

The Issue of Liability for Expenditure of Public Funds From the Perspective of State Aid Regulation

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Piotr Podsiadło*

From the economic point of view relating to State interventionism, it ought to be noted that State aid can be a justified action mainly because of social prosperity if the free competition market mechanism does not bring satisfactory results. The major criterion for providing State aid should be rationality, which is the highest determinant of the admissibility of using aid measures. The aim of the article is to analyse the conditions of admissibility of State aid in the European Union, taking into account the rules applicable to the obligation to notify and authorize State aid. Article 108 TFEU contains rules on the procedural aspects of State aid control and thus complements the substantive rules contained in Article 107 TFEU. Until the Treaty of Lisbon, Article 108 TFEU had never been amended. The procedure of State aid control constitutes a special procedure that deviates from the general procedures of monitoring the compliance with the European Union law.

Keywords: State aid, European Union, competition policy, notification and authorization procedure, recovery and repayment procedure.

Zagadnienie odpowiedzialności za wydatkowanie funduszy publicznych z perspektywy regulacji pomocy państwa

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Z ekonomicznego punktu widzenia w odniesieniu do interwencjonizmu państwowego należy zauważyć, że pomoc państwa może być działaniem uzasadnionym głównie ze względu na dobrobyt społeczny, jeśli mechanizm wolnej konkurencji nie przyniesie zadowalających wyników. Głównym kryterium udzielania pomocy państwa powinna być racjonalność, która jest najwyższym wyznacznikiem dopuszczalności stosowania środków pomocy. Celem artykułu jest analiza warunków dopuszczalności pomocy państwa w Unii Europejskiej, z uwzględnieniem zasad mających zastosowanie do obowiązku zgłaszania i zatwierdzania pomocy państwa. Artykuł 108 TFUE zawiera przepisy dotyczące proceduralnych aspektów kontroli pomocy państwa i tym samym uzupełnia przepisy materialne zawarte w art. 107 TFUE. Do czasu traktatu lizbońskiego art. 108 TFUE nigdy nie został zmieniony. Procedura kontroli pomocy państwa stanowi specjalną procedurę, która odbiega od ogólnych procedur monitorowania zgodności z prawem Unii Europejskiej.

Słowa kluczowe: pomoc publiczna, Unia Europejska, polityka konkurencji, procedura notyfikacji i autoryzacji, procedura windykacji i zwrotu.

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* **Piotr Podsiadło** – PhD, Cracow University of Economics, Faculty of Finance and Law, Department of Local Government Finance. <https://orcid.org/0000-0002-4657-3467>.

Correspondence address: Cracow University of Economics, 27 Rakowicka Street, 31-510 Cracow.



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1. Introduction

In the European Union's primary law, that is now the Treaty on the Functioning of the European Union (TFEU, 2016, OJ C 202/47), Member States are banned from providing aid to enterprises that distorts or may distort competition rules in the internal market. The criteria for admissibility of such aid were established and mechanisms for its granting were created (Bonhage, 2019; Nicolaides, 2018). Due to the fact that State aid may distort free competition or weaken pro-efficiency motivations of enterprises, the control and transparency of the aid provided by public authorities become a key element of this policy. Aid provided by individual countries may also lead to unequal competition between countries, hence the restrictions on state aid applied in the EU become a form of protection against "unhealthy" competition and so-called "aid wars" (Nicolaides & Bilal, 1999). Both the European Commission and the Court of Justice have repeatedly held the view that granting State aid by a given Member State cannot be justified only because similar effects are caused by the actions of another Member State (Galendi & Ricardo, 2018). In many negative decisions, the Commission justified the ban on granting aid by the need to prevent such wars between the European Union countries, indicating at the same time that allowing for the aid measure would set a precedent for the future and could lead to an overall increase in State aid in a given sector (Evans, 1997). In the *Steinike und Weinlig v. Germany* judgement (Judgment of the Court of 22 March 1977), the Court emphasized that a possible breach by a Member State under Article 107(1) TFEU on the prohibition of granting aid cannot be justified by the fact that other Member States are also violating this prohibition, as the effects of more than one distortion of competition in trade between Member States do not cancel each other but are cumulated and thus increase the negative consequences for the internal market. The above means that in the European Union context, due to the provision of unlawful State aid, a certain Member State or a specific economic sector is likely to gain an unjustified advantage over others, which would have a negative impact on the overall well-being of not only the Member State concerned but also the entire European Union (Nicolaides, 2006). As a result, in such a situation, other Member States could engage in intensive support of their industries, which would lead to aid wars (Ismer & Piotrowski, 2015).

