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PROCEDURAL ASPECTS OF EU STATE AID LAW

ABSTRACT

The article will discuss the main features of different procedural rules on EU State Aid law. The monitoring system of state aid control is based on ex ante verification pursuant to Article 108(3) TFEU. Since the European Commission has a central role, special emphasis will be on four different types of procedures: the procedure regarding notified aid, the procedure regarding unlawful aid, the misused aid procedure and the existing aid procedure.

Key words: State Aid, European Union, European Commission, Procedural Regulation

1. INTRODUCTION¹

State aid generally distorts competition. Granting aid to individual undertakings affects allocation of resources, which can have adverse consequences on investment and development in the end. State aid can also influence the market production-wise and disturb the balance among competitors.²

Favouring domestic service providers can trigger the application of State aid rules. In EU law, any aid, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, is prohibited, as far as it affects trade between Member States. Even though State aid is prohibited in general, in some cases it may be found compatible with the internal market, if it promotes legitimate goals and satisfies the principle of proportionality.

In order to be characterised as aid, an advantage granted to the recipient has to be of economic nature and such that it could not be realised under normal market conditions. Measure must imply actual or potential use of public resources, and be selective, i.e. directed specifically at certain undertaking or type of goods. The

¹ This paper has been supported in part by Croatian Science Foundation under the project "Flexicurity and New Forms of Employment (Challenges regarding Modernization of Croatian Labour Law (UIP-2014-09-9377) "and in part by the University of Rijeka project No. 13.08.1.2.03 "Social security and market competition".

² Hancher, L., Sauter, W., *EU Competition and Internal Market in the Health Care Sector*, Oxford University Press, Oxford, 2012, p. 262.

last condition, which needs to be determined, is whether the measure distorts competition or affects trade between Member States. In principle, prohibition of State aid is usually concentrated on distortion of trade between Member States. It is interesting that under the existing case law, it is not necessary to prove that the granted aid actually caused distortion or disturbed the position of consumers. The most important thing is to show that the position of undertaking has been reinforced in any manner whatsoever, which would otherwise not have been possible. The mere possibility suffices. Increasing number of proponents insist, however, that the accent should be placed on stronger analysis of the impact on restriction of competition.³

Basic principles are found in Articles 107, 108 and 109 TFEU⁴, as well as abundance of case law. Article 107 TFEU structurally consists of three parts. The first paragraph provides a general definition of aid contrary to internal market; the second paragraph enumerates so-called automatic exemptions, whereas the third paragraph prescribes certain categories of aid that can be declared compatible with the internal market. Therefore, any aid that distorts or threatens to distort competition by favouring certain undertakings or production of certain goods is prohibited, as far as it affects trade between Member States. However, certain situations are considered acceptable.⁵

There are two possibilities to justify aid that has been found incompatible with the internal market. Prohibition from Article 107 TFEU is never absolute or unconditional. Exceptions are contained in paragraphs 2 and 3 of the said Article. Paragraph 2 enumerates type of aid, which will always be exempted. This provision is of minor importance, given its limited scope. Paragraph 3, on the other hand, is more interesting, because it describes situations in which the Commission is entitled to authorise certain type of aid. As always, all exceptions are interpreted very strictly.

³ Bacon, K., *European Union Law of State Aid*, Oxford University Press, Oxford, 2013, p. 13.

⁴ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326/47.

⁵ Article 107(2) TFEU enumerates examples of aid that are always deemed compatible with the internal market. These include: a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas if the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

Pursuant to Article 107(3) TFEU⁶, Commission has been granted wide powers to exempt a certain aid. A significant number of block regulations in this segment facilitates Commission's job. When a certain aid is not covered by regulation, Commission may grant the exception by referring to guidelines and instructions. In other words, a general prohibition of aid is complemented by the provisions of Article 107(2) and (3) TFEU, which give the Commission a certain amount of flexibility.

