Admissibility of annulment actions challenging Commission decisions

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1. CHALLENGEABLE ACTS

1.1. General overview

In order to be a challengeable act, the contested measure must not be purely preparatory or merely confirmatory but must bring about a distinct change in the legal position of the applicant.

Those measures which definitively determine the position of the Commission upon the conclusion of an administrative procedure, and which are intended to have binding legal effects capable of affecting the interests of the complainant, are open to challenge. By contrast, it is not possible to challenge intermediate measures whose purpose is to prepare for the final decision; those intermediate measures do not have those binding legal effects.

1.2. Information injunctions

An information injunction adopted pursuant to Article 12(3) of the Procedural Regulation is an attackable act:

Joined Cases C-463/10 P and C-475/10 P Deutsche Post and Germany v Commission EU:C:2011:656, paragraphs 55 to 63.

1.3. Decisions to open the formal investigation procedure

A Commission decision to open the formal investigation procedure is not challengeable for aid granted in the past and that is not in the course of execution:

Case T-517/12 Alro v Commission EU:T:2014:890, paragraphs 31 to 44.

A Commission decision to open the formal investigation procedure is a challengeable act if it classifies a measure in the course of implementation as new aid (as opposed to existing aid or as non-aid):

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The General Court considers that the fact that the Member State does not object during the preliminary investigation procedure to the measure at issue being classified as new aid is not relevant to determining if an opening decision is a challengeable act.


A Commission decision to open the formal investigation procedure that does not have such legal effects which are independent of the final decision is merely preparatory:


In Case T-421/07 *Deutsche Post v Commission* EU:T:2011:720 the General Court held that a Commission decision expressing further doubts about national measures that were already the object of an opening decision did not have in itself additional legal effects for the alleged beneficiary. That decision was therefore not an attackable act. On appeal, that ruling was overturned by the Court. The Court reversed the interpretation by the General Court of the earlier opening decision. As a result, on the facts in that specific case the national measures examined in the challenged opening decision were not covered by another opening decision:

Case C-77/12 *P Deutsche Post v Commission* EU:C:2013:695.

1.4. Exchanges between the Member State and Commission after a final decision

A purely confirmatory act (for example, a letter to the Member State confirming that recovery interest is to be compound) is not open to challenge:

Joined Cases T-529/08 to T-531/08 *Diputación Foral de Álava and others v Commission* EU:T:2010:139, paragraphs 31 to 37.

Similarly, where the Commission responds to an invitation by a Member State to confirm that aid intensity laid down in a previous final decision (which does not in fact comprise a notification of a new aid), the response can be considered a confirmatory act even where it points to consequences of non-compliance with the original final decision:


A letter fixing the interest rate for recovery of aid in an individual case has been held to be attackable:


1.5. Rejections of complaints by a letter of the Commission's services

Where the services of the Commission definitively reject a complaint regarding alleged illegal aid (and so implicitly refuse to open the formal investigation procedure), that letter reveals the existence of a Commission decision which constitutes an attackable act:

Case C-521/06 *Athinaïki Techniki v Commission* EU:C:2008:422, paragraphs 29 and following
The General Court will strike from the register a challenge to an implicit decision to reject a complaint where that decision is withdrawn by means of a final decision on the compatibility of the alleged aid:


If the services of the Commission take a provisional position on a complaint regarding alleged illegal aid, such a letter is not an attackable act:


### 1.6. Existing aid

Recommendations made for appropriate measures in relation to existing aid are not challengeable acts:


Commission measures accepting Member States' commitments in response to a proposal for appropriate measure are, by contrast, challengeable act:

Case T-354/05 *TF1 v Commission* EU:T:2009:66, paragraphs 73 and 76.

### 2. Legal interest in bringing proceedings

#### 2.1. General overview

An action for annulment is admissible only in so far as the applicant has an interest in the annulment of the contested measure. Such an interest presupposes that the annulment of the measure must of itself be capable of having legal consequences that the action must be likely, if successful, to procure an advantage for the party who brought it.