The aim of the article is to analyse the conditions of admissibility of State aid in the European Union, taking into account the rules applicable to the obligation to notify and authorize State aid. Article 108 TFEU contains rules on the procedural aspects of State aid control and thus complements the substantive rules contained in Article 107 TFEU. Until the Treaty of Lisbon, Article 108 TFEU had never been amended. The procedure of State aid control constitutes a special procedure that deviates from the general procedures of monitoring the compliance with the European Union law.

2. Obligation to Notify State Aid to the European Commission and to Receive the EC's Authorization

In the European Union, aid is provided to enterprises at the national level by the competent authorities of the Member States (Douma & Kardachaki, 2016). The compliance of this aid with the rules of the Treaty is controlled at the EU level by the European Commission (Bruc, 2018; Brandtner & Vidoni, 2018). The Commission's powers in this respect are exclusive, which means that no other body, in particular a national one, has the authority to make a binding assessment of the legality of aid on the basis of the *acquis communautaire* in this area (Nicolaidis, 2003). National authorities can only investigate whether aid has been granted in accordance with their national law, and if not, they can possibly penalize an infringement (Buyskes, Kekelekis, & Nicolaidis, 2005).

In accordance with Council Regulation No 2015/1589 (OJ L 248/9) specifying the rules of proceedings before the European Commission as regards the procedure and forms of granting State aid, Member States are obliged to notify, that is to inform, the Commission about the intention to grant State aid. In order to consider the aid admissible under Article 107(3)(a)–(d) TFEU, the Commission must initiate proceedings on the so-called new aid, at the end of which it makes an individual decision regarding the compliance of the measure with the internal market (Muñoz de Juan, 2018; Robins & Geldof, 2018). The Treaty of Lisbon added new paragraph 4 to Article 108 TFEU, authorizing the Commission to exempt, by way of regulation, certain types of State aid from the notification obligation and the standstill clause (Segura, Olafsson, & Clayton, 2019). Therefore, any State aid schemes or projects that are not considered compatible with the internal market under the General Block Exemption Regulation (GBER) – Commission Regulation (EU) No 651/2014 (OJ L 187/1) and Commission Regulation (EC) No 800/2008 (OJ L 214/3) – or the *De Minimis* Aid Regulation – Commission Regulation (EU) No 1407/2013 (OJ L 352/1) and Commission Regulation (EC) No 1998/2006 (OJ L 379/5) – must be notified to the Commission under Article 108(2) TFEU at the stage of planning to grant or change them. This is the principle of preliminary (preventive) control established in Article 2 of Regulation No 2015/1589, which is expressed in the obligation of Member States to inform the Commission of any plans to grant or change new aid, which should take place early enough (Article 2(1)) and in an appropriate form (Article 2(2)). The second principle is the standstill rule, according to which a Member State cannot implement proposed aid measures until the new aid procedure is completed (Judgement of the Court of First Instance of 12 September 2007). In accordance with the standstill clause, such a notification should take place *ex ante*, that is before the Member State concerned starts granting State aid. The standstill clause is effective from the moment when a notification of the aid project is submitted

pending a decision in which the Commission determines that the aid can be granted or until such a decision is recognized by the Commission (Article 3). If the aid is granted before a positive decision is issued, that is before the authorization by the European Commission, it is considered to be misused aid. The Member State cannot implement the intended aid measures until the final decision in the case is issued, as it exposes itself to proceedings concerning prohibited aid by the Commission, which may lead to ordering the repayment of the State aid granted together with interest (Judgement of the Court of 27 October 2005). The control of compliance of the directions of granting State aid with the European Union law concerns both aid already granted and planned (Końska, 2009; Saryusz-Wolska & Końska, 2010).

