enforce EU public policies that are currently extensively promoted by the European Commission, such as the European Green Deal, Making Markets Work for People, or the reindustrialization policy. Strategically oriented State aid requires effective control, and "interested parties" can bring "a better insight regarding the contested aid measure to conclude whether the latter is aligned with the Union's interests and policies"[3]. Any inconsistencies in interpreting the concept of "interested party" can lead to a structural problem, identified as a management deficit endangering the effectiveness of enforcing State aid control.

The article is organized as follows: it starts with an introductory part; subsequently, the system for monitoring State aid and the role of interested parties within the system are discussed. The further section focuses on a review of literature referring to the problem of complainants in State aid procedures. This section is followed by a review of the CJEU's case law concerning the interpretation of the concept of "interested party" in reference to four categories of subjects: competitors, trade associations, beneficiaries of aid, and public authorities. The outcomes of the literature and caselaw analysis are presented in the conclusions.

2. EU system for monitoring State aid

According to Article 108(1) TFEU, a key task regarding State aid imposed on the Commission is "keeping under constant review all systems of aid existing in those States". In this area, the Commission is obliged to cooperate with Member States. To fulfil this task, EU law on State aid equips the Commission with two instruments: the authorization (notification) procedure and *ex post* control. The first (basic) tool is based on the duty to notify

[2] On state aid law as competition law see Herwig C.H. Hofman, "State aid review in the multi-level system. Motivations for aid, why control it, and evolution of aid in the EU", in *State aid law of the European Union*, eds. Herwig C.H. Hofman and Claire Micheau (Oxford: Oxford University Press, 2016), 6-9, and Maria João Melícias, "Policy considerations on the interplay between State aid control and competition law", *Market and Competition Law Review* 1, no. 2 (2017): 179-193.

[3] Antonis Metaxas, "EU State aid control in a dynamic global environment: Time to rethink the interested party concept?", *European State Aid Law Quarterly* 21, no. 1 (2022): 43.

"of any plans to grant or alter aid" (Article 108(3) TFEU). To make the system effective, the EU introduces – in case of any doubts related to the compatibility of State aid with the internal market – a standstill obligation according to which the Member State shall not put its proposed measures into effect until the Commission completes the authorizing procedure with a final decision – the provision contained in Article 108 (3) *in fine* TFEU is supplemented in this regard with Article 3 of Regulation 2015/1589 ("Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid"). The standstill obligation is considered to produce a horizontal direct effect[4], so – even if the issue is left behind the interest of this paper – the caselaw in this regard may be useful for a proper definition of complainants within the administrative proceedings before the Commission.

The *ex post* control system is "a counterpart of the State aid decentralisation process and, as such, is a cornerstone of the current State aid control system. The application of State aid rules is being increasingly decentralised thanks to the significant use of the block exemption Regulations by the Member States"[5]. The legal framework for *ex post* control of existing State Aid is contained in Regulation 2015/1589, altogether with procedural rules concerning unlawful State aid and misuse of State aid. The *ex post* control is undertaken by the Commission *ex officio* or on the basis of complaints coming from interested parties. According to Article 24(2) of Regulation 2015/1589, "any interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid". Interested party is defined by Article 1(h) of Regulation 2015/1589 as "any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid". The non-exhaustive exemplary list of interested parties contained in Article 1(h) covers the beneficiary of the aid, competing undertakings and trade associations. Despite the alleged clearness of this definition, the status of interested party enabling an effective submission of a complaint is more complicated.

The problem starts with the terminology used in Article 108(2) TFEU and Regulation 2015/1589 to name a complainant. While the latter uses

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[4] Łukasz Stępkowski, "Horizontal direct effect of the standstill obligation under article 108(3), third sentence TFEU", *Dyskurs Prawniczy i Administracyjny* no. 4 (2021): 141-151.

[5] María Muñoz de Juan, "Monitoring of State aid. From ex ante to ex post control", *European State Aid Law Quarterly* 17, no. 4 (2018): 483.

the phrase 'interested party', Article 108(2) of the Treaty operates with a more descriptive term: 'parties concerned to submit their comments' (in French: '*les intéressés en demeure de présenter leurs observations*'). A systematic and functional interpretation of EU law, specifically in the context of the preamble to Regulation 2015/1589, requires a concise understanding of phrases used in Article 108(2) TFEU as 'interested parties' in the meaning provided by Regulation 2015/1589. But even if this problem is solved, there is also the question of the scope of the category of interested parties and variations of subjects belonging to this category. Moreover, Article 24(2), second sentence, of Regulation 2015/1589 requires from the interested party the due completion of a form (set out in the implementing regulation) and the provision of mandatory information requested therein. The form mentioned in Article 24(2) of Regulation 2015/1589 constitutes Annex IV to Regulation 794/2004[6] as amended by Regulation 372/2014[7]. Point 3 of the form for the submission of complaints concerning alleged unlawful State aid or misuse of State aid lists the following categories of complainants (by their status): competitors of the beneficiary or beneficiaries (a), trade associations representing the interests of competitors (b), non-governmental organizations (c), trade unions (d), and EU citizens (e). Potential complainants can also identify themselves as other (not mentioned in point 3 of the Annex) entities. The content of the form does not reflect the suggestion, included in a definition from Article 1(h), that a beneficiary of State aid can enjoy the status of interested party. Indeed, it can, because the form is open to add a new category of entities, but still the fact that beneficiaries are not mentioned as potential complainants in the complaint form is striking and it says a lot about problems with defining interested parties.