⁶ Article 107(3) (a) TFEU refers to aid to promote economic development of areas where the standard of living is abnormally low or where there is serious underemployment. It is interpreted jointly with subparagraph (c) of the same provision, which points out that aid to facilitate the development of certain economic activities or of certain economic areas may be considered compatible with the internal market. These provisions are the base for granting regional aid. Although subparagraph (a) does not mention EU interests, case law determines that the Commission must always be guided by the Union's interest when granting certain exceptions. Claiming that the measure has positive impacts on a certain region is not sufficient; what matters is the impact on trade between Member States. Therefore, even though aid falls under the category of aid described under paragraph 3, the Commission has the final say. This subparagraph may be linked to subparagraph (c), but the main difference lies in the criterion of "underdevelopment". Comparison under subparagraph (a) is made taking into account the entire Union, whereas under subparagraph (c) comparison is made in relation to the national average. Such aid should be granted in the manner which develops less advantaged regions and which supports investments and creation of new jobs. Scope of this subparagraph is very limited and specific, because the Commission is the one that evaluates problems existing in certain regions. It is therefore not surprising that this provision has rarely been applied.

Subparagraph b) contains exceptions for aid to promote execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State. In order to assist recipients and providers of aid, the Commission has developed additional criteria to help by its assessment. The economic crisis in recent years heated up debates about potential aid to resolve serious disturbances in the economy of a Member State. In order to satisfy this criterion, disturbance must affect the entire national economy. It is said that this provision has blossomed after great economic turmoil in some Member States.

Pursuant to subparagraph (c), the Commission is entitled to grant aid to facilitate development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. It captures a wider spectrum of aid than subparagraph (a). This exception is also the one which is most commonly used. All sector and regional aid falls under this provision. The Commission's policy is more directed at granting horizontal aid used in certain activities or areas. In one of its judgments, the Court of Justice determined that all decisions in which the Commission adopts regional aid charts for each Member State should be interpreted so as to represent the integral part of Guidelines on regional State aid, and are considered binding only if accepted by Member States.

When it comes to granting aid to promote culture and heritage conservation (Article 107(3) (d) TFEU), it is important to highlight that the concept of culture is also interpreted narrowly. The commercial factor must not be neglected, because it can be a decisive element. Although sport is relatively closely linked to the notion of culture, is sometimes difficult to determine whether it falls under this exception. Heritage conservation is, in principle, covered by this subparagraph. Cultural activities are therefore subject to Commission's control. In other words, culture enjoys no special status when it comes to State aid.

Economic and social aspects are investigated. Arguments for and against the aid are put in balance. There are several questions, which the Commission always seeks to clarify.⁷ In the end, it all boils down to compliance with the principles of necessity and proportionality.⁸

According to Article 108 TFEU, the Commission shall in close cooperation with Member States, control all systems of existing aid schemes. If there is a necessity, it shall propose any appropriate measure required for effective functioning of the internal market. Commission will issue notices to the Member States to submit their comments. If the Commission still finds out that the aid is not compatible with the internal market or it is being misused, it shall decide that the State concerned abolishes or alters aid within certain period. In case of no compliance with the Commission's decision, the Commission or any other interested state may refer the matter to the Court of Justice of the European Union.

Besides the Commission's central role, the Council has certain powers in exceptional circumstances. It can act on the application by the Member State. In those cases, if the case has already been initiated by the Commission the application has an effect of suspending the procedure before the Commission, until the Council has made its attitude known. It may unanimously decide that the aid is compatible with the internal market. The Council has three months to give its opinion. If it does not act in the prescribed time, the Commission can proceed with its decision (Article 108 (2) TFEU).

The Commission has to be informed of any plans to grant or alter aid. If it considers that the intended plan is not compatible with the internal market, it shall initiate the formal procedure. Member States have to await for the Commission's final decision before they can put the measure into effect (Article 108(3) TFEU). The Commission has a power to adopt decisions addressed to Member States in which it permits or prohibits aid and which are subject to review by the General Court in the first instance and the Court of Justice on appeal.

Article 109 TFEU gives the possibility to the Council, on a proposal from the Commission and after consulting the European Parliament, to enact regulations for the application of Articles 107 and 108 TFEU and to determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

⁷ See State aid action plan - Less and better targeted state aid: a roadmap for state aid reform 2005-2009 (Consultation document) {SEC (2005) 795}, COM/2005/0107 final.

⁸ See Pošćić, A; *Gli aiuti di Stato nella Repubblica di Croazia*, in: Cosio, R., Sgroi A., Smokvina, V. (eds.), *Italia – Croazia, ordinamenti a confronto*, G. Giappichelli Editore, Torino, 2015, pp. 57-79.