3. Recovery and Repayment of State Aid

The European Commission, in cooperation with the Member States, performs a permanent review of existing aid, among others on the basis of the annual reports prepared by these countries (Judgement of the Court of 15 October 1996). According to Article 108(2) TFEU, if the Commission states that the Member State grants aid incompatible with the internal market rules within the meaning of Article 107(1) TFEU, it orders immediate cessation of its granting (Judgement of the Court of First Instance of 3 March 2010). If there is a difference in the assessment of aid between a given country and the Commission, the final decision lies with the Court of Justice (Cini & McGowan, 1998). Article 108(3) of the Treaty states that: “The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. [...] The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision”. The prohibition established by this provision on implementation of planned State aid before the Commission’s decision in this case covers within its scope all types of aid which have been granted by public authorities of certain Member States without the required notification. There are specific circumstances in which State aid can be provided in accordance with the law without the consent of the European Commission. It is important to indicate here the aid measures that meet all the requirements of the General Block Exemption Regulation, under which a Member State is exempted from the obligation to notify the planned aid measure. Similarly, the obligation to apply the standstill period does not apply to existing aid, which mainly concerns aid granted under the scheme existing before the accession of a given country to the European Union or under a programme previously approved by the European Commission.

Article 108(3) TFEU also enables the participation of national courts in the process of control of aid granted, but they cannot determine whether the proposed aid measure is admissible and compatible with the internal

market, as this is the sole competence of the European Union bodies, i.e. the European Commission, the Council and EU courts. Examination of the compatibility of the proposed aid measures with the principles of the internal market based on the criteria set out in Article 107(2) and (3) TFEU essentially falls within the competence of the European Commission (Judgement of the Court of First Instance of 3 February 2011). This means that the assessment of compliance of the planned State aid is the sole responsibility of the Commission and is controlled by the European Union courts (Judgement of the Court of 30 March 2006).

However, taking into account the provisions of the Treaty, it can be pointed out that if a Member State does not notify the Commission before granting or changing aid, it is considered to be unlawful aid in the context of EU law from the moment it was granted. Unlawful aid is aid granted in violation of Article 108(3) TFEU, which means that the scope of this concept includes aid subject to the prohibition referred to in article 107(1) TFEU. Unlawful aid does not therefore include non-aid measures within the meaning of Article 107(1) TFEU and State aid not prohibited by Article 107(1) TFEU. The concept of unlawful aid includes, in particular, non-notified aid and aid granted in breach of the standstill clause. On the other hand, the concept of non-notified aid covers aid already granted, which, despite the existence of the obligation to notify it, has not been notified to the European Commission. Procedural rules regarding the proceedings in the case of unlawful aid and the rules for its recovery can be found in Article 108(2) TFEU and Council Regulation No 2015/1589. The procedure laid down in Article 108(2) TFEU is held between the Commission and the Member State concerned, which means that this procedure is initiated only against the Member State concerned and not against the beneficiaries of the aid (Judgement of the Court of 24 September 2002). The enterprises that are beneficiaries of the aid are considered in these proceedings only as those interested, which means that such enterprises have certain procedural rights that are intended to enable them to provide the information to the Commission, but they do not have the status of a party to the proceedings that would allow the right of defence (Judgement of the Court of 6 October 2005). Proceedings regarding unlawful aid are initiated when the Commission has obtained information from any source about the alleged granting of such aid, and the entire procedure may be initiated *ex officio* or as a result of a third party's complaint. First, the Commission gives instructions to provide information on the aid measure which are addressed to the Member State concerned, and the deadline for the delivery of complete notification by that State is, in principle, 15 working days (Sinnaeve, 1999). Having read the comments and explanations of the Member State concerned, the Commission may issue either a decision ordering the suspension of aid (the so-called standstill order) or a decision on a provisional recovery ordering the repayment of the so far granted aid

(the so-called recovery order) until the final decision is made on the compliance of the aid with the common market. The introduction of a suspension order is designed not to worsen the subsequent situation of the beneficiaries of the questioned aid, because at the time of issuing a negative decision closing the proceedings they will be required to return the aid together with interest. In addition, the European Commission may issue this order for preventive purposes as further aid may contribute to a greater distortion of competition (Arhold, 2003). On the other hand, the decision ordering the Member State to temporarily recover unlawful aid is issued in the absence of any doubts as to the aid nature of the support provided and in circumstances requiring immediate action, as there is a significant risk of causing substantial and irreparable damage to the beneficiary's competitors in relation to the State aid provided. A failure to comply with these decisions may provide the basis for the Commission's complaint to the Court of Justice for violation of the Treaty. However, it should be noted that, according to the case law of the Court of Justice, the Commission cannot take a final decision ordering the recovery of aid if the only violation is the failure to report aid pursuant to Article 108(3) TFEU (Judgement of the Court of 21 November 1991). Therefore, the Commission must conduct full proceedings into the compatibility of aid with the internal market rules (Nicolaidis, 2002). It is only after completing such proceedings that a determination can be made as to whether the aid is incompatible with the provisions of the Treaty (Judgement of the Court of 12 February 2008).

