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Do the Infamous Star Chamber and EU State Aid Proceedings Have Anything in Common?

Steve Spinks (Sidley Austin) · Thursday, October 27th, 2016

The EU antitrust rules on State aid aim to prevent Member States from distorting competition by giving companies receiving State assistance a “leg up” on their competitors. The concept of State “aid” is broad, and the circumstances under which it may unlawfully distort competition are not always obvious. In addition, the Treaty provisions and secondary legislation governing its lawfulness are complex. At the same time, the quantity of aid packages on offer is never short of considerable, and in principle new aid schemes have to be notified to the European Commission for approval. The Commission has sought to simplify things through a General Block Exemption Regulation (“GBER”) granting automatic approval to measures meeting the regulation’s requirements. The Commission estimates that the GBER exempts around 75% of all State aid measures.[1] However, some forms of State aid fall outside the GBER’s scope and may give rise to Commission investigations. The recent and ongoing controversy around the Commission’s high profile investigations of Member State tax rulings accentuates this fact.

The mention of Commission State aid investigations brings us to the title of this article. The Star Chamber was an English law court that existed for more than 250 years until its abolition in 1641. It was established with the laudable aim of ensuring that nobles and well-to-do gentry did not escape their just deserts for the crimes they committed, as they might have done through intimidation if tried in the ordinary courts. By the 17th century, however, the Star Chamber had become infamous for arbitrary and inscrutable proceedings and harsh rulings disregarding fundamental individual rights. Its abuses are said to have influenced the U.S. Constitution’s Bill of Rights and no doubt also underlie some of the provisions in the European Convention on Human Rights.

The Convention in turn influenced the EU’s very own Charter of Fundamental Rights, which became legally binding with the Treaty of Lisbon’s 2009 entry into force. The Charter’s Article 41, on the right to good administration, enshrines “(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions”. Article 47 guarantees the right to a fair hearing by an independent and impartial tribunal. The Commission recognizes and seeks to respect these fundamental rights in (among others) its administrative proceedings under the general antitrust rules and the merger control rules. It does so under the control of the EU General Court and the EU Court of Justice in appeals. The

Commission considers that it also respects these rights under that same control in its proceedings under the State aid antitrust rules. But does it?

Under the Council procedural regulation governing State aid proceedings,[2] the aid beneficiary is an “interested party” in the Commission’s investigation, with the right to submit comments. However, only the Member State granting the aid has rights of defense, including the right of access to the Commission’s investigation file. The Commission has the discretion to seek information from the aid recipient, but only if the Member State granting the aid agrees. The Member State may refuse without having to give reasons and without the beneficiary having any right of recourse against that refusal to the EU General Court. In short, although a negative Commission decision will affect it adversely, the beneficiary has to rely in large measure on the Member State to defend the aid in the Commission’s proceedings. That is the case even though the Member State may or may not have a strong incentive to launch a robust defense, given the aid’s impact on the Member State’s budget. The recipient (or its competitors) may contest the legality of the Commission’s decision before the EU General Court and/or seek damages from the granting Member State before a national court. If it does so, however, the beneficiary will not have had access to the Commission’s investigation file, while its “adversary” will have had full access (subject to respect for confidentiality and professional and business secrecy). That difference raises a legitimate question about equality of arms.

In a September 2014 academic paper,[3] a distinguished lawyer (and former Commission official) discusses in detail what the paper describes as defects in the current State aid procedural rules, including the current position on access to the file. The paper raises compelling questions about the rules’ compliance with the Charter. He (or another lawyer) had sent a letter to the Competition Commissioner in January 2014 arguing that the Commission’s practice of refusing to provide aid beneficiaries and other interested parties with access to the Commission’s investigation file violated Articles 41 and 47 of the Charter. Not satisfied with the answer he received, the lawyer submitted a complaint in July 2014 to the European Ombudsman, whose remit is to investigate complaints about maladministration in the EU’s institutions and bodies. In her recent ruling on 23 September 2016,[4] the Ombudsman rejected the complaint. She found that the Commission’s practice of denying access to the file to anyone other than the concerned Member State complied with the applicable procedural regulations as well as with the case-law of the EU Courts on the procedural rights of interested parties. According to the Ombudsman, the fact that beneficiaries and other interested parties do not have access to the Commission’s investigation file corresponds to their limited role in the proceedings as foreseen in the procedural regulations and to the fact that proceedings are initiated against the Member State rather than the beneficiary.

According to the Ombudsman, therefore, refusing the beneficiary (and its competitors) access to the investigation file does not amount to maladministration. But is that the end of the story? The Ombudsman stressed that her remit of investigating maladministration does not include assessing whether the procedural regulations themselves violate the Charter. For its part, the EU General Court stated in a December 2014 case that the Charter is not intended to alter the nature of the review of State aid.[5] Although that case focused on the rights of third party competitors of the aid beneficiary, the EU Courts have so far consistently confirmed that even the aid beneficiary’s rights are not as extensive as the rights of the defense as such.[6]

That suggests that any change in the current situation regarding access to the Commission’s State aid investigation file would need to come voluntarily from the EU’s “legislature”. However, adoption of the procedural regulation falls within the remit of the Council, i.e., the representatives

of the Member States governments, which are the grantors of the aids in question. One therefore has to wonder whether the legislature would ever have any incentive to recognize that aid beneficiaries merit rights of defense. Even assuming the legislature had such an interest, moreover, it just adopted a new State aid procedural regulation in 2015 after an extensive Commission review process. As the Charter has been in force since 2009, the Council (acting on a Commission proposal) either missed an opportunity or deliberately avoided one when it adopted the 2015 regulation. Against that backdrop, any legislative change in the rules to alter the position on access to the file does not seem likely in the near term.

In light of the foregoing, the question in the title requires a balanced and nuanced answer. The Ombudsman says the Commission, in refusing a beneficiary access to its investigation file, is acting within the limits of the law laid down by the EU's legislature. The Commission would therefore no doubt consider any analogy of its proceedings to those of the 17th century Star Chamber as outrageously inappropriate. And to be fair the Commission would probably be right. Like any institution it has its imperfections, and some of the things it does are indeed inscrutable, questionable and occasionally just plain wrong. But comparing its State aid proceedings with the Star Chamber would be a gross exaggeration.

To a beneficiary faced with possible repayment of a sizeable paid-out aid or loss of an important future aid, however, not having access to the investigation file to comment in the Commission's proceedings and contest a negative Commission decision will no doubt seem patently unfair and highly unjust. As the aid beneficiary is adversely affected by the Commission decision, it is difficult, at high level at least, to square such a refusal of access to the file with Articles 41 and 47 of the Charter. Viewed from the perspective of the aid beneficiary, therefore, at least superficially analogizing the Commission's State aid proceedings to those of the infamous Star Chamber might not seem quite so farfetched after all.

The author is a partner at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP or its partners. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.

[1] http://europa.eu/rapid/press-release_IP-14-587_en.htm

[2] Council Regulation (EU) 2015/1589 of 13 July 2015, replacing Council Regulation (EC) 659/1999 of 22 March 1999 as amended.

[3] John Temple Lang, The Charter and EU State aid procedures, draft dated 22nd September 2014, available at <http://uksala.org/state-aid-modernisation-seminar-slides/>.

[4] http://www.ombudsman.europa.eu/cases/decision.faces/en/71568/html.bookmark#_ftn2

[5] Case T-140/13, Netherlands Maritime Technology Association v Commission, para. 60.

[6] Joined Cases C-74/00 P and C-75/00 P, Falck SpA and Acciaierie di Bolzano SpA v Commission, para. 83

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