The Discretionary Power of Competent Authorities in Applying State Aid Rules on Rescue and Restructuring

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Varazdin Development and Entrepreneurship Agency
in cooperation with
Faculty of Management University of Warsaw, Poland
University North, Croatia

Economic and Social Development

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THE DISCRETIONARY POWER OF COMPETENT AUTHORITIES IN APPLYING STATE AID RULES ON RESCUE AND RESTRUCTURING

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ABSTRACT

Following the adoption of the new Commission's Guidelines on rescue and restructuring, the authors take a closer look into the public authority's decision-making procedure to award restructuring aid. The analysis focuses on the national level of a decision-making process prior to the notification of restructuring aid to the Commission, using the example of the Republic of Croatia. The authors question the national procedure(s), its transparency and the margins of State's discretionary power to decide if and who to award the restructuring aid and initiate the procedure before the European Commission. It is being argued that the wider the discretionary power of the competent authorities who grant restructuring aid, the wider is the potential of negative social, financial and market-wise consequences both for the State as well as the recipient undertaking. In order to avoid worst possible scenario, the authors suggest de lege ferenda proposal of the assessment criteria.

Keywords: *discretionary power, firm in difficulty, restructuring aid, state aid*

1. INTRODUCTION

"Experience has shown time and again that "…the ill-considered use of public money to delay the difficult process of structural reform may in fact substantially harm the competitiveness of Europe in the longer term."[1] The undertakings facing serious difficulties in maintaining liquidity and daily business operations due to lack of capital and financing, having exhausted available market options to secure further liquid capital, may opt to address a public body (the State) to secure aid for either rescue or restructuring. The State, after letting the undertaking in difficulty explore the market options or applying (unsuccessfully) MEO principle in finding appropriate strategic partner and /or investor, may agree to restore the viability of the undertaking in difficulty by resorting to rescue and restructuring aid. In both cases, by doing so, the undertaking as well as the State need to follow stringent requirements addressing primarily the European Commission how to act when such a proposal is submitted for its consent. The requirements and the criteria for the Commission to follow when the proposal is submitted by the Member States are summarized in the soft law - The Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulties, introduced in July 2014[2] (hereinafter: the R&R Guidelines). Yet, the reasoning and the decision-making process that precedes is left to Member States. Decision to agree to award the restructuring aid to an undertaking in difficulty is led by Article 107 of the Treaty on the functioning of the European

[1] Eva Valle & Koen Van de Casteele, Revision of the Rescue and Restructuring Guidelines: A Crackdown?, 2004 Eur. St. Aid L.Q. 9 2004

[2] Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31.07.2014, p.1

Union[3] whereby aid granted "…through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"[4], unless the aid falls under exceptions that are considered compatible with the internal market. Between the direct application of Article 107 and the restructuring aid proposal prepared and submitted by the Member State to the Commission for approval, an entire internal decision-making procedure of examining the case and deciding on whether or not to grant the restructuring aid, is left to that Member State. Here, two questions rise interest of the authors: first, what is the decisive relevance of discretion by which the Member States decide whether or not to grant the restructuring aid and second, whether the initiative to and/or from the Member State with the proposal to grant the restructuring aid is internally considered (and communicated) open to all undertakings in difficulty (falling under the R&R Guidelines 2014). The authors first analyse the procedure before the Commission (Section 2), followed by the procedure in a selected Member State (Section 3). Concluding remarks are offed last (Section 4).

2. GUIDELINES ON RESCUE AND RESTRUCTURING 2014 – WHAT THE COMMISSION SEEKS AND THE MEMBER STATES SHOULD DEMONSTRATE

A Member State of the European Union may grant state aid not excluded from notification to the Commission only after the Commission's decision on aid's compatibility with the internal market. This obligation stems from Article 108 TFEU and Article 3 of the Regulation 2015/1589[5] precising that "aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid." Following the received notification on new aid, the Commission starts with the examination of the notification; the outcome may be diverse:

a) the Commission may establish that the notified measure does not constitute aid;
b) the Commission may establish that the notified measure constitutes aid compatible with the internal market falling within the scope of article 107(1) TFEU or
c) the Commission may establish that the notified aid raises doubt as to its compatibility with internal market within the scope of article 107(1) TFEU and pursue the matter further in form of formal investigation procedure.