The procedure in the case of unlawful aid takes place in a similar way as in the case of the standard notification procedure, wherein the Commission is not obliged to complete the preliminary examination phase within two months. As in the case of the preliminary examination phase, the Commission may – in the event of doubts as to the compatibility of the aid measure with the internal market – initiate a formal investigation procedure that may result in a decision stating that the granted aid does not constitute public aid, a positive decision stating that the granted aid is public aid consistent with the provisions of the Treaty, a conditional or negative decision (Judgement of the Court of 18 November 2010). The procedure may last longer than 18 months and the Member State is not entitled to request a decision by the Commission within 2 months.

Article 108(2) of the Treaty applies not only to unlawful aid but also to aid misused. According to Article 1(g) of Procedural Regulation 2015/1589, improperly used aid is aid used by the beneficiary in violation of the decision issued by the European Commission not to raise an objection, which is a positive decision closing the notification proceedings in the preliminary examination phase (*decision not to raise objections*), a positive decision closing the proceedings in a formal investigation procedure (*positive decision*) or a conditional decision closing the proceedings in a formal investigation procedure (*conditional decision*). Proceedings regarding misused aid are

initiated by the Commission with issuing a decision to initiate a formal investigation procedure and are carried out on terms similar to those stipulated for the proceedings in the case of unauthorized aid. The difference is that misused aid has already been approved by the Commission and therefore in the course of the proceedings the Commission is under the burden of proving that the aid has been misused. This means that the Commission does not carry out a preliminary examination of the aid and is always obliged to initiate a formal investigation and cannot issue a decision on aid recovery during the formal investigation procedure and in order to obtain information, it can only request complete information about the aid by means of a warrant. On the other hand, the Commission may, in order to protect the competition in the single market, issue a suspension order, namely a decision ordering the suspension of all aid for which there is a suspicion of improper implementation until the Commission takes a decision on the compatibility of the aid with the principles of the internal market.

If the European Commission issues a negative decision in proceedings regarding unlawful aid or proceedings regarding misused aid, the Member State is obliged to recover the aid from the beneficiary (Judgement of the Court of 12 December 2002). The recovery rests with the Member State and refers to the amount of aid granted and to the interest covering the period from the date of granting the aid until the date of return. In the judgement regarding the *Kohlegesetz* case, the Court of Justice stated for the first time that the Commission has the power to order the recovery of State aid granted unlawfully and incompatible with the internal market (Judgement of the Court of 12 July 1973). It was pointed out then that the Commission is the competent authority to decide whether a Member State is to change or abolish state aid which has proved incompatible with the internal market. It should therefore have the right to demand the return of such aid. In the *Alfa Romeo* judgement, the Court stressed that the purpose of the European Commission's action in the event of a request for recovery of unlawful aid is the loss of benefits by the beneficiary, gained in the market in comparison to competitors, and the restoration of the situation existing before the payment of this aid (Judgement of the Court of 4 April 1995). The restoration of the previous situation occurs when the beneficiary returns the aid granted unlawfully and incompatible with the common market, thus losing the advantage the beneficiary has gained in relation to competitors in the market and the conditions of competition prevailing before the aid was granted are restored (Judgement of the Court of 4 April 1995). In turn, the Court in the *Siemens v Commission* judgement emphasized that in order to eliminate any additional financial benefits resulting from unlawful aid, interest on unlawful amounts shall be returned as well, wherein the amount of interest must be equal to the financial advantage that arose from the availability of the aid measures for a certain period of time and from the fact that the beneficiary received them free

