

The Court's Paradoxical Montessori Revolution

'Help me to do it myself' is the famous motto of Montessori education. Montessori is all about individual self-empowerment. To some extent, this is what the CJEU has undertaken in its landmark judgment *Montessori* of 6 November 2018 (Joined Cases C-622/16 P and others). The Court there broadened access to legal protection by waiving the requirement of individual concern for competitors of beneficiaries of a State aid scheme. At one stroke of the pen, challenging Commission State aid Decisions before the EU courts has suddenly become a lot easier. Unfortunately however, the Court stopped the revolution mid-way by including only aid schemes.

In casu, Italy had exempted real estate used for certain activities by non-commercial entities (eg education by confessional schools) from municipal tax. The Commission had declared that parts of the measure did not constitute aid, while other parts did constitute aid but needed not to be recovered. The Montessori schools and others left out by the exemption had challenged that Decision before the GC, which had then declared the actions admissible (albeit eventually unfounded).

The revolution from the point of view of legal protection lies in the GC's, now confirmed, approach to the admissibility question. The GC qualified the Commission Decision as a regulatory act in the sense of the third limb of the fourth paragraph of Article 263 TFEU. Consequently, anyone directly concerned by the Commission Decision could bring an action for annulment without a need to additionally also prove their individual concern. Direct concern exists where the Decision immediately and automatically affects the plaintiff's legal situation without, in particular, any implementing discretion left. By contrast, individual concern requires that the plaintiff's position differs from 'all other persons and distinguishes them individually in the same way as the addressee of a decision' (judgment *Plaumann*). Following *Montessori*, proof of individual concern is no longer required to attack Commission Decisions concerning State aid schemes.

Prior to *Montessori*, it was unclear whether the concept of regulatory acts used in Article 263 extended to any non-legislative act of general application, thus including Commission Decisions on State aid, or whether it just meant tertiary law and implementing acts in the sense of Articles 290 and 291 TFEU. In its key judgment *Inuit* of 2013 (Case C-583/11 P), the CJEU had taken a restrictive approach. It had insisted that 'the concept of "regulatory act" ... is more restricted than ... "acts" [in general]'. The Court thus required the contested act to be of general application. Oddly, that jurisprudence has the potential paradoxical effect of relaxing annulment actions against tertiary (Article 290) and implementing (Article 291) acts while remaining stringent regarding regular administrative acts of individual application (administrative decisions). *De maiore ad minus* (tight conditions for actions against secondary legislation, more relaxed conditions for acts complementing or implementing secondary legislation) one would expect the contrary.

What did *Inuit* mean for State aid Decisions? Could they constitute acts of general application in spite of them being addressed to individual Member States? The answer now given by the CJEU is yes and no: State aid schemes are acts of general application. As was the case with the Italian tax exemption at hand, aid schemes are defined as measures which by themselves

(no need for further implementing Decisions) allow for the grant of individual aid. The Court in *Montessori* thus overcame the problem of the individual addressee of State aid Decisions by focusing on the national regulatory level: If the measures that the Commission actually assessed are of a general nature, that qualification is extended to the respective State aid Decision. In line with its general approach to qualifying the legal effects of acts under Article 263, the Court thus adopted an effects-based approach in *Montessori*.

However, Decisions regarding individual aid do not benefit from *Montessori*. They are not 'regulatory acts' in the meaning of Article 263. In fact, this had already been established in the *Mory* judgment of 2015 (Case C-33/14 P), which concerned recovery of individual aid. The Commission had consequently relied on *Mory* also in the *Montessori* case. While *Montessori* thus clarifies that aid schemes benefit from a more generous treatment, it also seems to uphold the narrower *Mory* approach for individual aid measures: The CJEU does not expressly mention *Mory* here, but it reiterates that individual recovery Decisions are not of general character. This indicates the Court's acceptance of the paradoxical effect of a much higher threshold for the respective annulment actions.

Montessori is a landmark judgment. It brings a revolution in terms of access to justice in State aid cases. Admittedly, that revolution is not carried fully through in that it does not in principle abandon the restrictive approaches of *Inuit* and *Mory*. The Court is still cautious not to open the door to Article 263 too generously and to keep annulment from developing into an *actio popularis*. Yet *Montessori* is also proof that, within those confines, the Court is ready to offer practical and working solutions for legal protection in specific situations like State aid.

Clearly, the Court should not stop there. Article 263 and *Inuit* need to be better tailored to competition dynamics and the realities of State aid. It is a formalistic absurdity that individual aid and recovery Decisions should be less easily susceptible to judicial review than Decisions over aid schemes. Not the general or individual scope of the act should make the difference in terms of its openness to judicial review, but its legislative or rather administrative nature. There is nothing in Article 263 to exclude that 'regulatory' be understood as administrative nature rather than general application. This is even emphasized by the Court in *Montessori* where it refers to the preparatory works for Article 263:

[T]hat provision was intended to broaden the conditions of admissibility of actions for annulment with respect to natural and legal persons, and the only acts of general application for which a restrictive approach was to be maintained were legislative acts. (para 26)

In this regard, the Court's visible non-mention of *Mory* might be an indicator for slow change. Should some judges indeed want to go beyond *Mory* in the future, not citing it now preserves some maneuvering space in that regard. Let's hope that flexibility will be used to help those negatively affected by aid measures – whether it be schemes or individual – to help themselves. *Maria Montessori* would be proud.

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