Even though the Guidelines address the Commission and not the Member States, by providing criteria to facilitate the Commission's final decision, the Member States are well aware and cautious of the Guidelines. In other words, after the (political) decision has been taken but before addressing the Commission with the notification of new aid, they take the Guidelines into account while preparing the proposal to be submitted to the Commission. The R&R Guidelines 2014 require the Commission to look whether the Member State which proposes to grant aid to an undertaking in difficulty has succeeded to "…demonstrate on objective grounds that the undertaking concerned is in difficulty…"[6], providing detailed criteria to assess whether or not a particular undertaking may be considered in difficulty.[7]

[3] OJ C 115, 9.5.2008, p. 91–92
[4] ibid
[5] 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 , OJ L 248, 24.9.2015, p. 9
[6] Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31.07.2014, point 19.
[7] Ibid, point 20.
For the purposes of these guidelines, an undertaking is considered to be in difficulty when, without intervention by the State, it will almost certainly be condemned to going out of business in the short or medium term. Therefore, an undertaking is considered to be in difficulty if at least one of the following circumstances occurs:

Besides assessing whether the undertaking in question is in difficultly, and thus falling within the scope of point 20 of the R&R Guidelines 2014, the Commission also considers other criteria. First, a well – defined objective of common interest must be determined under the scope of Article 107(3) of the TFEU. Second, it needs to be proved that the State intervention is sought in a situation where market cannot further deliver material improvement of the undertaking. Next, the Commission examines whether the aid measure is appropriate insofar as it is not under nor over the level that may have equally successful contributed to the same goal. The Commission also looks into the incentive effect to see whether the objective of common interest would (not) be reached without the proposed aid. The Member States need also to present the proportionate character of the notified aid, ways to avoid distortion of competition and negative effects on trade between Member States and lastly, the transparency of the entire procedure needs to be secured. It is important to mention another crucial criterion of assessment by the Commission; the Commission also looks at whether the Member State, in a given case, behaves as would the private investor under the same circumstances. What the Commission seeks is the rationale behind the decision of the Member State to "invest" in an undertaking in difficulty. Therefore, the Member State, in individual case, should scrutinize its own decision to MEOP (market economy operator principle) test whereby "… economic transactions carried out by a public body do not confer an advantage, and therefore do not constitute aid, if they are carried out in line with normal market conditions…".[8] Or, in other words – the Member State needs to prove that the private investor would make the same decision as the Member State and the comparison is made strictly as per their market behaviour and decision-making process. This point was explicitly raised by the Commission in the Slovenian Polzela case in 2016. The Commission explained that "[t]he behaviour of public creditors may also be compared to that of hypothetical private creditors that find themselves in a similar situation ("private creditor test"). Therefore, if a Member State argues that the economic transaction is in line with that test, it must provide evidence showing that the decision to carry out the transaction was taken on the basis of an assessment that a rational private creditor would have carried out to determine the transaction's profitability."[9] Hence, a Member State investing in an undertaking currently in difficulties is justifiable if there is a likely chance that the business will become profitable again. Some authors[10] question the mere existence of rescue and restructuring aid, emphasising that ailing undertakings should succumb to market conditions and that rescue and restructuring aid would not contribute to a different outcome than that of bankruptcy or insolvency proceedings that may as well keep viable parts of undertaking in the market, concluding that

a) In the case of a limited liability company (25), where more than half of its subscribed share capital (26) has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital.
(b) In the case of a company where at least some members have unlimited liability for the debt of the company (27), where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses.
(c) Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.
(d) In the case of an undertaking that is not an SME, where, for the past two years:
i.
the undertaking's book debt to equity ratio has been greater than 7,5 and
ii.
the undertaking's EBITDA interest coverage ratio has been below 1,0.