of charge (Judgement of the Court of First Instance of 8 June 1995). This means that the recovery of State aid is necessary to ensure uniform operation conditions in the single European market and therefore the recovery of aid granted in violation of the provisions of the Treaty or misused aid is not a punishment but a logical consequence of considering the aid as unlawfully granted (Judgement of the Court of 21 March 1990). This line of case law of the Court of Justice is also confirmed by the judgement of the Court in the *CETM v Commission* case declaring that the request for the return of unlawful aid is not an unanticipated sanction in the EU law, even if it is introduced long after the aid was granted (Judgement of the Court of First Instance of 29 September 2000). On the other hand, in the *Commission v Greece* judgement, i.e. “Olympic Airways” case (Judgement of the Court of 12 May 2005), and the *Commission v France* judgement, i.e. “Scott” case (Judgement of the Court of 5 October 2006), the Court drew particular attention to the fact that full implementation of the Commission’s recovery decision can only take place if the measures taken by the Member States in this respect bring concrete results and if the recovery procedure is promptly implemented with regard to the beneficiary of unlawful State aid. As long as the aid is not recovered, the beneficiary, by retaining funds from aid declared incompatible with the internal market rules, may benefit from the resulting undeserved competitive advantage.

The Court of Justice in the cases *Land Rheinland-Pfalz v Alcan Deutschland* (Judgement of the Court of 20 March 1997) and *Italy v Commission* (Judgement of the Court of 29 April 2004) pointed out that the exceptions to the recovery obligation, which involve compliance with “general legal principles”, concern the principle of legitimate expectations and the principle of legal certainty. The first rule means that the European Commission cannot demand the recovery of aid when it behaved in a way indicating that it recognized the given State aid as compliant with the EU law (Jaros & Ritter, 2004). In turn, the principle of legal certainty is interpreted in terms of the beneficiary’s knowledge of the legality of State aid to be received. According to the case law of the Court of Justice, this rule is usually opposed to the beginning of the temporal scope of an EU legal act falling in the immediate period preceding the publication of that act (Judgement of the Court of 25 January 1979). This means that in the absence of a different indication, it is presumed that the EU law does not have retroactive effect (Judgement of the Court of 24 March 2011).

Another exception to the obligation to return State aid is related to the limitation of the recovery claim. According to Article 17(1) of Regulation 2015/1589, the Commission’s recovery powers are subject to a 10-year limitation period which starts on the day on which the beneficiary was granted public aid unlawfully in any form under the aid scheme or as individual aid. After a period of 10 years, unlawful aid will be treated as existing aid, wherein the interruption of the limitation period is followed by any action

taken by the Commission or by a Member State which acts at the request of the Commission. In this case, it does not matter whether the Commission's request for information has been communicated to the beneficiary and any interrupted period begins to run again.

The recovery of aid will not be carried out even if, in the event of exceptional circumstances, the Member State concerned cannot implement the decision ordering the return of unlawful State aid. This is the "absolute impossibility" principle, which can be invoked as the reason for the failure to implement the European Commission's recovery decision only when the Member State has already used all available legal remedies to implement that decision (Judgement of the Court of 20 September 2007). An example is the case when an enterprise was liquidated as a result of bankruptcy proceedings before the Commission made the decision about the recovery, wherein the difficult financial situation of the beneficiary does not cause the application of this exception. In the judgements in the cases *Commission v Greece* (Judgement of the Court of 7 June 1988) and *Italy v Commission*, i.e. "ENI-Lanerossi" case (Judgement of the Court of 21 March 1991), the Court of Justice indicated that the occurrence of any practical, administrative or political adversities when performing the recovery in no way exempts a Member State from the obligation to perform all duties, for example, filing a claim for bankruptcy proceedings. In addition, a Member State cannot rely on the fact that its legal system does not provide a legal basis for the recovery of aid or that the recovery would be contrary to the constitutional order (D'Sa & Drake, 2010). Neither a failure to recover aid may be justified by practical difficulties in determining the amount to be repaid (Judgement of the Court of 18 October 2007).

According to Article 16(2) of Regulation 2015/1589, aid must be recovered together with interest from the date on which the unlawful aid was made available to the beneficiary until the date of its recovery. The method for calculating interest in relation to the recovery of aid was laid down in an implementing regulation of the European Commission. Article 14(3) of the procedural regulation further provides that recovery is to be carried out without delay and in accordance with the procedures provided for by the national law of the Member State concerned, as long as they provide for the immediate and effective implementation of the Commission's decision. The interpretation and scope of this provision was clarified by the Court of Justice in the judgement concerning the case of *TWD Textilwerke Deggendorf* (Judgement of the Court of 9 March 1994). According to that judgement, the Commission is entitled, when certain conditions are met, to order Member States to suspend the payment of new aid compatible with the internal market to an enterprise until the enterprise has repaid the previous aid granted unlawfully and incompatible with the common market, which is the subject of a recovery decision. With time, this judgement began to be called the Deggendorf principle systematically used in