The state aid system is based on the *ex ante* control. The Member States have to notify the Commission with plans to grant new aid or alter existing aid. However, the Commission has investigative powers and can act upon the complaint of any interested party or on its own initiative. Before it has been discussed, that in principle the Commission has a central role in the monitoring system except the situation concerning the Council. Another important feature not to be disregarded is that the administrative procedure is a procedure between the Commission and the Member State responsible for granting aid. The interested parties enjoy very limited procedural rights.⁹

Although the main features of the state aid control are contained in the Article 108 TFEU, there was a necessity for the regulation of procedure in details. The first Procedural legislation was No. 659/99¹⁰ that codified the Commission's practice and existed case law. The Regulation has been amended several times. In order to simplify and rationalize, the Regulation has been codified in 2015.¹¹ In the next chapters, the main features of four different types of procedures depending on the type of the aid in question will be scrutinised.

2. PROCEDURE REGARDING NOTIFIED AID

The new aid and the modified aid must be brought to the Commission's attention. The Commission has two possibilities: either to approve the measure on the basis to the simplified procedure or to apply a normal preliminary review procedure. If there are doubts with the compatibility of the aid with the internal market, Commission will open formal investigative procedure.

There are exemptions of the notification duty: aid covered by a Block Exemption Regulations, *de minimis* aid not exceeding €200,000 per undertaking over any period of 3 fiscal years or aid granted under an aid scheme already approved by the Commission.

The aid must be reported in a "sufficient time". In other words, it must be notified in the draft stage in order to have time and possibility to change the draft after the Commission's observations. Usually the Member State requests for the informal

⁹ Mazzocchi, F., *The Procedure before the Commission*, in: Santa Maria, A. (ed.), *Competition and State Aid, An Analysis of the EU Practice*, second edition, Wouters Kluwer, Alphen aan den Rijn, 2015, p. 109.

¹⁰ Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, [1999] OJ L 83/1. It was amended several times (in 2006 and two times in 2013).

¹¹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9.

opinion even before the notification.¹² The Member State must provide all the necessary information in order to enable the Commission to take a decision. The Member States are not allowed to put the measures into effect until the final decision. It derives from the Article 108(3) TFEU. The standstill obligation applies until the Commission adopts the final decision (the “positive” decision, the “no aid” decision or the “negative” decision).¹³

After receiving the complete notification from the Member State, the Commission has three possibilities. If the Commission, after the preliminary examination, finds that the notified measure is not state aid, it shall issue a decision. Secondly, if after a preliminary examination it finds that no doubts are raised as to the compatibility with the internal market of a notified measure, it shall decide that the measure is compatible with the internal market (“decision not to raise objections”). The decision shall specify which exception under the TFEU has been applied. The last possibility is to initiate proceedings pursuant to Article 108(2) TFEU (“decision to initiate the formal investigation procedure”). The last one concerns the situation where the Commission has doubts about the compatibility of the notified measure with the internal market.

All decisions have to be issued in the period of two months. Where the Commission has not taken a decision in the period of two months the aid shall be deemed to have been authorized. The Member State concerned may implement the measures in question after giving the Commission prior notice. The Commission has the last possibility to issue a decision in the period of 15 working days (Article 4 of the Regulation). This form of silent consent was implemented in the Regulation after the case *Lorenz* to protect the state interests.¹⁴

It has to be mentioned that even after the positive decision or after the decision that the measure does not constitute aid, the Commission has the power to revoke it, if it was based on imprecise information (Article 11 of the Regulation).¹⁵

Before going into the analysis of the formal investigation procedure, it has to be emphasized that in the 2009 Commission published the Notice on a simplified procedure for treatment of certain types of aid.¹⁶ The idea is to examine, in shorter time, certain types of state measures which only require the Commission to verify

¹² Mazzocchi, *op. cit.* note 9, p. 113.

¹³ *Ibid.* p. 115.

¹⁴ Case 120-73 Gebrüder Lorenz GmbH v Federal Republic of Germany et Land de Rhénanie-Palatinat [1973] ECR-01471, Mazzocchi, *op. cit.* note 9, p. 116.

¹⁵ *Ibid.* p. 117.