Article 1(h) of Regulation 2015/1589 not only appoints any "Member State, any person and undertaking or association of undertakings" as interested parties, but it also adds a prerequisite of "interests that might be affected by the granting of aid". The existence of this prerequisite seems to have resulted in an exemplary list of potential complainants mentioned

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[6] Commission Regulation (EC) No. 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 140, 30.4.2004, pp. 1-134.

[7] Commission Regulation (EU) No. 372/2014 of 9 April 2014 amending Regulation (EC) No. 794/2004 as regards the calculation of certain time limits, the handling of complaints, and the identification and protection of confidential information, OJ L 109, 12.4.2014, pp. 14-22.

in Article 1(h). This condition, even if it refers solely to the engagement in an administrative procedure before the Commission, bears some resemblance with the so-called *Plaumann* test[8], providing conditions for obtaining a *locus standi* to contest a legal measure on the basis of Article 263(4) TFEU. Under the *Plaumann* test, "the contested measure must affect the applicant's legal situation by directly imposing on him a prohibition, limitation or order of a particular action or by conferring on him a right. Exceptionally, the applicant is directly concerned if the act affects his economic interests in a qualified manner"[9]. The form for the submission of complaints concerning alleged unlawful State aid or misuse of State aid requires from complainants an explanation as to why and to what extent the alleged State aid affects their competitive positions. In case of inability to demonstrate the status of interested party (which, in practice, means bringing evidence for the influence of State aid, specifically if we take into account an open catalogue of interested parties), a submitted form is not registered as an official complaint but is, potentially, taken into consideration as general market information.

3. Complaints on unlawful State aid: literature review

Most papers and studies related to State aid in the EU focus generally on substantive State aid rules as a coherent part of competition law and policy[10] as well as targeting public support. As legislation on State aid is amended every few years, many studies are dedicated to the assessment of legislative proposals for new EU regulations. Regarding legal writings on State aid enforcement, much attention has been attracted by the role of competition in the process of State aid monitoring and control. In recent years, the number of papers on unlawful aid has been growing[11]; however, the problem of "interested parties" as potential complainants on unlawful State aid still seems to be under-researched. In the context of

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[8] Judgment of the Court of 15 July 1963, *Plaumann & Co. v. Commission of the European Economic Community*, 25/62, EU:C:1963:17.

[9] Łukasz Augustyniak, "The competence of the EC to review State aid measures", *Kontrola Państwowa* 1 (2023): 48.

[10] Among most recent publications (collective works) see, e.g., Leigh Hancher, Juan Jorge Piernas Lòpez (eds.), *Research handbook on European State aid law* (Cheltenham: Edward Elgar, 2021); Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds.), *EU state aid law. Emerging trends at the national and EU level* (Cheltenham: Edward Elgar, 2020).

[11] Cf Axel Cordewener, "Recovery of unlawful State aid", *Algemeen Fiscaal Tijdschrift* 70, no. 1 (2020): 34-41.

Regulation 1999/659[12], a paper by Massimo Merola and Leonardo Armati is worth mentioning, critically assessing the underrated position of claimants within the enforcement system of State aid rules[13]. The very sceptical attitude towards claimants' position has also been also expressed by Anduena Gjevouri, who criticized the Commission's reform of Regulation 1999/659[14] for attributing very limited procedural rights to third parties (the term third parties was used as a synonym for interested parties)[15]. This opinion on the limited competences of third parties is also shared by other authors: Francesco Mazzocchi[16], the latter and Edoardo Gambaro[17], Ana Pošćić[18] and Claire Micheau[19]. The thorough study of competitors (to beneficiaries of State aid) in the enforcement process of State aid rules was presented by Fernando Pastor-Merchante, who underlined that competitors' "power to trigger an investigation and force a decision on the merits of complaints" is "more than a gentle nudge"[20]. This author promotes a concept of greater participation of interested parties, namely competitors, in State aid procedures to overrule a bilateral (Commission-Member State) character of these procedures[21].

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[12] Council Regulation (EC) No. 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, pp. 1-9.

[13] Massimo Merola, Leonardo Armati, "Complainants' rights in State aid matters: Lost in modernisation?", *The Global Competition Law Centre Working Papers Series*, no. 1 (2013).

[14] Cf. Council Regulation (EU) No. 734/2013 of 22 July 2013 amending Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 204, 31.7.2013, pp. 15-22.

[15] Anduena Gjevouri, "Modernisation of EU State aid procedures: Are the rights of third parties more protected?", *Juridical Tribune* 5, no. 2 (2015): 58.

[16] Francesco Mazzocchi, "The procedure before the Commission", in *Competition and State aid: An analysis of the EU practice*, ed. Alberto Santa Maria (Kluwer Law International, Alphen aan den Rijn, 2015): 109.

[17] Francesco Mazzocchi and Edoardo Gambaro, "Private parties and State aid procedures: A critical analysis of the changes brought by Regulation 734/2013", *Common Market Law Review* 53, no. 2 (2016): 385.