the recovery of State aid, which is supposed to practically translate into the need to immediately and effectively implement decisions of the European Commission. This principle, in practice, is applied during the preliminary investigation procedure concerning a new aid measure, where the European Commission demands a Member State to suspend the payment of new aid to any beneficiary who did not return unlawful aid which was the subject of a previous recovery decision. If the request is not met, or if there is no unambiguous data on the recovery of unlawful aid, the Commission is not able to assess the combined effect of the old and new aid on competition and therefore takes the final decision on the new conditional aid measure. In such a decision, the Commission requests the Member State concerned to suspend the payment of new aid until it is satisfied that the beneficiary has repaid the earlier aid granted unlawfully and incompatible with the common market, together with interest due.

The decision ordering recovery is addressed to the Member State. The Court of Justice in its judgement in the case *Albaco Margarinefabrik Maria von der Linde* pointed out that such a decision is binding on all the authorities of a Member State, including the courts (Judgement of the Court of 21 May 1987). Hence, the specific roles of the authorities granting State aid in the Member States should be considered here, as should the powers of national courts that conduct proceedings in accordance with the principles of equality and efficiency. The principle of equality does not allow discrimination against complaints in connection with Article 108(3) of the Treaty in relation to complaints under national law. In turn, the principle of efficiency stipulates that the rules of national law cannot hinder or prevent the right to claim rights guaranteed by the EU law. The responsibilities of the Member State include “loyal” cooperation with the European Commission, determining the amount and beneficiary of aid (unless the Commission has previously done so in its decision), setting the procedure for recovery, sending the recovery request to the beneficiary without delay, fulfilling the obligation to provide the recovery of aid within a specified period of time which expires four months after the entry into force of the Commission decision, and taking all measures available under national law to ensure immediate and effective recovery of unlawful aid in case of any problems encountered in enforcing claims (these activities also include non-application of national law that would prevent effective and immediate execution).

The proceedings before national courts for State aid can be carried out in different contexts (Końska, 2009). It is for the national courts to protect the rights of the parties to the proceedings in the event of a possible breach by the national authorities of the prohibition of granting State aid, through drawing all consequences stemming from national law, both regarding the validity of the acts regulating admissible aid and the return of financial support (Judgement of the Court of 27 October 2005). In the event of failure to notify, national courts often intervene to safeguard the rights of

third parties that may be affected by the granting of unlawful State aid. Particularly, where the standstill clause is breached, national courts have the power to prevent the payment of unlawful or undisclosed aid and to take provisional measures such as suspension of the payment of aid until the aid measure is assessed and temporary recovery is ordered (Sinnaeve, 2005). The Court, in the judgement in the case *Administracion del Estado v Xunta de Galicia*, emphasized that if a national court were to be confronted with the fact that unlawful aid had been provided, the national court must order the recovery of aid (Judgement of the Court of 21 July 2005). On the other hand, in the judgements regarding the cases *SFEI v La Poste* (Judgement of the Court of 11 July 1996) and *CELF* (Judgement of the Court of 12 February 2008), the Court pointed out that the request for recovery does not usually take place when certain exceptional circumstances arise. According to the *CELF* case law, Article 108(3) of the Treaty should be interpreted in such a way that the national court is not obliged to order the recovery of aid implemented in breach of this provision if the Commission has adopted a final decision declaring the aid compatible with the common market within the meaning of Article 107(1) TFEU. However, the situation in which the Commission issued three decisions declaring aid to be compatible with the internal market and then the Union court annulled those decisions cannot in itself constitute an exceptional circumstance justifying a restriction on the beneficiary of the aid to return it if that aid was implemented in violation of Article 108(3) TFEU (Judgement of the Court of 11 March 2010). Under the EU law, the national court is required to order the aid beneficiary to pay interest for the period in which the unlawfulness persisted. The national court may, under national law, also order the return of unlawful aid in a given case without prejudice to the right of a Member State to subsequent re-implementation of it. The national court may also be faced with the need to decide on compensation for damage suffered as a result of the unlawful nature of aid. In the judgement in the case *Transalpine Ölleitung*, the Court of Justice pointed out that national courts are also responsible for complaints about compensation for the breach of the standstill clause lodged by competitors of beneficiaries and other third parties (Judgement of the Court of 5 October 2006). Article 108(3) TFEU should be interpreted in a way that national courts have an obligation to protect the rights of individuals against a possible violation by national authorities of a ban on the implementation of aid before the European Commission grants an authorization decision. National courts must at the same time take full account of the EU's interests and cannot adopt a measure whose only effect would be to extend the circle of beneficiaries. In addition to the possibility of claiming compensation from the Member State that has granted unlawful State aid, it is also possible to claim financial compensation directly from the beneficiary of such aid. In the *SFEI* case, it was considered that it is not possible to claim compensa-

