

Role of EU Member States and Situation of Beneficiaries

The competence of the EC to Review State Aid Measures

State aid in the European Union has become one of the most important areas of competition law (perhaps it may even be regarded a separate area of law), although it is based only on a few provisions of primary EU law. These are Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU)¹, which define the scope of the competence, substance and procedure in this area of law, as well as the institutions responsible for its implementation, including the review of granted state aid. This article focuses on the issues relating to the application of the rules on competence and procedure in order to determine the extent of the powers of the European Commission ('EC' or 'Commission') as regards the freedom to grant state aid and review the competences of EU Member States in that area.

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Introduction

The provisions refer rather laconically to the conditions and the scope of granting of state aid, and although they were already included in the founding Treaties of the European Union, their influence remained underestimated. Lately, their

importance has grown almost to the level of the constitutional principles of EU law, together with the enhanced activities of the Member States in the field of economic intervention and the Commission's fight for transparency and enforcement of competition rules in the EU internal market². Thereby, as a result of developments in the case-law and the practice in

¹ In this respect the reference should also be made to Articles 93 and 106 (2) TFEU. They are relevant as regards the financing of public services and services of general economic interest respectively, which may at times constitute state aid.

² As regards the revision of EC actions, see further W. Medrer: *Vorschriften über staatliche Beihilfen – Articles 107 to 109 AEUV* [in:] Schröter, H., Jakob, Klotz, R., Mederer (eds.), *Europäisches Wettbewerbsrecht*, Baden-Baden 2014, p. 2025.

this field, those provisions significantly restricted the sovereignty of the Member States in the freedom of action pursued in the context of the economic policy of the State³, while producing the most far-reaching economic effects. It should be noted that these Treaty provisions apply to any spectrum of state action and that the conditions laid down therein must, in practice, be taken into account during any State intervention. Furthermore, it would not be possible to implement European funds without the strict compliance with the state aid rules since the consequences of their breach (in the form of an obligation to repay aid with interest) may have a catastrophic effect on the beneficiaries of that aid.

The provisions of the Treaty, namely Articles 107 and 108 TFEU, although initially supplemented only by the communications from the European Commission on state aid, were clarified by acts of secondary EU law. 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, which codifies and develops the case-law of the Court of Justice of the European Union ('CJEU' or 'the Court') on state aid, should be assigned the key role in this area.

Both the provisions of the Treaty and those of secondary legislation must be

interpreted in light of the Court's extensive case-law, without the knowledge of which it is impossible to reconstruct correctly the relevant rules applicable in the field of state aid. The Commission has two types of powers⁴:

- the power to review of existing state aid, known as "grants control"⁵,
- the power to review the new state aid (including its alterations).

This article deals only with the latter. However, in view of the broad scope of the subject matter, it does not cover the Commission's specific powers in relation to investigations into certain sectors of the economy and aid (including decisions on 'sectoral aid') and matters relating to the state aid recovery.

Legal basis for the EC's powers to review

The legal basis for the exercise of the European Commission's powers to review in the field of state aid is Article 108 TFEU of which the paragraph 1 first sentence reads as follows: "The Commission shall keep under constant review, in cooperation with the Member States, the existing systems of aid in those States". It therefore constitutes an obligation, both for the Commission and the Member States, to collaborate in the spirit of sincere cooperation within the field of state aid schemes. It is not disputed, however, that the Member States

³ A. Kliemann: *Art. 107 AEUV* [in:] *Europäisches...* op.cit., p. 2033.

⁴ See P. Kostański: *Postępowanie przed Komisją Europejską w sprawie notyfikowanej pomocy państwa*, "Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego", 2006, vol. IV, p. 56.

⁵ See the articles of M. Szymański: *Zwalczanie nadużyć finansowych w funduszach Unii – ewolucja systemu ochrony budżetu UE – część I*, "Kontrola Państwowa" No 3/2021 and *Zwalczanie nadużyć finansowych w funduszach UE – narzędzia stosowane do ochrony budżetu Unii cz. II*, "Kontrola Państwowa" No 4/2021.

still have exclusive competence to decide in which areas and to what extent the aid measures may be targeted. However, it is the European Commission which is competent to determine which aid measures are permissible under EU law remaining a broad discretion in this matter. Moreover, the admissibility of state aid must be assessed solely in light of EU law and not national law⁶. It does not mean, however, that this discretion is unlimited, albeit very broad – it encompasses a complex assessment of economic and social conditions in the context of the European Union as a whole⁷. The EU courts may review the extent of that discretion only to check whether this institution has complied with the rules governing the procedure and the duty to give reasons of the contested measure, and whether there has been no error of fact relied or manifest error of assessment or misuse of powers⁸, in particular in cases in which the Commission's assessment is technical or complex⁹. In this field, the Commission remains the final arbiter which should weigh the interests of the European Union against national interests¹⁰. Thus, in essence, it has been underlined in legal writing that state aid is to be found in the 'direct

execution' model, in the context of which the EC implements EU law through its own structures¹¹.

Furthermore, Article 108(2) TFEU stipulates that, "if the Commission, after giving notice to the parties concerned to submit their comments, finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it is to decide that the State concerned must abolish or alter such aid within a period of time to be determined by the Commission". Moreover, in accordance with the paragraph 3 of this provision "the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that a plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned must not put its proposed measures into effect until that procedure has resulted in a final decision".

According to Article 108 TFEU only the Commission has competence to assess the compatibility with the internal

⁶ M. Blauberger: *Of Good and Bad Subsidies: European State Aid Control through Soft and Hard Law*, 32 "West European Politics" No 4/2009, p. 724.

⁷ Judgment of the CJ of 17.9.1980 in case 730/79, Philip Morris Holland BV v Commission, EU:C:1980:209, para 24.

⁸ Judgment of the CJ of 29.4.2004 in case C-372/97, Italy v Commission, EU:C:2004:234, para 83.

⁹ Judgment of the CJ of 22.12.2008 in case C-487/06 P, British Aggregates Association v Commission, EU:C:2008:757, para 114.

¹⁰ See further M. Schweda: *Compatibility of State Aid with the Common Market pursuant to Article 87(3) EC* [in:] M. Heidenhain (ed.), *European State Aid Law. Handbook*, Munchen 2010, p. 152-154.

¹¹ See legal writings cited in C.M. Colombo: *State aid control in the modernization era: Moving towards differentiated administrative integration?*, 25 "European Law Journal" 2019, p. 294.

market of any state aid, which has been notified or is to be found unlawful, subject to the review by the Courts of the European Union¹². That scheme is therefore based on preventive control (Article 108 (3) TFEU) as regards the amendment of existing aid schemes or new aid measures. The main aim of this regulation is to ensure that only state aid compatible with the internal market is granted¹³. The principal solution of this objective is the deferment of the entry into force of the measure until the doubts as to its compatibility with the internal market are resolved by the Commission's final decision¹⁴.