[18] Ana Pošćić, "Procedural aspects of EU state aid law", in *Procedural aspects of EU Law*, eds. Dunja Duić, Tunijca Petrašević, EU and Comparative Law Issues and Series no. 1 (2017): 494.

[19] Claire Micheau, "Control of State aid: A policy specific area of EU administrative law", in *Specialized administrative law of the European Union. A sectoral review*, eds. Herwig C. Hofmann, Gerard C. Rowe, Alexander H. Türk (Oxford: Oxford University Press, 2018): 460.

[20] Fernando Pastor-Merchante, "The protection of competitors under State aid law", *European State Aid Law Quarterly* 15, no. 4 (2016): 536.

[21] Fernando Pastor-Merchante, *The role of the competitors in the enforcement of State aid law* (Oxford and Portland, Oregon: Hart Publishing, 2017): 46-48.

While summing up the CJEU's case law in 2019, Pèter Staviczky claimed that "Apparently and at least the growing number of judgments from the General Court annulling the Commission's decisions for not opening formal investigations suggests, the Courts give a helping hand for third parties to effectively protect their interests against positive Commission decisions adopted without formal investigation procedures"[22].

The growing tendency in legal research is also locating a problem of interested parties in the broader perspectives of EU policies, mainly the European Green Deal and climate/environmental policy. Special attention should be given to articles that focus largely on the need for a broad interpretation of "interested party" in the context of contesting Commission's State aid decisions because of breaches of environmental law. The most recent papers refer to the recommendation of the Aarhus Convention Compliance Committee, which in March 2021 called the Commission to amend its laws and practices to ensure that Commission State aid decisions possibly breaking EU environmental law would be subject to internal or judicial review, in accordance with Article 9(3) and 9(4) of the Aarhus Convention. Juliette Dealrue and Sebastian D. Bechtel noticed that even if a definition of "interested party" in Article 1(h) Regulation 2015/1589 "is in principle phrased in a broad and open manner (…), the Commission regularly denies requests from environmental NGOs on this basis stating that they are not 'interested parties' for the purpose of the Regulation, for their market position not being affected by the grant of aid. The Commission nevertheless suggested, in the course of the communication before the Aarhus Convention Compliance Committee (…), that environmental NGOs could be considered interested parties, and their complaints admissible, if they allege breaches of environmental law by the beneficiary of aid"[23]. The environmental context has also brought other authors, such as Antonis Metaxas, to reflect on the necessity to broaden the concept of interested parties so that non-market entities, e.g., civil society organizations, obtain "'a locus standi' in EU state aid control administrative procedure"[24]. Alistair McGlone speaks for broadening the concept of

[22] Pèter Staviczky, "What will the EU Courts' recent judgments annulling Commission's State aid Decisions bring to Member States?", *European State Aid Law Quarterly* 18, no. 3 (2019): 296.

[23] Juliette Dealrue and Sebastian D. Bechtel, "Access to justice in State aid: How recent legal developments are opening ways to challenge Commission State aid decisions that may breach EU environmental law", *ERA Forum*, no. 22 (2021): 262.

[24] Metaxas, "EU State aid control", 43.

interested parties from Article 1(h) Regulation 2015/1589 to "the members of the public"[25].

4. Interested parties: Case law review

In this section, the CJEU's position upon selected categories of entities – potential complainants to the Commission – is scrutinized. Even if the list of interested parties in Article 1(h) seems to be sufficiently clear, case law brings a new light to some categories of complainants. The CJEU's statements have in some cases chosen a direction slightly different from the one presented by the Commission in Regulation 2015/1589.

4.1. Competing undertakings

Certainly, competing undertakings are listed in Article 1(h) of Regulation 2015/1589 among the examples of entities that may be considered as interested parties. The provision does not make any difference between direct and indirect competitors, but it can be assumed that a direct competitor may therefore be considered an interested party within the meaning of Article 1(h) of Regulation 2015/1589. This understanding has been widely confirmed by CJEU case law (e.g., a judgment in case C-322/09 P *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB*[26]). However, the Court has developed prerequisites for a competitor to get the status of interested party. In paragraph 54 of its judgment in case T-79/16 *Vereniging Gelijkberechtiging Grondbezitters and Others*[27], the GC specified that to be regarded as an interested party, the applicant must, first, show that it is in a competitive relationship with the beneficiaries of aid and, secondly, prove that the aid is likely to have a specific effect on its situation, distorting the competitive relationship in question. The relevance of this position was also confirmed by the CJEU in its appeal judgment in case C-817/18 P *Vereniging Gelijkberechtiging Grondbezitters and Others*[28]. It means that the mere fact of being in a competitive relationship does not by itself determine the status of interested party. A direct competitor must furthermore

[25] Alistair McGlone, *EU State Aid decisions and access to justice*, Policy report. Brussels School of Governance, (June 2022): 58.

[26] Judgment of 10 November 2010, *NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB v. European Commission*, C-322/09 P, EU:C:2010:701.

[27] Judgment of 15 October 2018, *Vereniging Gelijkberechtiging Grondbezitters and Others v. European Commission*, T-79/16, EU:T:2018:680.

[28] Judgment of 3 September 2020, *Vereniging Gelijkberechtiging Grondbezitters and Others v. European Commission*, C-817/18 P, EU:C:2020:637.

demonstrate that the aid infringes its interests by distorting a competitive relationship.