#### 2.2. Member States

Member States do not have to have to show an interest to act when they bring an action for annulment; for them, the issue is whether the attacked act produces legal effects and whether in addition whether those legal effects with regard to them:


2.3. **Non-privileged applicants: cases in which there may be no interest to act**

2.3.1. **General remarks**

An applicant who is not entitled to benefit from any aid that has been declared incompatible by the Commission's final decision clearly lacks any interest to act:


2.3.2. **Beneficiary of an aid declared compatible**

Equally, no interest exists where the applicant is the beneficiary of an aid which is declared entirely compatible with the internal market:

- Joined Cases T-15/12 and T-16/12 *Provincie Groningen and others v Commission* EU:T:2013:74, paragraphs 38, 53 and 55.

2.3.3. **Grantor of an aid declared compatible**

Applicants who grant the aid in question lack an interest to challenge the finding that aid is present, if that aid is declared compatible with the internal market:

- Joined Cases T-15/12 and T-16/12 *Provincie Groningen and others v Commission* EU:T:2013:74, paragraphs 44, 45, 46 and 47.

2.3.4. **Beneficiary attacking a commitment made in phase 1**

The General Court has ruled that an applicant who is a beneficiary has no interest where it challenges a commitment offered by a Member State in light of which the Commission decides not to open the formal investigation procedure:


The General Court applied that approach in Case T-203/10 *Stichting Woonpunt v Commission* EU:T:2011:766, paragraphs 58 to 62, in relation to a proposal for useful measures made in an existing aid procedure under Article 108(1) TFEU. On appeal, the
Court seems to have accepted that analysis in Case C-132/12 P *Stichting Woonpunt v Commission* EU:C:2014:100, paragraphs 26 to 32.

2.3.5. **Shareholder in a beneficiary**

Equally, where an applicant is a shareholder in a beneficiary (even if it is the beneficiary's main shareholder) it has no legal interest in bringing annulment proceedings against a decision requiring recovery of illegal and incompatible aid from that beneficiary:

- Case T-413/12 *Post Invest Europe v Commission* EU:T:2013:246, paragraphs 27 to 29.

2.3.6. **Firms financing a State aid measure found to be compatible**

Applicants who finance an aid measure that is declared compatible do not have an interest to challenge the decision if the Commission has separated the support measure from the parafiscal levy that finances it:


2.3.7. **Associations with a member who is the beneficiary of an aid measure where that member has itself brought annulment proceedings**

Associations may an interest to act on behalf of their members, and will have standing if one or more of those members is itself directly and individual concerned by the contested decision or is the addressee of that decision. However, where such a member has independently brought annulment proceedings, the association does not have an autonomous interest to act:


2.4. **Non-privileged applicants: cases in which there may be an interest to act**

2.4.1. **Beneficiary disputing the presence of aid/new aid**

An applicant who is the beneficiary of a measure it contends is existing aid has an interest in bringing proceedings to challenge the qualification of assistance as aid or as new aid.


It has such an interest even if it does not challenge the Commission's decision that the aid is compatible with the internal market:

An applicant who is the beneficiary of an aid found to be incompatible but for which no recovery is required has a legal interest to challenge the qualification of the assistance as aid, as well as to challenge the finding of incompatibility:


If the applicant is challenging a decision finding aid partially compatible and partially incompatible, it seems to have an interest to challenge the decision as a whole:


2.4.2. Competitor disputing commitments that make aid compatible

A complainant has an interest in challenging commitments accepted by the Commission as a basis for finding aid to its competitor to be compatible; following annulment, the Commission would have to have to assess whether it will appropriate to seek additional commitments:

Case T-354/05 TF 1 v Commission EU:T:2009:66, paragraphs 89 to 91

2.4.3. Beneficiary challenging an information injunction after the formal investigation procedure is closed

In a challenge to an information injunction which was decided after the formal investigation procedure closed, the General Court took a wide approach to interest to act. Unusually it linked the status of the disputed measure as a challengeable act with the interest to act:

Case T-570/08 RENV Deutsche Post v Commission EU:T:2013:589, paragraphs 42 to 48.