The institution must therefore have enough time to carry out its examination in the general interest of the European Union, which must, in principle, be completed within reasonable time¹⁵. Under this procedure, the Member States are required to cooperate and to provide all necessary data and information. Providing a Member State fails to cooperate, the EC can make its final decision only on the basis of the information available at that time¹⁶. That being so, it should be mentioned that the rights of the defence preclude the use by the Commission of

information to which the Member State has not been given an opportunity to comment¹⁷.

The system to review was conceived in such a way that the European Commission is at its heart, the national courts playing complementary but separate roles (acting as the EU courts)¹⁸.

The division of powers between the EC and the national courts is essential to the delimitation of the scope of jurisdiction between the European Union and the Member States. Those authorities have a separate but complementary role¹⁹. In this area, the national courts (subject to review by the Courts of the European Union) ensure that the rights of individuals are safeguarded in the event of a possible infringement by state authorities of the prohibition laid down in Article 108(3) TFEU (the implementation of state aid without prior notification), until the final decision is issued by the EC²⁰. This fulfils the obligation to protect the parties affected by the distortion of competition caused by granting unlawful aid²¹. It includes the power of the national court to adopt interim measures, i.e. such as the suspension of state aid measures in order to protect

¹² Judgment of the CJ of 19.7.2016 in case C-526/14, *Ktonik and Others*, EU:C:2016:570, para 37.

¹³ Judgment of the CJ of 12.2.2008 in case C-199/06, *CELF*, EU:C:2008:79, para 37.

¹⁴ Judgment of the CJ of 12.2.2008 in case C-199/06 *CELF*, para 48.

¹⁵ Judgment of the CJ of 14.2.1990 in case 301/87, *France v Commission*, EU:C:1990:67, para 17.

¹⁶ Judgment of the CJ of 14.2.1990 in case 301/87, *France v Commission*, para 22.

¹⁷ Judgment of the CJ of 11.3.2020 in case C-56/18 P, *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo sp. z o.o.*, EU:C:2020:192, para 73.

¹⁸ Judgment of the CJ of 21.11.2013 in case C-284/12, *Deutsche Lufthansa AG*, EU:C:2013:755, para 27.

¹⁹ Judgment of the CJ of 21.11.2013 in case C-284/12, *Deutsche Lufthansa AG*, para 27.

²⁰ Judgment of the CJ of 5.10.2006 in case C-368/04, *Transalpine Ölleitung in Österreich and Others*, EU:C:2006:644, para 38.

²¹ Judgment of the CJ of 11.7.1996 in case C-39/94, *Syndicat français de l'Express international (SFEI) and Others v La Poste and Others*, EU:C:1996:285, para 50.

the interests of the parties in the proceedings relating to the alleged state aid²², but it cannot be exercised to the detriment of the interests of the European Union, rendering the repayment of the aid practically impossible²³.

It should be taken into account that, according to settled case-law, Article 108(3) TFEU has direct effect – the prohibition laid down therein extends to all aid measures implemented in breach of the obligation of notification²⁴. It needs also be stressed out that the Commission's final decision does not have legal effect of regularising *ex post facto* the implementing measures which were invalid by reason of their adoption in breach of the prohibition laid down in Article 108(3) TFEU, otherwise the direct effect of that provision and the interests of individuals would be adversely affected²⁵. In such a case, it is for the national courts to draw the appropriate conclusions from the infringement of the prohibition laid down in Article 108 (3) TFEU, which is consistent with national law as regards the validity of aid measures concerned and the recovery of financial support granted in breach of that provision²⁶. In this field they may submit requests for data and clarification on

the classification of certain aid measures to the Commission and this institution is obliged to respond as soon as possible, in accordance with the principle of sincere cooperation²⁷. Interestingly enough, the EC's exclusive competence to rule on the compatibility of state aid with the internal market would be vitiated even by a breach of the national principle of *res judicata* if the national court were to rule in disregard of that competence of the EU institution²⁸.

The Commission's powers with regard to the rules of procedure in state aid matters therefore derive directly from the TFEU. However, due to the generality and brevity of the provisions of primary law in this area, they have been defined and clarified in the case-law of the Court and by a series of communications issued by the above-mentioned institution, which it has undertaken to bind itself against third parties. However, in order to ensure legal certainty in this area, Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty was adopted²⁹. That act was subsequently amended and updated on several occasions and consequently replaced

²² Judgment of the CJ of 11.7.1996 in case C-39/94, *Syndicat français...*, op.cit., para 52.

²³ Judgment of the CJ of 20.9.1990 in case 5/89, *Commission v Germany*, EU:C:1990:320, para 19.

²⁴ Judgment of the CJ of 21.11.1991 in case C-354/90, *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon v France*, EU:C:1991:440, para 11.

²⁵ Judgment of the CJ of 21.11.1991 in case C-354/90, *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon v France*, para 16.

²⁶ Judgment of the CJ of 21.10.2003 in joined cases C-261/01 and C-262/01, *Belgian State*, EU:C:2003:571, para 64.

²⁷ Judgment of the CJ of 11.7.1996 in case C-39/94, *Syndicat français...*, op.cit., para 50.

²⁸ See judgment of the CJ of 18.7.2007 in case C-119/05, *Ministero dell'Industria (), del Commercio e dell'Artigianato v Lucchini SpA*, EU:C:2007:434, para 63.

²⁹ O.J. L 83 of 27.03.1999, p. 1, as amended.

by 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, adopted on the basis of Article 109 TFEU ('Regulation 2015/1589')³⁰. Technical issues concerning notification and reporting are governed by Commission Regulation (EC) No 794/2004 on the implementation of Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union³¹. A certain role in this regard also plays *soft law* – for example the *Code of Best Practices for the conduct of State aid control procedures*³².

In accordance with the settled case-law of the Court of Justice, the earlier decisions of the Court relating to Regulation

No 659/1999 remain, in principle, equally valid as regards Regulation 2015/1589³³. It is therefore convenient to analyse its provisions in order to set out the principal rules on competences and procedure governing the Commission's conduct in this area.

Article 2 of Regulation 2015/1589 lays down an obligation to notify the granting of new aid, whereby the notification must be complete, i.e. it should contain all the information necessary for the European Commission to make the decision³⁴. Solely aid measures fulfilling all the conditions of state aid are subject to this obligation³⁵. It should be remembered that large number of measures are excluded from the requirement of notification: *de minimis* aid³⁶, aid falling within the scope of services of general economic interest³⁷ or general block exemption regulations³⁸

³⁰ O.J. L 248 of 24.09.2015, p. 9. That regulation replaced (and, in principle, codified) Council Regulation (EC) No 659/1999 of 22.3.1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (O.J. L 83, p. 1, as amended).

³¹ O.J. L 140, 30.04.2004, p. 1, as amended.

³² *Code of Best Practices for the conduct of State aid control procedures*, O.J. C 253, 19.07.2018, p. 14.

³³ *Mutatis mutandis* judgment of the CJ of 7.4.2022 in case C-429/20 P, Solar Ileias Bompaina AE v Commission, EU:C:2022:282, para 33; judgment of the CJ of 2.5.2019 in case C-598/17, A-Fonds, EU:C:2019:352, para 42.