The competitive relationship does not have to relate to the entire scope of economic activity of the beneficiary of aid and its competitor. In its judgment in case T-577/20 *Ryanair*, the GC held that a competitor was entitled to bring a complaint before the Commission, even though there was a limited competitive relationship between the complainant and the beneficiary of aid. The GC explained that only certain air routes were operated by both the complainant and the beneficiary of aid. The other air routes operated by these two entities did not overlap. Notwithstanding, the GC found that there was a competitive relationship justifying the complainant to be considered an interested party for reasons of Article 24(2) of Regulation 2015/1589.

Article 1 (h) of Regulation 2015/1589 does not explicitly determine whether a potential or indirect competitor is also entitled to lodge a complaint with the Commission. However, the admissibility of an action by a potential competitor has already been assessed by the CJEU. In its judgment in case T-167/19 *Tempus Energy*[29], the GC explained that the use of the expression 'in particular' establishes that that provision contains merely a non-exhaustive list of persons that could be categorized as "interested parties", with the result that the term covers an indeterminate group of persons. In support of this position, the GC referred to previous judgments in the following cases: 323/82 *SA Intermills*[30], C-83/09 P *Commission v. Kronoply*[31], C-505/18 *FranceAgriMer*[32]. In its judgment in case T-167/19 *Tempus Energy* the GC further pointed out that the EU Courts have interpreted "interested party" broadly. Thus, it is apparent from the case law that Article 1(h) of Regulation 2015/1589 does not rule out the possibility that an undertaking not being a direct competitor of the beneficiary of the aid can be considered an interested party, provided that it demonstrates that its interests could be adversely affected by the granting of the aid, and that, for that purpose, it is sufficient that that undertaking establishes, to

[29] Judgment of 6 October 2021, *Tempus Energy Germany GmbH i T Energy Sweden AB v. European Commission*, T-167/19, EU:T:2021:645.

[30] Judgment of 14 November 1984, *SA Intermills v. Commission of the European Communities*, 323/82, EU:C:1984:345, paragraph 16.

[31] Judgment of 24 May 2011, *European Commission v. Kronoply GmbH & Co. KG and Kronotex GmbH & Co. KG.*, C-83/09 P, EU:C:2011:341, paragraph 63.

[32] Judgment of 13 June 2019, *Copebi SCA v. Établissement national des produits de l'agriculture et de la mer (FranceAgriMer)*, C-505/18, EU:C:2019:500, paragraph 34.

the requisite legal standard, that the aid is likely to have a specific effect on its situation. The GC also referred to the CJEU's judgment in case C-307/18 *Generics*[33], which clarified that the assessment of whether there is potential competition must be carried out with regard to the structure of the market and the economic and legal context in which it operates. In the latter case, the CJEU assessed under what circumstances a manufacturer of generic medicines may be a potential competitor to a manufacturer of originator medicines which previously had exclusive marketing rights for its medicine due to intellectual property rights. Consequently, in its judgment in case T-167/19 *Tempus Energy*, the GC held that a potential competitor may be an interested party within the meaning of Article 1(h) of Regulation 2015/1589 insofar as it is apparent from the circumstances that it has made actual plans to enter the market in which the beneficiary has received aid.

The CJEU also considered whether an interested party could be an entity that is not a direct competitor of the beneficiary of aid, but whose interests may have been affected by the purchase of the same products. In paragraph 64 of its judgment in case C-83/09 P *Commission v. Kronoply*, the CJ clarified that Article 1(h) of Regulation 2015/1589 did not rule out the possibility that an undertaking which was not a direct competitor of the beneficiary of the aid, but which required the same raw material for its production process, could be categorised as interested party, provided that that undertaking demonstrated that its interests could be adversely affected by the granting of the aid. In that particular case, the beneficiary of aid and the complainant were not competitors on the same product markets but used the same raw materials (industrial wood) in their production process, and therefore, the CJEU held that they were in a competitive relationship as rival purchasers of wood.

In summary, it follows from CJEU case law that a direct competitor, as well as a potential and indirect competitor, may be interested parties within the meaning of Article 1(h) of Regulation 2015/1589, and those entities could be entitled to lodge a complaint with the Commission regarding an aid incompatible with the internal market. However, in each case, such an entity must demonstrate that its interests may be affected by the granting of State aid.

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[33] Judgment of 30 January 2020, *Generics (UK) Ltd and others v. Competition and Markets Authority*, C-307/18, EU:C:2020:52.

4.2. Trade associations

The definition of interested party set out in Article 1(h) of Regulation 2015/1589 lists trade associations among other examples of entities whose interests may be affected by the granting of aid. The CJEU has attempted to establish what entities have the status of trade associations and what conditions should be met to consider them as interested parties entitled to bring a complaint to the Commission under Article 24(2) of Regulation 2015/1589.

In this regard, one of the CJ's cases (C-319/07 P *3F*[34]) was particularly interesting. The judgment in Case C-319/07 P *3F* was handed down as the result of an appeal against a Commission decision that had been issued within the framework of a notification procedure. Nevertheless, the CJEU's conclusions are also relevant for determining the status of interested party in order to establish which entity is entitled to bring an action against the granting of unlawful State aid. The CJEU examined whether a trade union associating sailors could be an interested party. In this case, the aid was addressed to sailors from different countries (including countries outside the European Union) who belonged to different trade unions. The trade union which challenged the Commission's decision declaring that the aid was compatible with the internal market claimed that the granting of aid to sailors associated in other unions deteriorated its position in relation to those other trade unions. The CJEU held that the applicant must always show to the requisite legal standard that its interests might be affected by the granting of aid, which can be done by showing that the applicant is in fact in a competitive position in relation to other trade unions operating in the same market. The CJEU therefore approved the view that a trade union could be considered an interested party. However, the trade union is required to demonstrate that the aid affects its competitive position in relation to other trade unions.