[8] Syndicat français de l'Express international (SFEI) and others v La Poste and others., C-39/94, EU:C:1996:285

[9] State aid SA.40419 – Slovenia – Restructuring aid to Polzela d.d., Official Journal of the European Union, C 258, 15 July 2016

[10] Maier-Rigaud, Frank and Christopher Milde (2015) The Rescue and Restructuring Aid Guidelines of the European Commission - An Economic Point of View, World Competition: Law and Economics Review, 38(2), Available at SSRN: https://ssrn.com/abstract=2560227 7

the Commission was "(m)ore likely, …subject to political pressure from member states pushing in favour of retaining this instrument of adjusting market outcomes and rom large undertakings that, as mentioned above, benefit from the mere possibility of R&R aid through lower cost of capital".[11] The pressure may actually be two-fold; the internal one to attempt to save the failing undetakings of Member State's interest and, to achieve that objective, its pressure upon the Commission to see the cases through. It is the former one, i.e. the question of existence of political pressure, the political ratio behind the decision empowered by the discretionary right of the State to decide who to grant restructuring aid amongst those who potentially qualify (but either do not apply or are not being motivated to apply for aid), that the authors seek to explore in terms of its decisive margins. One may say that there are two different worlds colliding: the first one relating to the Commission's decision – making procedure and the other one relating to Member States's procedure which potentially use their discretionary power to push forward those dossiers that they (politically) consider vital due to reasons other than those listed in R&R Guidelines – the reasons that a private market operator would not find compelling in its business decision – making process. Hence, the factual conclusion that "litigation on rescue and restructuring aid typically focuses on the question as to whether the behaviour of the public authorities was in line with the behaviour of a private investor…"[12] gives rise to question whether the State provides sufficient assurances that voluntary, discretionary power is limited to the minimum so as to avoid politically motivated decisions. This may result in unsuccessful restructuring and aid to be recovered. In such a case, the undertaking needs to return the money received as well as the guaranteed loans and having failed that, the undertaking goes bankrupt and the inevitable loss is accounted for through the State budget. The consequences further embrace social and unemployment benefits for the workers, secured by the budget as well. Overall information on granted aid in terms of objective, instruments and amounts of aid can be accessed on State Aid Transparency Public Search [13] (hereinafter: Transparency) but the data provided are rather limited and vary from one Member State to another. The Commission, during the overall modernization of State policy made the Transparency [14] its cornerstone, requiring that state aid granted by Member States to undertakings above €500,000, is publicly disclosed as regards the identity of the beneficiary, the amount and objective of the aid as well as the legal basis of the aid granted. The Transparency, nontheless and without objection, presents the cases submitted / notified to the Commission, whereas the question of transparency lies primarily with the Member States, whether they have initially notified all aid granted or not. As some authors argued, „… for a number of decades, State aid policy remained defacto unenforced. In particular, Member States did not comply with their duty to notify new aid schemes to the EU Commission. In addition, Member States seldom implemented EU Commission Decisions declaring aids incompatible with the common market by recovering the aid from the recipient." [15] It is precisely these undisclosed data that is most telling.

3. GRANTING RESTRUCTURING AID IN A MEMBER STATE; THE PROCEDURE AND ITS TRANSPARENCY (CROATIAN EXAMPLE)

Firms that find themselves in difficulty have an option either to explore different market options at hand, declare (pre)bankruptcy procedure or resort to restructuring aid. Should they opt for the latter, they would channel their request via the Government's institution responsible for the sector/industry of the undertaking's prime business to the Ministry of Finance (MoF),

[11] ibid
[12] . Ianus, R., Orzan M.F. in Hoffman, H.C.H, Micheau, C., State aid law of the European Union, Oxford University Press, 2016, p. 299
[13] https://webgate.ec.europa.eu/competition/transparency/public/search/results/HR
[14] Competition Policy Brief, Issue 4, ISBN 978-92-79-35545-5, ISSN: 2315-3113, May 2014
[15] Marco Botta, State Aid Control in South-East Europe:The Endless Transition, EStAL 1 2013

responsible for the matters of state aid and communication with the Commission. It is, at this point, worth mentioning the Government State Aid Policy Guidelines[16] that, in the area of rescue and restructuring, reiterate the goals to be achieved: to provide liquidity support, to ensure viability and to provide temporary liquidity assistance to support the restructuring of the undertaking but also, to minimize sectoral aid simultaneously with expanding the horizontal aid. There are at least two problems identified by the authors. The first one relates to the (insufficient) procedural rules in granting state aid to rescue and restructuring and the other one to the lack of transparency and criteria for decision making.