³⁴ It should be remembered that the concept of new aid also covers alterations made to existing aid – judgment of the CJ of 9.10.1984 in joined cases 91 and 127/83, Heineken Brouwerijen BV, EU:C:1984:307, para 17.

³⁵ Judgment of the CJ of 21.7.2005 in case C-71/04, Administración del Estado, EU:C:2005:493, para 32. See also A. Sinnave: *Procedure before the Commission, Council Regulation 659/1999* [in:] M. Heidenhain (ed.), *European State Aid Law. Handbook*, Munchen 2010, p. 592 and the literature cited therein.

³⁶ See Article 3(1) of Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (O.J. L 352, 24.12.2013, as amended, s. 1); Article 3(1) of Commission Regulation (EU) No 717/2014 of 27.6.2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fisheries and aquaculture sector (O.J. L 190, 28.06.2014, as amended, p. 50).

³⁷ Article 1 of Commission Decision 2012/21/EU of 20.12.2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to undertakings entrusted with the operation of a service of general economic interest (O.J. L 7, 11.01.2012, as amended, p. 7).

³⁸ Article 3 of Commission Regulation (EU) No 651/2014 of 17.6.2014 declaring certain categories of aid compatible with the internal market pursuant to Articles 107 and 108 of the Treaty (O.J. L 187, 26.06.2014, as amended, p. 31).

or individual support under aid schemes approved by the Commission³⁹.

The notification obligation rests exclusively with the Member State concerned, which may not, in this regard, be replaced by the recipient of the aid⁴⁰. Only the Commission and the Member State (governmental authority) are parties to the notification procedure; regional or local authorities may take part in the proceedings only as interested parties⁴¹.

Such notification has suspensory effect (stand still clause). Until the EC adopts a decision, or the circumstances arise from which it may be inferred that it has been adopted, the aid measures cannot be implemented. Granting aid in breach of the notification obligation by a Member State constitutes an infringement of the principle of sincere cooperation, whereas the most serious consequences of the obligation to repay are borne by the beneficiaries of the aid scheme⁴². Undoubtedly, aid granted in violation of the obligations referred to in Article 108(3) TFEU is unlawful⁴³, i.e. granted in breach of the obligation to notify or just before the expiration of the

period provided for the EC's examination of a certain measure⁴⁴.

However, it should be taken into account that the compatibility of aid with the internal market should be assessed from the moment it is granted and not from the date of its notification⁴⁵. Some paradox has been pinpointed in legal writing – failure to comply with the obligation to notify constitutes an infringement only in relation to measures constituting state aid⁴⁶. As a result, while the proceedings before the national court may potentially duplicate the proceedings before the Commission as to the scope of examining whether a concerned measure constitutes state aid, unlike that institution which conducts the examination of the substantive compatibility of aid with the internal market, the national court should limit itself solely to verifying the compliance with the notification obligation and the stand still period⁴⁷.

Additionally, it is worth mentioning the presumption established by the Court, underlining that a diligent business operator must ascertain whether or not the aid received by him has been reported⁴⁸. However, the settled case-law of the courts of

³⁹ Judgment of the CJ of 16.5.2002 in case C-321/99 P, ARAP and Others, EU:C:2002:292, para 72.

⁴⁰ Judgment of the General Court of 10.11.2021 in case T-678/20, Solar Electric Holding and Others v Commission, EU:T:2021:780, paras. 26 and 27.

⁴¹ A. Sinnaeve: *Procedure before the Commission...*, op.cit., p. 575.

⁴² B. Kurcz: *Zasada solidarności a usuwanie skutków bezprawnej pomocy państwa na przykładzie sprawy CELF, „EPS” No 10/2008*, p. 29.

⁴³ Judgment of the CJ of 5.10.2006 in case C-368/04, Transalpine Ölleitung in Österreich and Others, EU:C:2006:644, para 40.

⁴⁴ E. Fronczak: *Rola sądów krajowych w postępowaniu z zakresu pomocy państwa*, „EPS” No 8/2008, p. 20.

⁴⁵ B. Kurcz: *Zasada solidarności...*, op. cit., p. 32. See also *Commission notice on the determination of the applicable rules for the assessment of unlawful State aid*, O.J. C 119, 22.05.2002, p. 22.

⁴⁶ E. Fronczak: *Rola sądów krajowych...*, op.cit. p. 21.

⁴⁷ *Ibidem*, p. 22.

⁴⁸ Judgment of the CJ of 20 September 1990 in case C-5/89, Commission v Germany, EU:C:1990:320, para 14.

the European Union shows that state aid cannot be declared incompatible with the internal market only on the sole ground that a notification obligation has been infringed⁴⁹.

It should be remembered, that according to the European Commission's recommendations, the notification procedure should be preceded by a pre-notification phase, during which the EC, often informally, gives advice on the manner in which the exemptions provided for by EU law may be used or adapted to the aid measures in order to satisfy the legal requirements⁵⁰. As a last resort, the Member State may withdraw its notification application. Nevertheless, in practice the willingness to use such a 'convenient procedure' by the Member States is considerably limited, since the Commission's services focus in the first place on administrative proceedings, which lengthens the period necessary for assessing the notified measures⁵¹.

Preliminary investigation procedure

Upon notification of state aid, the Commission is required to carry out a preliminary investigation, which may lead to three types of decision. Firstly, it may find that the notified measure does not constitute state aid

(Article 4(2) of Regulation No 2015/1589). Secondly, if the EC has no doubts as to the compatibility of the concerned measure with the internal market, as it falls within the scope of Article 107(1) TFEU, it makes a decision not to raise objections (Article 4(3) of Regulation No 2015/1589). Finally, if doubts arise as to the compatibility of the notified measure with the internal market, a decision to initiate the formal investigation procedure must be adopted (Article 4(4) of Regulation No 2015/1589). The EC is required to express its doubts, but the burden of dispelling them rests with the other parties to the proceedings⁵². In that regard, it emerges from the settled case-law of the Court that, if the Commission is unable to conclude that the concerned measure:

- does not constitute aid within the meaning of Article 107(1) TFEU, or
- is compatible with the TFEU (if it is deemed to be state aid), or
- the procedure under way does not enable it to overcome all the difficulties involved in determining whether the aid concerned is compatible with the internal market, it is required to initiate the formal investigation procedure and has no discretion in this regard⁵³.

⁴⁹ Judgment of the CJ of 14 February 1990 in case 301/87, *France v Commission*, EU:C:1989:357, paras. 19-21.

⁵⁰ R. van Druenen, P. Zwaan, E. Mastenbroek: *Getting State Aid Approved by the European Commission: Explaining the Duration of Preliminary Investigations in the State Aid Notification Procedure*, „JCMS”, vol. 60, No 3/2022, pp. 547-548.