This position was reiterated in the GC's judgment in case T-322/22 *Unsa Energie*[35]. The GC explained that, in order to qualify a trade union as an interested party, it is not sufficient to take into account the role and mission

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[34] Judgment of 9 July 2009, *3F v. Commission of the European Communities*, C-319/07 P, EU:C:2009:435.

[35] Judgment of 7 June 2023, *UNSA Énergie v. Commission*, T-322/22, EU:T:2023:307. Cf. Phedon Nicolaides, "Regulatory measures are not State aid & trade unions are not "interested party", 20 July 2023, Lexxion State Aid Blog, https://www.lexxion.eu/stateaidpost/regulatory-measures-are-not-state-aid-trade-unions-are-not-interested-party/.

of a trade union *in abstracto*. In addition, an assessment of the specific situation of the trade union is required. In that particular case, the GC found that a trade union must provide evidence to demonstrate, to the requisite legal standard, the possible impact of the disputed measures on its interests and those of its members within the framework of collective bargaining. Consequently, the GC examined whether the aid mechanism affecting the situation of an undertaking operating in an energy market had an impact on worsening the employment conditions of workers belonging to the trade union that lodged the complaint with the Commission. In that case, the GC held that the trade union did not have the status of interested party, as the risk of worsening employment conditions did not arise from the contested measures themselves, but from one of several choices made by the employer to remedy its worsening financial situation.

It should be added that the GC also recognised that the granting of aid may affect the interests, not necessarily of an economic nature, of an association pursuing an objective of general interest. In such a case, the association may also be classified as an interested party. Such conclusions were reached by the CJEU in Case C-647/19 P *Ja zum Nürburgring*[36]. The CJEU held that the interested party was an association that defended the interests of German motor sports in relation specifically to the Nürburgring racetrack. In the CJ's view, the association's central objective was to ensure the operation of that racetrack under economic conditions oriented towards the public interest so as to allow access to it for amateur sporting. The beneficiary of aid pursued a concept aimed at maximizing profits, which, according to the CJEU, was at odds with the appellant's objectives.

Another very interesting case concerned a complaint brought by a Spanish sports association running a football club. The complaint was lodged in relation to alleged aid granted to a football club from another Member State. The aid was to be used to employ a player who had previously played for the football club run by the complainant. In its judgment in case T-538/21 *PBL and WA*[37], the GC reiterated that Article 1(h) of Regulation 2015/1589 did not rule out the possibility for a trade union to be categorised as interested party, provided that it demonstrates, to the

[36] Judgment of 2 September 2021, *Ja zum Nürburgring eV v. European Commission*, C-647/19 P, EU:C:2021:666. Cf Irene Moreno-Tapia and Victoria Rivas Santiago, "Nürburgring: Limited scope to challenge the competitive purchase of assets that have received aid", *European State Aid Law Quarterly* 19, no. 4 (2020): 220-224.

[37] Judgment of 8 February 2023, *PBL and WA v. Commission*, T-538/21, EU:T:2023:53.

requisite legal standard, that its interests could be adversely affected by the granting of aid. With regard to this argument, the GC recalled that assigning the status of interested party to any person with a purely general or indirect interest in relation to State measures would constitute an interpretation that is manifestly incompatible with the provisions of Article 108(2) TFEU. Consequently, the GC found that the alleged infringement did not affect the applicant personally, but the public interest in general, which was not sufficient to consider the applicant an interested party.

In summary, trade associations may be considered interested parties entitled to lodge a complaint with the Commission regarding aid incompatible with the internal market. However, in each case, they must demonstrate that the aid affects their interests. It is important to note that in the case of trade associations, the GC recognises that these interests do not have to be exclusively economic in nature. When assessing whether the interests of a trade association have been affected, the GC also takes into account the general objectives pursued by the trade association. However, when lodging a complaint, a trade association cannot rely solely on the public interest. In each case, the aid granted must affect the interest of the trade association.

4.3. Beneficiaries of aid

Next, it should be assessed whether a complaint to the Commission can be lodged by the beneficiary of aid.

At first glance, there seems to be no reason for the beneficiary of aid to claim that the aid has been granted unlawfully. Lodging a complaint to that effect would appear to go against the beneficiary's interest. However, it turns out that there are certain situations in which the beneficiary of aid could be interested in lodging a complaint with the Commission.

If the State aid has not been notified previously to the Commission, the beneficiary of aid may be interested in obtaining an official decision from the European Commission declaring that the State aid received is compatible with the internal market. The possibility of issuing such a decision derives from Article 15(1) of Regulation 2015/1589. This means that a complaint leading to the examination of possible unlawful aid may ultimately result in a Commission decision confirming that the measure is compatible with the internal market.