¹⁶ Commission Notice on a Simplified procedure for the treatment of certain types of State aid, [2009] OJ C136/3

that the aid is in the accordance with the existing rules and practice. The categories of aid on which the simplified procedure applies are elaborated in the Notice in detail. Those categories include aid measures falling within the “standard assessment” sections of existing frameworks or guidelines, measures corresponding to well established Commission decision-making practice and situations that contain prolongation or extension of existing schemes. If the criteria for the simplified procedure are fulfilled, the Commission will issue a short-form decision.

2.1. The Formal Investigation Procedure

If the Commission has still doubts as to the compatibility of the measure with the internal market, it can initiate the formal investigation procedure. It shall summarise the relevant case law issues with a preliminary assessment of the aid character of the proposed measure (Article 6 of the Regulation). The Member States and the interested parties¹⁷ have a period of one month to submit comments that can be exceeded if justified. The Commission opens the formal investigation procedure only if it has serious doubts as to the compatibility of the measure with the internal market. One element that surely indicates “serious doubts” is a duration of the preliminary procedure.¹⁸ The comments received shall be submitted to the Member State concerned. The Member State concerned may reply to the comments submitted within a prescribed period, which shall normally not exceed one month. In some exceptional circumstances, the period can be extended (Article 6 of the Regulation). The Commission shall, as far as possible, endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission

¹⁷ It is interesting to note that any interested party may submit comments following a Commission decision to initiate the formal investigation procedure. Also interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid. The interested party shall complete a form with the mandatory information requested therein.

Where the Commission considers that the interested party does not comply with the compulsory complaint form, or that the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful aid or misuse of aid, it shall inform the interested party thereof and call upon it to submit comments within a prescribed period which shall not normally exceed 1 month. If the interested party fails to make known its views within the prescribed period, the complaint shall be deemed to have been withdrawn (Article 24 of the Regulation) According to the doctrine, there are certain doubts regarding the position of the interesting party. The discipline of sending complaints has been changed after the Regulation No. 734/2013 (Council Regulation (EU) No734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, [2013] OJ L 204/15) because there were divergence of views between the Commission and the courts. See Mazzocchi, *op. cit.* note 9, pp. 123,124.

¹⁸ See Mazzocchi, *op. cit.* note 9, p. 120 and Case T-73/98, Prayon-Rupel

and the Member State concerned. The procedure of reviewing the state aid is an adversary procedure.¹⁹

In particularly complex cases, the Commission may request any other Member State, an undertaking or an association of undertakings to provide all market information necessary to enable the Commission to complete final assessment. It should be again noted that the interested parties do not have the same rights as the Member States.²⁰In addition, the person receiving aid is not in a special position because the proceeding is not against the addressee of the aid.²¹

The Commission will close the formal investigation procedure by a decision. There are a few scenarios. The first one is a situation where the Commission finds that, after the modification by the Member State concerned; the notified measure does not constitute aid. The second one refers to the context where the Commission finds that, after the modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the internal market have been removed and shall decide that the aid is compatible with the internal market (“positive decision”). The Commission may attach to a positive decision conditions and may lay down obligations to allow compliance with the decision (“conditional decision”). The last one concerns the situation where the Commission finds that the notified aid is not compatible with the internal market (“negative decision”) (Article 9 of the Regulation).

As stated above, the Commission may revoke the previous decision, only in situations where it was based on incorrect information that was a decisive factor for the decision. In these situations, the Commission will open the formal investigation procedure. Article 11 of the Regulation speaks only of a revocation of positive, conditional or no aid decision. Nevertheless, the case law established that the revocation is not restricted only to the last circumstances.²²

3. PROCEDURE REGARDING UNLAWFUL AID

The unlawful aid is not the same as incompatible aid. The possible situations encompassing unlawful aid include aid that has not been notified and has been put into effect before the Commission’s authorisation, the aid that has been notified

¹⁹ *Ibid.* p. 122.

²⁰ More details on the request for information made to other sources can be found in Article 7 of the Regulation.

²¹ Mazzocchi, *op. cit.* note 9, p. 123.

²² See Case T-25/04 González y Díez, SA v Commission of the European Communities [2007] II-03121

but put into effect before the authorisation and aid that has been given in breach of the authorisation terms. The simplified procedure is not applicable.

