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Who is an *interested party*?

Discussion of some recent EU case law developments

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# Overview of Content

- The notion of *interested party* – main sources
- Admissibility of third parties challenging decisions
- EU case law on the notion of *interested party*
  - *Kronoply* and *3F* cases
  - *Braesch* (under appeal)
  - *CAPA*
  - *Ja zum Nürburgring & NeXovation*

# The notion of *interested party* (or *party concerned*?) – main sources

- Article 108(2) TFEU
  - “[...] *notice to the parties concerned to submit their comments, [...]*”
- Case law
  - *Intermills*, 323/82; *Cook*, C-198/91; *Matra*, C-225/91; *Sytraval*, 367/95 P; *British Airways*, T-371/94 & T-394/94, etc.
  - Undetermined group of addressees (*Intermills*, paragraph 16)
  - Case law “was given expression” in Article 1(h) under the terms “interested parties” (*Kronofrance*, T-27/02, point 37): the status of ‘party concerned’ is not therefore restricted to undertakings that are substantially affected by the grant of aid
- Regulation 2015/1589
  - Article 1 (h): ‘*interested party*’ means 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.
  - Article 6.1: [...] *The decision shall call upon the Member State concerned and upon other interested parties to submit comments. [...]*
  - Article 12.1: [...] *The Commission shall examine without undue delay any complaint submitted by any interested party [...]*
  - Article 24: *Rights of interested parties* (comments, complaint, copy of decision)
- *Parties concerned* equal *interested parties* (see Recital 33 Regulation 2015/1589)

# Admissibility (State aid) - General principles

- *locus standi* for third parties (Article 263, indent 3 TFEU)
  - direct and individual concern
  - direct concern only if against a regulatory act which does not entail implementing measures (*Montessori*, C-622/16 P to C-624/16 P)
  - *Plaumann* (25/62) and *Cofaz* (169/84) conditions: “position on the market significantly affected by the aid”

# Admissibility – third parties other than a beneficiary (1)

- *Cook* (C-198/91) and *Matra* (C-225/91)
  - Distinction Articles 108(3) and 108(2) TFEU
  - “*Where, without initiating the procedure under Article [108](2), the Commission finds on the basis of Article [108](3) that an aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision by the Commission before the Court*” (*Cook*, paragraph 22; *Matra*, paragraph 17)

# Admissibility – third parties other than a beneficiary (2)

- Alternative of the preliminary ruling on validity
- *TWD*, C-188/92; *Georgsmarienhütte*, C-135/16
  - reference inadmissible if the third party (*in casu* a beneficiary) was manifestly admissible in challenging the decision directly (*contra: W. Rau*, 133/85-136/85)
- *Atzeni*, C-346/03 & C-529/03
  - aid schemes: applicant not manifestly admissible
- *Casa di Risparmio di Firenze*, C-222/04
  - reference admissible if *initiated* by the national court

# Recent case law on the “interested party”

- *Kronoply*, C-83/09 P
  - “*any interested party* [...] is directly and individually concerned by [...] [a decision not to raise objections]” (paragraph 47).
  - “Where an applicant seeks the annulment of a decision not to raise objections, it essentially contests the fact that the Commission adopted the decision in relation to the aid at issue without initiating the formal investigation procedure, alleging that the Commission thereby acted in breach of the applicant’s procedural rights. In order to have its action for annulment upheld, the applicant may invoke any plea to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should have raised doubts as to the compatibility of that measure with the common market” (paragraph 59).
  - “[...] an undertaking which is not a direct competitor of the beneficiary of the aid, but which requires the same raw material for its production process, can be categorised as an interested party, provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid. [...] that undertaking [must] establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation” (paragraphs 64-65).
    - Kronoply/Kronotex are, in relation to ZSG, rival purchasers of wood.
    - undertakings which are not competitors of the aid recipient on the market for the goods which they manufacture can be covered by the notion of ‘interested parties’
- *3F*, C-646/11 P confirming T-30/03 RENV and C-319/07 P
  - a trade union can be an interested party if it shows that its interests or those of its members might be affected by the granting of aid (it should show that the aid is likely to have a specific effect on its situation or that of the members it represents) (C-319/07 P, paragraph 33).
- *Vereniging tot Behoud van Natuurmonumenten in Nederland*, C 817/18 P
- *BPC Lux*, T-812/14 RENV