2.5. Procedural issues concerning the applicant's interest to act

For the Commission to show that an applicant (potential beneficiary challenging a negative decision) has no interest, it must adduce proof that annulment will not procure an advantage:

Case C-519/07 P Commission v Koninklijke FrieslandCampina EU:C:2009:556, paragraphs 66 and 67.

No procedural rule requires an applicant to set out all the evidence enabling the admissibility of its action to be established at the stage of application. An applicant can raise new evidence on its interest to act in response to a plea of inadmissibility:
Events after the annulment proceedings have been started can affect whether there is an interest to act (in contrast with the question of whether the applicant is individually concerned). The interest to act must endure throughout the proceedings and it is not sufficient that it was present when the action was started:


3. **STANDING: REGULATORY ACTS WHICH DO NOT ENTAIL IMPLEMENTING MEASURES**

In light of Case C-50/00 *Unión de Pequeños Agricultores v Council* EU:C:2002:462, the Treaty of Lisbon modified the fourth paragraph of Article 263 TFEU. It added a third limb to that provision (in addition to existing limbs that give standing to addressees of challenged acts and to applicants who are directly and individually concerned by those acts). Under that new third limb, there is no need to show "individual concern" for challenges to regulatory acts which do not entail implementing measures.

*per* Kreuschitz: "This amendment only covers the lacuna [identified in that case-law] and will thus have no impact on applications for the annulment of State aid decisions of the Commission", in *EC State Aid Law/Le droit des aides d'Etat dans le CE*, Kluwer (2008), p. 378.

The General Court has ruled a Commission decision declaring an aid scheme compatible with the internal market to be a regulatory act because, although the beneficiaries of the aid were identified with precision (not on the basis of abstract criteria or envisaged in the abstract), the financing of the aid (which was an integral part of the aid measure) applied to situations defined in the abstract which were determined objectively:

Case T-238/14 *EGBA and RGA v Commission* EU:T:2016:259, paragraphs 33 to 36.

3.1. **Negative State aid decisions which order recovery**

Such decisions involve implementing measures, such as recovery measures and measures rejecting applications for the advantage which had previously been available under national law.

Case T-228/10 *Telefónica v Commission* EU:T:2012:140, paragraphs 43 and 44.

3.2. **Decisions declaring a State aid scheme incompatible with the internal market (without recovery)**

Such decisions also involve implementing measures:

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2 The same is true for a challenge to the standing of the applicants: see Case T-198/09 *UOP v Commission* EU:T:2013:105, paragraphs 32 and 33, and Case T-238/14 *EGBA and RGA v Commission* EU:T:2016:259, paragraph 53.
3.3. Decisions declaring an existing aid measure compatible with the internal market on the basis on commitments by the Member State to amend

Such decisions also involve implementing measures:
Case C-132/12 P *Stichting Woonpunt v Commission* EU:C:2014:100, paragraphs 52 to 54.

3.4. Decisions approving new aid as compatible with the internal market

Such decisions also involve implementing measures:
Case T-238/14 *EGBA and RGA v Commission* EU:T:2016:259, paragraphs 40 and 41.

4. **STANDING: THE CONCEPT OF "DIRECT CONCERN" UNDER ARTICLE 263(4) TFEU**

Under the second limb of the fourth paragraph of Article 263 TFEU, the applicant must be directly concerned by the contested measure to have standing.

For decisions concerning individual aid, direct concern is essentially self-evident. For general schemes matters are less straightforward. One can question whether there is direct concern where national implementing measures are required.