In general, the procedure is the same as for the notified aid. There are some particularities. The Commission is vested with the power to examine any information regarding alleged unlawful aid from whatever source. Usually the competitor is the one to give the information.²³ Here the Commission acts after a complaint or on its own initiative. Over the years there were certain doubts and misunderstanding of the Commission position in this situation. The Courts and the Commission were struggling with the unconditional nature of the obligation to start the procedure after receiving the complaint. Regulation 734/2013 introduced certain conditions to be fulfilled in order to confer the Commission a power to start a preliminary examination. The interested party must submit the complaints in a particular form.

The Commission has a power to issue injunctions. There are three types of potential injunctions. After the initiation of the formal investigation procedure, the Commission may request information from any other Member State, from an undertaking, or association of undertakings. Where, despite a reminder, the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information (“information injunction”). Those are interlocutory decisions. Another option is that the Commission, after giving the Member State concerned the opportunity to submit its comments, adopts a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market (“suspension injunction”). Those injunctions have been rarely used in practice. The injunctions may only be effective in situation where the Member State has not entirely paid or the state aid is expected to be to be paid in instalments.²⁴ The last possibility is to issue the so called “recovery injunctions”. The Commission can adopt a decision requiring the Member State to recover any unlawful aid provisionally, until the Commission decides on the compatibility of the aid with the internal market. Three criteria have to be fulfilled: there are no doubts about the aid character of the measure concerned, there is urgency to act and most importantly there is a serious risk of the substantial and irreparable damage to the competitor. (Article 13 of the Regulation).

²³ Mazzocchi, *op. cit.* note 9, p. 129.

²⁴ *Ibid.* note 7, p. 134.

If the Member State fails to comply with a suspension injunction or a recovery injunction, the Commission shall be entitled, while carrying out the examination on the substance of the matter on the basis of the information available, to refer the matter to the Court of Justice of the European Union directly. It shall apply for a declaration that the failure to comply constitutes an infringement of the TFEU (Article 14 of the Regulation).

In case of negative decisions, the Commission shall decide that the Member State shall take all necessary measures to recover the aid from the beneficiary (“recovery decision”) unless it is contrary to the general principles of EU law or the limitation period of 10 years has expired.²⁵The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission.

4. PROCEDURE REGARDING MISUSED AND EXISTING AID

Procedure regarding misused aid refers to the aid used in violation of the Commission decision. The Commission is obliged to open the formal investigation procedure and can order the recovery of the misused aid at the end of the procedure. The procedure applicable to unlawful aid is used.

According to the Regulation, the existing aid may cover the aid that existed prior the entry into force of the Treaty in certain Member States and is still applicable after the entry into force of the Treaty; aid schemes and individual aid which have been authorised by the Commission or by the Council; aid which is deemed to have been authorised; aid for which the ten year period has been expired (these is the only exception of the rule that the unlawful aid may not be considered to be existing aid), aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. The existing aid is not notified but is under the constant review by the Commission.

If the Commission, after reviewing the information obtained by the Member States, concludes that the existing aid scheme is not, or is no longer, compatible with the internal market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. If the Member State accepts the proposed measures, it is bound to implement them. In case of no acceptance, if the Commission after having taken into account the arguments of the Member State

²⁵ On limitation periods for the recovery of aid see Article 17 of the Regulation and Papi Rossi, A., *Recovery of Unlawful and Incompatible Aid*, in: Santa Maria, A. (ed.), *Competition and State Aid, An Analysis of the EU Practice*, second edition, Wouters Kluwer, Alphen aan den Rijn, 2015, pp.141-177.

concerned still considers that those measures are necessary, it shall initiate the formal investigation procedure. The procedure is the same as for the new notified aid except for the standstill clause.

5. CONCLUSION

There is a division of competences between the Commission and national courts. The Commission has a central role in determination whether the aid is compatible with the internal market. It is also the main policymaker. The Commission applies four different types of procedures: the procedure regarding notified aid, the procedure regarding unlawful aid, the misused aid procedure and the existing aid procedure. The national courts play an important role in safeguarding the stand still clause and in the case of enforcement of Commission's decisions.

Consolidated text of the Regulation serves as a tool for better understanding of the rules, their simplification and achieving uniformity in their application. Since the development of the internal market is a continuous process, clear and appropriate measures are required. It is also of vital importance to maintain the fundamental principles of EU law, such as equal treatment, legitimate expectations and proportionality.

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