⁵¹ See further as regards the disadvantages of such a solution, S.A. Jarecki: *Europejski Instrument Odbudowy a pomoc publiczna*, Warszawa 2022, pp. 54, 56, 111 and 112.

⁵² The observations of A. Sinnaeve: *State Aid Procedures: developments since the entry into force of the Procedural Obligation*, „CMLawRev” nr 4/2007, s. 988.

⁵³ See judgment of the CJ of 22.12.2008 in case C-487/06 P, *British Aggregates Association v Commission*, EU:C:2008:757, para 113) judgment of the GC of 18.5.2022 in case T-577/20, *Ryanair DAC v Commission*, EU:T:2022:301, para 25.

The Commission has two months to carry out the above-mentioned procedure, but with the consent of the Member State and the EC this time may be extended. Interestingly, the Commission may set a shorter period. If the EC delays issuing of the decision, the aid is deemed to be authorised and the Member State may implement the aid measure, but this institution in such circumstances has further fifteen working days to adopt one of those decisions. This provision codifies the so-called Lorenz procedure – in accordance with the case-law of the CJEU the aid implemented after the expiry of the two-month period belonged to the Commission and, following its notification, becomes existing aid⁵⁴. Nevertheless, the EC can easily and repeatedly extend the duration of the proceedings in such a way that it practically exercises comprehensive control over these proceedings⁵⁵. However, the institution cannot make unrestricted requests to a Member State solely for the purposes of prolonging the duration of the proceedings⁵⁶.

In principle, time limits in the proceedings before the Commission are based on the assumption that the application submitted is complete. However, it is often necessary to clarify certain points or

to supplement the information provided⁵⁷. The instrument for achieving this aim is a request for all necessary supplementary information from a Member State. The EC makes use of such instruments very often and therefore it leads to the considerable extension of the duration of the preliminary investigation procedure⁵⁸. The Member State's response should be confirmed, as failure to reply may result in a reminder correlated with setting an additional deadline for response. The important consequence is that failure to submit information results in a presumption of withdrawal of the notification application, unless it was extended before the expiry of the period for submission. The Member State may also declare that the notification is incomplete or additional information is not available or it has already been supplied, which triggers the time limit set for the preliminary investigation procedure by the EC.

A similar instrument is a request for information addressed to other sources: another Member State, an undertaking or an association of undertakings. The Commission may ask for all market information necessary for assessment of the aid measure, but it should take due account of the principle of proportionality, particularly

⁵⁴ Compare judgment of 11.12.1973 in case 120/73, *Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz*, EU:C:1973:152, paras. 5 and 6.

⁵⁵ S. Dudzik: *Postępowanie przed Komisją Europejską w sprawie pomocy państwa podlegającej zgłoszeniu: wprowadzenie i wyrok TS z 11.12.1973 r. w sprawie 120/73 Gebrüder Lorenz GmbH przeciwko Republice Federalnej Niemiec i Land Rheinland-Pfalz*, „EPS” No 7/2016, p. 51.

⁵⁶ A. Sinnaeve: *State Aid Procedures...*, op.cit., p. 983.

⁵⁷ S.A. Jarecki: *Europejski Instrument Odbudowy ...*, op.cit., p. 114.

⁵⁸ R. van Druenen, P. Zwaan, E. Mastenbroek: *Getting State Aid Approved...*, op.cit. p. 548; see also *Do the Commission's Procedures Ensure Effective Management of State Aid Control?*, European Court of Auditors <https://www.eca.europa.eu/Lists/ECADocuments/SR11_15/SR11_15_EN.PDF>.

with regard to small and medium-sized enterprises.

The preliminary procedure ends with the adoption of a decision not to raise objections, which not only declares the aid compatible with the internal market, but also constitutes implicitly a refusal to initiate the formal investigation procedure⁵⁹.

Formal investigation procedure

The decision to initiate the formal investigation procedure must, first of all, point out doubts as to the compatibility of the aid measure with the internal market and must include a request to submit comments within a specified period (normally within one month with a possibility of renewal). One of the essential procedural requirements include the Commission's obligation to give interested parties the opportunity to submit their comments⁶⁰. According to the Court, the publication of the notice in the Official Journal of the European Union is an appropriate means of informing all interested parties that a procedure has been initiated in so far as it seeks to obtain from those parties all information that might give the Commission a guidance of its future action, which also ensures that other Member States and interested parties may be heard⁶¹.

Comments may be submitted not only by the Member State concerned, but also

by all interested parties. In accordance with Article 1 (h) of Regulation 2015/1589 it means: „any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations”⁶². The scope of that concept was contentious as regards private entities who might participate in the proceedings before the Commission. As a result, the case-law of CJEU has evolved considerably, which will be later explained in more detail.

If an interested party submits a request for confidentiality on the ground of the potential damage which it may suffer, its identity shall not be revealed to the Member State which forwarded the notification. It may, however, respond to the submitted comments.

The principle of proportionality is given full expression in Article 7(2) of Regulation No 2015/1589, according to which the Commission may request information solely in cases related to:

- formal investigation procedures being deemed ineffective,
- beneficiaries of the aid, provided that the Member State concerned agrees.

When requests for market information have been submitted to third parties, the Commission acts as an information hub,

⁵⁹ Judgment of the CJ of 24.5.2011 in case C-83/09 P, *Commission v Kronoply GmbH & Co. KG & Kronotex GmbH & Co.*, EU:C:2011:341, para 45.

⁶⁰ Judgment of the CJ of 11.11.2021 in case C-933/19 P, EU:C:2021:905, para 63.

⁶¹ Judgment of the CJ of 11.3.2020 in case C-56/18 P *Commission v Gmina Miasto Gdynia and Port Lotniczy Gdynia Kosakowo sp. z o.o.*, para 72.

⁶² This definition has been based on the judgment of the CJ of 14.11.1984 in case 323/82, *SA Intermills v Commission*, EU:C:1984:345, para 16.

because all the data should go through it and it must ensure *inter alia* its confidentiality and its transmission to the Member State concerned. In particular, it may send reminders to the Member States delaying the transmission of the requested information. It is also for the Commission to impose fines on individual entities for giving incorrect or misleading information, provided they have been informed of such consequences.

The European Commission has several measures to gather information on notified aid schemes:

- a request for information addressed to the notifying Member State,
- a simple request for information addressed to other sources (other Member States, undertakings or association of undertakings) as regards technically complex cases subject to substantive assessment in relation to the market information,
- a request for information by decision (directed at an undertaking or association of undertakings).

The last two instruments which are addressed to undertakings and associations of undertakings are combined with coercive measures in the case of intentional conduct or as a result of gross negligence. In relation to ordinary requests, supplying incorrect or misleading information is punishable by a fine of 1% of total turnover (for the preceding business year). A similar fine may accompany a request for information by decision on supplying incorrect, incomplete or misleading information, or where information is not supplied within the prescribed time limit. Furthermore, the EC may impose on individual entities periodic penalty payments of up to 5% of

the average daily turnover (for the preceding business year) for each working day of delay, starting with the date indicated in the decision, until the requested information is provided. Those penalties must be based on the principles of proportionality as well as appropriateness, and the Commission must not only take into account the nature, gravity and duration of the infringement but also to make sure that these principles are particularly respected in case of small and medium-sized undertakings. If they have fulfilled their obligation, it is possible to mitigate the sanctions or even to waive them. However, it should be kept in view that it is the Court of Justice which has unlimited jurisdiction on those issues, therefore it may even increase the fines proposed by the EC.