A restrictive view (no direct concern) is taken in some case-law:

However, in the current state of jurisprudence, a more permissive approach is followed:

5. **STANDING: THE CONCEPT OF "INDIVIDUAL CONCERN" UNDER ARTICLE 263(4) TFEU**

Under the second limb of the fourth paragraph of Article 263 TFEU, the applicant must be individually concerned by the contested measure to have standing. That question of individual concern is notoriously complex in State aid litigation.

5.1. Individual concern in relation to phase 1 decisions

Pre-*Cook* and *Matra*, a restrictive view was taken on the individual concern of applicants challenging the result of the preliminary examination. They had to satisfy the *Plaumann* test, showing that they were individuated by the attacked act in the same manner as its addressee:
Post-Cook and Matra, whether a given applicant is individually concerned depends on the stage of the procedure at which the contested decision was taken and the interests invoked by the applicant.

5.1.1. **Challenge to positive phase 1 decisions**

An applicant can challenge decisions adopted under Article 4(2) and Article 4(3) of the Procedural Regulation (no-aid decision; decision not to raise objections for an alleged breach of procedural rights. In order to raise that ground, the applicant must be a "party concerned" under Article 108(2) TFEU or an "interested party" under Article 1(h) of the Procedural Regulation.

The basic test is set down in Case C-487/06 P British Aggregates v Commission EU:C:2008:757, paragraph 29:

"Such parties concerned are any persons, undertakings or associations whose interests might be affected by the granting of aid, that is, in particular competing undertakings and trade associations"

An applicant's status as a potential beneficiary of the aid measure that is examined in the decision which it contests does not preclude that applicant from being an interested party who may seek to protect its procedural rights.


5.1.1.1. **Competitors**

Competitors have standing to challenge a failure to open on the basis of non-respect of their procedural entitlements:

Joined Cases C-75/05 P and C-80/05 P Germany v Kronofrance and Commission EU:C:2008:482, paragraphs 35 to 44.

It is not necessary for the competitor to follow the same business model as the alleged beneficiary to have procedural entitlements:


A party concerned/interested party can be an indirect competitor of the beneficiary of the aid:

Case C-47/10 P Austria v Scheucher-Fleisch and others EU:C:2011:698, paragraph 132.

Equally, the applicant can be an interested party if it competes as a social actor with other social actors in respect of the workforce of the alleged aid beneficiaries:

Case C-319/07 P 3F v Commission EU:C:2009:435, paragraphs 33, 70 and 102

In Scheucher-Fleisch the General Court was insistent that the aid beneficiaries in that case were not only meat retailers but also producers, with whom the applicants were in a competitive relationship.
5.1.1.2. Complainants

When a competitor brings annulment proceedings against a phase 1 decision alleging breach of its procedural entitlements, activity in the administrative phase before the Commission is not enough to demonstrate that it is a "party concerned" or an "interested party":

Case C-78/03 P Commission v Aktionsgemeinschaft Recht und Eigentum EU:C:2005:761.

5.1.1.3. Negotiators (as recognised in CIRFS and Van der Kooy)

The status of "negotiator" is treated narrowly:

Case C-319/07 P 3F v Commission EU:C:2009:435, paragraphs 91 to 95.

5.1.1.4. Consumers

In an action brought by an association of tenants alleging aid in the sale of a firm owning several apartment buildings, the General Court noted that tenants are not undertakings and are not interested parties:


5.1.1.5. Mixing of procedural rights and pleas to the merits

Where the challenge is based on non-respect of procedural rights, the applicant must show that it is a party concerned and no more. If it wishes to challenge the phase 1 decision based on the merits of the decision, the Plaumann test applies:

Case T-481/07 Deltalings and SVW v Commission EU:T:2009:484, paragraphs 40 to 42.
Case T-193/06 TF1 v Commission EU:T:2010:389, paragraphs 74 to 76.