Obtaining such a decision may be important given the CJEU's position on the obligation to repay unlawful aid. The CJEU confirmed that Member

States may waive their obligation to recover unlawfully granted aid (i.e., granted without prior notification) if the Commission finds that the aid is compatible with the internal market[38].

In its judgment in case C-199/06 *CELF*[39], the CJEU ruled that "The last sentence of Article 88(3) EC is to be interpreted as meaning that the national court is not bound to order the recovery of aid implemented contrary to that provision, where the Commission has adopted a final decision declaring that aid to be compatible with the common market, within the meaning of Article 87 EC". In the same judgment, the CJEU indicated that "Applying Community law, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness. Within the framework of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State's right to reimplement it, subsequently. It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid".

The above position was confirmed in subsequent CJEU judgments: C-445/19 *Viasat Broadcasting*[40] and C-470/20 *Veejaam and Espo*[41]. The CJEU explained that "as regards the recovery of unlawful aid, premature payment of unnotified aid does not contradict the aim of ensuring that incompatible aid is never implemented, upon which Article 108(3) TFEU is based, where the Commission adopts a final decision finding that aid to be compatible with the internal market. Therefore, the national courts are not bound to order recovery of that aid" (para. 59 of the judgment in Case C-470/20, similarly para. 25 of the judgment in Case C-445/19).

Clarifying why it is required to recover interest accrued for the period when the State aid was unlawful, the CJEU pointed out that "obligation, which is incumbent on the national courts, stems from the fact that the implementation of aid in breach of Article 108(3) TFEU gives the aid recipient an undue advantage consisting, first, in the non-payment of the interest which it would have paid on the amount in question of the compatible aid, had it had to borrow that amount on the market pending

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[38] Cf Pieter Van Cleynenbreugel, "Recovering unlawful advantages in the context of EU State aid ruling investigations", *Market and Competition Law Review* 1, no. 1 (2017): 24-30.

[39] Judgment of 12 February 2008, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)*, C-199/06, EU:C:2008:79.

[40] Judgment of 24 November 2020, *Viasat Broadcasting UK Ltd v. TV2/Danmark A/S and Kingdom of Denmark*, C-445/19, EU:C:2020:952.

[41] Judgment of 15 December 2022, *Veejaam and Espo*, C-470/20, EU:C:2022:981.

the Commission's final decision, and, secondly, in the improvement of its competitive position as against the other operators in the market while the aid concerned is unlawful. The unlawfulness of that aid will, first, expose those operators to the risk, in the result unrealised, of the implementation of incompatible aid, and, secondly, make them suffer, earlier than they would have had to, in competition terms, the effects of compatible aid" (para. 60 of the judgment in Case C-470/20, similarly para. 27 of the judgment in Case C-445/19).

The obligation to repay interest only is a much lighter burden than the obligation to repay the entire amount of the State aid with interest. Therefore, it may be favourable for the beneficiary of aid to obtain a Commission decision declaring that the State aid is compatible with the internal market, in particular, if national courts or administrative authorities have taken action to recover unlawful aid.

Pursuant to Article 24(2) of Regulation 2015/1589, a complaint may be lodged with the Commission by an interested party. The beneficiaries of aid are listed in Article 1(h) of Regulation 2015/1589 among the entities that may be defined as interested parties. Therefore, the definition of interested party, on its own, seems to indicate that a beneficiary can be entitled to submit a complaint to the Commission.

However, when assessing a beneficiary's right to submit a complaint to the Commission, the CJEU held that beneficiaries are not entitled to request the assessment of the compatibility of the State aid with the internal market.

The facts of the case T-678/20 *Solar Electric*[42] were the following. The beneficiary of aid complained to the Commission because a national court ruled that national measures implementing a mechanism for the compulsory purchase of electricity at a price above the market level constituted unlawful State aid, as they had not been notified to the European Commission in accordance with Article 108(3) TFEU. Furthermore, the Commission confirmed in a letter to the beneficiary of aid (in fact, in a letter to several companies belonging to the same capital group) that the State aid had not been notified.

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[42] Judgment of 10 November 2021, *Solar Electric Holding and Others v. European Commission*, T-678/20, EU:T:2021:780.

In its judgment in case T-678/20 *Solar Electric*[43], the GC explained why the beneficiary of aid was not entitled to bring an action under Article 24(2) of Regulation 2015/1589. The GC clarified that there is no individual right to the granting of State aid. Accordingly, the beneficiary of aid may not take over a Member State's competence and, on its own initiative, submit a notification on behalf of that Member State to obtain a decision authorising the implementation of non-notified aid. Further, referring to the complaint mechanism before the Commission, the GC stressed that, according to the first sentence of Article 24(2) of Regulation 2015/1589, the purpose of that mechanism is to inform the Commission of any alleged unlawful aid. According to the GC, the fact that the complaint mechanism is designed to identify aid that is incompatible with the internal market also stems from point 8 of the complaint form referred to in Article 24(2) of Regulation 2015/1589 and annexed to Commission Regulation (EC) No. 794/2004, which requires the complainant to indicate "the reasons why [in its view] the alleged aid is not compatible with the internal market". The GC also referred to paragraphs 3 and 7 of the complaint form in support of its position. The GC pointed out that the complainant is required to explain how, in its opinion, the alleged State aid provides an economic advantage for the beneficiary or beneficiaries.

