Due Process Versus a Procedural Kafkaesque

Even recipients of State aid, who are the most vulnerable parties in the proceedings, are denied access to the Commission's case files. This practice of denial is in sharp contrast to the procedural rights enshrined in the Charter of Fundamental Rights (CFR). The right to good administration guarantees, pursuant to Article 41(2)(b) CFR, that 'every person' has the right of access to the files concerning them in administrative proceedings. The fact that the addressee of the Commission's decision is not the recipient of the aid itself, but the Member State concerned, does not preclude this fundamental procedural right according to the wording; rather, it also applies to those who are *actually* affected by an administrative measure.

The 2010 ruling by the Court of Justice in *Technische Glaswerke Ilmenau*[1] can be seen as the original sin in case law. In that case, the recipient of State aid was denied the right to inspect the files on the simplistic grounds that Regulation (EC) No 659/1999 (now Regulation (EU) 2015/1589) did not provide for such a right.[2] The explanation that the procedural fundamental right under Article 41(2)(b) CFR was not taken into account in *Technische Glaswerke Ilmenau* because the Commission's decision on the rejected request for access to files dated from before the CFR came into force is only superficially valid. This is because the rule of law through due process was already established at that time as a general principle of primary EU law.

It is therefore hardly surprising that the Court continued to follow this procedural sin path even after the CFR came into force. In its 2018 ruling in *Ryanair and Airport Marketing Services*[3], the Court correctly recognised that the recipient of State aid is entitled to a fair and impartial procedure under Article 41(1) CFR. However, it rejected a right of access to the file under Article 41(2) CFR on the grounds that Article 108 TFEU did not provide for such a right for the aid recipient as a mere party to the proceedings. The introduction of the CFR was not intended to bring about a change in the State aid procedure or to confer on third parties a right of control not provided for in Article 108 TFEU.[4] This reasoning could not be simpler. The Court fails to recognise that Article 41(1) and (2) CFR is designed as a uniform fundamental right to good administration, which, as primary law, is at least on a par with the provisions of the Treaties (Article 108 TFEU). The procedural rights of the aid recipient, which are guaranteed by fundamental rights, cannot be overridden by the State aid rules.

In particular, the absence of a standardised right of access to files in Regulation (EU) 2015/1589 cannot justify the conclusion that such a right does not exist. As secondary law, Regulation (EU) 2015/1589 must be interpreted in conformity with primary law and cannot derogate from or restrict the procedural rights enshrined in the CFR. The conflict rule *lex specialis derogat legi generali* does not, of course, apply within the standard hierarchy between primary and secondary law.

Regardless of the axiomatic conflict rules that apply universally in all civilised legal systems, this line of case law continues to be upheld, albeit with varying justifications. In the *Huhta-*

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1 Case C-139/07 P *Commission v Technische Glaswerke Ilmenau* [2010] ECLI:EU:C:2010:376.

2 *Commission v Technische Glaswerke Ilmenau* (n 1) para 56.

3 Case T-165/16 *Ryanair and Airport Marketing Services v Commission* [2018] ECLI:EU:T:2018:952.

4 *Ryanair and Airport Marketing Services v Commission* (n 3) paras 45 et seq.; see also Case T-140/13 *Netherlands Maritime Technology Association v Commission* [2014] EU:T:2014:1029, para 60.

maki[5] decision from 2022, fundamental rules on the burden of proof were turned on their head: The Court found that documents relating to ongoing State aid proceedings are subject to a general presumption of confidentiality, as otherwise the protection of the objectives of the investigation activities would be compromised.[6] The recipient of the aid is therefore only entitled to inspect the case file in exceptional cases if it succeeds in refuting this presumption in the specific case, for example by proving that there is an overriding public interest in disclosure.[7] It is true that the right to inspect files under Article 41(2)(b) CFR is not unlimited, but may be restricted on the basis of legitimate interests of confidentiality, professional or business secrecy. However, denying the right to inspect files on the basis of a blanket presumption of an impairment of overriding public interests fails to recognise that the burden of proof for the application of fundamental rights exceptions lies with the authority, which must also weigh the conflicting legal positions on a case-by-case basis and strike a careful balance between them. A proportionate balancing measure is the appropriate blacking out of critical passages in the files, such as those relating to competitors' trade or business secrets. In any case, the public interest emphasised by the Court in *Huhtamaki* in avoiding the 'undermining of the protection of the objectives of inspection, investigation and audit activities' just as little as the principle of confidential and loyal cooperation between the Commission and the Member States, can shift the authority's burden of proof regarding the restriction of a fundamental right.

The refusal to grant access to the file impairs the effective exercise of the beneficiary's further procedural rights. While the beneficiary formally has a right to submit comments in the State aid procedure pursuant to Article 6(1) Regulation (EU) 2015/1589, the lack of knowledge of the file makes it difficult to exercise this right and leaves the beneficiary scarcely able to respond in a substantive manner to the Commission's arguments, which are based on full knowledge of the file. The situation can become *Kafkaesque* for the recipient of the aid. Similar to the protagonist Josef K. in Franz Kafka's 'The Trial', who does not know what is being brought against him, the aid recipient is left in the dark by a withheld case file, against which it cannot adequately defend itself in the administrative proceedings. This imbalance continues at the level of legal protection against a negative decision by the Commission, especially since legal actions have no suspensive effect (Article 278 TFEU). In the worst case, this procedurally asymmetrical situation can lead to the necessity for the aid recipient to create provisions in its balance sheet under national law, which would then oblige it to file for insolvency in the event of over-indebtedness without the EU courts having made a final decision. So please: put an end to this procedural *Kafkaesque*!

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5 Case T-134/20 *Huhtamaki v Commission* [2022] EU:T:2022:100.

6 *Huhtamaki v Commission* (n 5) paras 32 et seq.

7 *Huhtamaki v Commission* (n 5) para 60.