The tests for standing differ depending on whether the applicant challenges the phase 1 decision based on the merits of the Commission decision or on an alleged breach of its procedural rights. Those different tests raise the issue of how much freedom the General Court has to extract a procedural basis from an application that seems to impugn the merits of the contested decision.

The case-law is mixed. Compare the restrictive approach (for applicants) seen in:

Case C-78/03 P Commission v Aktionsgemeinschaft Recht und Eigentum EU:C:2005:761.
Case C-176/06 P Commission v Stadtwerke Schwäbisch Hall and others EU:C:2007:730, paragraph 25.
Case C-83/09 P Commission v Kronoply and Kronotex EU:C:2011:341, paragraphs 54 to 59.

with the more generous approach to procedural claims found in rulings such as:

Case T-388/03 Deutsche Post and DHL International v Commission EU:T:2009:30, paragraphs 54 to 56 and 67 to 69.
In some rulings, the General Court has indicated that there must be a specific cross-reference between the *Cook/Matra* plea and any plea(s) on the merits in order for the latter pleas to be examined without the applicant going into its standing under *Plaumann*:


By contrast, other rulings of the General Court take a far more lenient approach as to when the applicant can be seen as trying to vindicate its procedural rights:


### 5.1.2. Challenge to negative phase 1 decisions

The beneficiary of individual aid can challenge a decision to open the formal investigation procedure if the decision affects (allegedly) existing aid or non-aid:

Case T-332/06 *Alcoa Trasformazioni v Commission* EU:T:2009:79, paragraphs 35 and 36

### 5.2. Individual concern in relation to phase 2 decisions

Where an applicant challenges a phase 2 decision (which is taken after a formal investigation procedure), the applicant cannot rely on its procedural rights as an interested party in order to demonstrate individual concern. It must satisfy the *Plaumann* test in those circumstances.

Case T-225/10 *Banco Bilboa Vizcaya Argentaria v Commission* EU:T:2012:139, paragraphs 28 to 31;

#### 5.2.1. Challenge to phase 2 decisions on schemes: actual and potential beneficiaries

An undertaking cannot, in principle, contest a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme.

Case C-519/07 P *Commission v Koninklijke FrieslandCampina* EU:C:2009:556, paragraph 53.
The Plaumann test is satisfied by actual recipient of individual aid granted under a sectoral aid scheme, recovery of which has been ordered by the Commission, according to a now settled line of General Court jurisprudence\(^3\). Examples include:

- **Case T-75/03** Banco Comercial dos Açores v Commission EU:T:2009:322, paragraphs 44 to 47.
- **Case T-335/08** BNP Paribas and BNL v Commission EU:T:2010:271, paragraphs 67 to 74.
- **Case T-541/13** Abertis Telecom and Retevisión I v Commission EU:T:2015:898, paragraphs 42 and 43.

That approach was confirmed by the Court in 2011:

- **Joined Cases C-71/09 P, C-73/09 P and C-76/09 P** Comitato "Venezia vuole vivere" v Commission EU:C:2011:368, paragraphs 52 and 56 to 59.
- **Case C-319/09 P** ACEA v Commission EU:C:2011:857, paragraphs 57 and 58.
- **Case C-320/09 P** A2A v Commission EU:C:2011:858, paragraphs 57 to 60.

However, it is at least strongly arguable that if potential beneficiaries of aid schemes do not have standing, neither should beneficiaries of unnotified aid schemes.

On the other hand, the General Court accepts that in order to have standing to challenge such decisions concerning unnotified aid schemes, the applicant must at least be an actual beneficiary faced with recovery:

- **Joined Cases T-228/00, T-229/00, T-242/00, T-243/00, T-245/00 to T-248/00, T-250/00, T-252/00, T-256/00 to T-259/00, T-265/00, T-267/00, T-268/00, T-271/00, T-274/00 to T-276/00, T-281/00, T-287/00 and T-296/00** Gruppo ormeggiatori del porto di Venezia v Commission EU:T:2005:90.
- **Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01** Diputación Foral de Álava and Gobierno Vasco v Commission EU:T:2009:315, paragraphs 113 to 115 (as regards Confebask).
- **Case T-221/10** Iberdrola v Commission EU:T:2012:112, paragraphs 27 to 44.