The formal investigation procedure must end with the adoption of one of the following decisions:

- that the notified aid measure does not constitute state aid,
- positive – declaring the aid compatible with the internal market,
- conditional – including conditions under which state aid may be recognised as compatible with the internal market together with the establishment of the obligations to monitor compliance with this decision,
- negative – declaring that the aid is not compatible with the internal market.

Interestingly enough, these remain the only form of decision falling within the Commission's competence, since any other letter or statement of position supplementing those decisions – or interpreting them – must be regarded as having

no legal force⁶³. Although EU law does not provide for the possibility of adopting decisions correcting or extending a pending proceedings, the fact remains that considerations of procedural economy and the principle of good administration militate in favour of such a solution⁶⁴. Furthermore, the case-law of the Court of Justice distinguishes between two concepts of the most serious procedural defects and decisions of the Commission leading to their withdrawal from the EU legal system. Firstly, infringement of an essential procedural requirement, namely the notification to the interested parties of the opening of the procedure and the possibility of submitting comments, results in invalidity of the decision by virtue of law⁶⁵. Secondly, other procedural defects might lead to the annulment in whole or in part of a decision only if it is proven that in the absence of this irregularity this decision might have been substantively different content⁶⁶.

It is worth remembering that the Commission has a discretion in assessing the compatibility of state aid measures with the internal market. Nonetheless, although that institution may adopt rules of conduct in order to lay down the relevant criteria in

this regard, the fact remains that by publishing such criteria the Commission imposes limits on its own discretion and cannot, in principle, depart from them without infringing general principles of law, such as equal treatment and the protection of legitimate expectations⁶⁷. The EC is compelled to indicate in its decision that it relates to state aid, and that the aid measure confers an advantage on the undertaking or undertakings which benefited from it, following an impartial and diligent investigation on the basis of the most complete and reliable evidence⁶⁸. It is for this institution to prove the existence of an advantage and not on the undertaking concerned to demonstrate its absence⁶⁹.

The indicative time limit for closing the formal investigation procedure is 18 months, but it may be extended by agreement with the Member State⁷⁰. At the end of that period, the Member State may request the Commission to make a decision, which must adopt it within two months.

The Member State may refer to all information received by the Commission from undertakings or associations of undertakings. Nevertheless, the EC is always required to pay due regard to the legitimate

⁶³ Judgment of the CJ of 15.9.2022 in case C-705/20, Fossil (Gibraltar) Ltd, EU:C:2022:680, para 49.

⁶⁴ Judgment of the CJ of 13.6.2013 in joined cases C-630/11 P to C-633/11 P, HGA and Others, EU:C:2013:387, paras 50 and 51.

⁶⁵ Judgment of the GC of 14.9.2022 in case T-603/19, Helsingin Bussiliikenne Oy v Commission, EU:T:2022:555, para 49.

⁶⁶ Judgment of the GC of 14.9.2022 in case T-603/19 Helsingin Bussiliikenne..., op.cit., para 51.

⁶⁷ Judgment of the GC of 22.6.2022 in case T-657/20, Ryanair DAC v Commission, EU:T:2022:390, para 61 and the case-law cited.

⁶⁸ Judgment of the CJ of 4.3.2021 in case C-362/19 P, Commission v Futbol Club Barcelona, EU:C:2021:169, para 62.

⁶⁹ Judgment of the CJ of 17.11.2022 in joined cases C-331/20 P and C-343/20 P, Volotea SA and easyJet Airline Co. Ltd v Commission, EU:C:2022:886, para 132.

⁷⁰ Judgment of the CJ of 8.5.2008 in case C-49/05 P, Ferriere Nord SpA v Commission, EU:C:2008:259, para 49.

interest of undertakings in the protection of their business secrets and other confidential information, in accordance with Article 9(10) of Regulation No 2015/1589.

One should also remember that the Commission may always withdraw decisions made during the formal investigation procedure if a decisive factor for their adoption has been based on inaccurate information.

The European Commission is competent to examine, on its own initiative, information concerning unlawful aid, regardless of its source. It is always obliged to make a full assessment of the compatibility of state aid with the internal market, irrespective of whether the prohibition on its implementation without prior approval has been complied with⁷¹. The Commission attempted, however, to draw negative consequences for the Member States from the failure to notify aid measures (which happens relatively frequent). Although, according to the CJEU, in such a case it can adopt only an interim measure ordering suspension of payment of aid and revealing all the documents, information and data necessary for assessing the compatibility of the aid with the internal market⁷².

The investigation of unlawful aid may be carried out following a complaint and on the basis of information provided on request to the Member State concerned, to another Member State, to an undertaking or to an association of undertakings.

In this case, the Commission may issue an injunction to the Member States concerned if, despite a reminder, they do not supply the requested information.

The European Commission may also initiate the formal investigation procedure in respect of misused aid.

Suspension of unlawful aid

In accordance with Article 13 (1) of Regulation No 2015/1589 the EC may, after giving the Member State concerned the opportunity to submit its comments, order the suspension of any unlawful aid until a final decision is made on the compatibility of the aid measures. It is an injunction which constitutes an independent legal remedy related to this decision to initiate the formal investigation procedure, and may be adopted at the same time as the decision or after it⁷³. There is nothing to prevent the Commission from ordering the provisional recovery of unlawful aid pending the adoption of a decision as to its compatibility with the internal market pursuant to Article 13(2) of Regulation No 2015/1589⁷⁴. A decision ordering the recovery may be issued only if the following conditions are met:

- according to an established practice there are no doubts about the aid character of the measure concerned;
- there is an urgency;
- there is a serious risk of substantial and irreparable damage to a competitor.

⁷¹ Judgment of the CJ of 7.4.2022 in joined cases C-102/21 and C-103/21, KW, SG, EU:C:2022:272, para 51.

⁷² See S. Dudzik [in:] S. Biernat (ed.), *Kamienie milowe orzecznictwa TSUE*, Warszawa 2019, pp. 606-612.

⁷³ Judgment of the CJ of 16.3.2021 in case C-562/19 P, *Commission v Poland*, EU:C:2021:201, para 51.

⁷⁴ Judgment of the CJ of 7.4.2022 in joined cases C-102/21 and C-103/21, KW, SG, para 51.

Interestingly, during this procedure it is possible to authorise a Member State to combine the refunding of the aid with the payment of rescue aid to the undertaking concerned. In accordance with Article 14 of Regulation 2015/1589 failure to comply with a suspension injunction or a recovery injunction constitutes a basis for the EC to refer a case directly to the CJEU, omitting the steps usually required for actions brought under Article 258 TFEU.