tion from the beneficiary under the EU law; however, the beneficiary of aid may be sued in accordance with the national law of the Member State concerned.

Where the European Commission decides on the return of State aid, national courts usually deal with two groups of cases, i.e. complaints questioning the legitimacy of the recovery order and third parties' claims for damages from the state authorities that incorrectly executed the Commission's recovery decision. The first group of cases is quite problematic, as the beneficiaries questioning the validity of recovery decisions before national courts thus contribute to the extension of the recovery process, which is in contradiction with the main purpose of the recovery procedure, namely to eliminate the distortion of competition on the market as quickly and effectively as possible. Therefore, according to the Deggendorf principle, when the beneficiary of aid could, in accordance with Article 263 of the Treaty, complain about the Commission's decision on recovery before the Court of Justice but has not done so, the beneficiary can no longer challenge the validity of this decision in the proceedings before national courts by claiming its unlawfulness (Tedoldi, 2007). On the other hand, in the event of compensation cases for improper performance of the provisions of the recovery decision, the defendant is the state authority that granted unlawful aid. Such an interpretation of an infringement of the European competition law follows from the case law of the Court of Justice, which, in the case *Francovich v Italy* (Judgement of the Court of 19 November 1991) and joined cases *Brasserie du Pêcheur SA v Germany* (Judgement of the Court of 5 March 1996), pointed out that the EU law establishes the principle that a Member State is obliged to repair damage caused to specific entities through an infringement of the EU law, which infringement may be ascribed to that Member State. In these cases, the Court of Justice referred to the foundations of the EU legal order and the obligation on national courts to ensure full effectiveness of the EU law and the protection of rights that it grants to specific entities (Brussels, 15 July 2009).

Generally, it should be noted that national courts do not have jurisdiction to adjudicate on the conformity of the European Union's normative acts with the EU law, which implies that national courts cannot annul the recovery decision or refuse to execute the recovery of aid specified as unlawful in case of doubts about the legality of this decision. In addition, national courts do not have the power to suspend enforcement of the recovery decision until the Union courts have decided on the legality of such a decision. A national court may temporarily suspend the implementation of an EU legal act if, in its opinion, there are serious doubts as to the validity of an EU act and if the validity of the contested act is no longer the subject matter for the Court of Justice.

4. Discussion

It is one of the basic principles of the European State aid law that State aid control should be in the hands of a strong supranational entity; otherwise the risk of ‘aid wars’ or ‘subsidies race’ between Member States could not be countered effectively. Under Article 108 TFEU, State aid control is therefore the responsibility of the Commission: it has sole competence to rule on the compatibility of State aid measures with the internal market under Article 107(2) and (3) TFEU. Article 108(2)(3) TFEU contains a narrow exception to this principle, insofar as, in certain cases, the Council may declare aid to be compatible with the internal market. Apart from this exception, it should be noted that Article 109 TFEU allows the Council to adopt, upon proposal by the Commission, all useful implementing regulations concerning Articles 107 and 108 TFEU. National courts also have an important role in State aid control. National courts are concerned not with the review of the compatibility of aid under Article 107 TFEU, but with the enforcement of the standstill clause in Article 108(3) sentence 3 TFEU, which is directly applicable according to the case law. Independent of the issue of the compatibility of aid, national courts have to take all necessary measures required for the protection of third parties against the granting of aid that infringes the standstill obligation.