According to the GC, the above considerations and requirements lead to the conclusion that the scope of Article 24(2) of Regulation 2015/1589 is limited to complaints made against unlawful aid which complainants consider to be incompatible with the internal market. Consequently, the GC is of the view that the regulation does not cover complaints aimed at declaring an aid compatible with the internal market and seeking the Commission's *ex post* approval. The GC held, therefore, that the beneficiary of unlawful aid could not rely on the first sentence of Article 24(2) of Regulation 2015/1589 to claim the right to lodge a complaint with the Commission. The same position was upheld in case T-623/20 *Sun West and others*[44] – the GC repeated that "no procedure for 'quasi notification'"[45].

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[43] See a case comment by Phedon Nicolaides, "An unusual case of a 'self-notification' of State aid by an aid beneficiary", 21 November 2021, *Lexxion State Aid Blog*, https://www.lexxion.eu/stateaidpost/an-unusual-case-of-a-self-notification-of-state-aid-by-an-aid-beneficiary/.

[44] Judgment of 8 December 2021, *Sun West and Others v. European Commission*, T-623/20, EU:T:2021:869.

[45] See a case comment by Phedon Nicolaides, "Ilegal aid cannot be regularised a posteriori", 28 December 2021, *Lexxion State Aid Blog*, https://www.lexxion.eu/en/stateaidpost/illegal-aid-cannot-be-regularised-a-posteriori/.

For the same reasons, the GC held that entities holding an economic interest in a recipient of State aid company, forming a single economic unit with the beneficiary of State aid, could not lodge a complaint with the Commission.

4.4. Aid granting authorities

It should also be considered whether the authorities of a Member State can bring a complaint to the Commission claiming the aid granted by that Member State to be unlawful.

The authorities of a Member State may contemplate bringing an action where aid has been granted without notification to the Commission and the laws of that Member State do not provide the possibility of requiring the repayment of unlawful aid. When bringing a complaint, Member State authorities may act on behalf of the Member State. This means that a complaint may be lodged by an authority which is competent to contact the Commission on State aid issues under domestic law. However, it is also possible for a complaint to be lodged by an authority which is not competent under national law to cooperate with the Commission. What is more, an authority may envisage lodging a complaint with the Commission against the official position of the Member State. Indeed, other national authorities or courts could take the view that given measures did not constitute State aid or that EU rules excluded the obligation to notify it (e.g., Regulation 651/2014 declaring certain types of aid as compatible with the internal market and consequently exempting such measures from the notification requirement).

So far, the CJEU has never ruled on a case in which a complaint regarding unlawful aid has been brought by the authorities of the Member State which granted that aid. For this reason, it is not possible to refer to the case law of the CJEU to determine whether Member State authorities can lodge a complaint with the Commission under Article 24(2) of Regulation 2015/1589.

When assessing whether Member State authorities may bring a complaint before the Commission, it is necessary to take into account the definition of interested party set out in Article 1(h) of Regulation 2015/1589. It results from the wording of that provision that a Member State may be considered as an interested party. It appears, however, that a Member State authority will not be treated as a Member State itself if it acts contrary to the official position of that Member State. In other words, if an authority

of a Member State lodges a complaint which the Member State does not support, the action of the authority before the Commission will not be deemed as that of the Member State. In such a situation, an authority of a Member State will not have the status of interested party within the meaning of Article 1(h) of Regulation 2015/1589. This is because the authority will not qualify as a Member State or any other entity listed in that provision. Member State authorities are not persons, undertakings, or associations of undertakings whose interests might be affected by the granting of aid. It can therefore be accepted that authorities of a Member State which do not act as a Member State are not entitled to lodge a complaint with the Commission under Article 24(2) of Regulation 2015/1589.

Next, it is necessary to consider whether a Member State or authorities acting on its behalf can effectively bring a complaint before the Commission regarding the aid granted by that Member State.

The definition of interested party set out in Article 1(h) of Regulation 2015/1589 lists Member States among the entities that can claim the status of interested party. It must be borne in mind, however, that the concept of interested party is defined in Article 1(h) of Regulation 2015/1589 not only for the purposes of applying Article 24(1) of Regulation 2015/1589 (i.e., identifying entities that may submit comments if a formal investigation procedure is initiated), but also for the purposes of applying Article 24(2) of Regulation 2015/1589 (i.e., identifying entities that may lodge a complaint with the Commission about unlawful aid). It should be recalled that when assessing whether a beneficiary of aid, i.e., an entity listed in the definition of interested party, has the right to lodge a complaint with the Commission, the GC, in case T-678/20 *Solar Electric*, found that the objectives of the provisions on the right to submit a complaint must be taken into account. This led the General Court to the conclusion that a beneficiary of aid did not have the right to file a complaint before the Commission pursuant to Article 24(2) of Regulation 2015/1589.

The purpose of the rules on filing complaints before the Commission, and, more broadly, the purpose of State aid rules, are an important factor to take into consideration in the assessment of the right to submit a complaint to the Commission. The provisions of Article 108(3) and (4) TFEU and Article 109 TFEU are particularly relevant in this context. Article 108(3) TFEU requires Member States to inform the Commission of any plans to grant or alter aid. The provision in question also imposes an obligation on Member States to refrain from putting the proposed measures

into effect until the procedure before the Commission has been completed. Exemptions from the procedure to notify the proposed measures to the Commission may be provided by Council Regulations (Article 109 TFEU) or Commission Regulations (Article 108(4) TFEU). In such a case, the aid must meet all the requirements set out in the Council Regulations or Commission Regulations.