On-site monitoring

An on-site monitoring may be carried out by the European Commission with the agreement of the Member State and after submitting its comments, and if there are serious doubts about the implementation of its decisions with regard to individual aid (not to raise objections, positive, conditional). In accordance with Article 27 (2) of Regulation No 2015/1589, the officials authorised by the Commission are empowered to verify compliance with the decision concerning:

- entering any premises and land of the undertaking concerned;
- asking for oral explanations on the spot;
- examining books and other business records and take, or demand, copies.

Where appropriate, the monitoring may be accompanied by independent experts – in cases where the Member State has duly justified objections as to their choice – they should be appointed in agreement with that State.

Before carrying out the on-site monitoring, the Member State must be informed in due time and in writing about on-the-spot monitoring and personal data of the inspectors who are required to produce the authorisation in writing, specifying the subject-matter and purpose of the inspection. Officials appointed by the Member State may assist with the inspection and if a national undertaking opposes a monitoring visit, the Member State should provide necessary assistance to enable them to carry out a monitoring visit.

The Member State should receive a copy of any report produced as a result of the monitoring visit.

The CJEU case-law on the EC powers

The review proceedings for the granting of state aid codified in Article 108 TFEU comprises two stages (and, in essence, two separate procedures): the initial phase of the preliminary investigation, consisting of formulating a *prima facie* opinion on the compatibility of the aid in question with the internal market, and the stage of formal investigation procedure. Thus, it is only in the context of this second stage, which is designed to ensure that the Commission is able to establish all the facts of a particular case, the Treaty provisions set forth the obligation to give the parties concerned opportunity to submit their comments⁷⁵. However, if we stick only to literal interpretation, it would mean that, if the Commission found in its decision that certain

⁷⁵ Judgment of the CJ of 15.6.1993 in case C-225/91, *Matra S.A. v Commission*, EU:C:1993:239, para 16.

aid measure was compatible with the internal market, the interested parties referred to in Article 108(2) TFEU as denied of the access to these kind of proceedings, would be completely deprived of judicial review of procedural safeguards. Therefore the CJEU case-law has acknowledged the possibility of bringing an action for annulment of such Commission's decisions in order to enable the applicants to ensure that their procedural rights are respected⁷⁶. The broader background of the relevant CJEU case-law will be presented in the following sub-chapter.

In accordance with Article 4(3) of Regulation No 2015/1589, the decision not to raise objections (a decision declaring given aid measure compatible with the internal market) is subject to review of its compatibility with EU law. This review includes *inter alia* an examination of whether the assessment of the information and all the data available to the EC at the preliminary stage of the investigation should have objectively raise doubts as to its compatibility with the internal market, given the fact that the existence of such doubts should trigger the initiation of the formal investigation procedure⁷⁷. The concept of doubt is objective in nature, which must be assessed both in by the circumstances in which the EC decision was adopted and

its contents, by comparing the grounds of that decision with the information available to this institution when it made a decision on the compatibility of the aid in question with the internal market⁷⁸.

The applicant may then raise any pleas demonstrating that the assessment of the information and evidence already available to the EC during the preliminary investigation phase of the procedure for reviewing state aid should have raised doubts as to its compatibility with the internal market. The use of such evidence should be made by the applicant, but not in a way that would cause change in the subject-matter of the action or the conditions for its admissibility⁷⁹. The very length of the preliminary procedure may be an indication that such doubts should have been raised, but it is not, in itself, an absolute condition requiring the opening of a formal investigation procedure⁸⁰.

Its effectiveness depends on the production of a body of consistent evidence (*indicia*), which requires an examination of the circumstances in which the decision not to raise objections was taken and of its content, in comparison with the assessment on which relied the Commission making its decision with the information available to it at the time when that measure was adopted⁸¹. Importantly, the General

⁷⁶ Judgment of the CJ of 13.12.2005 in case C-78/03 P, Commission v Germany and Aktionsgemeinschaft Recht und Eigentum eV, EU:C:2005:761, para 35 and the case-law cited.

⁷⁷ Judgments of the CJ of 24.5.2011 in case C-83/09 P, Commission v Kronoply GmbH & Co. KG and Kronotex GmbH & Co. KG, EU:C:2011:341, para 47.

⁷⁸ Judgment of the GC of 18.5.2022 in case T-577/20, Ryanair DAC v Commission, para 27.

⁷⁹ Judgment of the CJ of 3.9.2020 in case C-817/18 P, Vereniging tot Behoud van Natuurmonumenten in Nederland and Others, EU:C:2020:637, para 81.

⁸⁰ Judgment of the CJ of 24.1.2013 in case C-646/11 P, 3F v Commission, EU:C:2013:36, para 32.

⁸¹ *Ibidem*, para 31.

Court must take into account not only the information available to the Commission at that time, but also the information that might have been available to it⁸². This concept covers all documents which may have been requested by that institution during the ongoing proceedings⁸³. Such evidence may, for example, be provided by pinpointing the insufficient or incomplete nature of the examination carried out by the Commission within the framework of the preliminary investigation procedure, which might reveal serious difficulties in assessing the contested measure, and should, on its own, have obliged the Commission to initiate the formal investigation procedure⁸⁴. The EC is obliged to carry out the investigations with diligence and impartiality so that at the moment of adopting the decision it has the most complete and reliable data⁸⁵.

Although it is possible to find the case-law according to which, in certain situations, the Commission should go beyond the mere examination of the evidence brought to its attention⁸⁶, it seems that as a rule it is not required to examine all the circumstances of the case, even if they are in the public domain⁸⁷. However, it must

be considered that the Commission is not required to consult external experts⁸⁸ – it may rely on firm, precise and consistent evidence to determine whether there is a sufficiently concrete economic risk of burdens on the State budget in the future⁸⁹.

Similarly, it should be noted that the review carried out by the CJEU of the lawfulness of the decision to open the formal investigation procedure is limited in nature and, in the event of a challenge to the assessment of the concerned measure as state aid, is also limited to the examination whether the Commission committed a manifest error of assessment at the preliminary investigation phase⁹⁰. In such a case, the Commission must sufficiently examine that issue on the basis of the information provided by the Member State at that stage of the proceedings, even if this examination does not lead to a definitive assessment⁹¹. The principle of sincere cooperation imposes an obligation on the Member State to inform the EC, at the earliest moment possible, that the measures concerned do not constitute state aid. If this removes any doubts as to the absence of any element of aid in the measures examined, the formal investigation procedure

⁸² Judgment of the CJ of 2.9.2010 in case C-290/07 P, *Commission v Scott SA*, EU:C:2010:480, para 91.

⁸³ Judgment of the CJ of 20.9.2017 in case C-300/16 P, *Commission v Frucona Košice a.s.*, EU:C:2017:706, para 71.

⁸⁴ Judgment of the CJ of 12.10.2016 in case C-242/15 P, *Land Hessen*, EU:C:2016:765, para 38.