Therefore, if the applicant does not allege expressly that it benefited from the aid whose recovery is ordered, and there are no elements in the file before the Union court to indicate that the applicant did so benefit, it will not be individually considered by the negative decision:

- **Case T-327/09** Connefroy and others v Commission EU:T:2012:155, paragraphs 29 to 33.

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\(^3\) That approach of the General Court was built on **Joined Cases C-15/98 and C-105/98** Italy and Sardegna Lines v Commission EU:C:2000:570 (but the measure in issue there was an individual aid in reality because the regional scheme gave a wide margin of discretion); **Case C-298/00 P** Italy v Commission (Alzetta) EU:C:2004:240; and **Case T-55/99** CETM v Commission EU:T:2000:223 (that ruling doesn't clearly explain why the applicants were individually concerned).
Equally, if the contested decision does not order recovery for some aid granted under a scheme for reasons of legitimate expectations, the firms which enjoy those legitimate expectations are not individually concerned. That lack of standing is unaffected by the fact that a competitor is also challenging the decision insofar as it found that there were such legitimate expectations:

Case T-225/10 Banco Bilboa Vizcaya Argentaria v Commission EU:T:2012:139, paragraphs 24 to 27;
Case T-228/10 Telefónica v Commission EU:T:2012:140, paragraphs 31 to 37.
Case T-234/10 Ebro Foods v Commission EU:T:2012:141, paragraphs 26 to 28;

The General Court has accepted (with the approval of the Court) that an applicant is individually concerned if it had already applied for the aid which was prohibited, had taken all measures needed to qualify for the aid in relation to which the national authorities had no discretion:

Case C-519/07 P Commission v Koninklijke FrieslandCampina EU:C:2009:556, paragraphs 55 to 58.

5.2.2. Challenge to phase 2 decisions on individual measures: competitors

In order to challenge decisions taken at the end of a formal investigation procedure, it is not enough to be an actual or potential competitor. For an applicant challenging a decision under Article 9 of the Procedural Regulation to show it is individually concerned, there must be a real competitive relationship between the applicant and the beneficiary and the market position of the applicant must be substantially affected by the aid.

What is meant by substantially affected (or significantly affected)?

Contrast
Case T-88/01 Sniace v Commission EU:T:2005:128; and
Case C-260/05 P Sniace v Commission EU:C:2007:700
with
Case T-36/99 Lenzing v Commission EU:T:2004:312; and
Case C-525/04 P Spain v Lenzing EU:C:2007:698, paragraph 32.

The applicant must demonstrate the magnitude of the prejudice to its market position:

That test must be conducted by reference to beneficiaries of the aid measures in issue:

It is a test that is fully confirmed and applied in:
Case T-198/09 *UOP v Commission* EU:T:2013:105, paragraphs 38, 40, 42 and 45 to 49.

Even if some of the applicant's members are direct competitors whose competitive position is necessary affected by the contested decision, it does not follow that their position in the market could be substantially affected by the disputed aid since all undertaking in the sector in the EU may be regarded as competitors of beneficiaries of the disputed aid scheme:

Case C-78/03 *Commission v Aktionsgemeinschaft Recht und Eigentum* EU:C:2005:761, paragraph 72

The simple fact of being present in the same market as the beneficiary does not make a competitor individually concerned:

Case C-367/04 *Deutsche Post and DHL Express (formerly DHL International) v Commission* EU:C:2006:126, paragraphs 40 and 41.

Identification by name in the decision is not sufficient, nor is the production of market share figures:

Case T-388/03 *Deutsche Post and DHL International v Commission* EU:T:2009:30, paragraphs 49, and 50 and 51.