3.1. The normative aspect of aid granting procedure

The procedure is regulated by the Rules of proceedings on proposal submission of state aid, state aid data, *de minimis* state aid and registry of state and and *de mininis* state aid[17] (hereinafter: the Rules). The Rules of proceedings represents a technically administrative input for its addressees – aid grantors - in terms of procedural aspects but lacks the substantive input and criteria on grounds of potential decision and outcome. In essence, the procedure starts when the undertaking in difficulty approaches or is approached by the competent institution (aid grantor) with the initiative to finance its restructuring via restructuring aid. Once the (political) decision by the competent institution is made, that institution is obliged to submit its proposal to the MoF, amongst others, by completing a required form 3.III.b – *additional data on restructuring aid to nonfinancial undertakings in difficulty: individual aid.* [18]. The data sought are organized by sections that, in fact, represent the breakdown of the R&R Guidelines in form of a questionnaire to which the sectoral ministry on behalf of the undertaking in difficulty needs to answer and provide information. The fact that the form is completed does not in itself mean that the decision had been made on the grounds of these criteria. The sectoral ministry then addresses the individual aid to MoF; the MoF takes up to 45 days to issue its opinion on the proposal from the aspect of its compatibility with state aid rules and state aid policy of the Republic of Croatia. If the findings are positive, the MoF processes it further towards the Commission. If, however, the MoF finds the proposal contrary to state aid rules and / or the Government's state aid policy, it will address the issue of incompatibility with the proposing ministry to correct it accordingly in the following 30 days. Once the internal administrative data have been gathered, the Ministry of Finance contacts the Commission, precisely, DG Competition. The DG Competition, following the R&R Guidelines 2014, examines the case and reaches its decision. These general procedural rules are extremely vague and are not remotely precise enough to provide legal certainty to parties involved. First of all, it is uncertain how the procedure starts as the Rules regulate the procedure only from the moment the competent institution (aid grantor) has already made its decision and now has to communicate it to the MoF. This only means that the most relevant moment of decision-making procedure is entirely unregulated both in procedure and substance and is left entirely to the discretion of the aid grantor. The authors find this normative void at the very least unacceptable because it is prone to abuse. To provide a legal certainty and ensure the protective cushion, existing national procedure should also make internal *hows* be known, introducing criteria that both private and public undertakings in difficulty should adhere to if they wish to be restructured by state aid. Such criteria should develop upon R&R Guidelines introducing additional elements safeguarding that the interest of the State is indeed being secured. For instance, these criteria may be, e.g. the risk assessment of State's involvement in undertaking's restructuring, the

[16] Government State Aid Policy Guidelines 2017-2019, Official Gazette no. NN 27/2017, 24.3.2017
[17] Official Gazette no. 121/2016
[18] www.mfin.hr ; Regulation 794/2004, 21.4. 2004. (OJ EU, L 140, 30.4. 2004, L 302, 1.11.2006., L 407, 30.12.2006.; L 82, 25.3.2008.; L 313, 22.11.2008.; L 81, 27.3.2009., L 308, 24.11.2009.; L 109, 12.4.2014., L 325 10.12.2015., L 51, 26.2.2016.), Regulation 2015/2282, 27. 11.2015. (OJ EU, L325, od 10.12.2015.)