⁸⁵ Judgment of the CJ of 3.4.2014 in case C-559/12 P, *France v Commission*, EU:C:2014:217, para 63.

⁸⁶ Judgment of the CJ of 2.4.1998 in case C-367/95 P, *Commission v Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (Sytraval) and Brink's France SARL*, EU:C:1998:154, para 62.

⁸⁷ Judgment of the GC of 9.11.2022 in case T-111/21, *Ryanair DAC v Commission*, EU:T:2022:699, para 47.

⁸⁸ Judgment of the CJ of 20.9.2017 in case C-300/16 P..., *op.cit.*, para 72.

⁸⁹ Judgment of the CJ of 3.4.2014 in case C-559/12 P, *France v Commission*, EU:C:2014:217, para 65.

⁹⁰ Judgment of the CJ 21.7.2011 in case C-194/09 P, *Alcoa Trasformazioni Sr v Commission*, EU:C:2011:497, para 61.

⁹¹ Judgment of the CJ of 10.5.2005 in case C-400/99, *Italy v Commission*, EU:C:2005:275, para 48.

may not be initiated. If the provided information does not overturn the doubts as to the existence of state aid elements and if there are also doubts about their compatibility with the internal market, the Commission is obliged to initiate such a procedure. Moreover, it is an obligation in respect of which the Commission has no discretion at all⁹².

Legal remedies against the Commission's decisions

As regards questions related to the European Commission's powers to review state aid compatibility with the internal market, it is also useful to look at issues concerning the legal means when it comes to challenging the Commission's decisions. The brevity of this article does not allow to elaborate on the procedure, but it is useful to elucidate on a certain specific feature of the law of state aid in relation to the general requirements of the Treaty in this area. To all intents and purposes, an action for annulment against decisions of that institution is of utmost importance in this area, since they may have extremely serious effects in the field of competition law. I shall therefore address only a few important issues which have significant consequences for the rules on competence, and which determine the scope of powers and duties of this institution.

The European Commission's duty in particular is to safeguard procedural rights not

only for the parties to the review proceedings of State aid measures, but also for all other entities whose rights and obligations are affected by decisions concerning state aid. It would therefore be useful to carry out a brief re-examination of the procedural situation of entities within the scope of impact the aid decisions adopted by the European Commission may have.

In those circumstances, it is interesting to note that it is relatively simple in the case of Member States which, as a 'privileged applicant', always have a legal standing before the Court. It is worth noticing, that local or regional state authorities, provided they have legal personality under national law, have *locus standi* similar to that of entities governed by private law⁹³. The same applies to any person designated as an addressee of rules produced by the EC, they have the standing to challenge this kind of legal act. With regard to *locus standi*, the formal concept of the addressee applies – the act formally designates the entity concerned and then refers to this entity⁹⁴.

However, the circumstances would be much more complicated if the action were lodged by an individual who is not the formal addressee of a particular legal act. As regards those entities, the CJEU case-law has created a substantive concept of *locus standi* – it is available when the content of the act in question shows that it intends to produce binding legal effects capable of affecting the interests of the applicant

⁹² Judgment of the GC of 9.11.2022 in case T-11/21 ..., op.cit., para 44.

⁹³ Judgment of the CJ of 22.3.2007 in case C-15/06 P, Regione Siciliana v Commission, EU:C:2007:183, para 29.

⁹⁴ Judgment of the GC of 19.6.2009 in case T-48/04, Qualcomm Wireless Business Solutions Europe BV v Commission, EU:T:2009:212, para 46.

by bringing about a distinct change in its legal position⁹⁵. In this case, in order to establish *locus standi*, the entity must demonstrate the fulfilment of the conditions introduced in the 'Plaumann test', i.e. in principle it is concerned by the act directly and individually.

It must be remembered, that the identification of the protection of the interests of persons potentially affected by the adoption of a decision of the European Commission stems from the specific nature of the law of state aid. At the stage of the adoption of a formal decision about the commencing of the proceedings for authorising state aid, by way of exception, all persons claiming the right to be heard by that institution are entitled to be admitted into such proceedings.

Those entities are not necessarily directly and individually affected by the final decision concerning approving or disapproving an aid scheme. Nevertheless, EU law guarantees them safeguarding of their procedural rights from the Courts of the European Union. In those circumstances, any act – regardless of its form – is considered an approval decision if it is apparent from its substance and intention of the EC that it is its final position and deciding whether an aid measure is to be regarded as state aid and there is no doubt as to its

compatibility with the internal market⁹⁶. The account should be taken of the wording of the Commission's letters, their content, the context in which they given and the intention of their author⁹⁷.

Relating to the Plaumann test, the direct concern is satisfied when two conditions are met⁹⁸. First of all, the contested measure must affect the applicant's legal situation by directly imposing on him a prohibition, limitation or order of a particular action or by conferring on him a right⁹⁹. Exceptionally, the applicant is directly concerned if the act affects his economic interests in a qualified manner. This is the case, for example, when the undertaking concerned seeks to protect its competitive position on a market, where it acquires the same raw materials as the recipient of the aid, and is aware of a considerable price increase of these materials, therefore the existence of negative effects for that undertaking cannot be ruled out as a result of the activity of those beneficiaries¹⁰⁰.

The CJEU states that „persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated

⁹⁵ Order of the GC of 13.3.2015 in case T-673/13, *European Coalition to End Animal Experiments v ECHA*, EU:T:2015:167, para 26.

⁹⁶ Judgment of the CJ of 26.4.2018 in case C-233/16, *ANGED*, EU:C:2018:280, para 74.

⁹⁷ Order of the GC of 1.6.2022 in case T-585/21, *Zásilkovna S.A. v Commission*, EU:T:2022:338, para 33.

⁹⁸ See further M. Krajewski: *Przesłanki dopuszczalności skargi na nieważność aktu UE z art. 263 ust. 4 TFUE (analiza orzecznictwa)*, „PiP” No 2/2018, pp. 61-63.

⁹⁹ *Ibidem*, p. 61.

¹⁰⁰ Judgments of the CJ of 24.5.2011 in case C-83/09 P..., *op.cit.*, paras. 67-68.

from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed¹⁰¹. At the same time, however, the Luxembourg judges refer to certain specificity which regards state aid. Firstly, it is only at the phase of the formal investigation procedure that EU law requires the Commission to give notice to the interested parties to submit their comments¹⁰². In such a case, these persons, undertakings or associations whose interests might be affected by granting of the aid must be regarded as interested parties¹⁰³. Therefore it refers to an indeterminate group of addressees¹⁰⁴. It must be highlighted, that the interested parties seeking to participate in the proceedings cannot rely on an infringement of the rights of the defence, since such rights are not for them¹⁰⁵.

However, this situation must be distinguished from the one in which the person concerned challenges the merits of the state aid decision itself – in such circumstances, the mere status of interested party for the admissibility of the action is not sufficient. It is then necessary to demonstrate a particular status within

the meaning of the Plaumann test, for example demonstrating that the applicant's situation on the market was substantially affected by the aid granted under the contested decision¹⁰⁶.