The invocation of over-capacity on the market where the applicant is active without more is not sufficient to show that it is substantially affected in its position on the market:


To be substantially affected does not require demonstration of significant decline in turnover, appreciable financial losses or significant reduction in market share following the grant of the aid in question. It can arise from loss of an opportunity to make a profit or less favourable development than would have been the case without the aid:

Case C-487/06 *British Aggregates v Commission* EU:C:2008:757, paragraph 53.

The General Court has accepted that aid making up almost all of the funding for the largest player in a specific market within which the applicant was the main direct competitor necessarily substantially affected the market position of the latter:


Some disappointed applicants have disputed the requirement to show how their position in the market is affected by pointing out that the Union Courts do not require the Commission to engage in a full market analysis when it determines if aid is present. However, in Case C-367/04 *Deutsche Post and DHL Express (formerly DHL International) v Commission* EU:C:2006:126, paragraph 47, the Court noted that the two tests (standing/existence of aid) fulfil quite distinct and separate functions.

Some commentators seized on Case T-289/03 *BUPA and others v Commission* EU:T:2008:29, paragraph 78, to argue for a more lenient approach to *Plaumann* standing.
In an *obiter* remark\(^4\), the General Court had seen as evidence of "a substantial effect on [BUPA's] competitive situation" the step of lodging a complaint regarding the aid at issue in that case.

However, the General Court had already established such a substantial effect established independently. In other words, it was not the procedural involvement itself which was the basis for standing but the substantial effect on the applicant's competitive situation.

5.2.3. **Challenge to phase 2 decisions: national authorities other than central government**

Autonomous regional or local authorities are individually concerned by final negative decisions which affect their rights and specific interests:


There is no such individual concern for public law entities whose rights derive from the State or from an autonomous territorial entity and which does not enjoy financial autonomy:


6. **PROCEDURAL ISSUES (INCLUDING PLEAS OF ANNULMENT, LIMITATION PERIODS, ETC.)**

The general rules governing all annulment actions apply to actions against a State aid decision.

6.1. **Time Limits**

An action for annulment must be brought within two months of the date of publication or notification to the applicant, or of the date on which it came to the knowledge of the applicant.

An application lodged outside that period is time-barred:

Case T-205/11 *Germany v Commission* EU:T:2012:704


The date of notification is subsidiary where a measure is ordinarily published by the institution:


\(^4\) It is striking that the relevant passage in paragraph 78 is prefaced with the phrase, "*It should be added that*", which indicates that this development was not strictly necessary for the finding that the decision in issue there substantially affected BUPA Ireland in its competitive position on the Irish private medical insurance market, which had already been made.
Publication of a summary notice in the Official Journal combined with placing the full text on the Commission website constitutes publication for the purposes of Article 263 TFEU:

6.2. Representation by an independent lawyer

The applicant must be represented by an independent lawyer (unless it is entitled to be represented by an agent). Independence is not present if the lawyer is a director of the applicant:

Equally, a lawyer is not independent of the applicant if he is president of its executive committee:

The Union courts require that such representation must continue until the oral procedure has ended. If the applicant ceases to be represented, the courts may declare that the action has become devoid of purpose:

6.3. If partial annulment is sought, the contested measure must be severable

Where an applicant seeks to partially annul a measure of Union law, the action will only be admissible if it is possible for the contested provisions to be separated from the remainder of the act without changing its substance.

Such severability can be achieved for a decision that raises no objections to multiple aid measures:
Case E-23/14 Kimek Offshore AS v EFTA Surveillance Authority, judgment of 23 September 2015, paragraphs 56 to 58.

7. Further Reading


Azizi, J., ‘Droits de la défense dans la procédure en matière d’aides d’État: le point de vue judiciaire’, in Un rôle pour la défense dans les procédures communautaires de concurrence, Bruylant, Brussels, 1997, p. 87, especially pp. 112 to 120.