# One specific case: indirect competitor and role of negative externalities?

- *CAPA*, T-777/19 (15 Sept 2021)
  - offshore wind farms and fishermen
  - “phase I” decision contested
- Reminder principles of *Kronoply*
- Distinction with *Kronoply*
  - no competitive relationship fishermen / utilities
  - no risk of practical impact on the fishermen

## Other specific case (2): *Braesch*, T-161/18

- Burden-sharing measures in the context of the precautionary recapitalisation of Banca Monte dei Paschi di Siena
- Holders of bonds contested the decision
- Plea of inadmissibility rejected
  - aid likely to have a specific effect on the applicants' situation: 'interested parties'
  - interest:
    - annulment of the decision capable of benefiting them
  - standing:
    - beneficiaries of the procedural safeguards under Article 108(2) TFEU and Article 6(1) of Regulation 2015/1589
    - they should be able to challenge a decision not to raise objections
    - status of 'interested party' is sufficient to distinguish them individually, for the purposes of Article 263 TFEU
    - appropriate to examine, when assessing the substance of the action, all arguments made with respect to the existence of 'doubts', on account of which, if present, the Commission should have been required to open that procedure.
- Appeal pending: C-284/21 P
  - violation of Article 108(2) TFEU and Article 1(h) of Regulation 2015/1589 concerning "parties concerned" or "interested parties"

# Other specific cases (3):

*Ja zum Nürburgring, C-647/19P - NeXovation, C-665/19P*



- Unlawful and incompatible aid to public owners of the circuit and other infrastructures (hotels, leisure park) – aid recovery – bankruptcy
- Take over by private third acquirers
  - Economic continuity with previous aid recipient?
  - Tender procedure contains aid elements?

## Other specific cases (4):

*Ja zum Nürburgring, C-647/19P - NeXovation, C-665/19P*

- Ja zum Nürburgring eV
  - German racing association promoting the use and development of the circuit, supporting ADAC who made an offer for the Nürburgring (not selected)
- NeXovation
  - U.S. company was a tenderer, not selected
  - complainant to the Commission
- Capricorn Nürburgring GmbH
  - tenderer selected

## Other specific cases (5):

*Ja zum Nürburgring*, C-647/19P - *NeXovation*, C-665/19P

- 2014 Commission's decision
  - decision 1:
    - unlawful and incompatible aid to the public sellers
    - Capricorn not concerned by aid recovery
  - decision 2:
    - sale of Nürburgring to Capricorn is not aid
    - open, transparent and non-discriminatory tender procedure and market price
  - *Ja zum Nürburgring* and *NeXovation* contested the 2014 decision

# Other specific cases (5):

## *Ja zum Nürburgring*, C-647/19P - *NeXovation*, C-665/19P

- General Court's judgments of 19.6.2019
- T-373/15, *Ja Zum Nürburgring*
  - Decision 1: inadmissible
    - no substantial competitive position
    - no standing as trade association
    - no negotiation position in the formal investigation procedure
  - Decision 2: admissible
    - “Phase I decision”: *interested party*, admissible because it gathered relevant information on the assets for the Commission – dismissed on substance (no doubts)
- T-353/15, *NeXovation*
  - Decision 1: inadmissible
    - Participation in the procedure not sufficient; no market position affected by aid to sellers; possibility to acquire assets if not discriminated in tender not sufficient
  - Decision 2: see above

# Other specific cases (6):

## *Ja zum Nürburgring*, C-647/19P - *NeXovation*, C-665/19P

- Judgments on appeal
- *Ja Zum Nürburgring*
  - Decision 1: **appeal dismissed** (classic *Plaumann & Cofaz* test)
  - Decision 2: appeal **partially dismissed** (admissible but annulment on the substance of the judgment and of the decision: distortion of evidence by the General Court)
    - “Phase I decision”: *interested party*, admissible but NOT because it gathered relevant information (substitution of reasons)
    - an undertaking in competition with the beneficiary of an aid measure indisputably acts as an ‘interested party’
    - but, “*an undertaking that is not a competitor of the beneficiary of the aid at issue can be categorised as having that status, if it can demonstrate that its interests could be adversely affected by the grant of that aid*” (paragraph 57) – rejection of *3F*, *Kronoply* and *Montessori* cases raised by the Commission: the status of interested party does not presuppose a competitive relationship
    - ‘interested party’ because: association defending “*the interests of German motor sport in relation specifically to the Nürburgring race track, that its central objective is to ensure the operation of that race track under economic conditions oriented towards the public interest so as to allow access to it for sporting and other events*” (paragraph 66).
- *NeXovation*
  - see above

# Thank you for your attention!

**For any question and comment, please do not hesitate to contact me:**

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