investor's ratio (why should the State invest and what gains should it expect by what time), whether there already is the consent between the existing creditors on debt accountability and support for restructuring process and the existence of prospective strategic partner at a later stage of restructuring process. Going back to MEOP as presented above, it would be perhaps advisable to also, prior to and as part of the decision – making process whether and whom to grant restructuring aid, make a check list of when to apply (allowing the window of at least 6 months for the procedure to be completed), introducing some elements of MEOP (that the Commission would look at anyhow) and provide business and market rationale making it easier for the State to decide on the case. Having an internal procedure, communicated and publicized, not only provides for a legal certainty but also offers more security to the State justifying its decision. The existing procedure does not encompass the grounds on which a particular undertaking in difficulty should indeed receive restructuring aid; the case is built properly before the Commission as per the R&R Guidelines requirements but do not foresee internal benchmarks for decision made nor it makes it known the total number of undertakings that applied and the justified grounds of the administration's decision both for those who failed to be granted restructuring aid and for those who have.

3.2 The transparency of restructuring aid granting procedure

The fact that there are no precise rules on procedure and criteria necessarily leads to lack of transparency. Even if there were procedure and criteria, it would not suffice to guarantee legal certainty and avoidance of political decision-making. Searching for the answer brings us back to the beginning of the decision-making process and its political momentum, specifically if the State itself suggests to the undertaking to resort to restructuring aid falling under scope of the R&R Guidelines 2014. Similar thoughts are shared by Phedon and Ferruz who have found that "… a significant proportion of these measures suggest that aid provisions are inefficient in the sense that they cost more than the output they save. These findings cast doubt on the economic rationality of restructuring aid and suggest that governments may be guided by political objectives when they bail out a firm."[19]. In order to guarantee full transparency of the system, it would be necessary to have access to information (perhaps not ad nominem but by number of applicants, sector, aid instrument, amount sought) of overall applications, criteria of decision-making by the State and, in case of rejection or approval, the grounds of rejection stemming from the criteria. It would provide an insight into legal as well as economic ratio behind a public authority decision(s) (not) to grant restructuring aid. Currently, what is left outside of knowing is the number of undertakings in difficulty that have applied to be granted restructuring aid but failed in their attempt being rejected by the State whereas other have succeeded. Not being aware of their existence and, if they have applied and were rejected, of the grounds of rejection, criteria applied etc., one may wonder why have some undertakings been granted restructuring aid. They may have either been a) the only ones applied or b) the only once successful in presenting their case or c) the only once of vital socio-economic and political importance for the State to proceed further. In the case of c), one may see beyond just legal and socio-economic reasoning and resort to political judgement that would favour circumstances beneficial for maintenance of political power, which has close to nothing to do with facts and numbers. To that point, some authors suggest the susceptible manifestation or state aid if used improperly by "…becoming a political tool to increase chances of re-election for incumbent parties. When this is the case, the objective of the aid becomes less important. This can have serious consequences in terms of wasteful spending and effects on competition.

[19] M. A. Bolsa Ferruz, P. Nicolaides, An Economic Assessment of State Aid for Restructuring Firms in Difficulty: Theoretical Considerations, Empirical Analysis and Proposals for Reform, World Competition 37, no. 2 (2014)