The Court accentuated that the connection between the particular characteristics of the interested party and the specific subject-matter of the action makes it possible to distinguish the applicant individually in a decision not to raise objections within the meaning of the Plaumann test¹⁰⁷. However, the Court refused to recognize entities other than undertakings, such as trade unions or negotiators in social matters, as being individually concerned¹⁰⁸.

Curiously enough, the Court also accepts that it is possible to categorise as an interested party an undertaking which is not a direct competitor of the beneficiary of the aid, but which must show that its interests might be affected by granting of the aid, i.e. to prove that the aid is likely to have a specific effect on its situation. Although the effect on the interests of that undertaking may only be potential, the risk of a specific effect on those interests must be capable of being demonstrated to the requisite legal standard¹⁰⁹.

¹⁰¹ Judgment of the CJ of 15.6.1963 in case 25/62, *Plaumann & PMI and Co. v EEC*, EU:C:1963:17, p. 107.

¹⁰² Judgment of the CJ of 11.9.2008 in joined cases C-75/05 P and C-80/05 P, *Germany and Others v Kronofrance*, EU:C:2008:482, para 37.

¹⁰³ Judgment of the CJ of 13.12.2005 in case C-78/03 P, *Commission v RFN and Aktionsgemeinschaft Recht und Eigentum eV*, EU:C:2005:761, para 36.

¹⁰⁴ Judgment of the CJ of 24.5.2011 in case C-83/09 P..., *op.cit.*, para 63.

¹⁰⁵ Judgment of the GC of 14.9.2022 in case T-603/19, *Helsingin Bussilikenne Oy v Commission*, para 31.

¹⁰⁶ Judgment of the CJ of 13.12.2005 in case C-78/03 P..., *op.cit.*, para 37.

¹⁰⁷ Judgments of the CJ of 24.5.2011 in case C-83/09 P..., *op.cit.*, para 48.

¹⁰⁸ Judgment of the CJ of 23.5.2000 in case C-106/98 P, *SNRT-CGT and Others v Commission*, EU:C:2000:277, para 54.

¹⁰⁹ Judgment of the CJ of 7.4.2022 in case C-429/20 P, *Solar Ileias Bompaina AE v Commission*, EU:C:2022:282, para 35.

Summary

The exclusive competence of the European Commission to monitor state aid granted by the Member States, although expressed generally in the founding Treaties, has been operationalised and given concrete expression only in the Court's case-law. Following this jurisprudence, the communications summarizing the Commission's powers in this regard were issued, which imposed binding force on itself. Next, from the soft law stage, EU law became a codification of the established principles in the form of Regulation No 659/1999, followed by Regulation 2015/1589. Nevertheless, the case-law of the Court of Justice of the European Union as the final arbitrator of the disputes between the Commission and the Member States is still in the foreground.

As it has been demonstrated in this article, the Commission's competences are not unlimited. It is obliged to perform under

the supervision of the Court, which most often rules on these matters because of complaints brought by interested parties or – more broadly – competitors of the recipients of the alleged aid. Moreover, in certain well-defined circumstances, EU law also allows for interventions by national courts in the state aid matters. Nevertheless, they are obliged to cooperate in a comprehensive manner with the Commission. However, this institution has the broadest range of the reviews functions which, paradoxically, seem to be the most severe towards the beneficiaries of the aid, and not the Member States, often violating the state aid law.

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Keywords: state aid, review, the European Commission, notification of state aid, powers to review, aid scheme

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Bibliography:

1. Biernat S. (ed.), *Kamienie milowe orzecznictwa TSUE*, Warszawa 2019
2. Blauburger M.: *Of Good and Bad Subsidies: European State aid Control through Soft and Hard Law*, „West European Politics” No 4/2009.
3. *Code of Best Practices for the conduct of State aid control procedures.*

4. Colombo C.M.: *State aid control in the modernization era: Moving towards differentiated administrative integration?*, „European Law Journal” 2019.
5. *Commission notice on the determination of the applicable rules for the assessment of unlawful State aid.*
6. Druenen R. van, Zwaan P., Mastenbroek E.: *Getting State aid Approved by the European Commission: Explaining the Duration of Preliminary Investigations in the State aid Notification Procedure*, „JCMS” No 3/2022.
7. Dudzik S.: *Postępowanie przed Komisją Europejską w sprawie pomocy państwa podlegającej zgłoszeniu: wprowadzenie i wyrok TS z 11.12.1973 r. w sprawie 120/73 Gebrüder Lorenz GmbH przeciwko Republice Federalnej Niemiec i Land Rheinland-Pfalz*, „EPS” No 7/2016.
8. *Do the Commission's Procedures Ensure Effective Management of State aid Control?*, Europejski Trybunał Obrachunkowy.
9. Fronczak E.: *Rola sądów krajowych w postępowaniu z zakresu pomocy państwa*, „EPS” No 8/2012.
10. Jarecki S.A.: *Europejski Instrument Odbudowy a pomoc publiczna*, Warszawa 2022.
11. Kliemann A.: *Art. 107 AEUV* [in:] H. Schröter, T. Jakob, R. Klotz, W. Mederer (ed.), *Europäisches Wettbewerbsrecht*, Baden-Baden 2014.
12. Kostański P.: *Postępowanie przed Komisją Europejską w sprawie notyfikowanej pomocy państwa*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego”, 2006, vol. IV.
13. Krajewski M.: *Przesłanki dopuszczalności skargi na nieważność aktu UE z art. 263 ust. 4 TFUE (analiza orzecznictwa)*, „PiP” No 2/2018.
14. Kurcz B.: *Zasada solidarności a usuwanie skutków bezprawnej pomocy państwa na przykładzie sprawy CELF*, „EPS” No 10/2008.
15. Medrer W.: *Vorschriften über staatliche Beihilfen – art. 107-109 AEUV* [in:] H. Schröter, T. Jakob, R. Klotz, W. Mederer (ed.), *Europäisches Wettbewerbsrecht*, Baden-Baden 2014.
16. Schweda M.: *Compatibility of State aid with the Common Market pursuant to Article 87(3) EC* [in:] M. Heidenhain (ed.), *European State aid Law. Handbook*, München 2010.
17. Sinnaeve A.: *Procedure before the Commission, Council Regulation 659/1999* [in:] M. Heidenhain (ed.), *European State aid Law. Handbook*, München 2010.
18. Sinnaeve A.: *State aid Procedures: developments since the entry into force of the Procedural Obligation*, „CMLawRev” No 4/2007.
19. Szymański M.: *Zwalczanie nadużyć finansowych w funduszach Unii – ewolucja systemu ochrony budżetu UE – część I*, „Kontrola Państwowa” No 3/2021.
20. Szymański M.: *Zwalczanie nadużyć finansowych w funduszach UE – narzędzia stosowane do ochrony budżetu Unii cz. II*, „Kontrola Państwowa” No 4/2021.