According to Article 108(3) sentence 3 TFEU, known as the standstill obligation, Member States are prohibited from granting new aid without notifying the Commission and obtaining authorization. The standstill obligation is repeated in Article 3 of Procedural Regulation No 2015/1589. State aid granted in violation of the standstill obligation is ‘unlawful aid’. In the State aid law, formal unlawfulness is distinguished from material incompatibility of aid under Article 107 TFEU. The standstill clause serves to secure the mechanism of preventive State aid control, under Article 108(3) sentence 1 TFEU. On the one hand, it protects the decision-making monopoly of the Commission with regard to the compatibility of aid, as aid can only be granted after a positive decision by the Commission, which has repercussions for the scope of the application of the standstill obligation. On the other hand, the standstill clause also serves to protect the aid beneficiaries’ competitors. According to the European Court of Justice’s case law, the standstill clause is directly applicable so national courts can and must apply the standstill obligation. The standstill obligation can therefore be enforced by competitors before national courts.

It must be said that State aid does not just take the form of payment of a sum of money. State aid is also considered to be granted if the Member State is under a legal obligation to grant an economic advantage. This is the case if a mechanism is introduced that allows for the granting of aid without the need for further authorization or another procedural step. Aid

schemes are therefore also to be notified when in a draft form, before they enter into force and constitute an obligation for the Member State to pay aid. An early notification is also recommended for practical reasons because, if the Commission comes to the conclusions that the draft needs to be altered to become compatible aid, it can still be brought in line with the EU law. It is up to each Member State to choose the legal mechanism to ensure compliance with the standstill obligation. The Member State may, for example, use the Commission's precedents or the Commission's corresponding reservations of authorization. It is acceptable for the Member State to state that the payment is made dependent on the Commission's approval and file the notification subsequently.

5. Conclusions

The Treaty on the Functioning of the European Union allows granting State aid only for the implementation of specific objectives, including State aid for the compensation of damages caused by natural disasters or other exceptional occurrences, aid for facilitating the development of some economic activities or some economic regions, aid intended to support the implementation of important projects of common European interest or aid to remedy a serious disturbance in the economy of a given Member State or aid intended to promote the economic development of regions where the standard of living is abnormally low or regions in which there is serious underemployment. The EU system of State aid control is based on the obligation to notify the European Commission of a project of granting State aid under an aid programme or as individual aid.

De minimis aid, i.e. aid not exceeding 200,000 euros during the last three tax years, is exempt from notification. In addition, the Commission has also introduced so-called block exemptions setting compliance criteria for certain aid measures the fulfilment of which exempts notification of the measure to the Commission for approval. At present, these criteria are included in the General Block Exemption Regulation (GBER), which allows for the granting of many forms of state aid in a simplified way. The obligation to notify follows directly from Article 108 TFEU and is justified by the fact that the European Commission must be able to verify State aid projects before starting their implementation. Therefore, State aid plans must be notified to the Commission, whose task is to analyse whether the intended aid complies with the principles of the internal market. In the event that the Commission considers that a project is incompatible with the common market in accordance with Article 107 of the Treaty, it initiates proceedings to clarify whether the notified State aid qualifies as one of the many exceptions specified in the Treaty provisions. However, it should be noted that proceedings are not initiated for each aid project, but only if the European Commission considers that the aid cannot be granted on the basis of exception.

The European Commission is responsible for constantly examining aid programmes in force in individual Member States. If the Commission finds that the implemented aid programme is not or ceases to be in line with the provisions of the Treaty, proceedings are initiated on the existing aid. These proceedings are regulated by the provisions of the Procedural Regulation No 2015/1589 and aim to introduce relevant changes to a given aid programme which are necessary due to the gradual development or functioning of the internal market. The Commission then sends a recommendation to the Member State concerned proposing a substantive amendment of the aid scheme or the introduction of specific procedural requirements or withdrawal of the aid scheme. If a Member State does not comply with the above recommendations, the European Commission is obliged to clarify the doubts arising through a formal investigation procedure. In addition, within the scope of its control powers, the Commission may monitor the implementation of aid at the beneficiary's premises, which takes place when serious doubts arise as to the implementation of the Commission's decision by the beneficiary. However, this control is only possible after the interested Member State has been given the opportunity to take a position on the matter. The controlling entities have the right to enter any premises and real estate of a given enterprise, request oral explanations on-site, and examine books and other records and to make or request copies. Correctness of the decisions taken is assessed by the Commission, which uses in this respect annual reports sent by Member States.

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