"[20] The worst-case scenario, naturally, is granting aid to undertaking but failing to notify the Commission of the case. This particular offence that Member States may wilfully expose themselves to is, however, not in the focus of the authors. Another important issue relates to information campaign and availability of information to undertakings that they may actually resort to this particular type of aid. In no circumstance do the author support a wide promotion of restructuring aid beyond what is justified, specifically considering its distortive character. The restructuring aid through public financing should be limited to undertakings of vital importance. As others authors also argue "The rules should act as a stronger deterrent for companies to rely on support from the State and avoid introducing those changes which are necessary for their long-term viability."[21], the exit of failing undertakings is an everyday occurrence in the market and undertakings should not be artificially and beyond economic logic preserved from their inevitable faith. Yet, the question does not relate to circumstance of the decision made to proceed with notification process of State granting aid to particular undertaking but why that particular undertaking and not another (if another exists, the information is not shared hence the objective grounds of decision made is unknown). In earlier years, potentially, Member States were faced with a temptation to use aid to provide benefits to their own industries to maintain their national market presence and give them additional economic advantage; or, as some authors outline, the Member States were faced with a ""prisoner's dilemma" situations where domestic aid is granted to restore "the level playing field" with subsidised foreign industries." [22] If, hypothetically, a number of undertakings apply for restructuring aid, would the Member State make a discretionary decision to assist, for instance, either only those where the State has ownership, full or partial, or not? Would, in case where there is a mix of applicants between public and private, the State opt for a latter driven by its political interest to maintain the company's operations alive? The only nationally available information on rescue and restructuring aid may be found in the Ministry of Finance's overall annual report on state aid[23]; the report provides information on all aid granted to beneficiaries by aim, instrument and grantors. Last publicly available report, issued for 2015 indicates that the rescue and restructuring aid amounted to 43,7 million HRK (€5.7 million) in the form of debt write off, capital investment, loans and protested guarantees. It is worth mentioning that two (2) publicly owned undertakings in difficulties were beneficiaries of the total R&R aid in 2015. It is not so much the available information triggering our interest as much as the information missing from the report. Most notably this refers to information on undertakings that applied for state aid but failed to receive it. Particularly interesting in that regard is the information on the ownership structure of the firms in difficulty applying for restructuring aid. Is the state favouring its own undertaking over private ones? This fear is supported by the budgetary allocations for 2017[24], which display the possible discriminatory character of restructuring state aid between private and public undertakings in difficulty, allocating restructuring aid solely to publicly owned undertakings. Apart from the guarantees, private undertakings in difficulty may not benefit from restructuring aid on equal footing as the state owned (or state majority owned) companies where budgetary allocation for restructuring aid amounts to HRK 3 million (shipbuilding under restructuring process excluded). This

[20] Buts C., Joris T. i Jegers M. in State Aid Policy in the EU Member States – It's a Different Game They Play, State Aid Policy in the EU Member States, EstAL 21 2013).

[21] Eva Valle & Koen Van de Casteele, Revision of the Rescue and Restructuring Guidelines: A Crackdown?, 2004 Eur. St. Aid L.Q. 9 2004

[22] Sanoussi Bilal,Phedon Nicolaïdes, Understanding State Aid Policy in the European Community: Perspectives on Rules and Practice, Kluwer Law International, 1999

[23] Yearly report on state aid https://vlada.gov.hr/UserDocsImages/Sjednice/2017/05%20svibanj/37%20sjednica%20VRH/37%20-%2010%20b.pdf

[24] Official Gazette no. 119/2016 of 20.12.2016 at https://narodne-novine.nn.hr/edition_pdf.aspx?eid=129634

amount is significantly insufficient as a financial injection hence, the interested parties (in this case subject to ownership) need to signal their needs early on in the year, to be first internally processed prior to formal submission of their case(s) before the Commission. It is unknown whether then the undertakings are accepted, amongst others, on the "first come, first serve" basis, whilst the allocated budget is still available for use? Different situation is with restructuring aid in the form of guarantees whereby the budget allocation is significantly different and amounts to HRK 5.650 bln, yet it is aimed at the entire economic sector, public, private, SMEs, recapitalization and export guarantee support; there is far more spread of allocated instrument to be used throughout the fiscal year. Taking into consideration all said above, we may conclude that the decision by the State is highly discretionary and voluntary in terms of selecting which undertakings (and why) to grant aid for restructuring and returning to viability. The consequences may be severe for both the undertaking and the State in budgetary terms. For instance, in the procedure initiated by the Commission as laid down in Article 108(2) of the TFEU concerning the aid measure provided to a petrochemical company Oltchim thee Commission, in its letter to Member State, expressed its view that measures under evaluation whether they constitute state aid or not "… may confer aid to Oltchim because the public creditors and suppliers may have acted in a different way than a market economy operator in a similar situation. It is the Commission's preliminary view that all the above measures may amount to rescue and restructuring aid." The procedure has not been finalized, therefore the findings of the Commission remains unknown; should the Commission establish that the measures under scrutiny represent state aid, the recovered aid would have to be paid back to State.