In its judgment in case C-349/17 *Eesti Pagaar*[46], the CJEU already ruled that Article 108(3) TFEU must be interpreted as requiring the national authority to recover, on its own initiative, aid granted pursuant to Regulation No. 800/2008 when it finds, subsequently, that the conditions laid down by that regulation were not satisfied. The cited judgment concerned aid exempted from the notification procedure by a specific EU regulation. It can be reasonably assumed that the same approach would be justified in the case of non-notified aid or aid granted in breach of other EU regulations providing notification exemptions. As S.T. Tveit noticed, regarding the case C-349/17 *Eesti Pagaar*: "In practice, the CJ's reasoning is likely to have significant consequences since it now makes it entirely clear that the Member States on their own initiative – without the Commission's oversight – can (and must) take steps to reclaim aid that they assess unlawful and contrary to the EU State aid rules"[47].

It must be underlined that, according to the settled case law of the CJEU, both the administrative authorities and the national courts called upon within the exercise of their respective jurisdiction to apply provisions of EU law are under the duty to give full effect to those provisions, if necessary refusing of their own motion to apply any conflicting provision of national law, and it is not necessary for that court to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means (para. 31 of the CJEU's judgment in case 103/88 *Fratelli Costanzo*[48], paras. 26 and 39 of the CJEU's judgment in case C-224/97

[46] Judgment of 5 March 2019, *Eesti Pagar AS v. Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, C-349/17, EU:C:2019:172.

[47] Svein Terje Tveit and Eesti Pagar, "A new boost to national recovery? Annotation on the judgment of the Court (Grand Chamber) of 5 March 2019 in Case C-349/17 *Eesti Pagar AS v. Ettevõtluse Arendamise Sihtasutus, Majandus- ja Kommunikatsiooniministeerium*", *European State Aid Law Quarterly* 18, no. 2 (2019): 189.

[48] Judgment of 22 June 1989, *Fratelli Costanzo SpA v. Comune di Milano*, 103/88, EU:C:1989:256.

Erich Ciola[49], para. 24 of the CJEU's judgment in case 106/77 *Simenthal*[50], para. 34 of the CJEU's judgment in case C-614/14 *Ognyanov*[51], para. 54 of the judgment in case C-628/15 BT Pension Scheme[52]). This implies that national authorities should take all possible measures to recover aid granted in breach of Article 108(3) TFEU. National rules cannot constitute an obstacle to these actions. If national rules prevent recovery, national authorities should refrain from applying them.

The consequence of this approach is that Member States have no reason to complain to the Commission about unlawful State aid. When Member State authorities find that State aid has been unlawfully granted, they should act on their own to recover it. Member State authorities should not seek help from the Commission to that effect. The Commission decision declaring the aid incompatible with the internal market is not required for Member State authorities to take measures necessary to recover unlawful aid.

The above leads to the conclusion that the Member State which granted the aid, or the authorities of that Member State are not interested parties entitled to lodge a complaint with the Commission under Article 24(2) of Regulation 2015/1589. Consequently, complaints filed by such entities should not be examined by the Commission.

5. Concluding remarks

CJEU judgments on the concept of interested parties shall be considered as clear and settled, even if most of the judgments discussed above originate from recent years. The position of the CJEU seems to be rather stiffened, specifically when compared to the literal meaning of Article 1(h) of Regulation 2015/1589: competitors and trade associations are considered interested parties for the sake of application of Article 24(2) Regulation 2015/1589 as listed in Article 1(h), whereas beneficiaries of aid as well as public authorities granting the aid cannot enjoy the status of interested parties. Even in case of entities admissible to lodge a complaint on unlawful State aid to the Commission, it is still necessary to prove that the

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[49] Judgment of 29 April 1999, *Erich Ciola v. Land Vorarlberg*, C-224/97, EU:C:1999:212

[50] Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 106/77, EU:C:1978:49.

[51] Judgment of 5 July 2016, *Criminal proceedings against Atanas Ognyanov*, C-614/14, EU:C:2016:514.

[52] Judgment of 14 September 2017, *The Trustees of the BT Pension Scheme v. Commissioners for Her Majesty's Revenue and Customs*, C-628/15, EU:C:2017:687.

alleged unlawful aid has a chance to influence the interests of the potential complainant. This condition can be seen as a real obstacle and practical difficulty, since even economists are not able to achieve a consensus on the impact of State aid on competitors and third parties.

The CJEU's approach to the concept of the interested party in the meaning of Regulation 2015/1589 cannot be characterized as "more complainant- and individuals-friendly stance in the case law"[53] as postulated by many legal scholars. A too broad interpretation of the term could jeopardize a concise interpretation of State aid law – as Carlo Maria Colombo notes, "application of state aid law raises complex issues of interpretation, a feature that can provide a breeding ground for instability and inconsistency of national behaviours" [54].

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[53] Pastor-Merchante, "The protection of competitors", 532.

[54] Carlo Maria Colombo, "State aid control in the modernisation era: Moving towards a differentiated, administrative integration?", *European Law Journal* 25, no. 3 (2019): 297.

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