4. CONCLUSION

The aim of this article was to explore the margins of Member States' discretion in granting restructuring aid. The analysis was done using a Croatian example. The results display a lack of procedural rules and criteria of decision – making process at its initial level. As some authors argued, „… for a number of decades, State aid policy remained defacto unenforced. In particular, Member States did not comply with their duty to notify new aid schemes to the EU Commission. In addition, Member States seldom implemented EU Commission Decisions declaring aids incompatible with the common market by recovering the aid from the recipient." [25] Discretion leads us now to selectivity; potentially, the Member States may be selective in their decision – making using their discretionary power or as the Notion on State aid defines it in its point 123 and 124 "General measures which prima facie apply to all undertakings but are limited by the discretionary power of the public administration are selective. This is the case where meeting the given criteria does not automatically result in an entitlement to the measure." The explanation is elaborated to precise that "Public administrations have discretionary power in applying a measure, in particular, where the criteria for granting the aid are formulated in a very general or vague manner that necessarily involves a margin of discretion in the assessment."[26] Besides being potentially considered selective, such measure awarded in a non-transparent procedure cannot stand the test of to market economy operator and its decision (valuation) – making process in a similar situation. Would a (private) market economy operator, facing the similar situation, do the same as State? If not, why has the State decided to act differently and on what grounds? Potential consequences are financially, socially and market-wise enormous. Introducing concrete criteria such as risk assessment, debt accountability and creditor consent, MEO principle elements and making the process more transparent in advance, would provide the State with a strong legal shield against its own (wrong) doing.

[25] Marco Botta, State Aid Control in South-East Europe:The Endless Transition, EStAL 1 2013
[26] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262, 19.7.2016, p. 1–50

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LITERATURE:

1. Bellamy&Child, European Union Law of Competition, 7th ed., Rose V, Bailey D.(eds.), Oxford University Press ,2015.
2. Sanoussi Bilal, Phedon Nicolaides, Understanding State Aid Policy in the European Community: Perspectives on Rules and Practice, Kluwer Law International, 1999
3. M. A. Bolsa Ferruz, P. Nicolaides, An Economic Assessment of State Aid for Restructuring Firms in Difficulty: Theoretical Considerations, Empirical Analysis and Proposals for Reform, World Competition 37, no. 2 (2014)
4. Marco Botta, State Aid Control in South-East Europe:The Endless Transition, EStAL 1 2013
5. Buts C., Joris T. i Jegers M. in State Aid Policy in the EU Member States – It's a Different Game They Play, State Aid Policy in the EU Member States, EstAL 21 2013).
6. Hoffman, H.C.H, Micheau, C., State aid law of the European Union, Oxford University Press, 2016
7. Frank Maier-Rigaud, Christopher Milde, 'The Rescue and Restructuring Aid Guidelines of the European Commission: An Economic Point of View' (2015) 38 World Competition, Issue 2
8. Alice Pisapia, The Role of EU State Aid Policy in Enhancing the Development of theIndustrial Sector, Privredna kretanja i ekonomska politika god. 23 br. 2 (135) 2014.Eva Valle & Koen Van de Casteele, Revision of the Rescue and Restructuring Guidelines: A Crackdown?, 2004 Eur. St. Aid L.Q. 9 2004
9. Commission communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004, Official Journal C 296, 2.10.2012
10. Commission communication concerning the prolongation of the Community Guidelines on State aid for rescuing and Restructuring Firms in Difficulty, Official Journal C 156, 9.7.2009
11. Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, Official Journal C 249, 31.07.2014
12. Community guidelines on State aid for rescuing and restructuring firms in difficulty, Official Journal C 368, 23.12.1994, C 283, 19.9.1997, C 288, 9.10.1999, C 244, 1.10.2004
13. Commission Notice on the notion of State aid referred to in Article 107(1) of the TFEU, Official Journal C 262/01 2016, 19.07.2016